Case No. 75890

IN THE SUPREME COURT OF NEVADA

SFR INVESTMENTS POOL 1, LLC, A NEVADA LIMITED LIABILITY COMPANY, Appellant, vs. NATIONSTAR MORTGAGE, LLC, A DELAWARE LIMITED LIABILITY COMPANY, Respondent.	Electronically Filed Nov 26 2018 09:47 a.m. Elizabeth A. Brown Clerk of Supreme Court

APPEAL

From the Eighth Judicial District Court, Clark County
The Honorable MICHAEL VILLANI, District Judge
District Court Case No. A-13-684715-C

JOINT APPENDIX
VOLUME IV

JACQUELINE A. GILBERT, ESQ.
Nevada Bar No. 10593

DIANA S. EBRON, ESQ.
Nevada Bar No. 10580

KIM GILBERT EBRON
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139
Telephone: (702) 485-3300
Facsimile: (702) 485-3301

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EXHIBIT H-5

Ortwerth Deposition Transcript

In The Matter Of:

SFR Investments Pool 1, LLC vs.

Morgan Stanley, et al.

Katherine Ortwerth

April 5, 2016

Min-U-Script® with Word Index

DISTRICT COURT

CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL 1, LLC a Nevada limited liability company,

Plaintiff,

vs.

MORGAN STANLEY DEAN WITTER CREDIT CORPORATION, a Delaware corporation, HSBC BANK USA, N.A., a national banking association, as Trustee for Sequoia Mortgage Trust 2007-3; NATIONAL DEFAULT SERVICING CORPORATION, an Arizona corporation, REPUBLIC SILVER STATE DISPOSAL, INC., a Nevada corporation, SOUTHERN HIGHLANDS COMMUNITY ASSOCIATION, a Nevada non-profit cooperative corporation and MICHAEL K. SOMDAHL, an individual, DOES I through X; and ROE CORPORATIONS I through X, inclusive,

Defendants.

Case No. A-12-673418-C

DEPOSITION of KATHERINE ORTWERTH
Taken on Tuesday, April 5, 2016
At 1:06 p.m.
At 7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada

Reported by: Lori-Ann Landers, CCR 792, RPR

A P P E A R A N C E S:

For SFR Investments Pool 1, LLC

DIANA CLINE EBRON, ESQ.
Kim Gilbert Ebron
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139
Email: diana@kgelegal.com

For HSBC BANK USA, N.A.

JEFFREY S. ALLISON, ESQ.
LINDSEY E. PEÑA, ESQ.
Houser & Allison, APC
3900 Paradise Road, Suite 101
Las Vegas, Nevada 89169
Email: jallison@houser-law.com

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P R O C E E D I N G S

(Prior to the commencement of the deposition proceedings, a discussion was held off the record among the court reporter and counsel, wherein counsel stipulated to waive the reporter requirements under Rule 30(b)(4).)
(Witness sworn.)

KATHERINE ORTWERTH,

having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MS. EBRON:

Q. Good afternoon. My name is Diana Cline Ebron. I represent SFR Investments Pool 1, LLC in this matter. Can you please state your name for the record.

A. Katherine Ortwerth.

Q. Can you spell that?

A. K-a-t-h-e-r-i-n-e, Ortwerth, O-r-t-w-e-r-t-h.

Q. Are you employed?

A. Yes.

Q. Who is your employer?

A. Ocwen Financial Corporation.

Q. Have you had your deposition taken before?

A. Yes.

Q. How many times?

A. I don't know.

Q. More than 10?

A. More than 10.

Q. So you are familiar with the ground rules for a deposition?
A. Yes.
Q. Okay. I will just remind you that everything you say today is under oath, and that oath has the same force and effect as if we were sitting in a courtroom in front of a judge, even though there isn't one here today.
Do you understand?
A. Yes.
Q. Great. If you need to take a break at any time or anything else, you need a drink, just let me know. If there is a pending question I will have you answer that question before we take a break. But, other than that, let's get started.
A. Okay.
Q. How long have you been employed with Ocwen?
A. January 2014.
Q. What's your position?
A. Loan analyst.
Q. Have you held any other positions at Ocwen?
A. No.
Q. Were you employed before Ocwen?
A. OneWest Bank.
Q. What were the dates of employment?
A. April 2012 to November 2013.

Q. What was your position?
A. Default litigation specialist.
Q. Did you have any other positions besides the default litigation specialist at OneWest?
A. No.
Q. Were you employed before OneWest?
A. Yes.
Q. Where?
A. Lawyer's Aid Service.
Q. What were your dates of employment? It's okay if you estimate.
A. Sometime in 2011 to April 2012. I think it was May 2011, but I'm not sure.
Q. What was your position?
A. I didn't really have a title. I was kind of the assistant to the vice president of the company.
Q. Were you employed before Lawyer's Aid Service?
A. Yes.
Q. Where?
A. I kind of had two jobs running at the same time. One of them was at Aviles Engineering Corporation, and I was just digitizing their files for them. So, again, no title there. And that was from around August 2009 to April 2011.
And then for part of that I was doing recruiting

for University of Illinois College of Law.
Q. What were the dates that you did recruiting for the University of Illinois College of Law?
A. I think August 2009 to February 2010.
Q. Were you employed before that?
A. Yes.
Q. Where?
A. I worked for Law Offices of Kent Follmer part time from June 2008 to May 2009, I think.
Q. Did you have any other experience in the mortgage or banking industry other than Ocwen and OneWest?
A. No.
Q. Did you graduate high school?
A. Yes.
Q. Where?
A. Klein Forest High School in Houston.
Q. When was that?
A. 2001.
Q. Did you attend college?
A. Yes.
Q. Where?
A. University of Texas.
Q. What dates?
A. Fall 2001 through fall 2004.

Q. Did you earn a degree at University of Texas?
A. Yes.
Q. What?
A. BA in English.
Q. Do you have any other degrees?
A. Yes, I have a J.D. in law from the University of Illinois.
Q. What year did you get your degree from the University of Illinois?
A. 2009.
Q. Do you have any other professional certifications or licenses?
A. I passed the bar in Texas, but I'm inactive. I have been inactive pretty much the whole time.
Q. What were your duties as the default litigation specialist at OneWest Bank?
A. I basically case managed litigation that came in related to loan servicing. I would assign a file to outside counsel. I would do all the research on it, pull all documents, any kind of settlement authority I would get from the appropriate departments. Just kind of the day-to-day stuff on litigated files.
Q. Were part of your responsibilities at OneWest to testify at depositions or at trial?
A. No.

Q. When you worked at OneWest Bank did you work on files that were dealing with loans in Nevada?
A. Probably, but I don't know for sure.
Q. What office or what state was the office that you worked at for OneWest Bank?
A. Austin, Texas.
Q. What's your current business address at Ocwen?
A. 1661 Worthington, W-o-r-t-h-i-n-g-t-o-n, Road, Suite 100, West Palm Beach, Florida.
Q. What are your duties as a loan analyst?
A. Kind of -- my job has two parts, one which is appearing on behalf of Ocwen and the investors on litigated files, depos, trials, hearings, mediations, stuff like that.
The other half is doing in-office stuff. I'm either preparing for those appearances or I'm reviewing and signing documents for litigation such as verifications, affidavits, declarations.
I also do research on litigated files. If the attorneys need something looked into, I will get assigned it.
Q. Anything else?
A. That's pretty much it.
Q. You mentioned that you appear on behalf of Ocwen and investors. I'm assuming in depositions as well as at

trial; is that right?
A. Yes.
Q. About how many trials have you testified at?
A. I have no idea.
Q. More than 100?
A. I don't know. I had a week where -- Florida does this kind of rocket docket thing where they do a bunch in a day, and I did a bunch that week, but I don't know how many it was. That may have sent me over 100, but apart from that, not really.
Q. Fair enough. Are the cases that you testify in just usually in Florida or are they across the country?
A. They are across the country.
Q. About how many files do you work on at a time that you are assigned to?
A. I don't really get assigned files. I get assigned an appearance, and I work on that appearance and I get assigned documents and I work on that document, but I'm not ever assigned to a specific file from beginning to end or anything like that.
So I don't have a typical work week, so I can't say what my normal amount of things I'm working on at one time are.
Q. Fair enough. I'm going to show you a document that we are going to mark as Exhibit 1.

(Notice Of 30(b)(6) Deposition Of HSBC Bank USA, N.A. was marked as Exhibit 1, for identification, as of this date.)
Q. It's double-sided, so you can look at both sides.
Do you recognize this document?
A. I do.
Q. What is it?
A. A Notice of 30(b)(6) Deposition of HSBC Bank USA, N.A.
Q. Have you had a chance to review this before today?
A. I have.
Q. What is HSBC Bank USA, N.A.'s relationship with Ocwen such that you would be testifying on its behalf today?
A. So, just so we can clarify, it's all one -- HSBC Bank USA, N.A. as Trustee for Sequoia Mortgage Trust 2003 (sic), I am going to refer to as "the trust" from now on, that whole name, because HSBC Bank isn't here as HSBC Bank; it's for them as trustee for this trust. And we have a power of attorney for them, and we service the loan on their behalf.
Q. On Page 2 of the notice there are some definitions. It defines the property as the real

property located at 6023 Aromatico Court, Las Vegas, Nevada 89141, Parcel No. 176-36-417-040.
Whenever we talk about "the property" today, I'm going to be referring to the real property on Aromatico Court; is that okay?
A. Yes.
Q. Also, it defines the association as Southern Highlands HOA, but I think it's actually Southern Highlands Community Association.
So whenever I talk about "the association," I'm going to be referring to Southern Highland Community Association unless otherwise specified.
Okay?
A. Okay.
Q. Also, there is a definition for association foreclosure sale. And it refers to the auction held on July 11, 2012 by Alessi & Koenig, LLC on behalf of the association.
There are a lot of topics that are narrowed by the date of the association foreclosure sale, so if I ask you for information about something that happened before the association foreclosure sale, I'm looking to that date of July 11, 2012.
Okay?
A. Okay.

Q. Also, I may refer to Alessi & Koenig, LLC as "Alessi," if that's okay with you?
A. That's fine.
Q. What did you do to prepare for your deposition?
A. I reviewed our servicing records on this loan. I reviewed the prior servicer's records on this loan. I reviewed documents that we produced in discovery, and I had prep sessions with counsel.
Q. About how long did you spend preparing for your deposition?
A. I just got notified Thursday night. So I flew up here yesterday and spent all day yesterday preparing for it and then all this morning.
Q. Other than counsel, did you speak to anyone else in preparation for your deposition?
A. No.
Q. Did you email with anyone besides counsel to get information for your deposition?
A. We did, but we didn't get those answers yet, so it's not anything that I would be testifying to today.
Q. Okay. Were you able to speak with anyone or communicate with anyone from HSBC Bank USA in preparation for your deposition?
A. No.
Q. Did you speak to the previous servicer or email

with the previous servicer in preparation for your deposition?
A. They don't exist anymore, so, no.
Q. Who was the previous servicer?
A. Saxon.
Q. When was -- when did Ocwen become the servicer?
A. April 2012.
Q. Do you know if there were any other servicers before April of 2012 besides Saxon?
A. Not that I am aware of, but I don't know.
Q. On Page 3 of Exhibit 1 there are topics. Start there and go to Page 6.
Did you have a chance to review each of these topics before today?
A. I did.
Q. And are you the person that HSBC has designated to testify on its behalf?
A. Yes.
Q. You mentioned that you reviewed servicing records. What types of servicing records did you review?
A. I reviewed the comments and transaction history from Saxon, I reviewed Ocwen's comments and transaction history as well. I reviewed our actual system. I reviewed a bunch of -- they are called BPOs, but they are basically valuations of the property. I reviewed

recorded documents related to this property, and I reviewed discovery responses.
Q. Anything else?
A. I think that's it.
Q. If you think of anything else, you can go ahead and let me know.
A. Okay.
Q. Do you know what types of documents were included in the prior servicer's records?
A. So anything that happened on this loan prior to April 2012 we would have had incorporated into our business records.
So it would have been -- I mean, there are certain things in the prior servicer that I didn't go through such as letters to the borrower because they weren't really relevant to this litigation. But the comments log and transaction history would have been from the prior servicer, and I did review those.
Q. You mentioned that you reviewed Ocwen's system. Does that have a particular name?
A. REALServicing.
Q. And when you reviewed the other documents in the system like the BPOs and the recorded docs, were those imaged files or hard copies?
A. They were copies that I made sure they were in

our system as well, but I reviewed them as copies and then just checked that they were in our system.
Q. Does Ocwen store those types of records, like, in a separate imaging system or are those part of REALServicing?
A. We store them in vault.
Q. The prior servicer's records, are those all contained in vault or are they contained in vault and REALServicing?
A. All of Saxon's are in vault.
Q. I'm going to show you a document that we are going to mark as Exhibit 2.
(HSBC000001 through HSBC000004 was marked as Exhibit 2, for identification, as of this date.)
Q. Do you recognize this document?
A. I do.
Q. What is it?
A. It is a copy of the adjustable rate note for the property.
Q. I'm going to show you a document that we will mark as Exhibit 3.
(HSBC000005 through HSBC0000022 was marked as Exhibit 3, for identification, as of this date.)
Q. Do you recognize this document?
A. I do.

Q. What is it?
A. It's a copy of the deed of trust for the property.
Q. These two documents, Exhibits 2 and 3, is it your understanding that these make up the loan or the mortgage?
MR. ALLISON: Objection. Vague.
A. I don't know what you mean by that question.
Q. Okay. Both of these, the note and the deed of trust relate to the property on Aromatico; correct?
A. Yes.
Q. And the promissory note marked as Exhibit 2 was secured by the deed of trust; is that your understanding?
A. Yes.
Q. Who was the originating lender?
A. Morgan Stanley Dean Witter Credit Corporation.
Q. When was this loan originated?
A. I'm trying to find the date on here. September 16, 2004.
Q. When did HSBC first attain an interest in this loan?
A. We haven't been able to find the pooling and service agreement for this, so I don't know the date they got the interest. It would have been around 2007, just based on the name of the trust, and then the assignment I

believe was done, which just memorialized the purchase, was -- I believe was done in 2004.
Q. What do you mean?
A. Well, it was recorded in 2012.
Q. Oh, it was recorded in 2012 --
A. The assignment, yes. Sorry.
Q. Okay. Let's look at that. We will mark this as Exhibit 4.
(HSBC0000031 through HSBC0000032 was marked as Exhibit 4, for identification, as of this date.)
Q. Do you recognize this document?
A. I do.
Q. What is it?
A. It is the assignment of deed of trust from Morgan Stanley Dean Witter to HSBC, N.A. as trustee for the trust.
Q. And, as you mentioned before, this was recorded in 2012, correct?
A. Yes.
Q. And when was this executed?
A. It appears to have been executed on September 24, 2004.
Q. Is it your understanding that there was a blank assignment included with the file that was later filled

in to show the transfer to HSBC Bank USA?
A. I believe that's the case, but I don't know for sure. I haven't seen any documentation as to that. I have not seen the blank one, if there was a blank one.
Q. But it does look like the page that's Bates stamped HSBC0000032 has printed information as well as handwritten information?
A. Yes.
Q. You mentioned earlier that you couldn't find the pooling and servicing agreement for the trust; right?
A. Yes.
Q. And the trust is the Sequoia Mortgage Trust 2007-3?
A. Yes.
Q. Why did you say you think that it was put into the trust sometime around 2007?
A. Generally the name of the trust has the date that -- all of the 2007 trusts are 2007 dash something. Just generally based on the name they usually have the year in the name.
Q. So this isn't a loan that was originated and then put immediately into a trust, like some that I have seen, there was one that was originated and then it was several years later before it was put into a trust?
MR. ALLISON: Objection. Speculation.

A. I don't know.
Q. Where did you look to see if you could find the pooling and servicing agreement?
A. Ocwen has a system, it's kind of a shared server that we keep all the PSAs, and it wasn't located on there. So this is -- we reached out to some other people and they reached out to HSBC, but we haven't been able to get it yet.
Q. Do you know who filled out the information on the assignment?
A. I do not. It's not on the business records.
Q. Is that something that HSBC would know?
A. I doubt it.
Q. Who would know that?
MR. ALLISON: Objection. Speculation.
A. I don't know. I don't know if anyone will know that at this point besides the person that wrote on it.
Q. Do you know what entity the person who would have completed this would have been working for?
A. I don't know because I don't know what date this was written on, and I don't know who did it, so I couldn't tell you.
Q. But it wasn't Ocwen; right?
A. I don't know.
Q. You don't know if it was Ocwen?

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A. I do not.
Q. And this was recorded after Ocwen serviced the loan?
A. Yes.
Q. So it could have been Ocwen?
A. Could have been, yes.
Q. Now I'm just going to go through some of the recorded documents --
A. Okay.
Q. -- with you. I'm trying to do them basically in date order. I will show you some documents that have been marked as Exhibit 5.
(Notice Of Claim of Lien For Solid Waste Service was marked as Exhibit 5, for identification, as of this date.)
Q. Do you recognize these documents?
A. I don't know that I have seen all four of these, but I have seen at least some of them.
Q. What are they?
A. They are notice of claim of lien for solid waste services on the property.
Q. Are these something that are contained in HSBC's business records?
A. I don't know that they would have been unless they had been sent to the servicer.

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Q. Are these something that are contained in Ocwen's business records?
A. I don't believe that we had copies of these. I think the only copies we got were when counsel pulled them from the recordings on the property.
Q. Do you know when these were pulled?
A. Sometime during the course of this litigation. I don't know when.
Q. Do you know up in the upper left-hand corner what that stamp means, L 11/SPL1?
A. I do not.
Q. Look at what has been -- a document that we will mark as Exhibit 6.
(Notice Of Violation (Lien) was marked as Exhibit 6, for identification, as of this date.)
Q. Do you recognize this document?
A. Again, I don't know if I recognize this one. I have seen -- I believe there were a couple, and I don't know if I have seen this particular one or not.
Q. Do you recall seeing documents referencing Southern Highlands Community Association and Alessi & Koenig in HSBC's business records?
A. Again, they weren't in our business records, they were provided to me by counsel who pulled them from the recording office.

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Q. Let's look at this document that we will mark as Exhibit 7.
(HSBC0000026 was marked as Exhibit 7, for identification, as of this date.)
Q. Do you recognize this document?
A. I believe so.
Q. Is this something that was contained in HSBC's business records before counsel pulled publically recorded documents?
A. No.
Q. I'm going to show you a document that we will mark as Exhibit 8.
(HSBC0000023 was marked as Exhibit 8, for identification, as of this date.)
Q. Do you recognize this document?
A. Yes.
Q. What is it?
A. It's a notice of default and election to sell for the property from Saxon at the time.
Q. And this relates to the deed of trust that we marked as Exhibit 3?
A. Yes.
Q. On the page that is Bates stamped HSBC0000024, in the paragraph that is second from the bottom, it mentions that there was a "Failure to pay the installment

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of principal, interest and impounds which became due on November 1, 2009..." Do you see that?
A. Yes.
Q. Do you know if there were any payments made by the borrower on the loan after November 1, 2009?
A. I don't know if he was making payments that weren't applied before that, but I do know he's still due for November 1, 2009.
Q. I'm going to show you a document that we will mark as Exhibit 9.
(HSBC0000027 was marked as Exhibit 9, for identification, as of this date.)
Q. Do you recognize this document?
A. I believe so.
Q. What is it?
A. "Notice Of Default and Election to Sell Under Homeowners Association Lien."
Q. And is this something that was contained in HSBC's business records before counsel pulled the recorded documents?
A. No.
Q. Do you know when the first time was that HSBC obtained a copy of this notice of default and election to sell under homeowners association lien?
A. I don't know that we ever received a copy

outside of counsel pulling this from the recordings. I don't know if it was part of any litigation documents or not, but I know it's not something that we ever received outside of the litigation.

Q. This was recorded in February of 2011, right?

A. Yes.

Q. And that was before Ocwen took over servicing?

A. Yes.

Q. Do you know if Saxon received a copy of this?

A. It's not included in any of the business records we got from Saxon when we took over servicing the loan, and there is no reference to it in the comments log.

Q. Okay. So no reference in the comments logs, and there isn't, like, a scanned image of it?

A. Correct.

Q. I show you a document that we will mark as Exhibit 10.

(HSBC0000028 through HSBC0000029 was marked as Exhibit 10, for identification, as of this date.)

Q. Now, this is not a recorded document, but do you recognize it?

A. I don't know if I have seen the recorded version or this version, but I have seen the document, yes.

Q. And this first page that is Bates stamped

HSBC0000028; what is it?

A. A "Notice of Trustee's Sale."

Q. And is this something that is contained in HSBC's business records?

A. Yes.

Q. And did it receive a copy or in what way did it receive a copy?

A. It appears that National Default Servicing Corporation sent it to Saxon. There was an envelope that was dated October 11th. I don't know when Saxon received it, but the image copy is contained in the system.

Q. Who is National Default Servicing Corporation?

A. I believe -- I don't know what they are called in Nevada, but they were the foreclosure firm on the foreclosure trustee.

Q. And National Default Servicing Corporation is the one that recorded the notice of default and election to sell under deed of trust that we marked as Exhibit 8?

MR. ALLISON: Objection. Speculation to the extent that you know.

A. It appears to have been, yes.

Q. And is it your understanding that National Default Servicing Corporation was acting on behalf of HSBC at that time?

A. As far as I know, yes.

Q. So the one that we have in Exhibit 10 has an attachment to it. There is -- the page Bates stamped HSBC0000029. Is it your understanding that Alessi & Koenig mailed a copy of this notice of sale to National Default Servicing Corporation?

MR. ALLISON: Objection. Speculation.

A. They appear to have.

Q. And then you mentioned that Saxon Mortgage had received a copy of the notice of sale; is that right?

A. Yes.

Q. I'm going to show you a document that we will mark as Exhibit 11.

(Copy of certified mail envelope addressed to National Default Servicing Corporation and copy of an envelope addressed to Saxon Mortgage were marked as Exhibit 11, for identification, as of this date.)

Q. Have you seen this document before?

A. I have.

Q. These ones aren't Bates numbered, they were attached to the request for production of documents.

Is that your understanding?

A. I don't know what they were attached to. I know they were in our business records.

Q. Okay. So it looks to me that the first page of

Exhibit 11 is the same or a copy of the same document that was on -- in Exhibit 10, the second page.

A. Yes.

Q. Okay. And then the second page of Exhibit 11 appears to me to be a copy of an envelope addressed to Saxon Mortgage?

A. Yes.

Q. Do you know whose address is 7720 North 16th Street, Suite 300, Phoenix, Arizona 85020?

A. It appears to match the address for National Default Servicing Corporation.

Q. Was this -- a copy of this envelope included in the business records that Ocwen received when it took over servicing from Saxon Mortgage?

A. Yes.

Q. Were there any servicing notes corresponding to receipt of this notice of trustee's sale?

A. No.

Q. Do you know why there wouldn't have been any servicing notes?

A. I do not.

Q. Do you know what the -- it looks like it's handwritten FCL.

A. My best guess is that it stands for foreclosure, but I don't know for sure.

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Q. Now, earlier you mentioned when we were looking at the notice of default in Exhibit 9 that you didn't see any record of the notice of default?
A. Correct.
Q. Can you say for sure that Saxon did not receive a copy of this notice of default?
A. They appear to have imaged it, imaged the notice of trustee's sale which tells me that they image things they receive, and this was never imaged into the system, so my best guess is that they never received it.
Q. But you can't say for sure, right?
A. I cannot, no.
Q. Let me show you a document that we will mark as Exhibit 12.
(HSBC0000039 through HSBC0000040 was marked as Exhibit 12, for identification, as of this date.)
Q. Do you recognize this document?
A. I believe so.
Q. What is it?
A. "Trustee's Deed Upon Sale."
Q. Is this contained in HSBC's business records?
A. I do not believe so.
Q. Do you know when HSBC first obtained a copy of the trustee's deed upon sale?

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A. I do not, but I believe it was as part of this litigation.
Q. What is the process of boarding a loan when you take on the servicing rights?
A. So the process is generally that we, our technical people, get together with their technical people and talk about how we are going to translate the data. So obviously there is just data that's contained in the system.
So they get together, they talk about that, they create kind of a translation system. The information is uploaded onto a server, as far as the translation system, then it's boarded in our system; that's just for data, and then there is a series of quality checks to make sure that the data has been entered correctly and matches up with what was in the previous servicer's system.
And then also any imaged documents that are related to the loan are sent to us and put in our imaging system. And -- again, that's electronically. And then if the prior servicer is in possession of the collateral file, they would forward it to us as well, and the origination file.
Q. Anything else?
A. Just that there is a series of quality checks, they kind of match up the original documents versus the system to make sure it was boarded correctly, and they match up our information against the information they got from the prior servicer as well.
Q. Is there some kind of a process or procedure that Ocwen goes through when it takes over servicing a loan to see if there is action that needs to be taken on a file right away?
A. The prior servicer is supposed to let us know whether there is something pending on the loan. So, for example, if the borrower was in sort of a loss mitigation or dual proceeding they would let you know where they were at and provide us with all the documents.
If it was in foreclosure they'd code it as foreclosure and let us know who the foreclosure firm they were using is, and then we would usually transfer to one of our vendors unless it was close to being done, and then we would keep it.
Same with if there was pending litigation, they would let us know who the attorneys handling the litigation were and what the status of the litigation was.
Q. So for this file there would have been a foreclosure started, so that would have been flagged; is that correct?
A. Yes.

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Q. Was the borrower in loss mitigation at this time?
A. I don't believe that he was in loss mitigation with Saxon. I do know that Ocwen talked to him about potentially doing some sort of modification.
Q. Do you know if he ever -- and we are talking about the borrower, Mr. Somdahl; right?
A. Yes.
Q. Do you know if Mr. Somdahl ever filled out any, like, loan modification or short sale application?
A. From my review of the records it appears that he never did. He talked about it but never actually went through the process.
Q. Did Saxon flag the notice of trustee's sale that had been received from Alessi & Koenig through National Default Servicing Corporation when it transferred the loan to Ocwen?
A. Not that I have seen.
Q. Did Ocwen review the documents included in the file to determine if action needed to be taken on the association's notice of sale?
A. I don't believe so, no.
Q. When Ocwen began servicing the loan, did it look at the publicly recorded documents to see what was recorded against the property?

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A. No, we wouldn't do that unless it was part of -- if we were in the part of the foreclosure process where we were running title.
Q. In your review of Saxon's records, did you see any information about any action taken in relation to the association lien after the receipt of the foreclosure notice?
A. I did not.
Q. Has HSBC made any payments to the association before the date of the association foreclosure sale?
A. I don't believe so.
Q. And why don't you believe so?
A. I don't see any records in the transaction history showing that or any reference in the comments logs.
Q. Did HSBC, through either Saxon or Ocwen, ever communicate with Alessi & Koenig about the association foreclosure sale?
A. Not that I am aware of.
Q. Did HSBC or its servicers ever communicate with the association about this property?
A. I don't believe so.
Q. Were the taxes and insurance escrowed for this loan?
A. The taxes were always escrowed. The insurance

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was escrowed after Ocwen started servicing it, I believe.
Q. Were the association dues ever escrowed for this loan?
A. Not that I believe -- not that I am aware of.
Q. I'm going to show you a document that we will mark as Exhibit 13.
(HSBC0000035 was marked as Exhibit 13, for identification, as of this date.)
Q. Do you recognize this document?
A. I do.
Q. What is it?
A. A "Substitution Of Trustee."
Q. Who is being substituted as trustee?
A. National Default Servicing Corporation.
Q. And at this point -- this was in December of 2012; right?
A. Yes.
Q. And do you know why there wasn't a substitution of trustee back in 2010 when National Default Servicing Corporation first recorded the notice of default?
MR. ALLISON: Objection. Speculation.
A. I do not.
Q. I'm going to show you a document that we will mark as Exhibit 14.
(HSBC0000036 through HSBC0000038 was

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marked as Exhibit 14, for identification, as of this date.)
Q. Do you recognize this document?
A. I do.
Q. What is it?
A. A "Notice of Trustee's Sale."
Q. Does this notice of trustee's sale give notice of a sale to take place under the deed of trust that we marked as Exhibit 3?
A. Yes.
Q. This was recorded on behalf of HSBC; is that right?
A. Yes.
Q. It states that there is date and time of sale on December 26, 2012. Do you see that?
A. Yes.
Q. Did that sale go forward?
A. No.
Q. Do you know why not?
A. I know that they were just, from my review of the records, they were looking for the assignment of mortgage or trying to get an assignment of mortgage drafted. I don't know if that was before or after this time period.
There was also some -- we were talking to the

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borrower about loss mitigation, so we put the sale on hold for that.
And then there was -- the investor put a hold or the trust put a hold on all foreclosures to try to -- on the basis of something. I couldn't really tell what it was, but it was by investor request.
Q. So the assignment, which we marked as Exhibit 4, appears to have been recorded right around the same time, maybe a few seconds before --
A. Yes.
Q. -- before this one. So this sale wasn't postponed because they were looking for the assignment; right?
A. No, it would have been because of loss mit or because of the investor request.
Q. Okay. So that would have maybe explained the lag between the notice of default and the notice of sale?
A. Yes.
Q. Okay. Have you seen other notices of trustee's sale before in your capacity as a loan analyst?
A. Yes.
Q. Would you say that you are familiar with these types of documents?
A. I'm familiar with them in general. Again, every state requires different things, so I don't know what

legal necessity they have.
Q. Fair enough. On the second page, the one that's Bates stamped HSBC0000037.
A. Yes.
Q. There is a paragraph that says, "Said sale will be made, in an 'as is' condition, without covenant or warranty, express or implied, regarding title, possession or encumbrances..." Do you see that?
A. Yes.
Q. Do you know why that's included?
A. I do not. I just know that we always do foreclosure sales as is.
Q. Okay. And so this language is something that's always included or usually included in notices of trustee's sale?
A. Again, I don't know if it's usually included. I would assume that's something that's state by state whether it needs to be included or not, or maybe even foreclosure firm by foreclosure firm whether it needs to be included or not. But I know we generally only sell things as is.
I'm going to run to the bathroom real quick.
Q. Sure.
MR. ALLISON: Can we take a five-minute break.
MS. EBRON: Absolutely.

(Whereupon, a recess was taken at this time.)
BY MS. EBRON:
Q. Let's take a look at Exhibit 3 first before we move on to any additional documents. I wanted to ask you a couple of questions about the deed of trust.
Now, on the page that is Bates stamped HSBC000007 it has uniform covenants.
Do you see that?
A. Yes.
Q. And then in paragraph 1 it says, "Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges."
Do you see that?
A. Yes.
Q. In the second sentence of that section it says, "Borrower shall pay" -- or "shall also pay funds for Escrow Items pursuant to Section 3."
A. Yes.
Q. If you skip down to Section 3 it says, "Funds for Escrow Items. Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum to provide for payment amounts due for (a) taxes and assessments and other items which can attain priority over the Security Instrument as a lien or encumbrance on the property."

Do you see that?
A. Yes.
Q. Do you know why that was included?
MR. ALLISON: Objection. Speculation. Legal conclusion.
A. I do not.
Q. And you mentioned before that the taxes were escrowed, but the assessments to the association were not escrowed?
A. Correct.
Q. Do you know why they were not?
A. They usually are not, but I don't know specifically in this case.
Q. If you turn to the page in Exhibit 3 that is Bates stamped HSBC0000018.
A. Okay.
Q. Do you recognize that portion of the document?
A. Yes.
Q. What is it?
A. "Planned Unit Development Rider."
Q. Do you have an understanding of why a planned unit development rider would have been attached to this deed of trust?
A. Not really.
Q. Do you see in Exhibit F -- sorry, not Exhibit F,

Paragraph F, which is on the page Bates stamped HSBC0000019, it says, "Remedies. If Borrower does not pay PUD dues and assessments when due, then the Lender may pay them."
A. Yes.
Q. "Any amounts disbursed by Lender under this paragraph F shall become additional debt of Borrower secured by the Security Instrument."
A. Yes.
Q. Is it your understanding that this planned unit development rider gives the borrower notice that it has a responsibility to pay dues to the association; and that if the borrower does not pay, then the lender has the ability to pay them if it chooses; and then add whatever payments it made to the association as additional debt secured by the deed of trust?
A. That appears to be what it says, yes.
Q. Look at the document that we marked as Exhibit 15.
(Affidavit Of Debt was marked as Exhibit 15, for identification, as of this date.)
A. Yes.
Q. Again, these are double-sided. It looks like the first six pages are titled "Affidavit of Debt."
Do you see that?

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A. Yes.
Q. What is an affidavit of debt?
A. It's basically just something that we can run in our system to show what is the debt in the property and how it's broken down.
Q. Okay. So this is showing that as of April 1, 2016, that the principal balance of the loan is $338,000 -- $338,601.24?
A. Yes.
Q. And that there is a negative escrow balance; is that right?
A. Yes.
Q. So the advances made on behalf of borrower are shown at the bottom part of that page; is that right?
A. The bottom part of that page and the top part of the next page.
Q. So is it your understanding that all of the amounts that were advanced on behalf of this loan would be included somewhere within this six pages?
A. Just the amounts that Ocwen advanced.
Q. Where would the amounts that the previous servicer advanced be found?
A. In the Saxon payment history, which starts -- but --
Q. We will get there in a second.

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A. Yeah.
Q. On the affidavit of debt, Page 3, do you know what's included on that page?
A. So those are actually -- it's kind of included twice for some reason.
Q. What's included twice?
A. This is kind of the same information that's in the other paragraph, they are just like -- like it matches up.
Q. When you say the other paragraph --
A. The advances. So there is advances made on behalf of the borrowers all, and then they are supposed to be broken down between prior service and current servicer, but since this one only has Ocwen, it only has the current servicer, so that paragraph is -- or that section is essentially the same as the advances made on behalf of borrower all section. The entries are the same.
Q. Are we looking at -- oh, Page 2.
A. Oh, you are on Page 3. So 3 is going to be interest.
Q. Okay. And then what's included -- what type of information is included on Page 4?
A. That is continued interest.
Q. What about Page 5?

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A. Continued interest and then it has fees on the property.
Q. So the description of the fees on the property appear to be property inspection fees, and then there is a property valuation fee?
A. There is two, but, yes.
Q. A couple of those?
A. Yes.
Q. And then it says prior servicer fees of $1,251.52; is that right?
A. Yes.
Q. What does the column all the way to the right mean, like r-e-g-p-m-t-b-a-l?
A. I don't know.
Q. Okay. And then on Page 6 of the affidavit of debt, those are additional property inspection fees and BPO fees?
A. So those aren't additional. Again, this is just a situation where the first thing is all of them, and then it's supposed to be broken down between prior and current, but since the prior fees aren't included in this the current just matches up exactly with all.
Q. The next document appears to be a detailed transaction history, and it looks like it's one page.
A. Yes.

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Q. What is this?
A. This is Ocwen transaction history.
Q. And what's included -- what type of information is included in the transaction history?
A. Disbursements on the account, late fees, if the borrower were making payments those would be included, but the borrower never made any payments to Ocwen. So tax disbursements, insurance disbursements.
If we were paying -- if there was PMI on this loan, mortgage insurance, it would be on here too.
Q. Is there mortgage insurance on this loan?
A. Not that I am aware of.
Q. In the column that's marked "Description," all the way -- third from the bottom, it says, "Expense waive."
Do you know what that means? It's the one that's dated, it looks like, 7/29/15 or '13.
A. It appears that they were credited 875 for some sort of expense, but I don't know what it was. If you go to the third column or the third column after that it says, "total amount" and it says, "875."
Q. And then --
MR. ALLISON: Just for clarification, that's $8.75.
THE WITNESS: Yes.

Q. There is the one right above that, it looks like 2/12/13, it says, "Tax escrow disbursement"; is that right?
A. Yes.
Q. And then that means -- if you go over to that total amount column, what was the tax escrow disbursement for that?
A. It's hard to read, but it looks like 575.65 or -- could be a 5 or it could be 3. I don't know.
Q. Five, three or a dollar sign?
A. It's definitely not a dollar sign.
Q. Okay. And then right above that, above the tax escrow disbursement it says, "Investor pool/pool" -- I think "T"?
A. Yeah, "T." Transfer out and transfer in. This is where some money was moved around. We had been trying to get some explanation for this and we haven't been able to get it yet.
Q. What do you mean the money was moved around?
A. It was just transferred from one investor pool to another, but it doesn't appear to have ever -- we don't know if it was actually transferred or if they were just fixing things on the account or what.
Q. Can you tell what date that it was moved?
A. It looks like 1/12/2015.

Q. And was that -- did both of those investor pools, did those both happen on the same date?
A. Yes.
Q. I couldn't tell, some of those look like 5s and 3s. So the tax escrow disbursements, that's any time that taxes were paid?
A. Yes.
Q. And this is where you would have looked to see if there were any disbursements to a homeowners association?
A. Yes.
Q. But there weren't, right?
A. Correct.
Q. The next page looks like it's titled "Saxon Payment History." It says, "Page 1 of 17."
A. Yes.
Q. What is this?
A. It's basically the same thing as Ocwen's payment history, just in whatever system Saxon used at the time.
Q. And is it your understanding that the date in the bottom left-hand corner -- or do you know what your understanding is of that date, Thursday, November 8, 2012?
A. I have no understanding of that date.
Q. Okay. And then in the upper right-hand corner

it says, "Note, Principal balance, escrow balance, late charge balance and unapplied funds balance for transactions after August 2010 will be blank."
Do you know what that means?
A. I do not.
Q. The borrower didn't make any payments after Ocwen began servicing; right?
A. Correct.
Q. Did you see anything in this Saxon payment history that indicated that any payments were made to an association?
A. No.
Q. Let's look at the document that is marked as Exhibit 16.
(Saxon System Printout was marked as Exhibit 16, for identification, as of this date.)
A. Okay.
Q. Do you know what this is?
A. This seems like a Saxon system printout, but I can just -- I know as much about it as you do.
Q. Okay.
A. But it is what it is.
Q. This is something that Ocwen received from the previous servicer?
A. Yes.

Q. And then on the next page, and I think that these may go together, at least they were put together in the documents and disclosed that way, do you know what this is?
A. It appears to be a printout of a property account summary for taxes for the county.
Q. Is this something that was contained in the file that Ocwen received from Saxon?
A. Yes.
Q. And do you have any reason to doubt that the date in the bottom right-hand corner of September 22, 2010 is when this was printed?
A. It appears they were printed separately, just based on the date on the top right on the screenshot.
Q. Oh, sorry, on the top right of the screenshot we are talking about the first page of Exhibit 16?
A. Yes.
Q. And that is August 9, 2010, right?
A. Yes.
Q. And then on the bottom right-hand side of the property account inquiry it's September 22, 2010?
A. That's what it appears to be, yes.
Q. Do you know why this information would have been included in the file?
A. It was in Saxon's imaging system, so they sent

it to us. I don't know why it was in their imaging system.
Q. Can you look at what's been marked as Exhibit 17.
(LPS Screen Shot was marked as Exhibit 17, for identification, as of this date.)
A. Yes.
Q. Do you recognize that document?
A. Yes.
Q. What is it?
A. It appears to be a screenshot from LPS, but, again, this was -- screenshot was included in the image records from the prior servicer, and I don't know why they specifically imaged this document.
Q. What is LPS?
A. It is a platform that we use or that servicers use to communicate with vendors such as foreclosure trustees.
Q. And have you seen similar screens?
A. We used LPS at OneWest, so I have.
Q. Okay. So is it your understanding that this would have been something related to National Default Servicing based on the identification of the vendor on the top right?
A. Yes.

Q. Do you know if the start on the -- it's like in the top rectangle right underneath mortgagor, it says, "Start 1/3/2011."
Do you see that?
A. Yes.
Q. Do you know what that date would refer to?
A. Generally it refers to when it was opened up in LPS.
Q. Do you know who wrote the handwritten information "7/26, Ok RH" arrow, "John"?
A. No.
Q. That's just how it was contained in the business records from Saxon?
A. Yes.
Q. Look at what's been marked as Exhibit 18.
(Scanned Collateral File was marked as Exhibit 18, for identification, as of this date.)
Q. Again, this is a stack of documents, again, double-sided, that appear to go together, but I could be wrong.
So if you can just take a look through and let me know when you are ready.
A. I'm ready.
Q. You're ready?
A. Yeah.

Q. Okay. Do you know what these documents are?
A. It appears to be a scan of everything contained in the collateral file.
Q. So if we could go through just the pages -- the first page is something indicating when, like, the dates that the collateral file was scanned; is that right?
A. It's, like, basically the front page of the folder.
Q. Okay. So the collateral file has a folder and the first page and the last page are the outside of the folder?
A. Yes.
Q. And then inside the first page looks like a shipping label. Does that mean that the collateral file was shipped?
A. Yes.
Q. Same thing with the next page?
A. Yes.
Q. And then after that there is a letter?
A. It's a bailee letter.
Q. Bailee letter. And then if you go past the bailee letter it says, "Original document level inventory of collateral file"?
A. Yes.
Q. And so the checkmarks are the documents that are

included?
A. The original documents that are included, yes.
Q. And it says, "Original documents at receiving verified by" -- what does that mean?
A. So basically Ocwen received the collateral file from the custodian, and when we got it Patricia Hudson went through and filled out this sheet to say what was in it when she received it.
Q. So starting on the next page we've got a copy of the original note, right?
A. Yes.
Q. And is it your understanding that the current -- or the way that the note is currently, there is this endorsement allonge, no other endorsements?
A. Correct.
Q. And this is endorsed in blank?
A. Correct.
Q. And next we have a copy of the original deed of trust?
A. Yes.
Q. After the deed of trust it's title insurance policy; is that right?
A. Appears to be, yes.
Q. Do you know if the originating lender was aware that the property was located within a homeowners

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association when it originated the loan?
A. I can just speculate that they did based on the PUD rider, but apart from that I don't know anything that they did or did not know.
Q. Was there a copy of the CCNRs included in the origination file?
A. I haven't reviewed that, so I don't know.
Q. Do you know if the originating lender relied on any provisions in the CCNRs when it originated the loan?
A. I do not.
Q. Do you know if HSBC was relying on any particular provision of the CCNRs when it purchased the loan?
A. So HSBC, the trust, again, purchased this as part of a pool of loans; they didn't purchase this loan specifically. So my best guess is that they would not have known anything about the specifics of CCNRs related to this loan when they purchased the pool.
Q. Do you know how much the trust paid for its interest in the loan?
MR. ALLISON: Objection. Speculation. Legal conclusion. Relevance.
A. I do not. Again, they purchased -- they had one price that they paid for the whole pool. It wasn't broken up between loans, and I do not know what that

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price was.
Q. How do you know that this loan was included in the pool that was purchased?
A. Again, I haven't seen the PSA or the MLS in this one, so I don't know for sure because I haven't been able to get those documents yet.
Q. You said the PSA or the what?
A. The MLS. Pooling and Service Agreement or Mortgage Loan Schedule.
Q. And the mortgage loan schedule would be attached to the pooling and servicing agreement to let you know what loans were included in the pool?
A. It would be an exhibit, yes.
Q. So still in Exhibit 18, it looks like there is an endorsement to the title policy.
Is it your understanding that all of the maps at Southern Highlands, those are all included with the title policy?
A. It's my understanding, yes.
Q. There is a page, it says, "Endorsement attached to policy" and then it says, "The company hereby insures the owner of the indebtedness secured by the insured mortgage against loss or damage which the insured shall sustain by reason of" -- and then "1, the existence of any of the following:"

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Do you see that?
A. Trying to find that page.
Q. This is 1 of 2.
A. I got it. Yes.
Q. It says, "Covenants, conditions or restrictions under which the lien of the mortgage referred to in Schedule A can be cut off, subordinated, or otherwise impaired."
A. That's what it says.
Q. On Page 3 -- that was page -- this makes no sense. Okay. It says Page 1 of 2, but then the next page is Schedule B, and it says Page 4, and then it says Schedule B, Page 3.
A. It's probably just out of order in the collateral file.
Q. Okay. On the Schedule B that's marked as Page 3, it includes covenants, conditions and restrictions as an exception.
Do you see that?
A. Yes.
Q. Then it looks like there is another copy of the deed of trust?
A. Yes.
Q. And this one has a stamp Fidelity National Title on it?

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A. Yes.
Q. Then we got a preliminary title report?
A. Yes.
Q. This would have been with the origination file?
A. All of this is contained in the collateral file.
Q. Would this title report have been attained either at or before origination?
A. Generally, yes.
Q. Do you have any reason to believe that in this case that it wouldn't have been attained at or before origination?
A. No.
Q. Then do you know what this -- there is a request for release of documents.
What is that?
A. It's basically Ocwen requesting that they send the documents to us from the custodian.
Q. And then the reason for requesting the documents at that time was foreclosure?
A. Yes.
Q. And that was in October of 2012?
A. Yes.
Q. Do you know what that next page is?
A. My best guess is that they requested both of these files at the same time.

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Q. Do you know what WFLN means?
A. Wells Fargo Loan Number.
Q. Was Wells Fargo the custodian?
A. Yes.
Q. The next is another bailee letter?
A. Yes.
Q. Is this the loan number for the note and deed of trust marked as Exhibits 2 and 3?
A. I believe so.
Q. And then we have another "Document Level Inventory of Collateral File"?
A. Yes.
Q. This one is from 2012?
A. Yes.
Q. Another shipping label?
A. I don't think that -- maybe. I don't know.
Q. Something -- something related to shipping; right?
A. Yeah.
Q. And then do you know what this next page that says, "Doc Title. Title Special Instructions"?
A. No.
Q. What about the next page dated November 3, 2004?
A. It appears to be a letter to Morgan Stanley Dean Witter, but apart from that, I don't really.

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Q. All right. I think that's everything in that file. Is there a document or, like, screenshot that you would look at that shows who the investor is on this loan?
A. Yes.
Q. Is it in REALServicing?
A. Yes.
Q. Is there a particular name of the screen that you would look up?
A. There is actually -- it would just have the investor number on the main screen, and then you would -- we would have cross-referenced it on a different document.
Q. And did you do that for this case?
A. I did.
Q. And what did you find?
A. Our system is showing that this is actually in Sequoia Mortgage Loan Trust 2004-10 currently. So one of the things that we were trying to figure out was whether that's the correct trust or the 2007-3 is the correct trust.
Q. Do you know since the --
MS. EBRON: Off the record.
(Whereupon, a recess was taken at this time.)
BY MS. EBRON:

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Q. Do you have access to the pooling and servicing agreement for Sequoia 2004-10?
A. No.
Q. Do you know who does?
A. I looked for both of those, we've requested both of them from HSBC along with the MLS that go with them so we can determine which is correct.
Q. So is it possible that this loan is actually contained in the Sequoia 2004-10?
A. Again, I don't know, but it's possible, yes.
Q. Would that make sense to you given the origination date?
A. Yes.
Q. Okay. But HSBC is the trustee for both?
A. Yes.
Q. Does Fannie Mae have an interest in this loan?
A. No.
Q. How do you know that?
A. It would be listed as the investor in our system.
Q. Does Freddie Mac have an interest in this loan?
A. No.
Q. Is this loan FHA insured?
A. Not that I am aware of.
Q. Do you know if Wells Fargo is the custodian for

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both trusts, the Sequoia 2004-10 and the 2007-3?
A. I do not.
Q. Do you know if either the Sequoia 2004-10 or the Sequoia 2007-3 Trust recorded information to the SEC?
A. I believe -- I believe both of them did.
Q. Did you ever look on the SEC website to see if the pooling and servicing agreements were available there?
A. I believe -- I can't remember which one. I believe 2004-10 is available on the SEC website. I don't believe 2007-3 is, but I might have those flopped in my mind.
Q. Would the mortgage loan schedule be included on the SEC website?
A. No, because those contained personally identifiable information about people, so those are usually housed with either the trust or we usually have a copy. But in this case it wasn't in our system, so we are asking for it.
Q. What's your understanding about the transaction through which the trust attained an interest in the property?
A. Just in general that the trust would have purchased the -- basically the loans would have been pooled together, the trust would have purchased a pool

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and then appointed a trustee, in this case HSBC is trustee for both, and then they would have a servicer that actually does all the day-to-day activity on the loan.

Q. Are there any other entities of which HSBC is aware that currently claim an interest in the deed of trust?

A. No.

Q. Are there any other entities of which HSBC is aware that, at the time of the association foreclosure sale, claimed an interest in the deed of trust?

A. Not that I am aware of.

Q. Same thing but for the promissory note?

A. Not that I am aware of.

Q. Is there any entity that currently ensures the deed of trust or promissory note?

A. Just the title policy, but not anything besides that.

Q. Do you know if there has been any claims made against the title policy?

A. Just from prepping this I believe we tried to make a title policy claim regarding this litigation, but other than that I don't think so.

Q. Do you know if that claim was accepted or rejected?

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A. I do not know.

Q. Are there servicing guidelines applicable to HSBC's deed of trust?

A. Those would be contained in the PSA.

Q. And since we don't have copies of those we can't say for sure if there are any provisions that mention or are applicable to associations, association liens or association foreclosures, right?

A. Correct.

Q. Did HSBC or any of its servicers ever communicate with the borrower about the association lien?

A. I believe -- not about the lien. The borrower did talk to Ocwen regarding loss mitigation in late 2012, and he mentioned that it had been sold at an HOA sale.

Q. How do you know that?

A. From the comments log.

Q. What else did the comment say about that?

A. Just they asked him to send in a copy of the -- I forget what it's called, the bill, basically, and fill out some sort of form giving us the right to talk to the HOA.

Q. Do you know when in 2012 that was?

A. I believe December.

Q. Were there any other communications with the borrower about the association or the lien or foreclosure?

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A. I just believe a couple of times when he was talking about loss mitigation he just mentioned that it happened and that he wanted to keep the property, but no specifics were ever discussed.

Q. Did the borrower ever give any information about the facts or circumstances surrounding the sale?

A. I don't believe so.

Q. Did the borrower ever say that he was not delinquent on the association dues?

A. I don't believe so.

Q. Do you have any reason to believe that the borrower was not delinquent?

A. I do not.

Q. Does HSBC have any reason to believe that the notice of delinquent assessments that we looked at as Exhibit 7 was not mailed to the borrower?

A. We wouldn't know one way or the other whether it was mailed to the borrower.

Q. Does HSBC have any reason to believe that the notice of default recorded by the association that we marked as Exhibit 9 was not mailed to the borrower?

A. We wouldn't know whether it was mailed to the borrower.

Q. Does HSBC have any reason to believe that the

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notice of default was not posted on the property?

MR. ALLISON: Can you repeat that?

Q. Does HSBC have any reason to believe that the notice of default, the one that we marked as Exhibit 9, was not posted on the property?

A. I don't believe we know one way or the other whether it was or was not.

Q. Does HSBC have any reason to believe that the notice of trustee's sale, a copy of which was marked as Exhibit 10, was not mailed to the borrower?

A. We wouldn't know whether this was or was not.

Q. Does HSBC have any reason to believe that the notice of trustee's sale was not posted on the property?

A. We would not know whether it was or was not.

Q. Does HSBC have reason to believe that the notice of trustee's sale was not posted in three public places?

A. I don't believe whether we would know whether it was or was not.

Q. Does HSBC have any reason to believe that the information contained in the notice of trustee's sale was not published in a newspaper?

A. We wouldn't know whether it was or was not.

Q. Does HSBC have any reason to believe that the sale originally scheduled for October 26, 2011 was not orally postponed at that time?

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A. We don't know whether it was or was not.
Q. Did HSBC or any of its servicers or agents attend the scheduled foreclosure sale on October 26, 2011?
A. Not that I am aware of.
Q. Did HSBC or any of its agents attend the association foreclosure sale on July 11, 2012?
A. Not that I am aware of.
Q. Did HSBC or any of its servicers or agents participate in any civil or administrative action challenging the association lien or foreclosure sale before July 11, 2012?
A. Not that I am aware of.
Q. Did HSBC ever communicate with the association?
A. Not that I am aware of.
Q. Did HSBC ever communicate with Alessi & Koenig about this property?
A. Not that I am aware of.
Q. Does HSBC allege that Saxon took any action to protect the deed of trust after learning of the association foreclosure sale?
MR. ALLISON: Objection. Vague. Speculative and -- sorry, could you repeat that one more time.
(Whereupon, the record was read by the reporter.)

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MR. ALLISON: Further, I don't believe HSBC alleges anything as a plaintiff in this action.
A. I can just tell you what we did to protect our interest in the deed of trust. We continued paying taxes on an interest to protect the property and make sure that it was not sold at a tax sale, or if it burned down that we wouldn't get funds from it.
We continued to send people out to the property to make sure it was being maintained and that it was occupied. For a while we were continuing to work with the borrower to try to come up with some sort of situation where we can bring him current.
Q. In your review of the file did you see any internal communications that mention the association's lien, delinquent association assessments or the association foreclosure sale as it relates to the property?
A. There was one entry in Saxon's notes before the notice of trustee's sale was posted where the default company, I forget what their name is, but where the foreclosure trustee mentioned that there was a -- either a notice of lien or something like that posted, but there was nothing about the notice of trustee's sale.
Q. Do you know when that note was from?
A. I do not.

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Q. But it was included in Saxon's servicing notes?
A. Yes.
Q. Did HSBC have practices, policies or procedures applicable to the property for handling association liens at the time of the association foreclosure sale and during the time that it was noticing the foreclosure?
A. So it would have been the servicer policies and procedures; they rely on the servicer to handle things like that.
I don't know specifically what Ocwen's policies and procedures were from April 2012 to July 2012 period, and I certainly don't know what Saxon's procedures were.
Q. Who would know what Ocwen's policies and procedures were during that time period?
A. That department, I don't know who is in that department or what it is called.
Q. What department?
A. Whoever handles HOA liens. I'm sure there is a department.
Q. In preparation for your deposition did you check to see if there was a specific department that handled HOA foreclosures?
A. I did not.
Q. Do you know HSBC's factual basis for its allegation that the first deed of trust was not

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extinguished by the association foreclosure?
A. I know that we are pending the deposition of the HOA to get a breakdown of the fees, and we are waiting on that to really determine things from there.
Also, I know that there is a question about whether the purchase price at the sale was appropriate as the value of the property in our mind was around 230-, and it was sold for around, I believe, 6,200 at the sale. I think that's it.
Q. Okay. You mentioned that the value of the property according to HSBC was around 230,000?
A. Yes.
Q. And you reviewed some evaluations that were in the file?
A. Yes.
Q. Were there evaluations that were done around the time of the sale?
A. There was one that was in April 2012, and there was one that was in December 2012. I forget which one was which, but one was 229- and one was 230-.
Q. Do you know what the valuation of the property was at origination?
A. I do not.
Q. Do you know if it was -- if it would have been at least as much as the loan amount?

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A. Generally, yes.
Q. Do you know if this was a loan that allowed, like, 100 percent financing?
A. I do not. I know that this was a refi, and I think that's it.
Q. Do you know if the borrower received cash out?
A. I do not. I have not seen the settlement statement.
Q. I guess I keep saying borrower, but it's actually two people, Michael Somdahl and Joanna Somdahl.
A. Right.
Q. In your review of the file did you see any information about SFR Investment Pool 1, LLC that predated any litigation?
A. No.
Q. Does HSBC have any information in its records, its own business records that suggest that SFR had a relationship with the association beyond being a homeowner and a purchaser of association foreclosure properties?
A. Not that I am aware of.
Q. Does HSBC have any information in its records that suggest that SFR has or had a relationship with Alessi & Koenig, LLC except for purchasing properties at association foreclosure sales or from associations?

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A. Not that I am aware of.
Q. You mentioned some communications with Mr. Somdahl about the association foreclosure.
A. Yes.
Q. Did any of those communications or any others with Mr. Somdahl indicate that Mr. Somdahl thought that there was something -- some relationship between SFR and the association that was improper?
A. I don't believe he ever mentioned SFR.
Q. Does HSBC have any reason to believe that SFR had any relationship with Mr. Somdahl other than being the entity that purchased the property that he had previously owned?
A. Not that I am aware of.
Q. Does HSBC have any information about what SFR knew about the noticing of the sale at the time of the foreclosure sale?
So, for example, we have gone through the foreclosure notices here, you've mentioned that HSBC doesn't have any record of receipt of the notice of default.
Do you know if SFR knew that HSBC didn't have record of the notice of default at the time of the association foreclosure sale?
A. We do not know that, no.

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Q. Is there anything about the facts and circumstances surrounding the association foreclosure sale that HSBC alleges constitutes fraud?
A. Again, we are waiting to speak with them about their breakdown of the amounts owed, and we won't know that information until we do their depo.
Q. But as far as information from HSBC's business records, is there anything contained in those records that suggests that the facts and circumstances surrounding the sale constitute fraud?
MR. ALLISON: Objection. Legal conclusion.
A. I'm not aware of any.
Q. Does HSBC have any information about any collusion associated with the sale?
MR. ALLISON: Objection to legal conclusion.
A. I'm not aware of any.
Q. Does HSBC have any information that it believes supports an allegation that the association foreclosure sale was oppressive?
MR. ALLISON: Objection. Legal conclusion.
A. I'm not aware of any.
Q. Is there any information contained in HSBC's business records that it believes supports an allegation of unfairness in the circumstances surrounding the foreclosure sale?

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MR. ALLISON: Same objection.
A. I believe I would say the one thing is, again, as far as we were concerned it was at least were 229-, 230- at that time, and it was sold for 6,200.
Q. Anything else?
A. I don't think so.
Q. We are about done. One more question. In your review of the file did you see any communications between HSBC and the servicer of loan regarding the association?
A. No.
MS. EBRON: Do you have any questions?
MR. ALLISON: I have no questions.
THE REPORTER: Electronic?
MS. EBRON: Yes.
MR. ALLISON: Yes.

-oOo-

(Whereupon, the deposition of Katherine Ortwerth was concluded at 2:51 p.m.)

KATHERINE ORTWERTH

CERTIFICATE OF DEPONENT

PAGE LINE CHANGE REASON

* * * * *

I, KATHERINE ORTWERTH, deponent herein, do hereby certify and declare under penalty of perjury the within and foregoing transcription to be my deposition in said action; that I have read, corrected and do hereby affix my signature to said deposition.

KATHERINE ORTWERTH
Deponent

Subscribed and sworn to before me the day of 2016.

Notary Public

REPORTER'S CERTIFICATE

STATE OF NEVADA)
) ss
COUNTY OF CLARK)

I, Lori-Ann Landers, a duly commissioned Notary Public, Clark County, State of Nevada, do hereby certify:

That I reported the taking of the deposition of the witness, KATHERINE ORTWERTH, at the time and place aforesaid;

That prior to being examined, the witness was by me duly sworn to testify to the truth, the whole truth, and nothing but the truth;

That I thereafter transcribed my shorthand notes into typewriting and that the typewritten transcript of said deposition is a complete, true and accurate transcription of my said shorthand notes taken down at said time to the best of my ability.

I further certify that I am not a relative or employee of an attorney or counsel of any of the parties, nor a relative or employee of any attorney or counsel involved in said action, nor a person financially interested in the action; and that transcript review NRCP 30(e) was requested.

IN WITNESS WHEREOF, I have hereunto set my hand in the County of Clark, State of Nevada, this 5th day of April 2016.

LORI-ANN LANDERS, CCR 792, RPR

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EXHIBIT H-6

Kovalic Deposition Transcript

In The Matter Of:

Deutsche Bank National Trust, et al. vs.
SFR Investments Pool 1, LLC, et al.

Keith Kovalic
August 2, 2016

Min-U-Script® with Word Index

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR THE BENEFIT OF THE HARBORVIEW 2004-8 TRUST FUND,

Plaintiff,

vs.) Case No. 2:16-cv-00470-APG-CWH

SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company; CENTENNIAL POINT COMMUNITY ASSOCIATION, INC., a Nevada non-profit corporation,

Defendants.

SFR INVESTMENTS POOL 1, LLC,

Counter/Cross-Claimant,

vs.

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR THE BENEFIT OF THE HARBORVIEW 2004-8 TRUST FUND; NATIONSTAR MORTGAGE, LLC, a Delaware limited liability company; MARK KITCHEN, an individual; and NICOLE KITCHEN, an individual,

Counter/Cross-Defendants.

DEPOSITION OF KEITH KOVALIC

Taken at the Offices of Kim Gilbert Ebron
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada

On Tuesday, August 2, 2016
At 10:19 a.m.

Reported by: Jane V. Efaw, CCR #601, RPR

Appearances:

For the Plaintiff:

ROCK K. JUNG, ESQ.
Wright Finlay & Zak
7785 West Sahara Avenue
Suite 200
Las Vegas, Nevada 89117
(702) 475-7964

For the Defendant:

DIANA CLINE EBRON, ESQ.
Kim Gilbert Ebron
7625 Dean Martin Drive
Suite 110
Las Vegas, Nevada 89139
(702) 485-3300

* * * * * * * *

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Thereupon --
KEITH KOVALIC
was called as a witness by the Defendant, and having been first duly sworn, testified as follows:

EXAMINATION

BY MS. EBRON:

Q. Can you please state your name for the record?

A. Keith, K-e-i-t-h. Last name's Kovalic, K-o-v, as in Victor, a-l-i-c.

Q. Are you employed?

A. Yes.

Q. Who is your employer?

A. Nationstar Mortgage, LLC.

Q. I've taken your deposition quite a few times. Before the deposition, we discussed incorporating your background testimony from December 15th of 2015, Case Number 2:15-cv-01146, the Cayman Beach Street property where the Medlocks were the borrowers.

Is it okay if we incorporate your background testimony from that deposition?

A. Yes.

MS. EBRON: I'm going to mark that as

Exhibit 1.

(Thereupon Defendant's Exhibit 1 was marked for identification.)

BY MS. EBRON:

Q. I'm going to show you a document that we'll mark as Exhibit 2.

(Thereupon Defendant's Exhibit 2 was marked for identification.)

BY MS. EBRON:

Q. Do you recognize this document?

A. Yes.

Q. What is it?

A. The Notice of 30(b)(6) Deposition of Deutsche Bank National Trust Company, as Trustee for the Benefit of the Harborview 2004-8 Trust Fund.

Q. Is this something you've had a chance to review before your deposition today?

A. Yes.

Q. If you turn to page 2, there are some definitions. The first one is "property." It refers to the real property located at 9432 Melva Blue Court, Las Vegas, Nevada 89166, Parcel Number 125-07-811-040.

Whenever we talk about the property today of purposes of this deposition, we'll be talking about

the property on Melva Blue Court. Is that okay?

A. Yes.

Q. Also, definition Number 4 defines "the association" as Centennial Point Community Association, Inc.

So unless otherwise specified, whenever I refer to "the association" or "HOA," I'll be talking about the Centennial Point Community Association, Inc. Okay?

A. Yes.

Q. Also, we're here to talk about an association foreclosure sale. When I reference the association foreclosure sale, I'm talking about the auction held on September 11th, 2013, by Alessi & Koenig, LLC, on behalf of the association.

So whenever I look for anything that happened before the association foreclosure sale, I'm looking to that date of September 11th, 2013. Okay?

A. Yes.

Q. If I reference the borrowers in this case, I'm talking about Mark Kitchen or Nicole Kitchen. Okay?

A. Okay.

Q. And then if I talk about the Trust, I'll be talking about the Harborview 2004-8 Trust Fund for

Deutsche Bank as the Trustee. Okay?

A. Okay.

Q. And then just to be clear. Would it be accurate to say that the Trust is called the Harborview Mortgage Loan Trust 2004-8 Mortgage Loan Pass-Through Certificates, Series 2004-8?

A. That is correct.

Q. Did you have a chance to review the topics that start on page 3 and go to page 4?

A. Yes.

Q. Are you the person that Deutsche Bank, not Bank of America, has designated to testify on its behalf?

A. Yes.

Q. What did you do to prepare for the deposition?

A. I reviewed the topics of inquiry in this deposition notice. I cross-checked those with the current servicer, Nationstar's, system of record. I spoke with my counsel. I reviewed the documentation associated with this file as it pertained to these topics.

Q. Anything else?

A. No.

Q. When you say you reviewed documents

associated with this file, is there a particular location that you looked to find those documents?
A. Nationstar has a system called FileNet, where all of the imaged documents are held. So I reviewed that system.
Q. Anything else?
A. No. I'm sorry. In terms of documentation?
Q. Correct.
A. No. Everything -- any document associated with this file would be in FileNet.
Q. Did you look at any screen shots to learn any information for your testimony today?
A. What do you mean? Did I look at any --
Q. Did you look at a system of record?
A. Yes. As I stated, I reviewed Nationstar's system of record.
Q. And what's that called?
A. LSAMS, L-S-A-M-S.
Q. Were there any particular screens you looked at on LSAMS?
A. I looked at the general servicing notes regarding communications between the homeowner and the servicer, Nationstar, and Nationstar and the homeowners. I looked at the payment history.
Q. Anything else?

A. Not that I recall.
Q. When did Nationstar become a servicer for this loan?
A. I do not recall the exact date. I apologize.
Q. Do you know an approximate date?
A. I'm sorry, I don't.
Q. Do you know if there was a servicer before Nationstar?
A. Yes. Bank of America.
Q. Do you know if Nationstar became the servicer before or after the association foreclosure sale in September of 2013?
A. It was prior to the sale.
Q. Do you know if there are any other servicers besides Bank of America?
A. Not that I --
MR. JUNG: Objection. Calls for speculation.
THE WITNESS: Not that I'm aware of.
BY MS. EBRON:
Q. I'm going to show you a document that we will mark as Exhibit 3.
(Whereupon Defendant's Exhibit 3 was marked for identification.)

THE WITNESS: Okay.
BY MS. EBRON:
Q. Do you recognize this document?
A. I do not.
Q. I'm sorry?
A. I do not.
Q. When you were reviewing the file, did you see any declarations of covenants, conditions and restrictions?
A. I did not.
Q. So you didn't see any for Centennial Point?
A. No.
Q. Do you know if Deutsche Bank reviewed a copy of the declaration of covenants, conditions and restrictions before it obtained its interest in the property?
A. I do not.
Q. Do you know who would know that?
MR. JUNG: Objection. Speculation.
THE WITNESS: I do not.
BY MS. EBRON:
Q. Do you know if there are any particular provisions contained in the declaration of covenants, conditions and restrictions for Centennial Point that Deutsche Bank relied on at any point after it

obtained its interest in the Deed of Trust?
A. Like I said, I've never seen this document. It wasn't in any system of record. So I don't know how anybody would have been able to rely on something that I don't see a record of existing in any system of record for Deutsche Bank.
BY MS. EBRON:
Q. I'm going to show you a document that we'll mark Exhibit 4.
(Whereupon Defendant's Exhibit 4 was marked for identification.)
BY MS. EBRON:
Q. Do you recognize this document?
A. Yes, I do.
Q. What is it?
A. This is a Grant, Bargain and Sale Deed.
Q. Does this involve the property located at Melva Blue Court?
A. Yes, it does.
Q. And is this something that's contained in Deutsche Bank's business records?
A. Yes.
Q. Just going back to the relationship between Nationstar and Deutsche Bank. What is the relationship between Nationstar and Deutsche Bank

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such that you, as an employee of Nationstar, would be testifying on Deutsche Bank's behalf?
A. Nationstar under the pooling and servicing agreement conducts all front-facing functions or any customer-facing functions on behalf of the investor, Deutsche Bank.
So one of those things is if a lawsuit is to arise, the current servicer is given the right to handle all the litigation on behalf of Deutsche Bank. So as an employee of Nationstar, I'm speaking on behalf of Deutsche Bank.
Q. In preparation for your deposition, did you speak to anyone from Deutsche Bank?
A. I did not.
Q. Is it accurate to say that anything dealing with this particular loan should be available to you in Nationstar's business records?
MR. JUNG: Objection. Form. You can answer, Keith.
THE WITNESS: If by "anything" you mean recorded documents or things of that nature, when a loan's originated, there are certain documents. And then as the loan is transferred, some documents are transferred. Some are not.
I'm not here to place blame on anybody, but

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I can only review what documents Nationstar has on hand. So whatever Nationstar has today, that would be the documents that Deutsche Bank would also be relying on. Does that answer your question?
BY MS. EBRON:
Q. Well, I guess my question would be: Does Deutsche Bank maintain a file of documents that would be responsive to these topics that are in the deposition notice?
A. No. That's a duty of the servicer.
Q. Okay. So when you say Nationstar has only what it's got in its own file, do you mean that it's possible that some of the documents were not transferred from Bank of America to Nationstar?
A. It's possible. But as we've talked about in other depositions -- and I hate to refer back to another deposition other than this one. But unless something is transferred from a prior servicer and it says -- for instance, on Exhibit 4 on the bottom, it says page 1 of 4. If Nationstar, as the new servicer, were to receive pages 1 2 and 4, we would know that 3 is missing and could go back and request it.
However, if a document as a whole -- and it's not part of the collateral file that's

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audited -- is missing, you don't know to ask for something if you don't know it exists.
Q. In preparation for your deposition, did you speak to anyone at Bank of America to see if there were any additional documents or information that would be helpful in preparation for these topics?
A. I did not.
Q. I'm going to show you a document that we will mark as Exhibit 5.
(Whereupon Defendant's Exhibit 5 was marked for identification.)
BY MS. EBRON:
Q. Do you recognize this document?
A. Yes.
Q. What is it?
A. This is the Deed of Trust for the subject property.
Q. Who was the originating lender?
A. The originating lender was Full Spectrum Lending, Incorporated.
Q. And the borrowers were?
A. Mark and Nicole Kitchen, husband and wife.
Q. When was this loan originated?
A. The Deed of Trust is dated January 26th, 2004, and is notarized the same date on the page

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Bates-stamped SFR 20. So January 26th, 2004.
Q. Can you tell me what the relationship to this Deed of Trust is with Mortgage Electronic Registration Systems, Inc.?
A. As it's stated on the second page of the exhibit, MERS is Mortgage Electronic Registration Systems, Incorporated. MERS is a separate corporation that is acting solely as a nominee for the lender and the lender's successors and assigns.
MERS is the beneficiary under the security instrument. So they're acting as the nominee for the lender and the beneficiary and acting as the beneficiary.
Q. And do you know the purpose of the number that is right underneath the title "Deed of Trust"? It says MIN.
MR. JUNG: Objection. Calls for speculation.
THE WITNESS: It's the MERS identification number.
BY MS. EBRON:
Q. Do you have an understanding of the use of that number?
MR. JUNG: Objection. Form.
THE WITNESS: What do you mean by --

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BY MS. EBRON:
Q. Do you know what the identification number is used for?
A. As I've never been an employee of MERS, I don't know everything that it's used for. But on a surface level, it's essentially their loan number, their record name for the loan -- or for this Deed of Trust rather.
Q. And is it fair to say that if someone mails a document to MERS at the address listed here in the Deed of Trust in paragraph E and they include that MIN number, that the document would be forwarded to the current servicer?
MR. JUNG: Objection. Form. And it calls for speculation.
THE WITNESS: I can't -- I don't know.
BY MS. EBRON:
Q. Is it accurate to state that this Deed of Trust allows the lender to create an escrow? I'm looking on --
A. Yes, it does.
Q. -- page 3 of 16 and looking on page 6 of 16, which is Bates-stamped SFR 10.
A. And your question was does it allow the lender to create an escrow account?

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Q. Yes.
A. Yes, it does.
Q. In paragraph 4 on page 6 of 16, it says, "Discharges and liens. Borrower shall pay all taxes, assessments, charges, fines and impositions attributable to the property, which can obtain priority over the security instrument." Did I read that correctly?
A. I'm sorry. Where are you looking at?
Q. Page 6 of 16, paragraph 4. Discharges and liens.
MR. JUNG: It's the first sentence under Section 4.
THE WITNESS: Yes, that is correct.
BY MS. EBRON:
Q. Do you know if there was an escrow set up for taxes?
MR. JUNG: Objection. Calls for speculation.
THE WITNESS: Yes, there was, I believe.
BY MS. EBRON:
Q. Do you know if there was an escrow set up for homeowners association assessments?
MR. JUNG: Objection. Calls for speculation.

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THE WITNESS: I don't. Not that I recall.
BY MS. EBRON:
Q. Do you know the purpose of including a planned unit development rider, like the one that's on the page Bates-stamped SFR 22 through SFR 25?
MR. JUNG: Objection. Form. Calls for speculation.
THE WITNESS: If the property is in a neighborhood that is usually governed by a homeowners association that may or may not require dues, which would be considered a planned unit development, the property -- the Deed of Trust would have a planned unit development rider.
BY MS. EBRON:
Q. Is it fair to say that the Planned Unit Development Rider in paragraph A notifies the borrower that they have obligations under the CC&Rs?
MR. JUNG: Objection. The document speaks for itself.
THE WITNESS: I'm sorry. Could you read the question back?
(Whereupon the pending question was read by the reporter.)
THE WITNESS: The document says that the borrower shall perform all the borrower's obligations

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under the planned unit development's constituent documents. And, again, constituent documents are, 1, the declaration; 2, articles of incorporation, trust instrument, or any equivalent document which creates the owners association; and, 3, any bylaws or other rules or regulations of the owners association. Borrower shall promptly pay when due all dues and assessments pursuant to the constituent documents.
BY MS. EBRON:
Q. So would you agree that paragraph F, Remedies, allows the lender to choose to pay dues to an association if the borrower does not pay?
MR. JUNG: Objection. The document speaks for itself.
THE WITNESS: The first sentence of Section F states that if the borrower does not pay planned unit development dues and assessments when due, the lender may -- emphasis on the word "may" -- pay them. It doesn't say they have to pay them or that they're under any obligation to but that they may.
However, if the lender does choose to pay them, any amounts disbursed shall become the additional debt of the borrower secured by the security instrument.
And unless the borrower and lender agree to

other terms of payment, those amounts shall bear interest from the date of disbursement at the note rate and shall be payable, with interest, upon notice from lender to borrower requesting a payment.

BY MS. EBRON:

Q. Thank you. Have you seen the promissory note that this Deed of Trust secured?

A. I've seen a digital copy of it.

Q. And that was in FileNet?

A. Yes.

Q. Were there any endorsements?

A. Yes.

Q. How many?

A. I believe just one.

Q. And who was it to and from?

A. I believe it was from Full Spectrum Lending and then an endorsement in blank.

Q. Do you know when that copy of the promissory note with the blank endorsement from Full Spectrum Lending was scanned into your files?

A. I don't know the exact date. But it would have been within 90 days of the service transfer.

Q. And that was, again, sometime before the association foreclosure sale?

A. That's correct.

Q. I'm going to show you a document that we'll mark as Exhibit 6.

(Whereupon Defendant's Exhibit 6 was marked for identification.)

BY MS. EBRON:

Q. Do you recognize this document?

A. I do not.

Q. Do you know if that -- do you recognize what type of document it is from the face of the document?

A. Yes.

Q. What is it?

A. It's a homestead declaration.

Q. Do you know if that's something that would normally be contained in your business records?

A. "Normally" is a relative term, but I wouldn't say it's -- let me go back. This is something that is commonly found in our files. I don't recall seeing a copy of it. It's not to say it wasn't there, though.

Q. Okay. I'll show you a document that I'll mark as Exhibit 7.

(Whereupon Defendant's Exhibit 7 was marked for identification.)

BY MS. EBRON:

Q. Do you recognize this document?

A. Yes, I do.

Q. What is it?

A. Notice of Default/Election to Sell under Deed of Trust.

Q. Is this something that was contained in your business records?

A. Yes.

Q. And this relates to the Deed of Trust that we marked as Exhibit 5?

A. Yes, it is.

MS. EBRON: Off the record.

(Off the record.)

MS. EBRON: We'll come back to the Notice of Default in a second.

BY MS. EBRON:

Q. I'll show you a document that we're going to mark as Exhibit 8.

(Thereupon Defendant's Exhibit 8 was marked for identification.)

MR. JUNG: And, Diana, per our discussion before we went back on the record, Keith is going to have an opportunity just to clarify his earlier remarks about the servicing dates.

MS. EBRON: Correct. Go ahead.

THE WITNESS: Do you want me to clarify the

Deed of Trust, or are you going to go through the line of questioning again?

BY MS. EBRON:

Q. We'll clear it up.

A. Okay.

Q. Let's make sure we've got the right Deed of Trust to reference, and then we'll go from there. Do you recognize this document that's been marked as Exhibit 8?

A. Yes. But before I answer that, I did want to clarify something I said earlier.

I do have multiple depositions this week, and for some reason I could not remember the service transfer date. And I know I have one case where the sale happened before the service transfer and one where it happened after.

In this case the foreclosure sale was held on September 11th, 2013, which when the loan was being serviced by Bank of America, Nationstar started servicing this loan on April 1st, 2014.

So the foreclosure sale actually happened under Bank of America's watch, so to say, and about seven months prior to Nationstar obtaining the servicing rights of the loan.

Q. Thank you.

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A. And also you asked a question about the note. The note is from Countrywide to endorsement in blank. Just to clear that up.
Q. Okay. Let's go there. I'll probably just ask you that again after we go through this Deed of Trust.
Is it your understanding that the Deed of Trust that was marked as Exhibit 5 was reconveyed?
A. I don't know.
Q. Is it your understanding that this is a subsequent Deed of Trust that secured a loan on the property?
A. Yes.
Q. Who is the originating lender?
A. Countrywide Home Loans, Incorporated.
Q. And are the borrowers Mark Kitchen and Nicole Kitchen in this one too?
A. Yes. Husband and wife as joint tenants.
Q. And the amount of the note is how much?
A. $258,750.
Q. This Deed of Trust also contains authorization to create an escrow account; correct?
A. That is correct.
Q. And were your answers before about the escrow account related to this particular Deed of

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Trust rather than the one marked as Exhibit 5?
A. The --
MR. JUNG: Objection. Vague as to which particular question.
THE WITNESS: Which question was it?
BY MS. EBRON:
Q. Was there an escrow account set up for this loan?
A. Yes. I was referencing this. This is the Deed of Trust I looked at in my review of the file.
Q. Okay. So there was an escrow account set up for taxes but not for association dues; is that correct?
A. That is correct.
Q. And this Deed of Trust also contains a Planned Unit Development Rider with the same provisions as the one in Exhibit 5; correct?
A. That is correct. I would also point out that this is dated August 25th, 2004, and was signed and notarized on August 26th, 2004.
Q. Thank you. Going back to Exhibit 7.
A. Okay.
Q. This Notice of Default and Election to Sell under Deed of Trust relates to the Deed of Trust marked as Exhibit 8; correct?

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A. That is correct.
Q. You mentioned that you reviewed the payment history; right?
A. That is correct.
Q. In this Notice of Default, it mentions a delinquency date of September 1st, 2009. Do you see that?
A. Yes.
Q. Does that coincide with what you saw on the payment history?
A. Yes.
Q. Who is Recontrust Company, NA?
A. They were -- as it states on the first line of Exhibit 7, Recontrust NA is acting as an agent for the beneficiary under the Deed of Trust dated 8/25/2004.
They sent notices and things of this nature on behalf of Countrywide and subsequently Bank of America after they had merged.
Q. Going back to the promissory note. Did you see the original promissory note?
MR. JUNG: Objection. Asked and answered.
THE WITNESS: No. As I stated, I saw a digital copy.
///

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BY MS. EBRON:
Q. Do you know where the original promissory note is?
MR. JUNG: Objection. Speculation.
THE WITNESS: It's in our -- it's in Nationstar's vault warehouse in Dallas, Texas.
BY MS. EBRON:
Q. How do you know that?
A. There's a reference to the location of it within that warehouse in Nationstar's system of record, what file number, so on and so forth.
Q. Is there a particular screen where you see that information?
A. It's in LSAMS.
Q. When did this loan become part of the Trust?
A. I don't know.
Q. Where would you look to find out that information?
A. It would have been roughly on or around the time of origination. I believe -- well, I don't know exactly where you would find the exact date.
Q. I'm going to show you a document that we're going to mark as Exhibit 9.
(Whereupon Defendant's Exhibit 9 was marked for identification.)

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BY MS. EBRON:
Q. Do you recognize this document?
A. Yes, I do.
Q. And this is something that I printed off of the internet, off the SEC website?
A. Okay.
Q. And you had a chance to review this before your deposition and verify that this is a copy of the pooling and servicing agreement applicable to the Harborview Mortgage Loan Trust 2004-8 Mortgage Loan Pass-Through Certificates, Series 2004-8?
A. That is correct.
Q. Does the pooling and servicing agreement give you any additional information on when this loan would have been put into the trust or a time frame that that would have happened?
MR. JUNG: Objection. Form.
THE WITNESS: I can tell you the Pooling and Servicing Agreement is dated October 1st, 2004, which is on the fourth page of the document. So it would have been on or around that time. I mean, without going through this page by page --
BY MS. EBRON:
Q. Let me just ask you this. Is it your understanding that the loan would have been put into

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the trust sometime in 2004?
A. Yes. It would have been essentially. I mean, the name of the trust being 2004-8, it's the eighth trust that was created in 2004. Those are typically how those are numbered.
Q. Did Countrywide, who was the lender on the Deed of Trust, sell the loan to someone else before the trust purchased it?
MR. JUNG: Objection. Calls for speculation.
THE WITNESS: What do you mean sell? Sell to what?
BY MS. EBRON:
Q. I'm just looking at the front of the Pooling and Servicing Agreement. And I see Greenwich Capital Acceptance, Inc., as depositor of Greenwich Capital Financial Products, Inc., as the seller; Wells Fargo Bank, NA, as master servicer and securities administrator; and Deutsche Bank National Trust Company as trustee custodian. But I don't see Countrywide.
A. Just like any other loan, Countrywide is a bank that has -- or had access to multiple different investors in order to get their customers the best rates that they could offer, which didn't necessarily

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mean they were investing in every single loan that they originated.
So it's normally the case that they're not going to be the investor on every single loan or probably even on the majority of their loans. That's speculation. But from working there and originating loans there, it was rare that Countrywide was an investor on their own loans.
So even though they were the lender and the servicer, they might not have been the investor. They were servicing on behalf of whoever provided that product.
Q. Okay. So even though the Deed of Trust says Countrywide is the lender, that means that maybe Countrywide didn't front the money for the loan?
THE WITNESS: The lender is --
MR. JUNG: Objection. Form. Speculation.
THE WITNESS: It's my understanding that the lender is who originated the loan. It could be Countrywide. It could be Wells Fargo. It could be ABC Mortgage Company. It could be John Smith's Brokerage Shop. That doesn't necessarily mean that they lent the money. They were doing that front facing function of originating the loan on behalf of an investor.

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BY MS. EBRON:
Q. So the investor would provide the funds, and the lender would be the one who's interfacing with the public to lend it?
MR. JUNG: Objection. Calls for speculation.
THE WITNESS: Essentially. But that would be without going into the full origination of the loan. I guess that's the easiest way to say it.
BY MS. EBRON:
Q. Do you know how much the trust paid for its interest in the Deed of Trust?
A. I do not.
Q. Do you know who would know that?
MR. JUNG: Objection. Speculation.
THE WITNESS: I do not. Are you saying how much did the trust pay for --
BY MS. EBRON:
Q. For the Deed of Trust.
A. For the Deed of Trust. I don't know. And I don't know who would know that.
Q. Did you review a complete copy of the Pooling and Servicing Agreement?
A. I reviewed exactly what I'm looking at in Exhibit 9, if that's what you mean by -- well,

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there's 97 pages. The last page is numbered 97 of 97 on the copy you printed out.
Q. That's the only one that you saw. Did you see any copy with any schedules attached in your business records?
And what I'm getting at is on page 23 of 97, it defines mortgage loan schedule, "As of any day the list of mortgage loans included in the Trust Fund on such date attached hereto as Schedule 1." So I'm looking for whether or not you saw Schedule 1.
A. I did see a loan schedule with this loan number in there -- or with this mortgage in there rather. I do apologize.
Q. How many loans were listed on Schedule 1?
A. I wasn't looking for the total number. I apologize. I was just looking to ensure that this file was in the trust.
Q. Do you know if it was more than one page of loan numbers?
A. I honestly today assign function for information. So I don't know.
BY MS. EBRON:
Q. I'm going to show you a document that we'll mark as Exhibit 10.
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(Whereupon Defendant's Exhibit 10 was marked for identification.)
BY MS. EBRON:
Q. Do you recognize that document?
A. Yes, I do.
Q. What is it?
A. Corporation Assignment of Deed of Trust for the State of Nevada.
Q. Does this relate to the Deed of Trust we marked as Exhibit 8?
A. Yes, it does.
Q. Who is it from and who is it to?
MR. JUNG: Objection. The document speaks for itself.
THE WITNESS: It's from Mortgage Electronic Registration Systems, Incorporated, to Deutsche Bank National Trust Company as trustee for the benefit of the Harborview 2004-8 Trust Fund.
BY MS. EBRON:
Q. Do you see right after it says "Trust Fund," there's a couple asterisks and then some other language?
A. Yes.
Q. Do you know what that means?
MR. JUNG: Objection. Calls for speculation.
THE WITNESS: I mean, there's obviously some abbreviations here. It says "SND," which I'm not going to speculate what that means. Then it says "FCLR." I'm not going to speculate what that means. "Notice to Wells Fargo. Once notice is sent, proceed with," and then once again "FCLR," which I'm not going to speculate on that.
BY MS. EBRON:
Q. But it's your understanding that that isn't supposed to be part of the title of the entity that the Deed of Trust was assigned to?
MR. JUNG: Objection. Misstates prior testimony.
THE WITNESS: Could you rephrase your question?
BY MS. EBRON:
Q. When I asked you who the assignment was to and from, you stopped at "Trust Fund."
A. Right.
Q. And you didn't --
A. It appears that that is a note. Once again, I don't know what that note means because of the truncated words. But I've never seen anything like that in my career under the name of somebody taking

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the beneficial interest in a property.
Q. I haven't had that either. That's a first. Do you know Khadija Gulley?
A. I do not.
Q. I'm going to show you a document that we'll mark as Exhibit 11.
(Thereupon Defendant's Exhibit 11 was marked for identification.)
MR. JUNG: Diane, can I take a restroom break?
MS. EBRON: Sure. Off the record.
(A brief recess was taken.)
MS. EBRON: Back on.
BY MS. EBRON:
Q. I'm looking at Exhibit 11. Do you recognize this document?
A. Yes, I do.
Q. What is it?
A. Substitution of Trustee for the State of Nevada.
Q. And it's substituting Recontrust Company, NA, as the trustee?
A. That is correct. Deutsche Bank is substituting Recontrust.
Q. I had a quick question about the deed of

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trust again, Exhibit 8.
A. Okay.
Q. Does Fannie Mae have an interest in this loan?
MR. JUNG: Objection. Calls for speculation.
THE WITNESS: No.
BY MS. EBRON:
Q. Does that call for speculation? I mean, you would know if Fannie Mae had an interest; right?
A. Yes. It would be -- on that Pooling and Servicing Agreement, there would be references to Fannie Mae. Are you asking because of the form?
Q. Yes. Can you explain to me why it says Fannie Mae and Freddie Mac?
A. Once again, it is my understanding that it's a uniform instrument. And seeing as how at the time that this was originated Fannie Mae and Freddie Mac were just kind of the standard barriers of the mortgage industry. So their forms were used by most companies.
Q. Okay. So just because it says Fannie Mae and Freddie Mac, it doesn't mean that Fannie or Freddie had an interest in a particular loan?
A. Correct. It's just a form they created that

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is available for public use. It's like calling tissue "Kleenex" or a bandage a "Band-Aid." It's just a Fannie Mae form.
Q. Great. Does Freddie Mac has an interest in this loan?
A. No.
Q. Do you know if this loan is FHA insured?
A. It is not.
Q. And you know that by looking in your business records?
A. Yes.
Q. I'm going to show you a document that we'll mark as Exhibit 12.
(Thereupon Defendant's Exhibit 12 was marked for identification.)
BY MS. EBRON:
Q. Do you recognize this?
A. Yes, I do.
Q. What is it?
A. It's the Recision of Election to Declare Default in the State of Nevada.
Q. Does this relate to the Notice of Default we looked at in Exhibit 7?
A. Yes, it does.
Q. Do you know why the Notice of Default was

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rescinded?
A. I do not.
Q. Where would you look to find that out?
A. I would need to refer to whatever records Bank of America provided to Nationstar at the time of the servicing transfer in April of 2014.
Q. When you prepared for this deposition, did you open up every document that was in the file on --
A. Yes, I did.
Q. -- FileNet. And were there documents that were received by Bank of America?
A. Yes, there were.
Q. Did those documents include AS-400 notes?
A. I don't recall. I don't recall. And oftentimes Nationstar's system will reference AS-400 notes if things come up. Well, there's a subsequent servicer, and I didn't see any references to any AS-400 notes in Nationstar's collection history, or profile is what they call it. It's really just a comments log.
Q. So the only comments log that you saw were from April of 2014 going forward?
A. That I can say with certainty. Once again, I'm not saying they weren't there. There's nothing -- I did open everything in FileNet. If

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there were notes, there was nothing in them that jumped out at me or that I recall that jumped out at me.
Q. And when you were looking for the documents, or looking for information for your deposition and you were opening up documents, you were looking for any references to a homeowners association?
A. That is correct.
Q. And so if there were notes about homeowners association, lien, then you would have made a note of that?
A. Yes.
Q. Do you recall if there were any notes on the foreclosure of the property?
MR. JUNG: Objection. Vague as to "foreclosure of the property." By which entity?
MS. EBRON: The bank.
THE WITNESS: Which bank?
BY MS. EBRON:
Q. Anyone acting on behalf of Deutsche Bank?
A. And which foreclosure are you talking about?
Q. Foreclosure of the Deed of Trust?
A. By any party? Are you talking about the homeowners association foreclosure sale?
Q. No. The foreclosure of the Deed of Trust.

A. I guess I don't understand your question.
Q. There was a Notice of Default that was filed -- or recorded against the property, which was the beginning of a foreclosure of the Deed of Trust?
A. Right.
Q. Did you see any notes on that?
A. I don't recall anything specific.
Q. Okay. I'm going to show you a document that we'll mark as Exhibit 13.
(Whereupon Defendant's Exhibit 13 was marked for identification.)
BY MS. EBRON:
Q. Do you recognize this document?
A. I believe I saw a couple of these. I don't know if they were -- I don't recall if they were the same or different or if this is one of the exact notice of delinquent assessment liens that I saw. But I did see a notice of delinquent assessment lien.
Q. Is that something that was contained in your business records?
A. Yes.
Q. Do you know when it became a part of your business records?
A. It became a part of -- when you say "you," you're talking about Deutsche Bank?

Q. Correct.
A. It became a part of Bank of America's business records and subsequently Nationstar's upon the service transfer in April of 2014.
But I believe it was the latter half of November 2011 or possibly in early December 2011. On or about when this is dated.
Q. Do you have any reason to dispute the amount listed in this Notice of Delinquent Assessment?
A. I mean, all I see is a dollar -- it just says the amount owing is $796.12. And as of November 14th, 2011, it increases on the first day of each month at a rate of $57 per month, plus late charges and/or interest, plus attorneys/legal fees, and the fees of the agent for the association, the management body incurred in connection with preparation, recording, or foreclosure of this Notice of Delinquent Assessment.
So given all that, I don't see a breakdown of what equals $796.12.
Q. Do you have a reason to dispute that the borrowers were delinquent at this time?
A. I mean, they were delinquent on their mortgage at this time. So without being too speculative, I don't think it's too far off to say

that they were most likely delinquent on their homeowners association fees.
Q. Okay. But you didn't see anything in the file that was like --
A. They didn't call in and say, "Why are we getting these? We paid our fees," or anything.
Q. So you didn't see anything like that?
A. No.
Q. Okay. And I think I meant to ask this before when we were looking at Exhibit 12, the Recision of the Notice of Default.
Is it your understanding that the borrowers were still delinquent when the Notice of Default was rescinded?
A. Based on my recollection of the payment history, I don't believe they ever became current.
Q. Thank you.
A. Like I said, though, obviously based on just what you provided and documents today, this is a very document intensive file. So that's just based on my recollection.
Q. But when you looked at the payment history, did you see any payments after -- I think it was sometime in 2009 that was listed on the NOD; right? September 1st, 2009?

MR. JUNG: Objection. Vague as to "any payments."
BY MS. EBRON:
Q. Any payments from the borrower to the loan that was secured by the Deed of Trust we marked as Exhibit 8.
A. I don't recall exactly if the payments just stopped on that date or if payments were made after that date and applied to the furthest payment back that was due and owing. I don't believe they made any additional payments.
Q. Okay.
A. But, once again, if I had a copy of the payment history in front of me, I could very easily answer that for you.
(Thereupon Defendant's Exhibit 14 was marked for identification.)
BY MS. EBRON:
Q. Okay. Let's look at Exhibit 14. Do you recognize this document?
A. Yes, I do.
Q. What is it?
A. Notice of Default and Election to Self Real Property to Satisfy Notice of Delinquent Assessment Lien.

Q. Is this something that was contained in records you received from Bank of America?
A. Yes, it was. And just like the previous exhibit, Exhibit 13, I believe there were a couple of these -- I don't recall if this is the exact one I saw, but I have no reason to believe that it's not legitimate.
Q. Do you see any evidence of when it was received by Bank of America?
A. On or about when it was dated. Shortly thereafter. So like February, early March 2012.
Q. Did you see any copies of this Notice of Default that were paired with envelopes or Bates-stamped?
A. I did not.
Q. And did you see any AS-400 notes about the receipt of the Notice of Default?
A. I did see some mention of the Notice of Default and Election to Sell because there were attempts to cure that.
Q. And where did you see those?
A. In the AS-400 notes, I believe. Once again, it's a very document heavy file.
Q. Do you know how many notes there were about the Notice of Default?

A. I don't recall the exact number.
Q. But you would be able to tell if you had the AS-400 notes?
A. Yes. If I had those in front of me, I could point you to them.
Q. I do. Do you have any reason to dispute that as of the time this was recorded, that the borrowers were still delinquent to the association?
A. Just as I answered before, as they were still delinquent on their mortgage, I don't think it's outside the realm of possibility that they were still delinquent on their homeowners association fees.
Q. Do you have any knowledge about whether the Notice of Delinquent Assessment Lien was mailed to the borrowers?
MR. JUNG: Objection. Speculation.
THE WITNESS: I do not.
BY MS. EBRON:
Q. Do you have any knowledge about whether the Notice of Default and Election to Sell Real Property to Satisfy Notice of Delinquent Assessment Lien that we marked as Exhibit 14 was mailed to the borrowers?
MR. JUNG: Objection. Speculation.
THE WITNESS: I do not.

BY MS. EBRON:
Q. Do you have any knowledge about whether the Notice of Default we marked as Exhibit 14 was posted on the property?
A. I do not.
Q. Do you have any knowledge as to whether the Notice of Default and Election to Sell Real Property was mailed to any of the other subordinate lienholders on the property?
MR. JUNG: Objection. Speculation.
THE WITNESS: I do not.
BY MS. EBRON:
Q. Do you have any reason to dispute that the Notice of Default was mailed to --
A. I'm sorry. What was your previous question?
Q. Any subordinate lienholders.
A. Am I aware that it was sent to any or --
Q. Do you have any knowledge?
A. Okay. Not do I dispute?
Q. Right. Do you have any knowledge of it?
A. I do not, no.
Q. Okay. Do you have any reason to dispute that the Notice of Default we marked as Exhibit 14 was mailed to the address on the Assignment we marked as Exhibit 10?

A. As it's been in the system of record, it got in there somehow. So I don't know if it was sent to that address or another Bank of America address. But since it's contained in Bank of America's records, it got there somehow.
Q. I'm going to show you multiple documents that are similar. I'm going to mark that as Exhibit 15.
(Whereupon Defendant's Exhibit 15 was marked for identification.)
BY MS. EBRON:
Q. They're Bates-stamped SFR 109, 110, 116 and 117. If you can just take a quick look at these.
A. Okay.
Q. Have you seen these documents before?
A. I don't think so.
Q. In your review of the file, did you see any notices of lien?
MR. JUNG: Objection. Asked and answered.
THE WITNESS: I saw the Notice of Delinquent Assessment Lien. Possibly multiple notices, as we talked about on Exhibit 13. But in terms of these, which appear to be sewer liens, I don't recall seeing any sewer liens.
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BY MS. EBRON:
Q. Okay. Thank you. I'm going to show you a document that we will mark as Exhibit 16.
(Thereupon Defendant's Exhibit 16 was marked for identification.)
BY MS. EBRON:
Q. Do you recognize this document?
A. Yes, I do.
Q. What is it?
A. A Notice of Trustee's Sale.
Q. Is this something that's contained in your business records?
A. Yes, I believe so.
Q. And it's something that would have been received by Bank of America and then forwarded to Nationstar upon the servicing transfer?
A. That is correct.
Q. Did you see any notes in the AS-400 report about this Notice of Trustee's Sale?
A. I believe it was the same type of notes. Once again, if they're in front of me, I could give you a definite answer.
But between the Notice of Default and the Notice of Sale, there were notes as to the file being referred to outside counsel to tender the

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super-priority amount of the lien.
Q. Do you know when that attempt happened?
A. If I had some documentation in front of me, I could tell you an exact date. But I don't want to speculate. It was prior to the sale date, the HOA sale date.
Q. Do you have any information that would lead you to dispute the amount that's listed in the last paragraph as being the unpaid balance to the association?
MR. JUNG: Objection. Form.
THE WITNESS: Just as we talked about, I believe, on Exhibit 13, it just gives a total number. It says the total amount of the unpaid -- this is the second-to-last sentence of the document.
It says, "The total amount of the unpaid balance of the obligation secured by the property to be sold and reasonable estimated costs, expenses and advances at the time of initial publication of the Notice of Sale is $4,917.38." There's no breakdown of what adds up to that -- or what that number is comprised of. And it says it's an estimate on top of that.
So the fact that it just says estimated, that does leave me some doubt that the number could

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be different.
BY MS. EBRON:
Q. Do you have any reason to believe that there wasn't a delinquency?
MR. JUNG: Objection. Speculation.
THE WITNESS: Just as we've talked about multiple times now, the owners were still delinquent on their property. I don't think it's outside the realm of possibility that they were still delinquent on their homeowners association fees.
But, once again, I know Bank of America acquired outside -- or obtained outside counsel to tender payment for the super-priority amount of the HOA's lien.
BY MS. EBRON:
Q. Did Deutsche Bank or any of its agents go to 9500 West Flamingo Road, Suite Number 205, Las Vegas, Nevada 89147 at 2:00 p.m. on May 8th, 2013?
MR. JUNG: Objection. Speculation. Form.
THE WITNESS: I don't know.
BY MS. EBRON:
Q. If somebody had attended the noticed foreclosure sale, is that something that you would have expected to have seen in the business records?
A. Not necessarily.

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Q. Why not?
A. It's -- in my experience, I have never seen where it says John Smith attended sale date at blah-blah-blah address at blah-blah-blah time and the date matches the date. And also the sale didn't even happen on that date of May 18th, 2013. It happened on September 11th, 2013.
Q. Right. So there's no way for you to know -- strike that. You don't have any information about whether the sale was orally postponed, do you?
MR. JUNG: Objection. Calls for speculation.
THE WITNESS: I do not.
BY MS. EBRON:
Q. And you didn't see any notes in your file saying the May 8th, 2013, sale didn't go forward; it was postponed?
A. Not that I recall seeing.
Q. Do you have any information or knowledge about whether or not the Notice of Trustee's Sale was posted on the property?
A. I do not.
Q. Do you have any knowledge or information whether the Notice of Trustee's Sale was posted in three public places?

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MR. JUNG: Objection. Calls for speculation.
THE WITNESS: I do not.
BY MS. EBRON:
Q. Do you have any knowledge or information about whether the Notice of Trustee's Sale was mailed to the borrowers?
MR. JUNG: Calls for speculation. Objection.
THE WITNESS: I do not.
BY MS. EBRON:
Q. Do you have any knowledge or information about whether the information contained in the Notice of Trustee's Sale was published in any newspaper?
MR. JUNG: Objection. Calls for speculation.
THE WITNESS: I do not.
BY MS. EBRON:
Q. Did you see any evidence that someone from Deutsche Bank, Bank of America, or anyone they hired called Alessi & Koenig at the number listed on this Notice of Trustee's Sale?
A. Do I have knowledge that they called them?
Q. Right.
A. No. But I know that there was written

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correspondence.
Q. How do you know that?
A. Because I've seen it.
Q. And where was that located in your files?
A. It was provided to me by counsel.
Q. But it wasn't something that you saw on FileNet or LSAMS?
A. No. I don't believe so.
Q. Did you -- meaning Deutsche Bank through your servicer, which was probably Bank of America at the time -- call the ombudsman's office at the number listed on the Notice of Trustee's Sale?
A. Not that I'm aware of.
Q. Did Deutsche Bank have a policy or procedure for handling association foreclosure notices in April of 2013?
A. Once again, that is what I call a front-facing function. It has to do with the customer. So it would have defaulted to Bank of America's policies on that, which were to obtain outside counsel to determine the super-priority amount and tender that amount in order to satisfy the super-priority portion of the lien at minimum and protect their interests in the primary Deed of Trust.
Q. How do you know that that was Bank of

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America's policy and procedure for handling association liens?
A. From previously talking with Bank of America regarding what their policies and procedures were at that time.
Q. Did you ever talk to anyone at Bank of America about whether or not their policies and procedures changed after December 12th, 2012, when NRED issued its advisory opinion about the super-priority?
A. I just asked a general question about a general time period, which I believe was from when I worked at Bank of America until 2012, 2013 roughly. So until 2012.
So I believe I asked what the policies and procedures were from 2012 to current when I talked to them. And they are as I just explained.
Q. And did they mention if they had any procedure changes after NRED's advisory opinion?
A. Not specifically, no.
Q. Did you talk to them about whether or not there were changes after the SFR and U.S. Bank decision in September of 2014?
A. No, I did not. But I believe -- there's no but. Never mind.

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Q. Do you know if they had a policy change?
A. I do not.
Q. I'm going to show you a document we'll mark as Exhibit 17.
(Whereupon Defendant's Exhibit 17 was marked for identification.)
BY MS. EBRON:
Q. Do you recognize this document?
A. I do not recall seeing this.
Q. Okay. I'm going to show you a document we'll mark as Exhibit 18.
(Whereupon Defendant's Exhibit 18 was marked for identification.)
BY MS. EBRON:
Q. Do you recognize this document?
A. I do not.
Q. Do you have any reason to dispute that as of February 4th, 2013, that there were fines for violations that had occurred against the property?
A. I have never seen a document like this, a notice of violation. I don't know what this is in reference to. This is the first time I've seen this. So I can't really speculate on that.
MR. JUNG: Diana, I'm sorry. What exhibit number are we on?

MS. EBRON: 18.
MR. JUNG: That's the Notice of Violation Lien?
MS. EBRON: Correct.
MR. JUNG: And the Substitution of Trustee, that would have been Exhibit 17?
MS. EBRON: Correct.
MR. JUNG: Thank you.
BY MS. EBRON:
Q. During this time period in 2013, do you know if Deutsche Bank through its servicer was maintaining the property?
A. I don't recall.
Q. Do you know if they sent anyone by to check on the property?
A. I know there were property inspections done, numerous property inspections. Nothing jumped out at me, though, regarding anything where the lender would have -- I don't recall anything where the lender would have had to step in and change the locks or mow the grass or anything like that. I don't recall seeing any notes of that nature.
Q. I'm going to show you another document we'll mark as Exhibit 19.
///

(Whereupon Defendant's Exhibit 19 was marked for identification.)
BY MS. EBRON:
Q. Do you recognize this document?
A. Yes, I do.
Q. What is it?
A. The Trustee's Deed upon Sale.
Q. Is this something that was contained in the business records that you received from Bank of America when Nationstar began servicing the loan?
A. I believe this was provided to me by counsel.
Q. Is it accurate to say that no one from Deutsche Bank attended the auction on September 11th, 2013?
A. Not that I'm aware of.
Q. I'm sorry. I asked that poorly. Did anyone from Deutsche Bank attend the auction on September 11th, 2013?
A. No.
Q. Do you have any knowledge about the number of bidders at the sale?
A. No.
Q. Do you have any knowledge about any announcements that were made or not made before the sale?

MR. JUNG: Objection. Calls for speculation.
THE WITNESS: No.
BY MS. EBRON:
Q. Do you have any knowledge about any of the actual events of the sale?
A. No.
Q. Do you have any reason to doubt that SFR paid the winning bid?
MR. JUNG: Objection. Calls for speculation.
THE WITNESS: According to this Trustee's Deed, the buyer was SFR Investments Pool 1, LLC, who you represent. So I assume they purchased it, but that is an assumption.
BY MS. EBRON:
Q. Do you have any information about the identity of the other bidders at the sale?
A. I do not.
Q. Do you have any reason to believe that the bidders at the sale colluded with SFR so that SFR could purchase the property for $15,000?
A. I don't know.
Q. Do you have any reason to believe that SFR

Investments Pool 1, LLC, colluded with Alessi & Koenig, LLC, so that it could pay $15,000 as the highest bid?
A. I don't know.
Q. Do you have any reason to believe that SFR colluded with the association in any way in relation to the sale?
A. I don't know.
Q. I'm showing you a document that we will mark as Exhibit 20.
(Whereupon Defendant's Exhibit 20 was marked for identification.)
BY MS. EBRON:
Q. Do you recognize this document?
A. I believe I did see this document.
Q. What is it?
A. Substitution of Trustee.
Q. And it substitutes National Default Servicing Corporation as the trustee for the Deed of Trust we marked as Exhibit 8?
A. That is correct.
Q. I'll show you a document that we will mark as Exhibit 21.
(Whereupon Defendant's Exhibit 21 was marked for identification.)

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BY MS. EBRON:
Q. Do you recognize this document?
A. Yes, I do.
Q. What is this?
A. This is an Assignment of the Deed of Trust.
Q. And that's the Deed of Trust that is marked as Exhibit 8?
A. That is correct.
Q. Who is this from and who is it to?
A. It is from Bank of America, NA, to Nationstar Mortgage, LLC.
Q. In your review of the file, did you see any other Assignments besides this one and the one that we marked as Exhibit 10?
A. No, I did not.
Q. Why is Bank of America assigning this Deed of Trust to Nationstar?
A. I guess I don't -- can you rephrase your question?
Q. When did Bank of America, NA, become the beneficiary of the Deed of Trust marked as Exhibit 8?
A. I don't know.
Q. So we have this Assignment in February of 2010 that assigned the Deed of Trust to Deutsche Bank; right?

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A. That's correct.
Q. And then this assignment -- that was from MERS?
A. Yes. From MERS to Deutsche Bank.
MR. JUNG: Diana, for the record, when you refer to the Assignment in 2010, what Exhibit Number?
MS. EBRON: 10.
MR. JUNG: 10?
MS. EBRON: Yes.
BY MS. EBRON:
Q. Do you have any idea why this Assignment was prepared?
MR. JUNG: Objection as to form.
THE WITNESS: Can you rephrase your question?
BY MS. EBRON:
Q. Do you know why this was prepared?
A. I do not.
Q. Did Nationstar begin servicing in October of 2013?
A. No.
Q. It was in April of 2014; right?
A. Correct. I believe this is a -- I don't think this is a valid assignment.
Q. Do you know if there's a policy and

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procedure in place at Bank of America or if there was at this time for recording documents against a property?
MR. JUNG: Objection. Calls for speculation.
THE WITNESS: I don't.
BY MS. EBRON:
Q. But this is wrong; right? I mean, this isn't a valid Assignment?
A. Right. I would call it invalid, a ghost assignment. Based on my review of the file, I didn't see anywhere that the file was assigned from Deutsche Bank back to Bank of America and then where Bank of America would have the authority to assign it to anybody else.
Q. Do you think that the Assignment to Deutsche Bank could have been a mistake?
MR. JUNG: Objection. Calls for speculation.
THE WITNESS: Any answer I give you would be a hundred percent speculation. I just know that the chain follows to that point, and then the next step would be from Deutsche Bank to somebody else.
BY MS. EBRON:
Q. Okay.

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A. So I can't say whether that was done in error or not because everything up to that point falls in line.
Q. Do you know if Nationstar is a sub-servicer for this loan?
A. Based on the Pooling and Servicing Agreement, based on my review of the file, I don't believe Nationstar is a sub-servicer of this file. However, that would be something that would be very -- it wouldn't be anywhere, you know, that would be easily accessible for me to find that information, nor is it anything that I saw in the topics that I reviewed in order to prepare for this deposition today.
Q. Right. I just asked because Wells Fargo Bank, NA, is listed as the master servicer and securities administrator. And usually when there's a master servicer referenced and it's not any of the other entities who had been servicing the other entity, there's a sub-servicer.
And just to confirm. You said you did look at the schedule of mortgages?
A. Yes.
Q. And that's how you know for sure that the loan was transferred into the trust?

A. Yes.
Q. Okay. So it's just a rogue assignment from Bank of America?
A. Yes.
Q. And that's something that you've seen before; right? Where there's an Assignment that doesn't necessarily match up with reality?
A. Unfortunately, yes.
Q. I'm showing you a document that we'll mark as Exhibit 22.
(Thereupon Defendant's Exhibit 22 was marked for identification.)
BY MS. EBRON:
Q. Do you recognize this document?
A. I believe that this -- yes.
Q. Wright Finlay & Zak, LLP is a law firm retained by Nationstar; correct?
A. That is correct.
Q. And they would have recorded this on behalf of Nationstar?
A. That is correct.
Q. And Nationstar directed them to do it in their capacity as servicer for Deutsche Bank?
A. That is correct.
Q. I'm showing you a document that we'll mark

as Exhibit 23.
(Whereupon Defendant's Exhibit 23 was marked for identification.)
BY MS. EBRON:
Q. Do you recognize this document?
A. Yes, I do.
Q. Similarly, this was recorded by your attorneys?
A. That is correct.
Q. I'm showing you a document that we'll mark as Exhibit 24.
(Whereupon Defendant's Exhibit 24 was marked for identification.)
BY MS. EBRON:
Q. Do you recognize this document?
A. Yes, I do.
Q. What is it?
A. The title insurance policy.
Q. Do you know when this was obtained?
MR. JUNG: Objection. Diana, just as it goes to the topics listed in Exhibit Number 2 for this deposition, was this included?
THE WITNESS: And this isn't --
MR. JUNG: Regarding the title. I don't recall seeing that.

MS. EBRON: Oh, I'm not sure if I mentioned this specifically.
THE WITNESS: And just for the record, I didn't -- I saw this as it's part of the collateral file, but I didn't see anything in here that referenced title. So it's nothing that I looked at other than to make sure that we had a copy of it.
BY MS. EBRON:
Q. Do you know if there were any claims made on it?
A. I don't. And it's not something that I --
Q. Do you know where you would look to find that information out?
A. The systems of record for all the servicers since origination. Or contacting the title and title company directly.
Q. I'm showing you a document that we'll mark as Exhibit 25.
(Whereupon Defendant's Exhibit 25 was marked for identification.)
BY MS. EBRON:
Q. And these were part of the responses to requests for production of documents. Did you review the responses to requests for production of documents?

A. Yes.
Q. Did you also review the interrogatories?
A. Yes.
Q. Do you know who AJ Loll is?
A. Yes.
Q. Who is that?
A. He's vice president, I believe, of loss mitigation.
Q. For Nationstar?
A. For Nationstar, yes.
Q. And attorney-in-fact for Deutsche Bank?
A. I'm sorry?
Q. Is he also attorney-in-fact for Deutsche Bank?
MR. JUNG: Diana, you're referring to the response to interrogatories, the verification page?
MS. EBRON: Yeah.
THE WITNESS: Yes. I'm sorry.
BY MS. EBRON:
Q. All right. Let's go back to Exhibit 25.
A. Okay.
Q. Do you recognize the documents within this exhibit?
A. Yes, I do.
Q. What are they?

A. Essentially it's the chain of letters from Miles, Bauer, Bergstrom & Winters, who are the law firm obtained by Bank of America to address the issue of the super-priority amount of the homeowners association lien. So the first document is --

Q. Let me just ask you real quick. Are any of these documents ones that were contained in your business records?

A. These were provided by counsel.

Q. Do you know where they came from?

A. I do not.

Q. Do you have anyone to authenticate them through your business records?

A. Because they were provided to me by counsel, I didn't -- I wasn't looking for them when I was going through the thousands of documents in FileNet.

Q. But you opened up the web page?

A. Right.

Q. And you would have made a note if there was something referencing a homeowners association lien?

A. Yes.

Q. Do you have any information about any efforts to make any payments to the association on behalf of this property other than these documents?

A. I believe there was -- like I said, there

were notes in AS-400 regarding Miles Bauer and retaining them to acquire a payoff, which Centennial Point Homeowners Association provided on the SOB, technically page 2, 3 and 4. But nothing in there actually says what the super-priority amount is.

And we have a letter with Miles Bauer's response where they use the nine months of assessments and a copy of the check provided.

Q. Are there any other documents that were contained in your business records that relate to any attempts to pay?

A. Other than notes. These might have been in there, but I might not have made a mental note of it because I already had them.

Q. Okay.

A. So I'm not saying that they're not in there. I can verify that for you.

Q. Okay.

A. Which, if that's the case, then we would have the originals.

MS. EBRON: Well, I don't have any other questions.

MR. JUNG: I have some quick follow-up questions, please.

///

EXAMINATION

BY MR. JUNG:

Q. Mr. Kovalic, for the record, could you state when the HOA sale took place?

A. September 11th, 2013.

Q. When did Nationstar start servicing the subject loan?

A. April 1st, 2014.

Q. At the time of the HOA sale on September 11, 2013, was Bank of America the servicer?

A. Yes.

Q. And did Bank of America reach out to the HOA trustee, who at the time was Asset Recovery Services, after receiving a copy of the recorded Notice of Default that was recorded on March 6th, 2012?

MS. EBRON: Calls for speculation.

BY MR. JUNG:

Q. I'd like to point you back to Exhibit Number 25.

A. Okay.

MS. EBRON: He's already testified that he just received this from counsel, and it wasn't part of the business records. So I don't think we need to go through any of the details on here.

MR. JUNG: Right. But he won't have to

speculate because it's actually right here on Exhibit 25.

MS. EBRON: Expect for he can't verify or authenticate any of these business records. He's not an appropriate witness to do that. Anything that's on the face of these documents, he can't make any conclusions based on that.

BY MR. JUNG:

Q. Well, have you heard of the law firm Miles, Bauer, Bergstrom & Winters.

A. Yes. And it's mentioned in the Bank of America servicing notes.

Q. What has Miles, Bauer, Bergstrom & Winters done in their role in these HOA disputes?

MS. EBRON: Form. Calls for speculation.

THE WITNESS: Based on what I have seen in this file, they were retained to deal with the super-priority -- one, find out what the super-priority portion of the homeowners association lien was and then tender payment on behalf of Bank of America.

BY MR. JUNG:

Q. And based on the documents that you received and documents also contained in Exhibit Number 25 introduced by counsel, do you believe Miles, Bauer,

Bergstrom & Winters did that in this situation?
MS. EBRON: Form. Calls for speculation.
THE WITNESS: Based on the copy of the check that is in Exhibit 25, it appears that a check in the amount of $558, which is the equivalent of nine months of assessments, was made to Asset Recovery Services.
BY MR. JUNG:
Q. And then based on the documents that you reviewed and also contained in Exhibit Number 25, would you agree that there was a payoff demand provided by the HOA trustee at the time, which was Asset Recovery Services?
MS. EBRON: Form. Calls for speculation.
THE WITNESS: The first sentence of the second page of Exhibit 25 says, "We are in receipt of your demand for payoff regarding the above-referenced property." And then they provide the total amount. And then they provide the monthly assessment. And then there is a full ledger on the third page. It continues onto the fourth page.
BY MR. JUNG:
Q. And going back to that first sentence. When was that demand for payoff dated?
A. March 23rd, 2012.

Q. And when was the letter from Miles, Bauer Bergstrom & Winters with a copy of the tendered check dated?
MS. EBRON: Calls for speculation.
BY MR. JUNG:
Q. If you look on the copy of the check --
A. Right. You're just asking what date was the check dated?
Q. Right.
A. April 20th, 2012.
Q. And is that prior to the HOA sale of 2013?
A. Yes. The sale was in 2013.
Q. Is that also prior to when Alessi & Koenig was substituted in as HOA trustee for Asset Recovery Services? I believe it was introduced as an earlier exhibit, as Exhibit 17.
A. According to Exhibit 17, that is dated January 10th, 2013, and notarized the same day. So, yes, it was prior to that.
Q. Just for the record, there was a tendered super-priority amount check from Miles, Bauer Bergstrom & Winters to the HOA trustee, who was Asset Recovery Services at the time?
MS. EBRON: Form. Calls for speculation. Calls for a legal conclusion.

THE WITNESS: Based on the information, yes, and based on my review in preparation.
BY MR. JUNG:
Q. And based on your experience working for Nationstar, Miles, Bauer, Bergstrom & Winters is a law firm that has in the past tendered super-priority amount checks to HOAs or HOA trustees on behalf of banks or First Deed of Trust lienholders?
MS. EBRON: Calls for speculation. Form.
THE WITNESS: Based on my experience, yes.
BY MR. JUNG:
Q. Do you have any reason to doubt the authenticity of the documents that counsel presented as Exhibit 25 or documents you reviewed prior to this deposition?
A. No.
Q. Earlier counsel asked you if you had come across any records that would indicate any improprieties with the HOA sale including but not limited to collusions on the part of HOA trustee and SFR or between other bidders at the HOA sale and SFR; is that correct?
A. Yes. Are you asking whether those questions were asked?
Q. Yes.

A. Yes, they are.
Q. And I believe you said you didn't -- at this point in time, you had not come across any such information; correct?
A. That's correct.
Q. But just because you have not at this point and discovery is still ongoing, is it possible that additional information may come to the surface that does show improprieties of the sale?
MS. EBRON: Form.
THE WITNESS: It's possible. Not with certainty, but it's possible.
MR. JUNG: Thank you. No further questions.

FURTHER EXAMINATION
BY MS. EBRON:
Q. You didn't see anything in any of your business records that suggested any improprieties with the sale; right?
A. In my preparation for today's deposition, I didn't see anything that suggested that.
Q. Right. Do you know if this check was accepted?
A. The check was dated April 20th, 2012. And the last two pages of Exhibit 25 is another letter

from Miles Bauer dated July 29th, 2016. It's still questioning the --

Q. Do you have any information of whether or not the check was accepted?

A. I don't have any information.

Q. Okay. Are you aware that Bank of America's policies and procedures were to make a payment with a letter containing the same language as in this letter and then if it was rejected, to go ahead and just close the file?

A. I'm not aware of it. And that would have been -- no, I don't know.

MS. EBRON: Okay. That's all I have.

FURTHER EXAMINATION

BY MR. JUNG:

Q. One more follow-up question, Mr. Kovalic. Are you aware that it was the practice and procedures of HOA trustees to not accept any amount less than the full amount shown on the payoff demands they provided?

MS. EBRON: Form. Calls for speculation.

THE WITNESS: Could you rephrase that?

BY MR. JUNG:

Q. Sure. I'm sorry.

A. That one I don't understand.

Q. Are you aware that as a practice the HOA trustees or HOAs in Nevada did not accept nine months' worth of common assessments for the super-priority amount?

MS. EBRON: Form. Incomplete hypothetical. Calls for speculation.

THE WITNESS: Based on my experience, I can't recall a time when -- if the total amount due was more than nine months of assessments, whether that money was accepted as a payoff of the lien and the sale didn't -- and the sale stopped.

BY MR. JUNG:

Q. And how many cases or properties have you dealt with in Nevada where a super-priority amount was attempted to be tendered to the HOA?

MS. EBRON: Form. Calls for a legal conclusion. Calls for speculation.

THE WITNESS: In terms of just HOA super-priority lien issues, from December 2015 to today, I've probably dealt with 35 to 50 of these cases.

In terms of how many times there's been an attempt to tender or money's been tendered, it's probably been 75 percent of those.

MR. JUNG: Thank you. No further questions.

FURTHER EXAMINATION

BY MS. EBRON:

Q. None of those cases where there was an attempt to pay were ones where Nationstar attempted to pay; correct?

A. I'm sorry?

Q. All those cases that you were talking about, the 75 percent that included some type of attempt to pay.

A. Uh-huh.

Q. All those were with Bank of America, not with Nationstar. Correct?

MR. JUNG: Objection. Form.

THE WITNESS: They weren't solely with Bank of America, but they were not with Nationstar. Are you asking --

BY MS. EBRON:

Q. Has Nationstar ever tried to pay a homeowners association lien?

A. No. But prior servicers have.

Q. Right. So Nationstar doesn't have any firsthand knowledge of attempts to pay homeowners association liens in 2012 and '13; correct?

A. Not that I'm aware of, no.

MS. EBRON: Okay.

FURTHER EXAMINATION

BY MR. JUNG:

Q. One last question. As part of the servicing notes you had received from the prior servicer, would Nationstar have asked for documents showing a past tender?

MS. EBRON: Form. Calls for speculation. Incomplete hypothetical.

THE WITNESS: It would be situational. And it would depend on multiple factors. But if the file came over in foreclosure and then when the file's onboard and if it was found that it's a Nevada -- once again, sorry, just to go back. What time frame are we looking at here?

BY MR. JUNG:

Q. Sure. Just from 2012 to today, to this year, 2016.

A. Well, today the policies are totally different than they were in 2012, when this was a fairly -- when this was an issue on the rise.

So if through the foreclosure process you the homeowner being delinquent come to find out that

the property was sold due to an HOA lien, yes, then documents would be requested from prior servicers by Nationstar in order to see, you know, if there was an attempt to tender payment.

However, now that most of these files have been identified and they are usually flagged in some sort of way during the onboarding process that, you know, an HOA sale was held on date X, you know, they're going to request that documentation a lot quicker now than they would have four years ago.

MR. JUNG: Understood. Thank you. No further questions.

MS. EBRON: Okay. We're done. I would like an e-tran.

THE REPORTER: And would you like a copy of the transcript, Mr. Jung?

MR. JUNG: Yes, please.

THE REPORTER: Would you like an e-tran?

MR. JUNG: I'll go with e-tran. That's fine. Sure.

(Thereupon the taking of the deposition was concluded at 12:32 p.m.)

* * * * *

CERTIFICATE OF DEPONENT

PAGE	LINE	CHANGE	REASON

* * * * *

I, KEITH KOVALIC, deponent herein, do hereby certify and declare the within and foregoing transcription to be my deposition in said action; that I have read, corrected and do hereby affix my signature to said deposition.

_____
KEITH KOVALIC, Deponent

REPORTER'S CERTIFICATE

STATE OF NEVADA)
COUNTY OF CLARK) SS:

I, Jane V. Efaw, CCR No. 601, do hereby certify:

That I reported the taking of the deposition of the witness, KEITH KOVALIC, at the time and place aforesaid;

That prior to being examined, the witness was by me duly sworn to testify to the truth, the whole truth, and nothing but the truth;

That I thereafter transcribed my shorthand notes into typewriting and that the typewritten transcript of said deposition is a complete, true and accurate transcription of said shorthand notes taken down at said time, and that a request has been made to review the transcript.

I further certify that I am not a relative or employee of counsel of any party involved in said action, nor a relative or employee of the parties involved in said action, nor a person financially interested in the action.

Dated at Las Vegas, Nevada, this _____ day of _____, 2016.

_____
Jane V. Efaw, CCR #601

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EXHIBIT H-7

"Freddie Mac's "Borrower Notifications FAQs"

Borrower Notifications FAQs

Q: Why did I receive this notification letter from Freddie Mac?

A: By law, we're required to notify you that your mortgage was sold to us. The letter includes more information about your mortgage as part of our continued efforts to promote long-term, successful homeownership.

Q: Why did my lender sell my mortgage to Freddie Mac?

A: We provide funds to lenders by purchasing mortgages from them. This creates a continuous source of mortgage funds that allows homebuyers to obtain financing. We maintain requirements for the mortgages we purchase through lenders/Servicers. These activities allow us to fulfill our mission of providing liquidity, stability and affordability to the nation's residential housing market. The selling of your mortgage to Freddie Mac has no bearing, in any way, to the homeowner, your loan, or your specific loan obligations.

Q: Do I need to take action on this notice?

A: No. This notice requires no action on your part. It is for informational purposes only.
We recommend that you file your borrower notification letter with your other mortgage documents.

Q: Should I send my mortgage payments to Freddie Mac?

A: No. There is no change to the way you make your mortgage payment. You must continue to send your payments to the company listed on your mortgage statement.

Q: Do I contact Freddie Mac if I have questions about my mortgage payment?

A: No. If you have questions about your mortgage or mortgage payment, please contact your Servicer using the contact information in the notification letter you received from Freddie Mac or on your mortgage statement.

Q: Why is the balance in the letter different than the balance on my mortgage payment?

A: The original principal balance reflected on the notice was provided by your mortgage originator to Freddie Mac when your mortgage was originally sold to us. Any subsequent payments are not reflected in this notice. For more information on your current unpaid principle balance or your mortgage, please contact your Servicer using the contact information in the notification letter you received from Freddie Mac or on your current mortgage statement.

Q: Does Freddie Mac allow making or applying partial payments to my mortgage?

A: Your mortgage Servicer can answer any questions you have about your mortgage or mortgage payment. You can reach your Servicer using the contact information in our notification letter or on your mortgage statement.

Q: Will I continue to receive correspondence from Freddie Mac?

A: Freddie Mac relies on our Servicers to keep borrowers informed on issues related to their mortgage. However, if there is a regulatory requirement or government mandate, Freddie Mac may be required to notify you.

TRUST NOTIFICATION LETTERS (ex. Guaranteed Senior Subordinate)

Q: Freddie Mac has already sent me a similar borrower notification letter. Why am I receiving another?

A: You received a second borrower notification letter because your mortgage was sold into a trust after it was sold to us. Section 404 of the *Helping Families Save Their Homes Act of 2009* requires certain mortgage purchasers to notify borrowers in writing of the sale, transfer, or assignment of their mortgage.

Q: Do I need to take action on this notice?

A: No. This notice requires no action on your part. The sale of your mortgage to a trust does not affect any terms or conditions of the mortgage, deed of trust, or note. The notification letter is for your information. We do recommend that you file your borrower notification letter with your other mortgage documents.

Q: Why did Freddie Mac sell my mortgage to a trust?

A: We sell mortgages into trusts to reduce the potential risk to Freddie Mac and taxpayers. The sale will also help bring private capital back into the mortgage credit markets. The trusts issue securities backed by similar mortgages to an underwriter for sale to investors. The proceeds from the sale are transferred to Freddie Mac, which uses those funds to purchase additional mortgages. The sale of your mortgage to Freddie Mac does not affect your loan or your specific loan obligations.

Q: What is a trust?

A: A trust is a legal relationship created to hold and protect property for the benefit of others. Freddie Mac routinely creates trusts to hold and protect the loans backing its mortgage-backed securities.

Q: Can I have my mortgage removed from the trust?

A: No. Freddie Mac's transfer of your mortgage to a trust does not, in any way, change your mortgage rights or obligations. Your Servicer must continue to service your mortgage in accordance with Freddie Mac's servicing requirements and applicable law. If you have questions about the ownership, your mortgage, or a trust, please contact your Servicer using the contact information in the notification letter you received from Freddie Mac or on your mortgage statement.

Q: Who actually owns my mortgage, Freddie Mac or the trust?

A: The trust indicated on your notification letter owns your mortgage. Freddie Mac is the trustee of that trust. A trustee is an individual or organization who manages assets for the benefit of another.

Q: What does your letter mean where it states that Freddie Mac is no longer the owner of my mortgage but is a trustee of the trust?

A: The trust owns your mortgage, but authorizes Freddie Mac to act on behalf of the trust in certain matters.

EXHIBIT H-8

No. 12-56737

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BANK OF MANHATTAN, N.A.,

Plaintiff-Appellee,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for First Heritage Bank, N.A.,

Defendant-Appellant.

On Appeal From The United States District Court For The Central District Of California, Case No. 2:10-cv-04614-GAF-AGR

THE FEDERAL DEPOSIT INSURANCE CORPORATION'S PRINCIPAL BRIEF

COLLEEN J. BOLES
Assistant General Counsel
LAWRENCE H. RICHMOND
Senior Counsel
J. SCOTT WATSON
Counsel
MINODORA D. VANCEA
Counsel
FEDERAL DEPOSIT INSURANCE CORPORATION
3501 Fairfax Drive, VS-D7014
Arlington, VA 22226-3500
(703) 562-2049

Counsel for the Federal Deposit Insurance Corporation

Date: April 5, 2013

CORPORATE DISCLOSURE STATEMENT

The Federal Deposit Insurance Corporation is a federal corporation established under 12 U.S.C. § 1811.

Date: April 5, 2013

Respectfully submitted,

s/ Minodora D. Vancea
Minodora D. Vancea
Counsel For FDIC

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STATEMENT REGARDING ORAL ARGUMENT

Appellee Federal Deposit Insurance Corporation, as receiver for First Heritage Bank, N.A. ("FDIC"), respectfully requests oral argument. This case involves a question of statutory interpretation of vital importance to FDIC's performance of its statutory duties.

JURISDICTIONAL STATEMENT

The district court, which had jurisdiction under 12 U.S.C. § 1819(b)(2)(A), entered a final judgment against FDIC on August 28, 2012. Record Excerpts ("R.") 20. FDIC timely filed a notice of appeal on September 24, 2012. R.1. This Court has jurisdiction under 28 U.S.C. § 1291 over the final judgment of the district court.

STATEMENT OF THE ISSUES

Whether Section 1821(d)(2)(G), which provides that FDIC may transfer "any assets" without "any approval . . . or consent," renders unenforceable contractual provisions such as rights of first refusal that require a counterparty's consent or approval before FDIC may transfer a receivership asset.

An addendum of relevant statutes is provided at the end of this brief.

STATEMENT OF THE CASE

This lawsuit arises from a Loan Purchase Agreement ("LPA") entered into between First Heritage Bank ("Heritage") and Professional Business Bank ("PBB"), under which Heritage acquired from PBB a 50% interest in a secured

commercial loan that PBB made to one of its customers. R.26. Within a year, Heritage failed and was placed into FDIC receivership, and the receiver sold the LPA at a discount to Commerce First Financial, Inc. ("CFF") as part of the liquidation of Heritage's assets. R.26.

PBB sued FDIC, claiming that the transfer to CFF without obtaining PBB's approval or consent breached the LPA, which conferred on PBB a right of consent and of first refusal with respect to the sale of Heritage's interest in the loan. R.29.

FDIC moved to dismiss PBB's suit on the basis of Section 1821(d)(2)(G), which allows FDIC to transfer "any assets" without "any approval . . . or consent." The district court denied the motion to dismiss, consistent with the decision it issued a month earlier in *Deutsche Bank National Trust v. FDIC*, 784 F.Supp.2d 1142, 1155-57 (C.D. Cal. 2011). There, as here, the district court held that Section 1821(d)(2)(G) only frees FDIC from statutory restrictions on its ability to transfer assets, not from contractual transfer restrictions such as those here. R.23-24. FDIC moved for reconsideration in the *Deutsche Bank* case. The district court denied reconsideration on the Section 1821(d)(2)(G) issue. *See Deutsche Bank Nat'l Trust v. FDIC*, 854 F. Supp. 2d 756, 759 (C.D. Cal. 2011).

FDIC moved for summary judgment on PBB's claims for equitable and declaratory relief, which the district court granted. R.39-42. FDIC also informed the district court that in order to expedite the proceedings in this case, it did not intend

to pursue any defenses to liability on PBB's breach of contract claim other than the Section 1821(d)(2)(G) defense, which the district court had already denied at the motion to dismiss stage, and which FDIC intended to pursue on appeal from the final judgment in this case. Accordingly, the district court held that FDIC was liable for breach of contract damages, and that the only issue remaining to be decided was the amount of damages. R.37. On May 31, 2012, Bank of Manhattan acquired PBB, and was substituted in the case. Because the amount of damages arising from PBB's breach of contract claims was undisputed ($1,557,289.28), the district court entered final judgment in favor of PBB/Bank of Manhattan in the sum of $1,557,289.28 on August 28, 2012. R.20. FDIC timely filed a notice of appeal on September 24, 2012. R.1.

STATEMENT OF FACTS

In 2007, PBB loaned Al's Garden Art, Inc. $6 million, which was secured by assets identified in the loan documents. R.28. For $3 million, Heritage then acquired from PBB a 50% interest in that loan, which included an undivided 50% interest in the loan collateral, in a transaction documented in the Loan Purchase Agreement ("LPA"). R.28. The LPA obligated Heritage to seek PBB's consent to any transfer of its LPA interest to another entity, retained for PBB a right of first refusal on any bona fide offer to purchase the interest made by any third party, and further conferred on PBB the right to reacquire the 50% interest upon Heritage's

insolvency. R.28.

In late July 2008, Heritage failed, and FDIC was appointed receiver. R.28. PBB took no steps at that time to reacquire Heritage's 50% interest in the Al's Garden loan. R.28. In the meantime, FDIC promptly commenced liquidation of the institution. R.28. In January 2009, relying on its statutory power under Section 1821(d)(2)(G) to transfer assets without any approval or consent, FDIC entered into a Loan Sale Agreement ("LSA") to sell a pool of loans, including the 50% interest in Al's Garden loan, to CFF, without seeking PBB's consent or offering it the opportunity to repurchase the 50% interest. R.28. This lawsuit followed.

SUMMARY OF ARGUMENT

Section 1821(d)(2)(G) permits FDIC to "transfer any asset or liability of the institution in default (including assets and liabilities associated with any trust business) without any approval, assignment, or consent with respect to such transfer." 12 U.S.C. § 1821(d)(2)(G). By its plain terms, this Section frees FDIC of "any" kind of transfer restrictions, whether statutory or contractual.

The district court's contrary belief—that Section 1821(d)(2)(G) only frees FDIC of statutory, and not contractual transfer restrictions—has no support in the text of the statute, nor in its statutory context, history, and purpose.

A. Congress's use of the word "any" demonstrates that all transfer restrictions are foreclosed, "of whatever kind," without exception for those arising

from contract. *See United States v. Gonzales*, 520 U.S. 1, 5 (1997) (defining "any" as "of whatever kind") (citation omitted). There is no support for the district court's conclusion that contractual transfer restrictions do not fall within the purview of the statute because they were not expressly mentioned in Section 1821(d)(2)(G). Congress does not need to enumerate every "kind" of transfer restrictions that are barred in order to include them within the purview of the statute—"any" already includes "whatever kind" of transfer restrictions.

Moreover, the statute is clear, broad, and unqualified. The absence of any restrictive language in the text of Section 1821(d)(2)(G) leaves "no basis in the text for limiting" the statutory freedom from "any" transfer restrictions to mean only those restrictions imposed by statute, not by contract. *Gonzales*, 520 U.S. at 5. The Court should give effect to the text Congress enacted, which exempts FDIC from "any, not just some" transfer restrictions. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228 (2008) (citation omitted).

In any event, the district court's distinction between statutory and contractual transfer restrictions is flawed because, as the Supreme Court has held, an exemption from statutory obligations necessarily includes an exemption from contractual obligations, since contractual obligations have no independent legal force outside of the statutes that serve to enforce them. *Norfolk & W. Ry. v. Am. Train Dispatchers' Ass'n*, 499 U.S. 117, 130 (1991). Similarly here, because Section

1821(d)(2)(G)'s exemption from statutory transfer restrictions "suspend[s] application of the law that makes the contract binding," *id.*, the exemption from statutory restrictions necessarily includes an exemption from contractual restrictions.

Finally, that Section 1821(d)(2)(G) frees FDIC from "any" transfer restrictions, whether statutory or contractual, is underscored not only by Section 1821(d)(2)(G)'s language providing FDIC the power to transfer without "any consent . . . or approval," but also by Section 1821(d)(2)(G)'s language providing FDIC the power to transfer "any assets." Two other federal courts of appeal have interpreted the "any assets" language in similar statutes as giving FDIC the power to transfer even assets that would otherwise not be transferrable because of contractual transfer restrictions.

B. The statutory context, history, and purpose of Section 1821(d)(2)(G) do not support the district court's departure from the plain text of the statute. Section 1821(d)(2)(A)(i) does not provide, as the district court believed, that the receiver can never have any greater rights than the failed bank. Section 1821(d)(2)(A)(i) only says that the receiver has the rights and powers of the bank; it does not say that the receiver has no additional rights, powers, or defenses beyond those available to the failed bank. Indeed, there would have been no need for any provision in FIRREA other than Section 1821(d)(2)(A)(i) if FDIC only had the rights and powers of the failed bank. Yet there are numerous provisions in FIRREA beside Sec-

tion 1821(d)(2)(A)(i). Not surprisingly, the Supreme Court expressly recognized that FDIC can have greater rights and powers than those available to the failed bank when, as with Section 1821(d)(2)(G) here, FIRREA gives FDIC such rights.

Nor is there any statutory support for the district court's view that FIRREA only authorizes FDIC to repudiate, and not to breach contracts, or that FIRREA conditions the availability of the transfer powers in Section 1821(d)(2)(G) on repudiation. To the contrary, the district court's interpretation violates established principles of statutory construction, as requiring FDIC to repudiate in order to be able to transfer renders the transfer powers in Section 1821(d)(2)(G) largely meaningless because there is nothing left to transfer once a contract is repudiated (a repudiated contract has no value to a purchaser).

In addition, requiring FDIC to determine assignability on a contract-by-contract basis so that it can repudiate the contracts containing transfer restrictions defeats the entire purpose of rules allowing free transferability, which is to "eliminate[] the need for detailed examination of the failed bank's assets and of varying laws." *FDIC v. Bank of Boulder*, 911 F.2d 1466 (10th Cir. 1990) (en banc). "A need by the FDIC to determine assignability on an asset-by-asset basis would surely slow a rescue operation down, when dispatch was required." *Id*.

Moreover, traditional insolvency law bars the enforcement of contractual transfer restrictions because they hinder the trustee's ability to liquidate the assets

of the bankruptcy estate. Given that the purpose of FIRREA was to enhance, not diminish, the powers available to FDIC, there is no reason why Congress would have wished to give FDIC receivers lesser powers than those given to trustees in bankruptcy.

C. The principle of constitutional avoidance does not require a different result. Under basic contract law, parties have no right to enter into contracts that are contrary to Section 1821(d)(2)(G), *i.e.*, contracts that impose restrictions on FDIC's ability to transfer assets. And since no such rights existed, no rights were taken, and there is no taking at all, much less an unconstitutional taking.

D. But even if there were any lingering doubt, FDIC's interpretation should be accorded deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), because it is the most reasonable interpretation of a statutory provision FDIC is charged with administering.

STANDARD OF REVIEW

The question of statutory interpretation at issue in this case presents purely legal issues that are reviewed *de novo*. *Freeman v. Allstate Life Ins. Co.*, 253 F.3d 533, 536 (9th Cir. 2001).

ARGUMENT

I. FDIC's Transfer Without PBB's Consent Did Not Breach PBB's Contractual Rights

A. The Plain Language Of Section 1821(d)(2)(G) Renders Unenforceable Against The Receiver "Any" Transfer Restrictions, Whether Statutory Or Contractual

In Section 1821(d)(2)(G), Congress explicitly authorized FDIC, acting as receiver, to "transfer *any asset* or liability of the institution in default . . . *without any approval, assignment, or consent* with respect to such transfer." 12 U.S.C. § 1821(d)(2)(G)(i)(II) (emphases added). This language is clear, broad, and unqualified. It includes absolutely no limitations on FDIC's power to transfer. Rather, it removes all limitations, of any kind, on FDIC's power to transfer.

Congress's use of the word "any" refutes the district court's conclusion that Section 1821(d)(2)(G) frees FDIC only from statutory transfer restrictions, not from contractual transfer restrictions. As the Supreme Court has explained, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). Thus, Congress's use of the word "any" demonstrates that all transfer restrictions are foreclosed, "of whatever kind," without exception for those arising from contract. If Congress wished to except some transfer restrictions (namely contractual ones) from this rule, it would not have utilized a broad word such as "any," which does

not admit any exceptions for some kinds of transfer restrictions.

The absence of any restrictive language in the text of Section 1821(d)(2)(G) leaves "no basis in the text for limiting" the statutory freedom from "any" transfer restrictions to mean only those restrictions imposed by statute, not by contract. *Gonzales*, 520 U.S. at 5. The statute does not say that FDIC may transfer "without any . . . consent . . . *except when consent is required by contract*." If Congress wished to add this limiting language to Section 1821(d)(2)(G), it could have easily done so. Instead, it used the word "any." This Court should give effect to the words Congress actually used, and reject the lower court's invitation to read the italicized limitation into the limitation-free language of the statute. Courts "are not at liberty to rewrite the statute to reflect a meaning we deem more desirable. Instead, we must give effect to the text Congress enacted," including text like Section 1821(d)(2)(G), which exempts FDIC from "any, not just some" transfer restrictions. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228 (2008) (citation omitted).

That Section 1821(d)(2)(G) frees FDIC from "any" transfer restrictions, whether statutory or contractual, is underscored not only by Section 1821(d)(2)(G)'s language conferring on FDIC the power to transfer without "any consent . . . or approval," but also by Section 1821(d)(2)(G)'s language conferring on FDIC the power to transfer "any assets." At least two other federal courts of

appeal have interpreted the "any assets" language in similar statutes as giving FDIC the power to transfer even assets that would otherwise not be transferrable because of contractual transfer restrictions. *NCNB Texas Nat'l Bank v. Cowden*, 895 F.2d 1488, 1499-1501 (5th Cir. 1990) (statute allowing FDIC to transfer "any assets" permitted FDIC to transfer assets that were not transferrable under state law or contract); *FDIC v. Bank of Boulder*, 911 F.2d 1466, 1472-73, 1475 (10th Cir. 1990) (en banc) ("the federal FDIC statute authorizes the transfer of assets—nontransferable under state law—from FDIC/Receiver to FDIC/Corporation," even though the contract at issue contained a provision making it "subject to the UCP, ... [which] contains a blanket restriction on transfer"). The identical "any assets" language in Section 1821(d)(2)(G) should therefore be similarly interpreted.

This Court's prior decision interpreting Section 1821(d)(2)(G) further confirms that "Congress specifically exempted the FDIC from having to obtain any consent when effectuating the sale or transfer of receivership assets." *Sahni v. Am. Diversified Partners*, 83 F.3d 1054, 1059 (9th Cir. 1996). To be sure, *Sahni* invalidated a consent requirement imposed by state statute. However, the analysis in *Sahni* was not limited to its particular facts. Nothing in this Court's analysis supports a distinction between a statutory consent requirement and a contractual consent requirement. To the contrary, this Court announced a broad rule under which "any" consent requirements are invalidated, and cited with approval two reported

decisions that expressly held that Section 1821(d)(2)(G) bars enforcement of contractual rights of consent or of first refusal. *Sahni*, 83 F.3d at 1059 (citing *RTC v. Charles House Condominium Ass'n*, 853 F. Supp. 226, 230 (E.D. La. 1994), and *NVMercure Ltd. P'ship v. RTC*, 871 F. Supp. 488, 491 (D.D.C. 1994)).

Sahni's reliance on decisions invalidating contractual consent requirements underscores the conclusion that the rule announced by *Sahni*—that FDIC is not required to obtain *any* consent before transferring an asset—means what it says: That the statute bars any consent restrictions, whether statutory or contractual.

In any event, the district court's distinction between statutory and contractual transfer restrictions is flawed because, as the Supreme Court has held, an exemption from statutory obligations necessarily includes an exemption from contractual obligations, since contractual obligations have no independent legal force outside of the statutes that serve to enforce them: "A contract has no legal force apart from the law that acknowledges its binding character. As a result, the exemption in § 11341(a) from 'all other law' effects an override of contractual obligations . . . by suspending application of the law that makes the contract binding." *Norfolk & W. Ry. Co. v. Am. Train Dispatchers' Ass'n*, 499 U.S. 117, 130 (1991) (statute exempting certain railroad mergers from obligations imposed by "all other law" exempted them from both statutory and contractual obligations).

The Supreme Court also stressed that where, as in Section 1821(d)(2)(G) here, a statute "is clear, broad, and unqualified," the statute "does not admit of the distinction" between statutory and contractual obligations drawn by the lower court there. *Norfolk*, 499 U.S. at 128. In the case before the Supreme Court, the exemption of certain railroad mergers from obligations imposed by "all other law" was "broad enough to include laws that govern the obligations imposed by contract," as the "obligation of a contract is 'the law which binds the parties to perform their agreement,'" and a "contract depends on a regime of common and statutory law for its effectiveness and enforcement." *Id*. at 129-130 (citations omitted). Similarly here, because the exemption from statutory transfer restrictions in Section 1821(d)(2)(G) "suspend[ed] application of the law that makes the contract binding," *id*. at 130, the exemption from statutory restrictions necessarily included an exemption from contractual restrictions.

The Supreme Court's reasoning in *Norfolk* also refutes the district court's view that Section 1821(d)(2)(G) does not free FDIC of contractual consent obligations because Congress did not *explicitly* list contractual consent obligations in the statutory language.[1] In *Norfolk*, just as here, the statute at issue did not explicitly exempt the carriers from contractual obligations. The Supreme Court nonetheless

[1] Order denying reconsideration on the Section 1821(d)(2)(G) issue in *Deutsche Bank Nat'l Trust Co. v. FDIC*, Case No. 2:09-cv-03852-GAF, Docket No. 77 at 6 (C.D. Cal. May 2, 2011).

found that the statute's broad language exempting the carriers from obligations imposed by "all other law" included all subcategories of "all other law," whether explicitly listed or not, including contractual obligations. Indeed, the ordinary meaning of "any" obviates the need for an explicit listing of each and every subcategory. *See also*, *e.g.*, *NCNB*, 895 F.2d at 1499-1501 (federal statute allowing FDIC to transfer "any assets" permitted FDIC to transfer assets that were not transferrable under state law or contracts relating to fiduciary appointments, even though federal statute did not "explicitly" refer to the transfer of fiduciary appointments).

In sum, there is simply no textual support for the district court's distinction between statutory and contractual transfer restrictions, and its effective reading of "any" as "some."

B. The Statutory Context, History, And Purpose Of Section 1821(d)(2)(G) Reinforce Its Plain Meaning

The statutory context, history, and purpose of Section 1821(d)(2)(G) do not support the district court's departure from the plain text of the statute. To the contrary, all these sources reinforce the plain text of the statute, which frees FDIC of any transfer restrictions, whether statutory or contractual.

Statutory Context. The district court's interpretation is bereft of any statutory support. The main decision on which the district court relied, *Waterview Management Co. v. FDIC*, 105 F.3d 696 (D.C. Cir. 1997), believed that Section 1821(d)(2)(A)(i) supported its reading of Section 1821(d)(2)(G) because it suppos-

edly provided that the receiver can never have any greater rights than the failed bank. Under this theory, if a contractual transfer restriction is valid against the failed bank, it must be valid against the receiver. But 1821(d)(2)(A)(i) does not provide that the receiver can never have any greater rights than the failed bank. Section 1821(d)(2)(A)(i) only says that the receiver has the rights and powers of the bank. It does not say that the receiver has no additional rights, powers, or defenses beyond those available to the failed bank.

Indeed, there would be no need for any provision in FIRREA other than Section 1821(d)(2)(A)(i) if FDIC only had the rights and powers of the failed bank. Not surprisingly, the Supreme Court expressly recognized that FDIC can have greater rights and powers than those available to the failed bank: "[FIRREA] places the FDIC in the shoes of the insolvent S&L, to work out its claims under state law, *except where* some provision in the extensive framework of FIRREA provides otherwise. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (emphasis added).

By noting that FDIC typically stands "in the shoes" of the failed bank "except where some provision in the extensive framework of FIRREA provides otherwise," the controlling *O'Melveny* decision clearly conflicts with *Waterview*'s holding that FDIC must *always* stand "in the shoes" of the failed bank and thus can never have greater rights than those of the failed bank. *Waterview* erroneously

omitted the "except where" language in its citation of *O'Melveny*'s stand-in-the-shoes analysis. 105 F.3d at 701.

The district court also relied on dicta in *Sharpe v. FDIC*, 126 F.3d 1147 (9th Cir. 1997), which stated without any elaboration or support that "FIRREA does not authorize the breach of contracts." *Id.* at 1155.[2] But *Sharpe* never analyzed or discussed Section 1821(d)(2)(G), and thus never had an opportunity to decide whether Section 1821(d)(2)(G) authorizes FDIC to breach contracts.

Moreover, focusing on whether Section 1821(d)(2)(G) authorizes FDIC to breach contracts is the wrong inquiry—as discussed in Part C below, there is no right in the first place to enter into a contract that is contrary to Section 1821(d)(2)(G), *i.e.*, a contract that imposes restrictions on FDIC's ability to transfer assets. *See* Part C *infra* (citing, inter alia, *Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240, 307-08 (1935) ("Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them"). Under traditional principles of contract law, any contractual transfer restrictions

[2] The conclusory statement that "FIRREA does not authorize the breach of contracts" was not *Sharpe's* holding, which was much narrower: "We hold that the FDIC did not act within its statutorily granted powers in breaching the Sharpes' settlement agreement *because recording of the reconveyance* of the debtor's deed of trust for which it did not pay full consideration cannot be considered a statutorily authorized function of the FDIC." 126 F.3d at 1155 (emphasis added). And because it was made without any support or analysis, *Sharpe*'s conclusory statement lacks persuasive authority as well.

that seek to limit FDIC's ability to transfer assets are invalid and unenforceable because they are contrary to Section 1821(d)(2)(G), the law in existence when they were made. *See id*. And because such contractual transfer restrictions are invalid and unenforceable, there can be no breach in the traditional sense of the word. The district court thus erred in searching for an authority to breach contracts. There is no breach here because there is no right to enter into such contracts in the first place.

In any event, FIRREA does authorize the breach of contracts. *Sharpe* would have presumably cited any statutory prohibition against the breach of contracts if it believed there was one. The lack of such citation demonstrates that *Sharpe* thought that FIRREA was silent as to whether FDIC may breach contracts. But the statute is in fact not silent. Far from prohibiting FDIC from breaching contracts, FIRREA actually empowers FDIC to perform any acts that the failed bank was entitled to perform (12 U.S.C. § 1821(d)(2)(B)(iii) (FDIC authorized to "perform all functions of the institution")). Because banks, like any other parties, are allowed to breach contracts under traditional contract law, and FDIC may perform any acts that the failed bank could, FDIC necessarily has the power to breach contracts.

Section 1821(d)(20) further confirms that Congress did not wish to upset the traditional rule under state law that any parties, including a bank or its receiver, may breach contracts: "*Nothing in this paragraph shall be construed to limit* the

power of a receiver or conservator to exercise *any rights under contract or law*, including to *terminate, breach,* cancel, or otherwise discontinue such agreement." 12 U.S.C. § 1821(d)(20) (emphases added). The Supreme Court's decision in *O'Melveny* reinforces this very point: "§ 1821(d)(2)(A)(i) places the FDIC in the shoes of the insolvent [bank], to work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise." *O'Melveny*, 512 U.S. at 87. Because no "provision in the extensive framework of FIRREA" removes the preexisting right to breach a contract, FDIC retains that preexisting right.

In addition, as discussed, the plain text of Section 1821(d)(2)(G) does allow FDIC to transfer assets notwithstanding contractual transfer restrictions. Thus, even if the statute were silent as *Sharpe* assumed about FDIC's power to breach contracts in general, it is not silent about FDIC's power to breach the specific contractual provisions at issue here (although "breach" is somewhat of a misnomer since the contractual transfer restrictions are invalid and unenforceable in the first place). Unless there is a statutory prohibition against the breach of contracts (and there is none cited by *Sharpe* or the district court), there is nothing that can contradict the plain language of Section 1821(d)(2)(G) freeing FDIC from any transfer restrictions, whether statutory or contractual. Mere silence is not enough to over-

ride a specific statutory provision allowing FDIC to transfer assets without any consent, whether statutory or contractual.

Finally, FIRREA's repudiation provisions do not support the district court's conclusion, either. Relying on *Waterview*, the district court held that FIRREA's repudiation provisions in Section 1821(e) provide that FDIC may only transfer without consent if it first repudiates the contractual restrictions at issue.[3] That is simply not true. Section 1821(e) nowhere provides that FDIC may only exercise any rights that it has under provisions such as Section 1821(d)(2)(G) only if it first repudiates. Section 1821(e) merely provides that repudiation is a *right* "[i]n addition to any other rights a conservator or receiver may have" (12 U.S.C. § 1821(e)(1)), not that it is a precondition to the exercise of other rights.

Moreover, as the D.C. Circuit recently explained, FIRREA attaches one single consequence to the failure to repudiate: a possible increase in the amount (not priority) of damages (12 U.S.C. § 1821(e)(3)(A)). *MBIA Ins. Co. v. FDIC*, 708 F.3d 234, 243 (D.C. Cir. 2013) (the repudiation provisions "do not change the priority of damages," but only "serve to limit the [amount of] damages available to a counterparty," and this limitation on the amount of damages is the "only conse-

[3] *See Waterview*, 105 F. 3d at 701 ("Section 1821(e) explains how this [Section 1821(d)(2)(G)) power works with regard to contracts entered into pre-receivership: if the [receiver] prefers to transfer an asset without pre-existing limitations, then the [receiver] can abrogate a contract containing limitations, such as a purchase option or marketing rights, but it must pay damages to the option holder.").

quence[] Congress attached to repudiation"). If FDIC breaches a contract, it must still pay damages, but the damages are not limited to actual compensatory damages as with repudiation, but may include the three categories of damages that are excluded in repudiation (expectation damages, punitive damages, and emotional damages), if such categories are otherwise available under state law. *Id*.

Because Congress imposed only one consequence (related to the amount of the damages) on the failure to repudiate, courts are without authority to impose additional consequences, such as a withdrawal of the powers provided by Section 1821(d)(2)(G). In addition, given that the free assignability of assets is crucial to FDIC's ability to enter into the Purchase and Assumption ("P&A") transactions that transfer, usually overnight after the bank failure, the bulk of the failed bank's assets to an acquiring institution, and that such transactions have helped safeguard the stability of the banking system, it is simply inconceivable that Congress would have wished to condition FDIC's ability to transfer on its exercise of repudiation rights without explicitly saying so anywhere in the statute. Inasmuch as Congress would not have imposed this significant consequence by implication, it is inconceivable that Congress would have actually hidden it by putting it in a provision that deals with repudiation as an additional "right" (not obligation) of the receiver. Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Assoc'n*, 531 U.S. 457, 468 (2001).

Thus, there is nothing in the statute, construed as a whole, supporting the district court's interpretation. In fact, the overall statutory context further underscores that Congress wished to eliminate contractual transfer restrictions. For example, there are two other provisions, at issue in *NCNB* and in *Bank of Boulder*, that allow FDIC to transfer assets without any transfer restrictions, whether statutory or contractual. *See NCNB*, 895 F.2d at 1499-1501 (statute allowing FDIC to transfer "any assets" permitted FDIC to transfer assets that were not transferrable under state law or contract); *Bank of Boulder*, 911 F.2d at 1472-73, 1475 ("the federal FDIC statute authorizes the transfer of assets—nontransferable under state law—from FDIC/Receiver to FDIC/Corporation," even though the contract at issue contained a provision making it "subject to the UCP, ... [which] contains a blanket restriction on transfer").

Statutory History and Purpose. Nor is there anything in the statutory purpose or history that supports the district court's interpretation. FIRREA's declared purpose is to "enhance" FDIC's ability to efficiently resolve failed banks and "to eliminate impediments to the efficient resolution of failed financial institutions." *FDIC v. Shain, Schaffer & Rafanello*, 944 F.2d 129, 131 (3d Cir. 1991). Traditional insolvency law bars contractual transfer restrictions because they prevent the trustee from liquidating the assets of the bankruptcy estate. *See, e.g., In re Crow Winthrop Operating P'ship*, 241 F.3d 1121, 1124 (9th Cir. 2001) (invalidating con-

tractual transfer restrictions because they would prevent the bankruptcy estate "from realizing the full value of its assets, in conflict with a fundamental bankruptcy policy"); 11 U.S.C. § 365(f)(1) ("notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease"). The district court's interpretation, which withdraws from FDIC this traditional insolvency power to be free from contractual transfer restrictions, is completely inconsistent with Congress's intent to enhance FDIC's powers. Given the unprecedented banking crisis that FDIC was confronting at the time the statute was enacted, and given that the purpose of FIRREA was to "enhance," not diminish, the powers available to FDIC, there is no reason why Congress would have wished to give FDIC receivers lesser transfer powers than those given to trustees in bankruptcy.

Moreover, the district court's interpretation, under which FDIC can be free of contractual transfer restrictions only if it repudiates the contract, frustrates the Congressional intent behind Section 1821(d)(2)(G). Requiring FDIC to repudiate in order to be able to transfer renders the statute largely meaningless since there is nothing left to transfer once a contract is repudiated (a repudiated contract has no value to a purchaser). In addition, requiring FDIC to go contract by contract to determine which contracts have consent provisions and to repudiate those contracts

defeats the entire purpose of rules allowing free transferability, which is to "eliminate[] the need for detailed examination of the failed bank's assets and of varying laws. Cost estimates can be made quickly and with greater accuracy, and P&A's [which involve sales of the bulk of a failed bank's assets to an acquiring institution, usually done overnight after the bank failure] can thereby be implemented with fewer risks and with the necessary speed." *Bank of Boulder*, 911 F.2d at 1475.

The "free assignability of assets from failing insured banks . . . realistically addresses the frequent need of the FDIC to operate under emergency conditions in rescue situations." *Id*. "A need by the FDIC to determine assignability on an asset-by-asset basis would surely slow a rescue operation down, when dispatch was required." *Id*. Because "decisions concerning the appropriate method of dealing with a bank failure must be made with extraordinary speed" (*Gunter v. Hutcheson*, 674 F.2d 862, 869 (11th Cir. 1982)), subjecting FDIC to the additional burden of considering assignability on an asset-by-asset basis would cripple the FDIC's ability to enter into the overnight P&A transactions that have helped safeguard the stability of the banking system over the past few decades.

C. Adherence To The Plain Language of Section 1821(d)(2)(G) Would Not Be Unfair To Contractual Counterparties, Nor Would It Create A Constitutional Problem

Despite the absence of any textual support for exempting contractual transfer restrictions from the purview of Section 1821(d)(2)(G), the *Waterview* court be-

lieved that such reading was required in order to avoid rendering the statute unconstitutional. But *Waterview* performed no constitutional analysis, and neither did the district court. Instead, *Waterview* rewrote the statute, in a manner not supported by its plain text, based on the simple belief that it would have been "astonishing" if Congress intended to take away preexisting contractual rights. 105 F.3d at 701. *Waterview* had it exactly backwards.

First, the principle of constitutional avoidance is plainly inapposite here. That principle allows a court to choose between two plausible interpretations of a statute, not to choose an implausible interpretation of the statute that is contrary to its plain text as *Waterview* did. *Reno v. ACLU*, 521 U.S. 844, 884-85 (1997) (the court "may impose a limiting [constitutional] construction . . . only if [the staute] is 'readily susceptible' to such a construction," and may "not rewrite a . . . law to conform it to constitutional requirements'"); *City of Houston v. Hill*, 482 U.S. 451, 468 (1987) ("This ordinance is not susceptible to a limiting construction because, as both courts below agreed, its language is plain and its meaning unambiguous.").

Second, there were no preexisting contractual rights whatsoever either here or in *Waterview*. It is Section 1821(d)(2)(G) that is preexisting to the contracts, not the contracts that are preexisting to Section 1821(d)(2)(G). The contract here was entered into in 2007 and that in *Waterview* in 1992, well after the enactment of FIRREA in 1989.

Because Section 1821(d)(2)(G), which predates the contracts, allows FDIC to transfer without consent, parties cannot contract for the opposite result. "Contracts, however express, cannot fetter the constitutional authority of the Congress. . . . Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them." *Norman*, 294 U.S. at 307-08. "If the regulatory statute is otherwise within the powers of Congress"—as the regulation of banking is—"its application may not be defeated by private contractual provisions." *Connolly v. PBGC*, 475 U.S. 211, 224 (1986).

Because the contractual transfer restrictions here were contrary to preexisting law to the extent they applied to FDIC, they are invalid and unenforceable: "That no contract can properly be carried into effect, which was originally made contrary to the provisions of law . . . [is a] proposition[] which admit[s] of no doubt." *Louisville & Nashville R. Co. v. Mottley*, 219 U. S. 467, 485 (1911); *see also id*. (agreeing with "Pomeroy on Contracts, § 280 . . . [which] observ[ed] that an illegal contract cannot be made the basis of any judicial proceeding and that no action in law or equity could be maintained upon it"). *See also Connolly*, 475 U.S. at 223-24 (parties cannot use private contracts to avoid liability imposed by statute); *Concrete Pipe & Prods. of Ca., Inc. v. Construction Laborers Pension Trust for S. Ca.*, 508 U.S. 602 (1993) (same).

Accordingly, *Waterview*'s concern about preexisting contract rights misapprehends basic contract law. As discussed, any contractual provision requiring consent or approval for an FDIC transfer was invalid or unenforceable on the date it was made—and being invalid and unenforceable, it never provided any contractual "right" at all, let alone one preexisting the statute. Since no rights existed, no rights were taken, and there can be no taking, much less an unconstitutional one.

In sum, there is no unfairness here and no deprivation of any contract rights, because there were no valid contract rights in the first place. Banking is a regulated industry, and sophisticated banking institutions such as PBB certainly knew or should have known that under the law existing at the time when it entered into the contract, the right of first refusal would be invalid against FDIC should its counterparty be placed in receivership. And it also knew or should have known the basic principle that the "application" of a statutory section such as Section 1821(d)(2)(G) "may not be defeated by private contractual provisions." *Connolly*, 475 U.S. at 224. Moreover, the laws applying to federally-insured banks such as Section 1821(d)(2)(G) are an implied part of contracts between the banks and parties doing business with them, and thus a party's contractual rights and obligations are limited by these laws. *See Home Bldg. & Loan Assoc. v. Blaisdell*, 290 U.S. 398, 435 (1934) ("existing laws [are] read into contracts in order to fix obligations

as between the parties").[4]

If anything, unfairness and mischief come from the approach proposed by *Waterview* and the district court: The "result would be that individuals and corporations could, by contracts between themselves . . . render of no avail the exercise by Congress, to the full extent authorized by the Constitution, of its power to regulate [banking]. No power of Congress can be thus restricted. The mischiefs that would result from a different interpretation of the Constitution will be readily perceived." *Louisville*, 219 U. S. at 485-86.

Finally, even if the contracts here had existed prior to the enactment of Section 1821(d)(2)(G) (and they did not), there would still be no Takings Clause violation. The Supreme Court has repeatedly held that in a highly regulated industry such as banking here, there is no constitutional violation under either the Takings Clause or the Due Process Clause when Congress enacts new legislation adjusting the burdens and benefits of public life, even if such legislation has the effect of completely nullifying certain contractual provisions that were valid when made. *See Connolly*, 475 U.S. at 224-27 (finding no taking even if statute invalidated preexisting contract rights); *Concrete Pipe*, 508 U.S. at 645-46 (same). The reason

[4] *See also Norfolk*, 499 U.S. at 130 ("Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it . . . This principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge.") (citation omitted).

for such decisions is manifest: "To subordinate the exercise of the Federal authority to the continuing operation of previous contracts would be to place to this extent [federal regulatory matters] in the hands of private individuals and to withdraw from the control of the Congress so much of the field as they might choose by 'prophetic discernment' to bring within the range of their agreements. The Constitution recognizes no such limitation." *Norman*, 294 U.S. at 310.

Applying these principles, the First Circuit held that FIRREA's invalidation of prior contract rights related to certain transfer restrictions (ipso facto clauses) did not effect an unconstitutional taking because the statute "adjust[ed] the benefits and burdens of economic life to promote the common good." *McAndrews v. Fleet Bank*, 989 F.2d 13, 17-19 (1st Cir. 1993). FIRREA "is altering the future operation of landlords' and tenants' preexisting contractual rights in order to stem the disruption of banking services within communities, lessen the costs of bank liquidation, and restore public confidence in the nation's banking system." *Id*.

The district court dismissed *McAndrews*, noting that it involved a different FIRREA provision, Section 1821(e)(12)(A), not Section 1821(d)(2)(G).[5] But the reasoning of *McAndrews* is equally applicable here. In performing the constitutional analysis, the First Circuit applied the three-factor test adopted by the Su-

[5] Order denying reconsideration on the Section 1821(d)(2)(G) issue in *Deutsche Bank Nat. Trust Co. v. FDIC*, Case No. 2:09-cv-03852-GAF, Docket No. 77 at 7 (C.D. Cal. May 2, 2011).

preme Court in *Connolly*. With respect to the first factor, the First Circuit held that it did not favor a taking, as FIRREA was enacted to "adjust the benefits and burdens of economic life to promote the common good," "in order to stem the disruption of banking services within communities, lessen the costs of bank liquidation, and restore public confidence in the nation's banking system." *Id*. This rationale equally applies here, as it describes the purpose and effect of the entire statute, not only of the provision at issue in *McAndrews*. With respect to the second factor, the First Circuit held that rendering the ipso facto clause unenforceable against FDIC only takes away a small portion of the entire bundle of rights provided by the contract. This analysis equally applies here. The right of consent and of first refusal is only a small part of the bundle of contractual rights at issue here, and it is in any event not completely invalidated with respect to parties other than FDIC. For example, the right of first refusal would be valid against FDIC's assignee should that assignee wish to transfer its interest in the LPA. Finally, as to the last takings factor, the First Circuit held that in a highly regulated industry such as banking, parties can have no reasonable expectation that some of their contractual rights will not be affected, modified and even possibly nullified by future legislation. *Id*. This equally applies here. Indeed, as the Supreme Court explained, "[t]here can, in the nature of things, be no vested right . . . in the omission to legislate upon a particular subject which exempts a contract from the effect of subsequent legislation

upon its subject matter by competent legislative authority." *Louisville*, 219 U. S. at 484. Thus, under the three-factor test established by the Supreme Court, Section 1821(d)(2)(G) effects no unconstitutional taking.

D. Even If There Were Any Lingering Ambiguity In The Statutory Language, FDIC's Interpretation Must Prevail Because It Is The Most Reasonable One In Light Of The Statute Construed As A Whole

As shown above, FDIC's interpretation of Section 1821(d)(2)(G) is the only interpretation of that statute that is reasonable in light of its plain language, the statutory context, and the history and purpose of Section 1821(d)(2)(G). But even if there were other reasonable interpretations of the statute, FDIC's interpretation is the most reasonable one because it does not render meaningless the word "any," and it does not frustrate Congress's purpose of allowing FDIC to dispose quickly of the assets of failed institutions, without the significant delay caused by an asset-by-asset analysis of state transfer restrictions.

As the D.C. Circuit recently explained in deferring to FDIC-receiver's interpretation of another FIRREA provision, "[a]t the very least" FDIC is "entitled to *Skidmore* deference" because it was "charged with administering this highly detailed regulatory scheme." *MBIA*, 708 F.3d at 245. In according *Skidmore* deference, the court examined the purpose of the statutory scheme and concluded that just as in prior cases awarding FDIC *Skidmore* deference, FDIC's interpretation was persuasive because contrary readings of the text "would frustrate Congress's

. . . purpose" in enacting the provision "and would render the statutory scheme largely meaningless." *Id*. *See also Wells Fargo Bank v. FDIC*, 310 F.3d 202, 208-09 (D.C. Cir. 2002) (according *Skidmore* deference to FDIC). Similarly here, *Skidmore* deference is appropriate because FDIC, which is charged with administering Section 1821(d)(2)(G) and rest of FIRREA, interpreted the statute in a manner that is consistent with the statutory text and purpose. By contrast, the district court's interpretation enfeebles the word "any," cripples FDIC's ability to effectuate the overnight P&A transactions that have proved so vital to the continued stability of the banking system, and frustrates the statutory purpose of allowing FDIC to transfer assets "without any" restrictions.

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed.

Respectfully submitted,

COLLEEN J. BOLES
Assistant General Counsel
LAWRENCE H. RICHMOND
Senior Counsel

s/ Minodora D. Vancea
MINODORA D. VANCEA
J. SCOTT WATSON
Counsel

Federal Deposit Insurance Corporation
3501 Fairfax Drive, VS-D7014
Arlington, VA 22226-3500
(703) 562-2049

Counsel for the Federal Deposit Insurance Corporation

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief contains 7,276 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Fed. Cir. R. 32(b). Microsoft Word 2003 was used to calculate the word count.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point, Times New Roman font.

STATEMENT OF RELATED CASES

FDIC is not aware of any related cases pending in this Court.

s/ Minodora D. Vancea
Minodora D. Vancea
Counsel For FDIC

ADDENDUM OF STATUTORY PROVISIONS

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STATUTORY PROVISIONS

12 U.S.C. § 1821(d)(2)(A) & (G) 1a

12 U.S.C. § 1821(e)(1), (2) & (3) 2a

12 U.S.C. § 1821(e)(13)(A) 3a

STATUTORY PROVISIONS

Sections 1821(d)(2)(A) & (G) provide

(d) POWERS AND DUTIES OF CORPORATION AS CONSERVATOR OR RECEIVER.--

….

(2) GENERAL POWERS.--

(A) SUCCESSOR TO INSTITUTION.--The Corporation shall, as conservator or receiver, and by operation of law, succeed to--

(i) all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution; and

(ii) title to the books, records, and assets of any previous conservator or other legal custodian of such institution.

….

(G) MERGER; TRANSFER OF ASSETS AND LIABILITIES.--

(i) IN GENERAL.--The Corporation may, as conservator or receiver--

(I) merge the insured depository institution with another insured depository institution; or

(II) subject to clause (ii), transfer any asset or liability of the institution in default (including assets and liabilities associated with any trust business) without any approval, assignment, or consent with respect to such transfer.

(ii) APPROVAL BY APPROPRIATE FEDERAL BANKING AGENCY.--No transfer described in clause (i)(II) may be made to another depository institution (other than a new depository institution or a bridge depository institution established pursuant to subsection (m) or (n)) without the approval of the appropriate Federal banking agency for such institution.

Sections 1821(e)(1), (2) & (3) provide:

(e) Provisions relating to contracts entered into before appointment of conservator or receiver

(1) Authority to repudiate contracts

In addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may disaffirm or repudiate any contract or lease--

(A) to which such institution is a party;

(B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and

(C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote the orderly administration of the institution's affairs.

(2) Timing of repudiation

The conservator or receiver appointed for any insured depository institution in accordance with subsection (c) of this section shall determine whether or not to exercise the rights of repudiation under this subsection within a reasonable period following such appointment.

(3) Claims for damages for repudiation

(A) In general

Except as otherwise provided in subparagraph (C) and paragraphs (4), (5), and (6), the liability of the conservator or receiver for the disaffirmance or repudiation of any contract pursuant to paragraph (1) shall be--

(i) limited to actual direct compensatory damages; and

(ii) determined as of--

(I) the date of the appointment of the conservator or receiver; or

(II) in the case of any contract or agreement referred to in paragraph (8), the date of the disaffirmance or repudiation of such contract or agreement.

(B) No liability for other damages

For purposes of subparagraph (A), the term "actual direct compensatory damages" does not include--

(i) punitive or exemplary damages;

(ii) damages for lost profits or opportunity; or

(iii) damages for pain and suffering.

(C) Measure of damages for repudiation of financial contracts

In the case of any qualified financial contract or agreement to which paragraph (8) applies, compensatory damages shall be--

(i) deemed to include normal and reasonable costs of cover or other reasonable measures of damages utilized in the industries for such contract and agreement claims; and

(ii) paid in accordance with this subsection and subsection (i) of this section except as otherwise specifically provided in this section.

Section 1821(e)(13)(A) provides:

(A) In general

The conservator or receiver may enforce any contract, other than a director's or officer's liability insurance contract or a depository institution bond, entered into by the depository institution notwithstanding any provision of the contract providing for termination, default, acceleration, or exercise of rights upon, or solely by reason of, insolvency or the appointment of or the exercise of rights or powers by a conservator or receiver.

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April, 2013, an electronic copy of the foregoing Principal Brief for Appellant was filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Court's CM/ECF system and was served electronically by the Notice of Docket Activity upon counsel of record for the Appellee.

s/ Minodora D. Vancea
Minodora D. Vancea
Counsel For FDIC

TAB 11

OPPN

DIANA S. EBRON, ESQ.
Nevada Bar No. 10580
E-mail: diana@KGElegal.com
JACQUELINE A. GILBERT, ESQ.
Nevada Bar No. 10593
E-mail: jackie@KGElegal.com
KAREN L. HANKS, ESQ.
Nevada Bar No. 9578
E-mail: karen@KGElegal.com
KIM GILBERT EBRON
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139
Telephone: (702) 485-3300
Facsimile: (702) 485-3301
Attorneys for SFR Investments Pool 1, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

IGNACIO GUTIERREZ, an individual, Plaintiff, vs. SFR INVESTMENTS POOL 1, LLC; NEVADA ASSOCIATION SERVICES, INC.; HORIZON HEIGHTS HOMEOWNERS ASSOCIATION; KB HOME MORTGAGE COMPANY, a foreign corporation, DOE Individuals I through X, ROE Corporations and Organizations I through X, Defendants. And Related Claims	Case No. A-13-684715-C Dept. No. XVII **SFR INVESTMENTS POOL 1, LLC'S OPPOSITION TO NATIONSTAR MORTGAGE, LLC'S MOTION FOR SUMMARY JUDGMENT AND COUNTER MOTION TO STRIKE** **Hearing Date: January 3, 2018** **Hearing Time: 8:30 a.m.**

SFR Investments Pool 1, LLC ("SFR") opposes Nationstar Mortgage, LLC's ("Nationstar" or "Bank") Motion for Summary Judgment. Further, SFR moves to strike Exhibit B to Bank's motion, "Federal Home Loan Mortgage Corporation's ["Freddie Mac's"] Declaration in Support of Nationstar Mortgage, LLC"s Renewed Motion for Summary Judgment" because neither Freddie Mac nor Dean Meyer were disclosed within the original or the extended discovery period. This opposition and countermotion are based on the following memorandum of points and authorities, the declaration of Diana S. Ebron, Esq. ("Ebron Decl.") attached as **Exhibit 1**, the papers and pleadings on file herein, including SFR's motion for summary judgement, and oral argument heard by the Court at the hearing on this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Bank had one job after remand from the Nevada Supreme Court—prove Freddie Mac's interest in the Deed of Trust and the Bank's servicing relationship with FHFA. But during the discovery period, it failed to disclose the appropriate documents and witnesses needed to do this. The Bank is not entitled to summary judgment because the Bank has not presented admissible evidence as to the Bank's and Freddie Mac's purported interests in the Deed of Trust. Even if there were admissible evidence of Freddie Mac's/FHFA's purported "property interest" in the Deed of Trust, which there is not, the Bank has not produced admissible evidence of any contractual relationship with Freddie Mac or FHFA that would allow it to invoke 12 U.S.C. 4617(j)(3) on behalf of the FHFA. And even if the Bank *could* invoke 4617(j)(3) to save itself from its inaction that caused the Deed of Trust to be extinguished by the Association foreclosure sale, the Bank's claims still fail because stripping SFR's property interest without notice and an opportunity to be heard would violate SFR's due process rights. Further, the Bank's arguments that price alone is enough to set aside the sale and that the sale was commercially unreasonable have been squarely rejected by the Nevada Supreme Court. Thus, the Bank's motion must be denied and judgment entered in favor of SFR.

II. COUNTERMOTION TO STRIKE

The entirety of Exhibit B to the Bank's motion—the declaration of Dean Meyer on behalf of Freddie Mac—and any argument related to it, must be stricken because the Bank failed to disclose Freddie Mac and/or Dean Meyer during the original or extended discovery period. NRCP 16.1(a)(1)(A) required the Bank to provide the "name and, if known, the address and telephone number of each individual likely to have information discoverable under Rule 26(b), including for impeachment or rebuttal, identifying the subjects of the information" within 14 days after the Rule 16.1(b) conference, which in this case was held on November 6, 2014.

Pursuant to NRCP 16.1(e)(3), the Court "shall impose upon the party or a party's attorney, or both, appropriate sanctions in regard to the failure(s) as are just, including the following: (A) Any of the sanctions available pursuant to Rule 37(b)(2) and Rule 37(f); (B) **An**

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited or exchanged pursuant to Rule 16.1(a)." (emphasis added). In addition, NRCP 37(c)(1) provides that:

> A party that without substantial justification fails to disclose information required by Rule 16.1, 16.2, or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), **is not, unless such failure is harmless, permitted to use as evidence** at a trial, **at a hearing, or on a motion any witness or information not so disclosed.**

NRCP 37(c)(1)(emphasis added).

The Bank never disclosed Freddie Mac of Dean Meyer as witnesses in its initial disclosures made on July 10, 2015 or any of its supplemental disclosures through the last day of discovery after remand—October 17, 2017. See Ebron Decl. It was not until the Bank filed its motion for summary judgment on November 15, 2017 that any mention of Dean Meyer made it into this case through his post-discovery declaration on behalf of Freddie Mac. Id.

SFR will be severely prejudiced if any portion of Exhibit B is considered by the Court at this point in the litigation. Id. Bank has consistently taken the position that Freddie Mac is completely unnecessary to this litigation, and won on that point at the Nevada Supreme Court. When the Bank listed Nationstar as the only witness that would provide information about Freddie Mac's ownership interest and the purported servicing relationship, SFR presumed the Bank was maintaining that same position. SFR's position is that Freddie Mac does not actually have an interest in the loan or any relevant information related to this case, which is why SFR did not name Freddie Mac as a witness. Id. **The *only* reason SFR did not depose Freddie Mac was because the Bank failed to list Freddie Mac as a witness** as required by Rule 16.1. Id. Instead, it appeared that the Bank would rely on its own witness to attempt to prove both Freddie Mac's purported ownership and its servicing/agency relationship with Freddie Mac/FHFA.

SFR should have been afforded the opportunity during the discovery period to depose Freddie Mac on the declaration and documents the Bank now intends to rely upon for its summary judgment motion. SFR attempted to obtain information from Nationstar about the documents, but Nationstar took the position that it could not and would not authenticate or

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

explain the documents. Id. It seems Nationstar is using gamesmanship to try to deprive SFR of its right to properly challenge its purported evidence by waiting until well after the time SFR could have subpoenaed Freddie Mac to even claim Freddie Mac had any relevant information to this litigation.

To be clear, Freddie Mac's documents and declaration are questionable on their face and require further inquiry, if not outright rejection. For example, Freddie Mac's cryptic screen shots are partially illegible and have blanks where there should not be blanks, leaving one to question if some type of incriminating information was simply redacted without a privilege log. See Ex. 1 to Bank's Ex. B. Further, these screen shots are dated July 26, 2017—nowhere near the time of the 2013 Association foreclosure sale. One screen shot identifies Bank of America as being "active" with a power of attorney. See Ex. 2 to Bank's Ex. B. Dean Meyer uses this screen to purportedly prove that Freddie Mac purchased the loan in 2005 from Bank of America, N.A. Ex. B, ¶5(e). But this allegation contradicts the purported assignment of the deed of trust attached as Bank's Ex. C, which indicates that Bank of America, N.A. did not become involved in the loan until it was the successor by merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing LP. This merger did not happen until July 2011, so Freddie Mac could not have purchased the loan from Bank of America, N.A. The idea that Bank of America, N.A. serviced the loan since August 22, 2005 is equally problematic, given the language in the assignment. The screen shot purporting to show Nationstar as the current servicer is also questionable because it contradicts Nationstar's sworn testimony that it has a written power of attorney with Freddie Mac. See Ex.4 to Bank's Ex. B (noting "NO" next to "Power of Attorney). The purported "Loan Status*Manager* Mortgage Payment History Report" attached as Ex. 5 to Bank's Ex. B, has disappearing columns, numbers that simply do not add up and was also generated in July 2017. Further, the same document shows the loan as "inactive" in November 2012, before the foreclosure sale and shortly after Nationstar was supposed to have become the servicer. It was at that point that all of a sudden, the "Interest Due" column began registering $0.00. It is unclear what, if any, information Nationstar was "reporting" on the "inactive" loan from then to July 2017. Ex. 5 to Bank's Ex. B.

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

Because the Bank's failure to comply with Rule 16.1 would prejudice SFR if the "evidence" were to be considered by the Court, the declaration of Freddie Mac and all of the arguments based upon the purported evidence must be stricken. To the extent the Court intends to consider any of the information contained in or attached to Bank's Exhibit B, which it should not, SFR must be allowed to conduct a deposition.

III. STATEMENT OF DISPUTED FACTS

Disputed Facts # 1-5:

1. A Deed of Trust listing Ignacio Gutierrez as the borrower ("Borrower"); KB Home mortgage company ("KB Home") as the lender ("Lender"); and MERS, as beneficiary solely as nominee for Lender and Lender's successors and assigns, was executed on July 6, 2005, and recorded on July 20, 2005. ***Ex. A****. The Deed of Trust granted Lender a security interest in real property known as 668 Moonlight Stroll Street, Henderson, Nevada (the "Property") to secure the repayment of a loan in the original amount of $271.638.00 to Borrowers (the "Loan"). Id.*
2. Freddie Mac purchased the Loan and thereby obtained a property interest in the Deed of Trust on or about August 22, 2005. Freddie Mac Decl., ***Ex. B*** *at ¶5(d). Freddie Mac maintained that ownership at the time of the HOA Sale on April 5, 2013.Id. at ¶5(i).*
3. On April 23, 2012, MERS, as nominee for Lender and Lender's successors and assigns, assigned the Deed of Trust to Bank of America, N.A. ***Ex. C****.*
4. On November 28, 2012, Bank of America, N.A. recorded an assignment of the Deed of Trust to Nationstar. ***Ex. D****.*
5. At the time of the HOA Sale on April 5, 2013, Nationstar was the servicer of the Loan for Freddie Mac. See ***Ex. B*** *at ¶5(i); see also Nationstar Decl., Ex. E at ¶¶ 5,6.*

As explained in SFR's motion, which SFR incorporates fully as if restated herein, SFR challenges that the Freddie Mac ever purchased this particular deed of trust and note and the purported servicing relationship. As explained above, the Bank cannot rely on Exhibit B to its motion because, according to the Bank's 30(b)(6) witness, the only entity that could possibly authenticate or explain the documents is Freddie Mac or its employees. Freddie Mac and Dean Meyer were never disclosed as a potential witness during discovery. Moreover, Nationstar's declaration attached as Exhibit E does not include any of the documents it purports to rely on and references as exhibits. Even if it had, as explained in SFR's motion, the documents and the Bank's conclusion based on them are questionable at best. In addition, SFR has demanded to see the original of many of these documents, but instead, the Bank has only produced copies. NRS 52.245 states that admissible copies will only be treated as originals when there is no genuine question of material fact is raised as to the authenticity of the copies. NRS 52.245(1)(a).

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

Disputed Fact #6: *"The relationship between Nationstar as the servicer of the Loan, and, on the other hand, Freddie Mac as owner of the Loan, is governed by Freddie Mac's Singles Family Seller/Servicer Guide ("Guide"). The Guide serves as a central governing document for Freddie Mac's relationship with servicers nationwide."*

The Bank has not provided admissible evidence to establish that this purported fact is true. See Disputed Facts #1-5. There is nothing tying this document directly to the subject Property or loan. SFR further objects to any attempt the Bank may make to request the Court take judicial notice of this website and/or these purported documents. The purported "facts" of these documents are not "generally known within the territorial jurisdiction of this court, nor "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." NRS 47.130(2). Additionally, while the Bank purports to be the servicer for this loan, the recorded documents state that the Bank is the owner of the note and beneficiary of the deed of trust. For these reasons, the Court should not consider the Freddie Mac Servicing Guide as evidence for purposes of determining whether or not to grant summary judgment. SFR intends to file a Motion in Limine to exclude this evidence in the event this matter goes to trial.

Disputed Fact #7: *"At no time did the Conservator consent to the HOA Sale extinguishing or foreclosing Freddie Mac's interest in Property.'"*

The Bank has not provided admissible evidence to establish that this purported fact is true. The April 2015 press release upon which the Bank relies, is a hearsay document which is neither a statute nor regulation and does not meet the standard for any hearsay exception. This document is not authenticated and does not qualify as a "public record." Moreover, this hearsay statement was made well after the foreclosure for the purposes of litigation, thus calling into question the relevance and authenticity of this statement.

In addition, Freddie Mac's own servicing guidelines require the servicer to pay, and allow it to be reimbursed for, association dues to protect the deed of trust. The servicing guidelines contemplate an association's right to a lien and to foreclose on that lien. These provisions in the servicing guide were made while Freddie was in conservatorship, with authority supposedly granted by the FHFA.

Tellingly, the Bank does not call 4617(j)(3) the "Federal Extinguishment Bar"—this is because the statute does not mention "extinguishment", only foreclosure. The FHFA has taken

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

the position at the Nevada Supreme Court that it does not have a problem with an association foreclosing on its lien, only the results of the foreclosure. But once it allowed the foreclosure to go forward, it should have looked for its remedy with its servicer instead of SFR.

It is undisputed that the FHFA has never set up procedures to seek consent—for association sales or bank foreclosure sales. FHFA, through Fannie Mae and Freddie Mac, have interests in second deeds of trust, as evidenced by the servicing guide provisions related to second deeds of trust. It would be disingenuous to say that an association must seek consent through a non-existent procedure, but a first deed of trust holder would not have to seek consent through the same non-existent procedure. Instead, it is more likely that the FHFA approved of the foreclosures by both associations and banks by allowing them to go forward, with the expectation that the servicer would follow the guidelines and protect the deed of trust. It was not until the FHFA decided to lie in bed with the servicers instead of invoking its remedy of repurchase by the servicer that it issued this informal "withdrawal of consent" in the form of a press release.

Further, there is evidence that the FHFA through Fannie Mae has consented to an association foreclosure during the conservatorship. In Trademark Properties of Michigan, LLC v. Federal National Mortgage Association, 308 Mich.App.132 (Mich.App.), property owned by Fannie Mae was foreclosed upon by an association, and not once throughout the litigation did Fannie Mae raise 4617(j)(3). In Trademark, Fannie Mae had purchased the property on May 11, 2010 at a lender foreclosure sale. Thereafter, Fannie Mae failed to pay its assessments. As a result, the association foreclosed on February 15, 2011. This foreclosure was upheld, and at no time did Fannie Mae allege 4617(j)(3) prohibited the foreclosure.

Disputed Fact #8: *Nationstar's expert opines that the fair market value of the Property at the time of the HOA sale was $138,000."*

SFR does not dispute that the Bank's expert opined this. However, SFR disputes the valuation as it calls for a legal conclusion. In addition, SFR contests the manner in which the

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

valuation is calculated, as set forth in its rebuttal expert report.[1] Additionally, the Bank's Exhibit J is hearsay and unauthenticated and should not be considered in resolving the Bank's motion.

I. LEGAL ARGUMENT

A. The Bank has the Burden of Proving its Defenses (or Claims Masquerading As Defenses)

The Bank's argument is wholly premised on the notion that Freddie allegedly purchased the purported "loan" and obtained a property prior to the subject foreclosure sale. And since Freddie was under conservatorship of the FHFA, the so-called "Federal Foreclosure Bar" under 12 U.S.C.(j)(3) allegedly precluded SFR from acquiring free and clear interest in the Property. *See* Bank's MSJ p. 13. This argument requires the Bank to prove that the purported loan is "property of" FHFA for purposes of 4617(j)(3), which in turn requires the Bank to prove that Freddie owned the purported loan at the time of the sale and that FHFA succeeded to the loan rather than it being held in trust. See Breliant v. Preferred Equities Corp., 918 P.2d 314, 318 (Nev. 1996)(Evidence of a superior interest must be enough to overcome the "presumption in favor of the record titleholder" who is, in this case). Unfortunately for the Bank, here the evidence shows that the Bank, Freddie, or FHFA lacks any interest in the Property. Moreover, FHFA and the Enterprises have already admitted that as "[a] threshold matter, of course, [Plaintiff] must have a property interest in order for [4617(j)(3)] to apply." Dansker, No. 2:13–cv–01420–RCJ–GWF (ECF No. 54, 2:12-13). Herein, the Bank, Freddie, and FHFA have exclusive access to and possession of facts concerning securitization, whether the mortgage was "held in trust." Adobe, 809 F.3d at 1080. Thus, the Bank is possession of all the information to meets it burden of proving quiet title if what it alleged is true.

B. The Bank Did Not Prove Standing to Enforce or that the Purported Loan is the Property of Freddie Mac or the FHFA.

The Bank carries the burden to show its presumptively extinguished deed of trust should be reinstated. Velazquez v. Mortgage Electronic Registration Systems, Inc., No. 2:11–CV–576, slip op., 2011 WL 1599595, at *2 (D.Nev. Apr. 27, 2011) (quoting Breliant v. Preferred Equities Corp., 918 P.2d 314, 318 (Nev.1996)). The Bank does not have and has never had title to the Property. It has the

[1] It should be noted that SFR's previously disclosed rebuttal expert, Michael L. Brunson, SRA, MNAA, disagrees that assessed value should be used as a reliable benchmark to determine a property's value in this context. See **Exhibit 2.**

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

burden of proof to demonstrate that the note and deed of trust were properly transferred to it. Because the Bank attempts to claim it is entitled to relief under 12 U.S.C. § 4716(j)(3), it must demonstrate that FHFA allegedly "succeed[ed] to" the mortgage, causing it to be "property of" FHFA for purposes of 4617(j)(3), which in turn requires it to prove that Freddie purchased and had ownership of the purported loan at all relevant times, including the time of the sale. It cannot do so on the record before the Court. Thus, if the Bank cannot show a property interest held by Freddie, summary judgment in the Bank's favor is inappropriate. See Dansker, 2017 WL 1380414, at *2 (denying summary judgment after finding a genuine issue of material fact as to whether Fannie owned the note and deed of trust at the time of sale); See also Berezovsky v. Moniz, 869 F.3d 923, 929 n.5 (9th Cir. 2017).

Here, the Note and Deed of Trust were split at origination because Mortgage Electronic Registration Systems ("MERS") is the named nominee/beneficiary identified in the Deed of Trust. See Edelstein v. Bank of New York Mellon, 128 Nev. Adv. Op. 48, 286 P.3d 249 (Nev. Sept. 27, 2012). This split prevents "enforcement of the deed of trust through foreclosure unless the two documents are ultimately held by the same party." Id. at 260 citing Cervantes v. Countrywide Home Loans, Inc., 656 F.3d 1034, 1039 (9th Cir. 2011). While this is not a foreclosure action, the Bank seeks to strip SFR of its property rights, similar to a borrower under a note and deed of trust. The Bank must prove standing to enforce by providing evidence that both the note and Deed of Trust were reunified and validly transferred to it, and that Freddie owned the note and had standing to enforce at all relevant times. It has failed. This raises many questions of material fact, and on similar records, summary judgment has been rightfully denied by multiple courts.[2]

The proper method of transferring a mortgage note is governed by Article 3 of the Uniform

[2] See D'Andrea Cmty. Ass'n, No. 3:15-cv-00377-RCJ-VPC, 2017 WL 58582, at *4 (D. Nev. Jan. 4, 2017) (denying summary judgment asserted under the auspices of 4617(j)(3) based on the existence of an assignment that identifies the holder of the note to be entity other than Fannie, and rejecting the notion asserted here—that the bank / servicer was permitted to service the loan while Fannie was owner of the loan and deed of trust—because the bank / servicer failed to provide evidence that such a relationship even existed by way of documentary evidence.); see, e.g., Kielty, No. 2:15-cv-00230, 2016 WL 1030054, at *3 (Jones, J.); Dansker, No. 2:13-cv-01420, 2015 WL 5708799, at *3 (D. Nev. Sept. 29, 2015) (Jones, J.); LN Mgmt. LC Series 5271 Lindell v. Estate of Piacentini, No. 2:15-cv-00131, 2015 WL 6445799, at *4 (D. Nev. Oct. 8, 2015) (Dorsey, J.); LN Mgmt. LLC Series 2543 Citrus Garden v. Gelgotas, No. 2:15-cv-00112, 2016 WL 1071005, at *6 (D. Nev. Mar. 16, 2016) (Du, J.) ("[N]either the Curcio Declaration nor the SIR Exhibits establishes that there is no genuine dispute of material fact as to when Fannie Mae acquired the requisite interest in the Property, and what the contours of that interest are.")

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

Commercial Code—Negotiable Instruments because a mortgage note is a negotiable instrument.[3] Leyva v. Nat'l Default Servicing Corp., 255 P.3d 1275, 1279-81 (2011). The obligor on the note has the right to know the identity of the entity that is "entitled to enforce" the mortgage note under Article 3, see NRS 104.3301, see also In re Veal, 450 B.R. 897, 920, at *16 (B.A.P. 9th Cir. June 10, 2011). Similarly, in a case like this one, a lender must show that it is the party entitled to enforce the mortgage note. UCC § 3–203(a); UCC § 3–203(b). While the failure to obtain the endorsement of the payee or other holder does not prevent a person in possession from being the "person entitled to enforce" the note, the possessor does not have the presumption of a right to enforce. Branch Banking & Trust Co. v. Smoke Ranch Dev., LLC, No. 2:12-CV-00453-APG-NJK, 2014 WL 4796939, at *4 (D. Nev. Sept. 26, 2014). The possessor of the note must demonstrate both the fact and the purpose of the delivery of the note to the transferee in order to qualify as the "person entitled to enforce." Leyva, 255 P.3d at 1281. The Bank has completely failed to prove it has standing to enforce the note and deed of trust which precludes it from quiet title.

A written assignment of a deed of trust is an instrument that sets forth the chain of title. Kono v. Wells Fargo Bank, N.A., No. 59928, 2013 WL 7158570, at *2 (Nev. Dec. 17, 2013). A written assignment's purpose is to complete the chain of title of the person seeking to enforce the note. See Cf. Einhorn, 128 Nev. Adv. Op. 61, 290 P.3d 249, 254 (2012). The Bank must provide a certified copy of the assignment of mortgage and provide proof that the assignment was made by a party that itself held the mortgage. See U.S. Bank N.A. v. Ibanez, *941* N.E.2d 40, 52 (Mass.App. 2011)(citing In re Samuels, 415 B.R. 8, 20 (Bankr.D.Mass.2009)). The Bank may provide a complete chain of assignments linking it or Freddie/FHFA to the record holder of the mortgage, or a single assignment from the record holder of the mortgage. Id. *(*citing In re Parrish, 326 B.R. 708, 720 (Bankr.N.D.Ohio 2005)). Where MERS has been involved, the deed of trust may have been transferred among members without having abided by Nevada's recording statutes to put the public on notice of who the actual

[3] See NRS 104.3102; NRS 104.3109; 104.3201; 104.3204. A party wishing to enforce a note must demonstrate it was validly negotiated or transferred by proper endorsement or proving the transaction through which the note was acquired. Leyva, 255 P.3d at 1281 citing NRS 104.3203(2) and U.C.C. § 3-202 cmt 2.

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

beneficiary is, not just the nominee beneficiary.

The Bank failed to produce the original, wet-ink endorsed note, a certified copy of the promissory note, a certified copy of the assignment, and the chain of ownership of the note and the deed of trust. Thus, the Bank has not demonstrated it or Freddie/FHFA has standing to enforce the loan.

The Bank claims that In re Montierth, 354 P.3d 648 (Nev. 2015) stands for the proposition that that Freddie Mac does not have to record its so-called interest, but this is wrong. The Montierth case dealt with two certified questions from the U.S. Bankruptcy Court: (1) what occurs when a note and deed of trust remain split at the time of foreclosure; and (2) whether the recordation of an assignment constitutes a ministerial act that does not violate the automatic stay. Id. at 649. What is more, the Montierth case involved a lender/creditor and borrower/debtor; it never addressed the validity of a property interest or what was required to prove ownership, particularly as it pertains to a subsequent third party like SFR. *See* Nationstar Mortgage LLC v. D'Andrea Community Association, 2017 WL 58582 *4 (January 4, 2017) (rejecting Nationstar's interpretation of Montierth that Fannie Mae's purported interest need not be recorded; and noting the recorded documents facially contradicted any claim of ownership on the part of Fannie Mae).

C. Even if Freddie Mac had a Property Interest, if such a Property Interest is Held in Trust, the Bank Cannot Prevail.

As fully explained in SFR's motion, even if Freddie Mac had the loan on its books and Nationstar was transferring it information about the loan, if the loan is "held in trust" the Bank cannot prevail. Normally, with the Enterprises – specifically Freddie and Fannie Mae ("the regulated entities"), the Agency is deemed to "succeed to" the assets of the regulated entities. 12 USC 4617(b)(2)(A)(i). And when this succession happens, the Agency ("FHFA") is given several powers as the conservator of these properties held by the regulated entities. 12 U.S.C. 4617(b). Succession is so basic that it is described under the Agency's "General Powers." Id. Succession is also fundamental to any allegation that NRS 116 is preempted by state law, as only "property of the agency" is protected from "levy, attachment, garnishment, foreclosure, or sale without the consent of the Agency." 12 USC 4617(j)(3).

Not a single document has been disclosed that proves Freddie's alleged mortgage interest.

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

Besides, if Freddie actually holds a property interest, it is held in trust.

> And as Freddie has expressly told borrowers:
>
> Q: Who actually owns my mortgage, Freddie Mac or the trust?
>
> A: **The trust** indicated on your notification letter **owns your mortgage**. Freddie Mac is the trustee of that trust. **A trustee is an individual or organization who manages assets for the benefit of another**.
>
> Q: What does your letter mean where **it states that Freddie Mac is no longer the owner of my mortgage** but is a trustee of the trust?
>
> A: **The trust owns your mortgage**, but authorizes Freddie Mac to act on behalf of the trust in certain matters.

See Ex. H-7 to SFR's MSJ (emphasis added). Because the mortgage is not "property of" FHFA, FHFA does not have power to make a decision concerning consent that supposedly "preempts" SFR's interests. Without "preemption," the Bank does not have an interest superior to SFR's, preventing it from being "entitled to judgment as a matter of law." 56(a). At bottom, 4617(b)(19)(B) precludes summary judgment.

D. Purported DOT Assignments are Inconsistent with the Bank's "Ownership" Evidence

In addition to the Loan potentially being "held in trust" by the FHFA, the recorded documents speak against any alleged interest in the property held by Freddie. The Bank is telling this Court to disregard language in recorded deed of trust assignments. The Bank has developed this "trust us" approach to evidence because some of the language in the purported deed of trust assignment contradicts the Bank's narrative about what they supposedly own. Here, the Deed of Trust "together with the note(s) and obligations therein described" was purportedly assigned to Bank of America, N.A. as successor by merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing LP on April 17, 2012 and then to Nationstar. These assignments demonstrates that Freddie did not own the note at the time of the foreclosure sale. The Bank's insistence that the language in these documents should be disregarded and not believed is patently ridiculous. Such a position begs the question why the Bank relies on the validity of the deed of trust transfer in the first instance, and why ***that document should be honored for what it states on its face***. At a minimum, the deed of trust transfer is inconsistent with the Bank's contentions about Freddie's "ownership." This inconsistency is

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

yet another reason why the Bank cannot satisfy its burden of proof. Also, as explained above, if this Court were to consider Freddie Mac's declaration, which it should not, the assignment showing Countrywide as a previous servicer/beneficiary/owner belies that assertion that Freddie Mac purchased the loan from Bank of America, N.A. in 2005, when Bank of America, N.A. did not become "successor by merger" until 2011.

E. **The Supreme Court's Analytical Approach to Due Process Precludes the Defense the Bank Seeks under 12 U.S.C. § 4617(j)(3).**

The Supreme Court's analytical approach to due process—the principles used to determine whether a "property" interest exists and whether a "deprivation" has occurred—prevents relief. If an issue of law precludes relief, then dismissal is proper. Neitzke v. Williams, 490 U.S. 319, 326 (1989); Somers v. Apple, Inc., 729 F.3d 953, 961 (9th Cir. 2013).

The first principle is that "[p]rocedural due process imposes constraints on governmental *decisions* which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." Mathews v. Eldridge, 424 U.S. 319, 332 (1976) (emphasis added). **The second principle** is that "property" interests "[a]ttain ... constitutional status by virtue of the fact that they have been initially recognized and protected by state law ... ." Paul v. Davis, 424 U.S. 693, 710 (1976). State law's recognition of an individual's interest establishes the existence of constitutionally protected "property." Id. And, if state law recognizes a property interest, then "[i]n the usual case, the fact that the property interest is recognized under state law is enough to trigger the protections of the Due Process Clause." Ralls Corp. v. CFIUS, 758 F.3d 296, 316 (D.C. Cir. 2014). **The third principle** is that "deprivation" occurs when a government actor's decision alters or extinguishes a state-recognized property interest:

> In each of these cases, as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished. It was this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the [Fifth and] Fourteenth Amendment.

Paul, 424 U.S. at 711. Notably, courts apply the Supreme Court's analytical approach to cases where state and federal law interact. United States v. James Daniel Good Real Prop., 510 U.S. 43, 53-54

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

(1993); Ralls, 758 F.3d at 316. Interaction typically occurs between state-recognized property interests and a federal law that authorizes a government actor to make decisions that nullify those interests. *Id.*

Here, the Bank's claims/defenses implicate these principles, precluding relief. The Bank identifies a government actor's **decision**: FHFA allegedly decided not to consent to extinguishment. Such a decision is constrained by due process. Next, the Bank claims Freddie has ownership in the property despite SFR's claim to ownership pursuant to NRS 116. See SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 334 P.3d 408, 419 (Nev. 2014). Finally, a **deprivation** would take place if FHFA's decision not to consent "distinctly altered or extinguished" SFR's state-recognized interests by making Freddie's alleged interests superior to SFR's. Id. In light of the Supreme Court's analytical approach, FHFA's decision would have had to satisfy due process. As is elaborated below, this did not occur. At bottom, the Supreme Court's analytical approach to due process precludes relief.

F. **The Bank's Claims Transform Deprivation into "Preemption"**

The Bank's claims are governed by a particular due process context, one involving the interplay between state and federal law. James Daniel Good, 510 U.S. 43; Brock v. Roadway Express, Inc., 481 U.S. 252 (1987); Ralls, 758 F.3d 296; United States v. Bacon, 546 F. App'x 496 (5th Cir. 2013); Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192 (D.C. Cir. 2001); Pillsbury Co. v. FTC, 363 F.2d 757 (5th Cir. 1966). Within this context, what the Bank calls "preemption" is, instead, "deprivation" that must satisfy due process. Id. The context consists of cases that concern: (i) state-recognized property interests, (ii) a federal law that authorizes a government actor to make decisions that nullify those interests, and (iii) a government actor's decision nullifies those interests without due process. Id. Such decisions do not "preempt" state law; they *deprive* individuals of property. Id.

For example, in Ralls an American corporation (Ralls Corp.), owned by two Chinese nationals, purchased four Oregon LLCs and their assets, including easements and several contracts; Oregon property law recognized and protected these interests. Pursuant to the Defense Production Act of 1950 ("DPA"), a federal agency analyzed the sale and referred it to the President due to national security concerns. The DPA authorized the President to nullify Ralls's property interests if the President decided there was a threat to national security. After reviewing the transaction, the President decided a

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

threat to national security existed, thus nullifying Ralls's interests. Ralls, 758 F.3d at 306. Yet, the DPA did not afford Ralls constitutionally sufficient notice or an opportunity to be heard before the President made his decision; the statute had a dearth of procedural participation and protections. Id. at 320. The D.C. Circuit determined "[t]his lack of process constitutes a clear constitutional violation, notwithstanding the Appellees' substantial interest in national security and despite our uncertainty that more process would have led to a different presidential decision." Id. The same deficiencies plague 4617(j)(3), which does not afford SFR notice or an opportunity to be heard before FHFA purportedly decided not to consent.

Like Ralls, there are other cases where a government actor's decision deprived—not "preempted"—state-recognized property interests without due process. In *Brock*, the Secretary of Labor decided a trucking company fired one of its drivers for whistleblowing in violation of the Surface Transportation Assistance Act of 1982. This decision deprived the trucking company of its state-recognized property interest in being able to fire employees. Due process was violated because the trucking company did not receive sufficient notice before the Secretary's decision. Brock, 481 U.S. at 257, 268. National Council of Resistance of Iran ("NCRI") dealt with the Secretary of State's decision to designate an entity as an alias of a foreign terrorist organization consistent with the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). This decision deprived the entity of an interest in a bank account without due process of law because the AEDPA did not provide notice or an opportunity to be heard before the Secretary's decision. NCRI, 251 F.3d at 208. In Pillsbury, the Federal Trade Commission ("FTC") decided that the Pillsbury Company's acquisition of two companies and their assets "lessen[ed] competition" under the Clayton Act. This decision nullified Pillsbury's state-recognized property interests in the companies. Due process was violated because a United States Senate subcommittee hearing had improperly intruded into the FTC's then still-pending review of Pillsbury's acquisitions. Pillsbury, 363 F.2d at 963. James Daniel Good concerned the United States' decision to *ex parte* seize a house and land that belonged to a person who had pled guilty to drug charges; at the time, the house was being rented. The government's decision—made pursuant to civil forfeiture laws—deprived the owner of state-recognized property interests. Due process was violated because the owner was not given notice or an opportunity to be heard. James

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

Daniel Good, 510 U.S. at 46. A similar situation occurred in Bacon, where the United States Customs and Border Protection decided to destroy electronics that belonged to an individual convicted of possessing child pornography. This decision ran afoul of due process because Customs did not give the owner of the electronics constitutionally sufficient notice. *Bacon*, 546 F. App'x at 501.

Ralls, Brock, NCRI, Pillsbury, James Daniel Good, and Bacon are due process cases where a government actor's decision deprived individuals of state-recognized interests. The Bank seeks to change all of this, mutating due process *deprivation* cases into "preemption" precedent, where a government actor's decision "preempts" state-recognized interests. No longer will decisions *deprive* people of property; they will, instead, "preempt" rights from materializing in the first place—effectively doing away with due process.

The Bank disagrees, acting as though 4617(j)(3) is an absolute prohibition compelling preemption. But 4617(j)(3)'s phrase "without the consent of the Agency" indicates that 4617(j)(3) does not absolutely prohibit extinguishment. If FHFA consents, then extinguishment can occur. Indeed, the Bank's treatment of 4617(j)(3) as an absolute prohibition impermissibly erases language from a statute, with the Bank going so far as pretending that a press release from 2015 from can somehow *nunc pro tunc* address FHFA's consent to the April 2013, foreclosure sale herein; Williams v. Duke Energy Int'l, Inc., 681 F.3d 788, 805 (6th Cir. 2012); Hesperos v. Sandaa, 265 F. 921, 923 (4th Cir. 1920). Congress gave the FHFA the directive to exercise discretion as to consent. The FHFA's ignoring of this discretion and its treatment of 4617(j)(3) as an absolute prohibition violates Congress's intent and SFR's due process rights.

Assuming *arguendo* that 4617(j)(3) is an absolute prohibition—which it is not—due process would still preclude the defense. Consider that Brock, Pillsbury, and James Daniel Good's pertinent statutes contained absolute prohibitions. James Daniel Good, 510 U.S. at 47 n.1; Brock, 481 U.S. at 258; Pillsbury, 363 F.2d at 953. Consistent with the Complaint's view of "preemption," these statutes would have prevented the litigants in these cases from obtaining state-recognized interests. Such an approach would not only contravene those cases' due process analyses, but it would also drain due process of any continued vitality; the Bank's approach would "preempt" due process from a familiar context involving state and federal law.

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

Besides, a similarly bloated version of "preemption" was rejected by the Supreme Court in the Taking Clause context. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1012 (1984). The Environmental Protection Agency ("EPA") claimed it had "preempted"—instead of taken—a pesticide registration applicant's state-recognized interests. The Supreme Court determined EPA's argument "proves too much" because "[i]f Congress can 'pre-empt' state property law in the manner advocated by EPA, then the Taking Clause has lost all vitality." Id. The same holds here; if FHFA can "preempt" state-recognized interests as the Bank alleges, then due process "[h]as lost all vitality." Id. The Bank's claims transform deprivation into "preemption."

G. Mischaracterizing 4617(j)(3) does not Defeat SFR's Claims

It is a common mischaracterization by the Bank that 4617(j)(3) as a self-executing law that triggers the legislative acts doctrine. These mischaracterizations create the illusion that 4617(j)(3) in and of itself—and not FHFA's decision—"preempted" Nevada law. In reality, if the Bank had proved Freddie Mac's interest, any decision by FHFA would nullify, rather than "preempt," SFR's interests.

1. ***4617(j)(3) is not Self-executing***

Self-executing laws function on their own, without the involvement of a government actor; they uniformly impact all citizens by articulating the circumstances under which property interests will lapse. Tulsa Prof'l Collection Services, Inc. v. Pope, 485 U.S. 478, 486 (1988); Texaco, Inc. v. Short, 454 U.S. 516, 530, 533-37 (1982). Meanwhile, a statute is not self-executing when it authorizes a government actor—other than the legislature—to make individualized decisions that nullify property interests, ensuring that "[t]he property interest was taken only after a specific determination that the deprivation was proper." Texaco, 454 U.S. at 537. Within non-self-executing laws, government actors have a "role to play beyond enactment" of the statute. Tulsa, 485 U.S. at 486.

Here, 4617(j)(3) is not self-executing for three reasons. **First**, 4617(j)(3)'s reference to "the Agency" means a government actor (*i.e.*, FHFA)—other than Congress—is involved. **Second**, 4617(j)(3) authorizes FHFA to make a "specific determination," whether to "consent." This is confirmed by 4617(j)(3)'s coupling of the words "consent" and "Agency" in the phrase "consent of the Agency." Such coupling links "the Agency" with the decision to "consent," denoting that 4617(j)(3) authorizes FHFA to make a "determination." And, FHFA's "determination" is "specific" because

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

4617(j)(3) focuses on "*the* consent" of FHFA. Congress's use of the word "the" demonstrates that FHFA's decision is individualized, to be made on a case-by-case, mortgage-by-mortgage, foreclosure-by-foreclosure basis. See generally In re Cardelucci, 285 F.3d 1231, 1234 (9th Cir. 2002) (Congress's use of definite article "the" in a statute connotes individualization). **Third**, the Bank avers that FHFA's decision nullified SFR's state-recognized interests. The Bank also alleges FHFA's decision prevents extinguishment of the Bank's purported interests, thereby altering (*i.e.*, nullifying) SFR's state-recognized interests. Id. at Bank's MSJ 13-14. All told, 4617(j)(3) is not self-executing because it: (i) involves a government actor (FHFA) other than Congress, (ii) authorizes FHFA to make "a specific determination," and (iii) FHFA's determination nullifies state-recognized property interests.

2. ***The Legislative Acts Doctrine is Inapplicable***

Under the legislative acts doctrine, due process is satisfied if a legislature properly enacts a generally applicable law that impacts a large group of people, covers considerable amounts of land, and does not target specific individuals. Hotel & Motel Ass'n of Oakland v. City of Oakland, 344 F.3d 959, 969 (9th Cir. 2003). The doctrine is limited to "a legislatively mandated substantive change in the scope of [an] entire program." Atkins v. Parker, 472 U.S. 115, 129 (1985); Ortiz v. Eichler, 794 F.2d 889, 894 (3d Cir. 1986). It does not, however, apply to "the procedural fairness of individual eligibility determinations." *Id.*

Here, FHFA's decision not to consent is individualized, concerning individual mortgages, houses, associations, foreclosure sales, and purchasers. If Congress intended an outright ban to foreclosures of FHFA properties, it would have legislated as such. Instead, it authorized the FHFA to execute sound judgment and to consent on any individual situation. Thus, the legislative acts doctrine is inapplicable because FHFA's decision is an "individual ... determination[,]" the "procedural fairness" of which is dictated by due process. *Atkins*, 472 U.S. at 129.

3. The Ninth Circuit Rejected a Legislative Acts Doctrine Argument

The Ninth Circuit recently rejected a legislative acts doctrine argument concerning the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"). Bank of Manhattan, N.A. v. FDIC, 778 F.3d 1133, 1137 (9th Cir. 2015). The recent decision, Bank of Manhattan, determined that FIRREA did not preempt state contract law. *Id.* at 1136. At issue was whether a conflict existed

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

between: (i) a provision in FIRREA that authorized the Federal Deposit Insurance Corporation ("FDIC") (as receiver) to transfer assets without having to get "consent" and (ii) a pre-receivership contract that effectively required FDIC to obtain another party's written "consent" before FDIC could transfer an asset.

One of FDIC's arguments invoked the legislative acts doctrine to show that its decision to transfer an asset without obtaining "consent" did not deprive anyone of state-recognized interests (*i.e.*, contract rights). Specifically, FDIC asserted that no deprivation occurred because FIRREA was enacted before the contract; Congress's enactment of FIRREA prevented the contracting parties from having interests.

> As discussed, any contractual provision requiring consent or approval for an FDIC transfer was invalid or unenforceable on the date it was made—and being invalid and unenforceable, it never provided any contractual "right" at all, let alone one preexisting the statute. Since no rights existed, no rights were taken, and there can be no taking, much less an unconstitutional one. In sum, there is no unfairness here and no deprivation of any contract rights, because there were no valid contract rights in the first place.

SFR's MSJ, Exhibit H-8 p. 26. After calling this argument "novel," the Ninth Circuit refused to adopt FDIC's reasoning because it was irrelevant that FIRREA was enacted before the contract, and no conflict between state and federal law existed. Bank of Manhattan, 778 F.3d at 1136. The Ninth Circuit determined that FDIC's decision—rather than Congress's enactment of FIRREA—deprived individuals of state-recognized interests. *Id.* Such a determination should apply here.

H. Claims are Implausible because of Due Process

Claims for quiet title and "permanent injunction" necessitate allegations about superior title. NRS 40.010; see also Chapman v. Deutsche Bank Nat'l Trust Co., 302 P.3d 1103, 1106 (Nev. 2013). But, if allegations of superior title reveal an impediment or bar to relief, then the corresponding causes of action are facially implausible NRCP 8(a)(1). Here, the Bank's allegations reveal a constitutional barrier to relief; FHFA's decision not to consent to extinguishment, if the Bank had proved Freddie Mac's ownership, would deprive SFR of its state-recognized property interests without due process of law.

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KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

1. SFR's Property Interests

Due process' first element is the existence of a property interest. Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972). If state law recognizes an interest, then that interest is "property" for Fifth Amendment purposes, and due process is triggered. James Daniel Good, 510 U.S. at 53-54. Here, SFR claims its property interest via NRS 116 foreclosure sale in which it was the highest bidder at auction. SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 334 P.3d 408, 419 (Nev. 2014). Thus, the fact that SFR claims an interest in the property that is recognized by Nevada law cannot be disputed.[4]

2. FHFA Would Deprive SFR of its Property

Due Process' second component is a deprivation of property by a government actor. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001). Deprivation occurs when "a right or status previously recognized by state law was distinctly altered or extinguished" by a government actor. Paul, 424 U.S. at 711. Here, the Bank avers that FHFA's decision to not consent to foreclosures defeats SFR's state-recognized property interests by making the Enterprises' alleged interests superior to SFR. Thus, it is plain to see how the FHFA's lack of consent delineates how the FHFA would deprive SFR of its property if the Bank had proved Freddie Mac's interest.

3. FHFA is a Government Actor

In order to implicate due process, there must be a government actor. Brentwood, 531 U.S. at 295. Within the 4617(j)(3) context, FHFA has conceded that it is a government actor in at least two lawsuits. Nationstar Mortg. LLC v. SFR Investments Pool 1, LLC, No. 2:15-cv-00267-RFB-NJK (D. Nev. May 26, 2015) (Dkt. No. 43); Fed. Nat'l Mortg. Ass'n v. SFR Investments Pool 1, LLC, No. 2:14-cv-02046-JAD-PAL (D. Nev. Mar. 3, 2015) (Dkt. No. 41). Due to this concession, SFR need not conduct a government actor analysis. Nevertheless, if this Court believes such analysis is necessary,

[4] It is irrelevant that the Bank disputes the validity of SFR's interests because due process "[h]as never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to 'any significant property interest[.]'" Fuentes v. Shevin, 407 U.S. 67, 86 (1972) (quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971)). Here, the Bank concede SFR purchased the Property, at foreclosure for $6,300. Thus, SFR has "significant property interests," triggering due process. Fuentes, 407 U.S. at 86; Roth, 408 U.S. at 577.

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

then SFR will provide one forthwith.

4. FHFA Would Deprive SFR of its Property without Due Process of Law

Due Process' last element is that deprivation occurred without due process of law. Zinermon v. Burch, 494 U.S. 113, 125 (1990). This factor focuses on the constitutional sufficiency of procedures, often described as "notice and an opportunity to be heard." Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). More precisely, when a statute is challenged on due process grounds, a court determines whether that law's procedures comport with due process. Lujan v. G & G Fire Sprinklers, Inc., 532 U.S. 189, 195 (2001).

Here, 4617(j)(3) is bereft of any procedures. Though it speaks of FHFA's "consent," 4617(j)(3) lacks a process to request "consent." 12 U.S.C. § 4617(j)(3). Similarly, there is no procedure for challenging FHFA's decision not to "consent." Id. As such, there is no opportunity to be heard. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985). This "lack of process constitutes a clear constitutional violation ... despite our uncertainty that more process would have led to a different ... decision." Ralls, 758 F.3d at 320.

Importantly, due process' "root requirement" is "an individual be given an opportunity for a hearing *before* he is deprived of any significant protected interest[.]" Loudermill, 470 U.S. at 542. The contours of a "hearing" are flexible, focusing on fairness. In this case, FHFA did not give SFR an "opportunity for a hearing" before FHFA deprived SFR of its interests; FHFA simply decided not to "consent." To make matters worse, 4617(j)(3) does not give SFR a post-deprivation remedy, an opportunity to contest FHFA's decision. 12 U.S.C. § 4617(j)(3). Rather, FHFA believes 12 U.S.C. § 4617(f) insulates its decisions from judicial review. Cnty. of Sonoma v. FHFA, 710 F.3d 987, 992 (9th Cir. 2013) (construing 4617(f) within property-assessed clean energy context). The absence of pre-deprivation procedures coupled with the lack of a post-deprivation remedy establishes FHFA deprived SFR of its property interests without due process of law. Zinermon, 494 U.S. at 132, 139.

Regarding the issue of notice, if procedures for protecting property interests are arcane or not publicly available, then due process requires notice of such procedures. City of W. Covina v. Perkins, 525 U.S. 234, 242 (1999). Here, no procedures for requesting FHFA's "consent" are "publicly available." Thus, due process requires FHFA to provide notice of procedures for protecting one's

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

interests. Id. As no such notice was given, due process was violated. *Id.*

Furthermore, if a government actor impacts a person's property interests, then the government actor must provide notice "reasonably calculated ... to apprise interested parties of the pendency of the action[.]" Mullane, 339 U.S. at 314. When a government actor knows notice is insufficient, it must take additional reasonable steps to provide notice. Jones v. Flowers, 547 U.S. 220, 230, 234 (2006); Greene v. Lindsey, 456 U.S. 444, 453-56 (1982); Robinson v. Hanrahan, 409 U.S. 38, 40 (1972); Covey v. Town of Somers, 351 U.S. 141, 146-47 (1956). Here, FHFA's decision impacted SFR's interests. Hence, FHFA had to provide notice to SFR. Yet, no such notice was given. For instance, the Enterprises' alleged "purchase" (and purported "ownership") of mortgages were not recorded, failing to notify SFR that: (i) the Enterprises had purported "interests" in the mortgages, (ii) FHFA allegedly succeeded to those "interests," (iii) 4617(j)(3) supposedly applied, and (iv) FHFA had authority to nullify SFR's interests. And, because the Enterprises' supposed "interests" were unrecorded, FHFA knew notice was insufficient, requiring it to take additional reasonable steps to provide SFR with notice. Jones, 547 U.S. at 230, 234; Greene, 456 U.S. at 453-56; Robinson, 409 U.S. at 40; Covey, 351 U.S. at 146-47. One reasonable step would have been to record Freddie's "purchases" (and supposed "ownership") with the Clark County Recorder. But this step was not taken, thereby violating due process. *Id.*

I. "Reasoned Decisionmaking" Defeats the Bank's Claims

If FHFA's decision not to consent is "[c]ontrary to, its statutorily prescribed, constitutionally permitted, powers[,]" then the Bank's arguments as to § 4617(j)(3) fail. Sonoma, 710 F.3d at 992 (quoting Sharpe v. FDIC, 126 F.3d 1147, 1155 (9th Cir. 1997)). The Bank alleges that FHFA's decision concerning consent is premised on its power to "preserve and conserve" Enterprise assets. Bank's MSJ p. 16. The "statutorily prescribed" scope of this power is confined to making decisions that are "**appropriate.**" 12 U.S.C. § 4617(b)(2)(D)(ii). (emphasis added). If FHFA's decision is not "appropriate," then it is "[c]ontrary to, its statutorily prescribed . . . powers[,]" precluding relief. Sonoma, 710 F.3d at 992. Though some provisions authorize FHFA to establish what is "appropriate"—such as when FHFA-as-conservator decides to "prescribe . . . regulations . . . regarding the conduct of conservatorships" 12 U.S.C. § 4617(b)(1)—the power to "preserve and conserve" is not

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

one of them. Instead, external considerations influence the meaning of "appropriate." One such consideration is "reasoned decisionmaking." Pursuant to "reasoned decisionmaking," the process a government actor uses to make a decision "must be logical and rational." Michigan v. EPA, 576 U.S. ___, 135 S.Ct. 2699, 2706 (2015) (internal citation omitted).

Here, the process that FHFA uses in deciding whether to consent is not "logical and rational." In part, this is so because no such process exists; 4617(j)(3) lacks a procedure to request FHFA's consent or an opportunity to contest FHFA's decision. Additionally, if an Enterprise's supposed "purchase" of a mortgage is unrecorded, then the public in general and SFR, in particular, have no notice of that purchase or of 4617(j)(3)'s applicability. Years will elapse before an Enterprise discloses its alleged "purchase" and so-called interest, keeping the public in the dark about the involvement of the Enterprises, 4617(j)(3), or FHFA. And when this involvement finally comes to light, 4617(j)(3) offers not a single procedural protection. Such secrecy is hardly "logical and rational," all in contravention of "reasoned decisionmaking." Because FHFA's decision violated "reasoned decisionmaking," it is not "appropriate," making it "contrary to . . . [FHFA's] permitted powers[.]" Sonoma, 710 F.3d at 992.

J. 4617(j)(3)'s Unconstitutionality Bars Preemption

The bottom line is that if the FHFA's implementation of 4617(j)(3) violates SFR's due process rights, this law cannot be used to preempt NRS 116. For the above reasons, SFR's due process defense defeats the Bank's argument of preemption of NRS 116.

K. In Nevada, the *Golden* Rule Applies for Analyzing Foreclosure Sales, Not "Commercial Reasonableness"

This Court has already found the sale proper and the Nevada Supreme Court remanded solely to allow the Bank to try to prove Freddie Mac's ownership and Nationstar's purported servicing relationship to FHFA. Despite that, the Bank argues that it should prevail based on arguments squarely rejected by the Nevada Supreme Court in Nationstar Mortgage, LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon, 133 Nev. Adv. Op. 91, 2017 WL 5633293 at *5 (Nov. 22, 2017). The Nevada Supreme Court has held that

> 'inadequacy of price, **however gross**, is not in itself a sufficient ground for setting aside a trustee's sale legally made; there must be in addition proof of some element of

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

fraud, unfairness or oppression **as accounts for and brings about the inadequacy of price**' (internal citations omitted) (emphasis added).

Golden v. Tomiyasu, 79 Nev. 503, 514, 387 P.2d 989, 995 (1963). Just recently, the Nevada Supreme Court stated that [i[f this court had adopted the Restatement, we would have overruled Golden rather than cite favorably to it." Nationstar Mortgage, LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon, 133 Nev. Adv. Op. 91, 2017 WL 5633293 at *5 (Nov. 22, 2017). The Nevada Supreme Court made itself clear by saying "[n]or do we believe that we should adopt a 20-percent standard and abandon *Golden*." Id. Therefore, the Restatement 20 percent argument on price alone is dead. The Court also rejected a commercial reasonableness standard for association foreclosure sale, since NRS 116.3116 et seq. provides the framework in which a foreclosure sale must proceed. Id. at *4.

Instead, an analysis must be done under the Golden Rule, with actual evidence of fraud, unfairness, or oppression to consider setting aside the sale, with the Bank "has the burden to show that the sale should be set aside in light of [SFR's] status as the record title holder." Id. (citing Brelliant v. Preferred Equities Corp., 918 P.2d 314, 318 (Nev. 1996); NRS 47.250(16)(rebuttable presumption law has been obeyed); and NRS 116.31166(1)-(2) ("[C]onclusive presumption that certain steps in foreclosure process have been followed.").

As explained by SFR's rebuttal expert, the price paid at auction was adequate because fair market value has no applicability to a forced sale situation. BFP v. Resolution Trust Corp., 511 U.S. 531, 537-538 (1994). This is because foreclosure redefines the market in which the property is offered for sale" as opposed to the free market. Id. at 548-49. So long as the state statutes include requirements for public noticing of the auction and provisions for competitive bidding, then the price obtained is the reasonable equivalent value of the property. See In re Tracht Gut, LLC, 836 F.3d 1146 (9th Cir. 2016)(extending BFP's analysis to California tax sales because they afford the same procedural safeguards as a mortgage foreclosure sale); T.F. Stone v. Harper, 72 F.3d 466 (5th Cir. 1995); Kojima v. Grandote Int'l Ltd. Co., 252 F.3d 1146 (10th Cir. 2001). Regardless of the type of sale, the analysis still aptly explains how market value cannot be compared to a forced sale transaction.

While the Bank may complain about the total amount received during the auction, the

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

market conditions that existed—largely created by the Bank—significantly lowered the value of the property. As stated in BFP "the only legitimate evidence of the property's value at the time it is sold is the foreclosure-sale price itself." BFP, 511 U.S. at 549. But given that this was a public auction, if the Bank disagreed with the collective public's valuation of the property, it should have bought the property at the auction itself. Instead, it was aware of the foreclosure proceedings, but did nothing.

Here, the Bank admits that Bank of America, the previous beneficiary of the Deed of Trust received foreclosure notices from the Association. Yet, the Bank claims the sale was "unfair and oppressive because the HOA failed to provide notice to Nationstar." **It is important to note that the Bank is careful not to say that it did not receive the notice** before the sale. Nor does it claim that it would have done anything differently if the notice had been mailed directly to Nationstar instead of multiple entities required to forward the document to Nationstar. Accordingly, the Bank has not demonstrated "unfairness" or "oppression."

L. SFR is a Bona Fide Purchaser for Value; Equity Liens in SFR's Favor.

Here, as the Bank provided no admissible evidence that SFR had any knowledge precluding it from bona fide purchaser ("BFP") status, SFR has the valid defense of being a BFP. As a result, the sale cannot be unwound; nor can SFR be said to have taken the Property subject to the Deed of Trust.[5]

First, while SFR is a BFP as to this Property, nothing under Nevada law requires a buyer at an NRS 116 sale to be a BFP. Put simply, SFR being a BFP is not a condition precedent.

Second, the Bank bears the burden to disprove SFR's BFP status as SFR is presumed to be a BFP. "Where a party is claiming equitable title, burden is on party claiming such equity to allege and prove that the person holding legal title is not a bona fide purchaser." First Fidelity Thrift & Loan Assn v. Alliance Bank, 60 Cal.App.4th 1433 (1998). The Bank did not meet this challenge.

…

[5] To the extent the Bank suggests, even by inference, that taking title subject to the deed of trust is an option, the statute does not provide such an option.

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

1. Bona Fide Purchaser Status Trumps Equitable Challenges.

The Nevada Supreme Court recognized the superiority of a BFP when it stated,

> When sitting in equity, however, courts must consider the entirety of the circumstances that bear upon the equities…This includes considering the status and actions of all parties involved, including whether an innocent party may be harmed by granting the desired relief.

Shadow Wood, at 1114 (Nev. 2016) citing Smith v. United States, 373 F.2d 419, 424 (4th Cir. 1966) ("Equitable relief will not be granted to the possible detriment of innocent third parties."); In re Vlasek, 325 F.3d 955, 963 (7th Cir. 2003) ("[I]t is an age-old principle that in formulating equitable relief a court must consider the effects of the relief on innocent third parties."); Riganti v. McElhinney, 56 Cal. Rptr. 195, 199 (Ct. App. 1967) ("[E]quitable relief should not be granted where it would work a gross injustice upon innocent third parties.")

The Court further exhorted that "[c]onsideration of harm to potentially innocent third parties is especially pertinent here where [the Bank] did not use the legal remedies available to it to prevent the property from being sold to a third party, such as 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 citing 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.").

In other words, the Nevada Supreme Court recognized that when a bona fide purchaser has no notice of a pre-sale dispute, such as an attempted tender, equity cannot be granted to the tendering party, particularly when the tendering party was in a position to seek relief earlier and defeat any bona fide purchaser status by putting the world on notice of that party's attempts to pay. In emphasizing "the legal remedies available to prevent the property from being sold to a third party," the Court placed the burden on the party seeking equitable relief to prevent a potential purchaser from attaining BFP status. If that party's inaction allows a purchaser to become a BFP, then equity cannot be granted to the detriment of the innocent third party. Put another way, BFP status trumps equitable relief.

This result is reinforced by the fact that not even a due process violation is sufficient to

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

overcome an individual's status as a BFP. Swartz v. Adams, 93 Nev. 240, 245–46, 563 P.2d 74, 77 (1977) (finding that where notice of sale was not given to owners, property still could not be returned to owners because property was purchased by a BFP). The Swartz Court remanded the case to allow the owners to seek compensatory relief against the person who initiated the sale rather than harm an innocent third party. Id. Therein lies the correct form of relief. The so-called harmed party (Bank) can seek money damages against the party who caused the harm (Association/Agent). But under no set of circumstances can equitable relief, to the detriment of the innocent purchaser, be granted to a party (Bank) who ignored earlier remedies and allowed a BFP to purchase the property.

The Nevada Supreme Court summed up this idea when it stated:

> Where 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, at 1116.

This is not a novel idea of jurisprudence. One of the most fundamental principles of law whether is that only the party that caused the harm can be held responsible. If BFP status is treated as a mere consolation, then all sales lack finality and all statutory foreclosures schemes are jeopardized; effectively morphing a non-judicial foreclosure into a judicial foreclosure. See Moeller v. Lien, 25 Cal. App. 4th 822, 830, 30 Cal. Rptr. 2d 777, 782 (1994); Melendrez v. D & I Investment, Inc., 26 Cal.Rptr.3d 413, 428 (Cal.Ct.App. 2005)(Creating finality to BFPs 'was to promote certainty in favor of the validity of the private foreclosure sale because it encouraged the public at large to bid on the distressed property…'")(internal citation omitted); 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.

What is more, by treating BFP status as a consolation, it effectively rewards the alleged harmed party who failed to protect itself by either invoking earlier remedies or defeating a BFP from purchasing the Property. It is a maxim, "he who seeks equity must do equity." No one is

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

entitled to the aid of the court when that aid is only made necessary by that party's own inactions or self-created hardship. Equity was not created to relieve a person of consequences of his own inactions. This maxim holds true in this case.

In the present case, the Bank failed to adequately protect its interest. Having failed to avail itself of earlier remedies (i.e. injunction, lis pendens, etc.) and allowing a BFP to purchase the property, equitable relief is no longer available to the Bank. This is not to say the Bank has no recourse; it simply means it has no recourse against SFR. In contrast, it still potentially has recourse against the Association/Agent i.e. the parties who caused the alleged harm in the first place. Therefore, the only appropriate remedy, money damages, not equitable relief that harms SFR, the innocent purchaser. This is consistent with Swartz noting:

> …the ideal remedy would be to return that property to the former owner pending constitutionally sufficient proceedings. Unfortunately, this may no longer be done without injury to innocent third parties who are bona fide purchasers of the property. However, Violet has also sought compensatory relief in her complaint. We therefore reverse and remand the case to the court below for appropriate proceedings consistent with this opinion.

93 Nev. at 245–46, 563 P.2d at 77.

If a homeowner, who was not afforded due process and therefore could not even avail herself of earlier remedies or prevent a BFP from purchasing the property, was not entitled to equitable relief, then certainly the Bank who did have notice and opportunity to invoke any number of remedies, and allowed a BFP to purchase the property, is not entitled to equity.

This is consistent with the Restatement's commentary: the wronged junior lienholder must seek a remedy from someone other than the purchaser. *See* Restatement (Third) Property: Mortgages, §8.3, Comment *b*. Other courts have also consistently found that a BFP is protected even when there is a wrongful rejection of tender. Moeller, 25 Cal. App. 4th at 831–32, 30 Cal.Rptr.2d at 783 (precluding an attack by the trustor on the trustee's sale to a bona fide purchaser even where the trustee wrongfully rejected a proper tender of reinstatement by the trustor); see also, Munger v. Moore, 11 Cal. App. 3d 1, 7, 89 Cal. Rptr. 323 (Ct. App. 1970)("a trustee or mortgagee may be liable to the trustor or mortgagor for damages sustained where there has been an illegal, fraudulent or willfully oppressive sale of property under a power of

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

sale contained in a mortgage or deed of trust")(citations omitted).

Protecting BFPs by making a Bank's remedy against the Association/Agent who acted wrongfully is sound policy. In a foreclosure proceeding with wrongful conduct, the only party with clean hands is the BFP. Every other party – i.e., the Bank and the foreclosure agent – was directly involved in the alleged wrongful conduct. It was the Bank who chose not to inform potential buyers of its attempts to protect its lien or avail itself of other remedies such as seeking an injunction or attending the sale.

To grant equitable relief in the form of SFR taking subject to the Bank's deed of trust, only punishes SFR, an undisputed BFP. All the while, the Association/Agent, who allegedly acted wrongfully, escapes liability (and never has to worry about being held accountable) and the Bank who created its own hardship (and never has an incentive to do equity) is rewarded. This cannot be the law in Nevada.

2. <u>The Bank comes to Court with unclean hands</u>.

Another maxim of equity: "equity aids the vigilant, not those who slumber on their rights." If the evidence in this case shows anything, it shows that the Bank slept on its rights; it did not do equity, and therefore it is not entitled to equity. While the Court should never get this far, if it were to weigh equities, the equities lie in favor of SFR.

In the present case, the Bank never availed itself of any number of earlier remedies. Most importantly, the Bank allowed a BFP to purchase the Property. The Bank did not pay or attempt to pay any portion of the Association's lien. The Bank did not contact the Association or Agent regarding the Association's lien. The Bank did not foreclose on its own deed of trust. There is no evidence suggesting that the Bank filed a complaint with NRED, nor that the Bank sought an injunction to prevent the sale. The Bank did not record a lis pendens against the Property. Finally, the Bank did not attend the sale. One who fails to do equity cannot claim equity.

Title should be quieted in SFR's name and the Bank enjoined from taking any further action to enforce its extinguished lien against the Property or further clouding SFR's title.

…

…

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

V. CONCLUSION

Based on the above, the Bank's Exhibit B and related argument should be stricken. Further, the Bank's Motion for Summary Judgment should be denied in its entirety and judgment entered in favor of SFR.

Dated this 13th day of December 2017

KIM GILBERT EBRON

By: */s/ Diana S. Ebron, Esq.*

DIANA S. EBRON, ESQ.
Nevada Bar No. 10580
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139-5974
Telephone: (702) 485-3300
Facsimile: (702) 485-3301
Attorney for Defendant/Counterclaimant/ Cross-Claimant,
SFR Investments Pool 1, LLC

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of December 2017, pursuant to NRCP 5(b)(2)(D), I caused service of a true and correct copy of the foregoing **SFR INVESTMENTS POOL 1, LLC'S OPPOSITION TO NATIONSTAR MORTGAGE, LLC'S MOTION FOR SUMMARY JUDGMENT AND COUNTER MOTION TO STRIKE** to be made electronically via the Eighth Judicial District Court's electronic filing system upon the following parties at the e-mail addresses listed below:

"Darren T. Brenner, Esq." .	darren.brenner@akerman.com
Akerman Las Vegas Office .	akermanlas@akerman.com
Diana Cline Ebron .	diana@kgelegal.com
E-Service for Kim Gilbert Ebron .	eservice@kgelegal.com
Michael L. Sturm .	mike@kgelegal.com
P. Sterling Kerr .	psklaw@aol.com
Richard J. Vilkin .	richard@vilkinlaw.com
Tomas Valerio .	staff@kgelegal.com

/s/ Diana S. Ebron
an employee of
KIM GILBERT EBRON

EXHIBIT 1

KIM GILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

DECLARATION OF DIANA S. EBRON

I, Diana S. Ebron, Esq., declare as follows:

1. I am an attorney with Kim Gilbert Ebron, and I am admitted to practice law in the State of Nevada.

2. I am counsel for SFR Investments Pool 1, LLC ("SFR") in this action.

3. I make this declaration in support of SFR's Opposition to Nationstar Mortgage, LLC's ("Bank" or "Nationstar") motion for summary judgment and Countermotion to Strike.

4. I have personal knowledge of the facts set forth below based upon my review of the documents produced in this matter, except for those factual statements expressly made upon information and belief, and as to those facts, I believe them to be true, and I am competent to testify.

5. I am knowledgeable about how Kim Gilbert Ebron maintains its records associated with litigation, including litigation in this case. In connection with this litigation concerning 668 Moonlight Stroll Street, Henderson, Nevada 89002; Parcel No. 179-31-714-046 (the "Property").

6. I reviewed Nationstar's intitial disclosures and each supplement thereto.

7. Based on my review, Nationstar never disclosed Freddie Mac of Dean Meyer as witnesses in its initial disclosures made on July 10, 2015 or any of its supplemental disclosures through the last day of discovery after remand which was October 17, 2017.

8. It was not until the Bank filed its motion for summary judgment on November 15, 2017 that any mention of Dean Meyer made it into this case through his post-discovery declaration on behalf of Freddie Mac.

9. The Bank subsequently made its sixth supplemental disclosure on November 29, 2017 at 6:33 pm, for the first time naming Freddie Mac as a potential witness, but without providing a phone number. The late disclosure states the following:

> **12. Corporate Representative for Federal Home Loan Mortgage Corporation**
> **(Freddie Mac)**
> **8200 Jones Branch Drive**
> **McLean, VA 22102-3110**

This witness is expected to testify concerning his/her knowledge of the facts and circumstances arising in connection with this lawsuit. In particular, Freddie Mac is expected to testify as to its ownership of the subject loan and Nationstar's servicing of the loan.

10. Before that, the only witness identified by Nationstar as having information about Freddie Mac's purported ownership was Nationstar. The disclosure stated:

1. Corporate Representative for Nationstar Mortgage, LLC
c/o AKERMAN LLP
1160 Town Center Drive, Suite 330
Las Vegas, Nevada 89144
Telephone: (702) 634-5000
This witness will testify regarding relevant facts and information relating to the third-party defendants' lien on the subject property and Freddie Mac's ownership.

11. Nationstar has consistently taken the position that Freddie Mac is completely unnecessary to this litigation, and won on that point at the Nevada Supreme Court.

12. When Nationstar listed itself as the only witness that would provide information about Freddie Mac's ownership interest and the purported servicing relationship, I presumed the Bank was maintaining that same position.

13. SFR's position is that Freddie Mac does not actually have an interest in the loan or any relevant information related to this case, which is why I did not name Freddie Mac as a witness in SFR's disclosures.

14. The *only* reason I did not attempt to depose Freddie Mac in this case was because Nationstar failed to list Freddie Mac as a witness as required by Rule 16.1.

15. It appeared that the Bank would rely on its own witness to attempt to prove both Freddie Mac's purported ownership and its servicing/agency relationship with Freddie Mac/FHFA.

16. I attempted to obtain information from Nationstar about the documents Freddie Mac is now attempting to authenticate and explain through Dean Meyer's declaration, but Nationstar took the position that it could not and would not authenticate or explain the documents.

17. After the late disclosure by Nationstar, I spoke with Melanie Morgan, Esq. and requested she withdraw the disclosure, as well as Freddie Mac's declaration and attached

KIM GILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

documents filed as Exhibit B to Nationstar's motion for summary judgment.

18. Even though I explained SFR's prejudice and inability to depose Freddie Mac due to the late disclosure, she refused to withdraw the disclosure or the Exhibit. She did not offer to allow SFR any discovery into Freddie Mac, but instead insisted that the late disclosure was "harmless."

19. In my opinion, Nationstar is using gamesmanship to try to deprive SFR of its right to properly challenge the purported evidence by waiting until well after the time SFR could have subpoenaed Freddie Mac to even claim Freddie Mac had any relevant information to this litigation.

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

DATED this 13th day of December, 2017.

/s/ Diana S. Ebron
Diana S. Ebron

KIM GILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

EXHIBIT 2

KAREN L. HANKS, ESQ.
Nevada Bar No. 9578
E-mail: Karen@hkimlaw.com
DIANA S. CLINE, ESQ.
Nevada Bar No. 10580
E-mail: diana@hkimlaw.com
JACQUELINE A. GILBERT, ESQ.
Nevada Bar No. 10593
E-mail: jackie@hkimlaw.com
HOWARD KIM & ASSOCIATES
1055 Whitney Ranch Drive, Suite 110
Henderson, Nevada 89014
Telephone: (702) 485-3300
Facsimile: (702) 485-3301
Attorneys for SFR Investments Pool 1, LLC

HOWARD KIM & ASSOCIATES
1055 WHITNEY RANCH DRIVE, SUITE 110
HENDERSON, NEVADA 89014
(702) 485-3300 FAX (702) 485-3301

DISTRICT COURT

CLARK COUNTY, NEVADA

IGNACIO GUTIERREZ, an individual,

Plaintiff,

vs.

SFR INVESTMENTS POOL 1, LLC; NEVADA ASSOCIATION SERVICES, INC.; HORIZON HEIGHTS HOMEOWNERS ASSOCIATION; KB HOME MORTGAGE COMPANY, a foreign corporation, DOE Individuals I through X, ROE Corporations and Organizations I through X,

Defendants.

SFR INVESTMENTS POOL 1, LLC, Nevada limited liability company,

Counter-Claimant and Third Party Plaintiff,

vs.

IGNACIO GUTIERREZ, an individual; NATIONSTAR MORTGAGE, LLC, a Delaware limited liability company; COUNTRYWIDE HOME LOANS, INC., A FOREIGN CORPORATION; DOES I-X; and ROES 1-10, inclusive,

Counter-Defendant/ Third Party Defendants.

Case No. A-13-684715-C

Dept. No. XVII

SFR INVESTMENTS POOL 1, LLC'S REBUTTAL EXPERT WITNESS DISCLOSURE

Defendant/Counter-Claimant/Third Party Plaintiff, SFR Investments Pool 1, LLC ("SFR"), by and through its counsel of record, Howard Kim & Associates, hereby designates the following rebuttal expert witness in the above-entitled matter as follows:

1. Michael L. Brunson, MNAA
Brunson Jiu, LLC
8670 W. Cheyenne Avenue, Ste 120
Las Vegas, Nevada 89129
702-641-5657

Mr. Brunson is a Nevada certified residential appraiser and AQB certified USPAP Instructor. He is expected to provide testimony regarding rebuttal opinions to Matthew Lubawy's initial expert report.

A true and correct copy of the rebuttal expert report is attached hereto as **Exhibit 1**. The expert report contains Mr. Brunson's curriculum vitae, fee schedule, and index of cases and published materials. The parties making this disclosure reserve the right to supplement this disclosure as allowed by the Nevada Rules of Civil Procedure.

DATED this 15th day of June, 2015.

HOWARD KIM & ASSOCIATES

KAREN L. HANKS, ESQ.
Nevada Bar No. 9578
DIANA S. CLINE, ESQ.
Nevada Bar No. 10580
JACQUELINE A. GILBERT, ESQ.
Nevada Bar No. 10593
1055 Whitney Ranch Drive, Suite 110
Henderson, Nevada 89014
Attorneys for SFR Investments Pool 1, LLC

HOWARD KIM & ASSOCIATES
1055 WHITNEY RANCH DRIVE, SUITE 110
HENDERSON, NEVADA 89014
(702) 485-3300 FAX (702) 485-3301

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of June, 2015, pursuant to NCRP 5(b), I served via e-service, **SFR INVESTMENTS POOL 1, LLC'S REBUTTAL EXPERT WITNESS DISCLOSURE**, to the following parties:

Akerman

Contact	Email
Akerman Las Vegas Office	akermanlas@akerman.com
Akerman e-service	akermanlas@akerman.com
Allison R. Schmidt	allison.schmidt@akerman.com

Attorneys for Nationstar Mortgage, LLC and Countrywide Home Loans, Inc.

Law Offices of P. Sterling Kerr

Contact	Email	Select
P. Sterling Kerr	psklaw@aol.com	

Law Offices of Richard Vilkin, P.C.

Contact	Email
Richard J. Vilkin	richard@vilkinlaw.com

Attorneys for Nevada Association Services, Inc.

/s/ Jody Foote
Employee of Howard Kim & Associates

HOWARD KIM & ASSOCIATES
1055 WHITNEY RANCH DRIVE, SUITE 110
HENDERSON, NEVADA 89014
(702) 485-3300 FAX (702) 485-3301

BRUNSON-JIU LLC
Valuation Consulting & Real Estate Damage Analytics

June 13, 2015

SFR Investments Pool 1, LLC, represented by attorneys Jacqueline A. Gilbert and Diana S. Cline of Howard Kim & Associates
1055 Whitney Ranch Dr., Suite 110
Henderson, NV 89014

RE: Ignacio Gutierrez v SFR Investments Pool 1, LLC, et al (Case No. A-13-684715-C)

Dear Misses Gilbert and Cline:

Per your request, I have examined the expert appraisal report completed by Mr. Gary Hardy and Mr. Matthew Lubawy of Valbridge Property Advisors, Inc. (Hardy/Lubawy report or Hardy/Lubawy appraisal). The Hardy/Lubawy report is a retrospective, fair market value appraisal of the fee simple interest of the subject as of March 08, 2013. Communication is via a general-purpose residential form with numerous narrative and graphic addenda. The Hardy/Lubawy report contains 17 pages in total. It includes development of the sales comparison approach, utilizing three comparable sales. The signed date is May 14, 2015.

Appraisers are mandated, by federal law and/or state law, to comply with the edition of the Uniform Standards of Professional Appraisal Practice (USPAP) in effect as of the effective date of their work. The USPAP require specific professional ethics, disclosure, and performance when an appraiser is engaged to perform a service requiring his or her appraisal expertise. The USPAP are promulgated by the Appraisal Foundation and are the recognized measure of professional due diligence for all licensed or certified appraisers.

This assignment falls under the category of Appraisal Review as defined by the USPAP and is developed in compliance with the current edition of that document. This is a desktop assignment. No inspection of the subject is necessary for credible assignment results. All opinions, conclusions, and analysis have been developed and communicated without advocacy or bias. They are communicated in a manner that is meaningful and not misleading within the context of the intended use, intended users, and scope of work for this assignment.

It is assumed under an Extraordinary Assumption that the factual data presented in the Hardy/Lubawy report is accurate. The independent opinion of value is based on the assumption that the subject was in average condition as of the retrospective effective date. ***Use of these assumptions is reasonable but may have affected the assignment results.*** In the case of conflicting data, additional research will be conducted (if necessary) to determine which information is most reliable in order to allow my report to arrive at credible assignment results.

Brunson-Jiu, LLC
8670 W. Cheyenne Avenue Suite 120, Las Vegas, NV 89129
702-641-5657 Phone 702-939-9080 Fax
www.redamages.com

The client for this assignment is SFR Investments Pool 1, LLC. The Intended Use is for litigation in the case noted above. Intended Users include the Client represented by Howard Kim & Associates. The Scope of Work for my assignment includes an appraisal review (as defined) of the Hardy/Lubawy report and an independent opinion of the retrospective disposition value. My review emphasizes compliance with the USPAP and generally accepted appraisal methodology. I have examined the techniques and methodology of the Hardy/Lubawy appraisal in order to determine the completeness, adequacy, relevance, appropriateness, and reasonableness of the work under review, developed in the context of the requirements applicable to that work.

The accompanying appraisal review report is completed in compliance with USPAP Standards Rules 3-4, 3-5 and 3-6, containing statements and summary discussions of the data, reasoning, and analyses that were used in the process of developing my opinions. Supporting documentation concerning the data, reasoning and analyses is retained in my work file.

The depth of discussion within this report is specific to the client and intended use stated below. Neither I, nor Brunson-Jiu, LLC is responsible for unauthorized use of this review.

Conclusions – Hardy/Lubawy Expert Appraisal Report

The appraisal report completed by Hardy/Lubawy contains numerous errors, violations of the Uniform Standards of Professional Appraisal Practice, and fails to use generally recognized appraisal methodology. These errors of omission and commission cause the overall appraisal report to be misleading and to lack credibility.

Conclusions – Independent Opinion of Value

HOA foreclosure properties have limitations on their bundle of rights. These limitations preclude the use of traditional owner-equity sales, and limit the use of traditional foreclosure sales in an analysis of value. Similar HOA foreclosure sales and consideration of "current" market conditions provide the best measure of value for this type of transaction.

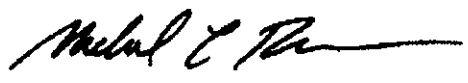
As an HOA foreclosure property, the retrospective disposition value as of March 08, 2013 was:

$11,000
Eleven Thousand Dollars

Specific findings in support of these conclusions are noted in the individual sections of the report that follows this letter. Readers of this report should refer to appropriate versions of the USPAP or relevant cited documents for proper understanding of this appraisal review report. Your attention is invited to the accompanying report, from which the above opinions were derived.

Documents relevant to my opinions and conclusions, including but not limited to the workfile for the Hardy/Lubawy report, have not been produced. While I can properly review the report, I cannot fully evaluate whether the analyses, opinions and conclusions were properly *developed*. Additional findings may apply once the workfile is made available. Future stages of the assignment may include additional valuation services, including but not limited to an independent retrospective appraisal. I reserve my right to amend my findings based on future production of relevant documents.

Respectfully submitted,



Michael L. Brunson, SRA, MNAA
AQB Certified USPAP Instructor #10796
Nevada Certified Residential Appraiser #A.0002794-CR
June 13, 2015

Assumptions and Limiting Conditions

The submitted report is subject to underlying assumptions and limiting conditions qualifying the information it contains as follows:

1. Possession of this review or copy thereof does not carry with it the right of publication.
2. The purpose of the assignment is to review the appropriateness of the conclusions and the compliance with the USPAP determined within the submitted report.
3. This review is intended solely for the use of the identified Client and Intended User(s). Neither all nor any part of the contents of this review shall be disseminated to the public through advertising, public relations, news, sales or other media without the prior written consent of the reviewer.
4. Unless stated otherwise in the review, the analyses, opinions and conclusions in this review are based solely on the data, analyses and conclusions contained in the appraisal report, appraisal review report, and/or the workfile under review.
5. All analyses, opinions and conclusions expressed by the reviewer are limited by the scope of the review process as defined herein.
6. The conclusions apply only to the property specifically identified and described herein and in the reviewed, appraisal review reports, appraisal reports and/or associated workfiles.
7. The reviewer has made no legal survey, nor has he commissioned one to be prepared; therefore, reference to a sketch, plat, diagram or previous survey appearing in the report is only for the purpose of assisting the reader to visualize the property.
8. No responsibility is assumed for legal matters existing or pending outside of the existing case.
9. Disclosure of the contents of this review is governed by the Nevada Commission of Appraisers and the USPAP.
10. The compensation received for this assignment is in no manner contingent upon the conclusion of the review.
11. Reviewer Competency: Michael L. Brunson is an AQB Certified USPAP Instructor and is fully competent in regard to the proper interpretation and application of the USPAP. He is also a Certified Residential Appraiser in Nevada and has the geographic competency to appraise the subject and similar properties within the Southern Nevada area.

Appraiser Certification

I certify that, to the best of my knowledge and belief:

- The statements of fact contained in this report are true and correct.
- The reported analyses, opinions, and conclusions are limited only by the reported assumptions and limiting conditions and are my personal, impartial, and unbiased professional analyses, opinions, and conclusions.
- I have no present or prospective interest in the properties that are the subject of the work under review and no personal interest with respect to the parties involved.
- I have performed no other services, as an appraiser or in any other capacity, regarding the properties that are the subject of the work under review within the three-year period immediately preceding acceptance of this assignment.
- I have no bias with respect to the properties that are the subject of the work under review or to the parties involved with this assignment.
- My engagement in this assignment was not contingent upon developing or reporting predetermined results.
- My compensation is not contingent on an action or event resulting from the analyses, opinions, or conclusions in this review or from its use.
- My compensation for completing this assignment is not contingent upon the development or reporting of predetermined assignment results or assignment results that favors the cause of the client, the attainment of a stipulated result, or the occurrence of a subsequent event directly related to the intended use of this appraisal review.
- My analyses, opinions, and conclusions were developed, and this report has been prepared, in conformity with the *Uniform Standards of Professional Appraisal Practice*.
- I have made no inspection of the subject of the work under review.
- No one provided significant professional appraisal review assistance to the person signing this certification.
- The reported analyses, opinions, and conclusions were developed, and this report has been prepared, in conformity with the Code of Professional Ethics and Standards of Professional Appraisal Practice of the Appraisal Institute.
- The use of this report is subject to the requirements of the Appraisal Institute relating to review by its duly authorized representatives.
- As of the date of this report, I have completed the continuing education program for Designated Members of the Appraisal Institute.

Michael L. Brunson, SRA, MNAA
AQB Certified USPAP Instructor #10796
NV Certified Residential Appraiser #A.0002794.CR
June 13, 2015

DEFINITIONS

For the purpose of this report, the following definitions apply:

Appraisal[1]

(noun) The act or process of developing an opinion of value; an opinion of value. (adjective) of or pertaining to appraising and related functions such as appraisal practice or appraisal services.

Comment: An appraisal must be numerically expressed as a specific amount, as a range of numbers, or as a relationship (e.g., not more than, not less than) to a previous value opinion or numerical benchmark (e.g., assessed value, collateral value).

Appraisal Review[2]

the act or process of developing and communicating an opinion about the quality of another appraiser's work that was performed as part of an appraisal or appraisal review assignment.

Comment: The subject of an appraisal review assignment may be all or part of a report, workfile, or a combination of these.

Assumption[3]

That which is taken to be true.

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[1] USPAP 2014-2015 Edition, The Appraisal Foundation.
[2] Ibid.
[3] Ibid.

Disposition Value[4]

The most probable price that a specified interest in real property should bring under the following conditions:
1. Consummation of a sale within a future exposure time specified by the client.
2. The property is subjected to market conditions prevailing as of the date of valuation.
3. Both the buyer and seller are acting prudently and knowledgeably.
4. The seller is under compulsion to sell.
5. The buyer is typically motivated.
6. Both parties are acting in what they consider to be their best interests.
7. An adequate marketing effort will be made during the exposure time specified by the client.
8. Payment will be made in cash in U.S. dollars or in terms of financial arrangements comparable thereto.
9. The price represents the normal consideration for the property sold, unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

Extraordinary Assumption[5]

An assumption, directly related to a specific assignment, which, if found to be false, could alter the appraiser's opinions or conclusions.

Comment: Extraordinary assumptions presume as fact otherwise uncertain information about physical, legal, or economic characteristics of the subject property; or about conditions external to the property, such as market conditions or trends; or about the integrity of data used in an analysis.

Fair Market Value[6]

The price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts. The fair market value of a particular item of property includible in the decedent's gross estate is not to be determined by a forced sale price. Nor is the fair market value of an item of property to be determined by the sale price of the item in a market other than that in which such item is most commonly sold to the public, taking into account the location of the item wherever appropriate.

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[4] The Dictionary of Real Estate Appraisal, 5th Edition, (Chicago: Appraisal Institute, 2010).
[5] USPAP 2014-2015 Edition, The Appraisal Foundation.
[6] IRS Regulation §20.2031-1.

Fee Simple Estate[7]

Absolute ownership unencumbered by any other interest or estate, subject only to the limitations imposed by the governmental powers of taxation, eminent domain, police power, and escheat.

Highest and Best Use[8]

The reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value. The four criteria the highest and best use must meet are legal permissibility, physical possibility, financial feasibility, and maximum productivity.

Hypothetical Condition[9]

That which is contrary to what exists but is supposed for the purpose of analysis.

Comment: Hypothetical conditions assume conditions contrary to known facts about physical, legal, or economic characteristics of the subject property; or about conditions external to the property, such as market conditions or trends; or about the integrity of data used in an analysis.

Impaired Value[10]

The indicated value of a property with a detrimental condition reached upon the application of one or more of the three approaches to value.

Market Area[11]

The area associated with a subject property that contains its direct competition.

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[7] The Dictionary of Real Estate Appraisal, 5th Edition, (Chicago: Appraisal Institute, 2010).
[8] Ibid.
[9] USPAP 2014-2015 Edition, The Appraisal Foundation.
[10] Randall Bell with Orell C. Anderson and Mike V. Sanders, Real Estate Damages: Applied Economics and Detrimental Conditions – 2nd Edition (Chicago: Appraisal Institute, 2008), p. 378.
[11] The Dictionary of Real Estate Appraisal, 5th Edition, (Chicago: Appraisal Institute, 2010).

Market Value[12]

The most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently, knowledgeably and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:

1. Buyer and seller are typically motivated;
2. Both parties are well informed or well advised, and each is acting in what they consider their own best interest;
3. A reasonable time is allowed for exposure in the open market;
4. Payment is made in terms of cash in U.S. dollars or in terms of financial arrangements comparable thereto; and,
5. The price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

Neighborhood[13]

A group of complementary land uses; a congruous grouping of inhabitants, buildings, or business enterprises.

Sales Comparison Approach[14]

The process of deriving a value indication for the subject property by comparing market information for similar properties with the property being appraised, identifying appropriate units of comparison and making qualitative comparisons with or quantitative adjustments to the sale prices (or unit prices, as appropriate) of the comparable properties based on relevant, market-derived elements of comparison.

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[12] Title XI, Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), [Pub. L. No. 101-73 103 Stat. 183 (1989)], 12 U.S.C. 3310, 3331-3351, and Section 5 (b) of the Bank Holding Company Act, 12 U.S.C. 1844 (b); Part 225, Subpart G: Appraisals; Paragraph 225.62(f).

[13] The Dictionary of Real Estate Appraisal, 5th Edition, (Chicago: Appraisal Institute, 2010).

[14] Ibid.

Appraisal Review

INTRODUCTION

File No.: 1505.2093

Client:

SFR Investments Pool 1, LLC. Engaged by attorneys Jacqueline A. Gilbert and Diana S. Cline of Howard Kim & Associates.

Review Appraiser:

Michael L. Brunson, SRA, MNAA
AQB Certified USPAP Instructor #10796
Nevada Certified Residential Appraiser #A.0002794-CR
Brunson-Jiu, LLC

Intended User(s):

Client only. Use of this report by others is not intended. It is understood that parties to this litigation other than the Client may be granted access to the report and related workfile. However, as noted in Statement 9 of the USPAP,

> *Parties who receive a copy of an appraisal, appraisal review, or appraisal consulting report as a consequence of disclosure requirements applicable to an appraiser's client do not become intended users of the report unless they were specifically identified by the appraiser at the time of the assignment.*

Intended Use:

Litigation in the matter of Ignacio Gutierrez v SFR Investments Pool 1, LLC, et al (Case No. A-13-684715-C). This report is not intended for any other use or in any other case.

Appraisers Who Completed the Work Under Review:

Gary N. Hardy, Nevada Registered Intern Appraiser #A.0206955-INTR
Matthew J. Lubawy, MAI, Nevada Certified General Appraiser #A.0000044-CG

Identification of the Work under Review:

The Hardy/Lubawy report is a general-purpose form report that includes 17 pages. It is a retrospective appraisal with an effective date of March 08, 2013 and a signed date of May 14, 2015.

Subject Property Address:	668 Moonlight Stroll Street Henderson, Nevada 89002
APN:	179-31-714-046
Location:	Horizon Heights, Henderson
Property Type:	Detached single-family residential
Owner of Record:	SFR Investments Pool 1, LLC
Interest Appraised:	Fee Simple.

Purpose and Scope of Assignment:

The purpose of this assignment is to develop a credible and reliable opinion as to the completeness, adequacy, relevance, appropriateness, and reasonableness of the work under review. This opinion is developed in the context of compliance with the USPAP and generally accepted appraisal methodology. An independent value opinion is part of the scope of this assignment. The following scope of work was developed in accordance with the objective of the assignment and in compliance with the USPAP.

- Collected and analyzed pertinent background information about the subject property.
- Examined various documents provided and requested of the client.
- Examined the expert report completed by Hardy/Lubawy.
- Verified relevant data from the work under review with the cited source when available or other reliable source as applicable.
- Noted compliance and lack of compliance with relevant sections of the USPAP.
- Noted compliance or lack of compliance with generally accepted appraisal methodology
- Developed opinions of the quality of the work under review.
- Developed an independent opinion of retrospective value.
- Concluded to final opinions.

My Appraisal Review Report is a summary report of the data, analysis, and conclusions. Supporting documentation is retained in the work file. Future stages of the assignment may include additional valuation services, including but not limited to additional analysis, consulting, deposition, and/or testimony.

Relevant Dates:

Transmittal date of Hardy/Lubawy appraisal:	May 14, 2015
Effective date of Hardy/Lubawy appraisal:	March 08, 2013
Date subject viewed by Hardy/Lubawy:	May 13, 2015
Date subject acquired at auction:	April 05, 2013

Additional relevant dates noted in the body of the review.

Effective date of appraisal review:

The effective date of this appraisal review is March 08, 2013[15] corresponding to the effective date of the work under review. The 2014-2015 version of the USPAP is relevant to both the Hardy/Lubawy appraisal and this review.

Reviewer Competency and Professional Assistance:

The Competency Rule of the USPAP states in part that, "Prior to accepting an assignment or entering into an agreement to perform any assignment, an appraiser must properly identify the problem to be addressed and have the knowledge and experience to complete the assignment competently…" As an AQB Certified USPAP Instructor, I am competent concerning the Uniform Standards and their application. As a Certified Residential Appraiser, I am competent in regard to the type of property and the analytical methods necessary to produce credible assignment results. My primary area of practice is Southern Nevada. I am competent concerning the geographic area and market.

USPAP Background:

The Uniform Standards of Professional Appraisal Practice, promulgated by the Appraisal Foundation, are the recognized measure of professional due diligence for all licensed or certified appraisers. The preamble of the USPAP provides a brief overview as to the purpose and intent of the Uniform Standards, stating in part:

> The purpose of the *Uniform Standards of Professional Appraisal Practice* (USPAP) is to promote and maintain a high level of public trust in appraisal practice by establishing requirements for appraisers. It is essential that appraisers develop and communicate their analyses, opinions, and conclusions to **intended users** of their services in a manner that is **meaningful** and **not misleading**…
> (Bold added for emphasis).

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[15] The effective date of the Hardy/Lubawy report does not relate to either the auction date (04/05/2013) or the recording date of the auction deed (04/08/2013).

The following excerpt from the Preamble helps the reader understand the relevance and applicability of the specific portions of the USPAP referenced in the report that follows.

USPAP addresses the ethical and performance obligations of appraisers through DEFINITIONS, Rules, Standards, Standards Rules, and Statements.

- The DEFINITIONS establish the application of certain terminology in USPAP.
- The ETHICS RULE sets forth the requirements for integrity, impartiality, objectivity, independent judgment, and ethical conduct.
- The RECORD KEEPING RULE establishes the workfile requirements for appraisal, appraisal review, and appraisal consulting assignments.
- The COMPETENCY RULE presents pre-assignment and Assignment Conditions for knowledge and experience.
- The SCOPE OF WORK RULE presents obligations related to problem identification, research and analyses.
- The JURISDICTIONAL EXCEPTION RULE preserves the balance of USPAP if a portion is contrary to law or public policy of a jurisdiction.
- The ten Standards establish the requirements for appraisal, appraisal review, and appraisal consulting service and the manner in which each is communicated.
    - STANDARDS 1 and 2 establish requirements for the development and communication of a real property appraisal.
    - STANDARD 3 establishes requirements for the development and communication of an appraisal review.
    - (Note: STANDARDS 4 and 5 have been retired)
    - STANDARD 6 establishes requirements for the development and communication of a mass appraisal.
    - STANDARDS 7 and 8 establish requirements for the development and communication of a personal property appraisal.
    - STANDARDS 9 and 10 establish requirements for the development and communication of a business or intangible asset appraisal.
- Statements on Appraisal Standards clarify, interpret, explain, or elaborate on a Rule or Standards Rule.
- Comments are an integral part of USPAP and have the same weight as the component they address. These extensions of the DEFINITIONS, Rules, and Standards Rules provide interpretation and establish the context and conditions for application.

It is important to note that the USPAP make a significant distinction between the *Development* of an appraisal or appraisal review and the *Communication* (reporting) of an appraisal or appraisal review. Standards Rule 1 (SR-1) applies to the *Development* of an appraisal of real property whereas SR-2 applies to the *Communication* of the appraisal. SR-3 is one of two Standards Rules where both development and communication are addressed in the same rule. However, the sections of SR-3 that apply to the development of an appraisal review are clearly labeled and the sections that apply to communication are clearly labeled.

This review focuses on compliance with generally accepted appraisal methodology and the USPAP – specifically the Preamble, Definitions, General Rules, Standards Rule 1 and Standards Rule 2 for the Development and Reporting of a Real Property Appraisal.

The table on the following page provides a summary of the Standards Rules applicable to the Hardy/Lubawy appraisal and a brief summary of my findings related to each specific USPAP rule. Green cells indicate compliance. Red cells indicate a lack of compliance. Yellow cells indicate either; technical violations of USPAP that do not significantly influence the overall credibility of the appraisal; or issues that are subject to interpretation.

Documents relevant to my opinions and conclusions, including but not limited to the workfile for the Hardy/Lubawy report, have not been produced. While I can properly review the report, I cannot fully evaluate whether the analyses, opinions and conclusions were properly *developed.* Additional findings may apply once the workfile is made available. Future stages of the assignment may include additional valuation services, including but not limited to an independent retrospective appraisal. I reserve my right to amend my findings based on future production of relevant documents.

Appraisal Report Style Review Checklist (2014-2015 USPAP)				
USPAP Reference	Item	Location	Notes	Compliance
2-1(a)	Clear, Accurate, Not Misleading		Utilized definition of Market Value is inappropriate.	N
2-1(b)	Sufficient Information for Understanding		Failure to indicate how the utilized definition applies to the problem to be solved.	N
2-1(c)	Disclose all Assumptions & Limiting Conditions	Form, Addenda		Y
2-2	Report Type Prominently Disclosed	Form		Y
Identify Problem and Determine Adequate Scope of Work				Compliance
2-2(a)(vi)	Transmittal Date Effective Date 1-2(d) Report Date	3	Reported effective date is neither the auction date, nor the recording date of the auction deed.	Y
2-2(a)(i) 1-2(a)	Client Identity	1		Y
2-2(a)(i); 1-2(a)	Intended User(s)	1		Y
2-2(a)(ii); 1-2(b)	Intended Use	1	Statement-9	Y
2-2(a)(iii); 1-2(e)	Legal Description or Other Property ID	1		Y
2-2(a)(iv); 1-2(e)(ii)	Property Interest	1		Y
2-2(a)(v) 1-2(c)	Type of Value	1, 4,13	Utilized definition is not disclosed, but is recognized as the IRS definition. It is not applicable to the appraisal problem in this case.	N
	Definition of Value	13		
	Source of Definition	No		
	Applicability/Application of Definition	No		
	Reasonable Exposure Time (if developed)	1		
2-2(a)(vii) 1-2(h)	Scope of Work	4, 11	Proper disclosure.	Y
Analysis and Development				Compliance
2-2(a)(ix); 1-3(a)(b)	Use Existing, Use Appraised	3		Y
2-2(a)(x)	Summarize HABU (if developed)	3		Y
2-2(a)(xi) 1-2(f) 1-2(g)	Standard Assumptions and Limiting Conditions	7		Y
	- Extraordinary Assumptions	1, 12		
	Disclosure of Affect	1		
	- Hypothetical Conditions	-		
	Disclosure of Affect	-		
2-2(a)(viii) 1-4	Collect/Verify/Analyze Info for Credible Results		No indication of consideration for conditions of sale/motivation. Sale 1 is an FHA REA. Sale 3 is a short-sale. No disclosure/consideration for type of transaction. Sale 2 is more than 500sqft smaller.	N
	(a) Sales Comparison Approach	2		
	(b) Cost Approach	-		
	(c) Income Approach	-		
2-2(a)(viii) 1-5(a)&(b)	Sales, Contracts and Listing History	2		Y
2-2(a)(viii) 1-6	Reconcile Data/Analysis and Approaches	5	Generic reconciliation comment.	Y
1-1(a)	Be Aware of, Understand, Correctly Employ	-	Fair Market Value is not applicable.	N
1-1(b)	Substantial Error: Omission or Commission	-	Fair Market Value is not applicable.	N
1-1(c)	Carelessness or Negligence		Errors. Potentially negligent performance	Y
Certification				Compliance
2-2(a)(xii)	Include a Signed Certification (SR 2-3)	13		Y
2-3	USPAP Certification	13		Y
General Rules				Compliance
ETHICS RULE – Conduct	Avoid Bias or Advocacy; Gross Negligence; Disclosure of Prior Work	-		Y
ETHICS RULE – Management	Disclosure of Payment to Procure; Contingent Compensation; Proper Advertising; Signature Issues	-		
ETHICS RULE – Confidentiality	Protect Appraiser-Client Relationship	-		
RECORD KEEPING RULE	Prepare and maintain a workfile. Must exist prior to issuance of any report. Must contain name of client/intended users; true copies of all reports; summaries of oral reports; and all data, info, docs to support opinions/conclusions and show compliance with USPAP.	workfile	Unknown. Workfile not provided.	-
COMPETENCY RULE	Applies to factors such as, but not limited to, an appraiser's familiarity with a specific type of property or asset, a market, a geographic area, an intended use, specific laws and regulations, or an analytical method.		Lack of competent performance.	N
SCOPE OF WORK RULE	Problem Identification	4, 12	Failure to properly identify the problem. Failure to use an appropriate type/definition of value. Results are not credible in context of Intended Use.	N
	SOW Acceptability	4, 12		
	Disclosure	4, 12		
JURISDICTIONAL EXCEPTION RULE		-		N/A

FINDINGS - Hardy/Lubawy Appraisal

Finding No. 1:

The Hardy/Lubawy report lacks credibility and is misleading. It purports to measure fair market value, but does not. The analysis fails to properly apply recognized appraisal methodology and uses sales that do not qualify under the utilized type and definition of value.

Key Observations:

The definition of market value used is from the Internal Revenue Service. It appears below for clarification.

> Fair Market Value[16]
> The price at which the property would change hands between a willing buyer and a willing seller, *neither being under any compulsion to buy or to sell* and both having reasonable knowledge of relevant facts. The *fair market value* of a particular item of property includible in the decedent's gross estate *is not to be determined by a forced sale* price. Nor is the fair market value of an item of property to be determined by the sale price of the item in a market other than that in which such item is most commonly sold to the public, taking into account the location of the item wherever appropriate. (*Emphasis* added)

Arm's-length transactions and typical buyer/seller motivation are key components of any appraisal using this definition of value. Yet two of the three comparable sales in the Hardy/Lubawy report are non-traditional. Sale 1 is an FHA REO and Sale 3 is a short sale. Both facts are conspicuously absent in the Hardy/Lubawy report.

The use of non-traditional sales in a market value appraisal has been a significant topic in the appraisal community following the bursting of the housing bubble. This topic is so significant that The Appraisal Practices Board of The Appraisal Foundation has issued a Valuation Advisory regarding the proper way to appraise in a declining market.[17]

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[16] IRS Regulation §20.2031-1.
[17] APB Valuation Advisory #3: Residential Appraising in a Declining Market, (The Appraisal Foundation, May 7, 2012).

Best practices and generally recognized appraisal methodology indicate that market value appraisals should avoid the use of non-traditional sales when possible, because they do not meet the requirement for *typical buyer and seller motivation.* In the instance where non-traditional sales are used, analysis of any difference in *market value* (typical motivation) and *disposition value* (atypical motivation) is necessary to determine an appropriate adjustment for conditions of sale. The guidance by the Foundation focuses on valuation for lending in a declining market but is applicable to any market value assignment that uses non-traditional transactions as sale comparables.

The Hardy/Lubawy analysis uses the sales comparison approach to value. This approach is based on the economic principal of Substitution. This principal states that when comparably equivalent goods or services are available, a buyer in an open market will choose the one with the lowest price. The sales comparison approach also considers the secondary principals of Supply and Demand, Balance, and Externalities. Development of an indicated value occurs by analyzing closed sales, listings, and/or pending sales of properties similar to the subject, using relevant units of comparison.

Hardy/Lubawy use three comparable sales in the sales comparison analysis. As noted, two are non-traditional sales that lack typical buyer and seller motivation. Because the subject is an HOA auction sale, the argument might be made that the analysis adheres to the principal of Substitution by comparing sales of similar distressed properties. However, the argument would fail for several reasons. First, there is no referenced analysis or adjustment for conditions of sale. Second, the sales utilized do not conform to the type and definition of value that the assignment claims to measure.

A key factor in the validity of the sales comparison approach is that the comparables are truly similar to the subject. In this case, the subject is a HOA foreclosure acquired at auction. It is distinctly different from a traditional, owner-seller, equity sale. Because of the unique circumstances associated with a property acquired at an HOA auction, it is also distinctly different from a typical foreclosure sale or short sale.

A professional appraisal report *must* be *"meaningful and **not misleading**."* If a non-traditional sale is used, it *must* be adjusted for conditions of sale and it *must* be applicable to the definition of value used in the report. In the Hardy/Lubawy report, the non-traditional sales contain no adjustment for type of transaction or conditions of sale. Despite proper disclosure in the MLS, the sales are not even *identified* by Hardy/Lubawy as non-traditional sales.

The remaining transaction (Sale 2) is over 500 square feet (27%) smaller than the subject. While similar in bed and bath count, it is unlikely that the typical buyer would consider this property a viable market alternative to the subject property.

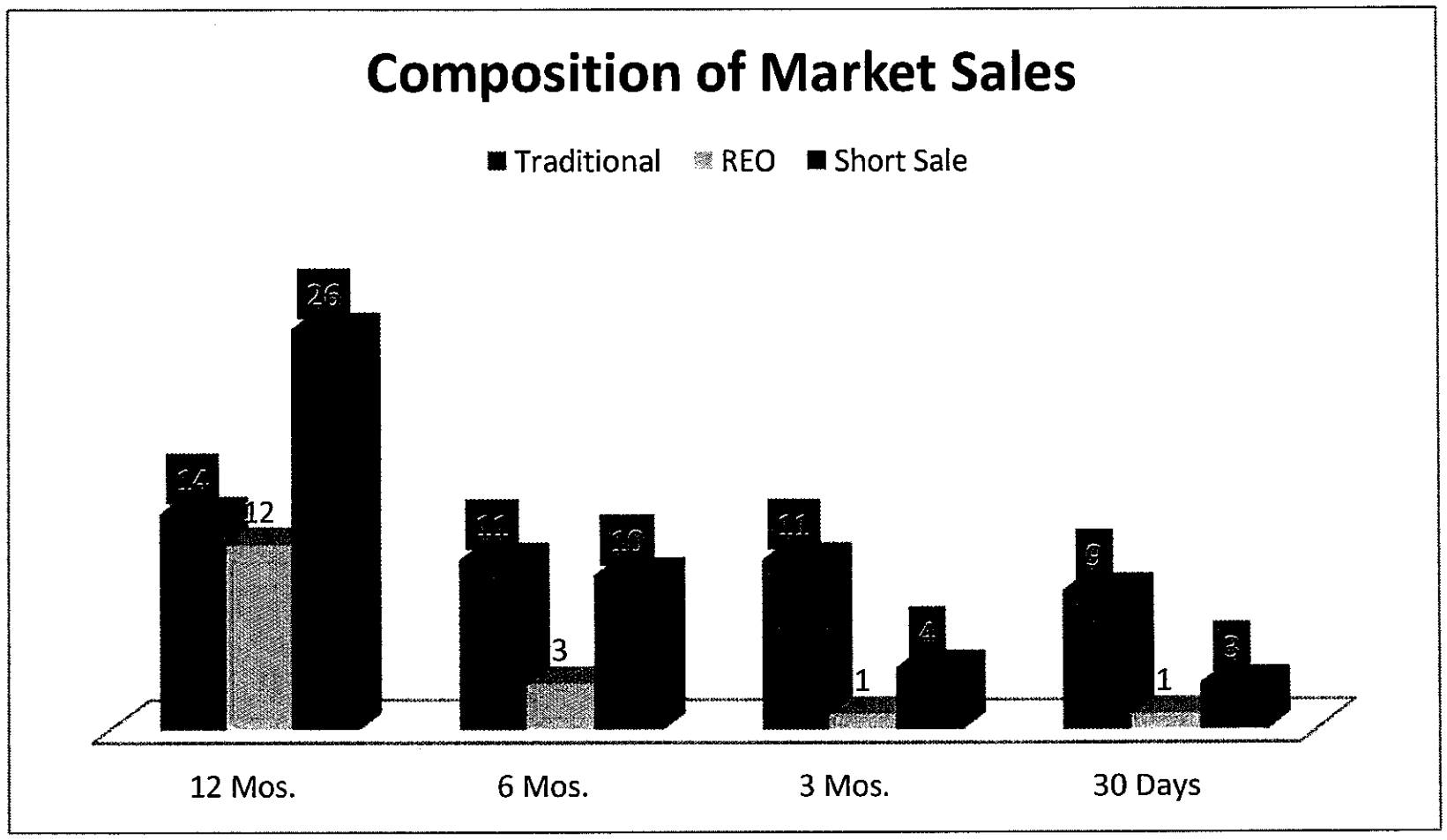
Ultimately, not one of the Hardy/Lubawy sales are comparable to the subject. All are different in the bundle of rights conveyed. Sales 1 and 3 are non-traditional transactions that would require adjustment for conditions of sale in order to measure fair market value. Sale 2 is significantly smaller than the subject - to the degree that is it simply not a viable comparable. This represents numerous violations of the USPAP and causes the analysis to lack credibility.

Independent analysis, using the parameters stated and implied in the Hardy/Lubawy report resulted in the table and graphs shown on the following pages.

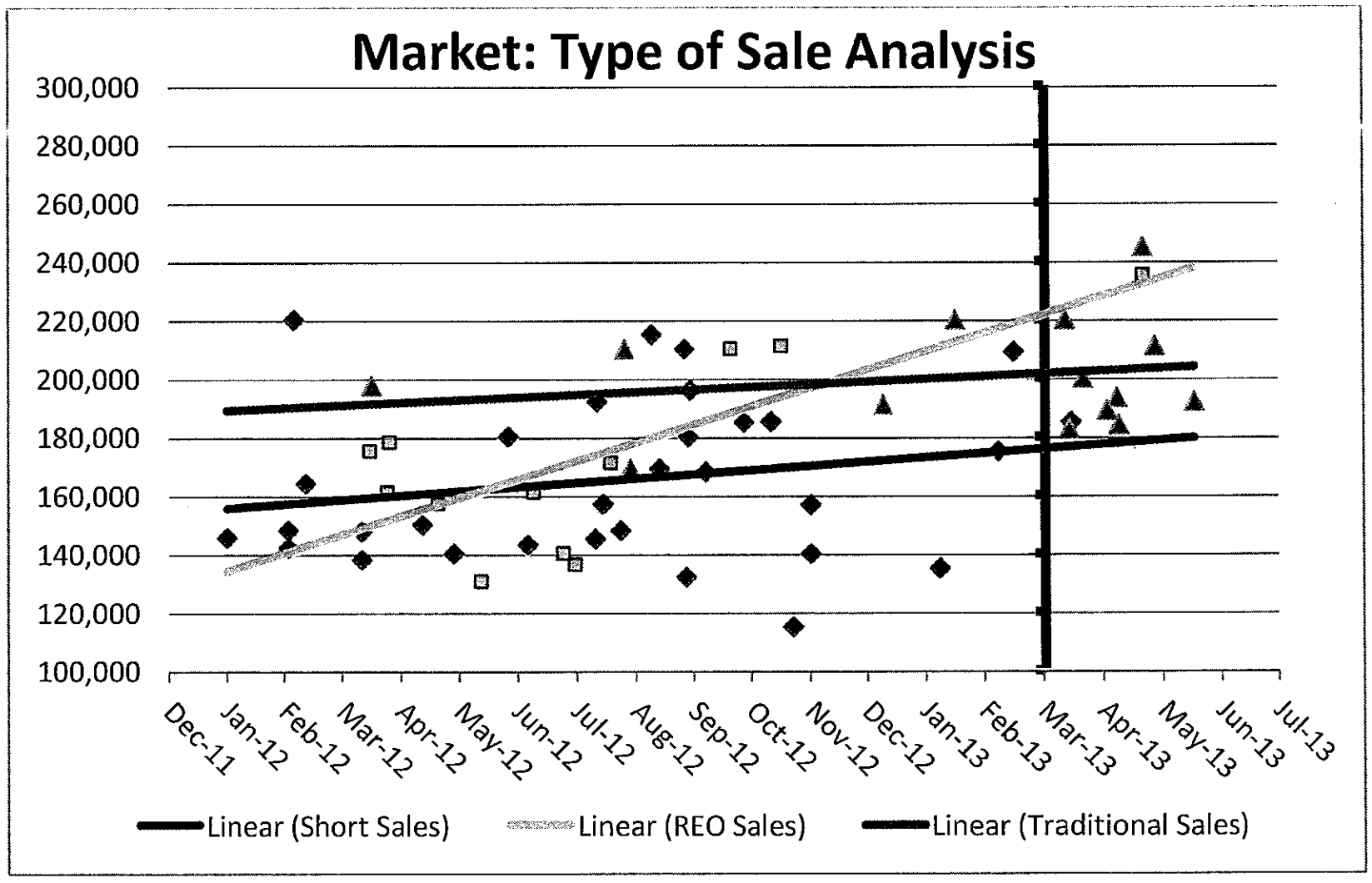
Market Output

	Sale Price	List Price	YearBlt	Concessions	DOM	Concessions	Sales to List Price Ratio	
				$		%	% less than 90 days	
mean	175,195	170,859	2004	1,036	67	0.6%	103.8%	
median	175,000	169,900	2005	0	24	0.0%	101.2%	
mode	220,000	179,900	2005	0	8	0.0%	100.0%	
min	115,000	107,900	2000	0	0	0.0%	92.6%	
max	245,000	249,900	2007	7,300	367	3.5%	144.1%	
	Analysis Date:	3/8/2013						
	12 Mos.		6 Mos.		3 Mos.		30 Days	
Sales	#	%	#	%	#	%	#	%
Traditional	14	26.9%	11	45.8%	11	68.8%	9	69.2%
REO	12	23.1%	3	12.5%	1	6.3%	1	7.7%
Short-Sale	26	50.0%	10	41.7%	4	25.0%	3	23.1%
Total	52	100.0%	24	100.0%	16	100.0%	13	100.0%

The upper portion of the table above shows point statistics of some transactional characteristics. The lower portion shows the composition of the types of sale in the market in the prior year. Non-traditional sales were dominating this market overall. However, their influence was declining. The most current comparable data was 68.8% traditional. Clearly, traditional sales did exist for comparison. If one determined that the use of a non-traditional sale was necessary, there is adequate data available to determine an adjustment. The chart on the following page shows the same information from the lower portion of the table in a graph.

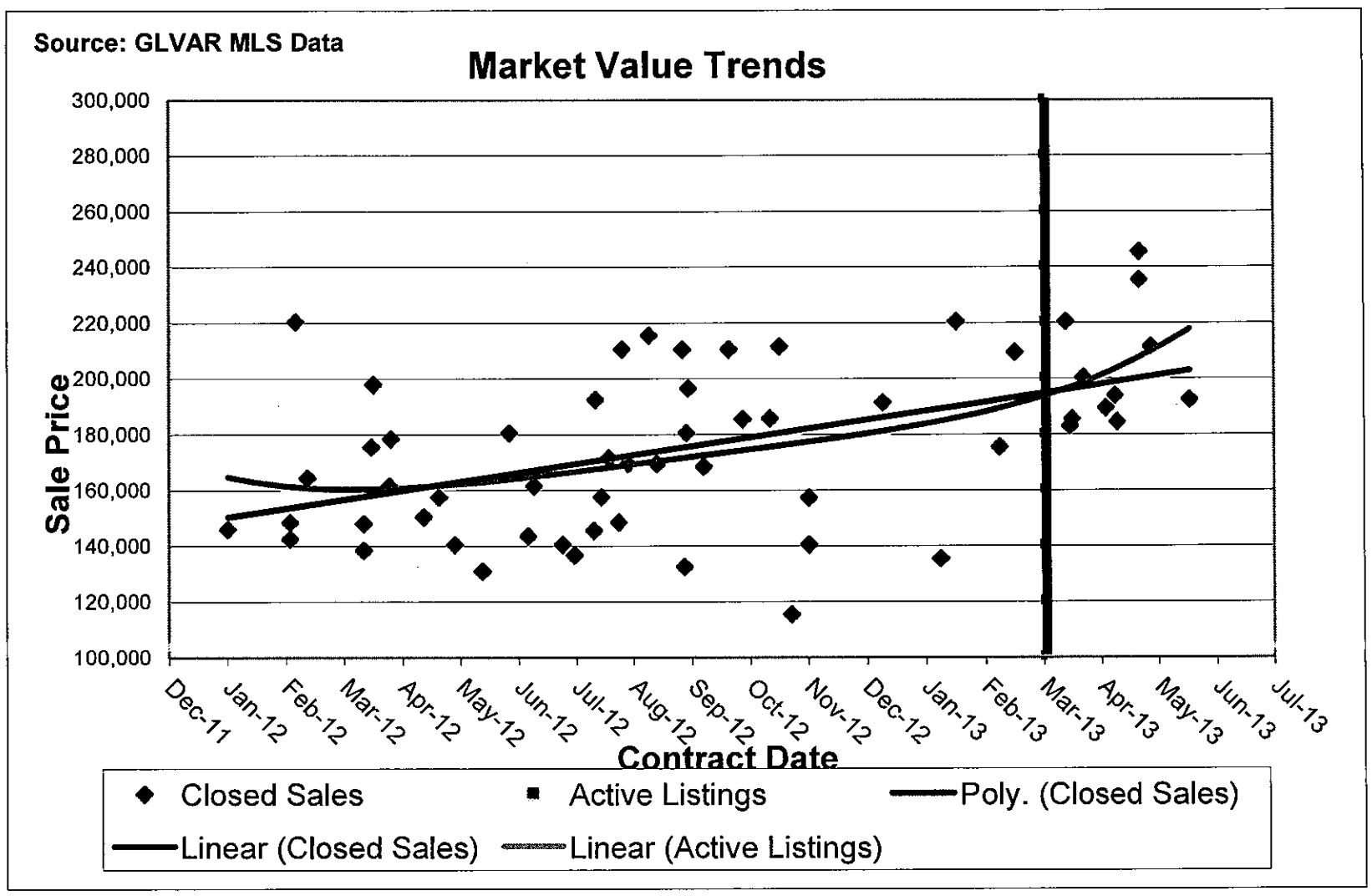


Clearly, there were traditional sales that could have and should have been used either as comparables or for comparison/analysis and adjustment. Lacking any evidence of an analysis in the Hardy/Lubawy report, the graph below shows the trends for the various types of transactions present in the retrospective subject market.



The graph separates the data by type of transaction. The trend for REO is skewed by the both the number and frequency of REO sales and would require additional analysis. However, it clearly demonstrates the need for an adjustment to the non-traditional sales.

In addition to the failure to properly analyze the non-traditional sales, Hardy/Lubawy incorrectly report a stable market. The graph below demonstrates an increasing market (~22% y-o-y) as opposed to a *stable* market as reported by Hardy/Lubawy.[18]



[18] Hardy/Lubawy Report, p. 1.

Conclusion:

By failing to distinguish the types of transactions in the market, Hardy/Lubawy fail to recognize that the subject existed in a segmented market. Traditional sales were available for comparison and analysis. They represented 68.8% of the available sales 3-months prior to the effective date. REO sales were erratic and limited in number. The influence and number of short sales was declining. In either case, an adjustment was warranted if they were going to be utilized.

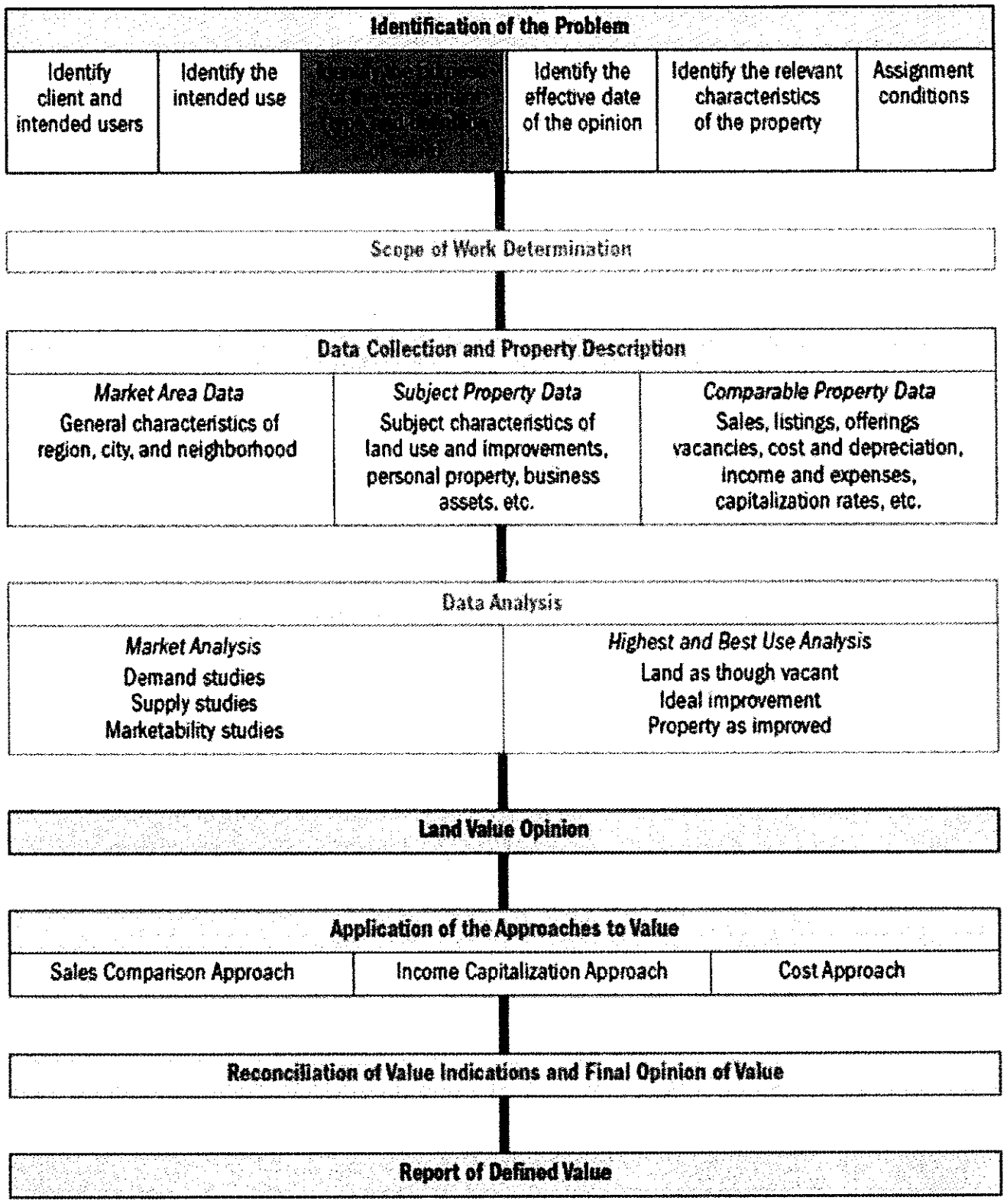
A proper analysis of the defined market value in this retrospective market requires analysis and adjustment of non-traditional sales. Failing to do either, the Hardy/Lubawy appraisal lacks credibility and is misleading.

Finding No. 2:

Failing to identify the type and definition of value applicable to the assignment demonstrates a lack of competent performance. It also causes the Hardy/Lubawy report to be misleading and to lack credibility.

Key Observations:

The diagram below comes from The Appraisal of Real Estate, 14th Edition. It shows the 8-step valuation process. The added highlight in step-1 shows that the type and definition of value are part of the first step.[19]



The definition appears on the following page for clarification.

[19] The Appraisal of Real Estate, 14th Edition, p 37 (Chicago: Appraisal Institute, 2013).

> Fair Market Value[20]
> The price at which the property would change hands between a willing buyer and a willing seller, *neither being under any compulsion to buy or to sell* and both having reasonable knowledge of relevant facts. The *fair market value* of a particular item of property includible in the decedent's gross estate *is not to be determined by a forced sale* price. Nor is the fair market value of an item of property to be determined by the sale price of the item in a market other than that in which such item is most commonly sold to the public, taking into account the location of the item wherever appropriate. (*Emphasis* added)

The IRS definition of Fair Market Value is applicable to assignments with an Intended Use of probate and/or estate tax where the IRS is an Intended User. It is not applicable to the circumstances of this case. The subject sold in accordance with NRS 116 at a forced auction because of unpaid HOA dues. Even if one overlooks the proper application of the IRS value definition, one must ignore the requirement that neither party be under compulsion and the requirement that the value is not to be determined by a forced sale.

The last clause of the IRS definition emphasizes the importance of identifying the appropriate market in which an HOA Foreclosure property will sell. Certainly, a property lacking insurable clear title, will not commonly sell in the same market as traditional owner-equity houses. Neither will it commonly sell in the same market as non-HOA foreclosure (REO) or short sale properties.

It is possible that the client imposed the utilized definition of market value upon Hardy/Lubawy. If that were the case, that information would require disclosure within the report to ensure USPAP compliance and to ensure the trier-of-fact is not misled. Lacking such disclosure, it follows that Hardy/Lubawy selected the type and definition of value.

[20] IRS Regulation §20.2031-1.

The 14th Edition states:

> *One essential task that the appraiser must complete at the very onset of the valuation process is identifying and defining the type of value that will be the focus of the appraisal assignment. The type of value should be one of the terms of engagement between the client and appraiser. The appraiser should be certain of this at the time the assignment is accepted, notwithstanding certain unusual situations.*[21]

It continues:

> *Properties in distressed markets often do not meet the conditions specified in the definition of market value. Other types of value might be more appropriate for properties when a forced sale or some other form of distress is influencing the decisions of the buyer or seller.*[22]

In 1Q 2013, the Las Vegas market was still recovering from the bursting of the housing bubble. Nevada's robosigning law (AB284) was under scrutiny leading into the 2013 legislature. Appraisers working in this retrospective market were balancing a market showing rapid appreciation due to a lack of supply - with the issue of an undetermined number of houses that were abandoned or technically abandoned. The potential of 12+ months of *shadow* inventory had many real estate professionals questioning the sustainability of the market. Following the most significant rise and fall of any housing market in the nation, Las Vegas was most certainly a distressed market.

"The intended use of an appraisal dictates which definition of market value is applicable." [23] Hardy/Lubawy notes the intended use is for *"litigation."* [24] The Hardy/Lubawy appraisal uses F*air* M*arket Value.* The definition is provided, but the source is not disclosed and there is no comment indicating how the definition is being applied. Numerous other issues and errors are noted. [25] However, they are deemed secondary in light of the use of an inapplicable type and definition of value.

Conclusion:

Based on the above information and the purpose and intended use of the assignment, an alternate definition of value was warranted. Failure to utilize an appropriate type and definition of value and numerous other errors and inconsistencies cause the report to lack credibility and to be misleading.

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[21] The Appraisal of Real Estate, 14th Edition, p 57 (Chicago: Appraisal Institute, 2013).
[22] The Appraisal of Real Estate, 14th Edition, p 65 (Chicago: Appraisal Institute, 2013).
[23] The Appraisal of Real Estate, 14th Edition, p 60. (Chicago: Appraisal Institute, 2013).
[24] Hardy/Lubawy Report, p. 1 and 4.
[25] See the table "Appraisal Report Std-3 Review Checklist" on page 15 of this report.

Finding No. 3:

The most logical type and definition of value for the assignment would be Disposition Value or a custom definition that incorporates the property rights and risk associated with the purchase of an HOA auction property. The most reasonable sales would be similar HOA auction sales.

Key Observations:

Type and Definition of Value

"The intended use of an appraisal dictates which definition of market value is applicable."[26] Hardy/Lubawy notes the intended use is *"litigation."*[27] As noted in the prior finding, *"Other types of value might be more appropriate for properties when a forced sale or some other form of distress is influencing the decisions of the buyer or seller."*[28] The current definition of Disposition Value is shown below.

Disposition Value[29]

The most probable price that a specified interest in real property should bring under the following conditions:

1. Consummation of a sale within a future exposure time specified by the client.
2. The property is subjected to market conditions prevailing as of the date of valuation.
3. Both the buyer and seller are acting prudently and knowledgeably.
4. The seller is under compulsion to sell.
5. The buyer is typically motivated.
6. Both parties are acting in what they consider to be their best interests.
7. An adequate marketing effort will be made during the exposure time specified by the client.
8. Payment will be made in cash in U.S. dollars or in terms of financial arrangements comparable thereto.
9. The price represents the normal consideration for the property sold, unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

This definition most closely captures the circumstances of a HOA foreclosure sale under NRS 116.

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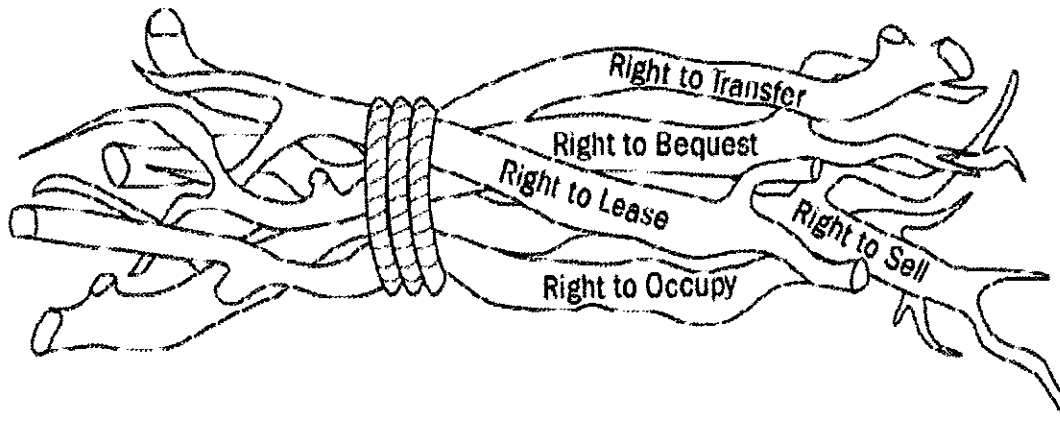
[26] The Appraisal of Real Estate, 14th Edition, p 60. (Chicago: Appraisal Institute, 2013).
[27] Hardy/Lubawy Report, p. 1 and 4.
[28] The Appraisal of Real Estate, 14th Edition, p 65 (Chicago: Appraisal Institute, 2013).
[29] The Dictionary of Real Estate Appraisal, 5th Edition, (Chicago: Appraisal Institute, 2010).

Proper Selection of Comparable Sales

The bundle of rights is a common way of referencing the components of interest in real property. A proper understanding of the bundle of rights is foundational to a properly developed and communicated appraisal. The interest or rights associated with real estate ownership are the right to: use the real estate; sell it; lease it; enter it; and give it away. They are often illustrated as a bundle of sticks. Each stick has value and can be separated and traded in the market.



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Buyers of HOA foreclosures can face limitations on any or all of these rights. Use and occupancy can be limited by pending litigation and/or prior owners/tenants that refuse to vacate. Transferability is limited by the inability to obtain insurable clear title. Clearly, these properties contain a measure of risk not present in a traditional sale, a short-sale, or a non-HOA foreclosure.

These risks and their associated costs will likely reduce the number of potential buyers. The most likely buyer is an investor. The investor's decision to buy will be affected by these risks and costs.

The 14th Edition states:

> *The real property rights to be appraised are singled out among the relevant characteristics of the property because, like the appropriate type and definition of value for the assignment, the property rights appraised are a fundamental element of the assignment. An oversight in the analysis of some other characteristic of the property may or may not have a noticeable effect on the ultimate opinion of value, but a poor understanding of what precisely is being valued guarantees a critical error in the development of the appraisal.[1] ... Real property appraisal involves not only the identification and valuation of a variety of different rights, but also the analysis of the many limitations on those rights, and the effect that the limitations have on value.* [31]

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[30] The Appraisal of Real Estate, 14th Edition, p 5 (Chicago: Appraisal Institute, 2013).

[31] The Appraisal of Real Estate, 14th Edition, p 69-70. (Chicago: Appraisal Institute, 2013).

1 See David Lennhoff, "You Can't Get the Value Right If You Get the Rights Wrong," *The Appraisal Journal* (Winter 2009): 60-65.

The cited Appraisal Journal article deals solely with commercial property. However, the concept, that the bundle of rights is fundamental to an appraisal assignment, applies.

Conclusion

Based on the above analysis, the most logical definition of value would be Disposition Value. The most similar transactions, and therefore the best comparable sales, are other HOA foreclosures. Traditional sales are so different that they should not be used. Short-sales and typical foreclosure sales require analysis of the conditions of sale and appropriate adjustment in order for their use to be meaningful and not misleading.

Conclusion – Hardy/Lubawy Expert Appraisal Report

The appraisal report completed by Hardy/Lubawy contains numerous errors, violations of the Uniform Standards of Professional Appraisal Practice, and fails to use generally recognized appraisal methodology. These errors of omission and commission cause the overall appraisal report to be misleading and to lack credibility.

Documents relevant to my opinions and conclusions, including but not limited to the workfile for the Hardy/Lubawy report, have not been produced. While I can properly review the report, I cannot fully evaluate whether the analyses, opinions and conclusions were properly *developed*. Additional findings may apply once the workfile is made available. Future stages of the assignment may include additional valuation services, including but not limited to an independent retrospective appraisal. I reserve my right to amend my findings based on future production of relevant documents.

-- END OF REVIEW --

Appraisal Report

All assignment characteristics from the review are extended to the independent opinion of value. Information from the Hardy/Lubawy appraisal regarding physical characteristics are assumed accurate. The retrospective condition is assumed to have been *average*. ***The use of these assumptions is reasonable but may have affected the assignment results.***

As noted, the most logical definition of value would be Disposition Value (as defined). The subject is appraised in fee simple interest. However, there are limitations on the bundle of rights that must be considered. As noted in the original report, buyers of HOA foreclosures can face limitations on any or all of the rights. Use and occupancy can be limited by pending litigation and/or prior owners/tenants that refuse to vacate.

As of the retrospective effective date, there was no title company in Southern Nevada willing to issue title insurance following an HOA foreclosure. The lack of insurable clear title would have limited traditional financing options and the ability to sell/transfer the property.

An additional risk in the purchase of HOA lien properties is the likelihood of litigation. The typical buyer would have been aware of numerous district court cases that ended with decisions both against and in favor of a buyer's position. As of the retrospective effective date, the typical buyer would have been aware that the Nevada Supreme Court case regarding HOA liens was still undecided.

The risks noted above are not present in the purchase of a traditional foreclosure property. They demonstrate the problem of using traditional foreclosures to measure disposition value of a HOA lien foreclosure.

My independent analysis uses an effective date of March 08, 2013, the date of the HOA auction. Research of historical foreclosures and trustees deeds in the MLS tax assessor's database revealed 13,965 transactions in Clark County that recorded between April 1, 2012, and August 1, 2013. Restricting the search criteria to detached, single-family houses between 1,800 and 2,500 square feet of GLA and built between 2000 and 2010 reduced the number of transactions to 565. Further restricting the search to properties located in MLS areas 601 through 605 reduced the number to 38. Some HOA foreclosures in this period were classified by the assessor as a traditional "recorded value." Therefore, this final search was expanded to included "recorded value" transactions resulting in 443 possible transactions.

Based on the above analysis, the best comparable sales will be similar HOA foreclosures. Reading of the recorded deeds revealed that 10 transactions (including the subject) were HOA foreclosures under NRS 116. Those transactions appear in the table below sorted by auction date with the most current transactions on top. The subject is highlighted in green.

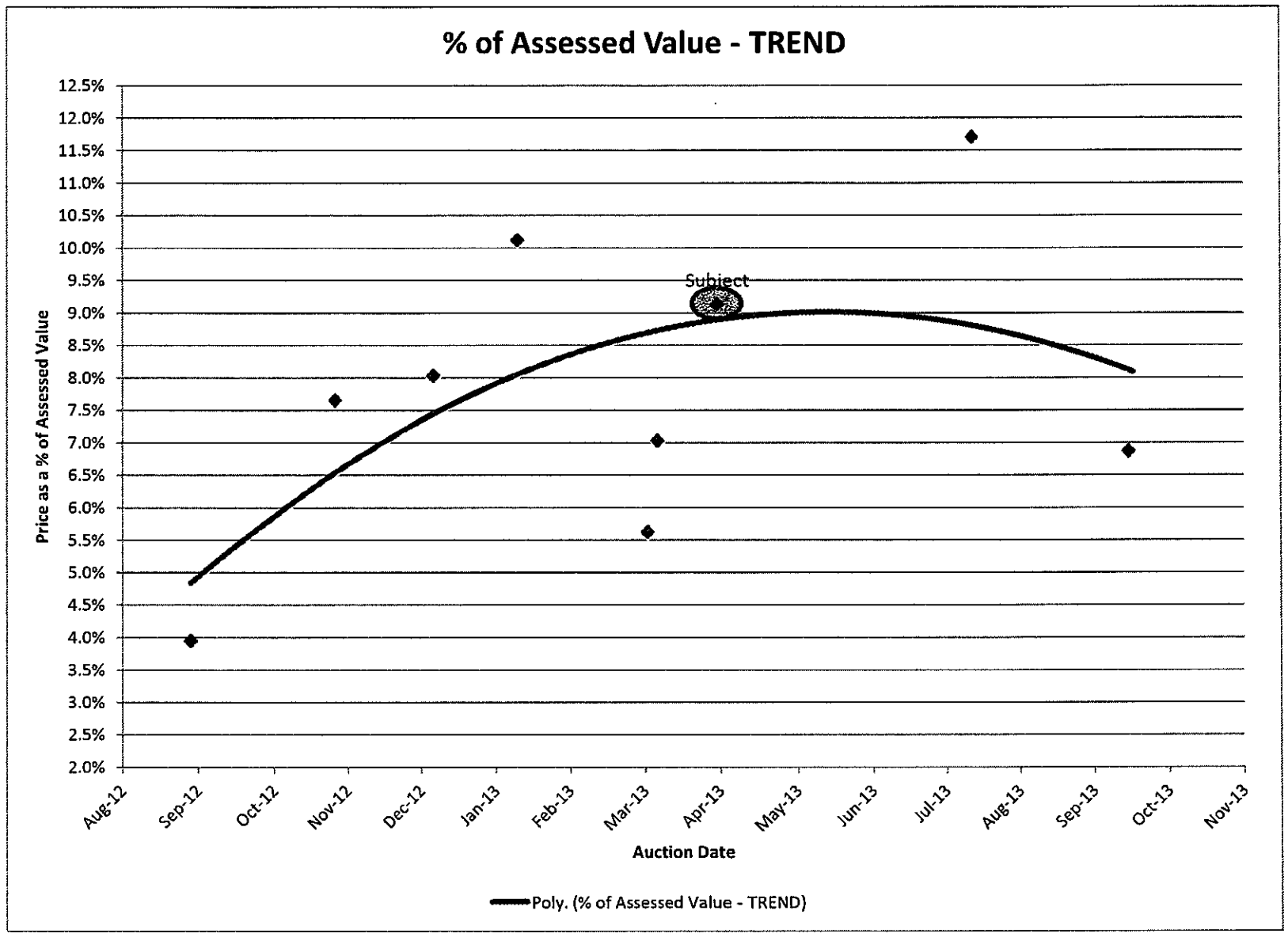
Area	Address	Typestyle	GLA	Beds	Baths	Year Built	Lot SqFt	Garage	Assessed Value	Auction Price	% of Assessed Value	Auction Date	Buyer
601	731 EMERALD IDOL PL	2 STORY	1909	3	2.5	2005	3485	438	$135,786	$9,300	6.8%	9/17/2013	SATICOY BAY LLC
601	767 EASTER LILY PL	2 STORY	1909	3	2.5	2009	3485	438	$145,446	$17,000	11.7%	7/16/2013	SFR INVESTMENTS POOI
605	668 MOONLIGHT STROLL ST	2 STORY	2161	3	2.5	2005	3485	380	$120,703	$11,000	9.1%	4/5/2013	SFR INVESTMENTS POOI
601	644 PALM WASH LN	2 STORY	1909	4	2.5	2008	3049	438	$142,574	$10,000	7.0%	3/12/2013	SFR INVESTMENTS POOI
604	139 KAVA KAVA ST	2 STORY	2470	4	2.5	2003	6098	635	$160,543	$9,000	5.6%	3/8/2013	PREMIER ONE HOLDING
601	650 TALIPUT PALM PL	2 STORY	1915	3	2.5	2008	3920	447	$156,363	$15,800	10.1%	1/15/2013	SFR INVESTMENTS POOI
605	297 JESSICA GROVE ST	2 STORY	2334	4	3	2006	6098	623	$149,674	$12,000	8.0%	12/12/2012	SFR INVESTMENTS POOI
605	682 POINT BLUFF ST	2 STORY	2052	3	2.5	2005	3485	410	$123,157	$9,400	7.6%	11/2/2012	THREE PALMS INV GRP
604	1010 PECOS RIVER AV	2 STORY	2260	4	3	2005	3920	456	$152,654	$6,000	3.9%	9/5/2012	SFR INVESTMENTS POOI

Mean	7.8%
Median	7.6%
Mode	#N/A
St. Deviation	2.3%
Min	3.9%
Max	11.7%

Outlier

601	1423 ORANGE JUBILEE RD	2 STORY	1972	3	2.5	2006	1307	424	$103,340	$24,100	23.3%	6/20/2013	SATICOY BAY LLC

During the verification, it was discovered that in later HOA lien transactions the assessed value was utilized to calculate the real property transfer tax. Assessed value becomes a constant point of reference that can be used for comparison. Analysis of the auction price as a percentage of the assessed value for similar transactions reveals a range from 3.9% to 23.3%. The transaction at 1423 Orange Jubilee is considered an outlier and is removed from the analysis. The trend indicated by the data appears on the following page.



Logically one would expect the disposition value to fall somewhere within the range indicated by the most current data.

Conclusion:

The subject auction price of $11,000 is 9.1% of the retrospective assessed value. This figure falls within the range of contemporaneous transactions and is just above the trendline. The conditions of the auction sale meet the conditions of the definition of disposition value. Therefore, my professional opinion is that the subject's acquisition price is equivalent to the retrospective disposition value.

As an HOA foreclosure property, the retrospective disposition value as of March 08, 2013 was:

$11,000
Eleven Thousand Dollars

-- END OF APPRAISAL --
-- END OF REPORT --

Addenda

A. Qualifications of Michael Brunson
B. Expert Disclosure for Michael Brunson

Addendum A: Qualifications of Michael Brunson

Michael L. Brunson, SRA, MNAA

AQB Certified USPAP Instructor
Nevada Certified Residential Appraiser #A.0002794-CR
Member of the Nevada Real Estate Division Appraisal Advisory Review Committee
Collateral Valuation Specialist
mike@**RE**damages.com www.**RE**damages.com

VALUATION BUSINESS BACKGROUND

Brunson-Jiu, LLC (Partner, 2011 – Present) Founding partner of a firm providing real property valuations, consulting and expert witness services. Areas of specialty include: real estate damages analysis for residential, commercial, vacant land and multi-family properties; and business valuation and exit planning strategies.

Bell Anderson & Sanders LLC (Contract Appraiser, 2008 – 2014) Engagement involved studying the economic impact of detrimental conditions, including issues such as environmental contamination, construction defects, legal conditions such as eminent domain, and proximity effects.

Columbia Institute (Instructor, 2009-Present) Approved to teach pre-licensing and continuing education courses related to residential appraisal

Ascent Appraisal, Inc. (Principle/Chief Appraiser, 1997 – 2011) An independent real estate valuation and consulting firm providing a comprehensive range of professional valuation products and services. We specialize in expert witness services; litigation support and consulting; forensic review; and complex valuation assignments.

Institute for Real Estate and Appraisal Studies (Instructor, 2003 – 2009) Approved to teach both pre-licensing and continuing education courses related to residential appraisal.

Ascent Inspection, Inc. (Owner/Primary Inspector, 2001 – 2003) An independent residential and commercial inspection firm providing both pre-purchase and pre-listing property inspections.

Berry & Associates (Registered Intern/Office Manager, 1995 – 1997) Performed single and multi-family residential appraisal assignments in form reports on various property types; conducted extensive market research & due diligence; performed internal appraisal review function; and appraisal office management.

EXPERT WITNESS / CONSULTING

AQB Certified USPAP Instructor The Uniform Standards of Professional Appraisal Practice (USPAP) are the recognized standard of care for professional appraisers. Michael is one of only six certified appraisers qualified as an AQB Certified USPAP Instructor in Nevada. He teaches USPAP courses and provides USPAP consultation to attorneys, appraisers, and lending clients. Michael has completed assignments for civil, probate, real estate damages, and divorce cases. He has qualified as an expert witness in real estate valuation in the 8th Judicial District Court of Clark County, Nevada.

Assignments in which an expert has provided deposition or court testimony are disclosed in compliance with state/federal law. Cases lacking such testimony are confidential.

Cases with Court Testimony:	Johnson et al v Stanpark, 09A606013
	Santos Probate, 10P068058
	Dennett v Miller, A-459131
Cases with Deposition:	FDIC v CoreLogic, SACV11-704 DOC
	Nguyen v Taylor, 11A644936C
	Aguirre (et al) v American Nevada (et al), 09A600566
	Copper Sands HOA, Etal v Copper Sands Realty, LLC, A-560139
	Deutsche Bank National Trust Co. v Mha, A-532836
	Carlisle v Pardee, A-421939
	Demby v Chamberlin, A-443513

INTERVIEWS, PUBLICATIONS AND PUBLIC TESTIMONY

Local and national media recognize Michael as an expert in the Las Vegas Real Estate market.

- Panel Member, Spring 2015 Housing Outlook, Homebuilders Research (May 29, 2015)
- Panel Member, Lied Institute and Nevada Department of Business and Industry - Nevada Housing Forum (September 22, 2014)
- Panel Member, Using the Cost Addendum for High Performance Homes (October, 16, 2013)
- Panel Member, The Green Home Valuation Summit, Phoenix, AZ (September 23, 2013)
- Appraisal Industry Representative, Special City Council Meeting of the City of North Las Vegas, Regarding the underwater mortgage crisis (June 11, 2013)
- Panel Member, Spring 2013 Housing Outlook, Homebuilders Research (April 12, 2013)
- Interviewed by Diana Olick of CNBC (March 5, 2013 published on cnbc.com and aired on the NPR Nightly Business Report)
- Panel Member and Presenter, 2012 High Performance Home & Building Summit (August 15-16, 2012)
- Panel Member, Spring 2012 Housing Outlook, Homebuilders Research (April 27, 2012) Quoted by Hubble Smith of the Las Vegas Review Journal.
- Real Estate Panel Member, Spring 2011 Economic Outlook, UNLV Center for Business and Economic Research, (June 20, 2011)
- Interviewed by Jason Morgan of *Valuation Review*, Appraisers caught in the middle of Las Vegas housing market tensions, Online: March, 31, 2011, Print: April 25, 2011
- Interviewed by Calvert Collins of KLAS-TV (aired March 28, 2011)
- Author, Growing Business: Giving Clients What They Need, Vol. 217, February 16, 2011, *Working RE Magazine*
- Interviewed by Hubbel Smith of the Las Vegas Review-Journal (August 5, 2010).
- Interviewed by Calvert Collins of KLAS-TV (aired May 5, 2010)
- Interviewed by Dana Gentry of Las Vegas 1 (aired March 27, 2009)
- Interviewed by Chris Saldana of KLAS-TV (aired March 9, 2009)
- Interviewed by Stephanie Dhue of the Nightly Business Report (aired October 12, 2007).
- Interviewed by Hubbel Smith of the Las Vegas Review-Journal (June 7, 2007).

Michael has provided public comment and testimony before the Nevada Commission of Real Estate Appraisers, the Nevada Assembly Committee on Commerce and Labor and the Nevada Senate Committee on Commerce and Labor on numerous occasions.

MEMBERSHIPS

National Association of Appraisers: 2013, 2014 President; 2010-2012 Vice President,

Coalition of Appraisers in Nevada: 2011, 2010 President; 2009 Vice President; Government Relations Committee Chair 2009-2014.

SRA Designated Member, Appraisal Institute

National Association of Realtors

Greater Las Vegas Association of Realtors

TEACHING EXPERIENCE

Approved by the State of Nevada to teach both pre-licensing and continuing education appraisal courses. Michael has also been approved to teach courses in California, Arizona, Indiana, Michigan, Wisconsin, and Utah. A partial list of classes includes:

Fundamentals of Real Estate Appraisal
Applied Residential Appraisal Techniques I
Appraisal Law in Nevada
Highest & Best Use Analysis I
Appraising Small Residential Income Properties
Cost Approach Revisited
Communicating the Appraisal I, II, III and IV
7 and 15 Hour National Uniform Standards of Professional Appraisal Practice
How Finance affects Value
Advanced Neighborhood and Market Area Analysis
Appraising 2-4 & Multi-Family Properties
Foreclosures & Short Sales: Dilemmas and Solutions

Private seminars authored and instructed by Mr. Brunson:

Neighborhood and Market Analysis I and II
Cost Approach – The Square Foot Method
Mortgage Fraud – An Appraiser's Perspective (NV CLE Seminar)
Residential Real Estate Appraisal (For Brokers/Agents)
How to Select & Evaluate an Expert Witness (NV CLE Seminar)

EDUCATION

Professional Education

University of Nevada, Las Vegas, Introductory and Intermediate Statistics
Clark County Community College, Principles of Real Estate Appraisal
Appraisal Institute, Standards of Professional Practice, Part A (410)
Appraisal Institute, Standards of Professional Practice, Part B (420)
Appraisal Institute, Standards of Professional Practice, Part C (430)
Appraisal Institute, Nevada Appraisal Statutes
Appraisal Institute, FHA and the Appraisal Process
Appraisal Institute, Complex Litigation Appraisal Case Studies
Appraisal Institute, Analyzing the Effects of Environmental Contamination on Real Estate
Appraisal Institute, Advanced Income Capitalization
Appraisal Institute, Advanced Spreadsheet Modeling for Valuation Applications
Appraisal Institute, General Appraiser Site Valuation and Cost Approach
Appraisal Institute, General Appraiser Sales Comparison Approach
Appraisal Institute, General Appraiser Market Analysis and Highest and Best Use
Appraisal Institute, Real Estate Finance, Statistics, and Valuation Modeling
Appraisal Institute, Advanced Residential Report Writing, Part I and II
Nevada Commission of Appraisers, Valuing Residential Energy Efficiency
Chicopee Group, Impact of Financing on Appraisals
TWI Systems, 50 hours of Professional Inspection Training
Clark County Community College, 60 hours of home Inspectors Training
Institute for Real Estate and Appraisal Studies, Applied Residential Appraisal Techniques I
Institute for Real Estate and Appraisal Studies, Highest and Best Use Analysis I
Institute for Real Estate and Appraisal Studies, Introduction to Business Appraisal
Institute for Real Estate and Appraisal Studies, Small Residential Income Properties I
Institute for Real Estate and Appraisal Studies, Introduction to Commercial Appraisal
Institute for Real Estate and Appraisal Studies, Income Capitalization I and II
IRWA, Principles of Real Estate Engineering
IRWA, Understanding Environmental Contamination in Real Estate
IRWA, Environmental Due Diligence and Liability
(Current Continuing Education course list available upon request)

Other Education

University of Nevada at Las Vegas, Las Vegas, NV - 1991
B.A. in Psychology. Emphasis on experimental psychology and methodology.

Chaparral High School, Las Vegas, NV ▪ 1987
Graduated with High Honors.

REFERENCES

- Available upon request

Addendum B: Expert Disclosure Requirements

Compensation for Study and Testimony:

Michael L. Brunson charged an hourly rate of $300 per hour for this stage of the assignment. Michael's hourly rate is $300 for non-testimony time and $350 for testimony time. Non-testimony time is billed for research, consultation, meetings, field inspections, travel, analysis, deposition preparation, and court preparation.

Publications:

Author, Growing Business: Giving Clients What They Need, February 16, 2011, Vol. 217, *Working RE Magazine*

National Association of Appraisers, Appraisal 4-1-1 e-newsletters

Summary of Recent Testimony:

Court testimony:	Johnson et al v Stanpark, 09A606013
	Santos Probate, 10P068058
	Dennett v Miller, A-459131
Deposition Testimony:	FDIC v CoreLogic, SACV11-704 DOC
	Nguyen v Taylor, 11A644936C
	Aguirre (et al) v American Nevada (et al), 09A600566
	Copper Sands HOA, Etal v Copper Sands Realty, LLC, A-560139
	Deutsche Bank National Trust Co. v Mha, A-532836
	Carlisle v Pardee, A-421939
	Demby v Chamberlin, A-443513

TAB 12

OMSJ
MELANIE D. MORGAN, ESQ.
Nevada Bar No. 8215
TENESA S. SCATURRO, ESQ.
Nevada Bar No. 12488
AKERMAN LLP
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89134
Telephone: (702) 634-5000
Facsimile: (702) 380-8572
Email: melanie.morgan@akerman.com
Email: tenesa.scaturro@akerman.com

Attorneys for Bank of America, N.A., as Successor by Merger to BAC Home Loans Servicing, LP fka Countrywide Home Loans, Inc., incorrectly sued as Countrywide Home Loans, Inc. and Nationstar Mortgage, LLC

AKERMAN LLP
1160 TOWN CENTER DRIVE, SUITE 330
LAS VEGAS, NEVADA 89144
TEL.: (702) 634-5000 – FAX: (702) 380-8572

DISTRICT COURT

CLARK COUNTY, NEVADA

IGNACIO GUTIERREZ, an individual,

Plaintiff,

vs.

SFR INVESTMENTS POOL 1, LLC; NEVADA ASSOCIATION SERVICES, INC.; HORIZON HEIGHTS HOMEOWNERS ASSOCIATION; KB HOME MORTGAGE COMPANY, a foreign corporation; DOE Individuals I through X; ROE Corporations and Organizations I through X,

Defendants.

SFR INVESTMENTS POOL 1, LLC, Nevada Limited Liability Company,

Counter-Claimant and Third Party Plaintiff,

vs.

IGNACIO GUTIERREZ, an individual; NATIONSTAR MORTGAGE, LLC, a Delaware limited liability company; COUNTRYWIDE HOME LOANS, INC., a foreign corporation; DOES I through X; and ROES 1-10, inclusive,

Counter-Defendant and Third Party Defendants.

Case No.: A-13-684715-C

Dept. No: XVII

NATIONSTAR MORTGAGE, LLC'S RESPONSE IN OPPOSITION TO SFR INVESTMENT POOL 1, LLC'S MOTION FOR SUMMARY JUDGMENT

Hearing Date: January 3, 2018
Hearing Time: 8:30 a.m.

Nationstar Mortgage LLC files this response in opposition to SFR Investment Pool 1, LLC's (**SFR**) motion for summary judgment. Nationstar incorporates by reference the arguments and evidence in support of its own motion for summary judgment.

I. INTRODUCTION

At the time of the HOA Sale, Freddie Mac had a property interest by virtue of its ownership of the Deed of Trust encumbering the Property.[1] The Federal Foreclosure Bar protected that interest from extinguishment, precluding SFR from taking an interest in the Property free and clear of the Deed of Trust.

Nationstar's arguments supporting summary judgment were recently endorsed fully by the Ninth Circuit in three cases: *Berezovsky*, *Elmer*, and *Flagstar*. The first two affirmed summary judgment to FHFA, Freddie Mac, and Freddie Mac's servicers. Those cases are two of ten related cases in which this Court has granted nearly identical summary judgment motions. Here, just as in those ten related cases, Nationstar has submitted ample, admissible evidence of Freddie Mac's property interest. SFR has presented no contradictory evidence, only arguments that misconstrue governing law and misinterpret this evidence in ways that contradict controlling authority. Courts have already rejected these arguments, and SFR offers no plausible basis to distinguish this case. Accordingly, the Court should deny the SFR's motion and grant summary judgment in favor of Nationstar.

II. STATEMENT OF FACTS

Nationstar incorporates by reference the statement of facts set forth in its motion for summary judgment. Nationstar disputes SFR's statement of fact that the foreclosure sale complied with all requirements of law. MSJ at 5. As set forth in Nationstar's motion, NAS did not mail a copy of the notice of sale to Nationstar. Nationstar's MSJ at 20.

. . .

. . .

. . .

[1] Terms not defined herein shall take on the definition in Nationstar's Motion for Summary Judgment (**MSJ**).

AKERMAN LLP
1160 TOWN CENTER DRIVE, SUITE 330
LAS VEGAS, NEVADA 89144
TEL.: (702) 634-5000 – FAX: (702) 380-8572

III. ARGUMENT

Nationstar incorporates by reference its arguments in its renewed motion for summary judgment, and more specifically opposes SFR's motion on the following additional grounds.

A. Nationstar is Not Seeking to Enforce a Right of Redemption.

SFR first claims title vested in SFR without equity or right of redemption. MSJ at 6-7. The argument is red herring. Nationstar is not seeking to enforce any kind of statutory redemption right. Rather, as set forth in its motion for summary judgment, Nationstar is relying on a federal statute to show that the HOA's foreclosure sale could not have extinguished the deed of trust. *See* 12 U.S.C. § 4617(j)(3); *see also* Nationstar MSJ at 10-20.

B. The Nevada Supreme Court rejected SFR's deed recitals argument.

SFR argues this Court should look no further than the trustee's deed recitals because foreclosure sales and the resulting deeds are presumed valid, and the recitals contained within the trustee's deed are conclusive. MSJ at 7-8. This argument ignores the Nevada Supreme Court's decision in *Shadow Wood* when making this argument. In *Shadow Wood*, 132 Nev. Adv. Op. at 21, the Court noted that the deed recitals outlined in NRS 116.3116 only concern "default, notice, and publication of the" notice of sale, and thus do not provide any presumption regarding other aspects of the foreclosure. *Id*., at 10. As to those issues, Nevada courts "retain the power, in an appropriate case, to set aside a defective foreclosure sale on equitable grounds." *Shadow Wood*, 132 Nev. Ad. Op. 5 at 11, 2016 WL 347979, at *5 (quoting *Golden v. Tomiyasu*, 387 P.2d 989, 995 (Nev. 1963)). To the extent Nationstar has the burden to produce evidence of the kind of unfairness necessary to set aside a sale, it has more than met that burden. As set forth in Nationstar's motion for summary judgment, several defects in the foreclosure process warrant relief from the HOA foreclosure sale, including the HOA trustee's failure to provide Nationstar notice of the sale. MSJ at 20-24.

C. SFR Fails to Raise Any Meaningful Challenge to the Evidence Here.

The Court should not credit SFR's objection to the evidence or to judicial notice of the facts in the public record because it alleges there has been some "serious misconduct" on the part of Nationstar. SFR MSJ at 16-17. SFR's aspersions are grounded in allegations of mistakes made by *other servicers* in *other actions*, and SFR does not point to any fact casting doubt on the accuracy of

AKERMAN LLP
1160 TOWN CENTER DRIVE, SUITE 330
LAS VEGAS, NEVADA 89144
TEL.: (702) 634-5000 – FAX: (702) 380-8572

the evidence here. SFR cannot use guilt-by-association to refute presumptively valid property records from the county recorder's office. Similarly, the HUD report that SFR cites concerns the mortgage foreclosure practices of *other* servicers in connection with foreclosures conducted prior to 2012 on Federal Housing Administration insured loans.[2] *See* SFR MSJ Ex. H-1. The HUD report has nothing to do with this case: the Loan here is owned by an Enterprise under FHFA conservatorship, not one of the loans insured by the FHA described in the report; Nationstar is not mentioned in the HUD report; and the Loan here was not foreclosed upon, prior to 2012 or otherwise, so any concerns about foreclosure-related conduct has no bearing on the issues here. SFR fails to explain how the issues discussed in the report relate to any document or fact concerning the Loan here. SFR cannot create an issue of material fact by making allegations of misconduct by others in contexts completely different from those here.

Nationstar did produce testimony, and documents, from Freddie Mac regarding its ownership of the Loan. MSJ at Ex. B. The evidence is attached to and explained in Nationstar's motion for summary judgment. *Id.* To the extent SFR argues Nationstar cannot rely on this evidence because it was not produced with its disclosures, SFR is mistaken. Nationstar produced the documents Mr. Meyer relied on with its third and fourth supplemental disclosures. MSJ at Ex. D. Nevada's Rules of Civil Procedure also do not mandate supplements to initial disclosures must be made before the discovery cutoff date. NRCP 16.1, 26(e). In fact, a party is permitted to disclose witnesses it intends to present at trial up to thirty days before trial. NRCP 16.1(a)(3). Nationstar served its sixth supplemental initial disclosures, disclosing Freddie Mac's corporate representative as an individual with knowledge of the Freddie Mac's ownership of the Loan, on November 29, 2017. Nationstar's Sixth Supplemental Disclosures, **Ex. A**. Nationstar's disclosure was timely. *See id.*

SFR argues Nationstar never told the Court it owned the Deed of Trust, specifically referencing statements made in an October 14, 2015 motion to dismiss, and points to Nationstar's interrogatory responses from 2015 where it inadvertently failed to respond to two questions. MSJ at 14-15. SFR's arguments are disingenuous. Nationstar is unaware of any motion to dismiss filed on

[2] The Federal Housing Administration ("FHA") is not the same entity as FHFA.

AKERMAN LLP
1160 TOWN CENTER DRIVE, SUITE 330
LAS VEGAS, NEVADA 89144
TEL.: (702) 634-5000 – FAX: (702) 380-8572

October 14, 2015. To the extent SFR is referring to Nationstar's motion to dismiss its third party complaint filed September 18, 2013, over four years ago, SFR is simply nitpicking semantics. True, Nationstar did characterize the mortgage as "its loan" in the motion, but the reasons for doing so are easy to understand. Nationstar is the beneficiary of record of the Deed of Trust. MSJ at Ex. D. This does not mean Nationstar owns the Loan. SFR's arguments are even more insincere due to the fact that it clearly had notice of Freddie Mac's ownership claims as early as September 28, 2015, when Nationstar opposed SFR's motion for summary judgment. SFR also should not be permitted to take advantage of Nationstar's inadvertent failure to answer two out of thirty interrogatories SFR served back in 2015. This is the first time the mistake was brought to Nationstar's attention.[3] Had Nationstar been aware, it would have corrected the issue long ago. SFR has waived any argument the responses are deficient.

D. Securitization of the Loan Is Irrelevant to the Protection of the Federal Foreclosure Bar.

SFR also contends that the Loan here was securitized, and that the Federal Foreclosure Bar does not apply because FHFA as Conservator does not succeed to the ownership of securitized loans, unlike all other assets of the Enterprises. SFR MSJ at 17-20. These arguments fail both as a matter of law and fact. The Loan was not securitized at the time of the HOA Sale. Even if it had been securitized, it would have no bearing on the Federal Foreclosure Bar's protection because Freddie Mac owns the mortgage loans it securitizes, and FHFA as Conservator succeeds to that ownership interest during the conservatorship.

1. The Loan Was Not Securitized at the Time of the HOA Sale.

SFR's securitization argument is irrelevant to this case because the Loan was *not* securitized at the time of the HOA Sale. While Freddie Mac placed the Loan into a securitization trust after acquisition, it was removed from that trust and transferred to Freddie Mac's unsecuritized portfolio of loans January 15, 2009, more than four years before the HOA Sale in April 2013. **Ex. B**, Supp.

[3] SFR's argument is also disingenuous because it omits the fact that Nationstar clearly stated that it was acting as Freddie Mac's servicer at least five times in responses to SFR's second set of discovery requests. SFR also deposed Nationstar twice and each time testified repeatedly that Freddie Mac owned the loan.

AKERMAN LLP
1160 TOWN CENTER DRIVE, SUITE 330
LAS VEGAS, NEVADA 89144
TEL.: (702) 634-5000 – FAX: (702) 380-8572

Decl. of Dean Meyer, ¶ 8. The Loan has not been securitized since. *Id.*

SFR cites no evidence to the contrary demonstrating that the Loan was securitized at the time of the HOA Sale. Rather, SFR merely contends that the Loan may have been securitized. Given that SFR's speculation is incorrect, this should end any inquiry into securitization. Indeed, the only time securitization could possibly matter is at the time of the HOA Sale—that is the time that Freddie Mac's property interest either existed or did not, and thus was protected by the Federal Foreclosure Bar, or was not. The evidence confirms the Loan was not securitized at the time of the HOA Sale, so SFR's remaining arguments on the issue are not relevant here.

2. Freddie Mac Owns the Loans It Securitizes

Even if the Loan had been securitized at the time of the HOA Sale, SFR's argument is premised on the flawed assumption that Freddie Mac does not own the loans it securitizes. As a matter of law, the Enterprises own the loans that they securitize, because those loans are deposited into common-law trusts of which the Enterprise is the trustee. The Enterprises then sell certificates that entitle the certificate-holders to a contractually specified portion of the payments borrowers make on the mortgages in that pool. *See, e.g.*, March 2013 PC Master Trust Agreement, "Definitions" (defining Freddie Mac as the trustee).[4]

As the Seventh Circuit explained in a case involving securitized assets, "[i]n American law, a trustee is the legal owner of the trust's assets." *Paloian v. LaSalle Bank, N.A.*, 619 F.3d 688, 691 (7th Cir. 2010). Courts in New York—the jurisdiction governing the execution of Freddie Mac trust agreements—confirm that a common-law trust is not a legally cognizable entity capable of owning property, but instead can act only through a trustee, which holds legal title to trust property. *S.E.C. v. Am. Bd. of Trade, Inc.*, 654 F. Supp. 361, 366 (S.D.N.Y.), aff'd, 830 F.2d 431 (2d Cir. 1987) ("A trustee . . . holds legal or equitable title to the property placed in his possession."). Indeed, it is well established that "a traditional common law trust is a legal relationship between legal entities, not a legal entity in-and-of-itself . . . . A trust is not a legal 'person' which can own property . . . ." *Lane*

[4] A copy of the March 2013 PC Master Trust Agreement that was in effect at the time of the September 7, 2013 HOA Sale is publicly available at http://www.freddiemac.com/mbs/docs/pcagreement_032213.pdf.

AKERMAN LLP
1160 TOWN CENTER DRIVE, SUITE 330
LAS VEGAS, NEVADA 89144
TEL.: (702) 634-5000 – FAX: (702) 380-8572

v. Wells Fargo Bank, N.A., No. 3:12-cv-00015-RCJ-VPC, 2012 WL 4792914, at *6 (D. Nev. Oct. 8, 2012); *see also* 76 Am Jur. 2d Trusts § 3 (2005) ("[T]he general rule is that '[a] trust is not an entity distinct from its trustees and capable of legal action on its own behalf, but merely a fiduciary relationship with respect to property.'").

Thus, Freddie Mac's common-law securitization trusts are not legal entities that have the capacity to own property, and the beneficiaries of those trusts are not the owners of the trust property. Pursuant to blackletter trust law, Freddie Mac maintains ownership of the assets of the trust as trustee.

SFR also cites to a Freddie Mac FAQ, SFR MSJ at 20, leaving out context which demonstrates it is not relevant here. That particular FAQ discusses "Senior Subordinate" trusts that have been used by Freddie Mac to securitize only certain mortgage loans purchased since 2015, and thus do not pertain to any of the Loan at issue here—or any other Freddie Mac loans at issue in related HOA-sale litigation, all of which were purchased before 2015. *See* Bulletin at 4-5 (Apr. 15, 2015), http://www.freddiemac.com/singlefamily/guide/bulletins/pdf/bll1505.pdf. That FAQ is relevant to only that subset of mortgage loans, and those that Freddie Mac owns. Indeed, other FAQs provided to borrowers of Freddie-Mac owned loans, such as the one here, makes clear that Freddie Mac owns those mortgage loans. *See, e.g.*, Borrower Notification Letter FAQs, http://myhome.freddiemac.com/own/borrower_notification_letter_faqs.html ("your mortgage was sold to us [Freddie Mac]").

3. FHFA Succeeds to Mortgages Held in Trust

SFR argues, seemingly in the alternative, that even if Freddie Mac owns securitized loans, FHFA does not succeed to that ownership interest. SFR relies on a provision of HERA that says securitized loans "shall be held" by the Conservator. SFR MSJ at 17-20 (citing 12 U.S.C. § 4617(b)(19)(B) (the "Trust Protection Provision")). SFR contends that this means FHFA did not succeed to mortgages "held in trust," as it did to all Enterprise assets pursuant to 12 U.S.C. § 4617(b)(2)(A)(i) (the "Succession Provision"), which provides that FHFA "by operation of law, immediately succeed[s] to … all rights, titles, powers, and privileges of the [entity in conservatorship] with respect to … [its] assets …." SFR's argument thus is rooted in an assertion

AKERMAN LLP
1160 TOWN CENTER DRIVE, SUITE 330
LAS VEGAS, NEVADA 89144
TEL.: (702) 634-5000 – FAX: (702) 380-8572

that the word "holding" must be read as an exception to "succession," an assertion unsupported by the statute itself.

Indeed, the Ninth Circuit in *Elmer* gave this argument short shrift, holding that the plain language of the Trust Protection Provision "prohibits creditors from drawing on assets held in trust to satisfy creditors' claims; it does not bar the Agency from succeeding to [an Enterprise's] interest in the assets." *Elmer*, 2017 WL 3822061, at *2. This plain-language interpretation by the Ninth Circuit lays bare that the logic of SFR's argument breaks down swiftly: "to succeed" and "to hold" are not mutually exclusive.

SFR's proffered reading of the Trust Protection Provision also makes no practical sense. The provision as a whole specifies that securitized mortgages are off-limits to the Enterprises' general creditors, that the Conservator must hold them according to the terms of the trust agreements underlying the particular securitization pool, and that FHFA can promulgate reasonable regulations to cabin the damages available on claims relating to such mortgages.[5] This reflects sound policy by Congress aimed at stabilizing the nation's housing-finance system.

Yet SFR contends that this unrelated HERA provision—one to which the Succession Provision makes no reference, and which itself makes no reference to the Succession Provision—somehow supersedes and nullifies the Succession Provision as it would apply to the Enterprises' securitized loans, thereby leaving that class of asset, and *only* that class, subject to the impairments against which the Federal Foreclosure Bar protects. That is wrong. SFR's interpretation would

[5] 12 U.S.C. § 4617(b)(19)(B) reads as follows:

> (i) In general
>
> Any mortgage, pool of mortgages, or interest in a pool of mortgages held in trust, custodial, or agency capacity by a regulated entity for the benefit of any person other than the regulated entity shall not be available to satisfy the claims of creditors generally, except that nothing in this clause shall be construed to expand or otherwise affect the authority of any regulated entity.
>
> (ii) Holding of mortgages
>
> Any mortgage, pool of mortgages, or interest in a pool of mortgages described in clause (i) shall be held by the conservator or receiver appointed under this section for the beneficial owners of such mortgage, pool of mortgages, or interest in accordance with the terms of the agreement creating such trust, custodial, or other agency arrangement.
>
> (iii) Liability of conservator or receiver
>
> The liability of the conservator or receiver appointed under this section for damages shall, in the case of any contingent or unliquidated claim relating to the mortgages held in trust, be estimated in accordance with the regulations of the Director.

AKERMAN LLP
1160 TOWN CENTER DRIVE, SUITE 330
LAS VEGAS, NEVADA 89144
TEL.: (702) 634-5000 – FAX: (702) 380-8572

leave securitized mortgages with *less* protection than that afforded to unsecuritized loans under the Federal Foreclosure Bar, flouting Congress's intent to preserve the Enterprises' securitization function—and thereby destabilizing the secondary mortgage market.

If, as SFR contends, Congress intended the Trust Protection Provision to negate the Succession Provision (which it positioned some 17 subsections and 4,000-plus words away) one might have expected Congress to say so, or to at least offer some perceptible hint. For example, Congress might have combined the two provisions, positioned them adjacently, or included some cross-reference between them. But Congress did none of those things, which leads to the opposite conclusion: Congress used different language in two different parts of HERA with different purposes to achieve different results. In contrast to the broad terms of the Succession Provision, the Trust Protection Provision articulates a narrow directive concerning the management and extra protection of securitized loans from the Enterprises' creditors.

SFR places much reliance on the heading "General Exceptions" to suggest an intention to override all other provisions of Section 4617, including the Succession Provision. *See* SFR MSJ at 18. "But headings and titles are not meant to take the place of the detailed provisions of the text" of a statute. *N.L.R.B. v. Fresh & Easy Neighborhood Mkt., Inc.*, 805 F.3d 1155, 1160 (9th Cir. 2015) (quoting *Bhd. of R.R. Trainmen v. Balt. & O.R. Co.*, 331 U.S. 519, 528 (1947)). SFR ignores that the text of the Trust Protection Provision does not fully exempt *any* property from *all* powers articulated in the preceding sections, but rather delineates a far more limited exception: it directs the Conservator to manage securitized mortgages according to the terms of the underlying trust instruments, and places those mortgages off-limits to the Enterprises' general creditors.

SFR's argument seems to be based in the fact that the Trust Protection Provision does not state that the Conservator is the successor to, specifically, the Enterprises' securitized loans. But why would it? The fact that the Conservator succeeded to *all* assets of the Enterprises is established in the Succession Provision, while the Trust Protection Provision addresses particular rules for the Conservator's management of one type of asset—securitized loans.[6]

[6] SFR's reliance on Section 4617(b)(19)(B)(iii) is especially puzzling. *See* SFR MSJ at 20. After all, if the Conservator does not succeed to mortgages held in trust, as SFR contends, then it cannot be subject to damages relating to those

AKERMAN LLP
1160 TOWN CENTER DRIVE, SUITE 330
LAS VEGAS, NEVADA 89144
TEL.: (702) 634-5000 – FAX: (702) 380-8572

In sum, this Court should follow *Elmer* by reading the Succession and Trust Protection Provisions according to their plain text and the clear Congressional intent to provide more protection to securitized asserts during the conservatorship, not less. SFR's argument fails; the Federal Foreclosure Bar protects securitized loans, just as it does other assets of the Enterprises.

IV. CONCLUSION

Pursuant to 12 U.S.C. § 4617(j)(3), the HOA Sale did not extinguish Freddie Mac's interest in the Property. Accordingly, Nationstar respectfully requests that the Court deny SFR's motion and grant summary judgment to Nationstar.

DATED this 14th day of December, 2017.

AKERMAN LLP

/s/ Tenesa S. Scaturro
MELANIE D. MORGAN, ESQ.
Nevada Bar No. 8215
TENESA S. SCATURRO, ESQ.
Nevada Bar No. 12488
1160 Town Center Drive, Suite 330
Las Vegas, NV 89144

Attorneys for Nationstar Mortgage LLC

AKERMAN LLP
1160 TOWN CENTER DRIVE, SUITE 330
LAS VEGAS, NEVADA 89144
TEL.: (702) 634-5000 – FAX: (702) 380-8572

mortgages. In any event, the fact that certificate-holders may bring claims against FHFA for breach of the trust agreements does not help SFR, which is not a certificate-holder and which seeks to extinguish these mortgages, not ensure they are managed pursuant to the terms of the trust agreements.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on this 14th day of December, 2017 and pursuant to NRCP 5, I caused to be served a true and correct copy of the foregoing **NATIONSTAR MORTGAGE, LLC'S RESPONSE IN OPPOSITION TO SFR INVESTMENT POOL 1, LLC'S MOTION FOR SUMMARY JUDGMENT**, 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.

P. Sterling Kerr, Esq.
LAW OFFICES OF P. STERLING KERR
2450 St. Rose Parkway, Suite 120
Henderson, NV 89074

Attorneys for Ignacio Gutierrez

Richard J. Vilkin, Esq.
LAW OFFICES OF RICHARD J. VILKIN, P.C.
1286 Crimson Sage Ave.
Henderson, NV 89012

Attorneys for Nevada Association Services, Inc.

Diana S. Ebron, Esq.
KIM GILBERT EBRON
7625 Dean Martin Drive, Suite 200
Las Vegas, Nevada 89139

Attorneys for Nevada Association Services, Inc.

/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

TAB 13

RIS

DIANA S. EBRON, ESQ.
Nevada Bar No. 10580
E-mail: diana@KGElegal.com
JACQUELINE A. GILBERT, ESQ.
Nevada Bar No. 10593
E-mail: jackie@KGElegal.com
KAREN L. HANKS, ESQ.
Nevada Bar No. 9578
E-mail: karen@KGElegal.com
KIM GILBERT EBRON
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139
Telephone: (702) 485-3300
Facsimile: (702) 485-3301
Attorneys for SFR Investments Pool 1, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

IGNACIO GUTIERREZ, an individual,

Plaintiff,

vs.

SFR INVESTMENTS POOL 1, LLC; NEVADA ASSOCIATION SERVICES, INC.; HORIZON HEIGHTS HOMEOWNERS ASSOCIATION; KB HOME MORTGAGE COMPANY, a foreign corporation, DOE Individuals I through X, ROE Corporations and Organizations I through X,

Defendants.

SFR INVESTMENTS POOL 1, LLC, Nevada limited liability company,

Counter-Claimant and Third Party Plaintiff,

vs.

IGNACIO GUTIERREZ, an individual; NATIONSTAR MORTGAGE, LLC, a Delaware limited liability company; COUNTRYWIDE HOME LOANS, INC., A FOREIGN CORPORATION; DOES I-X; and ROES 1-10, inclusive,

Counter-Defendant/ Third Party Defendants

Case No. A-13-684715-C

Dept. No. XVII

SFR INVESTMENTS POOL 1, LLC'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

SFR Investments Pool 1, LLC ("SFR") hereby files its Reply in Support of its Motion for Summary Judgment. SFR hereby incorporates its Opposition to Nationstar's Motion for Summary Judgment and Counter-Motion to Strike, filed on December 14, 2017, as if fully stated herein.

INTRODUCTION

This matter was remanded from the Nevada Supreme Court with very simple instructions. This Court was to conclude "whether Freddie owned the loan in question, or whether Nationstar had a contract with Freddie Mac or the FHFA to service the loan in question." *Nationstar Mortgage, LLC v. SFR Investments Pool 1, LLC*, 396 P.3d 754, 758 (Nev. 2017). The Nevada Supreme Court did not disturb any of the other grounds on which this Court granted judgment in favor of SFR in the first instance. As a result of the remand, the Bank had one job: prove that Freddie owned the loan and that the Bank had a right to service this loan on behalf of Freddie. The Bank has failed to complete this job and providing nothing that prevents this Court from granting summary judgment in favor of SFR.

STATEMENT OF DISPUTED AND UNDISPUTED FACTS

SFR hereby incorporates the Statement of Undisputed Facts from its MSJ, as well as the Statement of Disputed Facts presented in its Opp., as if fully stated herein. In addition, SFR states as follows:

Disputed Fact #1: Nationstar's dispute regarding whether the foreclosure sale complied with all requirements of law. Bank Opp. at 2:21-23.

This issue was not previously raised and is therefore waived by the Bank. Further, this Court has already validated the foreclosure sale in its prior Order Granting Summary Judgment, which was not overturned by the Nevada Supreme Court on remand. As stated previously, there were specific issues which were to be resolved on remand, and this was not one of them. This disputed fact does not prevent this Court from granting summary judgment in favor of SFR.

LEGAL ARGUMENT

I. THE BANK FAILED TO MEET ITS BURDEN ON REMAND.

When this case was on appeal, the Nevada Supreme Court stated that "the servicer of a loan owned by a regulated entity may argue that the Federal Foreclosure Bar preempts NRS 116.3116,

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

and that neither Freddie Mac nor the FHFA need be joined as a party." *Nationstar Mortgage, LLC v. SFR Investments Pool 1, LLC*, 396 P.3d 754, 758 (Nev. 2017).

However, "the district court did not determine whether Freddie owned the loan in question, or whether Nationstar had a contract with Freddie Mac or the FHFA to service the loan in question. Rather, the district court held that Nationstar lacked standing in either case." Id. "Therefore, we conclude that remand is appropriate so the district court may address these factual inquiries in the first instance." Id. (footnote omitted).

The Bank has failed to prove either factor for which this matter was remanded. The Bank has not proven that Freddie Mac owned the loan in question, nor has it provided the contract with Freddie Mac or the FHFA by which Nationstar services the loan.

A. The Bank has the Burden of Proving its Defenses (or Claims Masquerading As Defenses).

The Bank's arguments are entirely premised on the idea that Freddie Mac allegedly purchased the underlying loan, obtaining a property interest prior to the Association foreclosure sale, and since Freddie Mac was under the conservatorship of the FHFA, the so-called "Federal Foreclosure Bar" under 12 U.S.C. 4617(j)(3) allegedly precluded SFR from acquiring free and clear interest in the Property. This argument requires the Bank to prove that the purported loan is "property of" the FHFA for purposes of 4617(j)(3), which in turn requires the Bank to prove that Freddie owned the purported loan at the time of the sale and that FHFA succeeded to the loan rather than it being held in trust. *See Breliant v. Preferred Equities Corp.*, 918 P.2d 314, 318 (Nev. 1996) (Evidence of a superior interest must be enough to overcome the "presumption in favor of the record titleholder" who is SFR in this case).

Here, the evidence shows that the Bank, Freddie, nor FHFA have any interest in the Property. Moreover, FHFA and the Enterprises have already admitted that as "[a] threshold matter, of course, [Plaintiff] must have a property interest in order for [4617(j)(3)] to apply." *Dansker*, No. 2:13–cv–01420–RCJ–GWF (ECF No. 54, 2:12-13). Herein, the Bank, Freddie, and the FHFA have exclusive access to and possession of facts concerning securitization, whether the mortgage was "held in trust." *Adobe*, 809 F.3d at 1080. Thus, the Bank is possession of all the information

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

to meets it burden of proving quiet title if what it alleged is true.

However, the Bank has utterly failed to provide any evidence to substantiate their claims. As the Bank bears the burden to establish its purported defense pursuant to 12 U.S.C. 4617(j)(3) and it failed to meet said burden, this Court should grant summary judgment in favor of SFR.

B. <u>The Bank's Evidence of Freddie's Ownership and its Contractual Interest in Servicing the Property is Unsatisfactory.</u>

The Bank is the named party and had the responsibility to establish the Freddie owns the mortgage in question. The following is a comprehensive list of such evidence the Bank has produced to support Freddie's alleged loan interest in the property:

1) Screenshot from Nationstar's Servicing System;
2) The "please read" message / the Servicing Guidelines; and
3) Testimony regarding Limited Power of Attorney to Nationstar from Freddie.

Each of these were discussed extensively in SFR's MSJ and were not substantively responded to in the Bank's Opp. Further, the only additional evidence the Bank asserts supports their position was the late-disclosed declaration of Dean Meyer, attached to its MSJ as Exhibit B. The Bank purports to attach yet another self-serving, late-disclosed supplemental declaration of Mr. Meyer to its Opp., however, the Bank's Opp. did not actually contain any exhibits. In any event, for the same reasons presented in SFR's Opp. regarding Mr. Meyers first declaration, any additional declarations of Mr. Meyer should be equally disregarded. To the extent the Bank does produce this supplemental declaration and attempts in some way to supplement with the purported exhibits, it should be stricken for the same reasons laid out in SFR's Counter-Motion to Strike Exhibit B to the Bank's MSJ.

SFR further addressed the downfalls of the Bank's "evidence" in significant detail within its MSJ, and especially within SFR's Opp. and Counter-Motion to Strike, and as a matter of efficiency, said arguments are incorporated as if fully stated herein.

The only argument presented by the Bank related to its purported "contract" with Freddie Mac or FHFA is a reference to Freddie Mac's Single-Family Seller/Servicer Guide ("Guide"). As stated within SFR's Opp., said Guide is not sufficient to establish the relationship necessary, nor can this Court take judicial notice of the Guide, or any "facts" purportedly established by same.

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

C. Even if Freddie has a Property Interest, the Bank Cannot Refute that the Mortgage is Held In Trust.

SFR's arguments on this issue are detailed within SFR's MSJ and SFR's Opp. The Bank has failed to provide any sufficient evidence or argument to refute the scenario presented by SFR. The only "evidence" provided by the Bank was another late-disclosed, self-serving supplemental declaration of Mr. Meyer, which came with no other supporting evidence. As referenced above, this purported supplemental declaration should be stricken for the same reasons the original declaration of Mr. Meyer should be stricken.

The Bank then argues that the Borrower FAQs provided by SFR apply to some other category of loans allegedly owned by Freddie Mac. However, we have yet another assertion that is entirely unsupported by evidence. Argument of counsel is not evidence. It is not SFR's burden to demonstrate the loan was held in trust; it is the Bank's burden to demonstrate that it is **not** held in trust. The April 15, 2015 bulletin referenced by the Bank is hearsay and the Bank is trying to use it to prove the facts asserted therein. In any event, the bulletin makes no reference, inclusive or exclusive, to the FAQs noted by SFR. Again, the Bank has failed to meet its burden.

Additionally, the Bank reliance on *Elmer* is overstated. First, *Elmer* is unpublished. Second, *Elmer* is not inconsistent to SFR's position. The Bank is essentially arguing semantics. Even if the Bank's position was correct, and the FHFA "succeeded" to a mortgage held in trust by Freddie Mac, the FHFA would only succeed to whatever interest Freddie Mac had. Thus, if Freddie Mac was acting as a trustee and held a mortgage in trust, then even assuming *arguendo* that the Bank's interpretation and application of *Elmer* is correct, the FHFA would only succeed to the interest Freddie Mac had as a trustee, but would not succeed to the mortgage, as the underlying trust would retain ownership. Based on that interpretation, the protections afforded under 12 U.S.C. 4617(j)(3) would be inapplicable, as the mortgage would not be property of the Agency. The burden lies with the Bank to disprove this line of reasoning; it is not SFR's burden to prove it, as it goes directly to the Bank's "defense" under 4617(j)(3), and does not prevent summary judgment in favor of SFR.

II. SFR IS A BONA FIDE PURCHASER FOR VALUE

As laid out in SFR's Opp. and Counter-Motion, SFR is a BFP and the Bank provided no

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

evidence or argument to the contrary. In the interest of efficiency, SFR hereby incorporates by reference the arguments regarding SFR's BFP status as if fully stated herein. *See* SFR's Opp. at 25:14-29:26.

CONCLUSION

SFR has met its burden and come to this Court with a valid foreclosure deed. The Nevada Supreme Court has instructed this Court to evaluate both Freddie Mac's interest in the property, as well as the Bank's contractual right to service this property. However, the Bank has failed to provide evidence that Freddie Mac owns the mortgage or that it has a right to service this property on behalf of Freddie Mac. Therefore, this Court should enter summary judgment against the Bank and in favor of SFR, stating that (1) title is quieted in SFR's name; (2) the DOT was extinguished; and (3) the Bank, and any agents, successors and assigns are permanently enjoined from interfering with SFR's possession and ownership of the Property.

Dated this 28th day of December, 2017

KIM GILBERT EBRON

By: */s/ Jacqueline A. Gilbert*
JACQUELINE A. GILBERT, ESQ.
Nevada Bar No. 10593
DIANA S. EBRON, ESQ.
Nevada Bar No. 10580
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139-5974
Telephone: (702) 485-3300
Facsimile: (702) 485-3301
Attorney for Defendant/Counterclaimant/ Cross-Claimant, SFR Investments Pool 1, LLC

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

KIMGILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of December 2017, pursuant to NRCP 5(b)(2)(D), I caused service of a true and correct copy of the foregoing **SFR INVESTMENTS POOL 1, LLC'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT** to be made electronically via the Eighth Judicial District Court's electronic filing system upon the following parties at the e-mail addresses listed below:

"Darren T. Brenner, Esq." .	darren.brenner@akerman.com
Akerman Las Vegas Office .	akermanlas@akerman.com
Diana Cline Ebron .	diana@kgelegal.com
E-Service for Kim Gilbert Ebron .	eservice@kgelegal.com
Michael L. Sturm .	mike@kgelegal.com
P. Sterling Kerr .	psklaw@aol.com
Richard J. Vilkin .	richard@vilkinlaw.com
Tomas Valerio .	staff@kgelegal.com

/s/ Jason G. Martinez
An employee of KIM GILBERT EBRON

TAB 14

MELANIE D. MORGAN, ESQ.
Nevada Bar No. 8215
TENESA S. SCATURRO, ESQ.
Nevada Bar No. 12488
AKERMAN LLP
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89144
Telephone: (702) 634-5000
Facsimile: (702) 380-8572
Email: melanie.morgan@akerman.com
Email: tenesa.scaturro@akerman.com

Attorneys for Nationstar Mortgage, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

IGNACIO GUTIERREZ, an individual,

Plaintiff,

vs.

SFR INVESTMENTS POOL 1, LLC; NEVADA ASSOCIATION SERVICES, INC.; HORIZON HEIGHTS HOMEOWNERS ASSOCIATION; KB HOME MORTGAGE COMPANY, a foreign corporation; DOE Individuals I through X; ROE Corporations and Organizations I through X,

Defendants.

SFR INVESTMENTS POOL 1, LLC, Nevada Limited Liability Company,

Counter-Claimant and Third Party Plaintiff,

vs.

IGNACIO GUTIERREZ, an individual; NATIONSTAR MORTGAGE, LLC, a Delaware limited liability company; COUNTRYWIDE HOME LOANS, INC., a foreign corporation; DOES I through X; and ROES 1-10, inclusive,

Counter-Defendant and Third Party Defendants.

Case No.: A-13-684715-C
Dept.: XVII

NATIONSTAR MORTGAGE LLC'S ERRATA TO MOTION FOR SUMMARY JUDGMENT

Nationstar Mortgage LLC files this errata to its renewed motion for summary judgment filed on November 15, 2017. Exhibit E to Nationstar's renewed motion, Nationstar's declaration in support of the motion, inadvertently omitted the exhibits to the declaration.

AKERMAN LLP
1635 VILLAGE CENTER CIRCLE, SUITE 200
LAS VEGAS, NEVADA 89134
TEL.: (702) 634-5000 – FAX: (702) 380-8572

A corrected copy of Exhibit E with attachments is attached hereto.

DATED this 8th day of January, 2018.

AKERMAN LLP

/s/ Tenesa S. Scaturro

MELANIE D. MORGAN, ESQ.
Nevada Bar No. 8215
TENESA S. SCATURRO, ESQ.
Nevada Bar No. 12488
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89134
Attorneys for Nationstar Mortgage, LLC

AKERMAN LLP
1635 VILLAGE CENTER CIRCLE, SUITE 200
LAS VEGAS, NEVADA 89134
TEL.: (702) 634-5000 – FAX: (702) 380-8572

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th of January, 2018 and pursuant to NRCP 5(b), I served via the Clark County electronic filing system a true and correct copy of the foregoing **NATIONSTAR MORTGAGE LLC'S ERRATA TO MOTION FOR SUMMARY JUDGMENT**, addressed to:

Kim Gilbert Ebron

Diana S. Ebron	diana@kgelegal.com
KGE E-Service List	eservice@kgelegal.com
Michael L. Sturm	mike@kgelegal.com
Tomas Valerio	staff@kgelegal.com
tomas tomas	tomas@kgelegal.com

Law Offices of P. Sterling Kerr

P. Sterling Kerr	psklaw@aol.com

Geisendorf & Vilkin, PLLC

Richard J. Vilkin	richard@vilkinlaw.com

/s/ Doug J. Layne
An employee of AKERMAN LLP

AKERMAN LLP
1635 VILLAGE CENTER CIRCLE, SUITE 200
LAS VEGAS, NEVADA 89134
TEL.: (702) 634-5000 – FAX: (702) 380-8572

EXHIBIT E

EXHIBIT E

MSJD
MELANIE D. MORGAN, ESQ.
Nevada Bar No. 8215
TENESA S. SCATURRO, ESQ.
Nevada Bar No. 12488
AKERMAN LLP
1160 Town Center Drive, Suite 330
Las Vegas, Nevada 89144
Telephone: (702) 634-5000
Facsimile: (702) 380-8572
Email: melanie.morgan@akerman.com
Email: tenesa.scaturro@akerman.com
Attorneys for Bank of America, N.A., as Successor by Merger to BAC Home Loans Servicing, LP fka Countrywide Home Loans, Inc., incorrectly sued as Countrywide Home Loans, Inc. and Nationstar Mortgage, LLC.

AKERMAN LLP
1160 TOWN CENTER DRIVE, SUITE 330
LAS VEGAS, NEVADA 89144
TEL.: (702) 634-5000 – FAX: (702) 380-8572

DISTRICT COURT

CLARK COUNTY, NEVADA

IGNACIO GUTIERREZ, an individual,

Plaintiff,

vs.

SFR INVESTMENTS POOL 1, LLC; NEVADA ASSOCIATION SERVICES, INC.; HORIZON HEIGHTS HOMEOWNERS ASSOCIATION; KB HOME MORTGAGE COMPANY, a foreign corporation; DOE Individuals I through X; ROE Corporations and Organizations I through X,

Defendants.

SFR INVESTMENTS POOL 1, LLC, Nevada Limited Liability Company,

Counter-Claimant and Third Party Plaintiff,

vs.

IGNACIO GUTIERREZ, an individual; NATIONSTAR MORTGAGE, LLC, a Delaware limited liability company; COUNTRYWIDE HOME LOANS, INC., a foreign corporation; DOES I through X; and ROES 1-10, inclusive,

Counter-Defendant and Third Party Defendants.

Case No.: A-13-684715-C
Dept. No: XVII

DECLARATION IN SUPPORT OF RENEWED MOTION FOR SUMMARY JUDGMENT

43165549;1
43206062;1

I, AJ Loll, declare as follows:

1. My name is AJ Loll. I am competent to testify and have personal knowledge of the matters stated herein by virtue of my position as Managing VP for Nationstar Mortgage LLC (**Nationstar**).

2. As Managing VP for Nationstar, I am familiar with certain Nationstar systems and databases that contain data regarding mortgage loans owned by Federal Home Loan Mortgage Corporation (**Freddie Mac**) that Nationstar services. I have reviewed Nationstar's systems and databases containing information and data related to this loan.

3. Entries in Nationstar's systems and corresponding databases are made at or near the time of the events recorded by, or from information transmitted by, persons with knowledge. Nationstar's systems and databases are maintained and kept in the course of Nationstar' regularly conducted business activity, and it is the regular practice of Nationstar to keep and maintain information regarding loans owned by Freddie Mac that Nationstar services in Nationstar's databases. Nationstar's systems and databases consist of records that were made and kept by Nationstar in the course of its regularly conducted activities pursuant to its regular business practice of creating such records. These systems and databases are Nationstar's business records.

4. The records in Nationstar's systems and corresponding databases are consistent with my knowledge of the following matters:

a. On or about July 6, 2005, Ignacio A. Gutierrez (**Borrower**) obtained a loan from KB Home Mortgage Company (**Lender**) in the amount of $271,638.00.

b. The Borrowers executed a note dated July 6, 2005 in favor of Lender (the **Note**). Their promise to repay the amount borrowed is secured by a Deed of Trust recorded against real property located at 668 Moonlight Stroll Street, Las Vegas, Nevada 89015 (the Note and Deed of Trust together are the Loan).

c. Nationstar began servicing the Loan on or about July 16, 2012. True and correct copies of printouts from Nationstar's records pertaining to the date that Nationstar began servicing the Loan are attached as **Exhibit 1**.

AKERMAN LLP
1160 TOWN CENTER DRIVE, SUITE 330
LAS VEGAS, NEVADA 89144
TEL.: (702) 634-5000 – FAX: (702) 380-8572

5. Nationstar's records also indicate Freddie Mac owned the Loan on July 16, 2012, the date Nationstar began servicing the Loan—and has owned the Loan ever since. True and correct printouts from Nationstar's business records pertaining to Freddie Mac's ownership interest in the Loan and identifying Freddie Mac as the current loan owner are attached as **Exhibit 2**. The "Loan Data" screenshot documents the basic loan information. The "Investor" is identified as FHLMC SCH/ACT GANESHA which refers to Freddie Mac.

6. Nationstar was Freddie Mac's authorized loan servicer and beneficiary of record of the Deed of Trust for the Loan at the time of the HOA sale.

7. Freddie Mac's Single-Family Servicing Guide (the **Guide**) serves as a central document governing the contractual relationship between Freddie Mac and its servicers, including Nationstar. An interactive version of the Guide is publicly-accessible on the Internet through links found at: http://www.freddiemac.com/singlefamily/guide/. Archived prior versions of the Guide are available at the same web address by clicking prior years under the link to the snapshot of the current version. I have reviewed portions of the Guide.

8. I have reviewed Nationstar's system of books and records and have not found evidence that Nationstar received the HOA's notice of sale.

I declare that the foregoing is true and correct.

Executed this 1st day of November, 2017 in Coppell, Texas.

NATIONSTAR MORTGAGE LLC

By: _____

Name: A. J. Loll, Vice President
Nationstar Mortgage LLC

AKERMAN LLP
1160 TOWN CENTER DRIVE, SUITE 330
LAS VEGAS, NEVADA 89144
TEL.: (702) 634-5000 – FAX: (702) 380-8572

EXHIBIT 1

EXHIBIT 1

Nationstar MORTGAGE
PO BOX 650783
DALLAS, TX 75265

www.MyNationstarMtg.com

July 27, 2012

63912 0000468 001
IGNACIO A GUTIERREZ
668 MOONLIGHT STROLL ST
HENDERSON NV 89002-0505

Re: New Nationstar Loan Number 0597203363

Dear Ignacio A Gutierrez,
Welcome to Nationstar Mortgage! Effective 07/15/12 Nationstar Mortgage is now the servicer for your mortgage account. We're excited about the opportunity to serve you. You can count on Nationstar Mortgage to meet your needs whether you're looking to make a payment or refinance your loan. We offer many exciting features including 24-hour account access through our Internet website at www.MyNationstarMtg.com, various payment options, and a toll free line 1-877-782-7612 with automated account information.

To ensure accuracy, please verify the following loan information:

Name:	Ignacio A Gutierrez	Home Phone Number:	702-558-9034
Property Address:	668 Moonlight Stroll Street Henderson Nv 89015	Work Phone Number:	000-000-0000
Mailing Address:	668 Moonlight Stroll St Henderson Nv 89002-0505		

If you find any of the information listed above to be incorrect, please contact us immediately at 1-877-782-7612.

At Nationstar Mortgage, your business and total satisfaction are important to us. Any time you have questions regarding your account, do not hesitate to contact us at 1-877-782-7612, 8:00 a.m.to 5:00 p.m. central time Monday thru Friday or mail your questions to:

Nationstar Mortgage LLC
Attn: Bankruptcy Department
350 Highland Drive
Lewisville, Texas 75067

692-4014-0807F

We look forward to a long and lasting relationship with you.

Sincerely,

Nationstar Mortgage

Please be advised that the information contained in this letter is being sent for informational purposes, and should not be considered as an attempt to collect a debt.

Nationstar MORTGAGE

This area is intentionally left blank.

Nationstar MORTGAGE
PO BOX 650783
DALLAS, TX 75265
www.MyNationstarMtg.com

July 27, 2012

63912 0000468

IGNACIO A GUTIERREZ
668 MOONLIGHT STROLL ST
HENDERSON NV 89002-0505

New Nationstar Loan Number: 0597203363

NOTICE OF ASSIGNMENT, SALE, OR TRANSFER OF SERVICING RIGHTS

Dear Ignacio A Gutierrez:

You are hereby notified that the servicing of your mortgage loan, that is, the right to collect payments from you, is being assigned, sold or transferred from BANK OF AMERICA to Nationstar Mortgage LLC, effective 07/15/12.

The assignment, sale or transfer of the servicing of the mortgage loan does not affect any term or condition of the mortgage instruments, other than terms directly related to the servicing of your loan.

Except in limited circumstances, the law requires Nationstar Mortgage send you this notice no later than 15 days after the effective date of the transfer.

Your new servicer is Nationstar Mortgage LLC.

Nationstar Mortgage's business address is:

Nationstar Mortgage LLC
350 Highland Drive
Lewisville, Texas 75067
www.MyNationstarMTG.com

Nationstar Mortgage's toll free number is 1-877-782-7612. If you have any questions relating to the transfer of servicing to Nationstar Mortgage, call 1-877-782-7612 between 8 a.m. and 8 p.m. on the following days Monday - Thursday, 8 a.m. and 5 p.m. on Friday, or visit us anytime at **www.MyNationstarMTG.com.**

The date that Nationstar Mortgage will start accepting payments from you is 07/15/12. You can pay online via the Nationstar Mortgage website at **www.MyNationstarMTG.com.**, or you can send all payments due on or after that date to:

Nationstar Mortgage LLC
PO Box 650783
Dallas, Texas 75265

Your mortgage life insurance, disability insurance and/or other optional products will not continue. If you wish to retain optional products, you will need to contact your current optional product/service provider.

Enclosed is your Welcome Letter which includes a payment coupon with detailed loan information.

You should also be aware of the following information, which is set out in more detail in Section 6 of the Real Estate Settlement Procedures Act (RESPA) (12 U.S.C. 2605):

During the 60-day period following the effective date of the transfer of the loan servicing, a loan payment received by your old servicer before its due date may not be treated by the new loan servicer as late, and a late fee may not be imposed on you.

Section 6 of RESPA (12 U.S.C 2605) gives you certain consumer rights. If you send a "qualified written request" to your loan servicer concerning the servicing of your loan, your servicer must provide you with a written acknowledgement within 5 Business Days of receipt of your request. A "qualified written request" is a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, which includes your name and account number, and your reasons for the request. If you want to send a "qualified written request" regarding the servicing of your loan, it must be sent to this address:

Nationstar Mortgage LLC
Attention Research Department
350 Highland Drive
Lewisville, Texas 75067
www.MyNationstarMTG.com

Not later than 30 Business Days after receiving your request, your servicer must make any appropriate corrections to your account, and must provide you with a written clarification regarding any dispute. During this 60-Business Day period, your servicer may not provide information to a consumer reporting agency concerning any overdue payment related to such period or qualified written request. However, this does not prevent the servicer from initiating foreclosure if proper grounds exist under the mortgage documents.

A Business Day is a day on which the offices of the business are open to the public for carrying on substantially all of its business functions.

Section 6 of RESPA also provides for damages and costs for individuals or classes of individuals in circumstances where servicers are shown to have violated the requirements of that Section. You should seek legal advice if you believe your rights have been violated.

Important Loan Transfer "Home Affordable Modification Program" Information

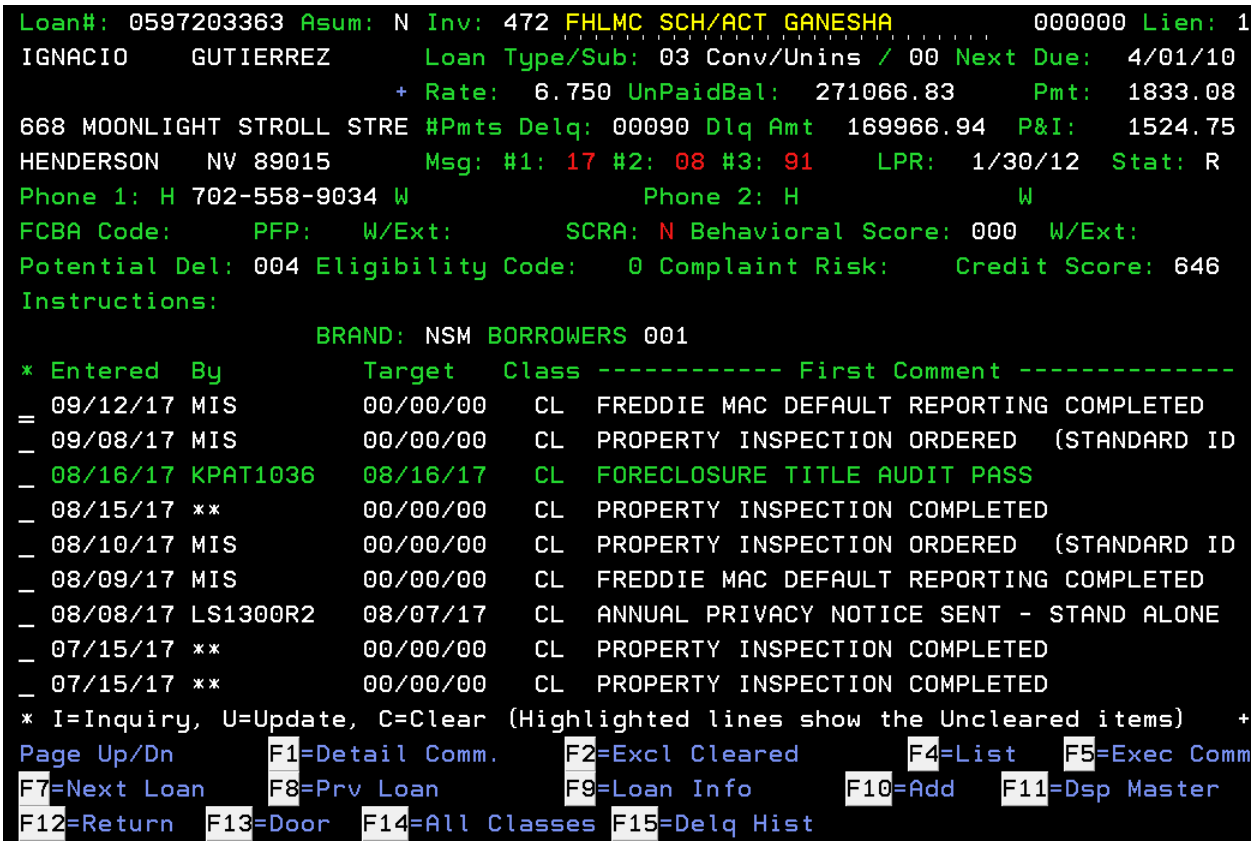
Home Affordable Modification Program: If you are currently participating in (or being considered for) a loan modification program, we will be transferring all your documentation to the new servicer. Until the transfer date, you should continue to make your payments (e.g., trial payments if attempting to qualify for a modification under the Home Affordable Modification Program) to BANK OF AMERICA. After transfer, you should make all payments to Nationstar until such time that you are provided additional direction. Decisions regarding qualification will be made by Nationstar. All information regarding other loss mitigation activities (forbearance agreements, short sales, refinances and deed-in-lieu of foreclosure) will be forwarded to Nationstar for processing. Please be advised that this transfer may extend the time needed for a final decision.

Sincerely,
Nationstar Mortgage LLC

EQUAL HOUSING OPPORTUNITY

EXHIBIT 2

EXHIBIT 2


Loan#: 0597203363 Asum: N Inv: 472 FHLMC SCH/ACT GANESHA 000000 Lien: 1
IGNACIO GUTIERREZ Loan Type/Sub: 03 Conv/Unins / 00 Next Due: 4/01/10
+ Rate: 6.750 UnPaidBal: 271066.83 Pmt: 1833.08
668 MOONLIGHT STROLL STRE #Pmts Delq: 00090 Dlq Amt 169966.94 P&I: 1524.75
HENDERSON NV 89015 Msg: #1: 17 #2: 08 #3: 91 LPR: 1/30/12 Stat: R
Phone 1: H 702-558-9034 W Phone 2: H W
FCBA Code: PFP: W/Ext: SCRA: N Behavioral Score: 000 W/Ext:
Potential Del: 004 Eligibility Code: 0 Complaint Risk: Credit Score: 646
Instructions:
BRAND: NSM BORROWERS 001
* Entered By Target Class ---------- First Comment ----------
_ 09/12/17 MIS 00/00/00 CL FREDDIE MAC DEFAULT REPORTING COMPLETED
= 09/08/17 MIS 00/00/00 CL PROPERTY INSPECTION ORDERED (STANDARD ID
_ 08/16/17 KPAT1036 08/16/17 CL FORECLOSURE TITLE AUDIT PASS
_ 08/15/17 ** 00/00/00 CL PROPERTY INSPECTION COMPLETED
_ 08/10/17 MIS 00/00/00 CL PROPERTY INSPECTION ORDERED (STANDARD ID
_ 08/09/17 MIS 00/00/00 CL FREDDIE MAC DEFAULT REPORTING COMPLETED
_ 08/08/17 LS1300R2 08/07/17 CL ANNUAL PRIVACY NOTICE SENT - STAND ALONE
_ 07/15/17 ** 00/00/00 CL PROPERTY INSPECTION COMPLETED
_ 07/15/17 ** 00/00/00 CL PROPERTY INSPECTION COMPLETED
* I=Inquiry, U=Update, C=Clear (Highlighted lines show the Uncleared items) +
Page Up/Dn F1=Detail Comm. F2=Excl Cleared F4=List F5=Exec Comm
F7=Next Loan F8=Prv Loan F9=Loan Info F10=Add F11=Dsp Master
F12=Return F13=Door F14=All Classes F15=Delq Hist

TAB 15

RIS

MELANIE D. MORGAN, ESQ.
Nevada Bar No. 8215
TENESA S. SCATURRO, ESQ.
Nevada Bar No. 12488
AKERMAN LLP
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89134
Telephone: (702) 634-5000
Facsimile: (702) 380-8572
Email: melanie.morgan@akerman.com
Email: tenesa.scaturro@akerman.com

Attorneys for Nationstar Mortgage, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

IGNACIO GUTIERREZ, an individual,

Plaintiff,

vs.

SFR INVESTMENTS POOL 1, LLC; NEVADA ASSOCIATION SERVICES, INC.; HORIZON HEIGHTS HOMEOWNERS ASSOCIATION; KB HOME MORTGAGE COMPANY, a foreign corporation; DOE Individuals I through X; ROE Corporations and Organizations I through X,

Defendants.

SFR INVESTMENTS POOL 1, LLC, Nevada Limited Liability Company,

Counter-Claimant and Third Party Plaintiff,

vs.

IGNACIO GUTIERREZ, an individual; NATIONSTAR MORTGAGE, LLC, a Delaware limited liability company; COUNTRYWIDE HOME LOANS, INC., a foreign corporation; DOES I through X; and ROES 1-10, inclusive,

Counter-Defendant and Third Party Defendants.

Case No.: A-13-684715-C
Dept.: XVII

NATIONSTAR'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND TO OPPOSE COUNTERMOTION TO STRIKE

AKERMAN LLP
1160 TOWN CENTER DRIVE, SUITE 330
LAS VEGAS, NEVADA 89144
TEL.: (702) 634-5000 – FAX: (702) 380-8572

As described in Nationstar's Motion for Summary Judgment, while Freddie Mac is in conservatorship under FHFA, none of its property "shall be subject to . . . foreclosure . . . without the consent of [FHFA]." 12 U.S.C. § 4617(j)(3) (the "Federal Foreclosure Bar").[1] In this case, at the

[1] Terms not defined herein shall take on the definition in Nationstar's Motion for Summary Judgment ("MSJ").

time of the HOA Sale, Freddie Mac had a property interest in the Deed of Trust encumbering the Property. As multiple federal and state courts, including the Ninth Circuit, have held in dozens of cases, MSJ at 10-11 (citing cases), the Federal Foreclosure Bar protects Freddie Mac's interest, precluding SFR from acquiring a free and clear interest in the Property. *See, e.g.*, *Berezovsky v. Moniz*, 869 F.3d 923, 932 (9th Cir. 2017); *Saticoy Bay, LLC v. Flagstar Bank, FSB*, 699 Fed. App'x 658 (9th Cir. Oct. 20, 2017); *Elmer v. JPMorgan Chase & Co.*, No. 15-17407, 2017 WL 3822061, at *1-2 (9th Cir. Aug. 31, 2017). The legal issues here are identical to all of these other cases, and the facts here are virtually identical to those in many of these cases: Fannie Mae and Freddie Mac own a secured mortgage loan, giving them a protected property interest while their contractually authorized servicer appears in the property records as beneficiary of record on their behalf. SFR repeats many of the same arguments that courts have already rejected in these related cases. SFR's arguments similarly fail and should be rejected.

Additionally, the Court should deny SFR's counter-motion to strike Nationstar's evidence proving Freddie Mac's interest in the Property because Nationstar's evidence was timely disclosed preventing any prejudice to SFR.

Finally, Nationstar demonstrated low price and unfairness sufficient to set aside the HOA's sale and SFR has failed to meet its burden that it is a bona fide purchaser.

Accordingly, this Court should grant Nationstar's Motion for Summary Judgment.

ARGUMENT

I. The Federal Foreclosure Bar Defeats SFR's Claim to an Interest in the Property Free and Clear of the Deed of Trust

A. Freddie Mac Had a Protected, Secured Property Interest at the Time of the HOA Sale

As discussed in Nationstar's Opening Brief and *infra*, the Federal Foreclosure Bar protects the property of Freddie Mac while it is in conservatorship. That protection is not limited to the interest Freddie Mac might have if it were the *beneficiary of record* of the Deed of Trust at the time of an HOA Sale. Rather, it extends to the secured property interest that Freddie Mac has as the *owner* of the note and Deed of Trust—an interest recognized under Nevada law—while its

AKERMAN LLP
1160 TOWN CENTER DRIVE, SUITE 330
LAS VEGAS, NEVADA 89144
TEL.: (702) 634-5000 – FAX: (702) 380-8572

contractually authorized servicer is record beneficiary of the Deed of Trust. Freddie Mac's property interest is amply supported in the evidentiary record through property records, Freddie Mac's and Nationstar's business records with supporting employee declarations, and Freddie Mac's Servicing Guide—the same type of evidence the Ninth Circuit held as sufficient and valid to confirm Freddie Mac's Property interest at the summary judgment stage.[2]

1. Freddie Mac Owned the Note and Deed of Trust Under Nevada Law

SFR argues that Nationstar has not proven that Freddie Mac owns the note and Deed of Trust. Opp. at 8. SFR is wrong and fails to engage with the chief authorities cited in Nationstar's Opening Brief that set out Nevada's approach to ownership of a deed of trust: *In re Montierth*, 354 P.3d 648 (Nev. 2015) and the Restatement (Third) of Property: Mortgages § 5.4 (1997) ("Restatement"). Pursuant to these authorities, Freddie Mac had an interest in the Property at the time of the HOA Sale, regardless of the fact that Nationstar was the record beneficiary of that Deed of Trust. Indeed, the Ninth Circuit has cited to these authorities to recognize Freddie Mac's property interest under similar factual circumstances. *Berezovsky*, 869 F.3d at 923 (recognizing the Nevada Supreme Court's adoption of the Restatement); *Elmer*, 2017 WL 3822061 (following *Berezovsky)*; *Flagstar Bank, FSB*, 699 F. App'x at 658-59 (same for Fannie Mae). Interestingly, SFR cites to *Berezovsky*, but fails to apply the law to this case. Opp. at 9.

The Nevada Supreme Court recognized in *Montierth* that an entity who owned a loan was a secured creditor—meaning that it had a property interest in the collateral—while MERS, an entity with which it had an agency or contractual relationship, was record beneficiary of the deed of trust. *See Montierth*, 354 P.3d at 651. The Restatement, which *Montierth* adopts, explains the relationship between "institutional purchasers of loans" and their servicers, and states that when a servicer appears in the public records as beneficiary of a mortgage, "[i]t is clear in this situation that the owner of both the note and mortgage is the investor and not the servicer." Restatement § 5.4 cmt. c. The Ninth Circuit analyzed *Montierth* and the Restatement in detail to confirm Nevada law

[2] In its Opposition, SFR briefly argues that Freddie Mac does not have a property interest because the Loan was securitized, and FHFA does not have an interest in securitized loans. Opp. at 8, 11-12. As explained in Nationstar's Opposition brief, the Loan was not securitized at the time of the HOA Sale and even if it was, FHFA as Conservator succeeds to that ownership interest during the conservatorship. Nationstar's Opp. at 5-7.

AKERMAN LLP
1160 TOWN CENTER DRIVE, SUITE 330
LAS VEGAS, NEVADA 89144
TEL.: (702) 634-5000 – FAX: (702) 380-8572

recognizes that a loan owner like Freddie Mac has a secured property interest when its contractually authorized servicer (Nationstar) appears as beneficiary of record. *See Berezovsky*, 869 F.3d at 933. This Court should do the same here.

The relevant facts in this case are materially the same as those in *Montierth*, the section of the Restatement cited by *Montierth*, and the Ninth Circuit cases: (i) the owner of the note was not reflected in the public record, though the lien itself was recorded; (ii) the owner of the note had a contractual or agency relationship with the beneficiary of record; and (iii) the beneficiary of record had authority to foreclose on the owner's behalf. *See* MSJ. These authorities make clear that the loan owner has a property interest under these circumstances.

SFR attempts to rely on a Nevada Supreme Court decision that predates *Montierth* to claim that Freddie Mac did not have a Property interest because "the Note and Deed of Trust were split." Opp. at 9 (citing *Edelstein v. Bank of New York Mellon*, 286 P.3d 249, 256 (2012)). But *Montierth* expressly and significantly clarifies *Edelstein* by confirming that Nevada law adopts the Restatement approach articulating exceptions to the general rule discussed in *Edelstein*. *See Montierth*, 354 P.3d at 651. Those exceptions provide that a foreclosure *could* proceed when the owner of a loan was not the beneficiary named in the recorded deed of trust, so long as the named beneficiary had a particular relationship with the loan owner. *Id.* at 650-51. Accordingly, *Montierth*'s explicit adoption of those Restatement exceptions confirms that under Nevada law a loan owner, like Deutsche Bank in *Montierth* and Freddie Mac here, has a secured interest when the beneficiary of record is a servicer acting on the loan owner's behalf.

Montierth confirms that there is no rule that every deed of trust must be recorded *in its owner's name* for the owner to have a valid, secured interest, *Montierth*, 354 P.3d at 650-51, contrary to SFR's contention, Opp. at 10-11. Indeed, Nevada's recording statutes do not require public recording of changes in the ownership of a loan in order for a party to have a legal property interest through that ownership. *See* NRS 106.210 (discussing only recording of assignments of beneficial interests). The recording statutes require only the recording of a "conveyance" of a deed of trust itself or an assignment of a deed of trust, not its subsequent acquisition by an investor

AKERMAN LLP
1160 TOWN CENTER DRIVE, SUITE 330
LAS VEGAS, NEVADA 89144
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through its purchase of a loan. *See Leyva v. Nat'l Default Servicing Corp.*, 255 P.3d 1275, 1279 (Nev. 2011) (deed of trust constitutes a conveyance as defined by NRS 111.010).

At the time of the HOA Sale, the relevant security interest, the Deed of Trust, was recorded in the name of Freddie Mac's contractually authorized servicer, Nationstar, and SFR is charged with notice that the Deed of Trust encumbered the Property. The Deed of Trust was the instrument that Freddie Mac owned, regardless of whether Freddie Mac's name appeared on the face of the instrument. The requirements of the Nevada recording statutes are consistent with those in Kentucky, which the Sixth Circuit Court of Appeals recently held did not require a separate recording anytime a party purchased a loan, so long as the beneficiary of record remained the same entity, as is the case here. *See Higgins v. BAC Home Loans Servicing, LP*, 793 F.3d 688, 689 (6th Cir. 2015).

If Nevada's recording statutes required all *loan ownership* interests to be recorded, a loan owner would always also need to serve as beneficiary of record of a deed of trust. Under such a rule, the loan owner in *Montierth* would not have had a secured property interest, and the Nevada Supreme Court would have ruled that MERS could not act as record beneficiary as nominee for the lender. But *Montierth* made the opposite ruling, consistent with *Higgins* and with a number of Ninth Circuit decisions regarding MERS and its role in the consumer mortgage industry. *See In re Mortgage Elec. Registration Sys., Inc.*, 754 F.3d 772, 776-77 (9th Cir. 2014); *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1038-39 (9th Cir. 2011).

Thus, *Montierth* confirms that SFR's challenge to Freddie Mac's Property interest because Nationstar, not Freddie Mac, appeared as the record beneficiary of the Deed of Trust fails. Opp. at 10-11. Indeed, "Nevada law . . . recognizes that . . . a note owner remains a secured creditor with a property interest in the collateral even if the recorded deed of trust names" a servicer. *Berezovsky*, 869 F.3d at 932. Here, the recorded documents name Freddie Mac's contractually authorized servicer, Nationstar. Thus, "[a]lthough the recorded deed of trust here omitted Freddie Mac's name, Freddie Mac's property interest is valid and enforceable under Nevada law." *Id.*

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2. The Evidence Unequivocally Proves That Freddie Mac Owns the Loan and Deed of Trust

SFR argues that the evidence before this Court is insufficient to prove that Freddie Mac owned the Loan and Deed of Trust. Opp. at 11-16. But SFR's arguments ignore the rules of evidence and applicable case law. The history of Freddie Mac's ownership and relationship with its servicer at the time of the HOA Sale is supported by the recorded property records, and Nationstar and Freddie Mac's business records, which are supported by declarations from their respective employees.

Nationstar submitted Freddie Mac's business-records data from its MIDAS system, an electronic system of record that Freddie Mac uses in its ordinary business operations to track millions of loans it owns nationwide. MSJ at Ex. B. The MIDAS data shows the date on which Freddie Mac acquired ownership of the Loan was in August 2005—long before the April 2013 HOA Sale. *Id.* This data demonstrates Freddie Mac's continued ownership of the Loan at the time of the HOA Sale. *Id.* Freddie Mac's business records also show that Nationstar was the servicer for Freddie Mac at the time of the HOA Sale. *Id.* Nationstar also submitted its own business records proving that it was the servicer of the Loan for Freddie Mac at the time of the HOA Sale. MSJ at Ex. E and Errata.

Evaluating the same type of evidence as that presented here—business records and a declaration from a Freddie Mac employee—the Ninth Circuit held that Freddie Mac's "database printouts" were admissible and sufficient to support a "valid and enforceable" property interest under Nevada law. *Berezovsky*, 869 F.3d at 932-33 & n.8. In *Elmer*, "Freddie Mac provided a record from its internal database stating . . . the loan's "funding date"[, which] was . . . well before the [foreclosure] sale[, and] Freddie Mac's employee explained that the record indicates that Freddie Mac acquired ownership of the loan . . . and has owned it ever since." *Elmer*, 2017 WL 3822061, at *1. Nationstar has provided the same type of evidence here—Freddie Mac's business records providing the "funding date," which was before the HOA Sale, and an employee declaration explaining the records and the fact that Freddie Mac continued to own the Loan at the time of the HOA Sale. The submitted business records are "*reliable* and uncontroverted evidence of Freddie Mac's interest in the property on the date of the foreclosure." *Elmer*, 2017 WL 3822061, at *1

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(emphasis added). Indeed, the Ninth Circuit rejected speculation by the opposing party that the records might be interpreted in some way other than that presented in Freddie Mac's employee declaration. *Id.*

In order to convince the Court not to consider the business records from Freddie Mac or Nationstar, the burden is on SFR to establish that "the source of information or the method or circumstances of preparation indicate a lack of trustworthiness." Fed. R. Evid. 803 (2014 advisory committee notes). The chief indication of a record's untrustworthiness is whether it is "a document prepared for purposes of litigation," and thus effectively "not a business record"; "where the only function that the report serves is to assist in litigation or its preparation, many of the normal checks upon the accuracy of business records are not operative." *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1259 (9th Cir.1984); *Impact Mktg. Int'l, LLC v. Big O Tires, LLC*, No. 2:10-cv-01809-MMD, 2012 WL 2092815, at *3 (D. Nev. June 11, 2012) (quoting *Paddack*).

SFR does not dispute that Freddie Mac uses the data contained in MIDAS in its ordinary course of business. However, SFR contends that the business records are "questionable" because they "are dated July 26, 2017—nowhere near the time of the 2013 Association foreclosure sale." Opp. at 4. But the July 2017 date is the date in which the information was pulled from the database and printed. SFR confuses a print-date of a continuously used database with a record newly created for litigation. "[S]o long as the original computer data compilation was prepared pursuant to a business duty in accordance with regular business practice, the fact that the hard copy offered as evidence was printed for purposes of litigation does not affect its admissibility." *United States v. Hernandez*, 913 F.2d 1506, 1512-13 (10th Cir. 1990).

In addition, rather than engaging with the Ninth Circuit authorities—*Berezovsky* and *Elmer*—SFR cites to a few decisions from the District of Nevada that have declined to grant summary judgment to FHFA, the Enterprises, or their servicers based on a similar evidentiary record. Opp. at 9 & n.2. These cases were all decided before the Ninth Circuit confirmed what evidence is sufficient to establish Freddie Mac's property interest. Consequently, these decisions would not withstand scrutiny upon appellate review.

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For example, in *LN Management, LLC Series 5664 Divot v. Dansker*, the court's decision denying a servicer's motion for summary judgment was predicated on the fact that Fannie Mae was not named as the beneficiary of record on the deed of trust. No. 2:13-cv-01420-RCJ-GWF, 2015 WL 5708799, at *3 (D. Nev. Sept. 29, 2015)); *see also Kielty v. Fed. Home Loan Mortg. Corp.*, No. 2:15-cv-00230-RCJ-GWF, 2016 WL 1030054, at *3 (D. Nev. Mar. 9, 2016); *LN Mgm't LLC Series 2543 Citrus Garden v. Gelgotas*, No. 2:15-cv-0112-MMD, 2016 WL 1071005, at *6 (D. Nev. Mar. 16, 2016). But the Ninth Circuit rejected this concern in *Berezovsky*, *Elmer*, and *Flagstar*, holding that the assignment of a deed of trust to a servicer or MERS is consistent with the Enterprise's ownership interest, and does not defeat summary judgment, because the owner and the record beneficiary need not be the same entity.

Similarly, while the court in *LN Mgmt. LC Series 5271 Lindell v. Estate of Piacentini*, referred in passing to Fannie Mae's database records as "cryptic," its decision to deny summary judgment rested on the court's uncertainty as to whether there was sufficient evidence of a servicer relationship to satisfy *Montierth*. *See* No. 2:15-cv-00131-JAD-NJK, 2015 WL 6445799, at *2, *4 (D. Nev. Oct. 8, 2015). But the Ninth Circuit has since confirmed that Freddie Mac's Guide, along with its business records and testimony, sufficiently proves the servicer relationship.[3] *Berezovsky* and *Elmer* evaluated Freddie Mac's Guide and found that the "Guide's language mirrors *Montierth*'s description of the requisite . . . relationship," *id.* at 933, because it details how the servicer, as beneficiary of record, is "*acting on Freddie Mac's behalf.*" *Elmer*, 2017 WL 3822061, at *1 (emphasis added).

SFR's argument that the Court should not consider the Guide because "[t]here is nothing tying this document directly to the subject Property or loan," Opp. at 6, misunderstands the evidence. The Guide shows the *content* of the Freddie Mac-servicer relationship, confirming that its governing terms match the relationship discussed in *Montierth*. *See Berezovksy*, 869 F.3d at 932-33 & n.9. But as noted above, the fact of a particular servicing relationship between Freddie Mac and Nationstar regarding the Loan and Property in this case is evidenced by witness testimony and business records,

[3] Contrary to SFR's contention, Opp. at 4, like the Ninth Circuit has done, the Court can take judicial notice of the Guide. *See Berezovsky*, 869 F.3d at 932 n.9.

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not by the Guide itself. SFR has not identified any genuine basis to dispute that evidence.

SFR also argues that the language assigning the Deed of Trust is "inconsistent" with Freddie Mac's Property interest because the language assigns the Deed of Trust "together with the note(s) and obligations therein described." Opp. at 12. However, this language does not suggest any change in *ownership* of the note or deed of trust; Mortgage Electronic Registration System ("MERS") had no ownership interest in the Deed of Trust to transfer to Bank of America, N.A. ("BANA"), then to Nationstar, since Freddie Mac owned the Loan beginning in August 2005. And prior to Freddie Mac's acquisition of the Loan, MERS was beneficiary "solely as nominee for Lender and Lender's successors and assigns." MSJ at Exs. A, C. MERS never had an ownership interest in the Loan. The principle of *nemo dat quod non habet—i.e.*, one cannot give what one does not have—confirms that the use of assignment language could not enlarge the property rights MERS had and could transfer to BANA, then to Nationstar. *See Mitchell v. Hawley*, 83 U.S. 544, 550 (1872). This is because an "assignee stands in the shoes of the assignor and ordinarily obtains only the rights possessed by the assignor at the time of the assignment, and no more." 6A C.J.S. Assignments § 111; *see also* 55 Am. Jur. 2d Mortgages § 944 (An "assignee of a mortgagee's interest in a mortgage gains only the rights the assignor had at the time of the assignment.").

Thus, under the circumstances here, the assignment language must be read to be consistent with these principles of assignment law and the contractual relationships between Freddie Mac and its servicers: the assignment transferred only an interest in the Deed of Trust as beneficiary of record and whatever interest in the note the assignor had at the time. The assignment did not transfer ownership of the note or the Deed of Trust.[4] Indeed, had it done so, BANA, and later Nationstar would not have continued to report monthly to Freddie Mac concerning the Loan, remitting principal and interest payments. But as Freddie Mac's records show, its servicers did just that. Ex. B at ¶ 5(j). If BANA or Nationstar believed the assignment made one of them the owner of the Loan, they never evidenced that belief by any action.

[4] SFR also argues that Freddie Mac's ownership interest is contradicted by the assignments because Mr. Meyer's declaration stated that Freddie Mac purchased the Loan from BANA instead of from its predecessor BAC Home Loans Servicing, LP. Opp. at 4. SFR's argument is frivolous. As SFR recognizes, BANA became assignee as successor by merger to BAC Home Loans Servicing, LP in 2011. *Id.* That Mr. Meyer named BANA, the current entity that BAC has since merged into, does not raise a material question of fact.

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In short, despite SFR's conclusory statements to the contrary, SFR has failed to raise any genuine issue of material fact and offers no evidence contrary to these business records and declarations. SFR cannot defeat summary judgment merely by saying it does not believe the evidence introduced by Nationstar: a "metaphysical doubt as to the material facts" cannot defeat summary judgment. *Berezovsky*, 869 F.3d at 933.

3. Freddie Mac's Ownership of the Loan At the Time of the HOA Sale Is Not Dependent on Whether It Holds the Endorsed Note Now

Instead of presenting any contrary evidence, SFR argues that Nationstar should have to produce the endorsed note to prove who can enforce it, citing the method for the transfer of notes under Article 3 of the Uniform Commercial Code or Nevada Revised Statutes § 104.3201. Opp. at 9-11. This argument misunderstands the difference between the *holder* and the *owner* of a secured instrument, which may be two different entities. A transfer of a note has no bearing on ownership, but instead "vests in the transferee any right of the transferor to enforce the instrument." NRS § 104.3203. Under Nevada law, "[a] person may be a person entitled to enforce [a promissory note] even though the person is not the owner of the [note]." NRS § 104.3301(2). Thus, "the status of holder merely pertains to one who may enforce the debt and is a separate concept from that of ownership." *Thomas v. BAC Home Loans Servicing, LP*, No. 56587, 2011 WL 6743044, at *3 n.9 (Nev. Dec. 20, 2011). In *Thomas*, the Nevada Supreme Court applied the Uniform Commercial Code in an analogous case where Freddie Mac claimed to own a note while BAC was the holder of the note and the record beneficiary of the associated deed of trust. The Court held there was nothing inconsistent with this situation under Nevada law. *See id.* at *1, 3 & n.9. Therefore, the question that SFR poses—who is the *holder* of the note *now*?—has no bearing on the issue to be decided here: whether Freddie Mac *owned* the note *at the time of the HOA Sale*.

As SFR confirms in its brief, the purpose in proving that Freddie Mac holds the endorsed note is to give Freddie Mac authority to enforce the note. *See* Opp. 9-11. But neither Freddie Mac nor Nationstar are attempting to enforce the note in this litigation, which would be to try to foreclose on the Property. Indeed, SFR concedes that "this is not a foreclosure action." Opp. at 9. But contrary to SFR's contention, this case does not resemble a foreclosure action because the Federal

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Foreclosure Bar does not "seek[] to strip SFR of its property rights" as the Federal Foreclosure Bar recognizes valid homeowner foreclosure sales. Instead, Nationstar argues that under the Federal Foreclosure Bar, the Deed of Trust still encumbers the Property, and SFR acquired its interest in the Property subject to it.

Under Nevada law, Freddie Mac must have been the *owner* of the note and have a contractual relationship with Nationstar at the time of the HOA Sale to maintain a secured property interest; it is of no relevance if Freddie Mac holds the endorsed note today. Even if the note had been endorsed to some other entity (it has not been), this would not have any bearing on the ownership question relevant here.

As discussed, Freddie Mac's business records, not the note, are direct evidence that establish the relevant facts: the date Freddie Mac purchased the Loan and the fact that Freddie Mac owned the Loan and Deed of Trust at the time of the HOA Sale. SFR does not identify how the promissory note could be more probative of the facts relevant to this case than the business records that Freddie Mac itself uses in the central business function of keeping track of the loans it acquires. Accordingly, evidence of who is entitled to enforce the note is irrelevant to the Federal Foreclosure Bar.[5]

B. SFR Is Not a Bona Fide Purchaser, But Even If It Were, the Federal Foreclosure Bar Still Applies

SFR contends that Nevada's bona fide purchaser laws protect it from any claim based on Freddie Mac's interest in the Property relying, again, on the fact that Freddie Mac's name did not appear in the public records at the time of the HOA Sale.[6] Opp. at 25-29. However, Nevada's bona fide purchaser laws do not apply here—SFR was not a bona fide purchaser because it had "actual

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[5] SFR also takes issue with the fact that the Seller/Servicer Profile Inquiry record from MIDAS, identifying one of the servicer numbers associated with BANA, shows BANA as having a "power of attorney." SFR Opp. at 4. SFR seems to believe that this record shows BANA has a power of attorney regarding the particular Loan here, but Mr. Meyer's discussion of that record shows that this record only identifies the seller/servicer, BANA, who is elsewhere identified in the loan-specific records only by its number. The Seller/Servicer Profile Inquiry does not contain any information specific to the Loan, and thus the fact that BANA has a "power of attorney" generally does not mean it has one for the Loan here, which is currently serviced by Nationstar.

[6] SFR bears the burden of proving it is a bona fide purchaser. *RLP-Ampus Place LLC v. U.S. Bank, National Association*, Case No. 71883 at *2-3 (unpublished) (Dec. 22, 2017), *citing Berge v. Fredericks*, 95 Nev. 183, 187 (1979). Even if BFP applied, SFR failed to meet its burden of proof.

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knowledge, constructive notice of, or reasonable cause to know that there exists . . . adverse rights, title, or interest to, the real property." NRS 111.180.

Here, both the Deed of Trust and its assignment to Nationstar were recorded prior to the HOA Sale in April 2013. That Deed of Trust is the instrument that Freddie Mac owns, regardless of whether Freddie Mac's interest is apparent from the face of the instrument. Thus, it is immaterial whether the state statutes render an unrecorded deed of trust invalid against a subsequent bona fide purchaser—the Deed of Trust embodying Freddie Mac's interest was recorded at the time of the HOA Sale in the name of its servicer. As a consequence, SFR cannot legitimately claim that it was a bona fide purchaser; it was on notice of the Deed of Trust encumbering the Property *before* the foreclosure sale.

Furthermore, the Deed of Trust put SFR on inquiry notice because it stated that the note, along with the Deed of Trust, "can be sold one or more times without prior notice to Borrower." *See* MSJ at Ex. A. Thus, SFR was on notice that unnamed other parties might have an interest in the Property. In this case, that interest was held by Freddie Mac which, along with Fannie Mae, has a large, well-publicized, and well-known role in the national housing market, especially in the aftermath of the recent housing crisis. In 2008, the Enterprises' "mortgage portfolios had a combined value of $5 trillion and accounted for nearly half of the United States mortgage market." *Perry Capital LLC v. Mnuchin*, 848 F.3d 1072, 1083 (D.C. Cir. 2017). Since 2012, "Fannie and Freddie, among other things, collectively purchased at least 11 million mortgages." *Id.*

Thus, SFR cannot avoid the duty to inquire imposed before one can claim bona fide purchaser status. Any purchaser of a property sold at an HOA sale in recent years should expect that there is a significant likelihood that Fannie Mae or Freddie Mac own the loan secured by the deed of trust that the purchaser hopes to secure in the course of the HOA sale or subsequent transfers. SFR cannot complain that it had no idea that a beneficiary of record of a deed of trust might be a servicer acting on behalf of one of the Enterprises. The Enterprises' reliance on servicers as beneficiaries of record is a well-established practice in this industry—a practice supported by the variety of cases concerning MERS and loan servicers and the Restatement's

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recognition of the relationship between loan owners and their servicers who act as beneficiaries of record. *See Nationstar Mortgage, LLC v. SFR Investments Pool 1, LLC*, No. 69400, 133 Nev. Adv. Op. 34, 2017 WL 2709806, at *3 (Nev. June 22, 2017) (citing *Montierth* and the Restatement in describing servicers' role); *see also del Junco v. Conover*, 682 F.2d 1338, 1342 (9th Cir. 1982) (parties engaged in a regulated business are particularly unable to claim ignorance of the relevant law); *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971) ("[W]here . . . the probability of regulation is so great," one operating in that business "must be presumed to be aware of the regulation."). Thus, SFR could and should have anticipated that there was a significant chance that a property it purchased at an HOA foreclosure sale was subject to an interest owned by one of the Enterprises. *Atkins v. Parker*, 472 U.S. 115, 130 (1985) ("All citizens are presumptively charged with knowledge of the law.").

Furthermore, there is no legal basis for the lack of a recorded assignment to Freddie Mac to interfere with the mandatory protection afforded to Freddie Mac's interests by the Federal Foreclosure Bar. The U.S. Supreme Court has rejected an analogous challenge to a statute allowing enforcement of an unrecorded lien that the affected party (a secured lender who repossessed property subject to the lien) had no practical means of discovering. *See Int'l Harvester Credit Corp. v. Goodrich*, 350 U.S. 537 (1956).

That case concerned a motor carrier's failure to pay a New York state highway tax, and the state's effort to impose and enforce a tax lien on trucks the carrier had purchased on credit from a vendor who retained a security interest in them. *Id.* at 538-42. When New York attempted to enforce its lien, the carrier's trucks had already been repossessed by the vendor under the security arrangement. *Id.* at 542. When the state contended that its unrecorded lien embodied a senior interest, essentially extinguishing the vendor's interest in the trucks, the vendor responded that the enforcement of such an unrecorded lien would violate its right to due process. *Id.* at 543. While the U.S. Supreme Court recognized that the vendor had neither notice of the government's unrecorded tax lien before the conditional sale or the later repossession, nor any practical means

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of discovering it,[7] the Court upheld the validity and seniority of state's lien, reasoning that the vendor had subjected itself to the possibility of such a lien by executing conditional sales of trucks operating in New York. *Id.* at 541, 544-46.

As in *International Harvester*, even if SFR was unaware of Freddie Mac's ownership of the Deed of Trust, that would not make the operation of a statute protecting that lien unfair or unequitable. Freddie Mac's Deed of Trust remains an encumbrance on the Property, undisturbed by the HOA Sale.

Nevertheless, if SFR was a bona fide purchaser under Nevada law, the Federal Foreclosure Bar would preempt those statutes. The bona fide purchaser statutes would add a hurdle to the protection of Freddie Mac's interest, those laws would come into conflict with the Federal Foreclosure Bar, and the state law must yield. As the Ninth Circuit held twice, "the Federal Foreclosure Bar preempts the Nevada law to the extent that the Nevada law would permit a foreclosure on a superpriority lien to extinguish Freddie Mac's interest, without [FHFA's] consent, while Freddie Mac is under [FHFA's] conservatorship." *Elmer*, 2017 WL 3822061, at *1; *Berezovsky*, 2017 WL 3648519, at *6-7 (same).

The conflict between the Federal Foreclosure Bar and the bona fide purchaser statutes, as SFR would interpret them, is obvious. The Federal Foreclosure Bar automatically bars any nonconsensual extinguishment through foreclosure of any interest in property held by Freddie Mac while in conservatorship. 12 U.S.C. § 4617(j)(3). However, according to SFR's interpretation, the bona fide purchaser laws would allow state HOA lien sales to extinguish Freddie Mac's property interests whenever the associated deed of trust appeared in the name of Freddie Mac's nominee or servicer, an arrangement (as discussed *supra*) otherwise permitted under Nevada law. Federal law thus precludes what state law would permit: extinguishment of the Freddie Mac conservatorship's deed-of-trust interest. Under such circumstances, state law must yield.

[7] Indeed, state employees were prohibited by law from informing the vendor that the trucks were subject to a tax lien. 350 U.S. at 541 n.7. The dissent focused on the point that the vendor had no reasonable means of avoiding the tax lien, noting that the vendor's only apparent means of doing so would be "by avoiding such sales" in the first place. *Id.* at 550 (Frankfurter, J., dissenting).

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C. FHFA Did Not Consent to the Extinguishment of the Deed of Trust

In an attempt to defeat summary judgment, SFR disputes the fact that FHFA did not consent to extinguishment of Freddie Mac's interest in the Property. Opp. at 6-7. *First*, it is SFR's burden to prove that FHFA consented to the extinguishment of Freddie Mac's property interest in this case. As discussed in Nationstar's Opening Brief, FHFA did not, and SFR has not shown otherwise. MSJ at Ex. L. "The Federal Foreclosure Bar does not require the Agency to actively resist foreclosure. Rather, the statutory language cloaks Agency property with Congressional protection unless or until the Agency affirmatively relinquishes it." *Berezovsky*, 869 F.3d at 930 (citation omitted).

Second, SFR incorrectly references Freddie Mac's Guide as purportedly evidencing consent to the extinguishment of Freddie Mac's property interest. SFR's characterization of the Guide is incorrect and confuses *priority* with *extinguishment.* It is consistent for Freddie Mac to direct its servicers in the Guide to try to protect the *priority* of its liens even when the Federal Foreclosure Bar would otherwise protect those liens from the more severe consequences of *extinguishment*. Freddie Mac's Guide does not suggest consent to extinguishment of Freddie Mac's property interests.

In any event, the terms of the Guide cannot override the preemptive effect of federal law. The Federal Foreclosure Bar is a statutory protection to the Enterprises provided by Congress for the duration of their conservatorship, regardless of any action by their servicers. If a servicer fails in its contractual duties during conservatorship, this does not equate to consent on behalf of FHFA to erase the protective effect of the statute. On the other hand, the Guide was written to apply throughout Freddie Mac's relationship with its servicers, relationships that predate, and will postdate, the conservatorship. Therefore, it is natural for the Guide to include instructions to servicers that would be necessary should the statutory protection not be in effect.

Moreover, SFR cannot enforce the terms of the Guide against Freddie Mac or its servicers. While the Guide is a contract between Freddie Mac and its servicers, SFR is not a party or a third party beneficiary of that contract, and therefore cannot enforce its terms. *See, e.g., Skylights v. Byron*, 112 F. Supp. 3d 1145, 1157 (D. Nev. 2015); *Wood v. Germann*, 331 P.3d 859, 861 (Nev. 2014) (person "who is neither a party nor an intended third-party beneficiary of [a mortgage-backed

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security contract], lacked standing to challenge the [contractually authorized] assignment's validity"); *Deerman v. Freddie Mac*, 955 F. Supp. 1393, 1404-05 (N.D. Ala. 1997).

Finally, SFR cites to Fannie Mae's failure to advance a federal preemption defense in a Michigan state court action, *Trademark Properties*, to argue FHFA consented here. Opp. at 7 (citing *Trademark Properties of Michigan, LLC v. Fannie Mae*, 308 Mich. App. 132, 863 N.W.2d 344 (2014)). SFR relies only on the fact that Fannie Mae appears to have raised various alternative arguments in its defense but not the Federal Foreclosure Bar. SFR fails to explain how *Fannie Mae's* decision to invoke certain arguments but not others in a different state and under different factual circumstances can be interpreted as consent to extinguishing *Freddie Mac*'s interest here.

D. SFR's Argument Concerning "Reasoned Decision Making" Fails

SFR's argument that FHFA's "decision not to consent" violates reasoned decision-making misunderstands the way that the Federal Foreclosure Bar works. Opp. at 22-23. This argument relies on the incorrect premise that the Federal Foreclosure Bar does not operate automatically and that FHFA makes property-by-property decisions about consent. This argument has no basis in the record. Indeed, such a reading of the Federal Foreclosure Bar would undermine the purpose of the statutory protection—making it toothless unless FHFA continuously monitors each potential state-law action that could affect the tens of millions of loans that the Enterprises own nationwide. The text of the Federal Foreclosure Bar makes clear that the protection is automatic and requires no such herculean efforts. *See Beal Bank, SSB v. Nassau Cty.*, 973 F. Supp. 130, 133 (E.D.N.Y. 1997) (evaluating the FDIC's similar property protection statute and concluding Congress did not intend the FDIC to make individual decisions for that protection to be effective). Accordingly, SFR's argument fails because it ignores that no Agency action is involved in protecting individual deeds of trust from extinguishment; Congress made the determination to protect them by statute, and that is all the "reasoned decisionmaking" to which SFR was entitled.

Even if SFR were correct that FHFA made individual decisions regarding particular properties, such decisions would be well within FHFA's statutory powers and thus appropriate. The Ninth Circuit has recognized that FHFA's powers as conservator include managing the mortgage assets of the Enterprises: "[N]othing precludes a conservator from making business decisions that

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