

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

BANK OF AMERICA, N.A.,  
SUCCESSOR BY MERGER TO BAC  
HOME LOANS SERVICING, LP FKA  
COUNTRYWIDE HOME LOANS  
SERVICING, LP, a National  
Association.

Appellant,

vs.

SFR INVESTMENTS POOL 1, LLC, a  
Nevada Limited Liability Company,

Respondent.

Case No. 70501

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**APPEAL**

from the Eighth Judicial District Court, Department XXI  
The Honorable Valerie Adair, District Judge  
District Court Case No. A-13-684501-C

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**APPELLANT'S INDEX TO APPENDIX**

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## **CERTIFICATE OF SERVICE**

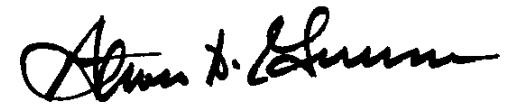
I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on this 7<sup>th</sup> day of October, 2016, I caused to be served a true and correct copy of foregoing **APPELLANT'S INDEX TO APPENDIX**, in the following manner:

**(UNITED STATES MAIL)** By depositing a copy of the above-referenced document for mailing in the United States Mail, first-class postage prepaid, at Las Vegas, Nevada, to the parties listed below at their last-known mailing addresses, on the date above written:

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LP FKA Countrywide Home Loans Servicing, LP*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

ALESSI & KOENIG, LLC,  
  
Plaintiff,

v.

BANK OF AMERICA, N.A., SUCCESSOR BY  
MERGER TO BAC HOME LOANS  
SERVICING, LP FKA COUNTRYWIDE  
HOME LOANS SERVICING, LP, unknown  
entity, DOES INDIVIDUALS 1-X, inclusive, and  
ROE CORPORATIONS XI-XXX, inclusive,

Defendants.

Case No.: A-13-684501-C  
Dept.: XXI

**DEFENDANT BANK OF AMERICA, N.A.'S  
REPLY BRIEF IN SUPPORT OF MOTION  
FOR SUMMARY JUDGMENT**

BANK OF AMERICA, N.A., SUCCESSOR BY  
MERGER TO BAC HOME LOANS  
SERVICING, LP FKA COUNTRYWIDE  
HOME LOANS SERVICING, LP, a National  
Association,

Cross-Claimant,

v.

ARMANDO A. CARIAS, an individual, DOES  
INDIVIDUALS 1 through 10, inclusive, and  
ROE BUSINESS ENTITIES 1 through 10,  
inclusive,

Cross-Defendants.

{37282677;1}

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1 BANK OF AMERICA, N.A., SUCCESSOR BY  
2 MERGER TO BAC HOME LOANS  
3 SERVICING, LP FKA COUNTRYWIDE  
4 HOME LOANS SERVICING, LP, a National  
5 Association,

6 Cross-Claimant,

7 v.

8 SFR INVESTMENTS POOL 1, LLC, a domestic  
9 Limited Liability Company, SUTTER CREEK  
10 HOMEOWNERS' ASSOCIATION, an unknown  
11 entity, and DOES 1 through 10 and ROE  
12 BUSINESS ENTITIES 1 through 10,

13 Cross-Defendants.

14 Defendant Bank of America, N.A.'s (**BANA**) files this reply to Cross-Defendant SFR  
15 Investments Pool 1, LLC's (**SFR**) opposition to BANA's motion for summary judgment.

## 16 MEMORANDUM OF POINTS AND AUTHORITIES

### 17 I.

#### 18 INTRODUCTION

19 **First**, the HOA had no lien to foreclose upon in February 2013 because BANA, as servicer,  
20 delivered a check to the HOA for an amount greater than the super-priority portion of the HOA's  
21 lien. SFR's argument, that a servicer must pay whatever an HOA asks, regardless of the amount of  
22 the limited lien, is contrary to the express language of NRS 116.3116(2)(c), the comments of the  
23 drafters of the Uniform Common Interest Ownership Act, and foreign to lien law.

24 **Second**, the February 2013 HOA foreclosure sale was commercially unreasonable. It is an  
25 undisputed fact that the HOA's foreclosure trustee, Alessi & Koenig, LLC withheld material  
26 information from bidders at the auction.

27 **Third**, Nevada designed its super priority notice scheme to be "opt-in," which does not meet  
28 the procedural due process clause's command for a foreclosure scheme that is designed to ensure  
actual notice to affect parties such as BANA.

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## LEGAL STANDARDS

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## LEGAL DISCUSSION

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1 of the property and bought the property at a sheriff's sale. The Nevada Supreme Court held that  
2 Moore held valid title as opposed to Allison Steel Manufacturing:

3 We think that appellant's position as a purchaser at a judgment sale is  
4 controlled by the rule announced in 8 Thompson on Real Property, §  
5 4313, at 371 (1963), which holds: 'The leading rule in absence of  
6 statute is that the doctrine of caveat emptor applies to a sale under  
7 execution, and a purchaser ordinarily acquires no better title than the  
8 debtor could have conveyed at the time the lien attached.'

9 *Allison Steel Manufacturing Co.*, 86 Nev. at 499, 471 P.2d at 669. The rule at foreclosure sales in  
10 Nevada is *caveat emptor*.

11 Here, there is no statutory provision in Chapter 116 which mentions the *bona fide* purchaser  
12 doctrine. NRS 116.31164 imposes a duty on a buyer to do its own research as to the quality of title  
13 it is buying:

14 3. After the sale, the person conducting the sale shall:

15 (a) Make, execute and, after payment is made, deliver to the  
16 purchaser, or his or her successor or assign, **a deed without warranty**  
17 which conveys to the grantee all title of the unit's owner to the unit;

18 NRS 116.31164(3)(a) (Emphasis Added). Likewise, the trustee's deed SFR received in this case was  
19 "without warranty." (Ex. G to MSJ, pg. 1).

20 The burden of evidence to establish bona fide purchaser status is on the purchaser. *Berge v.*  
21 *Fredericks*, 95 Nev. 183, 188, 591 P.2d 246, 248 (Nev. 1979) ("In order to be entitled to the status of  
22 a bona fide purchaser without notice under NRS 111.325, respondent Valdez was required to show  
23 that legal title had been transferred to her before she had notice of the prior conveyance to  
24 appellant.") SFR has provided this Court with no admissible evidence demonstrating that it is a bona  
25 fide purchaser. SFR did not even provide this Court with an affidavit stating it did not know of  
26 BANA's tender and interest in the Property.

27 The only admissible evidence in this case shows that SFR was on inquiry notice of BANA's  
28 continuing interest in the Property. To qualify as a bona fide purchaser, one cannot have actual or  
constructive notice of another party's unrecorded interest in the subject property. *Huntington v. Mila,*  
*Inc.*, 119 Nev. 355, 75 P.3d 354 (2003). "A duty of inquiry arises 'when the circumstances are such  
that a purchaser is in possession of facts which would lead a reasonable man in his position to make

1 an investigation that would advise him of the existence of prior unrecorded rights. He is said to have  
2 constructive notice of their existence whether he does or does not make the investigation. The  
3 authorities are unanimous in holding that he has notice of whatever the search would disclose.” *Id.*  
4 (quoting *Allison Steel Mfg. Co. v. Bentonite, Inc.*, 86 Nev. 494, 498, 471 P.2d 666, 668 (1970)).

5 Here, SFR was certainly on inquiry notice of BANA’s continuing interest in the Property.  
6 The Deed of Trust and Assignment of Deed of Trust were both recorded prior to the February 2013  
7 foreclosure. (Ex. A and Ex. B to MSJ). Plaintiff could have called the foreclosure trustee. Whether  
8 or not Plaintiff did either, Plaintiff cannot disclaim knowledge of what a reasonable investigation  
9 would have revealed.

10 Similarly, BANA was not required to record its payment of the super-priority amount. SFR’s  
11 argument is nonsensical. The Deed of Trust and Assignment were recorded in the land records (Ex.  
12 A and Ex. B to MSJ). BANA’s interest in the Property stems from these documents. Nevada law  
13 does not further require that a party record every action it takes to maintain its interest in the  
14 Property. Nowhere in NRS 116 *et seq.* does it state that tender attempts must be recorded in the land  
15 records.

16 **D. The HOA had No Lien to Foreclose in February 2013.**

17 **1. BANA's Delivery of a Check for 9 Months' Assessments Extinguished the HOA's**  
18 **Lien by Satisfying the Putative Debt Supporting the Lien.**

19 A lien has no separate existence from the debt it secures. NRS 116.3116(1); *see also* 51  
20 Am.Jur.2d, Liens § 1. SFR does not dispute that BANA delivered a check to Alessi & Koenig, LLC  
21 for 9 months' of assessments before the February 2013 foreclosure sale. Plaintiff concedes, by  
22 failing to argue otherwise, that the sum delivered was more than the super priority amount. Plaintiff  
23 merely argues that BANA's act of delivering a check to Alessi & Koenig, LLC was not a tender.  
24 Plaintiff argues that BANA should have delivered more than the lien amount, whatever the HOA  
25 demanded.

26 The super priority portion of the lien is not subject to debate. It's sum is fixed by statute. It  
27 is potentially two fixed amounts. The first line of *SFR Investments Pool 1 v. U.S. Bank*, 334 P.3d  
28 408, 414 (Nev. 2014) reads as follows:

1 NRS 116.3116 gives a homeowners' association (HOA) a superpriority  
2 lien on an individual homeowner's property for **up to nine months of**  
3 **unpaid HOA dues.**

4 *Id.* at 409. (Emphasis added). Contrary to plaintiff's argument, the "full amount due" is not  
5 whatever an HOA demands, but rather what is the statutory sum entitled to priority. BANA  
6 delivered a check for 9 months to Alessi & Koenig, LLC. (**Ex. E** to MSJ).

7 Further, SFR's claim that BANA's tender was invalid because it was not "unconditional"  
8 lacks merit. SFR claims that BANA "conditioned the proposed payment by putting forth the  
9 condition that any endorsement of the cashier's check will be strictly construed as an unconditional  
10 acceptance and an express agreement that the lien has been paid in full." SFR Opp. at 5. Clearly  
11 this is not the sort of condition that limits the validity of a tender. BANA simply made clear that its  
12 tender was for payment of the lien. To rule that this constituted an improper condition invalidating  
13 BANA's tender would mean that no party could specify the purpose of their tender.

## 14 **2. SFR's Citation to *Moeller* is Not on Point.**

15 SFR throughout its brief mistakenly cites to *Moeller v. Lien*, 25 Cal.App.4th 822 (Cal. Ct.  
16 App. 1994). This case is not on point. **First**, the case does not involve a creditor's right to redeem  
17 the priority of its mortgage prior to a non-judicial HOA foreclosure. **Second**, it does not involve the  
18 doctrine of tender. While *Moeller* mentions the doctrine of tender, the borrower in *Moeller* merely  
19 alleged that it had he did not know he had a right to a one day postponement. *Id.* at 784. Any  
20 attempt to stretch *Moeller* beyond its facts is unpersuasive because such a reading conflicts with  
21 decades of California foreclosure law. **Third**, Bank of America is not seeking to use the doctrine of  
22 tender to disturb the sale. Bank of America seeks an order from this Court to hold that, if Plaintiff  
23 has title, Plaintiff holds title subject to Bank of America's senior deed of trust.

24 **Fourth**, Plaintiff's reading of *Moeller*, that a foreclosure sale cannot be disturbed is far too  
25 broad. The rule in California is not that the *bona fide* purchaser rule, even if it was applicable here  
26 which it isn't, trumps the tender rule. Courts in California have always held that where a party cures  
27 a putative obligation to pay, there is no statutory right to initiate foreclosure in the first place and  
28 such a sale would be *void ab initio*. *Chavez v. Indymac Mortg. Servs.*, 219 Cal.App.4th 1055, 1063  
(Cal. App., 2013) (citing *Bank of America v. La Jolla Group II*, 129 Cal.App.4th 706 (Cal. Ct. App.



2005) (trustor and beneficiary entered into agreement pursuant to which trustor would cure default but trustee mistakenly conducted foreclosure sale at which third party purchased property). A foreclosure sale conducted after a trustee rejects such a tender would be void, not voidable. (*Bisno v. Sax* (1959) 175 Cal.App.2d 714, 724 ("Speaking generally, the acceptance of payment of a delinquent installment of principal or interest cures that particular default and precludes a foreclosure sale based upon such preexisting delinquency. The same is true of a tender which has been made and rejected.")).

**E. The HOA Sale Was Commercially Unreasonable.**

An HOA's obligation to act in good faith with respect to all of its obligations and rights under NRS Chapter 116 is found at NRS 116.1113. Nevada's legislature created a spreadsheet that details where each section of its unique version of the Uniform Common Interest Ownership Act was derived. Nevada based its version of NRS 116.1113 on NRS 104.1203. Thus, Nevada's legislature specifically intended that the concept of good faith found in Chapter 116 be informed by the Uniform Commercial Code concept of good faith.

Alessi & Koenig sold the Property at a price far below market value. It is an undisputed fact that Alessi & Koenig, LLC did not inform bidders at the sale that the lender had delivered the super priority amount prior to the sale. SFR certainly does not argue that it would have proceeded with bidding at the auction regardless of the tender. No bidder could conceivably know the quality of title it was bidding upon at the auction. This uncertainty is not solely due to the legal uncertainty prior to the *SFR* decision. There was also uncertainty regarding the property's title due to the HOA's foreclosure agent not disclosing to bidders that a tender occurred. The result was a sale for far less than the Property's fair market value. This Court should set the sale aside as void.

**F. Chapter 116 of NRS's Non-Judicial Foreclosure Scheme Violates the Procedural Due Process Clause Requirement of A Statutory Scheme Designed to Guarantee Meaningful Notice and Meaningful Opportunity to be Heard.**

**1. *SFR Investments Pool 1, LLC v. US Bank's* Brief Procedural Due Process Analysis Does Not Resolve the Issue.**

Contrary to the SFR Decision, the enactment of Nevada's version of UCIOA certainly did not put BANA on notice that its deed of trust could be extinguished. **First**, Bank of America's secured

1 loan did not exist until October 2010. (**Ex. A** to MSJ). **Second**, The HOA's lien did not exist until  
 2 February 2012 (**Ex. C** to MSJ). **Third**, Nevada's Supreme Court could not, and did not cite, to any  
 3 state law that adopted the UCIOA to demonstrate that an HOA could use a non-judicial process to  
 4 foreclose upon a super priority lien for assessments. In fact, while the court did cite to *Summerhill*  
 5 *Village Homeowners Ass'n v. Roughley*, — Wash.App.—, 289 P.3d 645, 647–48 (2012), the  
 6 court ignored that Washington expressly disallowed non-judicial foreclosure of HOA super priority  
 7 liens.<sup>1</sup> **Fourth**, *In re Medaglia*, 52 F.3d 451, 455 (2nd Cir. 1995) is not relevant. *In re Medaglia* is  
 8 not a facial challenge case. In that case, the Second Circuit held a bankruptcy court's particular  
 9 application of 11 USC 523(a)(3)(B) to bar a secured creditor's claim filed after the bar date did not  
 10 offend procedural due process.

## 11 2. State Action Exists.

12 State action exists where the state has used coercive power, whether covert or overt, or  
 13 provided significant encouragement to the private actor such that the challenged action can be fairly  
 14 attributable to the state. *Blum v. Yaretsky*, 457 U.S. 991, 104, 102 S.Ct. 2777, 73 L.Ed.2d 534  
 15 (1982). The question of whether actions of a private actor are fairly attributable to the state is a fact  
 16 bound inquiry. *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S.  
 17 288, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001).

18 SFR is correct that traditionally, a state's acquiescence in the remedy of non-judicial  
 19 foreclosure to enforce a private bargain between two private parties is not state action. *Flagg*  
 20 *Brothers, Inc v. Brooks*, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978):

21 Respondent Brooks has never alleged that state law barred her from  
 22 seeking a waiver of Flagg Brothers' right to sell her goods at the time  
 23 she authorized their storage. Presumably, respondent Jones, who  
 24 alleges that she never authorized the storage of her goods, could have  
 25 sought to replevy her goods at any time under state law. See  
 26 N.Y.Civ.Prac.Law § 7101 et seq. (McKinney 1963). The challenged  
 statute itself provides a damages remedy against the warehouseman for  
 violations of its provisions. N.Y.U.C.C. § 7-210(9) (McKinney 1964).  
 This system of rights and remedies, recognizing the traditional place of  
 private arrangements in ordering relationships in the commercial

27 <sup>1</sup> "If an association forecloses its lien under this section nonjudicially pursuant to chapter 61.24.  
 28 RCW, as provided by subsection (9) of this section, the association shall not be entitled to the lien  
 priority provided for under subsection (3) of this section." RCW 64.34.364(5).

1 world, can hardly be said to have delegated to Flagg Brothers an  
2 exclusive prerogative of the sovereign.

3 *Id.* at 160. Similarly, in *Apao v. Bank of New York*, 324 F.3d 1091, 1094-1095 (9th Cir. 2003) the  
4 Ninth Circuit found no state action where Nevada had merely recognized a power of sale conferred  
5 by the borrower's private agreement with her lender.

6 The contrast between *Flagg Brothers* and *Apao* could not be more stark. The following facts  
7 taken from the public record of AB 221, AB 204, and the scholarly articles explaining the  
8 government purpose behind the rise of HOAs nationally cannot be disputed. **First**, Nevada  
9 mandated the creation of this particular HOA, and all HOAs in Nevada, because they govern  
10 common open space. **Second**, HOAs had supplanted traditional state actors in providing services  
11 commonly enjoyed such as maintenance of private streets, providing recreational resources, and  
12 maintenance of common areas such as street lights and sidewalks. **Third**, the source of the super  
13 priority lien is not a private agreement. **Fourth**, Nevada barred HOAs and deed of trust beneficiary's  
14 from subordinating the HOA's super priority lien. **Fifth**, in 2009, Assemblyperson Spiegel stated  
15 that the super priority had to be lengthened to ensure that the HOAs, who had supplanted local  
16 governments in providing services, did not fail. **Sixth**, the scholarly authority concerning rise in the  
17 number of HOAs nationally can be explained in large part because HOAs supplanted public actors in  
18 providing commonly enjoyed services at no cost to local governments.

19 Moreover, an HOAs board member's powers are circumscribed by statute. NRS 116.3102.  
20 The declarant had no choice but to create a homeowner's association because the community had  
21 common open space. NRS 278A.130. Under Nevada law, the HOA had no choice but to have a  
22 super priority lien that could not be subordinated. *See* NRS 116.1104; *see also SFR Investments*  
23 *Pool 1, LLC*, 334 P.3d at 418-419. An HOAs powers with respect to super priority and super  
24 priority foreclosure are circumscribed by state law.

25 Finally, SFR's analysis to challenge the state action finding in *Culbertson v. Leland*, 528  
26 F.2d 426 (9th Cir. 1975) is not persuasive. Contrary to SFR's analysis, BANA does not cite  
27 *Culbertson* to argue that Nevada's creation of a right that did not exist at common law is  
28

determinative. There is state action because Nevada has displaced the rules of priority and given HOAs the whip of non-judicial foreclosure to compel lenders to satisfy a unit owner's debt.

**3. The Facial Due Process Violation is Nevada's Design of a Foreclosure Notice Scheme That Does Not Guarantee Actual Notice to Lienholders Such as BANA.**

The HOA Lien Statute is unconstitutional because it does not ensure mortgagees with a potential loss of their property interests will receive notice and an opportunity to be heard.<sup>2</sup> The Due Process Clause of the U.S. Constitution requires that, "at a minimum, [the] deprivation of life, liberty, or property by adjudication be preceded by notice and an opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (emphasis added). An "elementary and fundamental requirement of due process ... is notice reasonably calculated, *under all circumstances*, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Tulsa Prof'l Collection Services, Inc. v. Pope*, 458 U.S. 478, 484 (1988) (quoting *Mullane*, 339 U.S. at 314) (emphasis added). Put more simply, state action may not extinguish an interest in real property unless the holder of that interest is afforded notice of that action.

Here, SFR cites to NRS 116.31168 to argue that Nevada designed a statutory scheme to require actual notice to the first position beneficiary. (**Opp MSJ** at 15). SFR takes great pains to argue that this shows Nevada's legislature intended to incorporate NRS 107.090(3)(b)'s notice provisions to Chapter 116 non-judicial foreclosure. (*Id.*). This argument fails because it ignores the AB 221 spreadsheet where the legislature explained that the source of NRS 116.31168 was the request for notice provision for lienholders of NRS 107.090.

Plaintiff's argument ignores the Nevada legislature's amendments to its notice of foreclosure scheme in 1993. In 1993, Nevada's legislature extensively revised its version of the Uniform Common Interest Ownership Act through AB 612. AB 612, at section 6, created a new section of Chapter 116, NRS 116.31163:

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<sup>2</sup> A foreclosure under the HOA Lien Statute alleged to have extinguished a first deed of trust is state action subject to a due-process challenge. *See Culbertson*, 528 F.2d 426 (holding that private innkeeper's seizure of property without notice pursuant to state innkeeper's lien statute constituted state action and violated due process).

The association or other person conducting the sale shall also mail, within 10 days after the notice of default and election to sell is recorded, a copy of the notice by first-class mail to:

1. *Each person who has requested notice pursuant to NRS 107.090 or 116.31168;*

2. Any holder of a recorded security interest encumbering the unit's owner's interest *who has notified the association*, 30 days before the recordation of the notice of default, of the existence of the security interest; and

3. A purchaser of the unit, if the unit's owner has notified the association, 30 days before the recordation of the notice, that the unit is the subject of a contract of sale and the association has been requested to furnish the certificate required by NRS 116.4109.

1993 Statutes of Nevada, Page 2355. (Italics in original). Next, AB 612 then amended NRS 116.31166(3):

3. The sale of a unit pursuant to NRS 116.31162 and 116.31164 *and section 6 of this act* vests in the purchaser the title of the unit's owner without equity or right of redemption.

1993 Statutes of Nevada, Page 2373. (Italics in original). Finally, AB 612, section 40, revised NRS 116.31168(1), the provision cited by plaintiff. However, Nevada's revisions in 1993 to this section was to strip lienholders of actual notice:

116.31168 1. The provisions of NRS 107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed. The request must identify the lien by stating the names of the unit's owner and the common-interest community. [The association must also give reasonable notice of its intent to foreclose to all holders of liens in the unit who are known to it.]

1993 Statutes of Nevada, Page 2373.

Finally, NRS 107.090(3)(b) was created in 1989. *See* 1989 Statutes of Nevada, Page 644. Nevada's legislature could have simply incorporated NRS 107.090(3)(b) into Chapter 116, but they did not. Nevada's legislature specifically only incorporated the request notice provision of NRS 107.090 and not the provision cited by plaintiff. SFR's argument violates the rule is only "every *reasonable* construction must be resorted to, in order to save a statute from unconstitutionality." " *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)) (Emphasis added).

1 That Chapter 116 is a request notice scheme by legislative design is easily shown by  
2 comparing Chapter 116's foreclosure scheme with the actual notice scheme Nevada's legislature  
3 designed and made applicable to property tax foreclosures. Before a property can be sold for  
4 delinquent property taxes, the county treasurer must mail via certified mail a notice of sale to the  
5 owner and any lienholder. NRS 316.595(3)(b). If the notice of sale is returned unsigned, the county  
6 treasurer must make a "reasonable attempt" to notify the owner or lienholder prior to the sale. *Id.*  
7 Nevada's legislature knew how to design an foreclosure scheme granting lienholders a guaranteed  
8 right of actual notice, but chose not to do so through NRS Chapter 116.

9 V.

10 **CONCLUSION**

11 This Court should grant BANA's motion for summary judgment. BANA acted precisely  
12 according how the drafters of the Uniform Common Interest Ownership Act intended. BANA  
13 delivered a check for 9 months' of assessments. Alessi & Koenig, LLC's nondisclosure demonstrates  
14 a lack of honesty in fact and renders the sale commercially unreasonable. Finally, this Court should  
15 decline SFR's invitation to take out a blue pencil to the NRS Chapter 116's notice provisions in order  
16 to save them. NRS Chapter 116's notice provisions violate the federal procedural due process clause  
17 by requiring BANA to opt-in to notice when actual notice is BANA's due.

18 DATED this 28<sup>th</sup> day of January, 2016.

19 AKERMAN LLP

20 /s/ Steve Shevorski, Esq.

21 DARREN T. BRENNER, ESQ.

22 Nevada Bar No. 8386

23 STEVE SHEVORSKI, ESQ.

24 Nevada Bar No. 8256

25 1160 Town Center Drive, Suite 330

26 Las Vegas, Nevada 89144

27 *Attorneys for Bank of America, N.A.*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on this 14<sup>th</sup> day of January, 2016 I caused to be served a true and correct copy of foregoing **DEFENDANT BANK OF AMERICA, N.A.’S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**, in the following manner:

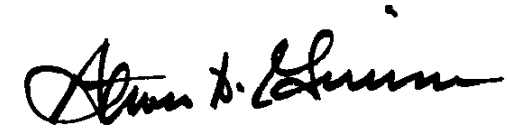
**(ELECTRONIC SERVICE)** Pursuant to Administrative Order 14-2, the above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by the Court’s facilities to those parties listed on the Court’s Master Service List.

<b>Alessi &amp; Koenig</b>		
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For those Parties not registered pursuant to Administrative Order 14-2, service was made in the following manner:

**(UNITED STATES MAIL)** Pursuant to NRCP 5(b), by depositing a copy of the above-referenced document for mailing in the United States Mail, first-class postage prepaid, at Las Vegas, Nevada, to the parties listed below at their last-known mailing addresses, on the date above written.

/s/ *Julia M. Diaz*  
An employee of AKERMAN LLP



CLERK OF THE COURT

TRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA  
\* \* \* \* \*

ALESSI & KOENIG, LLC,	.	CASE NO. A-13-684501-C
	.	
Plaintiff,	.	DEPT. NO. XXI
	.	
vs.	.	<b>TRANSCRIPT OF</b>
	.	<b>PROCEEDINGS</b>
ARMANDO A. CARIAS, et al.,	.	
	.	
Defendants.	.	
. . . . .	.	
<u>And all related claims.</u>	.	

BEFORE THE HONORABLE VALERIE P. ADAIR, DISTRICT COURT JUDGE

**DEFENDANT BANK OF AMERICA, N.A.'S MOTION FOR SUMMARY JUDGMENT;  
SFR INVESTMENTS POOL 1, LLC'S MOTION FOR SUMMARY JUDGMENT;  
ALESSI & KOENIG, LLC AND SUTTER CREEK HOMEOWNERS ASSOCIATION'S  
JOINDER TO SFR INVESTMENTS POOL 1, LLC'S  
MOTION FOR SUMMARY JUDGMENT**

WEDNESDAY, FEBRUARY 3, 2016

APPEARANCES:

FOR ALESSI & KOENIG,  
LLC AND SUTTER CREEK  
HOMEOWNERS ASSOCIATION:

CHANTEL M. SCHIMMING, ESQ.

FOR SFR INVESTMENTS  
POOL 1, LLC:

JACQUELINE A. GILBERT, ESQ.

FOR BANK OF AMERICA:

ARIEL S. STERN, ESQ.

COURT RECORDER:

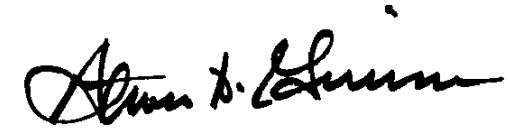
SUSIE SCHOFIELD  
District Court

TRANSCRIPTION BY:

VERBATIM DIGITAL REPORTING, LLC  
Englewood, CO 80110  
(303) 798-0890

Proceedings recorded by audio-visual recording, transcript  
produced by transcription service.





CLERK OF THE COURT

TRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA  
\* \* \* \* \*

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Englewood, CO 80110  
(303) 798-0890

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1     LAS VEGAS, NEVADA, WEDNESDAY, FEBRUARY 3, 2016, 10:10 A.M.

2             THE COURT:   Would everyone -- well, you all can  
3 fight amongst yourselves as to who you represent, but  
4 notwithstanding that, everyone's going to have to state their  
5 appearances for the record.  So, we'll start with you, Mr.  
6 Stern.

7             MR. STERN:   Good morning, Your Honor.  Ariel Stern  
8 on behalf of Bank of America.

9             MS. GILBERT:  Jacqueline Gilbert on behalf of SFR  
10 Investments Pool 1, LLC.

11            MS. SCHIMMING: Chantel Schimming on behalf of  
12 Alessi & Koenig and Sutter Creek Homeowners Association, Bar  
13 No. 8886.

14            THE COURT:   All right.  We're used to seeing SFR  
15 standing at that table.

16            MS. GILBERT:  I know.

17            MR. STERN:   That's what we were having a little  
18 colloquy about, are we on the right side.

19            THE COURT:   All right.  I had one question on this,  
20 and whoever wants to pipe up on this answer is welcome to do  
21 so.  My question is this: Bank of America tendered a  
22 particular amount, 760-something change; is that right?

23            MR. STERN:   I thought it was 720.

24            THE COURT:   I'm relying on memory.  Whatever it was  
25 -- oh, it's \$720 --

1 MR. STERN: Right.

2 THE COURT: -- was the amount that -- of the check.  
3 And in -- and this wasn't quite clear to me, so maybe I should  
4 have gotten this but I didn't. The Bank seems to be  
5 asserting, oh, this is absolutely undisputed. This is the  
6 correct amount, 100 percent, 720, it's the nine months worth  
7 of assessment and, in fact, it looks like they used a slightly  
8 higher amount of the 86 and change or whatever it was --

9 MR. STERN: Right.

10 THE COURT: -- again. So, my question is, is this  
11 truly undisputed that this was the correct amount of the nine  
12 months?

13 MR. STERN: I suppose, Your Honor, there is a  
14 factual and a legal dispute. And if you're asking factually  
15 --

16 THE COURT: Yeah. Factually, if you say -- well,  
17 the legal dispute is what number -- what do you use. That's  
18 to --

19 MR. STERN: Right.

20 THE COURT: -- me, the legal dispute.

21 MR. STERN: Right.

22 THE COURT: The factual dispute is, if we say that  
23 your theory, for lack of a better word, is correct --

24 MR. STERN: Yes.

25 THE COURT: -- is your number right?

1 MR. STERN: Yes, and --

2 THE COURT: Or is there even a dispute about that?  
3 And you didn't add fees or anything. You just did the basic  
4 monthly assessment --

5 MR. STERN: Right. We followed --

6 THE COURT: -- is that correct? And then you added  
7 for when it changed, I guess, it was some -- right? Am I  
8 correct, or am I confusing this --

9 MR. STERN: Yes.

10 THE COURT: -- with another case? It was like \$79,  
11 and then went up to \$86, but you used the \$86 for the entire  
12 nine-month period, right?

13 MR. STERN: Right.

14 THE COURT: That's essentially what you did?

15 MR. STERN: Correct, Your Honor. And this is -- we  
16 followed the practice that we typically did, and I'm sure  
17 you've seen it in other cases, which is to offer the payment  
18 in the amount that the statute says, in our view, is the  
19 correct amount, nine months. We in this case calculated that  
20 amount after Alessi provided a ledger that itemized the  
21 monthly amount, and so it was a simple math error that we  
22 actually erred on and overpaid.

23 THE COURT: Right.

24 MR. STERN: I think the error was that the monthly  
25 assessment changed from 75 to -- or whatever it was --

1 THE COURT: Whatever it was. It was 70-something --

2 MR. STERN: And --

3 THE COURT: -- to 80-something.

4 MR. STERN: And so, a significant portion of the  
5 nine-month period predated that change, but the tender amount  
6 assumed more. It assumed that it had been the new amount  
7 throughout the nine-month period, so that's what was tendered.  
8 I don't believe that there's been any dispute.

9 Certainly, there's argument as to the legal  
10 significance of that. And Alessi is present here and I  
11 suppose they can dispute it. I think they would be the  
12 correct party to dispute if the monthly assessment was a  
13 different amount.

14 THE COURT: Right, so that's undisputed.

15 MR. STERN: I believe that that -- you know, other  
16 counsel can speak to this. Obviously, there's going to be  
17 argument as to what that means legally, but I think --

18 THE COURT: Right.

19 MR. STERN: -- if you were to -- your question is,  
20 what is nine times --

21 THE COURT: Yeah, so that's undisputed.

22 MR. STERN: -- the monthly assessments, that's not  
23 disputed.

24 THE COURT: Well, I guess my question isn't, what's  
25 9 times 86, because we could all sit with -- you know, do it;

1 figure that one out. My question is, is there any dispute  
2 that that is the monthly amount, exclusive or not including  
3 fees, and costs, and interests, and other things? Because  
4 what you did was just a straight calculation. So, I guess my  
5 question to you, is there any dispute that the \$86 and change  
6 is greater to -- greater than or equal to the straight monthly  
7 assessment?

8 MR. STERN: I don't believe there's --

9 THE COURT: That's my question.

10 MR. STERN: I don't believe so, Your Honor.

11 THE COURT: Does that make sense? Now, because we  
12 could do --

13 MR. STERN: I think Alessi can speak to this.

14 THE COURT: -- the math. That's easy.

15 MR. STERN: I think Alessi can speak to this, but as  
16 far as we -- as far as we can tell, that's undisputed -- that  
17 part of it is undisputed.

18 MS. SCHIMMING: I actually don't think Alessi is the  
19 correct entity to speak to it, but based on what the --

20 THE COURT: Well, I mean, I'm assuming discovery's  
21 been --

22 MS. SCHIMMING: -- based on what the ledger states  
23 here --

24 THE COURT: Right.

25 MS. SCHIMMING: -- the assessment amount was \$80

1 through the majority of the -- the actual assessment itself  
2 amount was \$80 for that time period, yes.

3 THE COURT: Okay. Any -- all right, that was my  
4 only -- I thought that was undisputed, and I just wanted to  
5 make sure that that was -- that itself was undisputed.

6 (Pause in the proceedings)

7 MR. STERN: Right. So, there's competing motions,  
8 Your Honor.

9 THE COURT: Um-hum.

10 MR. STERN: We say a lot about constitutionality  
11 that I don't want to repeat.

12 THE COURT: Right. I mean --

13 MR. STERN: I think the focus of our hearing  
14 today --

15 THE COURT: And I've already rejected the  
16 constitutional argument, right or wrong.

17 MR. STERN: That's why I don't want to repeat all  
18 that.

19 THE COURT: I think I'm right, so -- and I think,  
20 you know, last time, you talked extensively on the preemption  
21 argument.

22 MR. STERN: Right.

23 THE COURT: Not on this case, a different case. So,  
24 you really don't need to rehash that.

25 MR. STERN: And I appreciate the --

1           THE COURT: I mean, I think, really -- and the  
2 commercially reasonable, you know, argument, I've already  
3 rejected that --

4           MR. STERN: So --

5           THE COURT: -- for various reasons.

6           MR. STERN: So, what I'd like to start with, Your  
7 Honor --

8           THE COURT: And I'm sorry to cut you off. Go ahead.

9           MR. STERN: No, any guidance --

10          THE COURT: So, I think those three, we can take off  
11 the table.

12          MR. STERN: Okay, I --

13          THE COURT: And go on.

14          MR. STERN: I would like to circle back in  
15 commercial reasonableness because of the new decision that  
16 came out last week --

17          THE COURT: Right.

18          MR. STERN: -- which I think --

19          THE COURT: I saw that as well.

20          MR. STERN: Obviously, that's not in the papers  
21 because of --

22          THE COURT: But let me -- let me cut to the chase.  
23 The new decision that came out last week, wouldn't that  
24 suggest that even if commercial reasonableness were a factor,  
25 it's something that we can evaluate in summary judgment?



1 Isn't that what that -- that -- to me, that's what that  
2 suggests.

3 MR. STERN: Well, Your Honor, there's two ways to  
4 look at that.

5 THE COURT: Because if you look at the decision,  
6 Judge Silver ruled in favor of the Bank and found that the  
7 sale wasn't commercially reasonable, correct?

8 MR. STERN: I think so, Your Honor.

9 THE COURT: Right. And so --

10 MR. STERN: It was a mess.

11 THE COURT: -- to me, I mean, the gist of it was --  
12 I thought the takeaway was that, well, this isn't something  
13 that she can just -- the district court can't just  
14 automatically say, oh, \$7,000 isn't commercially reasonable.

15 And that's what I've been saying all along, because  
16 how do you evaluate this with all of the uncertainty? There  
17 is no expert who can come in and say, this is how I evaluate  
18 the correct price, and that you can't just say, well, as a  
19 matter of law, a low price means it wasn't, A, a purchase for  
20 a value, and B, that the person was a bona fide -- was not --  
21 was not --

22 MR. STERN: So --

23 THE COURT: -- a bona fide purchaser.

24 MR. STERN: Your Honor --

25 THE COURT: So --

1 MR. STERN: The --

2 THE COURT: I'm interested to hear what you thought  
3 it said.

4 MR. STERN: I think it said a lot of things, and I  
5 think it likely had two authors, even though one signed it.  
6 And it reflects I think a -- this is just personal  
7 interpretation of this -- a baseline of unanimity.

8 And there may be some additional work that has to be  
9 done to get some of the remaining issues fully resolved. But  
10 the baseline of unanimity includes, first of all, a  
11 confirmation that commercial reasonableness is a factor. It's  
12 not a factor that, as you --

13 THE COURT: Well, see, I didn't read it that way. I  
14 didn't read it as saying commercial -- that it has to be  
15 commercially reasonable. The way I read that, it was a  
16 rejection of the district court's decision that because it  
17 wasn't, you know, commercially reasonable, that it wasn't a  
18 bona fide purchaser. That's how I read that.

19 MR. STERN: Well, Your Honor --

20 THE COURT: That -- because she ruled -- let's not  
21 forget, the District Court ruled for the Bank. And so --

22 MR. STERN: Correct, Your Honor, but --

23 THE COURT: -- to me, it was saying, well, you can't  
24 automatically say without anymore information that 7,000 or  
25 whatever it was that they paid for that property, meant that

1 it wasn't -- so, I didn't read it that you -- you're entitled  
2 to prove it; I read it the opposite way. I read it that the  
3 District Court was wrong in saying, oh, because it was a low  
4 price, that's one of the factors that means that the Bank  
5 should -- should -- that it was -- that the Bank should  
6 prevail on their Motion for Summary Judgment.

7 MR. STERN: The --

8 THE COURT: That's how I read that.

9 MR. STERN: And I don't necessarily disagree with a  
10 lot of what you just said.

11 THE COURT: Right.

12 MR. STERN: However, I think this case is a  
13 watershed in providing directive to the courts -- or, you  
14 know, to the judges that believe that commercial  
15 reasonableness was basically a nonissue. It is an issue. It  
16 may not be an issue that the Bank can offensively in summary  
17 judgment get.

18 THE COURT: Well, except, to me, you want us to say,  
19 oh, well, if they don't prove commercial reasonableness, the  
20 Bank should prevail, however that's calculated. But that  
21 decision doesn't say that.

22 What that decision says is, well, to me, maybe  
23 that's a factor that you can consider in evaluating the  
24 equities. Again, evaluating the equities, that's something  
25 that you can weigh. You can weigh anything. I mean, you

1 know, I can't say you can't weigh anything. I can't weigh  
2 against the Bank that you're wearing a blue necktie, but we  
3 can weigh various factors. So, that may be important in  
4 weighing the equities, number one.

5 And number two, that might be a consideration in  
6 determining whether or not somebody was a bona fide purchaser  
7 or not, but they -- but they clearly say -- Justice Pickering  
8 clearly says, look, you know, it's not reasonable value, it's  
9 -- it's not -- it's for a valuable consideration that you  
10 don't put a number on that. So --

11 MR. STERN: It's not market value. I think --

12 THE COURT: -- to me, I read it -- I read it  
13 differently than you do.

14 MR. STERN: And I don't -- I don't know --

15 THE COURT: I mean, I don't think it says, oh, the  
16 purchaser has to prove commercial reasonableness. I don't --  
17 that's what you want it to say, but it doesn't say that.

18 MR. STERN: Well --

19 THE COURT: To me, that may be --

20 MR. STERN: I haven't --

21 THE COURT: -- a factor. As I said, I'm weighing  
22 the equities.

23 MR. STERN: It's --

24 THE COURT: And they talk -- you know.

25 MR. STERN: It's -- it's -- if I could start with

1 the purchase price, Your Honor, there is a long history of  
2 argument in your court and others as to whether you need  
3 something additional to an adequate -- an inadequate purchase  
4 price in order for the Bank --

5 THE COURT: And clearly, you do.

6 MR. STERN: The Court I think confirmed that.

7 THE COURT: Right.

8 MR. STERN: But --

9 THE COURT: That clearly, you do.

10 MR. STERN: But before we get into the nitty-gritty  
11 of this case, the Court also opened the door, we believe, to a  
12 second inquiry into the purchase price by mentioning twice the  
13 Restatement of Property analysis, which is not commercial  
14 reasonableness; it's a different source of law.

15 So, commercial reasonableness emanates from Chapter  
16 116. It emanates from the incorporation of the good faith  
17 standard from the Uniform Commercial Code. That's --

18 THE COURT: Right. Yeah, I mean, candidly, I didn't  
19 read it that way. I read it that that's a factor that you can  
20 consider, and that you're allowed to inquire as to whether or  
21 not, you know, there was any fraud in the sale, and anything  
22 like that.

23 Now, if you're trying to prove fraud in the sale,  
24 then one of the things you're going to use as evidence of  
25 fraud is the purchase price. You're going to use the adequacy

1 of notice to potential buyers. You're going to use the  
2 adequacy of notice to the Bank. I mean, that was kind of an  
3 unusual case, because the Bank had purchased already the home  
4 and they stood in the position of the homeowner, which, to me,  
5 I would have maybe rather seen a decision that's more  
6 analogous to the cases most of us are getting, which is where  
7 the Bank doesn't own the home outright; the Bank stands as the  
8 holder of the Deed of Trust.

9 MR. STERN: And the reason that I think the Court  
10 was quite -- the Supreme Court was very annoyed at that,  
11 because they --

12 THE COURT: Right. Because you're standing as the  
13 homeowner. You're getting --

14 MR. STERN: Right.

15 THE COURT: I mean, so you -- I mean, basically  
16 balancing the equities. What I took away from that is the  
17 Bank should have been paying their Homeowners Association  
18 assessments as the homeowner all that time. But --

19 MR. STERN: Exactly.

20 THE COURT: -- to get back to commercial  
21 reasonableness, that's a factor. If you're trying to prove  
22 fraud, then you're going to look to commercial reasonableness,  
23 and that's a factor that you might prove. I mean, because,  
24 you know, if -- if people are all paying say \$10,000 for these  
25 homes that are worth 200,000, and they're paying \$500, then

1 that's a factor that looks for -- to -- to fraud. That's how  
2 I took that away.

3 MR. STERN: There's two lines, Your Honor. And with  
4 the Court's indulgence, I would like to read from page 15 of  
5 the opinion, which says towards the bottom quarter, "See  
6 also." So, they cite a case, and then the Supreme Court says,  
7 "See also Restatement Third of Mortgages, Section 8.3, Comment  
8 B," parentheses -- and this is where it's interesting, stating  
9 that, quote, "Gross inadequacy cannot be precisely defined in  
10 terms of a specific percentage of fair market value, but  
11 generally, a Court is warranted in invalidating a sale where  
12 the price is less than 20 percent of fair market value."

13 And if you go to the Restatement -- so, the Supreme  
14 Court says, "See the Restatement." You look at the  
15 Restatement, and there isn't a word in the Restatement about  
16 factors other than inadequacy of price.

17 So, this to us is a strong signal that, apart from  
18 commercial reasonableness, if you've got a sale price where  
19 it's less than 20 percent of market value, you've got a  
20 separate and standalone analysis under the Restatement of  
21 Property. Separate source of law; not commercial  
22 reasonableness under Section 116.

23 THE COURT: Right, I get what you're saying, I  
24 just --

25 MR. STERN: That's how we see it.

1 THE COURT: I -- I -- my -- my -- the -- I --

2 MR. STERN: And I think another --

3 THE COURT: It's curious, because when I read that,  
4 I mean, I'm just -- this is somewhat irrelevant, but you took  
5 it away, I guess, that, oh, this strengthens the Bank's  
6 position. And I read that and I thought, oh, oh, no, I've  
7 been granting summary judgment in favor of the Banks way too  
8 much. That's what I took away from reading that.

9 And I mean, I think my -- the message I took away  
10 from that was, look, there are many factors, and maybe we need  
11 to be fleshing all this stuff out more than granting summary  
12 judgment on it.

13 MR. STERN: Actually, I agree with that part of it.  
14 On that part of it --

15 THE COURT: And that's --

16 MR. STERN: -- you and I are in complete agreement.

17 THE COURT: And that's what I took away -- one of  
18 the thing -- I took several things away from it, but that's  
19 one of the things I took away. But I definitely --  
20 notwithstanding the fact that they cited the Restatement, you  
21 know, I took the commercial reasonableness away as maybe a  
22 factor that you could consider, again, in weighing the  
23 equities, and in determining whether or not there was fraud or  
24 collusion, or something like that between the Homeowners  
25 Association --



1 MR. STERN: Right.

2 THE COURT: -- and the ultimate purchaser. That's  
3 what I saw as the relevancy there; not that you could  
4 automatically say, oh, well, it's 20 percent of fair market  
5 value, it -- or it's, you know, 12 percent of fair market  
6 value, it's not commercially reasonable and the Bank should  
7 win. You know, again, it's a factor.

8 Well, if it's a factor that we can consider in  
9 making these determinations, then maybe the suggestion is we  
10 shouldn't be granting summary judgment on all this stuff.

11 MR. STERN: I think --

12 THE COURT: Although, you know, again, that's kind  
13 of what I took away from it.

14 MR. STERN: I think in terms of the procedure and  
15 the directive on summary judgment, I do agree with you on  
16 that, Your Honor. If you've got a -- a situation where  
17 there's various factors, and we as the Bank assert commercial  
18 reasonableness as a defense, and SFR and others say, not  
19 there, I think you are justified, and the guidance here is  
20 that you should deny their summary judgments --

21 THE COURT: See, I didn't read it --

22 MR. STERN: -- and send us to trial on that.

23 THE COURT: -- that way. What I read is if -- is,  
24 look, we shouldn't be -- here's the way -- where I -- what I  
25 took away is I -- you know, I -- my feeling is that the

1 legislature wanted the Homeowners Association s to be able to  
2 sell these properties when, you know, the owners aren't paying  
3 for them, and maybe to encourage the Banks to be paying the  
4 homeowners assessments, or to conduct their foreclosures ahead  
5 of time. That may have been the undercurrent, I don't know.  
6 But, you know, to -- to increase the expenses for the ultimate  
7 purchasers then makes these less attractive options to  
8 purchase.

9           And so, to me, you know, the more discovery you have  
10 to do on both sides, you know, I think the cost of litigation  
11 is -- it's bad for everybody, but, you know, I think that,  
12 again, commercial --

13           MR. STERN: There's a lot at stake --

14           THE COURT: If you had --

15           MR. STERN: -- on both sides, Your Honor.

16           THE COURT: And so, I took away, well, maybe we need  
17 to let more discovery occur. But my takeaway then is, okay,  
18 if you've done discovery, and there's nothing to suggest that  
19 it wasn't properly noticed, that you didn't have an  
20 opportunity for various entities or individuals to bid, and  
21 there's nothing to suggest fraud or collusion, then we don't  
22 need to look to commercial reasonableness.

23           Now, let's just say you've done discovery and there  
24 was something to suggest, oh, SFR's the only party that showed  
25 up, or SFR was the only party that was noticed, all of these

1 other entities that are out there buying this stuff didn't  
2 bid --

3 MR. STERN: Yeah.

4 THE COURT: -- didn't show up, didn't know about it,  
5 then -- then I think commercial reasonableness would come into  
6 play. That's kind of what I took away from that.

7 MR. STERN: We -- Your Honor --

8 THE COURT: But -- but my -- the message I took also  
9 as a judge was, well, maybe I need to let more discovery  
10 happen, because now the Banks -- to me, the message was -- and  
11 this is more pro bank -- is they have an opportunity now to  
12 assert the fraud, collusion, and I've been kind of saying, oh,  
13 well, it's probably fine.

14 MR. STERN: Your Honor, I think -- first of all, I  
15 tend to agree that more discovery is going to be necessary  
16 here, and --

17 THE COURT: Right.

18 MR. STERN: -- I agree --

19 THE COURT: Which is a benefit, frankly, to the  
20 Banks.

21 MR. STERN: Well, I don't know that -- probably. I  
22 mean, I think the more we find here, the -- the more factors  
23 are going to see --

24 THE COURT: Well, I mean, and I think the judges --

25 MR. STERN: -- become relevant.

1           THE COURT: -- are consistent in this view. Let's  
2 face it, the Bank of America can drag this thing through and  
3 fund discovery way, way better than a Homeowners Association  
4 and the purchasers.

5           MR. STERN: I don't know that that's --

6           THE COURT: But in any event, that --

7           MR. STERN: I don't know that that's --

8           THE COURT: We don't need to debate that.

9           MR. STERN: -- actually what's been decided. I --

10          THE COURT: Well, I think that's just the general  
11 consensus.

12          MR. STERN: It's -- that may be what it is, Your  
13 Honor. I think --

14          THE COURT: But in any event, that's --

15          MR. STERN: We do --

16          THE COURT: -- not really relevant.

17          MR. STERN: We do, I think --

18          THE COURT: I brought it up, but it's not  
19 necessarily relevant.

20          MR. STERN: It's certainly the case that a lot of  
21 these cases where commercial reasonableness was not as -- they  
22 didn't get the traction are probably -- in our view, probably  
23 going to require trials. I think that was a message that the  
24 Supreme Court was clear on when they spoke several times about  
25 the inappropriateness of summary judgment when there's a lot

1 of factors. I don't think they -- I --

2 THE COURT: So, wait. Can I cut to the chase? This  
3 is your Motion for Summary Judgment.

4 MR. STERN: Yes.

5 THE COURT: Now, we all know --

6 MR. STERN: We tendered --

7 THE COURT: -- that this was fully briefed --

8 MR. STERN: Yes.

9 THE COURT: -- prior to the time --

10 MR. STERN: That's one problem.

11 THE COURT: -- the decision came out. I guess it  
12 was, what --

13 MR. STERN: Thursday. Last Thursday.

14 THE COURT: Thursday, right.

15 MR. STERN: Yeah.

16 THE COURT: Less than a week ago.

17 MR. STERN: So, that's one problem, Your Honor.

18 THE COURT: So, are you now saying, well, maybe  
19 summary judgment isn't appropriate based on your reading of  
20 that decision?

21 MR. STERN: Yes and no. It's inappropriate for SFR;  
22 it's appropriate for Bank of America, because what this  
23 decision -- yes, I said it.

24 (Pause in the proceedings)

25 MR. STERN: But we are entitled to summary judgment

1 in this case, because we tendered; we paid the lien. And as I  
2 think you've already determined --

3 THE COURT: Well, let me cut to this, and I'm  
4 interested to hear your opinion on this -- this one.

5 MR. STERN: Yes, I think I know what the question's  
6 going to be.

7 THE COURT: Do you know where I'm going?

8 MR. STERN: I think, yes.

9 THE COURT: Well, when I read that, you know, I'd  
10 been saying, oh, the nine months is just -- and I think a lot  
11 of judges have been saying the nine months is just the  
12 assessments themselves; not all of this other stuff. But if  
13 you read the decision, it seems to contemplate, to me, that,  
14 oh, it's more than the nine months, because we need to have  
15 them -- you know, we can't --

16 MR. STERN: Here's the problem.

17 THE COURT: -- we need to -- but don't you read it  
18 that way?

19 MR. STERN: No.

20 THE COURT: Because Justice Pickering talks about,  
21 well, we don't really know what the fees and the costs are,  
22 but I thought there was a little bit of an ambiguity there.

23 MR. STERN: Here's --

24 THE COURT: And the ambiguity may be in the fact  
25 that the Bank was the owner --

1 MR. STERN: Exactly.

2 THE COURT: -- in that case. So, did it mean that  
3 we look to the -- all these fees and costs, because the Bank's  
4 the owner? And if you weigh the equities, why the heck should  
5 they profit when they were the owner? Or do we say -- I mean,  
6 again, I wish they used another case, frankly. That might  
7 have been --

8 MR. STERN: And I think that's what they --

9 THE COURT: Or do we say --

10 MR. STERN: -- were saying, Your Honor.

11 THE COURT: Or do we say, no, the Supreme Court is  
12 clearly contemplating that the nine months isn't just the nine  
13 months of the actual assessments --

14 MR. STERN: They didn't say that either.

15 THE COURT: -- that it is fees and costs?

16 MR. STERN: They didn't say that either.

17 THE COURT: So, what is it? What do you think?

18 MR. STERN: So, I think two things, Your Honor.

19 THE COURT: I had a question on that one.

20 MR. STERN: I think two things. And firstly, you  
21 said, I wish they had used another case for this and, I think,  
22 essentially, that's what they said there; we wanted another  
23 case. And this case --

24 THE COURT: Oh my God, there's like 200 --

25 MR. STERN: And we've --

1 THE COURT: -- out there.

2 MR. STERN: And this issue is slowly working its way  
3 through the -- you know, moving the pig through the --

4 THE COURT: And the only reason I say I wish they'd  
5 used another case is that case was very dissimilar from most  
6 of the cases.

7 MR. STERN: Yeah, so --

8 THE COURT: I mean, I'm not criticizing the Supreme  
9 Court, I just want to make it clear.

10 MR. STERN: Well --

11 THE COURT: That case is very factually  
12 dissimilar --

13 MR. STERN: Right.

14 THE COURT: -- from most of the cases I've had.

15 MR. STERN: Yeah, and what you have specifically in  
16 that case, Your Honor, I think -- so, in that case, the Bank  
17 forecloses first, they win the race to the finish line.  
18 They --

19 THE COURT: Right. And then they're the -- they --

20 MR. STERN: And then they think they've got a super  
21 priority issue.

22 THE COURT: Right.

23 MR. STERN: And so --

24 THE COURT: Which it really wasn't, because --

25 MR. STERN: The Bank wasn't --



1 THE COURT: -- they're the owner.

2 MR. STERN: In that case, the Bank was not thinking  
3 right. And then, without intending to criticize the Bank's  
4 counsel in that case, they continued to prosecute it as a  
5 super priority case, and they presented the record in that  
6 manner to the Supreme Court.

7 And so, I think what they said is, the record was  
8 such a mess that we don't know anything about amounts, or even  
9 times, because the time frame then becomes important, because  
10 when the Bank forecloses and becomes the owner, anything that  
11 was incurred --

12 THE COURT: Then they just stand in the shoes --

13 MR. STERN: -- before that --

14 THE COURT: -- of an ordinary owner who could --

15 MR. STERN: Correct. And so any -- any amount that  
16 was incurred before that would present the Supreme Court with  
17 the -- with the --

18 THE COURT: The super priority issue.

19 MR. STERN: -- with a justiciable issue is that  
20 super priority given that is costs. And until they can even  
21 determine that -- what amount or if any amount at all  
22 constituting costs was incurred before the Bank's foreclosure,  
23 that issue was not factually presented to the Court. And I  
24 think that's why they remanded with that language.

25 Having -- so, the first -- the first thing is, I

1 think they agreed, this is not the right case to decide that  
2 super priority is a cost issue. The other thing, they said  
3 they wanted -- they wanted a factual record on how much, and  
4 when, and what constitutes.

5 Certainly, the Court prefaced everything by saying  
6 it's an open issue. And they declined to decide it either  
7 way. They didn't also say all of these other amounts are part  
8 of the super priority lien.

9 And there's another issue, Your Honor. It's a  
10 nuanced issue, because the Court could come out and say, well,  
11 maybe some costs and fees are part of the lien, but not part  
12 of the super priority portion, because the statute --

13 THE COURT: Which is what we've --

14 MR. STERN: -- cuts it off at nine months.

15 THE COURT: Which is what I've been saying; that you  
16 can have fees and costs in the lien, but what's the super  
17 priority amount?

18 MR. STERN: And --

19 THE COURT: Because I've been, as you know, ruling  
20 that if the Bank tendered, and they tendered the correct  
21 amount, that that should protect their interest in the  
22 property. That's how I've been ruling. Or if they didn't get  
23 notice.

24 MR. STERN: Right.

25 THE COURT: And I think I had one case where they

1 sent it to the wrong address or something, so there wasn't any  
2 really evidence that the Bank had gotten notice.

3 MR. STERN: Right. And -- and I think that --

4 THE COURT: But now I'm thinking, well, maybe that's  
5 wrong.

6 MR. STERN: No.

7 THE COURT: Maybe --

8 MR. STERN: It's not wrong, Your Honor. You've been  
9 correct.

10 THE COURT: Maybe -- because I also kind of thought  
11 there was this suggestion in that, that when the Bank tenders,  
12 they should tender the whole amount and fight about it later.  
13 That if you're going to weigh the equities, the Bank should  
14 have tendered the whole amount instead of just tendering their  
15 own calculation and saying, well, that protects our interest.

16 MR. STERN: They didn't say that.

17 THE COURT: That's what I kind of thought that was a  
18 suggestion to.

19 MR. STERN: That was --

20 THE COURT: I'm glad I read this thing.

21 MR. STERN: -- not a response to the tender amount.  
22 It couldn't have been, because the Bank was a homeowner.

23 THE COURT: Right. So, that's why I thought it was  
24 ambiguous, because the Bank was the homeowner. But there's  
25 also the suggestion -- they didn't say -- I mean, they could

1 have done an easy decision in a page and said, the Bank stands  
2 in the position of a homeowner, and they were obligated to pay  
3 the full amount due, and they didn't. And it was foreclosed  
4 upon properly, and end of day -- end of story.

5 So, why did they go through this whole analysis  
6 talking about everything else if they weren't trying to give  
7 us some sort of guidance?

8 MR. STERN: I think, Your Honor, because they were  
9 trying to give the District Court guidance on the specific  
10 remand. I mean, that's -- in fact, they said that. They  
11 actually did say that. They said, on remand, we want --

12 THE COURT: Yeah, but then they didn't have to  
13 publish it if it was just to give guidance --

14 MR. STERN: Well, there's a lot more here. There's  
15 a lot more here in this opinion about the commercial  
16 reasonableness, about the inadequacy of the price, about how  
17 this theory about the trust deed recitals being sacrosanct at  
18 the level that it can then be assailed, that's out the door as  
19 well. Those are all important issues --

20 THE COURT: Right. Well, except --

21 MR. STERN: -- that require the published decision.

22 THE COURT: Except I still took it, yes, those are  
23 sacrosanct, unless you've got some of these other issues that  
24 aren't in the deed recital, such as, there was -- there's  
25 notice -- it's conclusively presumed there was notice, but if

1 you've tendered, then that's not in the deed recital. It  
2 doesn't say --

3 MR. STERN: Right.

4 THE COURT: -- the Bank didn't tender.

5 MR. STERN: I think --

6 THE COURT: So, I mean --

7 MR. STERN: I think the Court's going to go further  
8 than that, Your Honor, because they published -- they  
9 published this decision. There was an unpublished order on  
10 that same date in which --

11 THE COURT: Oh, I didn't see that.

12 MR. STERN: Well, we -- you know, the ones in the  
13 industry, we look at this stuff obsessively. They -- they  
14 published the -- excuse me -- they had an unpublished order in  
15 which they said -- in which they remanded, basically saying --  
16 they didn't say, you look at the trust deed recitals, but  
17 there was a question of notice, and that all was in the deed  
18 recitals.

19 THE COURT: Right.

20 MR. STERN: And they reversed on that. And so,  
21 while they didn't say it, I think that's -- the Court's  
22 probably heading that way.

23 THE COURT: Let me ask -- I'm -- oh, never mind.  
24 I'm sorry, go on.

25 MR. STERN: So, Your Honor, here, what we have is no

1 ambiguity as to what amount the Bank tendered. The Bank  
2 tendered nine months. There's no reason for the Court to have  
3 a trial on that issue, because you've got agreement from the  
4 HOA. I don't think -- I don't think SFR has challenged that  
5 part of it. And so, having -- and there's also no dispute  
6 here that Alessi received the check and then rejected it.

7 I think all of the factual determination that the  
8 Supreme Court wanted done in terms of what constitutes the  
9 amount is properly presented to you at summary judgment. I  
10 don't think there's anything that we're going to add to that  
11 at trial in terms of what amount -- what amounts constitute  
12 what. You've got it.

13 And so, the court didn't in Shadow Wood say, that's  
14 not sufficient. It said, we're not resolving this issue. And  
15 it didn't provide any guidance even when -- when it said that  
16 your -- that all of these other things have to determine it,  
17 about what the amount is. It didn't provide any guidance as  
18 to how you should, as a trial judge, determine what the legal  
19 significance of that is.

20 So, we're really left in the same universe in terms  
21 of what the legal significance is as we were beforehand.  
22 We've got some directive that the Court wants very precise,  
23 factual records on this, but you've got that here on summary  
24 judgment. We've got a statute. The statute is clear. It  
25 says nine months. It doesn't say nine months, comma, plus.

1 And I think --

2 THE COURT: Well, that's how I've been reading it in  
3 the past, but;.

4 MR. STERN: And there's nothing in Shadow Wood that  
5 contradicts that. All Shadow Wood says is, we want clear  
6 records. And on this clear -- on this very messy case where  
7 everybody thought they were dealing with a super priority,  
8 when, clearly, they're not, we want you all to get it right  
9 factually. And that's really what they said there. Your  
10 Honor, Justice Pickering was the author of both SFR, and now  
11 Shadow Wood.

12 THE COURT: Who do you think the Shadow author was?

13 MR. STERN: I think --

14 THE COURT: Pardon the pun, or semi-pun.

15 MR. STERN: Was that deliberate? That was good.

16 THE COURT: No.

17 MR. STERN: I think -- I don't know, Your Honor.  
18 There's certainly -- if you -- we also listened to the tape of  
19 the argument, and it seemed like Justice Douglas was asking  
20 some questions, and Justice Hardesty was asking some  
21 questions. And Justice Hardesty was concerned with the Bank's  
22 -- well, why didn't the Bank do more.

23 And I think one of the questions that is going to  
24 have to get resolved at some point is, at what point has the  
25 Bank done enough to satisfy the pre-sale tender rights? Is it

1 enough to do what the Bank did here, or when Alessi improperly  
2 rejects the payment, does the Bank now have to do more?

3 THE COURT: Well, to me, they seem to suggest that  
4 the Bank ought to do more; that the Bank ought to put the  
5 purchaser on --

6 MR. STERN: But here's the problem.

7 THE COURT: -- on notice at that point. And they  
8 say the Bank could have done this.

9 MR. STERN: Here's the problem. They say the Bank  
10 could have done this, but they say that in the context of BFP;  
11 they say that in the context of the inadequacy of price. They  
12 do not say that in the context of a tender.

13 And there is to the -- as we're -- and we've  
14 researched this exhaustively, and I'd be happy to provide more  
15 briefing on this. If you've got as a -- if you as a junior  
16 lien holder make a payment and it gets rejected, under the  
17 pre-sale common law right of tender, you do not have -- you do  
18 not have a further obligation.

19 I think one of the things that SFR said here is that  
20 we should have recorded this as a property interest as if it  
21 were an easement, or a fee, or some -- you don't have that  
22 obligation. That's one of the issues that was left unresolved  
23 here, and you've been correctly deciding this. You know, once  
24 we make the payment and pay, if the secured party -- if the  
25 lien holder rejects the payment, that's the end of it. And



1 nothing in Shadow Wood contradicts that.

2 And so -- and there's two parts of this, right? So,  
3 there's, what's the proper amount, but there's also, what's  
4 the consequence? And Shadow Wood did not get at all into the  
5 consequence.

6 And we're not talking about the consequence of the  
7 Bank not doing more on sufficiency of price or anything else,  
8 but on payment. And the clear tradition here from time  
9 immemorial under the common law is, if you have made your  
10 payment, that discharges your obligation. You don't have --  
11 it would be like if -- you know, let's say that you're my  
12 credit card bank --

13 THE COURT: No, I mean, I was agreeing with you, and  
14 I -- I mean, that made sense to me. As you know, I was ruling  
15 that way.

16 MR. STERN: Yeah.

17 THE COURT: But, you know, again, there's certainly  
18 a suggestion that, well, maybe the Bank ought to do more.  
19 Maybe the Bank is in the best position --

20 MR. STERN: Yeah.

21 THE COURT: -- to protect its interests, because  
22 certainly SFR, the purchaser, they don't know --

23 MR. STERN: Well --

24 THE COURT: -- what the Bank may or may not have  
25 done.

1 MR. STERN: Well, of course they know.

2 THE COURT: As they --

3 MR. STERN: Of course they know.

4 THE COURT: How do they know that?

5 MR. STERN: They know that for a couple of reasons.  
6 I heard some rustling over there.

7 THE COURT: Well, she's looking at you like, how do  
8 they know?

9 MR. STERN: Because they know -- and they've  
10 testified in depositions on this in many cases -- they know  
11 that they're buying litigation. They know that the Banks are  
12 doing this. And --

13 THE COURT: Well, yeah, but what the issue is --

14 MR. STERN: -- depending on the time frame, Your  
15 Honor --

16 THE COURT: What the issue is, is do they know that  
17 the Bank has tendered? And sometimes, the Bank doesn't  
18 tender. Sometimes the Bank tenders the wrong amount.  
19 Sometimes the Bank tenders the wrong amount and sends a  
20 letter, you better take this wrong amount or you people are  
21 out of luck, or whatever those letters say. And I know your  
22 bank has sent those letters.

23 MR. STERN: Yes, and --

24 THE COURT: Because Mr. Brenner has stood over there  
25 defending the letters.

1 MR. STERN: Oh, yeah, the letters are fine.

2 THE COURT: And so, all I'm saying is -- you know,  
3 or sometimes the Bank doesn't tender, or, you know, whatever.  
4 So, how on earth is the purchaser supposed to know in each  
5 instance -- and I'm -- you know, don't even tell me, oh, well,  
6 if it's Bank of America, they know that there's a tender,  
7 because that's not always true. We've had cases with the Bank  
8 of America where they've tendered the wrong amount. They  
9 didn't get the calculation. So --

10 MR. STERN: How does -- how do they know? Your  
11 Honor, there's a couple of ways that they can know. Firstly  
12 -- and but before we get there, I would suggest that we're --  
13 it's the wrong question with -- you know --

14 THE COURT: Well, you brought it up. You said they  
15 ought to -- right?

16 MR. STERN: I --

17 THE COURT: Did you hear that?

18 MR. STERN: I perhaps --

19 THE COURT: I heard, like, well, they ought to know.  
20 And then I said, well, how would they know?

21 MR. STERN: I perhaps --

22 THE COURT: I mean, so you --

23 MR. STERN: I perhaps stated it --

24 THE COURT: You brought it up.

25 MR. STERN: -- inartfully, Your Honor. What -- what

1 happens in these situations is that SFR and others like it  
2 know that there's a senior lien. They know -- and that's a  
3 matter of public record.

4 They also know that the Bank is going to claim a --  
5 an interest in that. And they also know that they were going  
6 to be buying litigation on this. They've admitted this;  
7 they've said it. They know all of these things.

8 Now, when the Bank makes a tender and makes the  
9 payment, it -- it's argued, anyway, that it is at that point  
10 the obligation of the trustee to either accept it, or if they  
11 don't accept it, to inform -- and Alessi & Koenig has informed  
12 buyers that there was a super priority tender.

13 We don't know when they started doing that. There  
14 was a -- I don't think they've done that in this case, but  
15 it's -- on SFR's perspective, the bona fide purchaser analysis  
16 is not about whether they had actual knowledge that there was  
17 a tender. It's really about whether they knew, or had reason  
18 to know, or would have known based on inquiry --

19 THE COURT: Knew -- right.

20 MR. STERN: -- that they were -- that they were  
21 coming into a problem. And that was the whole business model  
22 here; buy cheap, litigate. And they said -- and this is their  
23 defense to the commercial reasonableness, why their -- why the  
24 price they paid was adequate, is because they knew that they  
25 were buying a problem. That's not an innocent buyer. An

1 innocent buyer is somebody who actually doesn't know what  
2 they're getting into. SFR knows it's getting into a risky  
3 situation.

4 And so, you combine that with, in this case, Your  
5 Honor, Alessi's, I think. undisputed failure to inform anybody  
6 that there -- that they had rejected a tender, and that's --  
7 that's the additional factor you have on the commercial  
8 reasonableness balance.

9 So, it's -- it's certainly problematic that Alessi  
10 would not take this money, and then not tell anybody about it.  
11 They said that it was our responsibility. Well, Alessi's the  
12 trustee here. It's their -- it's actually their  
13 responsibility to do that.

14 THE COURT: Well, except, right now, we're looking  
15 -- we're weighing you against -- you, not literally, obviously  
16 -- against SFR. I mean, whether Alessi did something  
17 inappropriate really isn't the issue at the moment.

18 MR. STERN: And it is going to be an issue on the  
19 commercial reasonableness of the sale, Your Honor, we think,  
20 but -- because it's not just price plus --

21 THE COURT: Well --

22 MR. STERN: -- collusion or fraud; it's any  
23 impropriety, we think --

24 THE COURT: Well, okay.

25 MR. STERN: -- on the sale.

1 THE COURT: So, but it has to be an impropriety --

2 MR. STERN: No.

3 THE COURT: -- that -- that the purchaser was aware  
4 of, or should have been aware of, or something like that.

5 MR. STERN: And that's -- and that's -- and that's  
6 the key thing; should have been aware of. And SFR should have  
7 been aware of, and actually was aware of --

8 THE COURT: Well, knew or should have known. I  
9 mean, that's --

10 MR. STERN: -- and actually was aware of --

11 THE COURT: -- kind of the standard.

12 MR. STERN: The other thing, Your Honor -- and this  
13 is unique to SFR. And I'm blanking on the dates here, but I  
14 believe since the sale took place on -- in February of 2013,  
15 SFR would have a separate and very specific to them reason to  
16 know that Bank of America, at least, was tendering. And that  
17 is, one of the lawyers who works for SFR used to work for  
18 Akerman, and she was in charge of making these tenders. And  
19 so, she has the knowledge --

20 MS. GILBERT: Your Honor, I object to this entire  
21 comment. He has never brought this up before; has no right to  
22 bring it up now.

23 THE COURT: Okay.

24 MS. GILBERT: We're on summary judgment.

25 THE COURT: Right. Well, it's not part of the --

1 the record in the case.

2 MR. STERN: It's not part of the record --

3 THE COURT: So --

4 MR. STERN: -- in the case, but I'd be happy to make  
5 it part of the record, Your Honor.

6 THE COURT: Well, you don't need to, because, again,  
7 that's only relevant -- okay, I mean, I knew --

8 MR. STERN: SFR would have reason to know --

9 THE COURT: Okay.

10 MR. STERN: -- is what I'm saying.

11 THE COURT: Well, I know. And that's only relevant  
12 as to the timing of the sales.

13 MR. STERN: Right.

14 THE COURT: And right now, we're not -- because the  
15 earlier sales, SFR really -- and all of these other purchasers  
16 didn't really know what the extent of the litigation would be.  
17 They -- I mean, and they don't -- we still don't know. When  
18 is there going to be other rulings for the -- from the Supreme  
19 Court on this federal preemption thing? You know, there may  
20 be a ruling from the -- there's a division between the federal  
21 District Court judges, as we discussed last time.

22 MR. STERN: Yes, Your Honor.

23 THE COURT: And so, you know, I don't know.  
24 Certainly, early on, they may have been buying litigation, but  
25 I don't think it was foreseeable, the extent of the litigation

1 and the uncertainty that's -- that's I guess gone on for the  
2 length of time it's gone on for.

3 MR. STERN: I mean --

4 THE COURT: That was a poorly constructed sentence,  
5 but you got what I meant.

6 MR. STERN: I mean, I think, Your Honor, if what  
7 you're saying is that they didn't know that there would be  
8 hundreds of cases --

9 THE COURT: Well, they didn't know --

10 MR. STERN: -- that that's one thing --

11 THE COURT: Well, no, they didn't know --

12 MR. STERN: -- or whether this would be an issue.

13 THE COURT: -- how long it was going to take the  
14 Supreme Court to issue rulings. They didn't know -- I mean,  
15 one possibility could have been what Judge Crockett has been  
16 ruling, and I think some other judge ruled this, that it was  
17 conclusive -- a conclusive presumption, and that was it, and  
18 there was no other inquiry.

19 I know of at least -- I think there were two  
20 District Court judges, but I know for sure Judge Crockett was  
21 ruling that way. So, I mean, they didn't know. You know, we  
22 could have had a different decision from the Supreme Court  
23 that would have put a lot of this to bed. So, all I'm saying  
24 is, yes, they knew they were buying litigation --

25 MR. STERN: Yeah.



1 THE COURT: -- but I don't think any of us know --  
2 can say that it was foreseeable the --

3 MR. STERN: But --

4 THE COURT: -- extent of the litigation.

5 MR. STERN: But whether it was foreseeable or not,  
6 Your Honor, does not mean that they were -- the fact that they  
7 didn't foresee it doesn't mean that they're BFP.

8 THE COURT: Right. No, but all I'm saying is --  
9 just, I was making a comment. Anything else, Mr. Stern?

10 MR. STERN: I don't disagree with that -- the  
11 comment, Your Honor, about the extent of the -- yes, Your  
12 Honor.

13 Just in conclusion, the Court did not really do  
14 anything here to indicate that you've been ruling on these  
15 tender cases incorrectly. To the contrary, they simply want  
16 detailed, factual records. And we have this here on the issue  
17 of tender.

18 So, our position -- I don't -- I've been taking a  
19 while here and I think some of my statements can probably  
20 serve as opposition to Ms. Gilbert's argument as well.

21 THE COURT: Right, so I don't think we need to hear  
22 from you again. Is that what you're saying?

23 MR. STERN: That's exactly what I'm saying. Because  
24 of what Shadow Wood said and didn't say, we believe that at  
25 this point, summary judgment in favor of SFR is improper,

1 because all of those issues, to the extent that the Court has  
2 doubt about commercial reasonableness, and adequacy of price,  
3 all that I think needs to be tried.

4 THE COURT: Well, the only thing I would say there  
5 is, to me, once you've done discovery, unless you can make a  
6 showing that there was some kind of collusion, or impropriety,  
7 or something like that, in my view, we don't get to commercial  
8 reasonableness.

9 Now, if you can make that showing, first of all,  
10 that would give you the right to do discovery, which is  
11 something maybe I haven't been allowing the Banks to do. But  
12 once you've done the discovery, and gotten the file, and  
13 figured out the relationships, and what notice of the sale was  
14 given --

15 MR. STERN: Yes.

16 THE COURT: -- if you don't have anything to put up  
17 to show that, hey, there was an impropriety here, there's --  
18 you know, the HOA's cousin is the one who noticed the sale,  
19 and his brother-in-law is the only guy that -- you know, the  
20 cousin -- you know, they were cousins, that's the point, or  
21 something like that, then I don't know that we get to that  
22 question.

23 MR. STERN: Well --

24 THE COURT: But I could be wrong on that.

25 MR. STERN: Your Honor, given that, I would --

1           THE COURT: But, you know, again, that gives you the  
2 right to do discovery to see, who are these people? And I  
3 think that's what that last case --

4           MR. STERN: Given that commentary, Your Honor, if --  
5 I think I'll close on this. I think you should grant the Bank  
6 summary judgment based on the tender. If you're not inclined  
7 to do that, and on the other hand are inclined to give SFR,  
8 based on the fact that this is a brand new case, Shadow Wood,  
9 I think there's grounds for us to take limited 56(f) -- I  
10 haven't done an affidavit on this, but I would ask for it  
11 orally, that we allowed to take the discovery into those  
12 issues if you're leaning in their favor.

13           THE COURT: Well, that would be the only, I think,  
14 thing at that point in time. The only way you would get  
15 summary judgment is if the Court found, and consistent with  
16 what I've been finding in the past, that your tender was  
17 sufficient --

18           MR. STERN: Um-hum.

19           THE COURT: -- and that they take subject to your  
20 Deed of Trust. That would be the only thing.

21           On the other arguments that you've made, the Court  
22 has previously rejected them, and I didn't see anything in the  
23 Shadow Hills (sic) decision that would cause me to now accept  
24 those on a summary judgment basis. So --

25           MR. STERN: And -- and -- and I'm not going to talk

1 -- I'm not going to try and talk you any further out of it,  
2 Your Honor, but again, we believe that Shadow Wood now makes  
3 it improper to grant SFR or the other buyers summary judgment,  
4 really, on any case. I think the signal was, these things  
5 need to be tried, because it's intentionally equitable, and  
6 that's not appropriate for summary judgment. So --

7 THE COURT: But if all of the facts have been  
8 fleshed out -- again, to me, more of the message there was you  
9 need to let discovery happen. But if everything's been  
10 fleshed out through discovery, then the Court's the one that's  
11 going to make an equitable determination.

12 So, if there's a record before the Court for the  
13 Court to make the equitable determination, there's no dispute  
14 of facts; all of the facts are in agreement.

15 Now, obviously, if there's an issue of impropriety,  
16 or fraud, or something like that, that is a triable issue, and  
17 I don't know how that could ever be resolved on summary  
18 judgment, because -- unless the -- you know, the other side  
19 says, oh, yeah, I did commit fraud, but you're never going to  
20 get that.

21 So, those issues are always going to be triable,  
22 because it's always going to boil down to credibility. Those  
23 are always going to mandate a trial. But in those cases where  
24 you don't have that --

25 MR. STERN: Yeah.

1 THE COURT: -- to me, we're back to summary judgment  
2 where the numbers are all fleshed out.

3 Now, if there's a dispute on the numbers -- not the  
4 meaning of the numbers, but the numbers themselves, you might  
5 have to have a trial to figure out, well, this was the correct  
6 assessment, or they did get notice of this assessment.

7 Let's just say, for example, they gave you the wrong  
8 sheet, okay? And you say, oh, this is the sheet they gave me,  
9 and they say, no, this is not the -- the ledger, I guess. By  
10 sheet, I mean ledger.

11 MR. STERN: Right.

12 THE COURT: That might be a factual dispute that you  
13 would have to flesh out at trial. But if everybody's in  
14 agreement, this is the ledger, this is the numbers, we did  
15 discovery, there was no collusion here, I don't know what --  
16 I'm still kind of wondering what -- what are you going to try?  
17 I know some judges are having trials on everything, and I'm  
18 sitting there thinking, well, what are we trying here? But --

19 MR. STERN: Well, Your Honor, we --

20 THE COURT: You know, like I said, fraud is always  
21 going to be a triable issue.

22 MR. STERN: We --

23 THE COURT: Collusion's pretty much always going to  
24 be a triable issue.

25 MR. STERN: There was a number of instances, maybe

1 two or three times where the Court in Shadow Wood said  
2 expressly, this isn't appropriate for summary judgment, and I  
3 don't think they were expressing --

4 THE COURT: Right. Well, I think one --

5 MR. STERN: -- dissatisfaction with the factual  
6 record.

7 THE COURT: -- of the things they were saying was  
8 that the -- that there's not enough of a factual record on  
9 some of these issues.

10 Now, again, that doesn't mean that you have to go to  
11 trial on them if there's been discovery, and there's no  
12 question of fact based on the discovery and the evidence  
13 before the Court.

14 MR. STERN: Right.

15 THE COURT: But we don't need to resolve that today.

16 MR. STERN: The only thing I would ask, again, is if  
17 you're inclined to deny the Bank's Motion for Summary  
18 Judgment, that discovery be reopened.

19 THE COURT: We also deny SFR's motion?

20 MR. STERN: Well, yes, I think -- I think that goes  
21 without saying, Your Honor.

22 THE COURT: It goes without saying.

23 MR. STERN: Certainly, we want you to do that. But  
24 we additionally would ask that you allow us a brief limited of  
25 reopened discovery so that we could flesh out some of the

1 issues in this new decision, and we believe that's good cause.  
2 I apologize I don't have a 56(f) affidavit given the timing  
3 here. But, certainly, the Shadow Wood decision, if your  
4 thoughts on it are the way we're going to go, I think that  
5 certainly would have been useful guidance in the discovery  
6 process, and because of the timing here, we believe it's  
7 good cause --

8 THE COURT: Okay.

9 MR. STERN: -- for us to take another --

10 THE COURT: Let's hear --

11 MR. STERN: -- month or two on some of the  
12 discovery. Thank you, Your Honor.

13 THE COURT: Let's hear from Ms. Gilbert.

14 MS. GILBERT: Well, Your Honor, obviously, I  
15 disagree with Mr. Stern.

16 First, as to discovery -- I agree with Your Honor as  
17 to summary judgment can be granted. And I believe what  
18 happened in Shadow Wood and why they had to remand is because  
19 the District Court summarily, without making findings,  
20 determined there is no BFP, et cetera.

21 This Court can look at the record before today and  
22 make those -- make those decisions, and SFR can be granted  
23 summary judgment. They can't, because they have produced no  
24 evidence of fraud, collusion, or unfairness. They have  
25 produced no evidence that SFR is not a BFP.

1           It's not enough to know that somebody may come in  
2 equity -- Shadow Wood said this -- that not enough to know  
3 that somebody may come in equity and seek to overturn title or  
4 something like that, to know that that might possibly happen.  
5 You have to know something beyond that.

6           SFR, in February of 2013, was just starting its  
7 litigation, and it wasn't over things like tender. It was,  
8 the statute couldn't possibly mean what the statute means; the  
9 prior can't mean prior. And so, to sit here today and say  
10 that we knew -- just because we knew there was litigation --  
11 in fact, the cases they rely on --

12           THE COURT: And I've rejected that.

13           MS. GILBERT: Yeah.

14           THE COURT: I mean, like I said --

15           MS. GILBERT: And the cases they've relied on --

16           THE COURT: -- I don't think anyone could have  
17 foreseen this.

18           MS. GILBERT: -- were expressly returned from the  
19 Supreme Court saying -- saying that because they knew there  
20 was litigation, or that because there was a Senior Deed of  
21 Trust that existed is not enough to defeat BFP status.

22           First, you don't even have to deal with the  
23 Restatement here, because the price here -- if we accept,  
24 arguendo, that their expert is correct, the price is over 20  
25 percent, so you don't even have to deal with the Restatement



1 here.

2           So, now you're looking at fraud, oppression, and  
3 fairness, something they have produced nothing of. There is  
4 no question of notice. There is no -- they didn't raise  
5 anything about whether they had the right to sell it. None of  
6 those things were brought out.

7           To say that they need more discovery is  
8 disingenuous. We have been raising the issue of fraud,  
9 unfairness, and oppression consistently to their arguments of  
10 commercial reasonableness. We have been citing Long v. Towne  
11 throughout the whole thing.

12           To now say, I need to go back and look for this; you  
13 had a chance, you blew it, you don't have it, you don't get to  
14 do more. It's just -- it's wrong to allow them to go on a  
15 fishing expedition for something they have no genuine right to  
16 at this point, or can even sit here and say under Rule 11 that  
17 they believe it existed, because there isn't any.

18           As far as whether this -- the tender was sufficient,  
19 the Supreme Court has left that open. And it had nothing to  
20 do with whether or not this was a homeowner for this part of  
21 it, because on page 17, it expressly says, the question of  
22 whether, and if so, to what extent costs and fees are  
23 recoverable in the context of an HOA super priority lien --

24           THE COURT: Right.

25           MS. GILBERT: -- is open, particularly as to

1   foreclosures that predate the 2015 amendments. So, they  
2   produce a check for 720, and a letter that says, cashing this  
3   check conclusively says this, and you're agreeing to it. It's  
4   the same letter that they always produce. So, there's a  
5   dispute.

6               Now, my -- SFR's position is that if there is a --  
7   CC&Rs, there is an HOA lien, there is a first Deed of Trust,  
8   and the first Deed of Trust believes that it has paid or done  
9   something to elevate its -- its Deed of Trust over the HOA  
10   lien, it absolutely under the recording statutes needs to  
11   record something.

12              In fact, now it's required, because that puts the  
13   world on notice that the status of those liens has changed.  
14   And so, we believe that they would have to do something.

15              The other part of this is, whether you're looking at  
16   equity or not, I would challenge that there may not be a right  
17   to an equity. This is a homeowner, and it does talk about a  
18   homeowner having a right in equity. As a Deed of Trust  
19   holder, what they have a right to is money. They have a right  
20   to sell the property for money. They may take title to it, in  
21   which case they become a homeowner, but their right is to sell  
22   the property.

23              Have -- they have a remedy at law, so I don't know  
24   that equity applies. But if it applies, then they have to use  
25   some of their vast resources to put the world on notice that

1 they've done something, and here, they didn't do any of that.  
2 They sent a letter, they sent a check; it got rejected. They  
3 didn't show up at the sale, they didn't record something, they  
4 didn't do what SFR was forced to do in the beginning of all  
5 these litigations a few years ago, which is to run into court  
6 and get -- get an injunction to prevent the sale from  
7 happening when they wanted to sell out from under SFR. So, to  
8 say that, you know, all we have to do is one thing and we're  
9 protected I think is wrong. It's simply wrong.

10 And BFP -- they've provided nothing to show that SFR  
11 isn't a BFP; that we had any knowledge that they had offered a  
12 tender; that we had done any of those things. Again, we're at  
13 summary judgment. Discovery's closed. I don't think there's  
14 a need to reopen it.

15 If they have a remedy, and if they were somehow  
16 wronged, then they have -- they have relief. They have relief  
17 at law, but it doesn't -- shouldn't be taking the title away  
18 from SFR, who came in, paid significantly more than what was  
19 owed on the property at that time for the HOA lien, and was  
20 more than 20 percent of -- of the -- their expert's value,  
21 assuming that for the purposes of this motion --

22 THE COURT: Was correct.

23 MS. GILBERT: -- was correct. I think there was a  
24 dispute in the amount that's collectable. If there wasn't a  
25 dispute, they wouldn't put in the letter, this -- by cashing

1 this, you are saying that we are right. I think that shows  
2 that they had a dispute.

3 So, I think at this stage that you -- the tender,  
4 when you actually are looking at it, if you're going to look  
5 at balancing equities, it's not automatic anymore.

6 THE COURT: Yeah. I think in the past when they've  
7 done the letter -- and the Bank, Mr. Stern, to my  
8 recollection, doesn't always do the letter. In the past when  
9 the Bank has done the letter, I've said, well, you know what,  
10 there is a dispute here, and it's sort of unfair to condition  
11 the tender upon the HOA's inability then to try to collect  
12 additional funds under the super priority lien statute.

13 I think we've had one case like that in the past.  
14 But am I correct, the Bank doesn't always do the letter? That  
15 was eliminated after some period of time, and the Bank just  
16 does the tender without the letter; isn't that true?

17 MR. STERN: There -- yeah, Your Honor.

18 THE COURT: Right.

19 MR. STERN: And it isn't always --

20 THE COURT: Because I think I was sort of annoyed by  
21 the -- by the letter; that the Bank didn't just tender, but  
22 made their tender conditional on the HOA's acceptance that the  
23 Bank was right. And I think we've had one case where that  
24 happened, and I -- and I ruled against the Bank, or on that  
25 one.

1           And so, isn't it true that the Bank only did the  
2 letter in some cases; the Bank didn't do the letter in every  
3 case?

4           MR. STERN: I believe that's true, Your Honor,  
5 although I would add that the letter wasn't intended to say  
6 that the HOA -- that the HOA was right or wrong; it was  
7 basically saying we're paying the super priority, and --

8           THE COURT: And this is the amount, and so, I  
9 mean --

10          MR. STERN: And this is the amount --

11          THE COURT: -- implicit in that though is that our  
12 calculation is right.

13          MR. STERN: Well, that's not a condition, Your  
14 Honor. And the other -- the other important -- it's not  
15 saying that you -- you know, by taking this amount, you agree  
16 to this, this, or this. It's basically saying, the Bank has  
17 tendered the super priority amount. It's basically a  
18 statement of what the purpose of the payment is. The other  
19 issue -- and this is -- I don't know if this --

20          THE COURT: But doesn't it say something -- and I'm  
21 paraphrasing; I don't have the letter in front of me.

22          MS. SCHIMMING: We'll read --

23          THE COURT: Your acceptance of this indicate --  
24 resolves the issue, or is conclusive, something --

25          MS. SCHIMMING: Do you want me to read the actual

1 sentence?

2 THE COURT: I've got it here somewhere, but --

3 MS. SCHIMMING: "This is a nonnegotiable amount and  
4 any endorsement of said cashier's check on your part, whether  
5 express or implied, will be strictly construed as an  
6 unconditional acceptance on your part of the facts stated  
7 herein, and express agreement that BANA's financial obligation  
8 towards the HOA in regard to the real property located at 3617  
9 Diamond Spur Avenue has now been paid in full," along with, on  
10 the check, it's saying, "to cure HOA deficiency". And the  
11 entire letter is saying, our obligation is only nine months,  
12 which is clearly --

13 THE COURT: Right.

14 MS. SCHIMMING: -- in question.

15 THE COURT: Anyway, I'm sorry to cut you off. But I  
16 just wanted to make sure that that -- my understanding of this  
17 letter business was correct.

18 MR. STERN: There's another important piece of this,  
19 Your Honor.

20 THE COURT: Mr. Stern, your turn is over. I wanted  
21 to make sure that my factual impression was correct. It seems  
22 to be correct. The Bank does the letters in some cases, and  
23 not in other cases.

24 MR. STERN: I'll sit down, Your Honor.

25 THE COURT: All right.

1 MS. GILBERT: So --

2 THE COURT: Ms. Gilbert?

3 MS. GILBERT: -- basically, what SFR would say is  
4 that we believe that the factuals -- the facts in this case  
5 have -- they're before you, Your Honor. There's nothing in  
6 the record that shows that SFR knew about whatever dispute was  
7 going on with the HOA. They have proffered no evidence of  
8 that. They've -- they have deposed SFR, they've gotten the  
9 information from --

10 THE COURT: The file.

11 MS. GILBERT: -- from the file, they've gotten that.  
12 There is no other discovery that they actually need to do,  
13 other than go on a fishing expedition. And we believe that  
14 you can't. I believe that you have read this right, is the --  
15 the problem with the record before the Court in this one was  
16 that the Court didn't say why there wasn't a BFP; it didn't  
17 say why certain things existed.

18 Again, I don't even know that equity exists here for  
19 them to be able to come in under equity, because they have an  
20 adequate remedy at law, and that has been the law in this  
21 state since the 1800s.

22 But if they do, then the equities I think weigh --  
23 if you take all the facts that are before you, and include the  
24 fact that the price paid was more than 20 so you don't have to  
25 take the Restatement into consideration, I think you can rule

1 in SFR's favor.

2 THE COURT: All right.

3 MS. GILBERT: Do you have any other questions for  
4 me?

5 THE COURT: No. I'm going to just re-read -- I've  
6 read the case; I'm going to read it again. I'm going to issue  
7 a decision from chambers.

8 MS. SCHIMMING: With -- just -- well, I'm sorry, but  
9 with regard to the HOA, they did file a Joinder in this case  
10 to both the summary judgment motion --

11 MS. SCHIMMING: -- and the Opposition, and I just  
12 would like to be heard briefly on the --

13 THE COURT: Okay.

14 MS. SCHIMMING: -- fact that the cause of action  
15 against the Homeowners Association that has not already been  
16 something decided, constitutionality, what have you, is the  
17 tender issue. And to the extent that that issue exists, I  
18 want it to be known that the Homeowners Association is seeking  
19 summary judgment in that respect, as well. And the same  
20 argument applies.

21 In this -- in situations where a check is given and  
22 it's unconditional, we will absolutely accept a check, apply  
23 it, and say, hey, this amount was paid. Nine months of the  
24 assessments were paid. Nine months plus this were paid. Two  
25 months of assessments were paid, what have you. But when you



1 have a --

2 THE COURT: Yeah. And as I said, I've been ruling  
3 that if it's an unconditional tender and it's the right  
4 amount, that the purchaser takes subject to the Deed of Trust.  
5 I've only had it one time, and maybe I overlooked a letter in  
6 another case, but to my recollection, I've been ruling that  
7 when there's a conditional -- well, if it's the wrong amount,  
8 then certainly if there's a letter that it's unconditional,  
9 certainly the Bank loses.

10 If -- you know, I'm a little -- I guess -- I don't  
11 know. I'm a little unsympathetic, I guess, to the Bank when  
12 they -- when they make their tender conditional upon the HOA's  
13 exception -- acceptance of the unconditionality of the tender.  
14 So, by that, I mean, you know, take this, negotiate it, and by  
15 the way, you waive any other claims that this is the wrong  
16 amount.

17 MS. SCHIMMING: And the only thing I want to --

18 THE COURT: And I've been a little put off by that,  
19 frankly --

20 MS. SCHIMMING: The only thing --

21 THE COURT: -- and I've said that in other cases,  
22 so.

23 MS. SCHIMMING: The only thing I want to add to that  
24 is, if Alessi & Koenig did in fact accept that amount with  
25 those conditions on it, they're opening themselves up to

1 liability as the HOA, and opening themselves up to waiving the  
2 HOA's rights where they shouldn't be waived.

3 THE COURT: Right. And that's why I've been  
4 somewhat -- even though I don't agree with the HOA's  
5 calculation of the amount, I've been somewhat sympathetic to  
6 the HOAs on the argument that we don't negotiate these checks  
7 because of the letters. And some banks were tendering without  
8 the letters.

9 MS. SCHIMMING: And we -- as you can see, we have  
10 absolutely accepted. If payment is just made, it's accepted,  
11 and applied, and announced at the sale, so.

12 THE COURT: In any event, I think I understand  
13 everybody's position. I don't have any other factual  
14 questions. I think if I misstated some of the facts, you guys  
15 had an opportunity to correct that, so I think I have a good  
16 understanding of what facts have been developed in this case.  
17 Yes?

18 MR. STERN: Your Honor, I'd like to ask for just a  
19 very -- and I mean a very brief response to -- not Ms.  
20 Gilbert's, but Alessi's argument.

21 THE COURT: Okay.

22 MR. STERN: Because I think it's --

23 THE COURT: And that, to me, is just regarding a  
24 letter, and --

25 MR. STERN: Yes, it is regarding the letter.

1 THE COURT: Didn't we talk about that already?

2 MR. STERN: Yes, Your Honor, but that was before  
3 there was this additional presentation, so.

4 THE COURT: Okay. Well, just briefly, because I  
5 think you had an opportunity to discuss the letter --

6 MR. STERN: Yeah, the --

7 THE COURT: -- and the nature of the fact that the  
8 letter required them waiving -- sort of waiving their rights.

9 MR. STERN: The law on this, Your Honor, we believe  
10 is --

11 THE COURT: Didn't you brief this?

12 MR. STERN: Yes, I think so, Your Honor.

13 THE COURT: But in any event, it's faster for you  
14 just to make your argument than find out whether you briefed  
15 it or not.

16 MR. STERN: The argument, Your Honor, is that the --

17 THE COURT: If you didn't brief it in this case, and  
18 I think you did, it's been briefed in other cases. I think  
19 you did brief it though.

20 MR. STERN: The issue is, that it's not a bright-  
21 line rule as to whether it's unconditional or not. I mean,  
22 certainly, the cases talk about conditions and the fact that  
23 it has to be unconditional. But if you -- if you place a  
24 condition that you have a right to insist on, that does not  
25 defeat tender.

1           THE COURT: Yeah. I guess my point would be, if the  
2 law were established, and the law established that you had  
3 this right, then you can insist on it. But when the law is  
4 open and there hasn't been any decision on it, I'm a little  
5 put off by your insistence on something that's still an open  
6 question of law.

7           MR. STERN: But what do we --

8           THE COURT: That was my point.

9           MR. STERN: But what do we do, Your Honor, when you  
10 decide it way or the other, and then it goes up on appeal, and  
11 maybe the Supreme Court comes to a different decision? I  
12 think --

13          THE COURT: Well, I mean, they could have written a  
14 letter that says, this is our opinion as to what is required  
15 in this case, and therefore, we are tendering the amount that  
16 we calculate is required.

17          MR. STERN: That's essentially what they did.

18          THE COURT: They could've done that letter.

19          MR. STERN: That's essentially what they did.

20          THE COURT: Well, I read the letter --

21          MR. STERN: It's --

22          THE COURT: Okay. Number one, the letter speaks for  
23 itself. Number two, if my interpretation of the letter is  
24 incorrect, the letter speaks for itself, and so someone else  
25 is free to interpret it however they want to interpret it.

1 The way I read the letter is I think pretty evident by its  
2 plain language, that it is an unconditional acceptance.

3 And so, what I -- what my point is, you could have  
4 done, meaning, your client, could have done a different letter  
5 that said, this is our calculation and that's why we're  
6 tendering this amount. Thank you, good day. That wasn't  
7 done. And so, you know, the import of that remains to be  
8 seen, but I interpret the import one way, and somebody else --

9 MR. STERN: And our only point, Your Honor, is to  
10 the extent that you do find it's a condition, we -- it's a  
11 condition that -- consistent with what you believe the law is,  
12 it would have been a condition we were entitled to insist on.

13 THE COURT: And again, my only point is the law's  
14 unsettled, and so I hate to make people waive their rights on  
15 an area of unsettled law. And there are plenty of District  
16 Court judge -- well, I think the majority of the District  
17 Court is in the same camp I am on that assessment, and -- but  
18 there are other judges who disagree with that. And so it's  
19 clearly unsettled. That's my opinion, and I think that's  
20 true, because it's on -- you know, the judges don't all agree,  
21 so it's --

22 MR. STERN: Yeah.

23 THE COURT: -- unsettled. And the Supreme Court  
24 hasn't told us what the answer is yet.

25 So, thank you. Look for something Monday from

1 chambers.

2 MR. STERN: Thank you, Your Honor.

3 MS. SCHIMMING: Thank you, Your Honor.

4 MS. GILBERT: Thank you, Your Honor.

5 (Proceeding concluded at 11:15 A.M.)

6 \* \* \* \* \*

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**CERTIFICATION**

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

**AFFIRMATION**

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

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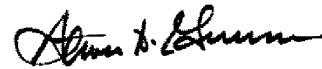
  
\_\_\_\_\_  
JULIE LORD, TRANSCRIBER

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**ORDER**

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CLERK OF THE COURT

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

ALESSI & KOENIG, LLC, a Nevada limited liability company,

Case No. A-13-684501-C

Plaintiff,

Dept. No. XXI

vs.

ARMANDO A. CARIAS, an individual; BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP, unknown entity, DOES INDIVIDUALS I-X, inclusive, and ROE CORPORATIONS XI-XXX, inclusive,

**ORDER DENYING BANK OF AMERICA, N.A.'S MOTION FOR SUMMARY JUDGMENT AND GRANTING SFR INVESTMENTS POOL 1, LLC'S MOTION FOR SUMMARY JUDGMENT**

Defendants.

AND RELATED CLAIMS.

This matter came before the Court on Bank of America, N.A., Successor by Merger to BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing, LP's ("BANA") Motion for Summary Judgment ("BANA MSJ"), filed on October 30, 2015, and SFR Investments Pool 1, LLC's ("SFR") Motion for Summary Judgment ("SFR MSJ"), filed on November 2, 2015. Alessi & Koenig, LLC ("Alessi") and Sutter Creek Homeowners Association ("Association") filed a Joinder to the SFR MSJ on November 20, 2015. SFR filed an Opposition to the BANA MSJ on November 20, 2015, to which Alessi and the Association filed a Joinder on November 21, 2015.



1 BANA filed its Opposition to the SFR MSJ on December 17, 2015, to which SFR filed its Reply  
2 on January 27, 2016.<sup>1</sup> BANA filed its Reply to the SFR Opposition and Alessi and the  
3 Association's Joinder on January 28, 2016. This Court heard arguments on the BANA MSJ, the  
4 SFR MSJ, and Alessi and Association's Joinder on February 3, 2016 at 9:30 a.m. Ariel E. Stern,  
5 Esq. appeared on behalf of BANA. Jacqueline A. Gilbert, Esq. appeared on behalf of SFR.  
6 Chantel M. Schimming, Esq. appeared on behalf of Alessi and the Association.

7 Having reviewed and considered the full briefing and arguments of counsel, for the reasons  
8 stated on the record, and good cause appearing, this Court makes the following findings of fact  
9 and conclusions of law.

10 FINDINGS OF FACT<sup>2</sup>

11 1. In 1991, Nevada adopted the Uniform Common Interest Ownership Act as NRS  
12 116.

13 2. On July 15, 1998, the Association recorded its Declaration of Covenants,  
14 Conditions & Restrictions and Reservation of Easements ("CC&Rs"). Pursuant to NRS  
15 116.3116, the recordation of the CC&Rs constituted record notice and perfection of the  
16 Association's lien.

17 3. On November 3, 2010, a Grant, Bargain and Sale Deed was recorded in the  
18 Official Records of the Clark County Recorder as Instrument No. 201011030002713  
19 transferring real property located at 3617 Diamond Spur Avenue, North Las Vegas, Nevada  
20 89032; Parcel No. 139-08-410-014 (the "Property") to Armando A. Carias.

21 4. On November 3, 2010, a Deed of Trust in favor of W.J. Bradley Mortgage  
22 Capital Corp. was recorded in the Official Records of the Clark County Recorder as Instrument  
23 No. 201011030002714 ("First Deed of Trust").

24 5. On January 26, 2012, an Assignment was recorded in the Official Records of the  
25 Clark County Recorder as Instrument No. 201201260003419 transferring the First Deed of  
26 Trust to BANA.

27 <sup>1</sup> SFR filed an Errata to its Reply on January 27, 2016.

28 <sup>2</sup> Any finding of fact that should be a conclusion of law is deemed a conclusion of law.

6. On February 23, 2012, Alessi, on behalf of the Association, recorded a Notice of Delinquent Assessment (Lien) in the Official Records of the Clark County Recorder as Instrument No. 201202230001691.

7. On May 8, 2012, Alessi, on behalf of the Association, recorded a Notice of Default and Election to Sell Under Homeowners Association Lien in the Official Records of the Clark County Recorder as Instrument No. 201205080002884 ("NOD"). Pursuant to the NOD, the amount due as of April 4, 2012 was \$2,290.00.

8. Alessi, on behalf of the Association, mailed the NOD to BANA.

9. On June 5, 2012, BANA, through its counsel Miles Bauer Bergstrom & Winters ("Miles Bauer"), sent a letter Alessi, as the Association's agent, in response to the NOD, which contained the following language:

Based on Section 2(b), a portion of your HOA lien is arguably senior to BANA's first deed of trust, specifically the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessment dated April 4, 2012. For purposes of calculating the nine-month period, the trigger date is the date the HOA sought to enforce its lien. It is unclear, based upon the information known to date, what amount the nine months' of common assessments pre-dating the NOD actually are. That amount, whatever it is, is the amount BANA should be required to rightfully pay to fully discharge its obligations to the HOA per NRS 116.3102 and my client hereby offers to pay that sum upon presentation of adequate proof of the same by the HOA.

10. On June 15, 2012, Alessi, as agent for the Association, sent a letter to Miles Bauer, BANA's counsel, stating that the foreclosure process would continue unless \$2,930.00 was paid. Alessi also sent Miles Bauer a ledger setting forth the unpaid assessments to date.

11. On June 28, 2012, Miles Bauer sent Alessi a check for \$720.00, representing 9 months' worth of delinquent assessments, and a letter containing the following language:

Our client has authorized us to make payment to you in the amount of \$720.00 to satisfy its obligations to the HOA as a holder of the first deed of trust against the property. Thus, enclosed you will find a cashier's check made out to Alessi & Koenig, LLC in the sum of \$720.00, which represents the maximum 9 months worth of delinquent assessments recoverable by an HOA. This is a non-negotiable amount and any endorsement of said cashier's check on your part, whether express or implied, will be strictly construed as an unconditional acceptance on your part of the facts stated herein

1 and express agreement that BANA's financial obligations towards the HOA in regards to  
2 the real property located at 3617 Diamond Spur Avenue have now been "paid in full".

3 12. On or around July 16, 2012, Alessi rejected and returned the check for \$720.00 to  
4 Miles Bauer.

5 13. After its check was rejected on or around July 16, 2012, BANA did nothing  
6 further to protect its interest in the Property.

7 14. On January 22, 2013, Alessi, on behalf of the Association, recorded a Notice of  
8 Trustee's Sale in the Official Records of the Clark County Recorder as Instrument No.  
9 201301220003107 ("NOS"). Pursuant to the NOS, the Property was to be sold on February 20,  
10 2013 at 2:00 p.m. at 9500 W. Flamingo Rd., Suite #205, Las Vegas, Nevada 89147 (Alessi &  
11 Koenig, LLC Office Building, 2<sup>nd</sup> Floor).

12 15. Alessi, on behalf of the Association, mailed the NOS to BANA.

13 16. On February 20, 2013, SFR was the highest bidder at the Association's public  
14 non-judicial foreclosure auction and purchased the Property for \$21,000.00 ("Association  
15 Foreclosure Sale").

16 17. On February 26, 2013, a Trustee's Deed Upon Sale was recorded in the Official  
17 Records of the Clark County Recorder as Instrument No. 201302260003889 ("Foreclosure  
18 Deed"). The Foreclosure Deed contains the following recitals:

19 This conveyance is made pursuant to the powers conferred upon Trustee by NRS  
20 116 et seq., and that certain Notice of Delinquent Assessment Lien, described  
21 herein. Default occurred as set forth in a Notice of Default and Election to Sell  
22 which was recorded in the office of the recorder of said county. All requirements  
23 of law regarding the mailing of copies of notices and the posting and publication  
24 of the Notice of Sale have been complied with. Said property was sold by said  
25 Trustee at public auction on February 20, 2013 at the place indicated on the  
26 Notice of Trustee's Sale.

25 18. No release of the super-priority lien or lis pendens was recorded by BANA  
26 against the Property prior to the Association Foreclosure Sale.

27 19. As such, SFR was not aware of BANA's attempt to pay a portion of the  
28 Association's lien prior to the Association Foreclosure Sale.

20. Neither SFR nor its manager, Christopher Hardin, has any relationship or interest in the Association other than owning property within the community.

21. Neither SFR nor its manager, Christopher Hardin, has any relationship or interest in Alessi outside its attendance at auctions, bidding, and occasionally purchasing properties at publicly-held auctions conducted by Alessi.

22. On September 18, 2014, the Nevada Supreme Court issued its opinion in SFR Investments Pool I v. U.S. Bank, concluding that NRS 116.3116(2) gives associations a true super-priority lien, the non-judicial foreclosure of which extinguishes a first deed of trust. SFR Investments Pool I v. U.S. Bank, 130 Nev. Adv. Op. 75, 334 P.3d 408, 419 (2014), reh'g denied (Oct. 16, 2014).

23. On January 28, 2016, the Nevada Supreme Court issued its opinion in Shadow Wood HOA v. N.Y. Cmty. Bancorp., 132 Nev. Adv. Op. 5 (2016) (herein after "Shadow Wood").

24. BANA argued that the noticing provisions of NRS 116.3116 et seq. for non-judicial foreclosure are facially unconstitutional as they do not require notice to the holder of a first deed of trust. Further, BANA also argued that the loan that underlies the first deed of trust is FHA insured and, therefore, HUD has an interest in the deed of trust. Therefore, BANA argued that federal law preempts state law and precludes extinguishment of the insured first deed of trust.

25. SFR argued that the statutes are constitutional both as applied and facially, requiring notice to recorded first security lienholders through the incorporation of NRS 107.090 through NRS 116.31168. SFR also argued that BANA lacks standing to assert the Supremacy Clause as it is not HUD or the FHA and that preemption does not apply because the federal and state policies are not in conflict.

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CONCLUSIONS OF LAW<sup>3</sup>

1. Summary judgment is appropriate where there is no remaining question of material fact such that the moving party is entitled to judgment as a matter of law. Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

2. NRS 116 is facially constitutional.

3. NRS 116 is not preempted by federal law.

4. The Association Foreclosure Sale was conducted pursuant to the Association's lien, which contained super-priority amounts.

5. Pursuant to Shadow Wood, the recitals set forth in the Foreclosure Deed that notices were properly provided is conclusive proof of the same. Alternatively, SFR has provided evidence that the Association Foreclosure Sale was properly noticed in this case.

6. In considering the price paid for the Property, one must also consider the market at the time, including but not limited to, the increased expenses purchasers at NRS 116 foreclosure sales faced after buying properties at these sales.

7. A sale pursuant to NRS 116 cannot be commercially unreasonable as a matter of law based on price alone.

8. NRS 116 has no requirement that sales be commercially reasonable. As such, purchasers at NRS 116 foreclosure sales have no burden to prove the commercial reasonableness of any such sale.

9. A commercial reasonableness analysis would only come into play if there was evidence that the sale was not properly noticed, that the bidding at the public auction was in some way chilled, or if there was evidence of fraud, collusion, or some other impropriety in the sale process. In those situations, commercial reasonableness may come into play under the Shadow Wood balancing of the equities test.

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<sup>3</sup> Any conclusion of law that should be a finding of fact is deemed a finding of fact.

1 10. As BANA's payment of \$720.00 was conditional, requiring the Association to  
2 waive its rights as to a currently undecided matter—namely, what amounts are included in a  
3 super-priority lien pursuant to NRS 116—this payment attempt did not constitute a sufficient  
4 tender to protect BANA's interest in the Property.

5 11. Pursuant to Shadow Wood, equity does not favor granting BANA relief in this  
6 case.

7 a. BANA was in a better position than SFR, a mere purchaser at a public sale,  
8 and could have done more to protect its interest in the Property.

9 b. After it submitted its payment to the Association, BANA should have done  
10 something to put potential purchasers, such as SFR, on notice of its attempted  
11 payment and corresponding belief that the super-priority lien was  
12 extinguished prior to the Association Foreclosure Sale.

13 c. SFR is a bona fide purchaser ("BFP").

14 d. The fact that SFR had record notice of the First Deed of Trust does not defeat  
15 its BFP status, particularly when there is no evidence to suggest SFR had  
16 actual knowledge of BANA's attempt to pay a portion of the Association's  
17 lien prior to Association Foreclosure Sale.

18 e. Additionally, as SFR purchased the Property for value, low price alone is not  
19 enough to deprive it of its status as a BFP.

20 12. As BANA has provided no admissible evidence of fraud, collusion, or other  
21 impropriety with the Association's non-judicial foreclosure process, it cannot show that  
22 there is a question of material fact remaining for trial.

23 Good cause appearing therefore,

24 ORDER

25 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the BANA MSJ is  
26 DENIED.

27 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the SFR MSJ is  
28 GRANTED.

KIM GILBERT EBRON  
7625 DEAN MARTIN DRIVE, SUITE 110  
LAS VEGAS, NEVADA 89139  
(702) 485-3388 FAX (702) 485-3381

1 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Alessi and the  
2 Association's Joinder to the SFR MSJ is GRANTED.

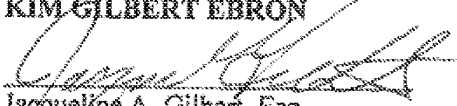
3 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that title to real property  
4 located at 3617 Diamond Spur Avenue, North Las Vegas, Nevada 89032; Parcel No. 139-08-410-  
5 014 is quieted in favor of SFR Investments Pool 1, LLC.

6 IT IS SO ORDERED.

7 Dated this 31<sup>st</sup> day of March, 2016.

8   
9 DISTRICT COURT JUDGE 

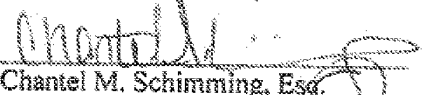
12 Respectfully Submitted By:  
13 KIM GILBERT EBRON

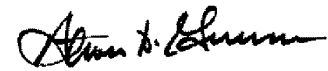
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15 Jacqueline A. Gilbert, Esq.  
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19 Attorney for SFR Investments Pool 1, LLC

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Successor by Merger to BAC Home Loans  
Servicing, LP FKA Countrywide Home  
Loans Servicing, LP

19 Approved as to Form and Content:  
20 ALESSI & KOENIG, LLC

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22 Chantel M. Schimming, Esq.  
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24 9500 W. Flamingo Road, Suite 205  
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26 Attorney for Alessi & Koenig, LLC and Sutter  
27 Creek Homeowners Association  
28



CLERK OF THE COURT

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Facsimile: (702) 485-3301  
8 Attorneys for SFR Investment Pool 1, LLC

9 **EIGHTH JUDICIAL DISTRICT COURT**

10 **CLARK COUNTY, NEVADA**

11 ALESSI & KOENIG, LLC, a Nevada limited  
liability company,

Case No. A-13-684501-C

12 Plaintiff,

Dept. No. XXI

13 vs.

14 ARMANDO A. CARIAS, an individual;  
BANK OF AMERICA, N.A., SUCCESSOR  
15 BY MERGER TO BAC HOME LOANS  
SERVICING, LP FKA COUNTRYWIDE  
16 HOME LOANS SERVICING, LP, unknown  
entity, DOES INDIVIDUALS I-X, inclusive,  
17 and ROE CORPORATIONS XI-XXX,  
inclusive,

**NOTICE OF ENTRY OF ORDER  
DENYING BANK OF AMERICA, N.A.'S  
MOTION FOR SUMMARY JUDGMENT  
AND GRANTING SFR INVESTMENTS  
POOL 1, LLC'S MOTION FOR  
SUMMARY JUDGMENT**

18  
19 Defendants.

20 AND RELATED CLAIMS.

21 PLEASE TAKE NOTICE that on April 18, 2016 this Court entered an **Order Denying**  
22 **Bank of America, N.A.'s Motion for Summary Judgment and Granting SFR Investments**  
23

24  
25  
26  
27  
28 ///



1 **Pool 1, LLC's Motion for Summary Judgment.** A copy of said Order is attached hereto.

2

3 DATED this 27<sup>th</sup> day of April, 2016.

4

5

**KIM GILBERT EBRON**

6

/s/ Diana Cline Ebron

7

DIANA CLINE EBRON, ESQ.

8

Nevada Bar No. 10580

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Las Vegas, Nevada 89139

Attorney for SFR Investments Pool 1, LLC.

9

10

**CERTIFICATE OF SERVICE**

11

I hereby certify that on this 27<sup>th</sup> day of April, 2016, pursuant to NRCP 5(b), I served via

12

the Eighth Judicial District Court electronic filing system, the foregoing **NOTICE OF ENTRY**

13

**OF ORDER DENYING BANK OF AMERICA, N.A.'S MOTION FOR SUMMARY**

14

**JUDGMENT AND GRANTING SFR INVESTMENTS POOL 1, LLC'S MOTION FOR**

15

**SUMMARY JUDGMENT** to the following parties:

16

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/s/ Tomas Valerio

25

An Employee of Kim Gilbert Ebron

26

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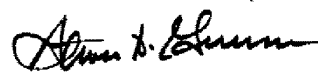
28

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**ORDER**

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*Attorneys for SFR Investments Pool 1, LLC*

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CLERK OF THE COURT

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**CLARK COUNTY, NEVADA**

ALESSI & KOENIG, LLC, a Nevada limited liability company,

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vs.

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Defendants.

Case No. A-13-684501-C

Dept. No. XXI

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13 2. On July 15, 1998, the Association recorded its Declaration of Covenants,  
14 Conditions & Restrictions and Reservation of Easements ("CC&Rs"). Pursuant to NRS  
15 116.3116, the recordation of the CC&Rs constituted record notice and perfection of the  
16 Association's lien.

17 3. On November 3, 2010, a Grant, Bargain and Sale Deed was recorded in the  
18 Official Records of the Clark County Recorder as Instrument No. 201011030002713  
19 transferring real property located at 3617 Diamond Spur Avenue, North Las Vegas, Nevada  
20 89032; Parcel No. 139-08-410-014 (the "Property") to Armando A. Carias.

21 4. On November 3, 2010, a Deed of Trust in favor of W.J. Bradley Mortgage  
22 Capital Corp. was recorded in the Official Records of the Clark County Recorder as Instrument  
23 No. 201011030002714 ("First Deed of Trust").

24 5. On January 26, 2012, an Assignment was recorded in the Official Records of the  
25 Clark County Recorder as Instrument No. 201201260003419 transferring the First Deed of  
26 Trust to BANA.

27 <sup>1</sup> SFR filed an Errata to its Reply on January 27, 2016.

28 <sup>2</sup> Any finding of fact that should be a conclusion of law is deemed a conclusion of law.

6. On February 23, 2012, Alessi, on behalf of the Association, recorded a Notice of Delinquent Assessment (Lien) in the Official Records of the Clark County Recorder as Instrument No. 201202230001691.

7. On May 8, 2012, Alessi, on behalf of the Association, recorded a Notice of Default and Election to Sell Under Homeowners Association Lien in the Official Records of the Clark County Recorder as Instrument No. 201205080002884 ("NOD"). Pursuant to the NOD, the amount due as of April 4, 2012 was \$2,290.00.

8. Alessi, on behalf of the Association, mailed the NOD to BANA.

9. On June 5, 2012, BANA, through its counsel Miles Bauer Bergstrom & Winters ("Miles Bauer"), sent a letter Alessi, as the Association's agent, in response to the NOD, which contained the following language:

Based on Section 2(b), a portion of your HOA lien is arguably senior to BANA's first deed of trust, specifically the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessment dated April 4, 2012. For purposes of calculating the nine-month period, the trigger date is the date the HOA sought to enforce its lien. It is unclear, based upon the information known to date, what amount the nine months' of common assessments pre-dating the NOD actually are. That amount, whatever it is, is the amount BANA should be required to rightfully pay to fully discharge its obligations to the HOA per NRS 116.3102 and my client hereby offers to pay that sum upon presentation of adequate proof of the same by the HOA.

10. On June 15, 2012, Alessi, as agent for the Association, sent a letter to Miles Bauer, BANA's counsel, stating that the foreclosure process would continue unless \$2,930.00 was paid. Alessi also sent Miles Bauer a ledger setting forth the unpaid assessments to date.

11. On June 28, 2012, Miles Bauer sent Alessi a check for \$720.00, representing 9 months' worth of delinquent assessments, and a letter containing the following language:

Our client has authorized us to make payment to you in the amount of \$720.00 to satisfy its obligations to the HOA as a holder of the first deed of trust against the property. Thus, enclosed you will find a cashier's check made out to Alessi & Koenig, LLC in the sum of \$720.00, which represents the maximum 9 months worth of delinquent assessments recoverable by an HOA. This is a non-negotiable amount and any endorsement of said cashier's check on your part, whether express or implied, will be strictly construed as an unconditional acceptance on your part of the facts stated herein

1 and express agreement that BANA's financial obligations towards the HOA in regards to  
2 the real property located at 3617 Diamond Spur Avenue have now been "paid in full".

3 12. On or around July 16, 2012, Alessi rejected and returned the check for \$720.00 to  
4 Miles Bauer.

5 13. After its check was rejected on or around July 16, 2012, BANA did nothing  
6 further to protect its interest in the Property.

7 14. On January 22, 2013, Alessi, on behalf of the Association, recorded a Notice of  
8 Trustee's Sale in the Official Records of the Clark County Recorder as Instrument No.  
9 201301220003107 ("NOS"). Pursuant to the NOS, the Property was to be sold on February 20,  
10 2013 at 2:00 p.m. at 9500 W. Flamingo Rd., Suite #205, Las Vegas, Nevada 89147 (Alessi &  
11 Koenig, LLC Office Building, 2<sup>nd</sup> Floor).

12 15. Alessi, on behalf of the Association, mailed the NOS to BANA.

13 16. On February 20, 2013, SFR was the highest bidder at the Association's public  
14 non-judicial foreclosure auction and purchased the Property for \$21,000.00 ("Association  
15 Foreclosure Sale").

16 17. On February 26, 2013, a Trustee's Deed Upon Sale was recorded in the Official  
17 Records of the Clark County Recorder as Instrument No. 201302260003889 ("Foreclosure  
18 Deed"). The Foreclosure Deed contains the following recitals:

19 This conveyance is made pursuant to the powers conferred upon Trustee by NRS  
20 116 et seq., and that certain Notice of Delinquent Assessment Lien, described  
21 herein. Default occurred as set forth in a Notice of Default and Election to Sell  
22 which was recorded in the office of the recorder of said county. All requirements  
23 of law regarding the mailing of copies of notices and the posting and publication  
24 of the Notice of Sale have been complied with. Said property was sold by said  
25 Trustee at public auction on February 20, 2013 at the place indicated on the  
26 Notice of Trustee's Sale.

27 18. No release of the super-priority lien or lis pendens was recorded by BANA  
28 against the Property prior to the Association Foreclosure Sale.

19 As such, SFR was not aware of BANA's attempt to pay a portion of the  
Association's lien prior to the Association Foreclosure Sale.

20. Neither SFR nor its manager, Christopher Hardin, has any relationship or interest in the Association other than owning property within the community.

21. Neither SFR nor its manager, Christopher Hardin, has any relationship or interest in Alessi outside its attendance at auctions, bidding, and occasionally purchasing properties at publicly-held auctions conducted by Alessi.

22. On September 18, 2014, the Nevada Supreme Court issued its opinion in SFR Investments Pool I v. U.S. Bank, concluding that NRS 116.3116(2) gives associations a true super-priority lien, the non-judicial foreclosure of which extinguishes a first deed of trust. SFR Investments Pool I v. U.S. Bank, 130 Nev. Adv. Op. 75, 334 P.3d 408, 419 (2014), reh'g denied (Oct. 16, 2014).

23. On January 28, 2016, the Nevada Supreme Court issued its opinion in Shadow Wood HOA v. N.Y. Cmty. Bancorp., 132 Nev. Adv. Op. 5 (2016) (herein after "Shadow Wood").

24. BANA argued that the noticing provisions of NRS 116.3116 et seq. for non-judicial foreclosure are facially unconstitutional as they do not require notice to the holder of a first deed of trust. Further, BANA also argued that the loan that underlies the first deed of trust is FHA insured and, therefore, HUD has an interest in the deed of trust. Therefore, BANA argued that federal law preempts state law and precludes extinguishment of the insured first deed of trust.

25. SFR argued that the statutes are constitutional both as applied and facially, requiring notice to recorded first security lienholders through the incorporation of NRS 107.090 through NRS 116.31168. SFR also argued that BANA lacks standing to assert the Supremacy Clause as it is not HUD or the FHA and that preemption does not apply because the federal and state policies are not in conflict.

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CONCLUSIONS OF LAW<sup>3</sup>

1. Summary judgment is appropriate where there is no remaining question of material fact such that the moving party is entitled to judgment as a matter of law. Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

2. NRS 116 is facially constitutional.

3. NRS 116 is not preempted by federal law.

4. The Association Foreclosure Sale was conducted pursuant to the Association's lien, which contained super-priority amounts.

5. Pursuant to Shadow Wood, the recitals set forth in the Foreclosure Deed that notices were properly provided is conclusive proof of the same. Alternatively, SFR has provided evidence that the Association Foreclosure Sale was properly noticed in this case.

6. In considering the price paid for the Property, one must also consider the market at the time, including but not limited to, the increased expenses purchasers at NRS 116 foreclosure sales faced after buying properties at these sales.

7. A sale pursuant to NRS 116 cannot be commercially unreasonable as a matter of law based on price alone.

8. NRS 116 has no requirement that sales be commercially reasonable. As such, purchasers at NRS 116 foreclosure sales have no burden to prove the commercial reasonableness of any such sale.

9. A commercial reasonableness analysis would only come into play if there was evidence that the sale was not properly noticed, that the bidding at the public auction was in some way chilled, or if there was evidence of fraud, collusion, or some other impropriety in the sale process. In those situations, commercial reasonableness may come into play under the Shadow Wood balancing of the equities test.

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<sup>3</sup> Any conclusion of law that should be a finding of fact is deemed a finding of fact.

1 10. As BANA's payment of \$720.00 was conditional, requiring the Association to  
2 waive its rights as to a currently undecided matter—namely, what amounts are included in a  
3 super-priority lien pursuant to NRS 116—this payment attempt did not constitute a sufficient  
4 tender to protect BANA's interest in the Property.

5 11. Pursuant to Shadow Wood, equity does not favor granting BANA relief in this  
6 case.

- 7 a. BANA was in a better position than SFR, a mere purchaser at a public sale,  
8 and could have done more to protect its interest in the Property.
- 9 b. After it submitted its payment to the Association, BANA should have done  
10 something to put potential purchasers, such as SFR, on notice of its attempted  
11 payment and corresponding belief that the super-priority lien was  
12 extinguished prior to the Association Foreclosure Sale.
- 13 c. SFR is a bona fide purchaser ("BFP").
- 14 d. The fact that SFR had record notice of the First Deed of Trust does not defeat  
15 its BFP status, particularly when there is no evidence to suggest SFR had  
16 actual knowledge of BANA's attempt to pay a portion of the Association's  
17 lien prior to Association Foreclosure Sale.
- 18 e. Additionally, as SFR purchased the Property for value, low price alone is not  
19 enough to deprive it of its status as a BFP.

20 12. As BANA has provided no admissible evidence of fraud, collusion, or other  
21 impropriety with the Association's non-judicial foreclosure process, it cannot show that  
22 there is a question of material fact remaining for trial.

23 Good cause appearing therefore,

24 ORDER

25 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the BANA MSJ is  
26 DENIED.

27 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the SFR MSJ is  
28 GRANTED.



KIM GILBERT EBRON  
7625 DEAN MARTIN DRIVE, SUITE 110  
LAS VEGAS, NEVADA 89139  
(702) 485-3388 FAX (702) 481-3381

1 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Alessi and the  
2 Association's Joinder to the SFR MSJ is GRANTED.

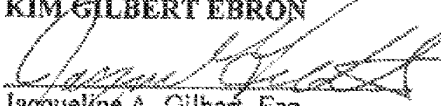
3 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that title to real property  
4 located at 3617 Diamond Spur Avenue, North Las Vegas, Nevada 89032; Parcel No. 139-08-410-  
5 014 is quieted in favor of SFR Investments Pool 1, LLC.

6 IT IS SO ORDERED.

7 Dated this 31<sup>st</sup> day of March, 2016.

8  
9   
DISTRICT COURT JUDGE 


12 Respectfully Submitted By:  
13 **KIM GILBERT EBRON**

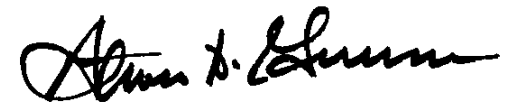
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19 Attorney for SFR Investments Pool 1, LLC

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Creek Homeowners Association



CLERK OF THE COURT

**MOT**

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*Attorneys for Defendant Bank of America, N.A., as successor by merger to BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing, LP*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

ALESSI & KOENIG, LLC,

Plaintiff,

v.

BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP, unknown entity, DOES INDIVIDUALS 1-X, inclusive, and ROE CORPORATIONS XI-XXX, inclusive,

Defendants.

Case No.: A-13-684501-C

Dept.: XXI

**BANK OF AMERICA, N.A.'S MOTION FOR RECONSIDERATION**

BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP, a National Association,

Cross-Claimant,

v.

ARMANDO A. CARIAS, an individual, DOES INDIVIDUALS 1 through 10, inclusive, and ROE BUSINESS ENTITIES 1 through 10, inclusive,

Cross-Defendants.

AKERMAN LLP

1160 TOWN CENTER DRIVE, SUITE 330  
LAS VEGAS, NEVADA 89144  
TEL.: (702) 634-5000 – FAX: (702) 380-8572

BANK OF AMERICA, N.A., SUCCESSOR BY  
MERGER TO BAC HOME LOANS  
SERVICING, LP FKA COUNTRYWIDE  
HOME LOANS SERVICING, LP, a National  
Association,

Cross-Claimant,

v.

SFR INVESTMENTS POOL 1, LLC, a domestic  
Limited Liability Company, SUTTER CREEK  
HOMEOWNERS' ASSOCIATION, an unknown  
entity, and DOES 1 through 10 and ROE  
BUSINESS ENTITIES 1 through 10,

Cross-Defendants.

Defendant Bank of America, N.A. (**Bank of America**), by and through its attorneys at the  
law firm AKERMAN LLP, hereby submits this Motion for Reconsideration of the Order granting  
summary judgment in favor of SFR Investments Pool 1, LLC (**SFR**) and denying Bank of America's  
motion for summary judgment. This Motion for Reconsideration is made and based upon the  
Memorandum of Points and Authorities attached hereto and such oral argument as may be  
entertained by the Court at the time and place of the hearing of this matter.

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**NOTICE OF MOTION**

PLEASE TAKE NOTICE that Defendant Bank of America will bring the foregoing, **BANK OF AMERICA'S MOTION FOR RECONSIDERATION**, for hearing before the Eighth Judicial District Court, located at the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada 89155, on the 20 day of JUNE 2016, at the hour of CHAMBERS \_\_\_\_:\_\_\_\_ o'clock \_\_\_\_m.

DATED this 16<sup>th</sup> day of May, 2016.

**AKERMAN LLP**

/s/ Darren T. Brenner, Esq.

DARREN BRENNER, ESQ.

Nevada Bar No. 8386

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*Attorneys for Bank of America, N.A. as  
successor by merger to BAC Home Loans  
Servicing, LP FKA Countrywide Home Loans  
Servicing, LP*

**MEMORANDUM OF POINTS AND AUTHORITIES****I. INTRODUCTION**

This Court should reconsider its Order granting summary judgment in SFR's favor. On April 18, 2016, this Court found that Bank of America tendered an amount equal to nine months' delinquent assessments, but held that this payment "did not constitute a sufficient tender to protect [Bank of America's] interest in the Property." Ten days later, the Nevada Supreme Court unequivocally held that the super-priority amount of an HOA's lien is limited to nine months' delinquent assessments. Because Bank of America's tender was equal to the super-priority amount of the HOA's lien as a matter of law, the tender was sufficient to discharge the super-priority lien. Consequently, to the extent SFR obtained any interest in the Property through the HOA foreclosure sale, that interest is subject to Bank of America's Deed of Trust. Accordingly, this Court should reconsider its Order granting summary judgment in SFR's favor, and instead grant summary judgment in favor of Bank of America.

## II. STATEMENT OF FACTS

1. On or about October 27, 2010, Armando Carias (**Borrower**) purchased real property located at 3617 Diamond Spur Avenue, North Las Vegas, Nevada 89032 (the **Property**) via a loan in the amount of \$74,642.00, which was secured by a Deed of Trust (the **Deed of Trust**). On October 27, 2010, Borrower executed this Deed of Trust in favor of W.J. Bradley Mortgage Corp. (**Bradley Mortgage**), with Mortgage Electronic Registration System, Inc. (**MERS**) as the beneficiary. Bradley Mortgage recorded the Deed of Trust on November 3, 2010. Bank's Mot., at **Exhibit A**.

2. On March 2, 2012, MERS assigned the Deed of Trust to Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP. Bank of America recorded the Assignment of Deed of Trust on January 26, 2012. Bank's Mot., at **Exhibit B**.

3. On February 23, 2012, Sutter Creek Homeowners Association (**HOA**), through its agent Alessi & Koenig, LLC (**HOA Trustee**), recorded a Notice of Claim of Delinquent Assessment Lien (**Lien**). The Lien stated that the amount due to the HOA was \$965.00, which included assessments, late fees, interest, and fees. Bank's Mot., at **Exhibit C**. The Lien neither identified the super-priority amount claimed by the HOA, nor described the "deficiency in payment" required by NRS 116.31162(1)(b)(1).

4. On May 8, 2012, the HOA, through the HOA Trustee, recorded a Notice of Default and Election to Sell Under Homeowners Association Lien. The Notice stated the amount due to the HOA was \$2,290.00, which included assessments, dues, interest, and fees. Bank's Mot., at **Exhibit D**. The Notice neither identified the super-priority amount claimed by the HOA, nor described the "deficiency in payment" required by NRS 116.31162(1)(b)(1).

5. By letter dated June 5, 20102, after the Notice of Default was recorded, Bank of America, through its counsel at Miles Bauer Bergstrom & Winters (**Miles Bauer**), contacted the HOA Trustee, and requested a payoff ledger detailing the amounts owed to the HOA in an attempt to determine the super-priority amount. Bank of America sought this information so that it could tender the full super-priority amount to the HOA Trustee. Bank's Mot., at **Exhibit E-1**.

1           6.       The HOA Trustee responded on June 15, 2012, attaching a ledger showing the  
2 monthly assessment amount was \$75.00 per month through January 1, 2012 and \$80.00 per month  
3 after January 1, 2012. Bank's Mot., at **Exhibit E-2**.

4           7.       On June 28, 2012, Bank of America, through Miles Bauer, tendered payment of  
5 \$720.00 (representing 9 months assessments at \$80.00 per month) to the HOA Trustee. Bank's  
6 Mot., at **Exhibit E-3**.

7           8.       The HOA, through the HOA Trustee, received and then ultimately rejected Bank of  
8 America's full super-priority tender. Bank's Mot., at **Exhibits E-4 & E-5**.

9           9.       Instead, the HOA, through the HOA Trustee, recorded a Notice of Trustee's Sale on  
10 January 22, 2013, setting the sale for February 20, 2013. The Notice stated the amount due to the  
11 HOA was \$4,285.00. Bank's Mot., at **Exhibit F**. The Notice of Sale neither identified the super-  
12 priority amount claimed by the HOA, nor described the "deficiency in payment" required by NRS  
13 116.31162(1)(b)(1).

14           10.      On February 20, 2013, the HOA, through the HOA Trustee, non-judicially foreclosed  
15 on the Property, selling the Property to SFR for \$21,000.00. SFR recorded the Trustee's Deed Upon  
16 Sale on February 26, 2013. Bank's Mot., at **Exhibit G**.

17           11.      On October 30, 2015, Bank of America moved for summary judgment, arguing that it  
18 was entitled to summary judgment for three reasons: (1) Bank of America's super-priority tender  
19 extinguished that portion of the HOA's lien prior to the foreclosure sale; (2) the HOA Lien Statute is  
20 facially unconstitutional under the Due Process Clause; and (3) the HOA's sale of the Property was  
21 commercially unreasonable. Bank's Mot., at 7.

22           12.      On November 2, 2015, SFR moved for summary judgment, arguing that it was  
23 entitled to summary judgment because: (1) the recitals in the foreclosure deed conclusively show  
24 SFR obtained title to the Property free and clear; (2) the sale vested title to the Property in SFR  
25 without equity or right of redemption; (3) it was a bona fide purchaser; and (4) the foreclosure sale  
26 was commercially reasonable. SFR's Mot., at 6–19.

27           13.      On April 18, 2016, this Court issued an Order granting SFR's motion for summary  
28 judgment, and denying Bank of America's motion for summary judgment. MSJ Order, at 7. This

1 Court found that Bank of America's June 28, 2012 payment to the HOA Trustee was equal to "9  
2 months' delinquent assessments." MSJ Order, at Findings of Fact ¶ 11. However, this Court held  
3 that this payment of nine months' delinquent assessments "did not constitute a sufficient tender to  
4 protect [Bank of America's] interest in the Property." *Id.*, at Conclusions of Law ¶ 10.

### 5 **III. LEGAL STANDARD**

6 A district court has the inherent authority to reconsider its prior orders. *Trail v. Faretto*, 91  
7 Nev. 401, 403, 536 P.2d 1026, 1027 (1975). "A court may for sufficient cause shown, amend,  
8 correct, resettle, modify or vacate, as the case may be, an order previously made and entered on the  
9 motion and the progress of the cause of proceeding." *Id.* A district court retains jurisdiction to  
10 reconsider a matter unless the order at issue is appealed. *Gibbs v. Giles*, 96 Nev. 243, 607 P.2d 118  
11 (1980). When a decision is clearly erroneous, or a party introduces materially different evidence,  
12 rehearing is appropriate. *Masonry & Tile Contractors v. Jolley, Urga & Wirth*, 113 Nev. 737, 941  
13 P.2d 486 (1997); *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976).

14 Here, this Court should reconsider its Order granting summary judgment in SFR's favor.  
15 After this Court issued the Order, the Nevada Supreme Court held that the super-priority amount of  
16 an HOA's lien is limited to nine months' delinquent assessments—the exact amount Bank of  
17 America tendered to the HOA Trustee prior to the foreclosure sale here. While this Court did not  
18 have the benefit of the *Ikon Holdings* decision when it issued the Order, that decision shows the  
19 Court's Order is due to be reconsidered. In light of *Ikon Holdings*, this Court should reconsider its  
20 Order granting summary judgment in SFR's favor, and instead grant summary judgment in favor of  
21 Bank of America, because Bank of America's tender of nine months' delinquent assessments  
22 extinguished the super-priority portion of the HOA's lien as a matter of law, and SFR is not a bona  
23 fide purchaser. Even if this Court holds that Bank of America's tender did not extinguish the super-  
24 priority lien prior to the sale, this Court should still reconsider its Order and allow this case to go to  
25 trial, as issues of material fact surround the balancing of equities this Court must conduct to  
26 determine whether to set aside the foreclosure sale.

### III. ARGUMENT

#### A. Bank of America's tender of nine months' delinquent assessments satisfied the super-priority lien as a matter of law.

This Court should reconsider its Order granting SFR's motion for summary judgment, and instead grant summary judgment in Bank of America's favor, because Bank of America's super-priority tender extinguished the super-priority lien prior to the foreclosure sale. **First**, Bank of America's tender of nine months' delinquent assessments was equal to the super-priority amount as a matter of law under the Nevada Supreme Court's recent decision in *Horizon at Seven Hills Homeowners Association v. Ikon Holdings, LLC*. **Second**, this tender extinguished the super-priority lien as a matter of law, as tender is complete when the money is offered to a creditor entitled to receive it. Stated simply, when Bank of America submitted payment for nine months' delinquent assessments, the super-priority lien was discharged. Accordingly, Bank of America is entitled to summary judgment.

##### 1. **Bank of America's pre-foreclosure payment equaled the full super-priority amount as a matter of law.**

After this Court entered summary judgment in SFR's favor, the Nevada Supreme Court "conclude[d] the superpriority lien granted by NRS 116.3116(2) does not include an amount for collection fees and foreclosure costs incurred; rather **it is limited to an amount equal to the common expense assessments due during the nine months before foreclosure.**" *Horizon at Seven Hills Homeowners Association v. Ikon Holdings, LLC*, 132 Nev. Adv. Op. 35, at 13 (Nev. Apr. 28, 2016). While this Court found that Bank of America tendered "9 months' worth of delinquent assessments," it held that "this payment attempt did not constitute a sufficient tender to protect BANA's interest in the Property." MSJ Order, at Findings of Fact ¶ 11, and Conclusions of Law ¶ 10. *Ikon Holdings* requires this Court to reconsider its Order granting summary judgment in SFR's favor, and instead grant summary judgment in favor of Bank of America.

Coupling the Nevada Supreme Court's holding in *Ikon Holdings* with its holding in *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.* shows that Bank of America is entitled to summary judgment based on its super-priority tender. In *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, the



1 Nevada Supreme Court clearly stated that a first deed of trust holder’s pre-foreclosure tender  
2 prevents the first deed of trust from being extinguished. 334 P.3d 408, 414 (“[A]s junior lienholder,  
3 [the holder of the first deed of trust] could have paid off the [HOA] lien to avert loss of its  
4 security[.]”); *id.*, at 413 (“As a practical matter, secured lenders will most likely **pay the [9] months’**  
5 **assessments** demanded by the association **rather than having the association foreclose on the**  
6 **unit.**”) (emphasis added).

7 As instructed by *SFR Investments* and *Ikon Holdings*, Bank of America tendered the super-  
8 priority amount prior to the foreclosure sale. Shortly after receiving the Notice of Default and  
9 Election to Sell, Bank of America, through counsel, contacted the HOA Trustee and requested a  
10 payoff ledger detailing the super-priority amount of the HOA’s lien. Bank’s Mot., at **Ex. E-1**. This  
11 payoff ledger showed the amount of the last nine months’ delinquent assessments—the unequivocal  
12 super-priority amount under *Ikon Holdings*—was \$720.00. *Id.*, at **Ex. E-2**. Accordingly, Bank of  
13 America sent a check to the HOA Trustee in the amount of \$720.00 on June 28, 2012. *Id.*, at **Ex. E-**  
14 **3**. While the HOA Trustee inexplicably rejected the super-priority payment, the super-priority  
15 payment still discharged the super-priority lien under the doctrine of tender.

16 **2. Bank of America’s super-priority payment discharged the super-priority lien as**  
17 **a matter of law.**

18 Tender is complete when “**the money is offered** to a creditor who is entitled to receive it.”  
19 *Cladianos v. Friedhoff*, 69 Nev. 41, 45, 240 P.2d 208, 210 (1952) (emphasis added). After the  
20 money owed is offered to the creditor, “nothing further remains to be done, and the transaction is  
21 completed and ended.” *Id.* Other jurisdictions agree that tender is defined as “**an offer of payment**  
22 that is coupled either with no conditions or only with conditions upon which the tendering party has  
23 a right to insist.” *Fresk v. Kramer*, 99 P.3d 282, 286-87 (Or. 2004) (emphasis added); *see also* 74  
24 Am. Jur. 2d *Tender* § 22 (2014). In its opposition to Bank of America’s motion for summary  
25 judgment, SFR stated that tender required “an unconditional offer of payment, consisting in actual  
26 production, in current coin of realm, of a sum not less than the amount due.” SFR’s Opp., at 5  
27 (quoting *Equitable Life Assur. Soc. of United States v. Boothe*, 86 P.2d 960, 962 (Or. 1939). Bank of  
28

1 America satisfied this standard by producing a check for the full amount due—\$720.00—the  
2 statutory super-priority amount. Bank’s Mot., at **Ex. E-3**. Under the tender doctrine as stated by  
3 SFR, Bank of America is entitled to summary judgment.

4 SFR argues Bank of America’s tender offer was “conditional” because it was “dispute[d] as  
5 to what is included in the super-priority amount, and Nevada has not ruled on this issue.” SFR’s  
6 Opp., at 3. Nevada has now ruled on this issue, unequivocally holding that the super-priority amount  
7 “is limited to an amount equal to the common expense assessments due during the nine months  
8 before foreclosure.” *Ikon Holdings*, 132 Nev. Adv. Op. 35, at 13. Bank of America tendered an  
9 amount equal to the last nine months’ delinquent assessments, as this Court found. MSJ Order, at  
10 Findings of Fact ¶ 11. Because the full super-priority amount was offered to the creditor entitled to  
11 receive it, the super-priority lien was discharged as a matter of law. This Court’s analysis should  
12 end here—Bank of America is entitled to summary judgment because the super-priority lien was  
13 discharged prior to the foreclosure sale.

14 Bank of America expects that SFR will argue the tender was conditional because the proper  
15 calculation of the super-priority amount was unclear at the time of tender. This argument is a non-  
16 starter. When a court interprets a statute, “it is explaining its understanding of what the statute has  
17 meant continuously since the date when it became law.” *Rivers v. Roadway Exp., Inc.*, 511 U.S.  
18 298, 313 n.12 (1994). Put simply, when the Nevada Supreme Court held the super-priority amount  
19 of an HOA’s lien is limited to nine months’ delinquent assessments in *Ikon Holdings* on April 28,  
20 2016, it also held that was the super-priority amount when Bank of America submitted the \$720.00  
21 to the HOA Trustee on June 28, 2012. The HOA Trustee’s incorrect interpretation of the super-  
22 priority amount at that time is irrelevant—“ignorance of the law is no excuse.” *U.S. v. Int’l Minerals*  
23 *and Chemical Corp.*, 402 U.S. 558, 563 (1971).

24 In any event, the plain language of the super-priority statute is unambiguous, and the agency  
25 charged with interpreting the statute confirmed the meaning of the unambiguous language well  
26 before the HOA’s foreclosure sale in this case. NRS 116.3116(2) states the super-priority amount is  
27 equal to the amount of assessments that “would have become due in the absence of acceleration  
28 during the nine months immediately preceding institution of an action to enforce the lien. . . .” In

2012, the Nevada Real Estate Division of the Department of Business and Industry (**NRED**), the agency charged with administering the HOA Lien Statute, explained that the “super priority lien based on assessments may not exceed 9 months of assessments as reflected in the association’s budget, and it may not include penalties, fees, late charges, fines or interest.” 13-01 Op. Dep’t of Bus. & Indus., Real Estate Div. 18 (2012); *see also Folio v. Briggs*, 656 P.2d 842, 844 (Nev. 1983) (explaining that courts “are obligated to attach substantial weight to [an] agency’s interpretation” of a statute it is charged with administering). The HOA and HOA Trustee’s decision to conduct a counter-textual interpretation of NRS 116.3116(2) to increase their profits does not effect on the validity of Bank of America’s tender.

By tendering the super-priority amount prior to the foreclosure sale, Bank of America preserved the first-priority position of its Deed of Trust, “avert[ing] the loss of its security” according to the Nevada Supreme Court. *See SFR Investments*, 334 P.2d at 414. Since the super-priority portion of the HOA’s lien was extinguished prior to the foreclosure sale, SFR’s interest in the Property, if any, is subordinate to Bank of America’s senior Deed of Trust. Accordingly, this Court should reconsider its Order granting summary judgment in SFR’s favor, and instead grant summary judgment in favor of Bank of America.

**B. SFR is not a bona fide purchaser.**

Bank of America is entitled to summary judgment because SFR is not a bona fide purchaser for value. As SFR correctly set forth in its motion for summary judgment, to qualify as a bona fide purchaser, a party must purchase property “(i) for value, and (ii) without notice of a competing or superior interest in the same property.” SFR’s Mot., at 11 (citing *Berge v. Fredericks*, 95 Nev. 183, 185, 591 P.2d 246, 247 (1979)). SFR cannot satisfy this second element, and thus cannot be a bona fide purchaser, because: (1) its managing member has admitted under oath that SFR knew litigation was necessary to attempt to clear title to properties purchased at HOA foreclosure sales, and (2) Bank of America’s Deed of Trust provided SFR with inquiry notice of Bank of America’s super-priority tender.

1           **1.       SFR’s deposition testimony reveals it is not a bona fide purchaser.**

2           SFR cannot be a bona fide purchaser because its managing member testified under oath that  
3 it knew it would have to litigate against those with competing interests to the properties SFR  
4 purchased at fire-sale prices at HOA foreclosure sales. SFR’s managing member, Christopher  
5 Hardin, as a 30(b)(6) representative in another case, testified that beginning in December 2012—  
6 before SFR purchased the Property—SFR sought to keep its HOA foreclosure auction purchases at  
7 prices “as small as possible because [we] knew [we] needed to expend a bunch of money in  
8 litigation.” **Declaration of Steve Shevorski, Exhibit 1**, at 18:12-21; 20:5-11. In that same  
9 deposition, taken on November 11, 2014, Hardin testified that SFR owned over 600 properties. *Id.*,  
10 at 15:14.

11           Put simply, SFR cannot be a bona fide purchaser when it knew there were competing interests to  
12 the properties it purchased at foreclosure sales, and it knew it would have to litigate against those  
13 holding these competing interests after it purchased a property. Further, having purchased hundreds  
14 of properties at HOA foreclosure sales, SFR was well aware of the risk attendant to purchasing these  
15 properties at deep discounts, like its purchase of the Property in this case. In light of its institutional  
16 knowledge of the HOA foreclosure sale industry, and the particular knowledge that it would have to  
17 litigate against those with competing interests in the properties it purchased, SFR’s argument that it  
18 is a bona fide purchaser is without merit.

19           **2.       Bank of America’s Deed of Trust put SFR on inquiry notice of the super-priority**  
20           **tender.**

21           Even setting aside its institutional knowledge and sworn testimony, SFR still cannot claim to  
22 be a bona fide purchaser because Bank of America’s Deed of Trust put it on inquiry notice of Bank  
23 of America’s super-priority tender. A party cannot qualify as a bona fide purchaser if the party was  
24 under a duty of inquiry prior to purchasing the property at issue. *Berge v. Fredericks*, 95 Nev. 183,  
25 188, 591 P.2d 246, 249 (1979). The *Berge* Court explained that this duty arises:  
26  
27  
28

1 when the circumstances are such that a purchaser is in possession of  
2 facts which would lead a reasonable man in his position to make an  
3 investigation that would advise him of the existence of prior  
4 unrecorded rights. He is said to have constructive notice of their  
5 existence whether he does or does not make the investigation. The  
6 authorities are unanimous in holding **that he has notice of whatever**  
7 **the search would disclose.**

8 *Berge*, 95 Nev. at 189 (emphasis added). The Nevada Supreme Court has clarified that “[a] recital in  
9 an instrument of record charges subsequent purchasers with notice of all material facts which an  
10 inquiry suggested by that recital would have disclosed.” *Allison Steel Mfg. Co. v. Bentonite, Inc.*, 86  
11 Nev. 494, 499, 471 P.2d 666, 669 (1970).

12 Here, the recorded Deed of Trust contained the following provision, which put SFR on  
13 inquiry notice of Bank of America’s super-priority tender:

14 If Borrower does not pay [HOA] dues and assessments when due,  
15 Lender may pay them.

16 Bank’s Mot., **Ex. A**. This provision of the publicly-recorded Deed of Trust put SFR on inquiry  
17 notice that Bank of America could pay off a lien which had priority over the Deed of Trust. Whether  
18 SFR actually knew of Bank of America’s tender is thus irrelevant, as it was under a duty to inquire if  
19 Bank of America had tendered, and it is “charge[d] ... with notice of all material facts which” this  
20 inquiry would have disclosed. *See Allison Steel*, 86 Nev. at 498.

21 Inquiring whether any party had tendered the super-priority amount prior to the sale would  
22 have been far from onerous—SFR could have simply asked the auctioneer at the HOA foreclosure  
23 sale if the super-priority lien had been paid off prior to the foreclosure sale. It could have called the  
24 HOA Trustee prior to the sale and made the same inquiry. The fact that SFR chose to bury its head  
25 in the sand here is irrelevant, however, because it is charged with knowledge of all facts this simple  
26 inquiry would have revealed. For this reason, while SFR may not have had actual knowledge of  
27 Bank of America’s super-priority tender, as this Court found, it did have inquiry notice of Bank of  
28 America’s tender, which is sufficient to defeat its bona fide purchaser claim. *See MSJ Order*, at  
Conclusions of Law ¶ 11(d).

1 SFR cannot qualify as a bona fide purchaser, as it had actual and constructive knowledge of  
2 the senior Deed of Trust, and inquiry notice of Bank of America's tender offer. Because SFR is not  
3 a bona fide purchaser, it is not shielded from the effect of Bank of America's super-priority tender,  
4 which extinguished that portion of the HOA's lien prior to the foreclosure sale. Consequently, to the  
5 extent SFR has any interest in the Property, that interest is subject to Bank of America's Deed of  
6 Trust. Accordingly, this Court should reconsider its Order granting summary judgment in favor of  
7 SFR, and instead grant summary judgment in Bank of America's favor.

8 **C. At minimum, there is an issue of fact for trial regarding the balancing of equities.**

9 Even if this Court disagrees that Bank of America's super-priority tender extinguished the  
10 super-priority lien as a matter of law, this Court should still reconsider its Order granting summary  
11 judgment in favor of SFR, as issues of fact remain regarding equitable balancing. In *Shadow Wood*  
12 *Homeowners Ass'n v. New York Comm. Bancorp*, the Nevada Supreme Court explained that trial  
13 courts must balance the equities between a foreclosure-sale purchaser and a party seeking to set  
14 aside the sale to determine if the sale should be set aside. *Shadow Wood*, 132 Nev. Adv. Op. 5, at  
15 19. To be clear, Bank of America's tender argument does not require the sale to be set aside.  
16 Rather, Bank of America argues that because the super-priority lien was extinguished prior to the  
17 sale, the interest SFR purchased at the sale is encumbered by Bank of America's Deed of Trust.  
18 Under this argument, equitable balancing is unnecessary, because this Court is not asked to  
19 invalidate the sale under its equitable authority.

20 If Bank of America's super-priority tender did not extinguish the super-priority lien prior to  
21 the sale, however, this Court must balance the equities to determine whether the sale should be set  
22 aside. Here, the equities favor setting aside the sale. Bank of America provided a \$74,462.00 loan  
23 to allow the Borrower to purchase a home. Bank's Mot., at **Ex. A**. When the Borrower fell behind  
24 on his HOA dues, Bank of America offered to pay the super-priority amount to the HOA, which  
25 would help alleviate some of the HOA's financial stress arising from homeowners failing to pay  
26 their dues themselves. MSJ Order, at Findings of Fact ¶ 11. The HOA's agent, the HOA Trustee,  
27 wrongfully rejected this super-priority tender, and proceeded to sell the Property for 21.8% of its fair  
28 market value.

1 In contrast, SFR simply purchased the Property at a fire-sale price. Despite its significant  
2 institutional knowledge, it did nothing to determine if the super-priority lien had been satisfied prior  
3 to the sale. This inquiry would have consisted of a simple phone call to the HOA Trustee. The  
4 HOA Trustee's failure to disclose Bank of America's super-priority tender may provide SFR with  
5 claims for monetary damages against the HOA or HOA Trustee if the sale is deemed invalid.  
6 However, SFR's failure to investigate the Property it purchased and the HOA Trustee's failure to  
7 disclose material facts regarding the quality of title it was conveying through the foreclosure sale  
8 should not cause Bank of America to lose its secured interest in the Property. As the Nevada  
9 Supreme Court stated throughout *SFR Investments*, an animating purpose of the super-priority  
10 provision is to encourage lenders to pay off the super-priority lien to provide HOAs with much-  
11 needed delinquent assessments. 334 P.3d at 413 ("As a practical matter, secured lenders will most  
12 likely **pay the [9] months' assessments** demanded by the association **rather than having the**  
13 **association foreclose on the unit.**"). Bank of America did so here. Accordingly, at minimum, this  
14 Court should reconsider its Order granting summary judgment in SFR's favor, and allow this matter  
15 to proceed to trial to resolve the issues of material fact surrounding the balancing of equities between  
16 Bank of America and SFR.

17 ///

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**IV. CONCLUSION**

This Court should reconsider its Order granting summary judgment in favor of SFR, and instead grant summary judgment in favor of Bank of America, as Bank of America’s super-priority tender extinguished the super-priority lien as a matter of law under *Ikon Holdings*. Alternatively, this Court should allow this matter to go to trial, as issues of material fact remain regarding the balancing of equities between Bank of America and SFR.

DATED this 16<sup>th</sup> day of May, 2016.

**AKERMAN LLP**

/s/ Ariel S. Stern, Esq.

ARIEL E. STERN, ESQ.

Nevada Bar No. 8376

STEVE SHEVORSKI, ESQ.

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successor by merger to BAC Home Loans  
Servicing, LP FKA Countrywide Home Loans  
Servicing, LP*



**DECLARATION OF STEVE SHEVORSKI, ESQ.**

1. I make this declaration based on my personal knowledge.

2. I am an associate with Akerman LLP and legal counsel for Bank of America in this action.

3. Attached as **Exhibit 1** to this declaration is a true and correct copy of the transcript of the deposition of Christopher Hardin, the managing member of and 30(b)(6) Witness for SFR Investments Pool 1, LLC in the case styled *SFR Investments Pool 1, LLC v. Bank of America, N.A.*, Case No. A-14-694435-C.

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

DATED this 16<sup>th</sup> day of May, 2016.

/s/ Steve Shevorski, Esq.  
**STEVE SHEVORSKI, ESQ.**

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on this 16<sup>th</sup> day of May, 2016 I caused to be served a true and correct copy of foregoing **BANK OF AMERICA, N.A.’S MOTION FOR RECONSIDERATION**, in the following manner:

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

<b>Alessi &amp; Koenig</b>		
	<b>Contact</b>	<b>Email</b>
	A&K eserve	<a href="mailto:eserve@alessikoenig.com">eserve@alessikoenig.com</a>
<b>Kim Gilbert Ebron</b>		
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	Ladine Oravetz	<a href="mailto:ladineo@aol.com">ladineo@aol.com</a>

For those Parties not registered pursuant to Administrative Order 14-2, service was made in the following manner:

**(UNITED STATES MAIL)** Pursuant to NRCP 5(b), by depositing a copy of the above-referenced document for mailing in the United States Mail, first-class postage prepaid, at Las Vegas, Nevada, to the parties listed below at their last-known mailing addresses, on the date above written.

/s/ *Julia M. Diaz*  
An employee of AKERMAN LLP

DISTRICT COURT  
CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL 1, )  
LLC, a Nevada Limited )  
Liability Company, )  
Plaintiff, )

vs. )

No. A-14-694435-C  
Dept. No. XIV

BANK OF AMERICA, N.A., a )  
national association, )  
successor by merger to )  
BAC HOME LOANS SERVICES, )  
LP FKA COUNTRYWIDE HOME )  
LOANS SERVICES, LP; )  
COREY SCHAEFER, an )  
individual; CHARLA )  
SCHAEFER, an individual; )  
and DOES I through X; )  
and ROE CORPORATIONS I )  
through X, inclusive, )  
Defendants. )



DEPOSITION OF CHRISTOPHER HARDIN  
30(b)(6) SFR Investments

Taken on Tuesday, November 11, 2014  
By a Certified Court Reporter  
At 9:06 a.m.  
At Akerman, LLP  
1160 Town Center Drive, Suite 330  
Las Vegas, Nevada

Reported By: Cindy Huebner, CCR 806

CSR ASSOCIATES OF NEVADA  
LAS VEGAS, NEVADA (702) 382-5015

1 APPEARANCES:

2

For the Plaintiffs:

3

DIANA S. CLINE, ESQ.  
Howard Kim & Associates  
1055 Whitney Ranch Drive  
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Henderson, NV 89014

6

7

For Bank of America and BAC Home Loans:

8

TENESA SCATURRO, ESQ.  
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1160 Town Center Drive  
Suite 330  
Las Vegas, NV 89144

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CSR ASSOCIATES OF NEVADA  
LAS VEGAS, NEVADA (702) 382-5015

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BY MS. SCATURRO	4
BY MS. CLINE	51
BY MS. SCATURRO	53

## INDEX OF EXHIBITS

NO.	DESCRIPTION	PAGE
A.	Notice of Rule 30(b)(6) Deposition of SFR Investments Pool 1, LLC	4
B.	Foreclosure Deed	4
C.	Copy of Cashier's Check	4

## INFORMATION TO BE PROVIDED

None

1 (Court reporter's opening statement was waived.)

2 \* \* \* \* \*

3 (Deposition Exhibits A - C marked.)

4 (Witness sworn.)

5 WHEREUPON:

6 CHRISTOPHER HARDIN

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

9

10 EXAMINATION

11 BY MS. SCATURRO:

12 Q. Could you please state your name for  
13 the record?

14 A. Christopher John Hardin.

15 Q. Can you please spell that?

16 A. C-H-R-I-S-T-O-P-H-E-R, J-O-H-N,  
17 Hardin, H-A-R-D-I-N.

18 Q. Have you ever had your deposition  
19 taken before?

20 A. Yes.

21 Q. About how many times?

22 A. Maybe four.

23 Q. When was the last time?

24 A. Three months ago.

25 Q. Was that here?

1 MS. CLINE: I can't remember if it was  
2 here.

3 THE WITNESS: I think it was at  
4 another property.

5 BY MS. SCATURRO:

6 Q. So it sounds like you probably know  
7 the ground rules as they say.

8 A. Very basically, but remind me.

9 Q. We will go over them so we are on the  
10 same page.

11 We have a court reporter here who is  
12 transcribing everything we are saying so it is  
13 important for you to say yes or no instead of an  
14 uh-huh or uh-uh. It is also important that we  
15 talk only one at a time. She can only get what  
16 each person is saying one at a time.

17 If you have a question or if you don't  
18 understand a question that I ask, let me know  
19 and I will try to clarify the question. If  
20 there is a word that I use that you don't  
21 understand, ask me to define it so we are on the  
22 same page, we are talking about the same thing.

23 If you need a break, let me know. I  
24 will just ask that you answer any pending  
25 question before we take a break. It is not a

1 marathon. Any time you need a break is fine.

2 Are you on any medications that would  
3 impact your ability to testify today?

4 A. No.

5 Q. Have you had any alcohol or other  
6 drugs in the last 24 hours?

7 A. No.

8 Q. Is there any other reason why you  
9 cannot competently testify today?

10 A. No.

11 Q. I have handed you what we are marking  
12 as Exhibit A, which is a notice of deposition of  
13 the Rule 30(b)(6) witness for SFR Investments.

14 Have you seen this notice before?

15 A. Yes.

16 Q. Have you been designated by SFR to  
17 provide testimony concerning the topics listed  
18 in the notice?

19 A. Yes.

20 Q. How did you prepare for today's  
21 deposition?

22 A. By reviewing the records that were  
23 held in the SFR office and reviewing public  
24 records at the Clark County Recorder's Office,  
25 as well as tax records.



1 Q. So you have a file for this property  
2 in your office that you reviewed?

3 A. We do. We provided it to you.

4 Q. Did you speak with anyone about your  
5 case or testimony in preparation for the  
6 deposition other than communications with  
7 counsel? I don't want to know anything that is  
8 privileged.

9 A. Other than counsel, no.

10 Q. How long have you worked for SFR?

11 A. Since October of 2012.

12 Q. And what is your title?

13 A. I am manager.

14 Q. Is that a corporate manager or like an  
15 office manager type designation?

16 A. Both.

17 Q. You referenced SFR's office. Where is  
18 their office located?

19 A. The office is located at 5030 Paradise  
20 Road, Suite B-214, Las Vegas.

21 Q. And how many employees are employed  
22 with SFR?

23 A. Approximately eight.

24 Q. And do those employees work out of  
25 that Paradise Road office?

1 A. Yes.

2 Q. Do you have an in-house legal person?

3 A. No.

4 Q. Who handles SFR's legal matters?

5 A. Howard Kim & Associates.

6 Q. Are they the only counsel that SFR  
7 utilizes?

8 A. We have used in the past an attorney  
9 by the name of David Rosenberg, but minimally.

10 Q. What kind of matters was that, did he  
11 handle for SFR?

12 A. Same type of matters that Howard &  
13 Associates does.

14 Q. About how long ago was that?

15 A. Maybe a little over a year ago  
16 perhaps. I can't remember the exact dates, but  
17 it has been a while.

18 Q. What are your job duties as a manager  
19 of SFR?

20 A. I am the sole manager for the company.  
21 It is a manager managed company per the  
22 Secretary of State. My job is to run all  
23 aspects of the company, including the  
24 researching and buying of properties, the  
25 handling of money, the hiring and firing of

1 employees, any and all aspects of the company.

2 Q. So do you report to anybody?

3 A. No. Under the operating agreement, I  
4 have total authority of the company and so I do  
5 what I -- the company has been very successful  
6 under my leadership so I am left alone to do  
7 what I need to do.

8 Q. So do you own SFR then?

9 A. No. I am a manager. I am an  
10 employee.

11 Q. So who owns SFR?

12 A. The company -- the sole member of the  
13 company is SFR Investments, LLC.

14 Q. And is that a Nevada LLC?

15 A. It is.

16 Q. Who are the members of that LLC?

17 A. I believe it is a company named SFR  
18 Funding, LLC.

19 Q. Is that also a Nevada LLC?

20 A. I believe that is a Delaware LLC.

21 Q. And who are the members of SFR  
22 Funding, LLC?

23 A. I am not sure. It is a Delaware LLC  
24 so I would have to go look at those records.

25 Q. Do you know if it continues on beyond

1 that substructure once we get to the next  
2 Delaware LLC?

3 A. I wouldn't know because I don't know  
4 the next level, I wouldn't know the steps  
5 beyond.

6 Q. So you stated you have sole  
7 responsibility for all of the business functions  
8 of SFR Investments then?

9 A. Right.

10 Q. How is SFR Investments funded?

11 A. When I need money, I ask the attorney  
12 for SFR to deposit money into the SFR account  
13 and he does.

14 Q. Where does that money come from, do  
15 you know?

16 A. I don't know. You would have to ask  
17 him.

18 MS. CLINE: Just for the record, that  
19 wasn't one of the topics listed.

20 MS. SCATURRO: I believe that is part  
21 of the corporate structure.

22 MS. CLINE: I don't know that it is,  
23 but my understanding is that the funding was not  
24 included.

25 THE WITNESS: It is also not relevant.

1 BY MS. SCATURRO:

2 Q. So are you paid a salary for your  
3 responsibilities as manager?

4 A. I pay myself a salary, yes.

5 Q. Are you a manager, officer, or  
6 director of any other entity?

7 A. I am the manager of SFR Investments,  
8 LLC.

9 Q. And what are your responsibilities and  
10 role with that entity?

11 A. The company has no operations so  
12 although I am the manager, it doesn't perform  
13 any business functions. Although I think one  
14 property might be titled in SFR Investments, but  
15 except for one property titled under that LLC,  
16 it has no operations.

17 Q. I just want to talk briefly about your  
18 background. What is your highest level of  
19 education?

20 A. College.

21 Q. Did you graduate?

22 A. Yes.

23 Q. What is your degree?

24 A. Political science.

25 Q. Have you had any legal training?

1 A. No.

2 Q. So getting back to SFR, what exactly  
3 is SFR? I guess when we are talking SFR so we  
4 are on the same page, we are talking SFR  
5 Investments Pool, the Plaintiff in this case.

6 What is SFR's business purpose?

7 A. To build a long-term rental portfolio.

8 Q. And how does it go about building that  
9 rental portfolio?

10 A. To be clear, the long-term rental  
11 portfolio would consist of single family houses,  
12 condos as opposed to other types of rental  
13 property, and so we would go out and look around  
14 the state of Nevada for investment deals, like  
15 many other investors do, nothing new or unusual,  
16 and we buy when we see opportunities.

17 Q. Do you purchase properties outside of  
18 the state of Nevada?

19 A. No.

20 Q. And do you do anything other than  
21 purchase properties and then lease them or rent  
22 them out?

23 A. No.

24 Q. Does it manage the properties?

25 A. We do.

1 Q. So do you have in-house people that  
2 manage it or do you work with a property  
3 manager?

4 A. In-house employees.

5 Q. So it is fair to say that SFR earns  
6 rental income from the properties, right?

7 A. That would be accurate.

8 Q. Does SFR sell any of the properties?

9 A. As a general policy, no. However, we  
10 have in the past either traded some back for  
11 various reasons, but very few.

12 Q. What do you mean trade some back?

13 A. There was an instance involving Wells  
14 Fargo Bank, a property we had bought, we found  
15 out after the sale, we didn't know before the  
16 sale obviously, was occupied by a little old  
17 lady with dementia and she had difficulty  
18 understanding what happened and refused to  
19 cooperate with us. I was left with the decision  
20 whether I wanted to evict a little old lady or  
21 work out a deal to stay in the house. Certainly  
22 it is not SFR's policy to harm people, so I got  
23 a hold of Wells Fargo Bank who would have been  
24 extinguished in that sale and we worked out an  
25 arrangement whereby title would be transferred

1 back to the little old lady and she could stay  
2 there. In a case like that where it is a matter  
3 of doing the right thing morally, we would do  
4 something like that.

5 Q. Did Wells Fargo pay you to convey the  
6 property back?

7 A. Well, I think the terms of the deal  
8 are probably confidential, but let's just say we  
9 agreed on an arrangement where the little old  
10 lady could stay in the house.

11 Q. So when we first started talking, you  
12 said that SFR has been -- I forget your exact  
13 words now -- very successful under your  
14 leadership. Is SFR profitable then?

15 A. I think until the litigation clears  
16 up, I think it would be not appropriate to talk  
17 about profits because the end is not in sight.

18 Q. And by the litigation, what are you  
19 referring to, this particular litigation?

20 A. Yes. As you are aware, there was a  
21 victory by SFR in the Supreme Court. The banks  
22 continue to fight for reasons which are beyond  
23 me, and so until we clear that out, I think  
24 discussing profits are premature.

25 Q. What's your definition of success



1 then?

2 A. I don't think I have one. I think I  
3 will know when I get there.

4 Q. I was just wondering what you meant  
5 when you said they have been successful under  
6 your leadership.

7 A. We have bought a very large number of  
8 homes, we fixed them, we rented them, we had  
9 court victories. It has not been a terrible two  
10 years. Work to be done still, risk ahead of us  
11 still, expense ahead of us still.

12 Q. About how many homes does SFR have in  
13 its portfolio?

14 A. A little over 600.

15 Q. You referenced the recent what you  
16 called court victory. You'll understand if I  
17 don't agree with that; but in any case, we are  
18 talking about the same recent Supreme Court  
19 decision. You were quoted in the Wall Street  
20 Journal stating you expected to make a  
21 significant return. What exactly is your  
22 expectation and what did you mean by significant  
23 return?

24 A. First of all, let's clarify what  
25 appears in the press is not always accurate. I

1 don't think that is quite the phrasing I was  
2 using. I think I was misquoted there.

3 Q. So do you expect to make a significant  
4 return?

5 A. I don't know yet. I know that's what  
6 everyone is out in the marketplace discussing,  
7 but I don't think we could even talk about that  
8 right now.

9 Q. So I want to go back and talk about  
10 SFR's procedures for purchasing properties at  
11 HOA foreclosure sales. In 2013, what was SFR's  
12 procedure for purchasing properties at HOA  
13 foreclosure sales? By procedure, I mean what  
14 did you do to prepare for purchasing a property?

15 A. I would investigate what might be  
16 coming up for sale, say, perhaps in the next  
17 five business days, by going on websites such as  
18 Foreclosure Radar, websites such as Nevada Legal  
19 News, I would call collection companies to see  
20 what they might be bringing to sale, I would --  
21 I think that is most of what I would do. There  
22 are occasions where I would attempt to buy  
23 directly from an investor who purchased a  
24 property, there were occasions where I reached  
25 out to HOA's that I knew had property revert

1 back to them and try to buy directly off of  
2 them. I was using a broad methodology of  
3 finding properties. We didn't buy everything.  
4 Some we buy, some we didn't. It depends on what  
5 I felt like at the time.

6 Q. How did you make that decision about  
7 what you would buy and what you wouldn't buy?

8 A. Just like any real estate investor  
9 would. Is it something that would fit into a  
10 long-term rental portfolio, what are the  
11 expenses involved, what part of town is it in,  
12 does it have a pool, not a pool, what condition  
13 is the property in, what legal risk I think  
14 might be involved with regard to expenses, how  
15 large, how small the house is, is it a condo.  
16 Condos typically have higher HOA fees so that is  
17 a consideration when you go rental properties.  
18 So I would make just a real estate investor  
19 decision on these houses, like investors across  
20 town do every single day.

21 Q. So part of that consideration would  
22 also be, and I think you said as much, what you  
23 could earn from that property, right?

24 A. In terms of rental income.

25 Q. And you mentioned the legal risk.

1 What legal risk were you considering when  
2 determining whether to purchase or not purchase  
3 a property?

4 A. I would say --

5 MS. CLINE: I was just going to ask if  
6 you could specify a time frame.

7 MS. SCATURRO: We were talking about  
8 2013. That is the time of the --

9 MS. CLINE: The foreclosure sale was  
10 in January of 2013?

11 MS. SCATURRO: That's correct.

12 THE WITNESS: As you are aware, in  
13 December of 2012, the Nevada Real Estate  
14 Division came out with an advisory opinion  
15 stating that an HOA foreclosure would extinguish  
16 a bank lien. As you are also aware, the Nevada  
17 Real Estate Division was granted authority by  
18 the Nevada Supreme Court to be the regulator of  
19 real estate law in this state prior to that.  
20 Therefore, when their opinion came out, it was a  
21 very powerful opinion.

22 Unfortunately, some didn't take it  
23 seriously, to their detriment. We were wise to  
24 take it seriously. When that decision came out,  
25 we realized that indeed the bank lien had been

1 extinguished, we were perplexed why nobody else  
2 saw that. It was clear as day to us. Our  
3 mission then going forward was to try to explain  
4 to people how and why it was extinguished; and  
5 so going to these auction on these properties, I  
6 had to take into account how long was it going  
7 to take me to explain to people what risks, what  
8 lawsuits, what expenses, and what if a judge  
9 here or a judge there doesn't quite  
10 understanding what we are trying to explain to  
11 them, what kind of risk does that put us into.

12           It was really an estimation. We knew  
13 we were right. There is no doubt we were right  
14 early on. We knew it. The question was how do  
15 you convince the rest of Nevada we are right,  
16 and it just took time for that to happen and  
17 expense.

18       Q.     So that consideration factored in to  
19 whether you purchase a property or not?

20       A.     Yes, because it takes a large amount  
21 of money. As we are doing the explaining, we  
22 are having to stave off foreclosure attempts by  
23 lenders, and that is very, very expensive, and  
24 so I have to estimate well, gee, if it is going  
25 to take me a year and a half to explain this to

1 the powers that be in Nevada, in the meantime, I  
2 may face 150 bank foreclosures, what is it going  
3 to cost me to stave off these foreclosures while  
4 I do the explaining.

5 Q. Is it fair to say the price you were  
6 willing to pay needed to be as small as possible  
7 because you knew you needed to expend a bunch of  
8 money in litigation?

9 A. Yes. Bear in mind in addition to a  
10 large and uncertain legal expense I was facing,  
11 I have other costs. I had at the time not eight  
12 employees but basically built up to eight  
13 employees, I had to pay for an office, I had to  
14 pay for repairs, I had to pay for leasing  
15 efforts, I had to pay off utility liens, I had  
16 to pay off second, third HOA's which are the  
17 non-foreclosing HOA's, I had to maintain the  
18 properties, put toilets in, air conditioners,  
19 hot water heaters. The expense is tremendous,  
20 so it was a very expensive effort.

21 Q. You knew when you were purchasing, we  
22 can talk specifically about this property, that  
23 you were likely also purchasing a lawsuit at  
24 that point?

25 A. No. Because bear in mind, not all of

1 our properties were in lawsuits. I was  
2 purchasing the possibility of a lawsuit and I  
3 don't know if one would occur or not.

4 Q. So let's talk a little bit about -- I  
5 guess to back up for a second, so the procedure  
6 that you just outlined, has that changed since  
7 2013? Do you have a different procedure that  
8 you follow today?

9 A. No. It is standard real estate  
10 investment underwriting. It has been around for  
11 a hundred years and won't change for another  
12 hundred years. Across the valley, I do the same  
13 thing that everybody else does.

14 Q. When you talk about how you  
15 investigate and review the various attributes of  
16 properties, do you review like, for example,  
17 Zillow when you are researching a property?

18 A. I will look at a number of websites to  
19 try to get a broad view of a property end to  
20 end. Zillow is one of the sites I look at. You  
21 can't trust any one site because it is off the  
22 internet. It is as accurate as the internet is.  
23 I will look at it and see if anything pops out  
24 that might catch my eye.

25 One thing I noticed on Zillow is you

1 will look at a property on Zillow and you will  
2 see a section off to the right side that says  
3 auctions.com, going into lender foreclosure in  
4 two weeks. Well, that is something I have to  
5 take into my underwriting.

6 Q. In that same vein, do you review the  
7 recorded documents before you purchase?

8 A. Yes.

9 Q. So do you review your understanding --  
10 it sounds like, and I am extrapolating from what  
11 you said, so tell me if I am wrong, but you take  
12 into account what the market value of the  
13 property is and I know you are probably going to  
14 say something about the definition of market  
15 value.

16 A. It is real. I am not playing games.  
17 The value of things are tricky, and I think you  
18 know that; but if you are out spending real  
19 money on real assets, you will find that values  
20 could move quite a bit depending on situations.

21 I know people like to go look at  
22 Zillow and say this is what it is worth. It is  
23 not. It is important to understand that Zillow  
24 is something off the internet. It is very  
25 important to understand that retail pricing



1 is -- the highest retail price that people like  
2 to quote is if the property had title insurance,  
3 if the property was able to obtain bank  
4 financing, if the property were purchased by a  
5 mom and pop who went out and got traditional  
6 financing. There are other values.

7           Do you use replacement value -- with  
8 an appraisal, you have MAI appraisal so you have  
9 income approach, you have replacement approach,  
10 you have comp approach. There are also  
11 conditions of these properties. Zillow does not  
12 take into account conditions. Some of these  
13 properties are disastrous. The insides are torn  
14 apart, the pool pumps are gone, the air  
15 conditioners are gone, there are squatters  
16 living in there, there are grow houses in there,  
17 the yards are destroyed, they need all new  
18 irrigation systems, and it's typical -- so a lot  
19 of times you don't know this because you can't  
20 get into these houses and can't get into these  
21 communities so you are taking a tremendous risk  
22 when you buy these houses. If I can't see the  
23 house or the inside of the house, I have no idea  
24 what I am walking into, so I fight that risk as  
25 well.

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1 Q. So do you get appraisals done ever?

2 A. No.

3 Q. But you could though, right?

4 A. No, you couldn't because how is an  
5 appraiser going to get inside the house?

6 Q. Don't they have drive-by appraisals  
7 that you could do?

8 A. What is that worth?

9 Q. I don't know.

10 A. Nothing. It is worthless. What if  
11 the entire kitchen is gone in the house? That  
12 is \$20,000, \$30,000.

13 Q. So at the time that you purchase a  
14 property, you know that regardless of the  
15 definition that we are going to use as far as  
16 market value is concerned, you know that what  
17 you are paying isn't market value, right?

18 A. No. You don't understand what market  
19 value is. Market value is if you put the  
20 property up for sale and told everybody in  
21 Nevada to come bid on it, what would it go for?  
22 That is what a value is, period.

23 Q. Using that definition.

24 A. Using that definition in the case of  
25 this property, NAS told everybody in the state

1 of Nevada, everyone in the world on this day at  
2 this time the property is going to sale,  
3 everyone in the world, all 7 billion people come  
4 bid on this property, what would you bid? I bid  
5 whatever I bid. That is the value. If you  
6 think it is worth more, you should have bid \$1  
7 more.

8 Q. If you listed this property for sale,  
9 and I guess we are getting ahead of ourselves  
10 here, you agree with me you paid \$37,000 for  
11 this particular property, right -- actually,  
12 let's go ahead and look at the foreclosure deed  
13 which is Exhibit B.

14 A. I paid -- well, on behalf of SFR, I  
15 paid \$37,200.

16 Q. If you took this property today and  
17 listed it on the market, would you expect to get  
18 more than \$37,000 for it?

19 A. Since the day of this purchase, a  
20 number of things have occurred which have  
21 changed what the numbers may be. You had the  
22 Nevada Bar Association, what their opinion is in  
23 our favor, you had Clark County come out with  
24 the opinions in our favor, you had the CAI come  
25 out, you had the law commission come out, the

1 Supreme Court decision come out in our favor.

2           If this was purchased today, a number  
3 of significant events occurred which have  
4 reduced the amount of risk involved in holding  
5 these kind of properties. As risk-reducing  
6 prices rise, it is basic finance, so I would  
7 expect that since risk has been compressed  
8 greatly since it was purchased, it would sell  
9 for more than this. It still wouldn't sell the  
10 highest possible retail value because there is  
11 still risk sitting out there, title insurance  
12 not obtainable at this time, although we will  
13 work on that in the future, so it should sell  
14 for more than this.

15       Q.     At the time you purchased this  
16 property, again, we will keep in mind the  
17 parameters you say, you don't know what the  
18 inside of the house looks like so hypothetically  
19 it is destroyed inside, but it still has got  
20 value, right? It is still land, it is still a  
21 structure, if need be for repairs, right?

22       A.     Well, I have had properties where from  
23 the outside looked fine, open the front door,  
24 they are burned out on the inside, plumbing is  
25 gone, wiring is gone, all of the appliances are

1 burned, it is an absolute disaster.

2 Q. Let's assume a situation like that,  
3 you go in and make those repairs?

4 A. I don't make those repairs. It is way  
5 too much money. We are not built for that. We  
6 generally hold them in the portfolio and figure  
7 out what to do with them. I think we traded one  
8 back with the cooperation of the bank and the  
9 bank doesn't want them either. Nobody wants  
10 those properties. We are holding them until we  
11 figure out what to do with them.

12 Q. Let's talk about a situation that is  
13 not so extreme. Let's say it needs some repair  
14 work but it is not a complete dud on the inside,  
15 you fix those up?

16 A. Because --

17 Q. Generally speaking.

18 A. Generally, yes. Unless the repairs  
19 get to the point where I think it is just too  
20 much money to put out right now relative to the  
21 ongoing fight, I still have tremendous expense,  
22 there is still litigation to be had, thanks to  
23 your group, and so I had to plan -- I had to  
24 budget out months in advance how much money I  
25 want to spend on maintenance versus repairs

1 versus running the office, salaries. I have to  
2 pay HOA assessments every month. I have lots  
3 and lots of bills to pay every month so I have  
4 to budget things out. And so as I believe it is  
5 warranted, I may repair some of the lower value  
6 repair jobs. Some of the houses have  
7 significant repairs needed and I will let those  
8 sit for right now until I figure out where the  
9 litigation is going to go on this.

10 Q. In a situation where there is minimal  
11 repairs, let's say you go and make the repairs,  
12 I understand this isn't your business model to  
13 resell the properties, but if you wanted to  
14 resell the property at the time, you know, let's  
15 say within a few months of your purchase at the  
16 foreclosure sale, would you expect to have the  
17 property sell for an increased value than what  
18 you paid for it?

19 MS. CLINE: Objection. Incomplete  
20 hypothetical. Do you want to talk about maybe  
21 this property specifically?

22 MS. SCATURRO: Yeah, we will get  
23 there.

24 THE WITNESS: I will say that I don't  
25 think this has anything to do with the fact that

1 your bank did not handle its responsibilities  
2 prior to the sale. It has zero to do with your  
3 case.

4 As you probably know, prices were  
5 rising and falling with the legal situation. As  
6 judges ruled in favor of our position, prices  
7 might rise a little bit. As a judge might rule  
8 against it, the price might fall down a little  
9 bit. As the Nevada Bar Association and Supreme  
10 Court come out with a decision in our favor,  
11 price went back up. It depends on the legal  
12 setting at the time.

13 So to say the value would be more or  
14 less at any one time, it would depend on what  
15 period of time we are talking about and what the  
16 legal environment was at that moment because  
17 prices have been fluid for two years.

18 BY MS. SCATURRO:

19 Q. Let's go ahead and talk about this  
20 property. How did you learn about this  
21 property? For clarification, the property  
22 address is 1354 Manorwood Street, Las Vegas,  
23 Nevada, 89135, and it is located in the Allerton  
24 Park HOA.

25 A. How did I learn of it?

1 Q. Yes.

2 A. I believe in this case, I would have  
3 utilized perhaps three different sources. I am  
4 going on distant memory. I believe I would have  
5 noticed it was going to sale by using  
6 Foreclosure Radar, I would have noticed it was  
7 going to sale by using Nevada Legal News, and  
8 probably just prior to the sale, I would have  
9 reached out to NAS and asked for the sale list  
10 for that week and they would email it to me just  
11 like they do for any investor, you call right  
12 now and get the list for Friday and it is  
13 available to anybody.

14 Based on those three sources, I zeroed  
15 in on the property. When I went to the auction,  
16 as it turns out, I was lucky enough to get a  
17 bite.

18 Q. We talked about your general  
19 procedures for purchasing properties. What did  
20 you do in this case prior to the sale to  
21 determine that SFR wanted to bid on the  
22 property?

23 A. I reviewed public records, I reviewed  
24 various real estate websites to see if there is  
25 anything interesting about the property I should



1 be aware of. Some of it I don't know what I am  
2 looking for sometimes, just anything that pops  
3 out of interest. I reviewed the SID's and LID's  
4 website for Nevada, amgnv.com. I reviewed the  
5 tax records just to see if there is anything I  
6 need to be aware of or cautious about, as any  
7 investor would.

8 Q. When you were reviewing the Recorder's  
9 website -- I believe you testified you were  
10 reviewing the Recorder's website. I am not sure  
11 if you were that specific.

12 A. Yes, I did.

13 Q. Did you obtain any copies of the  
14 recorded documents or did you just look at the  
15 listing on the website?

16 A. Based on what I saw on the Recorder's  
17 website, there is no need for me to get copies  
18 of the documents. They were fairly obvious what  
19 they were.

20 Q. Did you see any deeds of trust on the  
21 Recorder's website?

22 A. I am sure I did.

23 Q. So at the time you purchased the  
24 property, you were aware of Bank of America's  
25 deed of trust?

1       A.     I was aware it would be extinguished  
2 by the foreclosure sale.

3       Q.     So is that a yes?

4       A.     Yes.

5       Q.     Did you review the CC & R's before the  
6 foreclosure sale?

7       A.     No.

8       Q.     Is that something that you would do as  
9 part of your process generally?

10      A.     No.

11      Q.     Why wouldn't you review the CC & R's?

12      A.     Because they don't have any real  
13 relation to the investment of the property.

14      Q.     So you wouldn't want to know if there  
15 were certain restrictions on a given property  
16 that maybe required some sort of maintenance or  
17 compliance that you, you being SFR, wasn't  
18 willing to incur the expense or have the  
19 obligation to do?

20      A.     For example, what are you referring  
21 to?

22      Q.     For example, if the CC & R's say that  
23 the yard has to have three date palms in it and  
24 you don't know that and let's just say --  
25 because I don't even know. But let's just say

1 date palm trees are a couple thousand dollars  
2 each because they have to be mature ones or  
3 something and this one had the yard totally  
4 gutted out and you needed to incur the expense  
5 of bringing it up to the maintenance set forth  
6 on the CC & R's, isn't that something you would  
7 want to know?

8 A. No. As we discussed, part of my  
9 calculations in looking at how much I am willing  
10 to pay for these properties go back to as we  
11 discussed earlier, the yard may be destroyed,  
12 may not be destroyed, the house may be destroyed  
13 inside or not, so it is a risk I take.

14 Q. Do you view the properties prior to  
15 the auction, you drive by and check them out?

16 A. No. It is very difficult to get into  
17 those communities and certainly into the house.

18 Q. Did you review the County Assessor  
19 website for this property prior to the sale?

20 A. I don't remember.

21 Q. Is that something that you would  
22 typically do?

23 A. Typically. I may not do it every  
24 single time, but it is not unusual for me to do  
25 it.

1 Q. The Assessor's website indicates the  
2 assessed value of the property, right?

3 A. Yes.

4 Q. So you would have an indication of  
5 what at least the taxing authority thinks the  
6 assessed value is prior to the time of the sale,  
7 right?

8 A. Yes. But again, it is meaningless  
9 because the County has no idea what the  
10 condition the property is in or what the status  
11 of the property is, so you can't use assessed  
12 value as having any real worth.

13 Q. I reviewed some testimony that you  
14 previously gave in another lawsuit in a  
15 deposition and it is my understanding that when  
16 you are doing the research for the properties  
17 that you were trying to determine whether you  
18 want to purchase or not, you maintain a  
19 spreadsheet; is that correct?

20 A. Ask the question again.

21 Q. It is my understanding that when you  
22 are researching the property prior to the  
23 foreclosure sale, you put together a spreadsheet  
24 of the property that lists basic information and  
25 kind of ballparks where you want to start the

1 building at that you take with to foreclosure  
2 sales; is that right?

3 A. No. What I do is I will get the  
4 spreadsheet I am given by the foreclosure  
5 company or off of Nevada Legal News and that  
6 will list what is going to sale. I will then  
7 plug in things that I am interested in such as  
8 the date the house is built, how much bedrooms,  
9 what community, how many HOA's are involved,  
10 things that I mentioned about those houses.  
11 That is kind of what I work with. And then when  
12 the auction is over, I just throw it away. I  
13 don't have a need for it. Otherwise, I will  
14 have hundreds of them sitting around for no  
15 reason.

16 Q. So you don't have the one for this  
17 property then?

18 A. No. Just close up my files.

19 Q. So on this particular property, when  
20 did you learn of the opening bid price?

21 A. At the auction.

22 Q. So is it fair to say that the  
23 auctioneer told you what the opening bid price  
24 was?

25 A. Well, me and everyone else who was

1 attending the auction, yes.

2 Q. And do you recall what the opening bid  
3 price was?

4 A. I don't recall from memory, although I  
5 could look on the deed and the paperwork and  
6 surmise what it was.

7 Q. If you could do that, please.

8 A. It may be on the receipt, not the  
9 deed.

10 Q. I probably have that information  
11 somewhere.

12 A. I don't think it matters. It is an  
13 irrelevant piece of information.

14 Q. I believe it was around \$8,900. Does  
15 that sound accurate?

16 A. Yeah, I think it was a few thousand  
17 more, but a little over \$8,900 sounds correct.

18 Q. Do you remember what your opening bid  
19 was?

20 A. No. I don't know when I got into the  
21 bidding. I may have watched it for a bit before  
22 I jumped in. Sometimes I will be the first  
23 bidder and sometimes I will hang back and see  
24 how the energy of the auction is going.

25 Q. In light of that, how do you determine

1 your bid price? I have never been to an  
2 auction.

3 A. I will be very honest with you. A lot  
4 of it is gut instinct. It is a feel. I know a  
5 lot of people think it is a science and you hire  
6 a college kid and you give them a credit line.  
7 Some days, bidders are really aggressive and bid  
8 up high and some days, they are very quiet and  
9 not bidding up high at all and you jump in and  
10 you take a property.

11 It is just the feel of the day, the  
12 energy of the day, who is there, who is not, my  
13 confidence level and how the court procedures  
14 are going, how much risk I am incurring. I will  
15 sometimes not place a bid on a property until  
16 literally halfway into the bidding. I will show  
17 up and not expect to bid on a property and then  
18 I will see bidding surprisingly to be very soft  
19 and I will just jump in and take it and had no  
20 intention of doing that a minute ago.

21 Q. I don't know if on this property you  
22 have a specific recollection, but do you walk  
23 into the auction knowing for this Manorwood  
24 property, I am not willing to go over \$50,000,  
25 let's say?

1       A.     I think every investor goes to every  
2 auction has on their mind what they are willing  
3 to pay, but I also think some investors are more  
4 hard on that line than others on that line.

5               Where bidders are provided a hard  
6 credit limit, they can't go into the credit  
7 limit. I can do what I want. I could bid  
8 anything I want on any property I want. I could  
9 not bid, bid, go to auction, not go to auction,  
10 do whatever I want to do. I go in with some  
11 thoughts that gee, I hope I get it for this kind  
12 of a price, but sometimes I will get it for less  
13 than what I hoped and sometimes I will pay more.

14       Q.     Do you remember how many bidders were  
15 at this foreclosure sale?

16       A.     I don't, no.

17       Q.     Do you think it was -- can you  
18 estimate? Was it like 20?

19       A.     I really don't know. It was enough  
20 that the bidding went from, let's say, \$8,900 to  
21 \$37,200, so it was an active bidding session.

22       Q.     Again, keeping in mind I have never  
23 been to one, how many bidders typically I guess  
24 would show up at an auction?

25       A.     Depends on what auction, and perhaps



1 you should go to some auctions. It might save  
2 you some questions at these depositions.

3           It depends on which auction you go to.  
4 There is auctions -- there is several auctions  
5 that occur in town. There is one at 4th Street,  
6 there is one at NAS. Anywhere from I have seen  
7 as high as -- well, the day after the decision  
8 came out, NAS was -- probably sixty bidders  
9 showed up and so it was a full house. Other  
10 days, it might be eight or nine.

11       Q.     Are there people that you know at  
12 these auctions or is there sort of like oh, I  
13 see you at auctions all the time?

14       A.     Admittedly, I do see some of the same  
15 people every single day. We are competitors.  
16 We are not mean to each other, but it is  
17 business and it is money and we compete against  
18 each other.

19       Q.     Turning back to the foreclosure deed,  
20 about the fourth line from the bottom, the  
21 foreclosure deed states it is without warranty  
22 expressed or implied, right?

23       A.     Go to the sentence you are looking  
24 for.

25       Q.     The first paragraph, four lines up

1 from the bottom.

2 A. I am looking for the word warranty.

3 Q. First paragraph.

4 A. Thank you. I was in the wrong  
5 paragraph. Okay, yes, I found it.

6 Q. So that would be the foreclosure deed  
7 lists without warranty expressed or implied,  
8 right?

9 MS. CLINE: Objection. He is not an  
10 attorney.

11 THE WITNESS: Yes, the words are  
12 there.

13 BY MS. SCATURRO:

14 Q. Do you know what that means as a real  
15 estate person and layperson, do you know what  
16 that means?

17 A. Well, I would rather not get into  
18 trying to define what legal things mean.

19 Q. I am just asking what it means to you.

20 A. As far as I am concerned, what this  
21 deed in general means is I am taking this free  
22 of anything that occurred prior to the sale so I  
23 walk away -- what happens to the monies, what  
24 happens to the parties before the sale, it is  
25 none of my business and I take the property as

1 is.

2 Q. What do you mean by "as is"?

3 A. Possibly missing a kitchen, possibly  
4 having no yard, possibly having utility liens  
5 against it.

6 Q. Turning to the third page of this  
7 packet, this Declaration of Value form, who  
8 completes the Declaration of Value?

9 A. In this case, NAS.

10 Q. Did they consult with you at all to  
11 complete this?

12 A. No.

13 Q. Do you know why they indicated the  
14 value of the property at \$37,200?

15 A. No.

16 Q. But that is what SFR pays taxes on,  
17 right, that value?

18 A. Yes, uh-huh.

19 MS. CLINE: The transfer tax, right?

20 THE WITNESS: Yes, transfer tax.

21 BY MS. SCATURRO:

22 Q. And then turning to what was marked as  
23 Exhibit C, have you seen this before?

24 A. Yes.

25 Q. What is it?

1       A.     This is the cashier's check that was  
2 used to pay for the purchase of the subject  
3 property.

4       Q.     Is that your signature on the  
5 cashier's check?

6       A.     No. A bank would do that. It is a  
7 bank officer.

8       Q.     And it indicates that you paid  
9 \$37,200, right?

10      A.     Correct.

11      Q.     Did you attempt to obtain title  
12 insurance on the date of the foreclosure sale on  
13 this property?

14      A.     No.

15      Q.     Why not?

16      A.     Because we were trying to build a  
17 long-term rental portfolio.

18      Q.     Help me out there because I don't do  
19 your business.

20      A.     If I have no reason to sell, why go  
21 through the effort to try to find title  
22 insurance?

23      Q.     So if that's the case, then why would  
24 you need to sue the lender for quiet title?

25      A.     Because you are attempting to

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LAS VEGAS, NEVADA (702) 382-5015

1 foreclose against the property.

2 Q. So your lawsuit has nothing to do with  
3 title insurance then?

4 A. No.

5 Q. Have you ever spoken with anyone about  
6 obtaining title insurance for the properties in  
7 SFR's portfolio?

8 A. Are we talking about this property or  
9 just generally?

10 Q. We could start generally and then go  
11 specific.

12 A. We have in one instance been awarded  
13 default judgment and for that property, we went  
14 out, obtained title insurance as an experiment.  
15 We have never done it before. We wanted to see  
16 how does this work just to see if it could be  
17 done, and we successfully completed the entire  
18 transaction.

19 Q. What do you mean by -- I guess what  
20 were you trying to see? What were you  
21 experimenting?

22 A. Exploring the market. We are always  
23 looking for new and different ways of doing  
24 things and so we wanted to see what these houses  
25 would actually sell for, could you obtain title

1 insurance. It is part of being a professional,  
2 part of knowing what the marketplace is or is  
3 not.

4 Q. Do you know what you sold the property  
5 for?

6 A. Not offhand, no.

7 Q. Do you know the address of that  
8 property?

9 A. Not offhand.

10 Q. What title company did you use, if you  
11 remember?

12 A. I think Nevada Title. I don't  
13 remember anymore.

14 Q. I think you may have said but just so  
15 we covered the base, you did not attempt to  
16 obtain title insurance on this property?

17 A. No.

18 Q. On this particular property, what did  
19 you do with the property after the foreclosure  
20 sale?

21 A. I don't remember exact. We have a lot  
22 properties so I don't have them all in my head  
23 memorized, but I would imagine that we would  
24 have repaired any issues that may have been  
25 wrong with the property. It could be something

1 minor just to trimming a bush, putting in an air  
2 conditioner, and make sure they are rented.

3 Q. So that information wasn't contained  
4 in the files that you reviewed in preparation  
5 for the deposition?

6 A. If it was, you would know the answer.

7 Q. Well, we did request quite a bit of  
8 information that wasn't provided.

9 A. I gave you everything I had.

10 Q. So you don't have any records of  
11 repairs that you may have done on the property?

12 A. Sure. It is in the expense report I  
13 gave you.

14 Q. We didn't receive an expense report.

15 MS. CLINE: That was -- there was no  
16 unjust enrichment claim so there is no reason  
17 for us to provide that information, so that is  
18 why we objected to the expenses of the property.

19 MS. SCATURRO: I don't think it was a  
20 relevance objection. I think it was a  
21 confidentiality objection.

22 MS. CLINE: It is not relevant and it  
23 is confidential.

24 THE WITNESS: If I trim a bush, why do  
25 you care?

1 MS. CLINE: If you want to ask him a  
2 specific question on that, on the  
3 interrogatories or something like that.

4 MS. SCATURRO: He just testified that  
5 there was no information so I think that is what  
6 his testimony was.

7 THE WITNESS: It really doesn't  
8 matter.

9 BY MS. SCATURRO:

10 Q. Did you rent the property?

11 A. Yes.

12 Q. Who did you rent the property to?

13 A. I would need to look at a copy of the  
14 lease agreement. I don't know that person's  
15 name is really relevant.

16 Q. How much did you rent the property  
17 for?

18 A. I don't remember. I don't remember.

19 Q. Is it currently rented?

20 A. It is.

21 Q. Is it the same tenant that resided  
22 there since you purchased it at the foreclosure  
23 sale?

24 A. I don't know that we had more than one  
25 tenant on that property or not.



1 MS. CLINE: These questions are not  
2 listed as topics.

3 MS. SCATURRO: The disposition of the  
4 property is.

5 MS. CLINE: Is that what that means?  
6 I thought that that meant if it was sold or  
7 something like that.

8 MS. SCATURRO: That is what we meant.

9 MS. CLINE: Disposing of the property.

10 BY MS. SCATURRO:

11 Q. Do you plan to sell this property?

12 A. No.

13 Q. Are you current on the HOA  
14 assessments?

15 A. I believe we are, yes. I checked my  
16 accountants.

17 Q. In preparing for this deposition, I  
18 will let you know that I reviewed the Recorder's  
19 website and there is a lien by Summerlin HOA for  
20 the assessments.

21 A. We paid that. We had to get it  
22 released. It is old. You notice there has been  
23 no action since then.

24 Q. You previously testified that you, you  
25 being SFR, had approximately 600 properties in

1 your portfolio. Can you give me a breakdown  
2 about how many of those were purchased through  
3 NAS?

4 A. Oh, I would have no idea. I would  
5 have to go back and research all that.

6 Q. You can't ballpark an estimate?

7 A. And be proven incorrect would be  
8 worthless. I don't know. Again, I don't know  
9 that that really matters.

10 Q. Have you ever purchased any properties  
11 from NAS that were properties that were awarded  
12 to the HOA?

13 A. No.

14 Q. Do you know anyone who was employed or  
15 who is employed at Thoroughbred Management?

16 A. No.

17 Q. Or was during at the time of the  
18 foreclosure sale in late 2012, early 2013?

19 A. No.

20 Q. What's your relationship with NAS?

21 A. A bidder only. Well, now, we have  
22 properties. In the case where the  
23 non-foreclosing HOA has yet to be paid, we have  
24 to now deal with NAS and on rare occasion to  
25 settle out what the non-foreclosing HOA wants as

1 payment. We did that occasion. So we are a  
2 bidder and sometimes we deal with them as a  
3 homeowner catching up on assessments that we  
4 assumed.

5 Q. Do you have any agreements contractual  
6 or -- I'm sorry, written or oral with NAS?

7 A. No.

8 Q. Do you receive any payments from NAS  
9 for purchasing properties at their foreclosure  
10 sale?

11 A. No, with one minor exception. If I  
12 overpay, they will give me a refund check for  
13 the difference; but other than that, no. By the  
14 way, the reason I would overpay -- in this case,  
15 I went to the bank and got the exact amount, but  
16 sometimes I will show up with chunks of \$20,000  
17 checks. Unless I bid \$50,000 on a property, I  
18 would give them three times \$20,000, give them  
19 \$60,000 and they would mail me a check back for  
20 \$10,000. That would be the rare occasion they  
21 would give me money, but it is our own money  
22 back to us.

23 MS. SCATURRO: Let's take a quick  
24 break. I think I am pretty much done, but I  
25 just want to review my notes.

1 MS. CLINE: Okay.

2 (Recessed from 10:00 a.m. to 10:05  
3 a.m.)

4 BY MS. SCATURRO:

5 Q. Have you ever communicated with the  
6 homeowners, the former homeowners, Corey  
7 Schaefer and Charla Schaefer?

8 A. I don't remember ever doing that, no.

9 Q. Do you know -- not seeking  
10 attorney/client information, but do you know  
11 whether your attorney ever had communication  
12 with Corey and Charla Schaefer?

13 A. I don't know.

14 MS. CLINE: Can you define  
15 communication? Are we talking about actually  
16 physically speaking to them or sending a letter  
17 or filing a lawsuit and serving?

18 MS. SCATURRO: Sorry.

19 BY MS. SCATURRO:

20 Q. Not filing a lawsuit, but a letter,  
21 phone call with them or anyone on their behalf,  
22 if you know.

23 A. I don't know.

24 Q. Are you aware that the Schaefers used  
25 SFR?

1 A. Actually, not offhand I am not, no.  
2 We have a lot going on in the company and I  
3 don't follow every single detail.

4 Q. So then I guess it is fair to say you  
5 don't know whether you settled that case?

6 A. I don't know. I could look in the  
7 records, but I don't know.

8 MS. SCATURRO: That is all I have.  
9

10 EXAMINATION

11 BY MS. CLINE:

12 Q. Just following up on the question  
13 about communicating with the former homeowners,  
14 do you regularly after you purchase properties  
15 at a sale send letters to the former home?

16 A. Yes.

17 Q. Would you have done so in this case?

18 A. Yes.

19 Q. What were those letters about?

20 A. They are title change of ownership  
21 letter and we ask that the former homeowner  
22 contact us to work out their status of the  
23 property, are they going to continue to stay  
24 there and rent or work out to move out of the  
25 property.

1 Q. Other than that letter, you don't  
2 recall ever sending another letter or talking on  
3 the phone with any of the former homeowners for  
4 this property?

5 A. Correct.

6 Q. You testified earlier that you don't  
7 work with a property manager. Is that the case  
8 for all of the properties that SFR owns?

9 A. No. When I answered that question, I  
10 forgot that we do have some properties in  
11 northern Nevada, the Reno area, and we can't  
12 manage those out of our local office so I retain  
13 the property manager for those northern Nevada  
14 properties.

15 Q. You also testified earlier that you  
16 don't drive by the properties before you  
17 purchase them at sale. Do you ever drive by  
18 properties before auctions?

19 A. In thinking back, I have done so much  
20 of this in the past two years, there may have  
21 been a rare instance where it might have been a  
22 very large house and I just wanted to see what  
23 condition it was in before I buy it, but I don't  
24 think I have ever actually bought one of those I  
25 have driven by because it did come sale. I am

1 talking about extremely large houses where you  
2 are taking on a huge amount of financial risk.

3 MS. CLINE: That is all I have.

4

5 EXAMINATION

6 BY MS. SCATURRO:

7 Q. Did you ever receive a response to the  
8 letter that you sent to the former homeowners?

9 A. I don't remember.

10 Q. What is the name of your northern  
11 Nevada property manager?

12 A. His name is Dave Haskins.

13 Q. Is he part of the company or is it an  
14 individual person?

15 A. He operates by a company called Gunn  
16 Investment Services.

17 Q. G-U-N?

18 A. G-U-N-N, and he operates solely as a  
19 property manager up there, nothing more.

20 MS. SCATURRO: Okay. Thank you.

21 MS. CLINE: E-trans.

22 (Proceedings concluded at  
23 10:10 a.m.)

24

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CERTIFICATE  
OF  
CERTIFIED COURT REPORTER

\* \* \* \* \*

7 I, the undersigned Certified Court  
8 Reporter in and for the State of Nevada, do  
9 hereby certify:

10 That the foregoing proceedings were taken  
11 before me at the time and place therein set  
12 forth, at which time the witness was put under  
13 oath by me; that the testimony of the witness  
14 and all objections made at the time of the  
15 proceedings were recorded stenographically by me  
16 and were thereafter transcribed under my  
17 direction; that the foregoing is a true record  
18 of the testimony and of all objections made at  
19 the time of the proceedings.

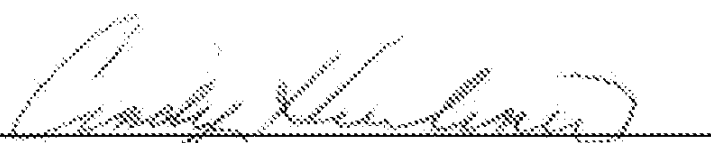
20 There being no request by the deponent or  
21 party to read and sign the deposition  
22 transcript, under Rule 30(e), signature is  
23 deemed waived. The original transcript will be  
24 forwarded Darren Brenner, Esq.

25 I further certify that I am a disinterested  
person and am in no way interested in the  
outcome of said action or connected with or  
related to any of the parties in said action or  
to their respective counsel.

The dismantling, unsealing or unbinding of  
the original transcript will render the  
reporter's certificate null and void.

In witness whereof, I have subscribed my  
name on this date, November 17, 2014.

21  
22  
23  
24  
25

  
Cindy Huebner  
CCR No. 806

CSR ASSOCIATES OF NEVADA  
LAS VEGAS, NEVADA (702) 382-5015





AKERMAN LLP  
1160 TOWN CENTER DRIVE, SUITE 330  
LAS VEGAS, NEVADA 89144  
TEL.: (702) 634-5000 - FAX: (702) 380-8572

**DISC**  
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Email: tenesa.scaturro@akerman.com

*Attorneys for Defendant Bank of America, N.A.*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

SFR INVESTMENTS POOL 1, LLC, a Nevada  
Limited Liability Company,

Plaintiff,

v.

BANK OF AMERICA, N.A., a national  
association, successor by merger to BAC HOME  
LOANS SERVICING, LP FKA  
COUNTRYWIDE HOME LOANS  
SERVICING, LP; COREY SCHAEFER, an  
individual; CHARLA SCHAEFER, an  
individual; and DOES I through X; and ROE  
CORPORATIONS I through X, inclusive,

Defendants.

Case No.: A-14-694435-C  
Dept.: XIV

**NOTICE OF RULE 30(B)(6)  
DEPOSITION OF SFR INVESTMENTS  
POOL 1, LLC**

Def. EXHIBIT <u>A</u>
WITNESS <u>Hoodin</u> <u>SFR</u>
DATE: <u>11/11/14</u>
CINDY HUESNER, CCR

PLEASE TAKE NOTICE that defendants Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP (BANA) will take the deposition of the Rule 30(b)(6) witness for SFR Investments Pool 1, LLC, upon oral examination at the offices of Akerman LLP, 1160 Town Center Drive, Suite 330, Las Vegas, Nevada 89144, on **November 3, 2014**, commencing at **9:00 AM** and continuing thereafter until completed.

Pursuant to Nevada Rule of Civil Procedure 30(b)(6), SFR Investments is required to designate one or more officers, directors, managing agents or other consenting persons most

1 knowledgeable to testify on its behalf with respect to the topics set forth in **EXHIBIT A**, attached  
2 hereto.

3 The deposition will be taken before a notary public or other person duly authorized by law to  
4 administer oaths, and will be conducted pursuant to the provisions of the Nevada Rules of Civil  
5 Procedure for the purpose of discovery, use as evidence at any trial or hearing, and any other  
6 purposes allowed by law. The deposition will be recorded stenographically, and may also be  
7 recorded by sound-and-visual videography. You are invited to attend and cross-examine.

8 DATED October 20, 2014.

9 AKERMAN LLP

10 

11 DARREN T. BRENNER, ESQ.

12 Nevada Bar No. 8386

13 TENESA SCATURRO, ESQ.

14 Nevada Bar No. 12488

15 1160 Town Center Drive, Suite 330

16 Las Vegas, Nevada 89144

17 *Attorneys for Defendant Bank of America, N.A.*

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1160 TOWN CENTER  
LAS VEGAS, NV 89144  
TEL: (702) 634-5000 - FAX: (702) 380-8572

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EXHIBIT A  
TO RULE 30(B)(6) NOTICE OF DEPOSITION FOR SFR INVESTMENTS POOL 1, LLC  
("SFR Investments")

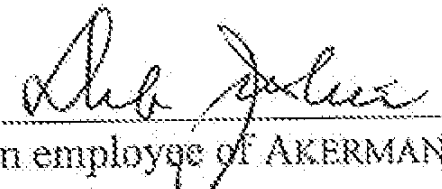
TOPICS

1. How SFR Investments obtained its interest in the property that is the subject of this lawsuit;
2. The foreclosure proceedings on or around January 24, 2013, as referenced by the foreclosure deed recorded against the property as instrument no. 201301240001308;
3. Your relationship, if any, with Nevada Association Services and/or any of its principals, including, without limitation:
  - a. Any contractual agreements, written or otherwise;
  - b. Identification of any payments you made to Nevada Association Services other than amounts tendered at a foreclosure sale (i.e., any payments for services Nevada Association Services rendered to you, any payments for identifying properties that were to be sold at an HOA foreclosure sale, any kickbacks, etc.
  - c. Any communications you had with Nevada Association Services related to the property that is the subject of this lawsuit.
4. Your knowledge of Bank of America, N.A.'s interest, or any other entity's interest, in the property that is the subject of this lawsuit.
5. The disposition of the property that is the subject of this lawsuit.
6. The corporate structure of SFR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 20, 2014 and pursuant to NRCP 5(b), I served and deposited for mailing in the U.S. Mail a true and correct copy of the foregoing **NOTICE OF RULE 30(B)(6) DEPOSITION OF SFR INVESTMENTS POOL 1, LLC**, postage prepaid and addressed to:

Howard C. Kim, Esq.  
Jacqueline Gilbert, Esq.  
1055 Whitney Ranch Drive, Suite 110  
Henderson, Nevada 89014  
*Attorneys for Plaintiff*

  
An employee of AKERMAN LLP

AKERMAN LLP

1160 TOWN CENTER  
LAS VEGAS, NEVADA 89144  
TEL: (702) 534-5000 - FAX: (702) 380-8572



Please mail tax statement and  
when recorded mail to:  
SFR Investments Pool I, LLC  
5030 Paradise Rd B-314  
Las Vegas, NV 89119

Inst #: 201301240001308  
Fees: \$18.00 N/C Fee: \$0.00  
RPTT: \$191.25 Ex: #  
01/24/2013 08:18:18 AM  
Receipt #: 1470480  
Requester:  
NORTH AMERICAN TITLE COMPAN  
Recorded By: RNS Pgs: 3  
DEBBIE CONWAY  
CLARK COUNTY RECORDER

**FORECLOSURE DEED**

APN # 164-02-112-148  
North American Title #10589

NAS # N35108

The undersigned declares:

Nevada Association Services, Inc., herein called agent (for the The Allerton Park Homeowner's Association), was the duly appointed agent under that certain Notice of Delinquent Assessment Lien, recorded August 25, 2008 as instrument number 0001964 Book 20080825, in Clark County. The previous owner as reflected on said lien is Cory Schaefer, Charis Schaefer, Nevada Association Services, Inc. as agent for The Allerton Park Homeowner's Association does hereby grant and convey, but without warranty expressed or implied to: SFR Investments Pool I, LLC (herein called grantee), pursuant to NRS 116.31162, 116.31163 and 116.31164, all its right, title and interest in and to that certain property legally described as: Summerlin Village 19-Phase 3, Plat Book 117, Page 26, Lot 148 Clark County

**AGENT STATES THAT:**

This conveyance is made pursuant to the powers conferred upon agent by Nevada Revised Statutes, the The Allerton Park Homeowner's Association governing documents (CC&R's) and that certain Notice of Delinquent Assessment Lien, described herein. Default occurred as set forth in a Notice of Default and Election to Sell, recorded on 11/5/2008 as instrument # 0002842 Book 20081105 which was recorded in the office of the recorder of said county. Nevada Association Services, Inc. has complied with all requirements of law including, but not limited to, the elapsing of 90 days, mailing of copies of Notice of Delinquent Assessment and Notice of Default and the posting and publication of the Notice of Sale. Said property was sold by said agent, on behalf of The Allerton Park Homeowner's Association at public auction on 1/18/2013, at the place indicated on the Notice of Sale. Grantee being the highest bidder at such sale, became the purchaser of said property and paid therefore to said agent the amount bid \$37,200.00 in lawful money of the United States, or by satisfaction, pro tanto, of the obligations then secured by the Delinquent Assessment Lien.

Dated: January 18, 2013

Misty Blanchard  
By Misty Blanchard, Agent for Association and Employee of Nevada Association Services

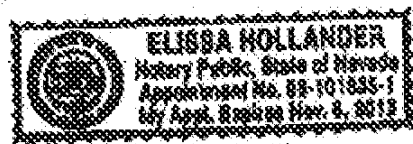
Deft EXHIBIT <u>B</u>
WITNESS <u>Hardin</u> <u>SEE</u>
DATE: <u>1/11/14</u>
CINDY HUEBNER, CCR

BANA000048

STATE OF NEVADA )  
COUNTY OF CLARK )

On January 18, 2013, before me, Elissa Hollander, personally appeared Misty Blanchard personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged that he/she executed the same in his/her authorized capacity, and that by signing his/her signature on the instrument, the person, or the entity upon behalf of which the person acted, executed the instrument.  
WITNESS my hand and seal.

(Seal)



(Signature)

*Elissa Hollander*

BA04000049



STATE OF NEVADA  
DECLARATION OF VALUE

1. Assessor Parcel Number(s)

a. 164-02-112-148

b. \_\_\_\_\_

c. \_\_\_\_\_

d. \_\_\_\_\_

2. Type of Property:

- |  |   |
|--|---|
| a. <input type="checkbox"/> Vacant Land  | b. <input checked="" type="checkbox"/> Single Fam. Res. |
| c. <input type="checkbox"/> Condo/Twnhse | d. <input type="checkbox"/> 2-4 Plex                    |
| e. <input type="checkbox"/> Apt. Bldg    | f. <input type="checkbox"/> Comm/Bldg                   |
| g. <input type="checkbox"/> Agricultural | h. <input type="checkbox"/> Mobile Home                 |
| i. <input type="checkbox"/> Other        |   |

FOR RECORDERS OPTIONAL USE ONLY

Book \_\_\_\_\_ Page: \_\_\_\_\_

Date of Recording: \_\_\_\_\_

Notes: \_\_\_\_\_

3.a. Total Value/Sales Price of Property

\$ 37,200.00

b. Deed in Lieu of Foreclosure Only (value of property) \_\_\_\_\_

c. Transfer Tax Value:

\$ 37,200.00

d. Real Property Transfer Tax Due

\$ 191.25

4. If Exemption Claimed:

a. Transfer Tax Exemption per NRS 375.090, Section \_\_\_\_\_

b. Explain Reason for Exemption: \_\_\_\_\_

5. Partial Interest: Percentage being transferred: 100 %

The undersigned declares and acknowledges, under penalty of perjury, pursuant to NRS 375.060 and NRS 375.110, that the information provided is correct to the best of their information and belief, and can be supported by documentation if called upon to substantiate the information provided herein. Furthermore, the parties agree that disallowance of any claimed exemption, or other determination of additional tax due, may result in a penalty of 10% of the tax due plus interest at 1% per month. Pursuant to NRS 375.030, the Buyer and Seller shall be jointly and severally liable for any additional amount owed.

Signature

Misty Blanchard

Capacity: Agent

Signature \_\_\_\_\_

Capacity: \_\_\_\_\_

SELLER (GRANTOR) INFORMATION  
(REQUIRED)

Print Name: Nevada Association Services

Address: 6224 W. Desert Inn Road

City: Las Vegas

State: Nevada

Zip: 89148

BUYER (GRANTEE) INFORMATION  
(REQUIRED)

Print Name: SFR Investments Pool 1, LLC

Address: 5030 Paradise Rd. B-214

City: Las Vegas

State: Nevada

Zip: 89119

COMPANY/PERSON REQUESTING RECORDING (Required if not seller or buyer)

North American Title Company

8485 W. Sunset Road, Suite 111

Las Vegas, Nevada 89113

Escrow #

10589 / N35108

State: \_\_\_\_\_

Zip: \_\_\_\_\_

AS A PUBLIC RECORD THIS FORM MAY BE RECORDED/MICROFILMED



usbank

CASHIER'S CHECK

No. 7107504154

N 36108

PAY

THIRTY SEVEN THOUSAND TWO HUNDRED DOLLARS AND 00 CENTS

DATE: JANUARY 18, 2013

TO THE  
ORDER OF: NAS

\$ 37,200.00

PURPOSE/REMITTER: SPR INVESTMENTS POOL 1, LLC

Location: 7107 RAINBOW & SAHARA

U.S. Bank National Association  
Minneapolis, MN 55402

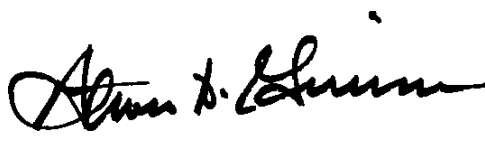


*[Signature]*  
AUTHORIZED SIGNATURE

⑈ 7107504154 ⑈ ⑆092900383⑆ 150080235313 ⑈

Deft	EXHIBIT	C
WITNESS	Hardin	SFE
DATE:	11/11/14	
CINDY HUEBNER, OCR		

NAS000264

  
CLERK OF THE COURT

**NOA**  
ARIEL E. STERN, ESQ.  
Nevada Bar No. 8376  
THERA A. COOPER, ESQ.  
Nevada Bar No. 13468  
AKERMAN LLP  
1160 Town Center Drive, Suite 330  
Las Vegas, NV 89144  
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Facsimile: (702) 380-8572  
Email: ariel.stern@akerman.com  
Email: thera.cooper@akerman.com

*Attorneys for Defendant Bank of America, N.A., as successor by merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP*

**EIGHTH JUDICIAL DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

ALESSI & KOENIG, LLC,  
  
Plaintiff,  
  
v.

Case No.: A-13-684501-C  
Dept.: XXI

**BANK OF AMERICA, N.A.’S NOTICE OF APPEAL**

BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP, unknown entity, DOES INDIVIDUALS 1-X, inclusive, and ROE CORPORATIONS XI-XXX, inclusive,  
  
Defendants.

BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP, a National Association,  
  
Cross-Claimant,  
  
v.  
  
ARMANDO A. CARIAS, an individual, DOES INDIVIDUALS 1 through 10, inclusive, and ROE BUSINESS ENTITIES 1 through 10, inclusive,  
  
Cross-Defendants.

BANK OF AMERICA, N.A., SUCCESSOR BY  
MERGER TO BAC HOME LOANS  
SERVICING, LP FKA COUNTRYWIDE  
HOME LOANS SERVICING, LP, a National  
Association,

Cross-Claimant,

v.

SFR INVESTMENTS POOL 1, LLC, a domestic  
Limited Liability Company, SUTTER CREEK  
HOMEOWNERS' ASSOCIATION, an unknown  
entity, and DOES 1 through 10 and ROE  
BUSINESS ENTITIES 1 through 10,

Cross-Defendants.

Notice is hereby given that Bank of America, N.A. appeals to the Supreme Court of Nevada  
from this Court's order of April 18, 2016, for which a notice of entry of order was entered April 27,  
2016, granting final judgment in favor of Cross-Defendant SFR Investments Pool 1, LLC and all  
interlocutory orders incorporated therein.

DATE: May 24, 2016.

AKERMAN LLP

/s/ Thera Cooper

ARIEL E. STERN, ESQ.

Nevada Bar No. 8376

THERA A. COOPER, ESQ.

Nevada Bar No. 13468

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*Attorneys for Bank of America, N.A. as  
successor by merger to BAC Home Loans  
Servicing, LP FKA Countrywide Home Loans  
Servicing, LP*

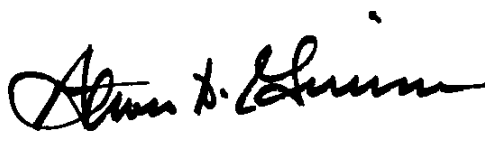
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on this 24th day of May, 2016, and pursuant to NRCP 5, I caused to be served a true and correct copy of the foregoing, **BANK OF AMERICA, N.A.’S NOTICE OF APPEAL**, 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.

<b>Alessi &amp; Koenig</b>		
	<b>Contact</b>	<b>Email</b>
	A&K eserve	<a href="mailto:eserve@alessikoenig.com">eserve@alessikoenig.com</a>
<b>Kim Gilbert Ebron</b>		
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	Diana Cline Ebron	<a href="mailto:diana@kgelegal.com">diana@kgelegal.com</a>
	E-Service for Kim Gilbert Ebron	<a href="mailto:eservice@hkimlaw.com">eservice@hkimlaw.com</a>
	Sarah Felts	<a href="mailto:sarah@kgelegal.com">sarah@kgelegal.com</a>
	Tomas Valerio	<a href="mailto:staff@kgelegal.com">staff@kgelegal.com</a>
<b>Law Office of Ladine Oravetz</b>		
	<b>Contact</b>	<b>Email</b>
	Ladine Oravetz	<a href="mailto:ladineo@aol.com">ladineo@aol.com</a>

/s/ Michael Hannon\_\_\_\_\_  
An employee of AKERMAN LLP

  
CLERK OF THE COURT

CAS  
ARIEL E. STERN, ESQ.  
Nevada Bar No. 8376  
THERA A. COOPER ESQ.  
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*Attorneys for Defendant Bank of America, N.A., as successor by merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP*

**EIGHTH JUDICIAL DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

ALESSI & KOENIG, LLC,  
  
Plaintiff,  
  
v.

Case No.: A-13-684501-C  
Dept.: XXI

**BANK OF AMERICA, N.A.'S CASE  
APPEAL STATEMENT**

BANK OF AMERICA, N.A., SUCCESSOR BY  
MERGER TO BAC HOME LOANS  
SERVICING, LP FKA COUNTRYWIDE  
HOME LOANS SERVICING, LP, unknown  
entity, DOES INDIVIDUALS 1-X, inclusive, and  
ROE CORPORATIONS XI-XXX, inclusive,  
  
Defendants.

BANK OF AMERICA, N.A., SUCCESSOR BY  
MERGER TO BAC HOME LOANS  
SERVICING, LP FKA COUNTRYWIDE  
HOME LOANS SERVICING, LP, a National  
Association,  
  
Cross-Claimant,  
  
v.  
  
ARMANDO A. CARIAS, an individual, DOES  
INDIVIDUALS 1 through 10, inclusive, and  
ROE BUSINESS ENTITIES 1 through 10,  
inclusive,  
  
Cross-Defendants.

1 BANK OF AMERICA, N.A., SUCCESSOR BY  
2 MERGER TO BAC HOME LOANS  
3 SERVICING, LP FKA COUNTRYWIDE  
4 HOME LOANS SERVICING, LP, a National  
5 Association,

6 Cross-Claimant,

7 v.

8 SFR INVESTMENTS POOL 1, LLC, a domestic  
9 Limited Liability Company, SUTTER CREEK  
10 HOMEOWNERS' ASSOCIATION, an unknown  
11 entity, and DOES 1 through 10 and ROE  
12 BUSINESS ENTITIES 1 through 10,

13 Cross-Defendants.

14 Bank of America, N.A., by and through its attorneys of record at Akerman LLP, submits its  
15 Case Appeal Statement pursuant to NRAP 3(f)(3).

16 1. The appellant filing this case appeal statement is Bank of America, N.A. (**Appellant**).

17 2. The order appealed is the Final Judgment for Plaintiff entered April 18, 2016. A  
18 Notice of Entry of Final Judgment was entered on April 27, 2016 by the Honorable Judge Valerie  
19 Adair.

20 3. Counsel for Appellants are Ariel E. Stern, Esq. and Thera A. Cooper, Esq. of  
21 Akerman LLP, 1160 N. Town Center Drive, Suite 330, Las Vegas, Nevada 89144.

22 4. Trial counsel for Respondent SFR Investments Pool 1, LLC is Diana Cline Ebron,  
23 Esq., Karen L. Hanks, Esq., and Jacqueline A. Gilbert, Esq., of Kim Gilbert, Ebron, 7625 Dean  
24 Martin Drive, Suite 100, Las Vegas, NV 89139. Appellant is unaware of whether trial counsel will  
25 also act as appellate counsel for Respondent.

26 5. Counsel for appellant are licensed to practice law in Nevada. Trial counsel for  
27 Respondent is licensed to practice law in Nevada.

28 6. Appellant is represented by retained counsel in the district court.

7. Appellant is represented by retained counsel on appeal.

8. Appellant was not granted leave to proceed in forma pauperis by the district court.

9. The date proceedings commenced in the district court was July 1, 2013.



10. In this action, Respondent alleges that it owns the property located at 3617 Diamond Spur Avenue, North Las Vegas, Nevada 89032, Assessor Parcel No. 139-08-410-014 (**Property**) free and clear of all liens as a result of an HOA foreclosure sale. Respondent filed an Answer, Counterclaim and Cross-Claim for Quiet Title and Injunctive Relief to have the court declare that Respondent bought the Property free and clear of Appellant's interests, including the deed of trust held by Bank of America, N.A. (**Deed of Trust**). Appellants alleged that the Deed of Trust was not extinguished by the foreclosure sale because its attempted tender satisfied the tender rule, the foreclosure sale was not commercially reasonable, and NRS 116.3116 is unconstitutional. The district court granted Respondent's motion for summary judgment over Appellants' opposition countermotion for summary judgment. Appellants now appeal the order granting Respondent summary judgment.

11. This case has not previously been the subject of an appeal to or original writ proceeding in the Supreme Court.

12. This appeal does not involve child custody or visitation.

13. This appeal does not involve the possibility of settlement.

DATED: May 24, 2016.

AKERMAN LLP

/s/ Thera Cooper

ARIEL E. STERN, ESQ.

Nevada Bar No. 8376

THERA A. COOPER, ESQ.

Nevada Bar No. 13468

AKERMAN LLP

1160 Town Center Drive, Suite 330

Las Vegas, NV 89144

*Attorneys for Bank of America, N.A. as  
successor by merger to BAC Home Loans  
Servicing, LP FKA Countrywide Home Loans  
Servicing, LP*

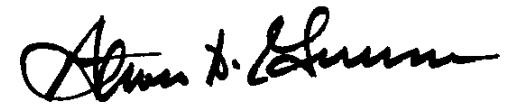
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on this 24th day of May, 2016, and pursuant to NRCP 5, I caused to be served a true and correct copy of the foregoing, BANK OF AMERICA, N.A.’S CASE APPEAL STATEMENT, 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.

<b>Alessi &amp; Koenig</b>		
<b>Contact</b>	<b>Email</b>	
A&K eserve	<a href="mailto:eserve@alessikoenig.com">eserve@alessikoenig.com</a>	
<b>Kim Gilbert Ebron</b>		
<b>Contact</b>	<b>Email</b>	
Diana Cline Ebron	<a href="mailto:diana@kgelegal.com">diana@kgelegal.com</a>	
E-Service for Kim Gilbert Ebron	<a href="mailto:eservice@hkimlaw.com">eservice@hkimlaw.com</a>	
Sarah Felts	<a href="mailto:sarah@kgelegal.com">sarah@kgelegal.com</a>	
Tomas Valerio	<a href="mailto:staff@kgelegal.com">staff@kgelegal.com</a>	
<b>Law Office of Ladine Oravetz</b>		
<b>Contact</b>	<b>Email</b>	
Ladine Oravetz	<a href="mailto:ladineo@aol.com">ladineo@aol.com</a>	

/s/ Michael Hannon  
An employee of AKERMAN LLP



CLERK OF THE COURT

**OPPM**

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Henderson, Nevada 89014

Telephone: (702) 485-3300

Facsimile: (702) 485-3301

*Attorneys for SFR Investments Pool 1, LLC*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

ALESSI & KOENIG, LLC, a Nevada limited  
liability company,

Plaintiff,

vs.

ARMANDO A. CARIAS, an individual; BANK  
OF AMERICA, N.A., SUCCESSOR BY  
MERGER TO BAC HOME LOANS  
SERVICING, LP FKA COUNTRYWIDE  
HOME LOANS SERVICING, LP, an unknown  
entity; DOES INDIVIDUALS I-X, inclusive;  
and ROE CORPORATIONS XI-XXX,

Defendants.

BANK OF AMERICA, N.A., SUCCESSOR  
BY MERGER TO BAC HOME LOANS  
SERVICING, LP FKA COUNTRYWIDE  
HOME LOANS SERVICING, LP, a National  
Association,

Cross-Claimant,

vs.

ARMANDO A. CARIA, an individual, SFR  
INVESTMENTS POOL 1, LLC, a domestic  
Limited Liability Company; SUTTER CREEK  
HOMEOWNERS ASSOCIATION, a  
homeowners association, and DOES 1 through  
10 and ROE BUSINESS ENTITIES 1 through  
10,

Cross-Defendants.

BANK OF AMERICA, N.A., SUCCESSOR  
BY MERGER TO BAC HOME LOANS

Case No. A-13-684501-C

Dept. No. XXI

**SFR INVESTMENTS POOL 1, LLC'S  
OPPOSITION TO BANK OF AMERICA,  
N.A.'S MOTION TO RECONSIDER**

**Hearing Date: June 20, 2016**

**Hearing Time: In Chambers**

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

SERVICING, LP FKA COUNTRYWIDE  
HOME LOANS SERVICING, LP, a National  
Association,

Third-Party Plaintiff,

vs.

SFR INVESTMENTS POOL 1, LLC, a  
domestic limited liability company, and DOES  
1 through 10 and ROE BUSINESS ENTITIES 1  
through 10,

Third Party Defendant.

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

Counter-Claimant,

vs.

BANK OF AMERICA, N.A., SUCCESSOR  
BY MERGER TO BAC HOME LOANS  
SERVICING, LP FKA COUNTRYWIDE  
HOME LOANS SERVICING, LP, a national  
association; ARMANDO A. CARIAS, an  
individual; DOES 1 10 and ROE BUSINESS  
ENTITIES 1 through 10 inclusive,

Counter-Defendant/Cross-Defendants.

SFR INVESTMENTS POOL 1, LLC (“SFR”), files its Opposition to BANK OF AMERICA, N.A.’s (the “Bank”) Motion to Reconsider the Order Granting SFR Investment 1 Pool, LLC’s Motion for Summary Judgment and Denying the Bank’s Motion for Summary Judgment. This opposition is based on the following memorandum of points and authorities, and all papers and pleadings on file herein.

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. LEGAL ARGUMENT**

#### **A. Standard for Motion to Reconsider.**

“A motion for reconsideration is *not* an avenue to re-litigate the same issues and arguments upon which the court already has ruled.” U.S. Aviation Underwriters, Inc. v. WestAir, LLC, No. 208-cv-00891-PMP-LRL, 2010 WL 1462707 \*2 (D.Nev. Apr. 12, 2010) (emphasis added). “Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is ...

1 an intervening change in controlling law.” Wright v. Watkins & Shepard Trucking, Inc., 968  
2 F.Supp.2d 1092, 1096 (D.Nev. 2013); see also NRCP 60(b).

3 **B. Standard for Motion to Summary Judgment.**

4 The Nevada Supreme Court recently reaffirmed that “[s]ummary judgment may be granted  
5 for or against a party on motion therefor ‘if the pleadings, depositions, answers to interrogatories,  
6 and admissions on file, together with the affidavits, if any, show that there is no genuine issue as  
7 to any material fact and that the moving party is entitled to a judgment as a matter of law.’” Shadow  
8 Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc., \_\_\_ Nev. \_\_\_, \_\_\_,  
9 366 P.3d 1105, 1109 (2016) (quoting NRCP 56(c)). The Nevada Supreme Court further instructed  
10 “[t]hat an action seeks declaratory or equitable relief does not prevent its adjudication on  
11 summary judgment Id. (emphasis added). Summary judgment is appropriate “when the pleadings  
12 and other evidence on file demonstrate that no ‘genuine issue as to any material fact [remains] and  
13 that the moving party is entitled to a judgment as a matter of law.’” Wood v. Safeway, Inc., 121  
14 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (emphasis added). When a Nevada court reviews a  
15 motion for summary judgment, “the evidence, and any reasonable inferences drawn from it, must  
16 be viewed in a light most favorable to the nonmoving party.” Id.

17 “The purpose of summary judgment ‘is to avoid a needless trial when an appropriate  
18 showing is made in advance that there is no genuine issue of fact to be tried, and the movant is  
19 entitled to judgment as a matter of law.’” McDonald v. D.P. Alexander & Las Vegas Boulevard,  
20 LLC, 121 Nev. 812, 815, 123 P.3d 748, 750 (2005) (quoting Coray v. Home, 80 Nev. 39, 40-41,  
21 389 P.2d 76, 77 (1964)). “Summary judgment is appropriate if, when viewed in light most  
22 favorable to the nonmoving party, the record reveals that there are no genuine issues of material  
23 fact and the moving party is entitled to judgment as a matter of law.” DTJ Design, Inc. v. First  
24 Republic Bank, 130 Nev. \_\_\_, \_\_\_, 318 P.3d 709, 710 (2014) (citing Pegasus v. Reno Newspapers,  
25 Inc., 118 Nev. 706, 713, 57 P.3d 82, 87 (2002)).

26 **In response to a Motion for Summary Judgment, the Bank “must, by affidavit or**  
27 **otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or**  
28 **have summary judgment entered against [it].” Wood, 121 Nev. at 32, 121 P.3d at 1031**

(emphasis added). The Bank ““is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture.”” *Id.* Rather, the Bank must demonstrate specific facts as opposed to general allegations and conclusions. *LaMantia v. Redisi*, 118 Nev. 27, 29, 38 P.3d 877, 879 (2002); *Wayment v. Holmes*, 112 Nev. 232, 237, 912 P.2d 816, 819 (1996). Though inferences are to be drawn in favor of the non-moving party, an opponent to summary judgment, like the Bank, must show that it can produce evidence at trial to support its claim. *Van Cleave v. Kietz-Mill Minit Mart*, 97 Nev. 414, 417, 633 P.2d 1220, 1222 (1981). Here, the Bank did not produce this evidence. Summary judgment in favor of SFR was appropriate, and the Bank’s Motion for Reconsideration of the Order must be denied.

**C. The Bank Did Not Make a Tender Offer and Thus Its Interest Was Extinguished in the First Foreclosure Sale.**

Regardless of the holding in *Ikon*,<sup>1</sup> the Bank has not presented evidence in its motion that the amount due to satisfy the superpriority portion of the lien was not in dispute at the time of foreclosure, or that the offer to pay was not conditional. In regards to the purported attempted payment by the Bank, this Court had found the following facts:

11. On June 28, 2012, Miles Bauer sent Alessi a check for \$720.00, representing 9 months’ worth of delinquent assessments, and a letter containing the following language:

Our client has authorized us to make payment to you in the amount of \$720.00 to satisfy its obligations to the HOA as a holder of the first deed of trust against the property. Thus, enclosed you will find a cashier’s check made out to Alessi & Koenig, LLC in the sum of \$720.00, which represents the maximum 9 months worth of delinquent assessments recoverable by an HOA. This is a non-negotiable amount and any endorsement of said cashier’s check on your part, whether express or implied, will be strictly construed as an unconditional acceptance on your part of the facts stated herein

- 3 -

1 and express agreement that BANA’s financial obligations towards the HOA in regards to the real property located at 3617 Diamond Spur Avenue have now been “paid in full”.

<sup>1</sup> *Horizon at Seven Hills Homeowners Association v. Ikon Holdings, LLC*, 132 Nev. Adv. Op. 35, 13, \_\_\_ P.3d \_\_\_, \_\_\_, 2016 WL 1704199 \*6 (Apr. 28, 2016).

1 See Findings of Fact, Conclusions of Law and Order, at 3:22-4:2.

2 Concerned primarily with the conditional language of the offer to pay, this Court ruled as  
3 follows:

4  
5 10. As BANA's payment of \$720.00 was conditional, requiring the Association to  
6 waive its rights as to a currently undecided matter—namely, what amounts are included in a  
7 super-priority lien pursuant to NRS 116—this payment attempt did not constitute a sufficient  
8 tender to protect BANA's interest in the Property.

9 Id. at 7:1-4.

10 As will be shown below, the conditional offer had to be considered before the foreclosure  
11 sale. Thus, the Association did not have the benefit of *Ikon* to make their decision. Furthermore,  
12 even if the offer was proper tender, the Bank had a duty to record this interest to put all other  
13 parties on notice. Since the Bank failed to do this, this purported tender would have been  
14 ineffective to a BFP such as SFR.

15 **1. The Bank's Conditional Offer to Pay is not a "Tender."**

16  
17 "[A]n actual tender of the proper amount due and owing will not operate to discharge a  
18 lien where the lienholder in good faith believes that a greater sum is due." *Segars v. Classen*  
19 *Garage and Service Co.*, 612 P.2d 293, 295 (Okla. Ct. App. 1980). As stated in *Shadow Wood*,  
20 whether a lender had to pay nine months plus collections costs in order to protect its deed of trust  
21 was still "open" during the pertinent time period. 366 P.3d at 1113. At the time of this sale, the  
22 two organizations tasked with enforcing NRS 116 had issued diametrically opposite opinions on  
23 the inclusion of collection costs in the super-priority portion of the lien. See State, Dept. of  
24 Business and Industry, Fin. Inst. Div v. Nevada Ass'n Services, Inc., 128 Nev. \_\_\_, \_\_\_, 294 P.3d  
25 1223, 1227 (2012).

26 Here, the Bank's alleged attempted payment was impermissibly conditional by providing  
27 a check that was a non-negotiable amount in which any endorsement of the check would be strictly  
28 construed as an unconditional acceptance that "BANA's financial obligations towards the HOA in

1 regards to [the Property] have now been ‘paid in full.’” See Bank’s Mot. Ex. E-3. This letter did  
2 not limit the time or scope of its obligation to the Association. Furthermore, this restrictive  
3 language could mean that acceptance of the check meant that the Association would accept all of  
4 the facts and arguments posited by the Bank in its letter, or the Bank would never again have to  
5 pay the Association further sums after said check. It would be reasonably problematic for the  
6 Association to have unconditionally accepted all of these facts and arguments because the issue of  
7 amounts was “still open,” and the letter could be deemed to absolve the Bank from any future  
8 payments in the event that it obtained title or it again lent money on the Property in the future.<sup>2</sup>

9 Thus, as this Court has already recognized and held, the Bank attached impermissible  
10 conditions along with its payment. *Ikon* did not speak a single word in regards to what constitutes  
11 an unconditional payment. As such, this Court has not been presented with any new law or fact to  
12 reconsider their previous order denying the Bank’s MSJ because the alleged attempted payment  
13 was conditional. As such the Court must Deny the Bank’s Motion. However, to the extent the  
14 Court is to proceed further with the “tender” analysis, the Court will see below that the Bank’s  
15 purported attempted payment was an unrecorded interest in property and not effective against SFR.

16 **2. Any Tender by the Bank Was An Unrecorded Interest In The Property.**

17 Under Nevada law, every interest in property must be recorded. Specifically, NRS 111.315  
18 provides:

19 **NRS 111.315 Recording of conveyances and instruments: Notice to third**  
20 **persons.** Every conveyance of real property, and every instrument of writing  
21 setting forth an agreement to convey any real property, or whereby any real property  
22 may be affected, proved, acknowledged and certified in the manner prescribed in  
23 this chapter, to operate as notice to third persons, shall be recorded in the office of  
24 the recorder of the county in which the real property is situated or to the extent  
permitted by NR 105.010 to 105.080, inclusive, in the Office of the Secretary of  
State, but shall be valid and binding between the parties thereto without such  
record.

25 ///

26 \_\_\_\_\_  
27 <sup>2</sup> In fact, *Shadow Wood* provides an excellent example of how accepting this conditional payment  
28 could play out. If the bank there had attempted such a payment, and that association accepted, then,  
once the property reverted to the bank in *Shadow Wood*, it could have argued that it owed nothing  
once it took title. Such conditions are not the type contemplated as acceptable.



1 If a "conveyance" is not recorded, it will have no effect on a subsequent purchaser. This  
2 is confirmed by NRS 111.325, which reads:

3 **NRS 111.325 Unrecorded conveyances void as against a subsequent bona fide**  
4 **purchaser for value when conveyance recorded.**

5 Every conveyance of real property within this State hereafter made, which shall  
6 not be recorded as provided in this chapter, shall be void as against any  
7 subsequent purchaser, in good faith and for valuable consideration, of the same  
8 real property, or any portion thereof, where his or her own conveyance shall be  
9 first duly.

10 (Emphasis added).

11 NRS 111.010(1) defines conveyance as:

12 **NRS 111.010 Definitions.** As used in this chapter:

13 1. "Conveyance" shall be construed to embrace every instrument in writing, except a last  
14 will and testament, whatever may be its form, and by whatever name it may be known in  
15 law, by which any estate or interest in lands is created, alienated, assigned or  
16 surrendered.

17 Thus, as is demonstrated above, any "tender" by the Bank is a "conveyance" under Nevada  
18 law.

19 *a. Equitable Subrogation*

20 If the Bank made a payment of the superpriority portion, various jurisdictions have stated  
21 that such payment does not extinguish the lien but instead allows a lien holder to sit in place of the  
22 senior creditor: this is called "equitable subrogation." See State Farm Fire & Casualty Co. v. East  
23 Bay Municipal Utility Dist., 53 Cal. App. 4th 769, 62 Cal. Rptr. 2d 72 (1997). And this is exactly  
24 what took place between the Bank and the Association if a payment was made.

25 In "equitable subrogation" the holder of a junior mortgage or encumbrance who pays or  
26 advances money to pay the debt secured by the prior mortgage or encumbrance is generally entitled  
27 to be subrogated to the rights of the senior encumbrancer. Dietrich Industries, Inc. v. U.S., 988 F.2d  
28 568 (5th Cir. 1993); Strike v. Trans-West Discounty Corp., 92 Cal. App. 3d 735, 155 Cal. Rptr.  
132 (1979). This rule is particularly important where a foreclosure of a senior lien will erase the  
security interest of a junior lien. Under this rule, a junior lienholder is entitled to reinstate the loan  
by making a payment sufficient to cure the default or to pay off the senior lien and becomes

1 subrogated to the rights of the senior lienholder as against the owner of the property. Pacific Trust  
2 Co. Ttee v. Fidelity Fed Sav. & Loan Assn., 184 Cal. App. 3d 817, 229 Cal. Rptr. 269 (1986). This  
3 is true even without express contractual authority. *Id.* This is exactly what occurs when a lender,  
4 such as the Bank, purportedly pays the superpriority portion of the Association's lien. The lender  
5 becomes "subrogated" to the rights of the Association. However, the lien is not extinguished. Said  
6 differently, payment by the guarantor is treated not as creating a new debt and extinguishing the  
7 original debt, but as preserving the original debt and merely substituting the guarantor for the  
8 creditor. *Putnam v. C.I.R.*, 352 U.S. 82 (1956).

9 "Equitable, or "legal" subrogation is given a liberal application. St. Paul Fire & Marine Ins.  
10 Co. v. Murray Guard, Inc., 37 S.W.3d 180 (Ark. 2001). It applies where one who has discharged  
11 the debt of another may, under certain circumstances, succeed to the rights and position of the  
12 satisfied creditor if: (1) payment must have been made by the subrogee to protect his or her own  
13 interest; (2) the subrogee must not have acted as a volunteer; (3) the debt paid must have been one  
14 for which the subrogee was not primarily liable; (4) the entire debt must have been paid; and (5)  
15 subrogation must not work any injustice to the rights of others. Sehremelis v. Farmers & Merchants  
16 Banks, 6 Cal. App. 4th 767, 7 Cal. Rptr. 2d 903, (1992); Dade County School Bd. v. Radio Station  
17 WOBA, 731 S. 2d 638 (Fla. 1999); Wilshire Servicing Com. v. Timber Ridge Partnership, 743  
18 N.E.2d 1173 (Ind. Ct App. 2001).

19 Ultimately, equitable subrogation creates an assignment of a property interest. Since  
20 subrogation effects an assignment by operation of law it is sometimes termed an "equitable  
21 assignment." Des Moines Furnace & Stove Repair Co., v. Lemon, 56 N.W.2d 923 (Iowa 1953);  
22 Rustad v. Reed, 321 P.2d 1083 (Mont. 1958); D'Angelo v. Cornell Paperboard Products Co., 120  
23 N.W.2d 70 (Wis. 1963). Regardless of whether a transfer is technically called an assignment,  
24 subrogation or equitable assignment, this transfer operates the same under the law with the purpose  
25 of passing the title to a cause of action from one person to another. Fifield Manor v. Finston, 7 Cal.  
26 Rptr. 377, 354 P.2d 1073 (1960). But what cannot be overstated is the fact that **this transfer is an**  
27 **"assignment" of an interest in real property**. And an "assignment" is a conveyance pursuant to  
28

1 NRS 111.010 and as such must be recorded pursuant to NRS 111.315 or be held ineffective against  
2 a subsequent BFP, such as SFR, pursuant to NRS 111.325.

3  
4 *b. Release or Discharge*

5 Even if the Court were to disagree with the characterization as an assignment/subrogation,  
6 any payment of the superpriority lien must still be recorded. As stated above, the definition of  
7 "conveyance" is broad and includes extinguishment or discharge of the lien. *See* NRS 111.010(1).

8 The purported satisfaction of the super-priority portion of the association's lien is a  
9 surrender or release of the Association's senior position. Black's Law Dictionary defines  
10 "surrender" and "release" as:

11 **Surrender, n. (15c)** 1. The act of yielding to another's power or control. 2. The  
12 giving up of a right or claim.

13 **Release, n. (14c)** Liberation from an obligation, duty, or demand; the act of giving  
14 up a right or claim to the person against whom it could have been enforced. 2. The  
15 relinquishment or concession of a right, title or claim. 3. A written discharge,  
16 acquaintance, or receipt; specifically a writing - either under seal or supported by  
17 sufficient consideration. 4. A written authorization or permission for publication.  
18 5. The act of conveying an estate or right to another, or of legally disposing of it. 6.  
19 A deed or document effecting a conveyance. 7. The action of freeing of the fact of  
20 being freed from restraint or confinement. 8. A document giving formal discharge  
21 from custody.

22 **Release of mortgage.** A written document that discharges a mortgage upon full  
23 payment by the borrower and that is publicly recorded to show that the borrower  
24 has full equity in the property.

25 (Emphasis added).

26 Because the satisfaction of a lien is a form of conveyance, "surrender" or discharge, NRS  
27 111.315 requires that the Bank's satisfaction be recorded in order to be effective as to SFR.  
28 Without such a recording, purchasers like SFR would be completely oblivious to any such release  
and will be harmed without any way to protect itself.

3. **Any change in Priority must be recorded under NRS 106.220.**

Further, because any purported tender would have the effect of changing the priority of the  
Association's lien, versus the deed of trust, it is required to be recorded as well.

1 NRS 106.220 provides:

2 **NRS 106.220 Filing and recording of instruments subordinating or waiving**  
3 **priority of mortgages or deeds of trust; constructive notice; effect of**  
4 **unrecorded instruments.**

5 1. Any instrument by which any mortgage or deed of trust of, lien upon or  
6 interest in real property is subordinated or waived as to priority, must, ..., be  
7 recorded in the office of the recorder of the county in which the property is  
8 located, and from the time any of the same are so filed for record operates as  
constructive notice of the contents there of to all persons. The instrument is not  
enforceable under this chapter or chapter 107 of NRS unless and until it is  
recorded.

9 (Emphasis added).

10 Thus, to the extent the Bank alleges that any alleged attempted payment cured the  
11 Association's superpriority portion of the lien, this would be an interest in property required by  
12 law to be recorded in accordance with the above-referenced statutes if it is to survive a properly  
13 recorded subsequent purchaser's interest.

14 The appropriate action that the Bank was required to take was the recording of a Notice of  
15 Partial (or full) Payment against Lien on the Property, indicating satisfaction of the notices  
16 recorded by the Association. The Bank did nothing, making the Bank's alleged interest void  
17 against the Foreclosure Deed as a matter of law.

18 As shown above, whether regarded as an assignment, subrogation or subordination, the  
19 instrument must be recorded with the Clark County Recorder's office in order to be effective as to  
20 subsequent purchasers, such as SFR. The Bank has not shown any evidence that the Bank recorded  
21 this property interest. As such, the Bank's claim that it paid the superpriority portion of the  
22 Association's lien is void against SFR by virtue of the recording statutes which state that an  
23 unrecorded deed or other instrument required to be recorded is not valid and effective against a  
24 subsequent bona fide purchaser. As a result, any alleged "tender" by the Bank would be ineffective  
25 against SFR and the resulting foreclosure sale. As such, even if "tender" was effectuated, the  
26 Bank's interest in the property would still be extinguished.

27 ...

28 ...

**D. The Court Has Already Found SFR Was a BFP, and No New Evidence or Law Has Been Presented that Would Allow this Court to Reconsider this Finding.**

This Court held as follows:

- c. SFR is a bona fide purchaser ("BFP").
- d. The fact that SFR had record notice of the First Deed of Trust does not defeat its BFP status, particularly when there is no evidence to suggest SFR had actual knowledge of BANA's attempt to pay a portion of the Association's lien prior to Association Foreclosure Sale.
- e. Additionally, as SFR purchased the Property for value, low price alone is not enough to deprive it of its status as a BFP.

See Findings of Fact, Conclusions of Law and Order, at 7:13-19.

Ultimately, this Court has already decided the issue that SFR was a BFP. In doing so the Court reviewed -- and rejected -- the Bank's arguments that SFR was not a BFP because it was aware of the First Deed of Trust. See Bank's Opp. to MSJ, pp. 15-16. Yet, the Bank double-downs on the argument in its motion for reconsideration.

In a desperate attempt to bolster this defeated argument, the Bank has attached the deposition of the NRCP 30(b)(6) witness of Christopher Hardin. See Bank's Mot. Ex. 1. This is not "newly discovered evidence" as required by NRCP 60(b). This deposition was taken on November 11, 2014, more than a year prior to this Court's decision on the issue. Furthermore, this deposition was taken by the very same party that filed this Motion to Reconsider, thus defeating any argument that this deposition was just discovered. As such, this Court is barred by law from considering the contents of this deposition. However, even if an inquiry of SFR's BFP status was completed, no evidence has been presented that would suggest that SFR was anything other than BFP.

**E. SFR is a Bona Fide Purchaser for Value; Equity Lies in SFR's Favor.**

A BFP is one who "takes the property 'for a valuable consideration and without notice of the prior equity. . . .'" Shadow Wood, 366 P.3d at 1115 (internal citations omitted). The fact that SFR "paid 'valuable consideration' cannot be contested." Id. (citing Fair v. Howard, 6 Nev. 304,

1 308 (1871). Further, notice by a potential purchaser that an association is conducting a sale  
2 pursuant to NRS 116, and that the potential exists for challenges to the sale “post hoc[,]” do not  
3 preclude that purchaser from BFP status. Shadow Wood, 366 P.3d at 1115-1116.

4 Additionally, the experience of the purchaser does not automatically defeat bona fide  
5 purchaser status. Melendrez v. D & I Inv., Inc., 127 Cal. App. 4th 1238, 1252-1253, 26 Cal.Rptr.3d  
6 413, 425-426 (2005). In Melendrez, the California Court of Appeals concluded, “[W]e see no  
7 reasoned basis for a blanket rule that would preclude a buyer from being a BFP simply because he  
8 or she has experience in foreclosure sales and purchases property at less than fair market value.” Id.  
9 at 1253, 426. The Melendrez court went on to state,

10 [a] holding that an experienced foreclosure buyer perforce cannot receive the  
11 benefits of the law as a BFP if he or she buys property for substantially less than its  
12 value would chill participation at trustees' sales by this entire class of buyers, and,  
13 ultimately, could have the undesired effect of reducing sales prices at foreclosure.  
We conclude therefore that the proper standard to determine whether a buyer at a  
foreclosure sale is a BFP is whether the buyer (1) purchased the property for value,  
and (2) had ***no knowledge or notice of the asserted rights of another***.

14 Melendrez, 26 Cal.Rptr.3d at 427 (emphasis added).

15 General knowledge by a purchaser is not enough to defeat BFP – it is the **specific facts** of  
16 that sale.

17 The Bank cites to several cases in which purchasers were privileged with insider  
18 knowledge of specific facts of the foreclosure which, in their jurisdiction, put the purchaser on  
19 inquiry notice. For example, in Berge, the dispute pertained to title to property where the first  
20 conveyance was executed first but not recorded until after the second conveyance was executed  
21 and recorded. Berge v. Fredericks, 591 P.2d 246, 247 (Nev. 1979). There, the Court held that the  
22 second purchaser did not have the benefit of Nevada’s “first in time” recording statute (and was  
23 not a purchaser in good faith) because she was on notice that a person without a recorded interest  
24 in the property was residing on the property (the first purchaser), and that the conveyance to her  
25 was made by a grantor who had a “reason to conceal” the prior unrecorded interest. Id. at 249-  
26 250. **Armed with these facts**, the second purchaser had a duty of inquire as to whether there was  
27 a prior unrecorded interest. Id. at 249 (emphasis added).

28 Allison Steel is similarly unpersuasive and inapplicable to this situation, as that case dealt

1 with the priority of liens where a creditor subsequently purchased property at a sheriff's sale with  
2 constructive knowledge of the existence of two prior recorded tax liens. See Allison Steel  
3 Manufacturing Co. v. Bentonite, Inc., 471 P.2d 666 (Nev. 1970). There the Court held that the  
4 subsequent purchaser did not have superior title, despite having recorded its deed before the prior  
5 purchaser at the tax lien sale. Id. at 497. This was because the tax liens had priority over the lien  
6 being foreclosed.

7 The common thread that ties these cases together is the insider knowledge of specific facts  
8 that the purchaser had in the purchasing situation. In contrast to these cases, no facts existed here  
9 which "would lead a reasonable man in [SFR's] position to make an investigation that would  
10 advise him of the existence of prior unrecorded rights." Id. The public records only showed (1)  
11 that a deed of trust was recorded **after** the Association perfected its lien by recording its declaration  
12 of CC&Rs; (2) that there was a delinquency by the homeowner, which resulted in the Association  
13 instituting foreclosure proceedings, and after complying with NRS Chapter 116, it sold the  
14 Property at a public auction. Additionally, the Bank did not file an action challenging the  
15 superpriority amount or the sale, and it did not record a release of superpriority lien or a lis pendens.  
16 Nothing was recorded to lead SFR to believe the Bank's priority had changed in relation to the  
17 Association's. Further, any inquiry SFR may have made to the Association's Agent, a party with  
18 which it has no special relationship, would have revealed exactly that which was the case here –  
19 there was no tender made by the Bank prior to the sale.

20 Here, the Bank has provided no evidence that SFR had any knowledge of specific facts of  
21 a superior interest, or that a superior interest survived the sale. In regards to SFR's duty of inquiry  
22 regarding the association sale, Shadow Wood provides guidance:

23 [W]hen an association's foreclosure sale complies with the statutory foreclosure  
24 rules, as evidenced by the recorded notices, such as is the case here, and without  
25 any facts to indicate the contrary, **the purchaser would have only "notice" that**  
**the former owner had the ability to raise an equitably based post-sale**  
**challenge**, the basis of which is unknown to that purchaser.

26 That [the Bank] retained the ability to bring an equitable claim to challenge [the  
27 association's] foreclosure sale **is not enough in itself to demonstrate that [the**  
**purchaser] took the property with notice of any potential future dispute as to**  
**title.**

28 Shadow Wood, 316 P.3d at 1116. SFR did not have a duty to inquire further than investigating

1 the recorded documents on the Property. Despite the fact that SFR has purchased many properties  
2 at foreclosure sales, the Bank has failed to present any facts that should be imputed to SFR that go  
3 to show that the Bank's interest in the property would have survived the foreclosure. In fact, even  
4 today, the Bank has failed to present any facts that would challenge the validity of the foreclosure  
5 sale.

6 **F. This Court Has Already Balanced the Equities and Found that They Tip**  
7 **in Favor of SFR; No Issue of Fact Remains that Would Require a Trial.**

8 This Court held as follows regarding the equities of this case:

- 9 5 11. Pursuant to Shadow Wood, equity does not favor granting BANA relief in this  
10 6 case.  
11 7 a. BANA was in a better position than SFR, a mere purchaser at a public sale,  
12 8 and could have done more to protect its interest in the Property.  
13 9 b. After it submitted its payment to the Association, BANA should have done  
14 10 something to put potential purchasers, such as SFR, on notice of its attempted  
15 11 payment and corresponding belief that the super-priority lien was  
16 12 extinguished prior to the Association Foreclosure Sale.  
17 13 c. SFR is a bona fide purchaser ("BFP").  
18 14 d. The fact that SFR had record notice of the First Deed of Trust does not defeat  
19 15 its BFP status, particularly when there is no evidence to suggest SFR had  
20 16 actual knowledge of BANA's attempt to pay a portion of the Association's  
21 17 lien prior to Association Foreclosure Sale.  
22 18 e. Additionally, as SFR purchased the Property for value, low price alone is not  
23 19 enough to deprive it of its status as a BFP.

24 Findings of Fact, Conclusions of Law and Order, at 7:5-19.

25 Should a Court decide to balance the equities, ss this Court did, , a court "must consider  
26 the entirety of the circumstances that bear upon the equities[.]" including the actions and inactions  
27 of the parties and "whether an innocent party [a BFP] may be harmed by granting the desired  
28 relief." Shadow Wood, 336 P.3d at 1114 (citing In re Petition of Nelson, 495 N.W.2d 200, 203  
(Minn. 1993) and Smith v. United States, 373 F.2d 419, 424 (4th Circ. 1966)). This is true *even*



1 *when there are potential irregularities in the foreclosure process*, such as pre-sale disputes  
2 between the association and the lender, *where the buyer has no knowledge or participation in the*  
3 *irregularities*. Shadow Wood, 336 P.3d at 1115-1116 (emphasis added). Such consideration of  
4 harm is particularly important where the lender has failed to avail itself of the legal remedies  
5 available to it to prevent the foreclosure sale. Id. at 1114, n.7. In Shadow Wood, even when the  
6 bank made an attempt to pay, the Court noted it still had remedies it did not take. Id. Here, **the**  
7 **Bank**— with notice—**did nothing** after its purported attempt to conditionally pay. It did not  
8 attend the sale and announce a dispute, nor did it file a lis pendens or otherwise put the world on  
9 notice that it disputed the superpriority amount of the lien or the Association foreclosure sale. As  
10 a result, title properly vested in SFR at the Association foreclosure sale.

11 The Bank has provided no evidence that SFR was anything other than a BFP. Specifically,  
12 the Bank has presented no evidence of **any** such knowledge or participation, fraudulent or  
13 otherwise, by SFR. SFR would be harmed by any claim to set aside the sale on those grounds.  
14 Therefore, SFR was entitled to summary judgment. This Court must deny the Bank's Motion to  
15 Reconsider.

## 16 **II. CONCLUSION**

17 The Bank has not shown this Court any newly discovered evidence or that *Ikon*  
18 represented an intervening change in controlling law that would warrant reconsideration of this  
19 case. As such, the Bank has not presented any authority that would justify the Reconsideration of  
20 this Court's Order Granting Plaintiff's Motion for Summary Judgment and as such should DENY  
21 the Bank's Motion herein.

22 DATED June 3rd, 2016.

**KIM GILBERT EBRON**

/s/ Jacqueline A. Gilbert

JACQUELINE A. GILBERT, ESQ.

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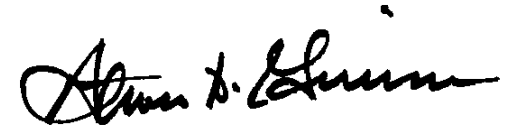
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 3rd day of June, 2016, pursuant to NRCP 5(b), I served via the Second Judicial District Court's electronic filing system the foregoing, **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO RECONSIDER ORDER GRANTING SFR INVESTMENT 1 POOL, LLC'S MOTION FOR SUMMARY JUDGMENT**, to the following parties:

<u>AKERMAN LLP</u>			
Name	Email	Select	
Akerman Las Vegas Office	<a href="mailto:akermanlas@akerman.com">akermanlas@akerman.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
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/s/ Zachary Clayton  
An Employee of Kim Gilbert Ebron



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*Attorneys for Defendant Bank of America, N.A., as  
successor by merger to BAC Home Loans Servicing,  
LP FKA Countrywide Home Loans Servicing, LP*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

ALESSI & KOENIG, LLC,  
  
Plaintiff,

v.

BANK OF AMERICA, N.A., SUCCESSOR BY  
MERGER TO BAC HOME LOANS  
SERVICING, LP FKA COUNTRYWIDE  
HOME LOANS SERVICING, LP, unknown  
entity, DOES INDIVIDUALS 1-X, inclusive, and  
ROE CORPORATIONS XI-XXX, inclusive,

Defendants.

Case No.: A-13-684501-C

Dept.: XXI

**BANK OF AMERICA, N.A.'S REPLY IN  
SUPPORT OF MOTION FOR  
RECONSIDERATION**

BANK OF AMERICA, N.A., SUCCESSOR BY  
MERGER TO BAC HOME LOANS  
SERVICING, LP FKA COUNTRYWIDE  
HOME LOANS SERVICING, LP, a National  
Association,

Cross-Claimant,

v.

ARMANDO A. CARIAS, an individual, DOES  
INDIVIDUALS 1 through 10, inclusive, and  
ROE BUSINESS ENTITIES 1 through 10,  
inclusive,

Cross-Defendants.

AKERMAN LLP

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TEL.: (702) 634-5000 – FAX: (702) 380-8572

BANK OF AMERICA, N.A., SUCCESSOR BY  
MERGER TO BAC HOME LOANS  
SERVICING, LP FKA COUNTRYWIDE  
HOME LOANS SERVICING, LP, a National  
Association,

Cross-Claimant,

v.

SFR INVESTMENTS POOL 1, LLC, a domestic  
Limited Liability Company, SUTTER CREEK  
HOMEOWNERS' ASSOCIATION, an unknown  
entity, and DOES 1 through 10 and ROE  
BUSINESS ENTITIES 1 through 10,

Cross-Defendants.

Defendant Bank of America, N.A. (**Bank of America**), by and through its attorneys at the law firm AKERMAN LLP, hereby submits this Reply Memorandum in Support of Motion for Reconsideration of the Order granting summary judgment in favor of SFR Investments Pool 1, LLC (**SFR**) and denying Bank of America's motion for summary judgment.

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

Nevada Revised Statute 116.3116(1) creates a statutory lien for unpaid assessments that a unit owner owes to an HOA. The statute also creates a "super-priority" portion of this statutory lien in which nine months of HOA assessments have priority over a senior deed of trust. Based on the plain language of the statute that creates the HOA lien, the Nevada Supreme Court confirmed in *SFR Investments* that nine months of unpaid HOA assessments constitute the statutory super-priority portion of this statutory lien. Since this Court granted SFR's Motion for Summary Judgment, the Nevada Supreme Court held in *Ikon Holdings* that the super-priority amount is limited to nine-months of assessments prior to an HOA foreclosure and does not include an amount for collection fees or foreclosures costs.

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In its Response in Opposition to Bank of America’s Motion to Reconsider, SFR attempts to rely on contract principles such as accord and satisfaction and equitable subrogation to invalidate the legal effect of Bank of America’s tender of the super-priority portion of the statutory HOA assessment lien. None of these contract principles are applicable to whether the statutory HOA lien was satisfied. It is *undisputed* in this case that Bank of America tendered the amount necessary to satisfy the super-priority portion of this statutory lien. Because Bank of America’s tender satisfied, and thus extinguished, the super-priority portion of the statutory HOA lien. To the extent SFR obtained any interest in the Property through the HOA foreclosure sale, then that interest is subject to Bank of America’s Deed of Trust. Accordingly, this Court should reconsider its Order granting summary judgment in SFR’s favor, and instead grant summary judgment in favor of Bank of America.

### III. ARGUMENT

#### A. Bank of America’s Tender of Nine-Months of Assessments Satisfied the HOA’s Super-Priority Lien.

Under NRS 116.3116(1), an HOA has a statutory lien for unpaid assessments. Also by statute, only nine-months of HOA assessments are entitled to this “super-priority” status. NRS 116.3116(2)(b)-(c). The Nevada Supreme Court in *SFR Investments*, applying the plain language of the statute, explained that “[a]s to first deeds of trust, NRS 116.3116(2) thus splits an HOA lien into two pieces, a superpriority piece and a subpriority piece.” *SFR Investments Pool 1 v. U.S. Bank*, 334 P.3d 408, 411 (Nev. 2014). As explained by the *SFR Investments* Court, “NRS 116.3116 gives a homeowners’ association (HOA) a superpriority lien on an individual homeowners’ property for up to nine months of unpaid HOA dues.” *Id.* at 409 (emphasis added). *SFR Investments* further provides that the beneficiary of record of a deed of trust can preserve its interest by “determining the precise superpriority amount” and tendering it “in advance of the sale.” *Id.* at 418.

...

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1 Since this Court granted SFR’s Motion for Summary Judgment, the Nevada Supreme Court  
2 held – again as a matter of statutory interpretation – that the super-priority portion of an HOA lien  
3 does *not* include collection fees and foreclosure costs incurred by an HOA. *Horizons at Seven Hills*  
4 *v. Ikon Holdings*, 2016 WL 1704199, at \*1 (Nev. April 28, 2016). The *Ikon Holdings* court  
5 confirmed that the super-priority amount is “limited to an amount equal to the common expense  
6 assessments due during the nine months before foreclosure.” *Id.* at \*6.

7 In this case, pursuant to NRS 116.3116(3)(b), Bank of America tendered the amount of the  
8 super-priority portion of the statutory HOA lien prior to the HOA foreclosure sale. Shortly after  
9 receiving the Notice of Default and Election to Sell, Bank of America, through counsel, contacted  
10 the HOA Trustee and requested a payoff ledger detailing the super-priority amount of the HOA’s  
11 lien. Bank’s Mot., at **Ex. E-1**. This payoff ledger showed the amount of the last nine months’  
12 delinquent assessments—the super-priority amount under *Ikon Holdings*—was \$720.00. *Id.*, at **Ex.**  
13 **E-2**. Accordingly, Bank of America sent a check to the HOA Trustee in the amount of \$720.00 on  
14 June 28, 2012 and explained that the check was sent to “satisfy [Bank of America’s] obligation . . .  
15 as a holder of the first deed of trust against the property.” *Id.*, at **Ex. E-3**. Even though the HOA  
16 Trustee rejected this payment, Bank of America tendered, and thus satisfied the super-priority  
17 portion of the statutory HOA lien.

18 **1. SFR’s Reliance on Contract Principles to Challenge Satisfaction of a Statutory**  
19 **Lien Fail As a Matter of Law.**

20 SFR improperly claims that Bank of America’s “conditional offer to pay is not a tender” and  
21 that Bank of America’s check constitutes an “unconditional” payment. SFR attempts to argue that  
22 Bank of America’s tender did not satisfy the statutory super-priority portion of the statutory HOA  
23 lien because “alleged attempted payment was impermissibly conditional by providing a check that  
24 was a non-negotiable amount.” SFR’s Opp., at 5. SFR’s argument improperly relies on contract law  
25 principles of accord and satisfaction as a basis for arguing that Bank of America’s tender of the nine-  
26 month super-priority amount could not satisfy a statutory lien.

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1 Contrary to SFR's assertion, and as set forth in the letter accompanying Bank of America's  
2 check to the HOA Trustee, Bank of America's tender was made pursuant to NRS 116.3116(2)(b)  
3 and was remitted to satisfy the nine-months of delinquent assessments (based on the HOA's  
4 assessment ledger) that the HOA was entitled to collect from the beneficiary of the Deed of Trust.  
5 SFR's assertion fails because it is based on the faulty premise that the amount Bank of America  
6 tendered was an attempt to resolve a disputed contractual debt. As set forth below, contract  
7 principles such as accord and satisfaction are inapplicable in this context where the HOA and Bank  
8 of America are not in privity of contract and where the obligations of the parties are determined not  
9 by contract, but by statute.

10 Under Nevada law, accord and satisfaction is an affirmative defense to a breach of contract  
11 claim. *See Nev. R of Civ. P. 8(c); Pierce Lathing Co. v. ISEC, Inc.*, 114 Nev. 291, 956 P.2d 93, 95  
12 (Nev. 1998); *Casarotto v. Mortensen*, 99 Nev. 392, 663 P.2d 352, 353 (Nev. 1983). The Nevada  
13 Supreme Court has explained that "principles of accord and satisfaction, subtending those of  
14 compromise and settlement dealing only with the disputed or unliquidated amounts, are contractual  
15 in nature." *Pederson v. First Nat'l Bank*, 93 Nev. 388, 392, 566 P.2d 89, 91-92, 1977 Nev. LEXIS  
16 573, \*7 (Nev. 1977) (quotation and citation omitted). As noted above, the HOA lien for assessments  
17 is a statutory lien, and the obligations, if any, that Bank of America may have to the HOA, are  
18 determined by statute, not by contract. Because Bank of America and the HOA are not in privity of  
19 contract, principles such as accord and satisfaction are not applicable and cannot render Bank or  
20 America's tender a nullity.

21 Moreover, even if principles of accord and satisfaction were applicable to the instant case,  
22 Bank of America's check sent to the HOA still constitutes tender sufficient to satisfy the super-  
23 priority portion of the HOA lien. SFR claims that "conditional" or "non-negotiable" language in the  
24 letter accompanying Bank of America's tender of the super-priority portion of the statutory HOA  
25 lien negates the effect of that tender (SFR Opp. at 6). The Nevada Supreme Court has rejected this  
26 analysis.

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1 In *Pederson v. First Nat'l Bank*, 93 Nev. 388(Nev. 1977), the Court acknowledged that even  
2 if a check contains “conditional” language, acceptance of that check does not necessarily resolve a  
3 dispute, and remittance of that check still constitutes tender. The alleged breaching party in  
4 *Pederson* asserted that “the trial court was compelled to sustain his affirmative defense since he  
5 tendered a check . . . in ‘full settlement’ of the Bank’s claim against him, which check was accepted  
6 by the Bank.” *Id.* at 392-393. The *Pederson* Court rejected this argument and explained that while  
7 “tender of that check and acceptance by the Bank is evidence supporting his defense of compromise  
8 and settlement, other evidence presented shows that the Bank accepted the check to be credited  
9 against the full sum due it.” *Id.* at 393. Although Bank of America was not attempting to resolve a  
10 debt,<sup>1</sup> the rationale in *Pederson* applies – Bank of America’s remittance of the check, even with  
11 conditional language, does not defeat the legal effect of the tender.

12 By tendering the super-priority amount prior to the foreclosure sale, Bank of America  
13 preserved the first-priority position of its Deed of Trust. Since the super-priority portion of the  
14 HOA’s lien was extinguished prior to the foreclosure sale, Plaintiff’s interest in the Property, if any,  
15 is subject to the Deed of Trust pursuant to NRS 116.31164(3)(a), which provides that the purchaser  
16 at an HOA foreclosure receives “a deed without warranty which conveys to the grantee *all title of*  
17 *the unit’s owner to the unit.*” NRS 116.31164(3)(a) (emphasis added). Under Nevada law, the HOA  
18 lost the ability to pass title free of the Deed of Trust when Bank of America’s tender extinguished  
19 the super-priority lien.

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26 <sup>1</sup>The fact that Bank of America’s counsel included “conditional” and “non-negotiable” language in its cover  
27 letter to the HOA Trustee does not transform the tender of the super-priority portion of a statutory HOA lien into an offer  
28 to enter into a contract or an accord and satisfaction. The balance of the cover letter makes clear than Bank of America  
is remitting payment of nine-months of delinquent assessments pursuant to NRS 116.3116(2)(b) and that the HOA  
Trustee should not interpret the payment of these nine-months as any admission that Bank of America should, or will,  
remit additional payment as to any collections costs or foreclosure fees.



1                   **2. Contract Principles Cannot Convert Bank of America’s Tender of the Super-**  
2                   **priority Portion of the Lien into a Conveyance That Must Be Recorded.**

3                   SFR also asserts, improperly, that “tender by the Bank was an unrecorded interest<sup>2</sup> in the  
4                   Property.” SFR Opp. At 6. As with the claim that Bank of America was attempting to resolve a  
5                   disputed contract, SFR’s argument on the alleged necessity of recording a tender offer similarly  
6                   lacks any legal or factual basis. As its argument that tender of the super-priority portion of a  
7                   statutory lien is a conveyance requiring recordation, SFR cites only the statute requiring recordation  
8                   of conveyance and the statutory definition of conveyance and concludes, solely on the basis of these  
9                   statutes, that a tender payment is a conveyance in real property that must be recorded.

10                  First, Nevada’s statutory recording act provides: “Every conveyance of real property within  
11                  this state hereafter made, which shall not be recorded as provided in this chapter, shall be void as  
12                  against any subsequent purchaser, in good faith and for a valuable consideration . . . .” NRS 111.325.  
13                  The statute further provides that “conveyance shall be construed to embrace every instrument in  
14                  writing, except a last will and testament, whatever may be its form, and by whatever name it may be  
15                  known in law, by which any estate or interest in lands is created, aliened, assigned or surrendered.”  
16                  NRS 111.010(a). Based solely on these statutory references, SFR makes the conclusory, and  
17                  completely unsupported determination, that “any ‘tender’ by the Bank is a ‘conveyance’ under  
18                  Nevada law.” SFR does not even attempt to explain how the delivery of a check that satisfies (as a  
19                  matter of law) the super-priority portion of a statutory lien could either create, alienate, assign or  
20                  surrender Bank of America’s security interest in the Property.

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26                  <sup>2</sup>In more than one place in its brief, SFR concludes that if Bank of America desired to protect the Deed of Trust,  
27                  Bank of America should have recorded notice of its tender payment. At one point, SFR goes so far as to assert that Bank  
28                  of America “was required” to record a “Notice of Partial (or full) Payment against Lien on the Property.” SFR cites no  
                    authority for the proposition that a party who tenders payment to satisfy a statutory lien has an obligation, or even the  
                    authority, to record any document in the public record associated with that lien.

1 SFR even acknowledges the fallacy of its conclusory pronouncement that tender equals  
2 conveyance by devoting the next several pages of its memorandum to an analysis of the doctrine of  
3 equitable subrogation in an apparent attempt to demonstrate that “equitable subrogation creates an  
4 assignment of a property interest.” SFR Opp. at 8. SFR’s reliance on the doctrine of equitable  
5 subrogation fails as a matter of well-established Nevada law. Although the Nevada Supreme Court  
6 has addressed the doctrine of equitable subrogation extensively, SFR does not cite a single case from  
7 either the Nevada Supreme Court or the federal District of Nevada. Instead, SFR relies on cases  
8 from at least five other states – from Arkansas to Wisconsin and from California to Iowa to support  
9 its conclusion that application of equitable subrogation requires this Court to find that Bank of  
10 America’s tender constitutes a recordable conveyance.

11 A review of the Nevada case law on the doctrine of equitable subrogation reveals why SFR  
12 failed to cite any Nevada precedent. The Nevada Supreme Court has explained that equitable  
13 subrogation is a doctrine “created to accomplish what is just and fair as between the parties” and that  
14 arises “when one party has been compelled to satisfy an obligation that is ultimately determined to  
15 be the obligation of another.” *AT & T Technologies v. Reid*, 109 Nev. 592, 855 P.2d 533, 535 (Nev.  
16 1993) (citations omitted); *Houston v. Bank of Am. Fed. Savings Bank*, 488, 78 P.3d 71, 73 (Nev.  
17 2003) (adopting section 76 of the Restatement (Third) of Property: Mortgages and explaining that  
18 equitable subrogation “permits a person who pays off an encumbrance to assume the same priority  
19 position as the holder of the previous encumbrance”).

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1 Of relevance to the instant case, however, the Nevada Supreme Court has specifically held  
2 that principles of equitable subrogation have no application where the lien at issue is a creation of  
3 statute. *In re Fontainebleau Las Vegas Holdings, LLC*, 289 P.3d 1199, 1212 (2012) (quoting *Lamb*  
4 *v. Goldfield Lucky Boy Mining Co.*, 37 Nev. 9, 16, 138 P. 902, 904 (1914) and concluding that  
5 “equitable principles will not justify a court’s disregard of statutory requirements”). In the context  
6 of statutorily created mechanic’s liens, the *Fontainebleau* Court concluded, “the plain and  
7 unambiguous language of NRS 108.225 precludes application of the doctrine of equitable  
8 subrogation, as it unequivocally places mechanics’ lien claimants in an unassailable priority  
9 position.” Important to its analysis, the *Fontainebleau* Court explained that a mechanic’s lien “is a  
10 statutory creature designed to provide contractors secured payment for their work and materials  
11 because they are generally in a vulnerable position.” *Id.* at 1210 (quotation and citation omitted).  
12 The Nevada Supreme Court has refused to apply equitable subrogation as a means of changing any  
13 priority associated with the statutory mechanic’s lien. This Court should do the same as to the  
14 statutory HOA lien.

15 **B. SFR Has Not Established Status as a Bona Fide Purchaser.**

16 In its response, SFR did not deny that it knew there were competing interests to the 600 or  
17 more properties that it has purchased at HOA foreclosure sales or that knew it would have to litigate  
18 against those holding these competing interests after it purchased a property. Rather, SFR claims  
19 that each of the 600 properties it has purchased at HOA foreclosure sales must be considered  
20 individually and that Bank of America has “provided no evidence that SFR had any actual  
21 knowledge of specific facts of a superior interest or that a superior interest survived the sale.” SFR’s  
22 claim to be a bona fide purchaser fails.

23 First, under Nevada law, bona fide purchaser status is an affirmative defense for which the  
24 asserting party bears the burden of proof. Nev. Rev. Stat. § 111.325. Thus, SFR has the burden of  
25 proof in establishing that it is a bona fide purchaser for value. *Berge v. Fredericks*. 591 P.2d 246,  
26 248 (Nev. 1979). Contrary to SFR’s conclusory assertion, Bank of America does not have the  
27 burden of proving whether SFR is a bona fide purchaser. Second, SFR has not, and cannot, claim  
28 that it did not have actual and constructive knowledge of Bank of America’s Deed of Trust.

1 SFR also fails to address substantively its duty to investigate whether Bank of America had  
2 tendered payment to satisfy the super-priority portion of the HOA lien. At the time of the HOA  
3 foreclosure sale, SFR knew: (1) Bank of America had recorded a deed of trust on the Property in the  
4 amount of \$74,642.00 on October 27, 2010; (2) just 16 months after the Deed of Trust was recorded  
5 (and thus likely would not have realized a significant decrease in the amount of indebtedness  
6 secured), the HOA recorded a Notice of Delinquent Assessment Lien in the amount of \$965; (3) by  
7 the time the HOA filed its Notice of Foreclosure Sale, the HOA was purporting to foreclose on a  
8 \$4,285 statutory lien; (4) the statute creating the HOA lien stated that nine months of assessments  
9 were superior to the Deed of Trust; (5) as of the date of the HOA foreclosure sale, the Deed of Trust  
10 had not been released. Based on these facts, at a minimum, SFR had a duty to investigate whether  
11 Bank of America had tendered the nine months of assessments.

12 Under Nevada law, “a duty of inquiry” arises “when the circumstances are such that a  
13 purchaser is in possession of facts which would lead a reasonable man in his position to make an  
14 investigation that would advise him of the existence.” *Allison Steel Mfg. Co. v. Bentonite, Inc.*, 471  
15 P.2d 666, 668. (Nev. 1970). Moreover, a party has “constructive notice of [the facts at issue]  
16 whether he does or does not make the investigation.” *Id.* To rebut this presumption, a party  
17 claiming to be a bona fide purchaser must show that it “made due investigation without discovering  
18 the prior right or title he was bound to investigate.” *Berge v. Fredericks*, 95 Nev. 183, 591 P.2d 246,  
19 249 (Nev. 1979). As the party claiming to be a bona fide purchaser, *SFR* has the burden of  
20 presenting evidence that it inquired as to whether Bank of America had tendered the nine-month  
21 super-priority portion of the HOA statutory lien. SFR has not presented such evidence, and SFR is  
22 presumed to know that Bank of America tendered the super-priority portion of the statutory HOA  
23 lien.<sup>3</sup> SFR has not satisfied its burden of proof as to whether it was a bona fide purchaser for value.

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28 <sup>3</sup>Because SFR has a duty of inquiry, it cannot challenge whether the HOA should have recorded a release of the  
super-priority portion of its statutory lien after Bank of America tendered payment for the nine months of assessments.

**IV. CONCLUSION**

As a matter of law, Bank of America's tender extinguished the super-priority portion of the HOA statutory lien. The Court should reconsider its Order granting summary judgment in favor of SFR and instead grant summary judgment in favor of Bank of America.

DATED this 13th day of June, 2016.

**AKERMAN LLP**

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*Attorneys for Bank of America, N.A. as  
successor by merger to BAC Home Loans  
Servicing, LP FKA Countrywide Home Loans  
Servicing, LP*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on this 13th day of June, 2016 and pursuant to NRCP 5, I caused to be served a true and correct copy of the foregoing **BANK OF AMERICA, N.A.'S REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION**, 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.

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/s/ Allen G. Stephens  
An employee of AKERMAN LLP

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## REGISTER OF ACTIONS

CASE NO. A-13-684501-C

Alessi & Koenig LLC , Plaintiff(s) vs. Armando Carias ,  
 Defendant(s)

§  
§  
§  
§  
§  
§  
§

Case Type: **Other Civil Filing**  
 Subtype: **Other Civil Matters**  
 Date Filed: **07/01/2013**  
 Location: **Department 21**  
 Cross-Reference Case Number: **A684501**  
 Supreme Court No.: **70501**

### PARTY INFORMATION

Counter	SFR Investments Pool 1 LLC	Lead Attorneys Diana S. Cline
Counter Defendant	Bac Home Loans Servicing LP <i>Formerly Known As</i> Countrywide Home Loans Servicing LP	Darren T. Brenner <i>Retained</i> 702-634-5000(W)
Counter	Bank of America N A	Darren T. Brenner
Counter	Carias , Armando A	
Cross Claimant	Bac Home Loans Servicing LP <i>Formerly Known As</i> Countrywide Home Loans Servicing LP	Darren T. Brenner <i>Retained</i> 702-634-5000(W)
Cross	Bank of America N A	Darren T. Brenner
Cross	Alessi & Koenig LLC	Huong Lam
Cross	SFR Investments Pool 1 LLC	Diana S. Cline
Cross	Sutter Creek Homeowners Association	Steven T. Loizzi, Jr.
Defendant	Bank of America	Darren T. Brenner
Defendant	Carias , Armando A	
Defendant	Home Loans Servicing LP <i>Formerly Known As</i> Countrywide Home Loans Servicing LP	
Plaintiff	Alessi & Koenig LLC	Huong Lam
Third Party	SFR Investments Pool 1 LLC	Diana S. Cline
Third Party Plaintiff	Bac Home Loans Servicing LP <i>Formerly Known As</i> Countrywide Home Loans Servicing LP	Darren T. Brenner <i>Retained</i> 702-634-5000(W)

Third Party Bank of America N A

Darren T. Brenner

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EVENTS & ORDERS OF THE COURT

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06/20/2016 **Motion For Reconsideration** (3:00 AM) (Judicial Officer Adair, Valerie)  
*Bank of America, N.A.'s Motion for Reconsideration*

**Minutes**

06/20/2016 3:00 AM

- COURT ORDERED, Motion for Reconsideration DENIED, as the amount of the super priority portion was in dispute at the time the tender was made, and Bank of America made its tender conditional. CLERK'S NOTE: A copy of this Minute Order was placed in the attorney folder of: Huong Lam, Esq., Darren Brenner, Esq., and Diana Cline, Esq. -se6/21/16

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