

IN THE SUPREME COURT OF THE STATE OF NEVADA

U.S. BANK, NATIONAL ASSOCIATION AS TRUSTEE FOR MERRILL
LYNCH MORTGAGE INVESTORS TRUST, MORTGAGE LOAN ASSET-
BACKED CERTIFICATES, SERIES 2005-A8, Appellant, Elizabeth A. Brown
Docket of Supreme Court

vs.

SFR INVESTMENTS POOL 1, LLC, Respondent.

CASE NO.: 79235

District Court Case No.: A739867C

Appeal from the Eighth Judicial District Court In and For the County of Clark
The Honorable Joanna A. Kishner, District Court Judge

JOINT APPENDIX – VOLUME XIII

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Lynch Mortgage Investors Trust, Mortgage Loan Asset-Backed Certificates, Series
2005-A8*

DOCUMENT	VOL	BATES
Affidavit of Service	I	JA00063
Affidavit of Service	I	JA00138
Affidavit of Service	I	JA00139
Affidavit of Service	I	JA00140
Amended Proposed Findings of Fact and Conclusions of Law	XII	JA02268- JA02283
Bench Memorandum Regarding Whether Defendant is a Bona Fide Purchase is Irrelevant	X	JA01939- JA01943
Complaint	I	JA00001- JA00062
Court's Trial Exhibit 1 - Alessi & Koenig Fax Dated 7-11-12 from Ryan Kerbow to A. Bhame Re: 7868 Marbledoe Ct./HO #18842	X	JA01896- JA01897
Court's Trial Exhibit 2 – Excerpts of Deposition of Ortwerth Dated 6/14/18	X	JA01898- JA01899
Defendant Antelope Homeowners' Association's Answer and Affirmative Defenses	III	JA00434- JA00443
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Joint Trial Exhibit 1 - Declaration of Covenants, Conditions and Restrictions for Antelope Homeowners' Association	III	JA00523- JA00585
Joint Trial Exhibit 2 - Second Amendment to the Declaration of Covenants, Conditions, and Restrictions for Antelope Homeowners' Association	III	JA00586- JA00588
Joint Trial Exhibit 3 - Grant, Bargain, Sale Deed	III	JA00589- JA00592
Joint Trial Exhibit 4 - Notice of Default and Election to Sell Under Deed of Trust	III	JA00593- JA00594
Joint Trial Exhibit 5 - Deed of Trust	III	JA00595- JA00616

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Joint Trial Exhibit 6 - Deed of Trust (Second)	III	JA00617- JA00629
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Joint Trial Exhibit 8 - Grant, Bargain, Sale Deed re-recorded to correct vesting to show Henry E. Ivy and Freddie S. Ivy, husband and wife as joint tenants with rights of survivorship	IV	JA00656- JA00661
Joint Trial Exhibit 9 - Notice of Delinquent Assessment (Lien)	IV	JA00662
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Joint Trial Exhibit 12 - Notice of Trustee's Sale	IV	JA00666
Joint Trial Exhibit 13 - Notice of Trustee's Sale	IV	JA00667
Joint Trial Exhibit 14 - Notice of Trustee's Sale	IV	JA00668
Joint Trial Exhibit 15 - Trustee's Deed Upon Sale	IV	JA00669- JA00670
Joint Trial Exhibit 16 - Release of Notice of Delinquent Assessment Lien	IV	JA00671
Joint Trial Exhibit 17 - Rescission of Election to Declare Default	IV	JA00672- JA00673
Joint Trial Exhibit 18 - Notice of Delinquent Violation Lien	IV	JA00674- JA00675
Joint Trial Exhibit 19 - Request for Notice Pursuant to NRS 116.31168	IV	JA00676- JA00678
Joint Trial Exhibit 20 - Notice of Lis Pendens	IV	JA00679- JA00682
Joint Trial Exhibit 21 - Letter from Miles, Bauer, Bergstrom & Winters, LLP to Henry Ivy	IV	JA00683- JA00685
Joint Trial Exhibit 22 - Letter from Miles, Bauer, Bergstrom & Winters, LLP to Antelope Homeowners Association	IV	JA00686- JA00687
Joint Trial Exhibit 23 - Correspondence from Alessi & Koenig to Miles, Bauer, Bergstrom & Winters, LLP	IV	JA00688- JA00694

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Joint Trial Exhibit 24 - Letter from Miles, Bauer, Bergstrom & Winters, LLP to Alessi & Koenig, LLC	IV	JA00695- JA00697
Joint Trial Exhibit 25 - Correspondence regarding corrected ARM Note	IV	JA00698
Joint Trial Exhibit 26 - Affidavit of Lost Note	IV	JA00699- JA00708
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Joint Trial Exhibit 29 - Deed of Trust, Note, and Lost Note Affidavit (Part 1)	V	JA00719- JA00968
Joint Trial Exhibit 29 - Deed of Trust, Note, and Lost Note Affidavit (Part 2)	VI	JA00969- JA00984
Joint Trial Exhibit 30 - Alessi & Koenig, LLC Collection File	VI	JA00985- JA01160
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Joint Trial Exhibit 34 - Corporate Assignment of Deed of Trust	VI	JA01212- JA01213
Joint Trial Exhibit 35 - Trustee's Sale Guarantee	VII	JA01214- JA01224
Joint Trial Exhibit 36 - Bank of America, N.A.'s Payment History	VII	JA01225- JA01237
Joint Trial Exhibit 37 - Greenpoint's Payment History	VII	JA01238- JA01248
Joint Trial Exhibit 38 - Bank of America, N.A.'s Servicing Notes	VII	JA01249- JA01261

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Joint Trial Exhibit 39 - Copy of Promissory Note and Allonges	VII	JA01262- JA01277
Joint Trial Exhibit 40 - Pooling and Servicing Agreement	VIII	JA01278- JA01493
Joint Trial Exhibit 41 - Mortgage Loan Schedule for PSA	VIII	JA01494- JA01512
Joint Trial Exhibit 42 - Corporate Assignment of Deed of Trust	VIII	JA01513- JA01514
Joint Trial Exhibit 43 - Acknowledgement of Inspection of the Original Collateral File	IX	JA01515- JA01620
Joint Trial Exhibit 44 - Antelope Homeowners Association's Initial Disclosures and all Supplements	IX	JA01621- JA01737
Joint Trial Exhibit 45 - Exhibit 1 to Deposition of David Alessi – Subpoena for Deposition of N.R.C.P. 30(b)(6) Witness for Alessi & Koenig, LLC	IX	JA01738- JA01746
Joint Trial Exhibit 46 - Exhibit 2 to Deposition of David Alessi – Account Ledger	IX	JA01747- JA01751
Joint Trial Exhibit 47 - Exhibit 3 to Deposition of David Alessi – Notice of Delinquent Assessment (Lien)	IX	JA01752
Joint Trial Exhibit 48 - Exhibit 4 to Deposition of David Alessi – Notice of Delinquent Violation Lien	IX	JA01753- JA01754
Joint Trial Exhibit 49 - Exhibit 5 to Deposition of David Alessi – Notice of Default and Election to Sell Under Homeowners Association Lien	IX	JA01755
Joint Trial Exhibit 50 - Exhibit 6 to Deposition of David Alessi – Notice of Trustee's Sale	IX	JA01756
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Joint Trial Exhibit 52 - Exhibit 8 to Deposition of David Alessi – Third Notice of Trustee's Sale	IX	JA01758
Joint Trial Exhibit 53 - Exhibit 9 to Deposition of David Alessi – Request for Payoff by Miles Bauer	IX	JA01759- JA01760
Joint Trial Exhibit 54 - Exhibit 10 to Deposition of David Alessi – Response to Miles Bauer Payoff Request	X	JA01761- JA01767

DOCUMENT	VOL	BATES
Joint Trial Exhibit 55 - Exhibit 11 to Deposition of David Alessi – Letter by Miles Bauer	X	JA01768- JA01770
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Joint Trial Exhibit 57 - Exhibit 1 to Deposition of David Bembas – Notice of Taking Deposition of SFR Investments Pool 1, LLC	X	JA01773- JA01778
Joint Trial Exhibit 58 - Exhibit 2 to Deposition of David Bembas – Notice of Delinquent Assessment (Lien)	X	JA01779
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Joint Trial Exhibit 60 - Exhibit 4 to Deposition of David Bembas – Notice of Trustee’s Sale	X	JA01781
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Joint Trial Exhibit 62 - Exhibit 6 to Deposition of David Bembas – Notice of Trustee’s Sale	X	JA01783
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Joint Trial Exhibit 64 - Exhibit 8 to Deposition of David Bembas – Letter Dated 12-16-11	X	JA01786- JA01788
Joint Trial Exhibit 65 - Exhibit 9 to Deposition of David Bembas – Trustee’s Deed Upon Sale	X	JA01789- JA01790
Joint Trial Exhibit 66 - Antelope Homeowners Association’s Answers to Plaintiff U.S. Bank’s Interrogatories	X	JA01791- JA01809
Joint Trial Exhibit 67 - Antelope Homeowners Association’s Answers To Plaintiff U.S. Bank’s Requests for Admission	X	JA01810- JA01825
Joint Trial Exhibit 68 - Antelope Homeowners Association’s Answers To Plaintiff U.S. Bank’s Request for Production of Documents	X	JA01826- JA01845
Joint Trial Exhibit 69 - SFR Investments Pool 1, LLC'S Objections And Answers To Plaintiff, U.S. Bank’s Interrogatories	X	JA01846- JA01857

DOCUMENT	VOL	BATES
Joint Trial Exhibit 70 - SFR Investments Pool 1, LLC'S Objections And Answers To Plaintiff, U.S. Bank's Requests for Admissions	X	JA01858- JA01870
Joint Trial Exhibit 71 - SFR Investments Pool 1, LLC'S Objections And Answers To Plaintiff, U.S. Bank's Request for Production of Documents	X	JA01871- JA01882
Joint Trial Exhibit 72 - Email Re: URGENT WIRE REQUEST: Status Update re: 10- H1715 (1st) De Vera Relevance, Hearsay, Authenticity, and Foundation	X	JA01883- JA01888
Joint Trial Exhibit 73 - BANA's Written Policies and Procedures Re: Homeowners Association (HOA) Matters – Pre-Foreclosure Relevance, Hearsay, Authenticity, and Foundation	X	JA01889- JA01893
Joint Trial Exhibit 74 – Alessi & Koenig Fax Dated 7-11-12 from Ryan Kerbow to A. Bhame Re: 7868 Marbledoe Ct./HO #18842	X	JA01894- JA01895
Notice of Appeal	XIII	JA02341- JA02366
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Notice of Entry of Order	III	JA00426- JA00433
Notice of Entry of Order	X	JA01974- JA01983
Notice of Entry of Order Granting SFR's Counter-Motion to Strike and Granting in Part and Denying in Part SFR's Motion for Summary Judgment	III	JA00469- JA00474
Notice of Entry of Stipulation and Order	II	JA00267- JA00274
Notice of Entry of Stipulation and Order	X	JA01959- JA01966
Notice of Entry of Stipulation and Order Dismissing Henry E. Ivy and Freddie S. Ivy Without Prejudice	II	JA00361- JA00367

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Notice to Adverse Parties and to the Eighth Judicial District Court of Remand of Previously-Removed Case to this Court	II	JA00141- JA00262
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Order Denying The Antelope Homeowners' Association's Motion to Dismiss	III	JA00390- JA00393
Order Granting SFR's Counter-Motion to Strike and Granting in Part and Denying in Part SFR's Motion for Summary Judgment	III	JA00465- JA00468
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SFR Investments Pool 1, LLC's Answer to First Amended Complaint	II	JA00347- JA00356
SFR Investments Pool 1, LLC's Trial Brief Re Admissibility of Certain Proposed Exhibits	III	JA00489- JA00510
SFR Investments Pool 1, LLC's Trial Brief Re Statute of Limitations	III	JA00511- JA00522
Stipulation and Order to Amend Caption	X	JA01953- JA01958
Stipulation and Order Dismissing Henry E. Ivy and Freddie S. Ivy Without Prejudice	II	JA00357- JA00360
Stipulation and Order Dismissing Mortgage Electronic Registration Systems, Inc. Without Prejudice	II	JA00263- JA00266
Stipulation and Order for Dismissal Without Prejudice as to Claims Between Antelope Homeowners Association and U.S. Bank National Association	X	JA01967- JA01973
Stipulation and Order to Dismiss SFR Investments Pool 1, LLC's Slander of Title Claim Against U.S. Bank, National Association	II	JA00275- JA00277
Transcript of Proceedings	I	JA00064- JA00096
U.S. Bank's Bench Memorandum Regarding Authentication and Admissibility of Proposed Exhibits 21, 22, 23, 24 and 31	X	JA01900- JA01911
U.S. Bank's Bench Memorandum Regarding Business Record Exception	X	JA01944- JA01952
U.S. Bank's Bench Memorandum Regarding Pre-Foreclosure Satisfaction of the Superpriority Portion of the HOA's Lien	X	JA01932- JA01938
U.S. Bank's Bench Memorandum Regarding Standing to Maintain Its Claims in this Action and Standing to Enforce the Deed of Trust and Note	X	JA01919- JA01931
U.S. Bank's Bench Memorandum Regarding Statute of Limitations	X	JA01912- JA01918

DOCUMENT	VOL	BATES
U.S. Bank's Objections to SFR Investments Pool 1, LLC's Pre-Trial Disclosures	II	JA00368- JA00372
U.S. Bank's Reply to SFR Investments Pool 1, LLC's Counterclaim	I	JA00115- JA00125

VOLUME XIII

DATE	DOCUMENT	VOL	BATES
07/18/19	Notice of Appeal	XIII	JA02341- JA02366
07/19/19	Recorders Transcript of Bench Trial – Day 6	XIII	JA02367- JA02476
01/31/20	Docket (A-16-739867-C)	XIII	JA02477- JA02483
02/07/20	Recorders Transcript of Bench Trial – Day 1	XIII	JA02484- JA02575

DATED this 15th day of June, 2020.

WRIGHT, FINLAY & ZAK, LLP

/s/ Christina V. Miller, Esq.

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*Attorney for Appellant, U.S. Bank, National
Association As Trustee For Merrill Lynch
Mortgage Investors Trust, Mortgage Loan
Asset-Backed Certificates, Series 2005-A8*

CERTIFICATE OF SERVICE

I certify that I electronically filed on the 15th day of June, 2020, the foregoing **JOINT APPENDIX – VOLUME XIII** with the Clerk of the Court for the Nevada Supreme Court by using the CM/ECF system. I further certify that all parties of record to this appeal either are registered with the CM/ECF or have consented to electronic service.

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

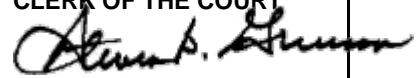
Service via electronic notification will be sent to the following:

Jacqueline Gilbert
Karen Hanks

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

/s/ Faith Harris

An Employee of WRIGHT, FINLAY & ZAK, LLP



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12 Merrill Lynch Mortgage Investors Trust, Mortgage Loan Asset-Backed Certificates, Series 2005-
13 A8

9 DISTRICT COURT
10 CLARK COUNTY, NEVADA

11 U.S. BANK, NATIONAL ASSOCIATION AS
12 TRUSTEE FOR MERRILL LYNCH
13 MORTGAGE INVESTORS TRUST,
14 MORTGAGE LOAN ASSET-BACKED
15 CERTIFICATES, SERIES 2005-A8,

16 Plaintiff,

17 vs.

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

20 Defendant.

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

23 Counter- Claimant,

24 vs.

25 U.S. BANK, NATIONAL ASSOCIATION AS
26 TRUSTEE FOR MERRILL LYNCH
27 MORTGAGE INVESTORS TRUST,
28 MORTGAGE LOAN ASSET-BACKED
CERTIFICATES, SERIES 2005-A8,

Counter- Defendant.

Case No.: A-16-739867-C

Dept. No.: XXXI

NOTICE OF APPEAL

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NOTICE OF APPEAL

Notice is hereby given than Plaintiff/Counter/Cross-Defendant, U.S. Bank, National Association as Trustee for Merrill Lynch Mortgage Investors Trust, Mortgage Loan Asset-Backed Certificates, Series 2005-A8 (“U.S. Bank”), by and through its attorneys of record, Matthew S. Carter, Esq. and Natalie C. Lehman, Esq., of the law firm of Wright, Finlay & Zak, LLP, hereby appeals to the Supreme Court of Nevada from the Findings of Fact and Conclusions of Law and Judgment entered on June 19, 2019, attached hereto as **Exhibit 1**, and all other orders made final thereby.

DATED this 18th day of July, 2019.

WRIGHT FINLAY & ZAK LLP

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*Attorneys for Plaintiff/Counter/Cross-Defendant,
U.S. Bank, National Association as Trustee for
Merrill Lynch Mortgage Investors Trust, Mortgage
Loan Asset-Backed Certificates, Series 2005-A8*

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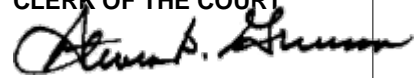
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Exhibit 1

Exhibit 1

Exhibit 1



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DISTRICT COURT

CLARK COUNTY, NEVADA

U.S. BANK, NATIONAL ASSOCIATION AS
TRUSTEE FOR MERRILL LYNCH
MORTGAGE INVESTORS TRUST,
MORTGAGE LOAN ASSET-BACKED
CERTIFICATES, SERIES 2005-A8,

Plaintiff,

vs.

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

Defendants.

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

Counter/Cross Claimant,

vs.

U.S. BANK, NATIONAL ASSOCIATION AS
TRUSTEE FOR MERRILL LYNCH
MORTGAGE INVESTORS TRUST,
MORTGAGE LOAN ASSET-BACKED
CERTIFICATES, SERIES 2005-A8,

Counter/Cross Defendants.

Case No. A-16-739867-C

Dept. No. XXXI

**NOTICE OF ENTRY OF FINDINGS OF
FACT AND CONCLUSIONS OF LAW
AND JUDGMENT**

KIM GILBERT EBRON
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1 PLEASE TAKE NOTICE that on June 18, 2019 the **FINDINGS OF FACT AND**
2 **CONCLUSIONS OF LAW AND JUDGMENT** was entered. A copy of said Order is attached
3 hereto.

4 DATED this 19th day of June, 2019.

5 **KIM GILBERT EBRON**

6 /s/ Diana S. Ebron

7 DIANA S. EBRON, ESQ.

8 Nevada Bar No. 10580

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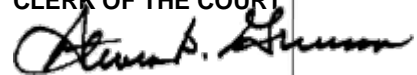
11 *Attorney for SFR Investments Pool 1, LLC*

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of June, 2019, pursuant to NRCP 5(b), I served via the Eighth Judicial District Court electronic filing system, the foregoing **NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT** to the following parties:

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/s/ Diane L. DeWalt
An Employee of KIM GILBERT EBRON



1 FFCL

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA
5

6 U.S. BANK, NATIONAL ASSOCIATION AS
7 TRUSTEE FOR MERRILL LYNCH
8 MORTGAGE INVESTORS TRUST,
9 MORTGAGE LOAN ASSET-BACKED
CERTIFICATES, SERIES 2005-A8,

10 Plaintiff,

11 vs.

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

13 Defendants.

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

16 Counter/Cross Claimant,

17 vs.

18 U.S. BANK, NATIONAL ASSOCIATION AS
19 TRUSTEE FOR MERRILL LYNCH
20 MORTGAGE INVESTORS TRUST,
MORTGAGE LOAN ASSET-BACKED
CERTIFICATES, SERIES 2005-A8,

21 Counter/Cross Defendants.

Case No. A-16-739867-C

Dept. No. XXXI

**FINDINGS OF FACT AND CONCLUSIONS
OF LAW AND JUDGMENT**

22 This matter came before the Court for trial on April 16, 17, 18, 23, 24,
23 2019, and May 20, 2019. Karen L. Hanks, Esq. and Jason G. Martinez, Esq.
24 appeared on behalf of SFR Investments Pool 1, LLC ("SFR"). Natalie Lehman,
25 Esq. and Dana Nitz, Esq. appeared on behalf of U.S. Bank National Association
26 as Trustee for Merrill Lynch Mortgage Investors Trust, Mortgage Loan Asset-
27 Backed Certificates, Series 2005-A8 ("U.S. Bank"). Having reviewed and

1 considered the facts, testimony of witnesses and arguments of counsel, for the
2 reasons stated on the record, and good cause appearing, the Court makes the
3 following Findings of Fact and Conclusions of Law:¹

4 **I. FINDINGS OF FACT**

5 Some of the following facts were stipulated to by the parties by way of
6 their Amended Joint Pre-Trial Memorandum. Where such facts were stipulated,
7 the Court takes such facts and unrefuted and undisputed:

8 1. In 1991, Nevada adopted the Uniform Common Interest Ownership
9 Act as NRS 116, including NRS 116.3116(2).

10 2. On June 23, 2004, the Antelope Homeowners Association
11 ("Association") perfected and gave notice of its lien by recording its Declaration of
12 Covenants, Conditions, and Restrictions ("CC&Rs") in the Official Records of the
13 Clark County Recorder as Instrument No. 200406230002013. (Ex. 1).²
14 Thereafter the Association recorded a Second Amendment to CC&Rs as
15 Instrument No. 200609140003739. (Ex. 2.)

16 3. On May 23, 2005, a Grant, Bargain Sale Deed transferring the real
17 property commonly known as 7868 Marbledoe Street, Las Vegas, Nevada
18 89149; Parcel No. 125-18-112-069 ("Property") Henry and Freddie Ivy ("Ivies")
19 was recorded in the Official Records of the Clark County Recorder as Instrument
20 No. 200610030004304. (Ex. 3.)

21 4. On May 23, 2005, a Deed of Trust identifying Mortgage Electronic
22 Registrations Systems, Inc. ("MERS") as nominee beneficiary for the originating
23

24
25 ¹ Pursuant to the agreement of the parties, the proposed Findings were filed and submitted by
26 June 4, 2019. Any Findings of Fact that are more appropriately Conclusions of Law shall be so
27 deemed. Any Conclusions of Law that are more appropriately Findings of Fact shall be so
28 deemed.

² The Parties stipulated to this fact.

1 lender, Universal American Mortgage Company, LLC ("Universal"), as Instrument
2 No. 200505230004228 ("Deed of Trust"). (Ex. 5.)³

3 5. On November 12, 2009, the Association, through its agent, Alessi &
4 Koenig, LLC ("Alessi"), recorded a Notice of Delinquent Assessment Lien
5 ("NODAL") in the Official Records of the Clark County Recorder as Instrument
6 No. 200911120004474. (Ex. 9.)⁴

7 6. On February 17, 2011, Alessi recorded a Notice of Default and
8 Election to Sell Under Homeowners Association Lien ("NOD") in the Official
9 Records of the Clark County Recorder as Instrument No. 201102170001289.
10 (Ex. 11.)⁵

11 7. On April 11, 2011, Alessi recorded a Notice of Sale ("NOS #1") in
12 the Official Records of the Clark County Recorder as Instrument No.
13 201108110003087. (Ex. 12.)⁶

14 8. On April 16, 2012, Alessi recorded a Notice of Sale ("NOS #2") in
15 the Official Records of the Clark County Recorder as Instrument No.
16 201204160000922. (Ex. 13.)⁷

17 9. On July 2, 2012, Alessi recorded a Notice of Sale ("NOS #3") in the
18 Official Records of the Clark County Recorder as Instrument No.
19 201207020001432. (Ex. 14.)⁸

20
21
22 ³ The parties stipulated to this fact.

23 ⁴ The parties stipulated to this fact.

24 ⁵ The parties stipulated to this fact.

25 ⁶ The parties stipulated to this fact.

26 ⁷ The parties stipulated to this fact.

27 ⁸ The parties stipulated to this fact.

1 10. Alessi, on behalf of the Association, mailed the NOD, NOS #1,
2 NOS#2 and NOS#3 to U.S. Bank's predecessor in interest, Universal and/or its
3 agent(s).⁹

4 11. Universal, the then recorded beneficiary of the Deed of Trust,
5 and/or its agent(s), received the NOD, NOS #1, NOS#2 and NOS#3.¹⁰

6 12. The Association foreclosure sale occurred on July 25, 2012
7 ("Sale").¹¹

8 13. On August 3, 2012, a Trustee's Deed Upon Sale ("Trustee's Deed")
9 was recorded in the Official Records of the Clark County Recorder, conveying
10 the Property to SFR Investments Pool 1, LLC ("SFR"). (Ex. 15.)¹²

11 14. SFR paid Alessi \$5,950.00 in exchange for the Trustee's Deed.

12 15. At the time of the Association Sale, Universal was the owner of the
13 Ivy Note and beneficiary of record of the Deed of Trust.¹³

14 16. On June 1, 2018, a Corporate Assignment of Deed of Trust was
15 recorded in which all beneficial interest in the Deed of Trust was purportedly
16 assigned to GreenPoint Mortgage Funding, Inc. (Ex. 34.)¹⁴

17 17. On July 2, 2018, a Corporate Assignment of Deed of Trust was
18 recorded in which all beneficial interest in the Deed of Trust was purportedly
19 assigned to U.S. Bank National Association, as trustee, successor in interest to
20 Wachovia Bank, National Association, as trustee for Merrill Lynch Mortgage
21

22 ⁹ The parties stipulated to this fact.

23 ¹⁰ The parties stipulated to this fact.

24 ¹¹ The parties stipulated to this fact.

25 ¹² The parties stipulated to this fact.

26 ¹³ The parties stipulated to this fact.

27 ¹⁴ The parties stipulated to this fact.

1 Investors Trust, Mortgage Loan Asset-Backed Certificates, Series 2005-A8 ("U.S.
2 Bank"). (Ex. 42.)¹⁵

3 18. On July 12, 2016, U.S. Bank filed a complaint against SFR.
4 Nowhere in the complaint does U.S. Bank plead tender or any facts related to
5 tender.

6 19. On May 8, 2018, U.S. Bank filed an amended complaint. This is the
7 first pleading where U.S. Bank pleads tender.
8

9 **II. CONCLUSIONS OF LAW**

10 **A. Evidentiary Rulings Re Witnesses Made During Trial**

11 1. U.S. Bank attempted to call a witness from Universal American
12 Mortgage Company, LLC. The Court granted SFR's objection to the same for
13 the following reasons: U.S. Bank never identified a witness by name for Universal
14 in violation of NRCP 16.1. There was no good cause presented for the failure to
15 name the witness. SFR raised timely objection(s). SFR also established that it
16 would be prejudiced if the Court allowed the unnamed witness to testify as they
17 had no opportunity to depose or have knowledge of what the witness would
18 state. After a full opportunity for oral argument by the parties the Court found the
19 Bank's conduct to be a per se violation of the Rule and under Rule 16.1(e)(3)
20 combined with the prejudice meant that the witness was precluded from
21 testifying at trial.

22 2. U.S. Bank attempted to call a witness from the Nevada Real Estate
23 Division ("NRED") by the name of Teralyn Thompson. The Court granted SFR's
24 objection to the same after a full hearing on the merits. The Court's reasoning
25

26
27 ¹⁵ The parties stipulated to this fact.
28

1 included *inter alia*: Neither NRED, nor Ms. Thompson were disclosed under
2 NRCP 16.1 as required. There was no good cause cited for the failure to name
3 her. Likewise, the documents for which the witness was expected to testify were
4 never disclosed as required by Rule 16.1. The first time these documents were
5 asserted to have been mentioned was the day before trial, via email to counsel
6 for SFR. The Court finds this to be a per se violation. Both the witness and the
7 documents were readily available during the discovery period, and the Bank was
8 aware of NRED's involvement by virtue of the NRED mediation; notice of
9 completion of which was filed on January 9, 2018. The Court further found that
10 the Bank had not shown good cause why the Bank failed to disclose the witness
11 and documents or sought relief from the Court to extend discovery. SFR raised
12 timely objection(s). The Court further found that SFR was prejudiced by the
13 failure to disclose as it could not depose the witness; did not prepare to have the
14 documents taken into account in the case; and thus, it would not be proper to
15 allow the witness to testify or have the documents introduced for the first time at
16 trial.

17 3. U.S. Bank attempted to call Harrison Whitaker, an employee of
18 Ocwen Financial Corporation, as both a witness on behalf of U.S. Bank and as
19 custodian of records. After a full hearing on the merits, the Court granted SFR's
20 objection to the same for the following reasons: Neither Mr. Whittaker nor
21 Ocwen were disclosed as a witness in this case as required by NRCP 16.1 and
22 the Court finds this is a per se violation. SFR raised timely objection(s). The
23 Bank knew at the time it was hired by Ocwen, that Ocwen was acting as the loan
24 servicer; and, therefore, if they intended to call Ocwen as a witness at trial, the
25 Bank could have disclosed an Ocwen witness. The Court acknowledges the
26 Bank produced Katherine Ortwerth as its 30(b)(6) witness during discovery and
27 took the fact that she left Ocwen into account. Given she left Ocwen's employ in
28

1 or around February 2019, and the trial was several months later, the Court found
2 that the Bank never named another witness for Ocwen or disclosed Ocwen
3 overall as a potential witness despite having time to do so. The Bank also chose
4 not to file a pre-trial motion to handle this issue despite knowing that SFR had
5 timely objected. The Court also found that SFR established it would be
6 prejudiced and thus in light of the totality of the circumstances, the Court found it
7 proper to sustain SFR's objection.

8 **B. Rule 52(c) Motions**

9 4. At the close of U.S. Bank's case in chief, SFR brought several Rule
10 52(c) motions based on the issues of law identified by U.S. Bank in the joint pre-
11 trial memorandum.

12 5. As to the Motion Re: Issue #5, whether the HOA's foreclosure sale
13 was wrongful and/or complied with the provisions of NRS Chapter 116, to the
14 extent tender is alleged, the Court denied the Motion without prejudice.

15 6. As to the Motion re: Issue #6, whether the HOA's foreclosure sale
16 should be set aside, and within that inquiry: (a) whether the price paid at the
17 foreclosure sale was inadequate; and (b) whether there were elements of fraud,
18 unfairness, and/or oppression in the HOA foreclosure process and resulting sale,
19 the Court granted this Motion. The only evidence U.S. Bank proffered for value
20 was the Assessor's taxable value for 2008 and 2010. There being no value from
21 2012 for the Court to compare to the price paid by SFR at the 2012 sale, the
22 Court cannot determine whether the price paid was grossly inadequate. But
23 even if the Court could compare the price paid to the proffered values, price
24 alone is not enough. There must be additional evidence of fraud, unfairness, and
25 oppression that accounted for or brought about the price paid, and the Court
26 finds no such evidence. See *Nationstar Mortgage, LLC v. Saticoy Bay, LLC*
27 *Series 2227 Shadow Canyon*, 405 P.3d 641, 647 citing *Golden v. Tomiyasu*, 79

1 Nev. 503, 514, 387 P.2d 989, 995 (1963) (internal citations omitted) (emphasis
2 added).

3 7. As to the Motion Re: Issue #7, whether the mortgage protection
4 clause(s) in the CC&Rs was applicable to subordinate the HOA assessment lien
5 to the Deed of Trust or preclude extinguishment of the Deed of Trust by a
6 foreclosure sale under NRS 116.31162 through NRS 116.31168, the Court
7 granted this Motion. No CC&Rs were admitted into evidence, so the Court
8 cannot determine whether a mortgage protection clause even existed in the
9 Association's CC&Rs.

10 8. As to the Motion Re: Issue #8, whether the recitals in the
11 Foreclosure Deed are conclusive proof of any matter contained therein, the Court
12 granted this Motion in part. The Motion is granted with respect to those recitals
13 contained in the Foreclosure Deed. As to the equity portion, the Motion is denied
14 without prejudice.

15 9. As to the Motion Re: Issue #9, whether the HOA lien and Notices
16 of Default and Sale included items and amounts not permitted by the CC&Rs and
17 NRS Chapter 116, the Court grants the Motion in part. It is granted as to the
18 CC&Rs as these were never admitted, so there is no proof the notices included
19 amounts not permitted by the CC&Rs. The Motion is also granted as to NRS
20 116. There is no evidence the Notices included amounts not permitted by NRS
21 116. The Court denies, without prejudice, as to the superpriority amount.

22 10. As to the Motion Re: Issue #10, whether SFR was a bona fide
23 purchaser of the Property as a matter of Nevada law, the Court denied this
24 Motion without prejudice.

1 **C. Subject Matter Jurisdiction**

2 11. At the time U.S. Bank filed its Complaint (July 12, 2016), U.S. Bank
3 was not the real party in interest and lacked standing; and therefore, under
4 NRCP 12(h)(3), dismissal of U.S. Bank's action is mandated.

5 12. Under NRCP 17(a), "[a]n action must be prosecuted in the name of
6 the real party in interest."

7 13. "A real party in interest is one who possesses the right to enforce
8 the claim and has a significant interest in the litigation." *Arguello v. Sunset*
9 *Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011) (internal quotations
10 omitted).

11 14. In short, the determination is whether the plaintiff is the correct
12 party to bring the suit. See *Elley v. Stephens*, 104 Nev. 413, 416-17, 760 P.2d
13 768, 771 (1988) ("appellants are asserting someone else's potential legal
14 problem; they are not the proper party to assert [this claim]"); see also *Hammes*
15 *v. Brumley*, 659 N.E.2d 1021, 1030 (Ind. 1995) (citing *Bowen v. Metro Bd. Of*
16 *Zoning Appeals*, 317 N.E.2d 193 (Ind. App. 1974)) (a real party in interest is the
17 person who is the true owner of the right sought to be enforced).

18 15. Here, the parties stipulated that at the time of the Association sale,
19 Universal was owner of the Ivy Note and beneficiary of record of the Deed of
20 Trust.

21 16. Also, at the time U.S. Bank filed its Complaint (July 12, 2016),
22 Universal was still the recorded beneficiary of the Deed of Trust. (Ex. 5.) This is
23 another stipulated fact by the parties.

24 17. As such, Universal was the real party in interest on July 12, 2016,
25 not U.S. Bank.

26 18. "The inquiry into whether a party is a real party in interest overlaps
27
28

1 with the question of standing.” *Arguello*, 252 P.3d at 208. The question of
2 standing “focuses on the party seeking adjudication rather than on the issues
3 sought to be adjudicated.” *Szilagyi v. Testa*, 99 Nev. 834, 838, 673 P.2d 495, 498
4 (1983). In order to have standing, the party must also have suffered a legally
5 redressable harm and the suit must be “ripe” and not “moot” (at least as to the
6 particular plaintiff) at the time of the lawsuit. See *Schwartz v. Lopez*, 382 P.3d
7 886, 894 (Nev. 2016) (to establish standing, a party must show the occurrence of
8 an injury that is personal to him and not merely a generalized grievance.)
9 (emphasis added.)

10 19. Whether a party has standing is a question that goes to the court's
11 jurisdiction. *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 964-65, 194
12 P.3d 96, 105 (2008); *Vaile v. Eighth Jud. Dist. Ct.*, 118 Nev. 262, 276, 44 P.3d
13 506, 515–16 (2002).

14 20. A court lacks the power to grant relief when (1) an indispensable
15 party is absent; or (2) the dispute is moot or not yet ripe, or a party does not have
16 the legal right to seek or receive the requested relief. See *State Indus. Ins. Sys.*
17 *v. Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273, 1274 (1984) (“There can be no
18 dispute that lack of subject matter jurisdiction renders a judgment void”). See
19 generally John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke
20 L.J. 1219, 1230 (1993); Antonin Scalia, *The Doctrine of Standing as an Essential*
21 *Element of the Separation of Powers*, 17 Suffolk U.L.Rev. 881, 881 (1983).

22 21. “Nevada has a long history of requiring an actual justiciable
23 controversy as a predicate to judicial relief” i.e. standing. *In re Amerco Derivative*
24 *Litig.*, 127 Nev. 196, 213, 252 P.3d 681, 694 (2011) (internal quotations omitted)
25 (citing *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986)).

26 22. Further, “a justiciable controversy [is] a preliminary hurdle to an
27 award of declaratory relief.” *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444
28

1 citing *Southern Pacific Co. v. Dickerson*, 80 Nev. 572, 576, 397 P.3d 187, 190
2 (1964)). What constitutes a justiciable controversy is defined in *Kress v. Corey*,
3 65 Nev. 1, 189 P.2d 352 (1948) as:

4
5 (1) there must exist a justiciable controversy; that is to say, a
6 controversy in which a claim of right is asserted against one
7 who has an interest in contesting it; (2) the controversy must be
8 between persons whose interests are adverse; (3) the party
9 seeking declaratory relief must have a legal interest in the
10 controversy, that is to say, a legally protectable interest; and (4)
11 the issue involved in the controversy must be ripe for judicial
12 determination.

13
14 23. Here, U.S. Bank falls short of these requirements. First, U.S. Bank
15 had no claim of right at the time of filing the Complaint because it did not become
16 the recorded beneficiary until July 2, 2018, nearly two years after the filing of the
17 Complaint. Thus, U.S. Bank had no interest in the Deed of Trust at the time the
18 Complaint filed. Second, in order for U.S. Bank's interest to be adverse to
19 SFR's, U.S. Bank would actually have to have an interest in the first place. But
20 at the time of filing the Complaint, U.S. Bank had no interest in the Deed of Trust.
21 Third, because U.S. Bank had no interest at the time it sued SFR, it follows that
22 U.S. Bank did not have a legally protectable interest at the time of filing. Finally,
23 because U.S. Bank had no interest at the time it sued SFR, all claims U.S. Bank
24 asserted against SFR were not ripe for judicial determination.

25
26 24. Based on the above, U.S. Bank has failed to show a justiciable
27 controversy and failed to show any injury. As such, U.S. Bank lacked standing at
28 the time the claims were filed against SFR.

29
30 25. Nor can the later assignment to U.S Bank in July 2018, while this
31 case was pending, cure the lack of subject matter jurisdiction at the outset. This

1 is so because subject matter jurisdiction “cannot be conferred by the parties.”
2 *Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990).

3 26. Under NRCP 12(h)(3), “[i]f the court determines at any time that it
4 lacks subject-matter jurisdiction, the court must dismiss the action.”

5 27. Because the Court finds that U.S. Bank was neither the real party in
6 interest, nor did it have standing at the time it filed its Complaint, the Court finds it
7 lacked subject matter jurisdiction from the outset. As such, under NRCP
8 12(h)(3), this Court dismisses U.S. Bank’s action.

9 **D. Statute of Limitations**

10 28. U.S. Bank alleges “quiet title” against SFR. In Nevada, “quiet title”
11 is just a slang term to identify any action where one party claims an interest in
12 real property adverse to another. Thus, the title of U.S. Bank’s claim does
13 nothing to assist the Court in determining which statute of limitations applies. In
14 order to determine this, the Court must look at the nature of the grievance to
15 determine the character of the action, rather than the labels in the pleadings.
16 *Torrealba v. Kesmetis*, 124 Nev. 95, 178 P.3d 716, 723 (2008).

17 29. Here, when the nature of U.S. Bank’s grievance is analyzed,
18 tender, i.e. the Association lacked authority to foreclose because the default of
19 the superpriority portion was cured, it becomes readily apparent that a three-year
20 statute of limitations applies under NRS 11.190(3)(a).

21 30. As the Nevada Supreme Court noted in *Torrealba*, “[t]he phrase
22 ‘liability created by statute’ means a liability which would not exist but for the
23 statute.” *Torreabla*, 178 P.3d at 722. The Court further noted, “[w]here a duty
24 exists only by virtue of a statute ... the obligation is one created by statute.”” *Id.*
25 quoting *Gonzalez v. Pacific Fruit Express Co.*, 99 F.Supp. 1012, 1015
26 (D.Nev.1951) (quoting *Abram v. San Joaquin Cotton Oil Co.*, 46 F.Supp. 969,
27 976 (D.Cal.1942)) (internal citations and quotations omitted).

1 31. Here, the “character” of U.S. Bank’s tender claim is simple: the
2 Association had a duty to accept BANA’s tender, and it unjustifiably refused it.
3 U.S. Bank even pled as much: “[t]he HOA trustee refused to accept [BANA’s]
4 tender.” By virtue of this “rejection” U.S. Bank claims the “liability” is a void sale
5 resulting in SFR taking subject to the deed of trust. This duty to accept tender
6 arises implicitly from NRS 116 because as the Nevada Supreme Court noted, it
7 is the statute, i.e. NRS 116.3116 that governs liens against units for HOA
8 assessments and details the portion of the lien that has superpriority status.”
9 *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 427 P.3d 113, 116 (Nev.
10 2018) (“*SFR III*”).

11 32. In other words, but for the statute, there would be no superpriority
12 portion and, in turn, no duty on the part of the Association to accept payment of
13 this portion from a bank, like BANA. Moreover, but for the Association’s
14 rejection, there would be no liability on the part of SFR by way of taking, subject
15 to the Deed of Trust. All told, the Association’s lien is created by statute; the
16 superpriority mechanism of that lien is created by statute; the superpriority
17 portion is fixed by statute; and the Association’s implicit duty to accept payment
18 of the superpriority portion is created by statute. See *Torrealba*, 178 P.3d at 723.

19 33. Based on this, U.S. Bank’s tender claim is subject to the three-year
20 statute of limitations prescribed by NRS 11.190(3)(a). Here, the sale occurred on
21 July 25, 2012. Thus, the date by which U.S. Bank had to file its tender claim was
22 July 25, 2015. Having not alleged its tender claim until May 5, 2018, U.S. Bank’s
23 tender claim is time-barred.

24 34. The Court rejects U.S. Bank’s argument that a five-year statute of
25 limitations under NRS 11.070 and NRS 11.080 applies. Neither of these statutes
26 are time-bar statutes; they are standing statutes. Regardless, neither statute
27 could ever apply to U.S. Bank as it never possessed the subject property, which
28

1 both statutes require. But even if a five-year statute of limitations did apply, U.S.
2 Bank would still be time-barred as it did not plead tender until nearly six years
3 after the sale.

4 35. The Court rejects U.S. Bank's argument that its Amended
5 Complaint (filed May 5, 2018) relates-back to its original Complaint (filed July 12,
6 2016). For one, because a three-year statute of limitations applies, relation-back
7 does not save the bank as the original Complaint is time-barred. But even if the
8 Court applied a longer statute of limitations, relation-back would not apply.

9 36. NRCP 15(c) states "[w]henver the claim or defense asserted in the
10 amended pleading arose out of the conduct, transaction, or occurrence set forth
11 or attempted to be set forth in the original pleading, the amendment relates back
12 to the date of the original pleading." However, "where the original pleading does
13 not give a defendant 'fair notice of what the plaintiff's [amended] claim is and the
14 grounds upon which it rests,' the purpose of the statute of limitations has not
15 been satisfied and it is 'not an original pleading that [can] be rehabilitated by
16 invoking Rule 15(c).'" *Baldwin County Welcome Center v. Brown*, 466 U.S. 147,
17 149 n. 3, 104 S.Ct. 1723 (internal marks and citation omitted). *See also, Glover*
18 *v. F.D.I.C.*, 698 F.3d 139, 146 (3d Cir. 2012).

19 37. In other words, the analysis under NRCP 15(c) is "whether the
20 original complaint adequately notified the defendants of the basis for liability the
21 plaintiffs would later advance in the amended complaint." *Meijer, Inc. v. Biovail*
22 *Corp.*, 533 F.3d 857, 866 (D.C. Cir. 2008) (emphasis added). Similarly, Nevada
23 law will not allow a new claim based upon a new theory of liability asserted in an
24 amended pleading to relate-back under NRCP 15(c) after the statute of
25 limitations has run. *Nelson v. City of Las Vegas*, 99 Nev. 548, 556–57, 665 P.2d
26 1141, 1146 (1983).

1 38. Here, U.S. Bank's original complaint, filed on July 12, 2016, never
2 pled tender or any allegations related to tender. It made no allegations
3 whatsoever that the super-priority portion was cured. Simply put, anyone reading
4 the original Complaint would have no idea U.S. Bank would later claim it
5 tendered the superpriority portion of the lien. Compare this to U.S. Bank's
6 Amended Complaint, U.S. Bank completely changed the basis for which it was
7 challenging the sale i.e. tender. Because of this there is no relation-back. See
8 *Nutton v. Sunset Station, Inc.*, 357 P.3d 966 (Nev. 2015). This provides an
9 independent basis for U. S. Bank's claims to fail.

10 **E. U.S. Bank Failed to Prove a Deliver of a Valid Tender**

11 39. In Nevada, "[v]alid tender requires payment in full." *SFR III*, 427
12 P.3d 113 at 117.

13 40. Under NRS 116.31162(b), the superpriority portion of the
14 Association's lien is comprised of (1) nine-months of common assessments; and
15 (2) charges incurred for nuisance-abatement and maintenance under NRS
16 116.310312.

17 41. In Nevada, "[t]he burden of demonstrating that the delinquency was
18 cured presale, rendering the sale void, [is] on the party challenging the
19 foreclosure..." *Resources Group, LLC v. Nevada Association Services, Inc.*, 437
20 P.3d 154, 156 (Nev. 2019).

21 42. Thus, under Nevada law U.S. Bank bears the burden of proving
22 what the superpriority amount was at the time of the sale, and that it delivered a
23 full payment of this amount prior to the sale.

24 43. At trial, U.S. Bank offered a letter with a check written from Miles
25 Bauer's Trust Account in the amount of \$405.00, dated December 16, 2011, (Ex.
26 24), but there was no evidence the check was in fact delivered to Alessi. Mr.
27 Jung only testified about general practices of the firm in terms of delivering
28

1 similar checks like the one at Ex. 24, but had no personal knowledge about Ex.
2 24; and therefore, offered no specific testimony about Ex. 24. (Testimony of R.
3 Jung, Day 1, at 6:5-15; 25:16-20; 25:24-25-26:1-4.)

4 45. Mr. Jung was asked if he recalled sending a tender check in this
5 case, and his answer was, "[i]ndependently, I don't." (*Id.* at 26:17-19.)

6 44. U.S. Bank offered no run slip or testimony from any runner that Ex.
7 24 was in fact delivered to Alessi prior to the sale. This is compelling to the Court
8 in light of Mr. Jung's testimony that the practice of Miles Bauer was to deliver
9 said letters via runner. (*Id.* at 26:6-8.) This also comports with Mr. Alessi's
10 testimony. (Testimony of D. Alessi, Day 3, at 86:16-23.)

11 55. U.S. Bank offered no receipt of copy to show delivery. This is
12 compelling to the Court in light of Mr. Alessi's testimony that delivery of said
13 letters were accompanied by an ROC that Alessi signed when it accepted the
14 letter. (*Id.* at 86:1-18.)

15 56. Further, Mr. Alessi testified that it was the practice of Alessi to
16 maintain a copy of letters like Ex. 24 in the file and/or notate its status report of
17 receipt of such letter. (*Id.* at 85:7-10; 14-19; 87:2-7.) The letter was absent from
18 Alessi's file and the status report does not notate receipt of Ex. 24. (*Id.* at 84:16-
19 19; *see also*, Ex. 30.)

20 57. NRS 51.145 provides that "[e]vidence that a matter is not included
21 in the records in any form, of a regularly conducted activity, can be used to prove
22 the nonoccurrence or nonexistence of the matter, if the matter was of a kind of
23 which was regularly made and preserved."

24 58. What is included in the status report, in addition to what is not, also
25 convinces the Court that Ex. 24 was not delivered. Specifically, on June 8, 2012,
26 and July 3, 2012, nearly a year after Ex. 24 was dated, Alessi received two
27 payoff requests from Miles Bauer. Had Miles Bauer delivered Ex. 24, these
28

1 payoff requests make little sense. (Ex. 30 at 616-617.) Additionally, Ocwen, the
2 servicer of the loan, inquired of Alessi about excess proceeds on September 24,
3 2014. (*Id.*) Had the Bank believed it tendered the superpriority amount, its
4 servicer would not have sought out excess proceeds as these monies are only
5 available to junior, extinguished lienholders. See NRS 116.31164.

6 59. All told, U.S. Bank failed to prove by a preponderance of the
7 evidence that Ex. 24 was delivered. But even more damaging to U.S. Bank's
8 claim is it never proved the superpriority amount. At trial, no ledgers were
9 admitted into evidence that could prove this amount. Likewise, the Court strikes
10 Mr. Alessi's testimony about the amount of the monthly assessments in 2009 as
11 this testimony constituted inadmissible hearsay to which SFR timely objected.

12 60. Having failed to prove the superpriority amount, even if this Court
13 could find Ex. 24 was delivered prior to the sale (which it cannot), the amount is
14 meaningless as the Court cannot determine from the evidence whether it was a
15 payment in full.

16 61. Having failed to prove its tender claim, the Court concludes the sale
17 extinguished the Deed of Trust.

18
19 **ORDER**

20 1. IT IS HEREBY ORDERED, ADJUDGED, AND DECREED U.S.
21 Bank's action against SFR is DISMISSED on the basis the Court lacked subject
22 matter jurisdiction at the time U.S. Bank filed its action.

23 2. IT IS HEREBY ORDERED, ADJUDGED AND DECREED U.S.
24 Bank's claim against SFR, which is grounded in tender, is time-barred.

25 3. IT IS HEREBY ORDERED, ADJUDGED, AND DECREED the
26 Deed of Trust recorded against real property located at 7868 Marbledoe Street,
27 Las Vegas, Nevada 89149; Parcel No. 125-18-112-069, recorded in the Official
28

1 Records of the Clark County Recorder as Instrument No. 200505230004228,
2 was extinguished by the July 25, 2012 Association sale.

3 2. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED U.S.
4 Bank its predecessors in interest and successors and assigns, principals, or
5 anyone else claiming an interest in the Deed of Trust, have no further right, title
6 or interest in real property located at 7868 Marbledoe Street, Las Vegas, Nevada
7 89149; Parcel No. 125-18-112-069 and are hereby permanently enjoined from
8 taking any further action to enforce the now extinguished Deed of Trust, including
9 but not limited to, clouding title, initiating or continuing to initiate foreclosure
10 proceedings, or taking any other actions to sell or transfer the Property.

11 3. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED title to
12 real property located at 7868 Marbledoe Street, Las Vegas, Nevada 89149;
13 Parcel No. 125-18-112-069 is hereby quieted in favor of SFR.

14 4. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED the lis
15 pendens recorded in the Official Records of the Clark County Recorder as
16 Instrument No. 20160713-0002695 is expunged.

17 **IT IS SO ORDERED.**

18 DATED this 14th day of June, 2019.

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22 **HON. JOANNA S. KISHNER**
23 **DISTRICT COURT JUDGE**
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CERTIFICATE OF SERVICE

I hereby certify that on or about the date filed, a copy of this Order was served via Electronic Service to all counsel/registered parties, pursuant to the Nevada Electronic Filing Rules, and/or served via in one or more of the following manners: fax, U.S. mail, or a copy of this Order was placed in the attorney's file located at the Regional Justice Center:

DANA J. NITZ, ESQ.
NATALIE C. LEHMAN, ESQ.
WRIGHT, FINLAY & ZAK, LLP.

KAREN HANKS, ESQ.
JASON G. MARTINEZ, ESQ.
KIM GILBERT EBRON



TRACY L. CORDOBA-WHEELER
Judicial Executive Assistant



1 **RTRAN**

2
3
4
5 **DISTRICT COURT**
6 **CLARK COUNTY, NEVADA**

7
8 **US BANK, NATIONAL**
9 **ASSOCIATION AS TRUSTEE**
10 **FOR MERRILL LYNCH**
11 **MORTGAGE INVESTORS**
12 **TRUST, MORTGAGE LOAN**
13 **ASSET-BACKED**
14 **CERTIFICATES, SERIES 2005-**
15 **A8,**

16 **Plaintiff,**

17 **vs.**

18 **SFR INVESTMENTS POOL 1,**
19 **LLC, a Nevada limited liability**
20 **company,**

21 **Defendant.**

22 **SFR INVESTMENTS POOL 1,**
23 **LLC, a Nevada limited liability**
24 **company,**

25 **Counter/Cross-Claimant,**

vs.

US BANK, NATIONAL
ASSOCIATION AS TRUSTEE
FOR MERRILL LYNCH
MORTGAGE INVESTORS
TRUST, MORTGAGE LOAN
ASSET-BACKED
CERTIFICATES, SERIES 2005-
A8,

Counter/Cross-Defendant.

CASE#: A-16-739867-C

DEPT. XXXI

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BEFORE THE HONORABLE JOANNA S. KISHNER, DISTRICT COURT
JUDGE

MONDAY, MAY 20, 2019

RECORDER'S TRANSCRIPT OF HEARING
BENCH TRIAL - DAY 6

APPEARANCES:

For the Plaintiff:	DANA J. NITZ, ESQ.
For the Defendant:	KAREN L. HANKS, ESQ. JASON G. MARTINEZ, ESQ.

RECORDED BY: SANDRA HARRELL, COURT RECORDER

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1 Las Vegas, Nevada, Monday, May 20, 2019

2
3 [Case called at 9:57 a.m.]

4 THE COURT: I'm just going to call the case and then you all
5 can tell me when you're ready to commence with your closings. It's case
6 739867, U.S. Bank National Association as Trustee for Merrill Lynch
7 Mortgage Investors Trust, Mortgage Loan Asset-Backed Certificate Series
8 2005-A8, Plaintiff versus SFR Investment Pool 1, LLC.

9 Now I'm still showing that you all have DOEs, but those should
10 been gone before the trial, so I'm not going to read the DOEs. SFR
11 Investment Pool 1, Counter Cross-claimant versus U.S. Bank National
12 Association as Trustee for Merrill Lynch Mortgage Investors Trust
13 Mortgage Loan Asset-Backed Certificate Series 2005-A8.

14 Now the caption of the most recent document I have still shows
15 MERS on it, for Universal American Mortgage Company.

16 MS. HANKS: Oh, that'd be my bad.

17 THE COURT: And it still shows Henry Ivy. So shouldn't that --

18 MS. HANKS: Is that based on my proposed findings -- my
19 amended proposed findings of fact?

20 THE COURT: That is.

21 MS. HANKS: That was -- that's totally my mistake, Your Honor.
22 I can resubmit it. That's totally my --

23 THE COURT: So shouldn't it just be the U.S. Bank --

24 MS. HANKS: Yes.

25 THE COURT: -- as trustee for Merrill Lynch and SFR

1 Investment Pool 1 --

2 MS. HANKS: Yes.

3 THE COURT: -- LLCs only to parties? Is that correct by both
4 Plaintiffs --

5 MS. HANKS: Yes, that's --

6 THE COURT: -- Counter-defendants,
7 Defendants/Counter/Cross-claimants?

8 MS. HANKS: Yes, that was just my mistake.

9 THE COURT: Is that correct from --

10 MR. NITZ: The caption should -- I didn't hear all of your
11 question, but the question should just read U.S. Bank, N.A. for the big
12 long trust name versus SFR and then the counterclaim SFR versus U.S.
13 Bank as Trustee.

14 THE COURT: I do appreciate it. So you all are in agreement?
15 I'm just --

16 MS. HANKS: Yes, correct now.

17 THE COURT: Since I saw a new caption pop up, I was just
18 making sure. Okay, so the DOES rows, MERS Universal American,
19 Henry Ivy, Freddie Ivys are all out.

20 MS. HANKS: Yeah.

21 THE COURT: Correct?

22 MS. HANKS: Yes.

23 MR. NITZ: Yes.

24 THE COURT: I do appreciate it. Thank you so much. So just
25 let us know. Now the question I'm going to ask before you all get started

1 on your closing arguments, since there are claims and there's
2 counter/cross-claims for your closing argument purposes, are you each
3 intending to do what I'm going to call one combined closing or are you
4 each planning on doing two, or something different, or did you all talk
5 among yourselves or do you need the Court to give you guidance on what
6 would make the most sense? What would you all like to do?

7 MR. NITZ: We did talk, Your Honor. And what we agreed is I
8 would do my closing as part of Plaintiff's case. They would do their
9 closing in response. I would have a reply and then they would have a
10 closing on their counterclaim. I would respond and they would have a
11 reply.

12 THE COURT: Is that correct?

13 MS. HANKS: Yes.

14 THE COURT: Okay, then whenever you all would like to start,
15 please feel free to commence, realizing depending on the amount of
16 timing you all are at, we may need to be taking, you know, break in lunch,
17 et cetera.

18 So how long in total anticipation on I'm just going to call it the
19 Plaintiff/Counter-defendant side of the table, I'm going to ask the same
20 thing for Defendant/Cross-claimant side of the table total, do we
21 anticipate?

22 MR. NITZ: What we had allotted was an hour for me, an hour
23 for her, rebuttal time I don't recall, and then total time beginning to end, 3
24 hours and 10 minutes.

25 THE COURT: Okay, so then we will definitely be breaking for

1 the lunch hour.

2 Okay, feel free to commence, counsel for Plaintiffs, since you
3 will up first, based on the agreement of the parties on behalf of the U.S.
4 Bank as Trustee for Merrill Lynch, et cetera. And there's --

5 MR. NITZ: Your Honor, there's a housekeeping matter that I
6 think we need to address before proceeding with the arguments because I
7 don't want it to get away from us at the end of the trial. And that was the
8 treatment of Exhibit 30.

9 THE COURT: Counsel, today is only set for closing arguments.
10 And so, the Court did not have any notice, nor did the Court receive any
11 stipulation or agreement between parties on anything other than closing
12 arguments for today.

13 So that's the only thing this Court is going to do, because that's
14 what the parties agreed when you all left and that's what the written
15 communications. I would go back to. Just one moment.

16 Because as you can appreciate, the Court spent a significant
17 amount of time. Dear Ms. -- this is on the Wright, Finlay, Zak, the parties
18 have discussed, okay, Dear Ms. Cordova [phonetic] per Judge Kishner's
19 request, the parties have discussed dates to proceed with closing
20 arguments in regard to the trial in the above case. Five dates U.S. Bank
21 and SFR are available to appear for the Court for closing arguments are
22 as follows colon.

23 Then you put May 17, morning only; May 20 without it
24 being -- May 21, May 22, or May 22 and May 23 said afternoon only. The
25 parties' estimate a total of 3 hours and 10 minutes for closing arguments.

1 At your earliest, please advise which date works for Judge
2 Kishner's calendar. If you have any questions regarding the matter,
3 please do not hesitate to contact me. Sincerely, Wright, Finlay,
4 Zak/Natalie Lehman with a cc: to Karen Hanks and Jason Martinez.

5 So that's the only thing that's teed up for today with regards
6 to -- is the closing arguments, because that's, A, the only thing that's left.
7 All parties rested on all of their cases.

8 Everything was done and just had closing arguments. Only
9 because of the amount of time you all went over your original estimate,
10 which is fine. We've accommodated it.

11 That's why it got set for another date. So it's just closing
12 arguments, counsel. So feel free to commence with your closing
13 argument.

14 MR. NITZ: Nonetheless, Your Honor, you never treated the
15 portions of Exhibit 30 that were excluded. Ms. Hanks suggested they be
16 attached as Exhibit 30A and I agreed with that, but Your Honor deferred.
17 So we just need to make sure the record is complete.

18 THE COURT: I will tell you the Court has not reviewed anything
19 other -- because you all -- specific communications, which I just read for
20 closing arguments. Your statements at the end of the last day were
21 closing arguments.

22 If you all are saying something else, I'm going to give Ms.
23 Hanks a quick moment, because I will tell you no one put the Court on
24 notice until you just said it about a minute ago. So we don't even have
25 the --

1 MS. HANKS: Binders?

2 THE COURT: Do we even have --

3 THE CLERK: We do.

4 THE COURT: Oh, we do have the binders. Okay, all right,
5 Madam Clerk's ahead, but --

6 MS. HANKS: I'm not aware that this was outstanding. I have a
7 little Post-it on those pages as 30A. So I presume that's how the Clerk
8 kept it, but to be certain, I didn't go down this list and double check it with
9 the Clerk when we left last time, but I wasn't aware that the Court deferred
10 that. I thought we were always talking about 30A. I thought they were
11 always 30A.

12 THE COURT: Like I said, the Court can't just do something
13 without having any notice or any information so that it can prepare. So I'm
14 going to let you all do your closing arguments.

15 I will check with Madam Clerk to see what the issue was after
16 you commenced -- finished all your closing arguments. And then, we will
17 see if there's something that without any notice whatsoever to the Court,
18 even from a pure courtesy standpoint, no one could prepare for something
19 that no one told us about, so.

20 Counsel for Plaintiff, please feel free to commence with your
21 closing argument.

22 CLOSING ARGUMENT BY THE PLAINTIFF

23 MR. NITZ: Thank you, Your Honor. First, I'd like to look at the
24 respective roles of the active parties, the role of Miles Bauer and
25 particularly the role of Rock Jung [pronounced Young].

1 Mr. Jung testified that upon referral from Bank of America
2 regarding Nevada HOA liens, they would open a file, review documents.
3 They would then contact the entity listed and the HOA recorded notices,
4 introduce themselves, and advise them they were willing to pay the super-
5 priority amount, whatever that amount may be, and that they wanted to
6 determine the super-priority amount was.

7 And then, they would receive information that would allow Miles
8 Bauer to calculate the super-priority amount. Miles Bauer would then, in
9 particular Mr. Jung, would go ahead and calculate that amount, obtain the
10 funds necessary to pay off that calculated amount, and then deliver a
11 check for that amount to the HOA or its collection agent.

12 He testified that during his tenure at Miles Bauer, he would say
13 Miles -- he was involved in HOA lien payments to Alessi several hundred
14 times between 2011 and 2012.

15 And the typical response that they would get when they were
16 trying to make the HOA lien payoffs, he's testified Alessi would not or
17 Alessi would reject any tendered checks that were sent on a basis that,
18 one, that didn't include their fees and costs.

19 Now for the role of Alessi, Mr. Alessi was asked to describe the
20 foreclosure process. He said the file was sent over to Alessi's office at the
21 notice of delinquent assessments stage by way of the management
22 company on behalf of the Association, usually emailing his office with an
23 attached ledger and instructions to place the account into collections.

24 Alessi & Koenig would then take the past due assessments, late
25 fees, and interest from the account ledger and input that information into

1 their data fields within their software program.

2 From that information, they would then generate the notice of
3 delinquent assessment lien and they would then request an updated
4 statement of account at the notice of default stage.

5 They would receive that from the HOA or its management
6 company. They would then update their information and generate the
7 notice of default, which they would record and mail.

8 If they received a payoff request from Miles Bauer, they would
9 send a payoff demand with a statement of account or ledger. And Mr.
10 Jung testified that as part of that custom and practice, they would always
11 get the payoff demand and either a ledger or a statement or -- of account
12 or both.

13 Then it was his custom and practice to review the statement of
14 account and prepare and calculate the super-priority lien, which would
15 have been the nine months or up to nine months of assessments due
16 before the notice of delinquent assessment lien.

17 Mr. Jung testified it was then his custom and practice to send a
18 second letter, which he described as a second letter or tender letter to
19 Alessi. Alessi -- and he said Alessi would always reject that letter unless it
20 paid Alessi's fees and costs.

21 Mr. Alessi testified that he told Miles Bauer pay whatever you
22 think you need to, to protect your deed of trust. Mr. Jung would then have
23 the tender letter with the payoff check delivered, hand delivered to Alessi.
24 And like I said, this was a dance that was played out hundreds of times
25 during the period of 2011 to 2012.

1 And, in particular, it was played out in this case. Mr. Jung sent
2 the letter, which was Exhibit 22. While the letter itself --

3 THE COURT: Please go ahead.

4 MR. NITZ: While the letter itself was not admitted, he read the
5 letter into the record. And so, the substance of that letter is before the
6 Court.

7 What's more, we know that Alessi received that letter, because
8 it's documented in Exhibit 30 at USB616. And we know it was received
9 because once it was received, Alessi & Koenig, specifically Ryan Kerbow,
10 generated the payoff demand letter, which was Exhibit 23, which was also
11 documented at Exhibit 30, USB616.

12 Mr. Alessi testified that the statement of account was used to
13 generate the notice of delinquent assessment lien, which was in turn used
14 to generate the -- or was the basis for the notice of default and the notice
15 of sale.

16 Mr. Alessi confirmed that Alessi & Koenig was only pursuing
17 collection of assessments. In other words, there were no nuisance and
18 abatement charges as part of the notice of the delinquent assessment lien
19 that they recorded, the notice of default, and the notice of sale.

20 He said that while there may have been nuisance or abatement
21 charges, those were being pursued by the management company,
22 CAMCO.

23 But in any case, the operative lien here, the one subject to the
24 notice of default and the multiple notices of sale was the statement of
25 account.

1 He testified that Alessi prepared the payoff statement based
2 upon receipt of the statement of account from the Homeowners
3 Association or its property manager. And it relied on the truthfulness and
4 accuracy of that statement in order to do so.

5 He said he would expect Mr. Kerbow sent the fax cover sheet,
6 which is the first two pages of Exhibit 23, USB169 and 170 as I recall.
7 And he also testified that he -- it was Alessi & Koenig's practice to attach
8 the most recent statement of account to the payoff demand letters.

9 In particular, and he said Ryan Kerbow would have just sent the
10 most recent letter -- ledger in the file, whereas others might have updated
11 it prior to sending the payoff letter.

12 In this case, we -- Mr. Alessi testified that the -- he testified
13 about the pages at 171 to 175. And the Court later admitted a statement
14 of account in connection with Exhibit 74, USB570 to 577.

15 We know not only that the notice of lien was only for
16 assessments and not nuisance and abatements, but we also know that
17 the amount of the assessments at the time was \$45 a month.

18 They were 40 -- Mr. Alessi testified to his recollection, based on
19 his review of the collection account in preparation for his testimony, that
20 the assessments were \$45 a month.

21 MS. HANKS: Objection, Your Honor, that's evidence that's not
22 in yet.

23 THE COURT: The Court is hearing the objection. Since it's
24 closing argument, I'm just listening. I'm not -- I'm noting the objection.
25 Thank you.

1 MR. NITZ: On Exhibit 23, it stated that the -- at Item Number
2 315, it stated the assessments through October 31, 2011 were \$1,611.61.
3 And Mr. Alessi had referred to the statement of account dated May 31,
4 2011 as --

5 MS. HANKS: Another objection, Your Honor to the evidence is
6 not in and you only admitted the document for nonhearsay purposes.

7 MR. NITZ: That was 570 to 577. But in any case, he relied on
8 that and the Court questioned how the -- that statement of account could
9 have been the basis for the entry on USB169, the assessments through
10 October 31, 2011 if it was generated in May 2011.

11 And Mr. Alessi explained that. He said it would have been a
12 simple matter for Mr. Kerbow to take that May 2011 statement, and add
13 \$45 a month for the five months through October 31, 2011, and add in the
14 late fees for that period to come up with the lien amount.

15 He said -- he testified that the -- that it would be consistent to
16 attach a resident transaction detail to cover -- to the cover letter
17 breakdown, but he said the 5/31/2011 date is bigger -- a bigger gap than
18 he's used to seeing between the date of the ledger and the date of the
19 breakdown, but it is consistent to attach a letter to that breakdown.

20 He testified that as of the time Alessi & Koenig generated the
21 notice of sale setting the HOA sale date for September 14, 2011, as
22 indicated on USB616, would be -- he said that USB169 would set forth the
23 total lien amount. Mr. Jung testified that he received the lien payoff.

24 MS. HANKS: Objection, Your Honor. That misstates. That's
25 not evidence in the record.

1 THE COURT: Is there a citation to that, counsel?

2 MR. NITZ: Pardon?

3 THE COURT: Is there a citation to that? A day or whose
4 testimony it is -- because I have it in -- I'm noting the objections. I'm going
5 to let counsel finish with his closing, but I'm going to ask everyone if you're
6 citing something somebody objects to, where is the citation to it?

7 But go ahead, please. Thank you so much.

8 MR. NITZ: Mr. Jung testified that he generated Exhibit 24 in
9 response to his receiptment [sic] of -- his receipt of the payoff demand
10 from Alessi.

11 MS. HANKS: Objection. That's arguing facts not in evidence.

12 MR. NITZ: He -- and specifically, he testified in the reporter's
13 transcript number 2 at page 23 in Exhibit 24:

14 You reference a statement of account. Do you know whether
15 the statement of account you reference in Exhibit 24 is related to the letter
16 in Exhibit 23?

17 Answer: Yes, it is the same statement.

18 And he knew it was the same statement and the Court can
19 make the same conclusion, because Exhibit 24 references a full payoff
20 amount of \$4,111.61, which is also the same amount listed in Exhibit 23,
21 Bates stamped USB169.

22 Mr. Jung testified reporter's transcript number 2 at page 24:

23 We would have reviewed the letter for charges that could
24 compromise the super-priority amount and then make a calculation of the
25 super-priority amount.

1 And Mr. Alessi testified that they would attach the ledger to their
2 breakdown. 1 -- USB171 to 175 matched documents in Alessi's file, 529
3 through 533.

4 What's more, the 570 to 577, which was admitted by the Court,
5 was a running balance. And that running balance could also be used
6 because it was identical or it contained the same information as that
7 statement of account, 171 to 175.

8 Mr. Alessi would not have been able -- or Alessi would not have
9 been able to send that resident transaction detail under cover of the facts
10 and unless they received it from the HOA or its property manager. And
11 those pages, he said, do appear in the collection file beginning at USB
12 529 to 533.

13 Correct. And refer to reporter's transcript number 2 or day
14 number 2, page 109. He recognized Exhibit 9, the notice of delinquent
15 assessment lien, as the notice of lien prepared by Alessi & Koenig on
16 behalf of Antelope in relation to the Marbledoe property.

17 And the title of this document, notice of assessment lien, he
18 said there was no indication that the notice of lien was for anything but
19 delinquent assessments.

20 In order to generate the notice of default, he had to rely on the
21 statement of account from the HOA, showing what the assessments and
22 other amounts attributable -- other lienable amounts were.

23 That notice of default appears at Exhibit 11, which was
24 prepared by Alessi & Koenig in performing its function as a collection
25 agent and foreclosure trustee for Antelope Homeowners Association.

1 Mr. Jung testified at reporters partial transcript 1, page 26, that
2 his custom and practice in responding to a payoff demand from Alessi &
3 Koenig would be to review the payoff demand, look for any charges that
4 would part of the super-priority amount, and then calculate based on
5 whatever applicable charges there were, and then tender the amount.

6 And when he said tender, he meant they would actually have a
7 legal runner hand-deliver a check in the calculated super-priority amount
8 to the HOA collection agent, or in this case, Alessi & Koenig.

9 There are several indicia that the statement of account was
10 received by Mr. Jung. For one, the statement of account the -- his letter,
11 Exhibit 24, refers to the full payoff amount of \$4,111.61. That's at
12 USB166. Not only that, but on Exhibit 23, that is set forth as the full lien
13 amount.

14 In addition on Exhibit 23, in the upper right hand corner, there's
15 handwritten in Ivy and handwritten in the Miles Bauer case number
16 11-81638.

17 These are all indicia that he received the payoff demand with
18 the statement of account. And then, Mr. Jung was asked if he recalled
19 what the amount was of super-priority lien. And he said \$405.

20 MS. HANKS: Objection, Your Honor. Argues facts not in
21 evidence.

22 MR. NITZ: Then he said he did attach a check for \$450 and
23 that was part of Exhibit 24, which was admitted. He was asked --

24 MS. HANKS: Objection, Your Honor. Argues facts not in
25 evidence.

1 THE COURT: I do remember Exhibit 24 was not admitted.
2 2417. Are you saying it was admitted, Exhibit 24 since you keep
3 references, the Exhibit itself was admitted?

4 MR. NITZ: Yes, Your Honor, Exhibit 24.

5 MS. HANKS: It's admitted, Your Honor. I'm objecting to what
6 his argument is about what Mr. Jung testified about it, but the exhibit is
7 admitted.

8 THE COURT: Okay, yes, thank you for that point of
9 clarification. My apologies. Thank you so much.

10 MR. NITZ: He was asked if he recognized Exhibit 24. And he
11 said, absolutely, that is the letter he sent to Alessi. He drafted it, he
12 signed it. I would refer the Court to reporter's partial transcript number 2,
13 at page 5.

14 If I could digress a moment. As I said earlier, Mr. Alessi
15 testified from his review of the collection file in preparation for his
16 testimony he recalled the assessments in the early part of 2011 were \$45.
17 I --

18 MS. HANKS: Objection. Arguing facts not in evidence.

19 MR. NITZ: I'd refer the Court to reporter's partial transcript
20 number -- for day 2 at page 116.

21 And also, he testified, based on your review of this collection file
22 in preparation to testify, what were the month -- what were the monthly
23 assessments for Antelope Homeowners Association in 2009? And he
24 said I believe they were \$45.

25 MS. HANKS: Objection, Your Honor. That's the issue that you

1 still have to rule on in terms of the hearsay. So objecting to facts not in
2 evidence.

3 THE COURT: Okay, the Court's noting everything.

4 MR. NITZ: What's more, I would refer the Court to reporter's
5 partial transcript, day 2, pages 120 to 121. And in particular, on page 121
6 --

7 THE COURT: Counsel, the only time I'm stopping you for one
8 second is because I was trying to reference as you were saying that. The
9 partial transcript I see for trial day 2 only goes to page 40. And you keep
10 referencing page numbers in the hundreds. So I just want to make sure
11 I'm on the same pages that you are.

12 MR. NITZ: It was a rather complicated process. We requested
13 partial transcripts daily. Or we got partial transcripts.

14 And the -- there were two sets. There was a reporter's partial
15 transcript number 1, reporter's partial transcript number 2, and reporter's
16 partial transcript number 3. And then, at the end of the trial, we
17 coordinated with counsel and got balance -- additional pages.

18 So rather than incorporate the pages like the ones you just
19 referred to into a whole transcript, they came out in parts. So there's parts
20 of transcript number 1, then there's the reporter's transcript number 1 that
21 or for day 1 that you just referred to. And then there's reporter's partial
22 transcript number 2. And then if you follow in sequence, there's reporter's
23 transcript day 2 picks up there.

24 THE COURT: Wait a second. Okay, you got -- okay, so you're
25 referencing recorder's transcript of April 22nd, the testimony of Rock Jung

1 and David Alessi only? Is that the one you're referencing versus the one
2 that says partial transcript for day 2 that was filed on 5/1? I'm just trying to
3 follow.

4 MR. NITZ: If I gave a citation to reporter's partial transcript 1, I
5 was referring to the reporter's partial transcript for day one. There may be
6 times here where I refer to the reporter's transcript alone without saying
7 partial. And in that case, I'm referring to the ones that were filed later.

8 THE COURT: Thank you for that clarification. I appreciate it.

9 MR. NITZ: So they were three reporters' partial transcripts and
10 then there were reporters' transcripts later supplied. I think one for each
11 day of the five days of trial so far that covered parts between the partial
12 transcripts.

13 Now I would also refer the Court to reporter's partial transcript
14 day 2, page 121. And the Court asked Mr. Alessi 45 in 2009, right?

15 Mr. Alessi said yeah.

16 The Court said okay. So we have --

17 MS. HANKS: Objection, Your Honor. This is the issue that you
18 still have a pending ruling on for hearsay. So it argues facts not in
19 evidence.

20 THE COURT: Okay, counsel, feel free to proceed. The Court's
21 noting that.

22 MR. NITZ: It -- like I said, it was Mr. Jung's custom and practice
23 to send a letter like the cover letter on Exhibit 24 with the check. And he
24 filed that in this case.

25 He was asked at reporter's partial transcript day 1 at page 28,

1 do you now recall how much the check was that you tendered?

2 Answer, yes.

3 And what was that amount?

4 \$405.

5 And do you recall how you came to that figure of \$405?

6 Most likely, it would have been based on assessments, nine
7 months of HOA assessments, absence -- absent any nuisance or
8 abatement charges, which once again, I never saw. So I would base that
9 \$405 most likely on the equivalent of nine months of assessments.

10 And I would submit to the Court if you had a calculator, multiply
11 45 by 9, and lo and behold, you get \$405.

12 At that point when the second letter, a tender letter, Exhibit 24
13 was delivered with the check for \$405, the tender was complete. That
14 amount paid off the entirety of nine months of assessments due at the
15 time of the notice of lien.

16 Under the cases at Diamond Spur [phonetic] and perhaps a
17 dozen recent supreme court cases, a tender of that nine months amount
18 discharged the super-priority lien such that any sale at that point would
19 have been of a sub-priority portion.

20 Moreover, a tender of that super-priority amount and the deed
21 of trust was not extinguished by or would not be extinguished by any
22 foreclosure sale.

23 In addition to the cases cited in our bench briefs, I would refer
24 the Court to a case from federal district court, Bank of America versus
25 Boulder Creek Homeowners Association, 2019, Westlaw 1441603.

1 And this was a decision by Judge Navarro on a motion for
2 summary judgment. In that case, she entered summary judgment in favor
3 of Bank of America based upon a Miles Bauer tender letter. In particular,
4 based upon the affidavit of Doug Miles regarding the contents of the Miles
5 Bauer file.

6 Like Diamond Spur and the other Nevada Supreme Court
7 cases, the check for -- the check that was tendered in that case amounted
8 to nine months and it discharged the super-priority lien.

9 During my opening statement, I said the evidence would show
10 that -- the evidence would show that there was a payoff request, that there
11 was a payoff demand from Alessi, and then there was a response to that
12 by a tender of the super-priority amount of \$405.

13 And I said at that time in the opening statement that, based
14 upon that evidence that -- or upon that proof, I would request a judgment
15 in favor of U.S. Bank, N.A. on its complaint and request a judgment in
16 favor of U.S. Bank N.A. on SFR's counterclaim.

17 Specifically, that there's a determination by the Court that the
18 deed of trust was not extinguished by the sale from Alessi to SFR and
19 SFR took subject -- took its interest subject to the deed of trust.

20 Your Honor, I had -- we had agreed I'd be allotted an hour for
21 my closing argument. I don't know what time I started.

22 THE COURT: Sure, 10:04.

23 MR. NITZ: 10:04, so --

24 THE COURT: Approximately.

25 Madam Court Recorder, that's what I said, 10:04?

1 THE COURT RECORDER: 10:05.

2 THE COURT: Between 10:04, 10:05. Sounds if you're looking
3 at that clock, if you're looking at a computer, so.

4 MR. NITZ: Looking at the clock in the courtroom, it appears
5 that I've used 40 minutes of my allotted one hour and I would reserve the
6 remaining 20 minutes as necessary for my reply.

7 THE COURT: Okay, counsel for Defense, would you like to do
8 your opposition closing argument, your Defense closing?

9 MS. HANKS: Yes, Your Honor.

10 THE COURT: Thank you so much.

11 MS. HANKS: If we could just have the Clerk link us to the
12 intranet or whatever it's called?

13 THE CLERK: Uh-huh.

14 THE COURT: Are your monitors up? Are the monitors on,
15 Madam Court Recorder?

16 Marshal, can you assist to get the monitor's on, please?

17 MS. HANKS: Your Honor, may I approach with a copy of our
18 closing argument?

19 THE COURT: Sure, of course.

20 MS. HANKS: We had to add a slide just now. So this
21 is -- we're going to update this for the --

22 THE COURT: Okay.

23 MS. HANKS: -- court filing, but --

24 [Counsel confers with counsel]

25 MR. NITZ: Your Honor, for the record, this printout of a closing

1 argument was just handed to me. I have not had a chance to review this
2 prior to this morning.

3 THE COURT: Okay, the Court notes that. Thank you so very
4 much, counsel.

5 Did you all have some agreement that you all were exchanging
6 closing arguments --

7 MS. HANKS: No.

8 THE COURT: -- to one another?

9 MS. HANKS: No, Your Honor.

10 THE COURT: Counsel for Plaintiff, did you have an
11 agreement? Did you provide them --

12 MR. NITZ: We didn't have any agreement one way or the other.

13 THE COURT: Okay, did you provide them your closing
14 argument?

15 MR. NITZ: No, but I didn't have a Powerpoint or a slide show.

16 THE COURT: Okay.

17 MR. NITZ: I didn't have the demonstrative evidence. And in the
18 pre-trial memo, we objected -- reserve the right to object to any
19 demonstrative exhibits.

20 THE COURT: Okay, I appreciate it. Thank you much. The
21 Court notes that just like it noted Defendant's objections during Plaintiff's
22 closing.

23 Counsel, please proceed.

24 CLOSING ARGUMENT BY DEFENSE

25 MS. HANKS: Good morning, Your Honor. This is SFR's

1 closing argument. I start -- I'm going to start with two threshold issues.
2 And the first threshold issue I want to deal with is that the Court lacks
3 subject matter jurisdiction.

4 And that is for two reasons. U.S. Bank is not the real party in
5 interest. And two, U.S. Bank lacks standing.

6 So we know from NRCP 12(h)(3) that if a court determines at
7 any time that it lacks subject matter jurisdiction, then the court must
8 dismiss the action.

9 So I'm going to talk about the first prong. U.S. Bank is not the
10 real party in interest. NRCP 17(a) just states that an action must be
11 prosecuted in the name of the real party in interest.

12 And the Nevada Supreme Court gave us a case --

13 [Sneeze]

14 THE COURT: Bless you.

15 MS. HANKS: -- that defines what a real party in interest is. And
16 they defined it as a real party interest is one who possesses the right to
17 enforce the claim.

18 So let's look at why U.S. Bank is not the real party in interest.
19 On July 25th, 2012, the Association sale occurred. And we know from the
20 stipulated fact in the joint pretrial memorandum, this is stipulated fact of
21 the parties, that Universal was the owner of the note and the beneficiary
22 of the deed of trust at the time of the Association sale. That's July 25th,
23 2012.

24 Then the next historical fact in the history of this particular case
25 is June 1st, 2018. On that date, there's a recorded assignment of the

1 deed of trust and the note from Universal to Greenpoint.

2 And that's admitted into -- I think we admitted those
3 assignments into the evidence, Your Honor. I did not point out that
4 exhibit.

5 The next relevant timeline is July 2nd, 2018. And the reason
6 why that's relevant is that's the first date and time that U.S. Bank has an
7 interest. That's when Greenpoint assigns the deed of trust to U.S. Bank.

8 And why that is telling is we know from the facts of this case
9 that U.S. Bank filed its complaint in -- excuse me, Your Honor, I wrote it
10 down somewhere else. Let me get the exact day right. July 12th, 2016.

11 So on July 12th, 2016, according to this timeline, Universal was
12 the still the real party in interest. And if we go back to the rule, you have
13 to at any point, if this Court didn't have subject matter jurisdiction, have to
14 dismiss it.

15 So it's inconsequential that after the action was filed, U.S. Bank
16 became the real party of interest, because the rule says at any point in
17 time.

18 So you have to look at July 12th, 2016 according to this timeline
19 and the stipulated facts of the parties and the admitted exhibits. U.S.
20 Bank was not the real party in interest.

21 So you did not have subject matter jurisdiction over U.S. Bank's
22 claim. And the rule requires, it mandates that you dismiss their claim,
23 their action.

24 If that wasn't enough, U.S. Bank also lacks standing. Now
25 standing often overlaps with real party in interest, but they are two distinct

1 concepts.

2 Standing is the Plaintiff has to incur the injury sufficiently severe
3 and a type acknowledged as legally cognizable such that a suit can be
4 brought at all.

5 And we have Nevada Supreme Court elaborating on this kind of
6 definition, saying to establish standing, you must show the injury is
7 personal to you. It is not a mere generalized grievance.

8 And here, because U.S. Bank was not a party of interest on July
9 25th, 2012, and they even weren't a party of interest in terms of having
10 any interest in the note or deed of trust at the time they filed a complaint in
11 July of 2016, they don't have any injury personal to them.

12 So that's -- on those two fronts, Your Honor, we would ask that
13 you find that you lack subject matter jurisdiction over U.S. Bank's claim
14 versus SFR.

15 MR. NITZ: Your Honor, I object to this. This would be more
16 appropriate as a Rule 52(c) motion. This is the time set for closing
17 argument.

18 THE COURT: Thank you. So much what I noted with regards
19 to Defendant's objection, the Court takes note of the objection.

20 And counsel, please proceed.

21 MS. HANKS: The next threshold -- and every argument I'm
22 going to make, Your Honor, throughout this closing argument is an
23 alternative argument. Obviously, you could end the discussion here if you
24 find that U.S. Bank lacks -- is not the real party in interest or lacks
25 standing.

1 Alternatively, another threshold question with respect to U.S.
2 claim is that it's time barred. And we know that after our 52(c) motions,
3 we've really narrowed down the challenge of this case of being tendered.
4 That's really what U.S. Bank's -- and I put the term quiet title claim, quiet
5 title in quotes because there is no such thing as a quiet title claim.

6 There's no specific elements to quiet title. Quiet title's a generic
7 term that just describes any claim that involves real property, where two
8 parties have adverse claims against each other.

9 So we know after the 52(c) motions that we really narrow down
10 U.S. Bank's challenge to tender. So in looking at that, I'm going to
11 analyze the statute of limitations with that challenge in mind.

12 So, first, I want to address what some of the purposes and
13 effects of statute of limitations are. It's a party with a valid cause of action
14 should pursue it with reasonable diligence.

15 We also know that the purposes by the time the sale claim is
16 litigated, evidence necessary to disprove the claim may be lost.

17 And another reason under purpose for the statute of limitations
18 that litigation of a long dormant claim may result in more inequity than
19 justice.

20 So before I get to what the actual statute of limitations applies to
21 the tender challenge, I want to first dispel the notion that it's a five-year
22 statute of limitations, because that gets thrown around a lot.

23 And a lot of times, we've kind of got and I believe and the
24 courts, and when I say the courts, I mean, the Nevada Supreme Court,
25 has gotten a little bit lackadaisical with really analyzing the claims.

1 And so, when we were hear this word quiet title, we tend to get
2 into a lazy kind of state and say, well, all quiet titles are governed by a
3 five-year statute of limitations.

4 And yet, you'll never have anyone be able to tell you, where is
5 that derived from? They just kind of say it, and then all of a sudden,
6 people just think it applies.

7 And it's because there's some case law out there, the kind of *in*
8 *dicta* has kind of explained that and dealing with adverse possession.
9 And a lot of times, you'll see them rely on these are the two statutes when
10 we talk about NRS 11.070 and 11.080.

11 But when you actually read those statutes, when you get out of
12 kind of the lackadaisical mindset and go, well, let me actually read the
13 statute you're relying on, it becomes abundantly clear that 11.070 does
14 not provide a five-year statute of limitations for someone like U.S. Bank.

15 So let's read it. It says no cause of action founded upon the title
16 to real property. So this one, 11.070 is dealing with title to real property.
17 Shall be effectual unless it appears that the person prosecuting action
18 was seized or possessed of the premises in question within five years
19 before committing of the act.

20 So we know that 070 deals with two things. We have conditions
21 precedent. It has to be title to real property that you're talking about and
22 you have to have been seized or possessed of the property in question.

23 And we know with U.S. Bank, this is not a action for title to real
24 property. Oftentimes, that's another instance where you'll hear banks get
25 kind of lazy with their terminology and say, well of course, it's title. I said

1 it's quiet title claim.

2 But we know, and I had this in our trial brief, Your Honor, so I'm
3 not going to belabor it in the closing today, we have the Hammes
4 [phonetic] case where the Nevada Supreme Court was directly tasked
5 with that same type of argument.

6 Not in the sense of a quiet title action, but it was whether a
7 claim against an association has to be going through the [indiscernible]
8 mediation.

9 And the argument was, well, this is a issue of title. And it was
10 dealing with a bank that had a money encumbrance, a lien against the
11 property.

12 And the Nevada Supreme Court said no, no, no, just because
13 we use those terms title, and just because you're trying to have a money
14 encumbrance to cloud title to the property, that does not mean your claim
15 is one of title.

16 When we use the term title, we mean fee simple ownership.
17 That's what that term of art means when we're talking about -- when
18 you're disputing title.

19 So with the Hammes case directing us when this 070 talks
20 about title to real property, they're talking about a dispute over ownership,
21 fee simple ownership, not a money encumbrance like a deed of trust that
22 U.S. Bank claims an interest in.

23 But even if that wasn't enough, you have the seized and
24 possessed and condition precedent. And again, in our trial, on our trial
25 brief, we explain this.

1 We have Nevada Supreme Court case precedent that defines
2 the word seized as fee title ownership. And possession as what it is,
3 possession. You actually have physical possession of the property.

4 So neither a seized or possessed is true for U.S. Bank. At all
5 times, U.S. Bank is only talking about a money encumbrance recorded
6 against the property. They've never had title -- they've never had fee
7 ownership of the property and they've never been in possession of the
8 property.

9 So when you actually look at the words of the statute, and don't
10 fall into that kind of lackadaisical approach, you can readily see that
11 11.070 cannot provide a five-year statute of limitations to U.S. Bank.

12 Now we turn to 080, which is commonly talked about. And in
13 fact, I'm sure as soon I sit down, counsel's going to spout about Gray
14 Eagle because Gray Eagle talks about it.

15 Nevada Supreme Court in dicta when dealing with what the
16 statute of the limitations might apply to an NRS 116 purchaser said an
17 11.080 would provide a five-year statute of limitations.

18 And I believe even more recently in 2018, a case that we
19 commonly refer to as Blaha [phonetic], even talked about 080. And I can
20 talk about those two cases more specifically in just a second.

21 But let's look at the actual statute itself. The statute itself says
22 no action for the recovery of real property. So this is how 080 differs from
23 070. Recovery of real property means you're trying to take back
24 possession.

25 And it also has a condition precedent. Before you can even

1 maintain the action, you have to have been seized or possessed of the
2 premises within five years of bringing the action.

3 So again, U.S. Bank can never show they were seized or
4 possessed of the property. And the reason why -- so when you read the
5 statute of 080, and then you read the context of Gray Eagle and the Blaha
6 case, now you can understand why the Nevada Supreme Court would say
7 this statute would apply to a purchaser.

8 So let me back up and give you some context to Gray Eagle
9 and Blaha. Gray Eagle was a case, I believe it was before Judge Bell,
10 and the argument was the purchaser was time barred.

11 That is, the complaint should be dismissed against the NRS 116
12 purchaser because within the statute of 116, there was a timeline in which
13 an association had to pursue a foreclosure or pursue delinquent
14 assessments.

15 And they liken that to a statute of limitations with respect to an
16 NRS 116 sale. I think the bank did in that case. And Judge Bell granted
17 the motion to dismiss, saying that the purchaser was time-barred.

18 And the Supreme Court said no, no, no, the statute within 116,
19 the time limit that 116 is talking about the association of how long
20 delinquent assessments can be pursued.

21 There's a certain period of time where delinquent assessments,
22 if they go past a certain amount of time, will no longer be collectible. That
23 does not apply to an NRS 116 purchaser.

24 The NRS -- and then so *in dicta*, they weren't actually required
25 to come to that conclusion. They just had to say the motion to dismiss

1 was wrongfully granted and they remanded it back.

2 But then *in dicta*, they noted if there was any statute of
3 limitations that would apply to an NRS 116 purchaser, it would likely be
4 11.080 because that person was seized and possessed.

5 So it makes sense, it would apply. We're not saying the statute
6 doesn't apply in other quiet title type actions. It just doesn't apply to U.S.
7 Bank.

8 Then if you go to the Blaha case, that was a decision, I believe,
9 Judge Weiss, where there was an NRS 116 sale. And this is pre the SFR
10 decision. There was an NRS 116 sale. And then later, there was a 107
11 sale.

12 The bank ignored the effect of the 116 sale, moved forward with
13 their own 107 sale. And the NRS 116 purchaser lost possession of the
14 property by the 107 sale. It went to a third-party purchaser.

15 And then, when the SFR decision came out, that 116 purchaser
16 said, well, hey, that was a wrongful sale. That 107 sale was void now,
17 because the supreme court now said you were wiped out. So he brings
18 an action.

19 And the bank in that case or the 107 purchaser in that case
20 argued, well, you're bound by the 90 to 100-day statutory period for
21 noticing within 107. That's the period where you can challenge a 107
22 sale.

23 And Judge Weiss agreed and said, yeah, that's the statute of
24 limitations. You're way past that.

25 Nevada Supreme Court said no. We're not dealing with

1 someone who is challenging the processes of the 107 sale. They're
2 claiming the sale was void because the deed of trust was extinguished by
3 the earlier 116 sale. And, therefore, you had no power to foreclose on it.

4 And so, the District Court or excuse me, the Nevada Supreme
5 Court when analyzing, well, what statute of limitations would apply, they
6 talked about 11.080.

7 But again, that makes sense because the 116 purchaser was
8 seized and possessed of the property within five years of bringing the
9 action. And, in fact, his whole action was to get recovery of his real
10 property back.

11 So that's why, again, when you see cases talking about -- in
12 fact, I can definitively say every case, every case, whether it be Nevada
13 Supreme Court, you see it from a District Court judge, and you see it from
14 a federal district court judge or you see it from the 9th Circuit, an
15 unpublished or even published decisions, when they're talking about
16 either 070 or 080, in every single context, they are dealing with a party
17 that had possession or title to the property.

18 It's usually in the context of a homeowner or someone who
19 purchased the property and had title or possession. And so, it is not a
20 five-year statute of limitations for U.S. Bank, while it may be for some
21 other party.

22 So having sufficiently dispelled the notion that somehow a
23 five-year statute of limitations would apply to U.S. Bank, we now have to
24 figure out, well, what would apply?

25 And we know from the Nevada Supreme Court in the Torrealba

1 case that we don't look at the label of the claim. We look at the nature of
2 the grievance.

3 And they even said that. They said, look, you have to look at
4 the nature of the character of the action and the nature of the grievance
5 before you can determine what the statute of limitations is.

6 And that's why I wanted to highlight the fact that you see this
7 term, slang term quiet title that I often put in quotes. That's -- we don't
8 want to focus on that, because there no such claim.

9 There's no elements. I can't point you to a book. There's no
10 book that will tell you if I have a quiet title claim I have these four
11 elements, this is what the party has to prove. And we've had that from
12 courts. It's just a generic term describes an adverse claim dealing with
13 real property.

14 So when we actually get down to the meat of what the U.S.
15 Bank is complaining about in this case, what's the nature of their
16 grievance and what's the character of their action, we know it's tender. I
17 mean, that's -- there's been for confusion there. We've narrowed that
18 down. This is the issue in this case. It's tender.

19 And what they're arguing by virtue of tender is simple. This is
20 the character and the nature of the grievance, that the association had a
21 duty to accept BANA's tender.

22 That's what they're saying that when this -- and we're going to
23 get to the other argument of it being sent. But assuming for the sake of
24 argument that a letter was sent with a check, what U.S. Bank is arguing is
25 that letter was required to be accepted by the Association and that there

1 was no justification for refusing it.

2 And U.S. Bank even pled as much. They said this is their
3 amended complaint. The HOA trustee refused to accept BANA's tender.

4 And then they say by virtue of this rejection, they ask the Court
5 to say U.S. Bank deed of trust survived the sale, and that the liability is
6 that the sale is void, and it results in SFR taking subject to the deed of
7 trust. That's what they're doing.

8 So you have a duty on the part of the Association to accept the
9 check. You have a failure to abide by that duty. And now, they want to
10 slap SFR with the liability for that. That is the quintessential, every
11 argument you're hear in a tender case.

12 And you're hearing it here. And so now, when we see that, we
13 see the character of the action equals a liability created by statute. This is
14 11.1903 or 3(a).

15 And we know from the Torrealba case that the liability created
16 by statute, that phrase, means liability which would not exist but for the
17 statute.

18 And they further say that where a duty exists only by virtue of
19 the statute, the obligation is one created by statute. And so, in this case,
20 the Torrealba case dealt with a notary, who violated certain provisions of
21 the statute.

22 So to be clear, it's not that the statute actually has to define it
23 within it. It doesn't have to say you have -- hereby have a duty to do X, Y,
24 Z. It doesn't have to be that specific.

25 It's simply that we have a statute that imposes some type of

1 duty on a party. Doesn't have to be explicit. And then, you can hold
2 someone responsible under that statute if they don't follow it. That's what
3 Torrealba was dealing with because the Torrealba case dealt with the
4 notary statute that didn't talk about a private right of action either.

5 It just talked about duties for -- of the notary and the person
6 who's trying to sue the notary for not doing those -- what she was
7 supposed to do under the statute.

8 And so, let's talk about what we have here, how we fit those
9 elements of Torrealba to a tee. The Association's lien is created by
10 statute. The super-priority mechanism of that lien is created by statute.

11 In fact, with the exception of some rare CCNRs out there, if you
12 didn't have NRS 116 giving a priority mechanism, the deed of trust would
13 survive.

14 That's the only thing, that's the only thing that gives it priority
15 over the deed of trust, because it's first in time is normally the rule. And
16 so, the super-priority mechanism is created by the statute itself.

17 The super-priority amount, the actual fixed amount is fixed by
18 statute. The statute tells us and defines us what that super-priority
19 amount is.

20 And while there's no explicit duty explained in the statute,
21 there's an implicit duty to accept the payment of the super-priority,
22 because what would be purpose of giving the association a mechanism by
23 which they could have some superiority over a deed of trust to bring the
24 bank to the table, if look at the UCIA and all the history behind it, what the
25 purpose of it was, was to bring the bank to the table on a house that was

1 underwater and not performing and you have a homeowner not paying
2 their dues.

3 And not leave the Association saddled with that debt -- that
4 problem, bring the bank to the table. What would it make any sense to
5 give the Association a power to have superiority over deed of trust to a
6 certain portion and then have an association not have a duty to accept
7 payment of that portion when a bank actually does it. It would make no
8 sense.

9 In other words, if the legislature wanted to give the Association
10 a true priority, and no way for a bank to protect it, it wouldn't even have
11 given a certain priority -- it wouldn't have to fix a certain amount of that
12 priority.

13 But by fixing it, it's implicit that once a bank pays it, you have to
14 accept it. You cannot deny it, there's no basis to deny it. So in light of
15 that, all of those elements matched Torrealba, now we know that the
16 three-year statute of limitations would govern U.S. Bank's claim.

17 And you could even go a shorter statute of limitations, but I
18 don't need you to. But you can also look we know from the Perry versus
19 Terrible Herbst case, where the Nevada Supreme Court said when a
20 statute lacks an expressed limitations period, we look to analogous
21 causes of action for which an express limitations period is available either
22 by statute or by case law.

23 So, I mean, I have to admit that NRS 116 does not give a
24 statute of limitations for U.S. Bank's claim. I think it's fair to go under the
25 liability created by the statute really does meet all the elements of a

1 Torrealba case, but we know from Perry versus Terrible Herbst, you don't
2 necessarily have to do that either. You can look to analogous causes of
3 action.

4 So let's look at Nevada's legislature -- the legislative intent with
5 respect to foreclosure sales. You'll see from this chart, there is not one
6 statute of limitations period that exceeds two years. The longest is two
7 years and that's for a tax sale.

8 So you could, under Perry versus Terrible Herbst say, well, I
9 think it meets the three, but I probably need to go even tighter because
10 Perry tells me I can look to analogous causes of action.

11 And because there's not one foreclosure law in Nevada that
12 gives anyone more than two years to challenge a sale, why would it be
13 any different for U.S. Bank? Why in the world would we extend it beyond
14 a two-year period for NRS 116 foreclosure? There's no difference.

15 So now, let's look how S -- U.S. Bank's claim would kind of exist
16 in this kind of field of your three or two-year statute of limitations. The
17 sale was July 25th, 2012.

18 That gives the claim deadline under the three-year statute of
19 limitation as July 25th, 2015. Under two-year, it would be July 25th, 2014,
20 but they don't plead tender until May 5th, 2018.

21 And since I'm not going to get a chance to rebut, I'm going to
22 anticipate counsel's argument that, well, what we filed our complaint in
23 2016.

24 Well, that doesn't help him for a couple of reasons. It doesn't
25 help him based on the math. I don't care if you take their first complaint

1 2016 as the trigger point.

2 It doesn't plead tender anywhere in that complaint, so you can't
3 really use it, but let me give the benefit of the doubt to U.S. Bank and give
4 them that date. It doesn't fit within the timeline. It's still past the three
5 years and it's still past the two years.

6 The only thing that would save him is five in that, but there's no
7 statute of limitations that would apply for a five for them.

8 So -- but even more problematic with the 2016 complaint is
9 there's no pleading of tender. So that's not really the trigger point for the
10 claim because it can't relate back to a complaint that has no mention of
11 tender.

12 So, really, the only pleading you're going to be looking at in this
13 case is the May 5th, 2018 amended complaint, which is the first time U.S.
14 Bank pleads tender.

15 And getting back to our kind of purpose and reasons for a
16 statute of limitations, if we accept as true that BANA sent a tender letter in
17 this case, that was dated October 2011. Why in the world did it take until
18 May 5th, 2018 for a party to allege tender?

19 That defies the whole purpose of why we have a statute of
20 limitations and essentially says you didn't move quickly on your claim.
21 And you knew about it even before the sale occurred.

22 So why on July 26, 2012 are you not coming into court? You
23 didn't want to do any before. Why weren't you doing on July 26, 2012 and
24 saying, hey, we tendered? So, Your Honor, we would ask that you find
25 that U.S. Bank's tender claim is time barred.

1 Now if you find that U.S. Bank has standing, that they're the real
2 party in interest, and their claim is not time barred, then we're actually
3 going to get to the merits of the case.

4 And the merits are that U.S. Bank failed to prove delivery of a
5 valid tender. And we know from the recent decision in 2019 of Resources
6 Group that they bear the burden, the burden of demonstrating that
7 delinquency was cured pre-sale regarding the -- rendering the sale void
8 was on the party challenging the foreclosure. In that case, they found that
9 the Resource Group failed to meet that burden, excuse me, not Resource
10 Group. HODC.

11 And so, we know it's their burden. And interestingly enough, in
12 Resources Group, while it's axiomatic if you're going to say a tender
13 cured, you have to show it's delivered.

14 You don't just write a check and keep it in your desk and then
15 say you paid. Obviously, you have to deliver the payment to the entity.
16 So it's axiomatic.

17 But Resources Group really highlighted how important delivery
18 is, because if you haven't had a chance to read Resources Group, I'm
19 sure you have, but I know you have a huge docket so I want to make
20 sure.

21 THE COURT: Same date, within a couple of hours noting on
22 what time it was, I might have read it, yeah. I did read it.

23 MS. HANKS: Great.

24 THE COURT: [Indiscernible.]

25 MS. HANKS: So with Resources Group, we know that delivery

1 became paramount because they couldn't even prove the exact time it
2 was delivered. There was no dispute it was delivered, but it came down
3 to a matter of minutes and timing.

4 And because they could not prove the minute and the time that
5 it was delivered on the day of the sale, they lost. HOVC lost and the
6 purchaser at that 116 sale won.

7 So let's look at what we have. Obviously in this case, I don't
8 think we're getting down to minutes, but to have a case that gets down to
9 minutes really shows you how important delivery is. We're -- I'm more on
10 a more macro level in this case, because we have no proof of delivery.

11 And here's why. We have no testimony. There is zero
12 testimony in this case. I went back to the transcript. Mr. Jung only
13 testified about general practices of the Miles Bauer firm in terms of
14 delivering similar checks like the one we see in Exhibit 24, but he had
15 absolutely no personal knowledge of Exhibit 24. And then he offered no
16 specific testimony of Exhibit 24.

17 And I've highlighted the testimony and cited it day one. All of
18 those citations are where it shows you his general testimony about what
19 happened generally and having no testimony specifically about Exhibit 24.

20 In fact, Mr. Jung was asked by his counsel, bank's counsel, if he
21 recalled sending a tender check in this case. He was asked that very
22 question.

23 And his answer was quote, "Independently, I don't". So there is
24 no question that there is no personal knowledge and no testimony about
25 delivering of Exhibit 24 for Mr. Jung.

1 There's also no testimony from a runner. You heard no runner
2 was called. I don't know -- they don't even know what company was the
3 runner.

4 But you heard there was no witness called by U.S. Bank that
5 said, hey, I was guy. I had Exhibit 24 and I did it. You have none of that
6 testimony.

7 And so, counsel for the bank was arguing at closing argument
8 that Mr. Jung also matched up the check that was Exhibit 24 with the
9 letter.

10 But we know -- I double checked that. This is the slide I added,
11 which is not on the copy that either of you or counsel have and I'll update
12 our closing argument after today with the Court and counsel.

13 The question was asked about Mr. Jung referring to Exhibit 24
14 and then referring to an unadmitted exhibit. And I objected and moved to
15 strike that testimony, because he was comparing one admitted document
16 to an unadmitted document and you granted it. You sustained it.

17 So when counsel in closing argument was arguing about
18 testimony, I have refer you to this, you cannot consider that, it's not
19 evidence. You should -- you granted my motion to strike.

20 Further proof of no delivery, you have no run slip and no ROC,
21 but we know from Mr. Jung's testimony that the practice of Miles Bauer
22 was to deliver these checks via runner. He said that at page 26 of his
23 testimony.

24 This also comports with Mr. Alessi's testimony. Mr. Alessi said,
25 yeah, in my understanding and all during that time period, they were

1 delivering these letters via runner. It's page 86 of his testimony.

2 Mr. Alessi further testified that he recalled they would also come
3 with an ROC or what I shortened the receipt of copy to.

4 And it would be attached to the letter and that Alessi would sign
5 that ROC and return it when they accepted the letter. And that's why I
6 was very careful to distinguish Alessi from some other collection
7 companies.

8 And I asked him, did -- were you the type of collection company
9 that just rejected the letter and never took it? He says, no, we did take it.
10 We would always take the letter, even though we didn't cash the check.
11 We would take the letter, and we would sign the ROC, and return it.

12 And yet, U.S. Bank did not produce that evidence. There's no
13 run slip. There's no ROC. It just is completely absence from this case,
14 despite the fact the testimony's saying it should exist, the delivery
15 occurred.

16 Then we have further proof of no delivery from Mr. Alessi, or
17 excuse me, Alessi & Koenig's file. There's no copy of Exhibit 24 in the
18 file. And we know from Alessi that he testified it was the practice of Alessi
19 & Koenig to maintain copies of a letter like Exhibit 24 in the file. He said it
20 at page 85 and 87.

21 And while he admitted that that's our practice, I can't
22 guaranteed it happened every time, that's not important. The important
23 thing is it was the practice.

24 That was the customary practice just like it's important that Mr.
25 Jung said it was the practice to deliver it with -- and Mr. Alessi talking

1 about the cover letter.

2 And the letter is completely absent from Alessi's file. So while
3 it's possible the practice wasn't followed, if you have a practice that should
4 have been filed and that was the typical ordinary practice, then it's
5 probable that it wasn't delivered.

6 You have to take that customary practice and say, well, I can't
7 assume it wasn't filed. I have to take what the customary practice was.
8 And it's absent from their file. So you see in Exhibit 30, it's completely
9 absent from their file.

10 They had a secondary practice, too. Not only did they keep the
11 letter was their typical practice. They would notate it in the status report.
12 And there is no notation in the status report.

13 Mr. Alessi testified it was the practice to do it. So, in fact, that
14 they didn't keep the letter, they might also have that secondary practice.
15 There's no notation. If you look at Exhibit 30, there's no notation. The
16 stats report doesn't indicate any receipt of Exhibit 24.

17 And so then, I want to look at the status report because the
18 status report is also telling of no proof of delivery as much as for what it's
19 lacking as for what it includes.

20 So while the status report lacks information that proves the
21 delivery, the information that it includes indicates no delivery. And here's
22 why.

23 The timeline of this status report indicates that October 19,
24 2011, Alessi & Koenig received a payoff request from Miles Bauer. It's
25 notated and then I quote it. They notate in the status report. And the

1 status report is Exhibit 30, page 616 through 617.

2 They respond to it. We clarified with Mr. Alessi that payoff
3 made doesn't mean that Alessi was making a payment. They were giving
4 a payoff request, telling them what the bank had to pay to protect the
5 interest or stop the sale. And that was give on October 2011.

6 Then in brackets, those stars -- that's not in the status report,
7 but this is an event in a timeline, Exhibit 24 is dated December 16, 2011.
8 So, if in fact that was delivered, why in the world would Miles Bauer on
9 June 8th, 2012 be requesting another payoff? And yet, that's what the
10 status report indicates.

11 And it's not just a status report, because we also saw that was
12 that very strange event that happened with us that Mr. Alessi actually
13 came when he actually gave the payoff request on July 11th, 2012.

14 So June 8th, 2012 post-dates the -- Exhibit 24. They're asking
15 for another payoff. They do it again July 3rd, 2012. They ask for another
16 payoff. And then, on July 11th, they get a response. And then you have
17 the sales July 25th, 2012.

18 So the status report, including that information, is also telling
19 and probable evidence that it wasn't -- that Exhibit 24 wasn't delivered
20 because there was no testimony from anyone from Miles Bauer or Rock
21 Jung about why they would be asking for a payoff request in June 8th and
22 July 3rd, 2012 if in fact Exhibit 24 was delivered.

23 What's even more telling from the status report is September
24 24th, 2014. The loan servicer is calling Alessi and asking and inquiring
25 about excess proceeds.

1 Again, that is telling because why would Ocwen be asking for
2 excess proceeds if they understood a tender check was delivered back in
3 December of 2011?

4 Because we know from NRS 116.311664, I believe I quoted
5 that right, that's the distribution statute. You are not entitled as a junior
6 lienholder to excess proceeds unless you are extinguished by the sale,
7 because you -- you're not junior if you weren't -- you're only junior if you're
8 extinguished by the sale. So there'd be no basis for Ocwen to request
9 excess proceeds, other than the fact that they understood they were
10 wiped out by the sale.

11 So this gets us to an evidentiary statute that we have at NRS
12 51.145. And it says that evidence that the matter is not included in the
13 records in any form of a regularly conducted activity can be used to prove
14 the nonoccurrence or nonexistence of that matter if the matter was of a
15 kind which was regularly made and preserved.

16 And it's this evidentiary rule within our statutes is where I
17 believe that you can base that Alessi & Koenig's practice to keep the letter
18 and notate it in their file, the lack of that, shows the nonoccurrence, shows
19 nondelivery.

20 You can even take Mr. Jung's testimony, too. He delivered it.
21 That was his practice and policy at Miles Bauer is delivery by runner. And
22 yet, you have a complete absence of any run slip or any ROC.

23 So the absence of that shows you a nonoccurrence or
24 nonexistence of delivery. An evidentiary statute that exists and you can
25 find on that.

1 Even absent delivery, there's a secondary prong with a tender
2 that U.S. Bank has not met its burden on. And that's no proof of the
3 super-priority amount.

4 And we know from the Bank of America versus SFR case,
5 which we commonly to refer to at SFR 3 or Diamond Spur, valid tender
6 requires payment in full. It is not sufficient just to show some money was
7 paid. You have to know and prove what the super-priority amount was.

8 And we know from the statute it's two parts. It's nine months of
9 common assessments pre-date -- nine months of common assessments
10 and nuisance abatement and maintenance charges, which is kind of
11 couched under those two terms.

12 Counsel indicated in his argument that we know the lien didn't
13 include any nuisance abatement or maintenance charges, but we don't
14 know that. We didn't have any testimony from the Association on that.

15 We didn't have any testimony from Alessi. In fact, Alessi wasn't
16 even sure what comprised, what the amounts comprised of. He's relying
17 on the Association to provide information.

18 So you would have to know what the Association and how they
19 categorized those charges. So that link is not there. So it's not actually
20 accurate to say we know.

21 Your Honor, I objected during counsel's closing argument and I
22 have the citation for it, on day 3, page 90, 5 through 21, I objected or
23 renewed my objection to Mr. Alessi's testimony about what the
24 assessment were for 2009, his testimony about \$45.

25 And on page 91, 4 through 14, you indicated to the Clerk you

1 wanted to have her carve that out. And at the end of the trial, you were
2 going to look at that and rule on that evidentiary issue.

3 You haven't had that ruling yet, but you still need to make it, but
4 that's --

5 MR. NITZ: Your Honor, I object. This is the time set for closing
6 argument. Your Honor said that there weren't other matters that would
7 considered at this point. So this should have been done before today or
8 reserved in a letter to the Court and it wasn't.

9 MS. HANKS: I'm sorry, Your Honor, my co-counsel put up the
10 portion of the screen where you said in the transcript, page 91 that you
11 were going to look at this at the time, make a determination for overall in
12 the case of whether you can consider that testimony.

13 Even if you do decide to consider that testimony in light of the
14 hearsay objection, on day 2, page 123, lines 10 through 11, Mr. Alessi
15 didn't even recall what time period he -- that that number was for.

16 So his testimony even backtracked, even if you get over the
17 hearsay problem with his testimony and decide to consider it, he said I
18 think it was \$45 at some point, but I don't recall if it was '09, '10 or '11 or
19 all three. So you have very unequivocal -- very equivocating testimony.

20 THE COURT: What day is that?

21 MS. HANKS: This is day 2, Your Honor. And it's the bank's
22 burden to prove what the super-priority amount was. So they'd have to go
23 back and prove what the nine months would have been during the time
24 period in which they tendered the letter and they didn't.

25 And so because of that, Your Honor, we would ask that you

1 draw the following conclusion, that this Court lacks subject matter
2 jurisdiction over U.S. Bank's claim.

3 So while that would require you to dismiss U.S. Bank's claim, it
4 does not require you to dismiss SFR's counterclaim. My understanding is
5 those can exist independent even if the initial complaint that caused the
6 counterclaim gets dismissed.

7 U.S. Bank's claim is time barred. U.S. Bank did not prove
8 delivery of a valid tender. SFR has produced a valid deed. And therefore,
9 the Association sale extinguished the deed of trust. Thank you, Your
10 Honor.

11 THE COURT: Okay, rebuttal, counsel?

12 MR. NITZ: Yes, Your Honor. I would first like to address the
13 issue of standing on this case. I would incorporate by reference, I'd ask
14 the Court to review our bench memorandum regarding standing.

15 U.S. Bank, as the beneficiary of record under the assignment of
16 the deed of trust, has standing to protect its interest. In this case, its
17 interest is the deed of trust and the asset that it encumbers.

18 Next on the issue that U.S. Bank is not the real party in interest,
19 at the time of the sale, Universal was a beneficiary of record. However,
20 we have the chain of assignments from that date forward all the way up to
21 the assignment by Universal's successor Greenpoint to U.S. Bank of the
22 deed of trust and the note.

23 So even if U.S. even if U.S. -- even if Universal was the
24 beneficiary of record at the time of the sale, U.S. Bank was the successor
25 in interest to that.

1 Under NRCF Rule 25, if there's a transfer of an interest, then
2 the suit can be maintained by the successor in interest, either substituting
3 in or maintained on behalf of the transferor.

4 And even if it was Universal at -- even if the beneficiary of
5 record was Universal at the time of sale, U.S. Bank is the transferee and it
6 could prosecute the claim under Rule 25 in its own name or in the name
7 of the --its transferor, either Universal or Universal's immediate transferee
8 Greenpoint.

9 The next issue was the issue of statute of limitations. I
10 would -- I refer the Court to our bench brief on -- regarding statute of
11 limitations. It was stated that NRS 11.070 does not provide a five-year
12 statute of limitations. It refers to the party bringing the suit.

13 If I might have a moment?

14 THE COURT: Okay, of course you may. Of course you may.

15 MR. NITZ: I misplaced my -- the language of that statute refers
16 to seized or possessed. And at that time, the deed of trust provided the
17 bank could enforce the deed of trust if the borrower didn't pay
18 assessment.

19 The deed of trust created a property interest in U.S. Bank. And
20 taking a step back, its borrower Mr. Ivy, was without question seized or
21 possessed of the interest under the grant -- a grant bargain and sale
22 deed, an exhibit that was admitted.

23 And U.S. Bank could enforce its interest on behalf of the
24 borrower. Like I said, if the borrower failed to honor the deed of trust, then
25 U.S. Bank could step in and take what action was necessary to protect the

1 secured asset, the secured interest, U.S. Bank's interest in the property.

2 It was also noted that 11.070 mentions recovery of real
3 property. But as I indicated, U.S. Bank had a property interest, had an
4 interest in the real property by virtue of the deed of trust.

5 The complaint filed was to reaffirm that interest under the deed
6 of trust to demonstrate or request the Court's determination that the deed
7 of trust was not extinguished by the sale from Antelope to SFR.

8 Next regarding NRS 11.080, that also refers to a five-year
9 limitations for a quiet title action, beginning from the time Plaintiff or
10 Plaintiff's ancestor, predecessor, or grantor was seized or possessed of
11 the premises in question.

12 Here, the grantor under the deed of trust was Ivy. The
13 predecessor interest of U.S. Bank was Ivy. And there's no question that
14 Ivy was seized or possessed of the premises at the time of the sale.

15 The case of Saticoy Bay, Gray Eagle versus JP Morgan Chase
16 was brought up. And that case applied NRS 11.080 as the basis for a
17 five-year statute of limitations to quiet title. And as mentioned, this is a
18 complaint to quiet title.

19 SFR offers up another statute of limitations, namely a three-
20 year statute under NRS 11.190 for an obligation arising under statute. In
21 this regard, I'd refer the Court to U.S. Bank's Opposition to SFR's Motion
22 for Summary Judgment, pages 8 to 10.

23 In order for there to be liability under the statute, or created by
24 statute to apply, the obligation must be created by that statute. In this
25 case, NRS Chapter 116 provides no right of action, no private right of

1 action. What's more, NRS 116 provides no remedy for failing to comply
2 with that statute or with that chapter.

3 It was mentioned that there was an implicit duty to accept
4 payment of the super-priority lien. Implicit duty, but there's no requirement
5 stated in the statute that the HOA or its agent had to accept a payment.

6 More importantly, even if it is implicit in the Chapter 116 scheme
7 that the HOA would have to accept it, the statute provides no liability for
8 the Homeowners Association for failure comply with 116.

9 This isn't an action by U.S. Bank against the Homeowners
10 Association. It's an action to quiet title by U.S. Bank against SFR, who is
11 maintaining an adverse claim, mainly that the deed of trust was
12 extinguished by the sale. NRS Chapter 116 also does not provide any
13 statute of limitations as counsel admitted.

14 While I do not have a citation at hand, where there are
15 competing statutes of limitations, it's a preference of the Court to apply the
16 law longest one.

17 In this case, if it's two years or three years or four years under
18 the undefined one, or five years under 11.070 or 11.080, it would be the
19 longest statute, the five-year statute, that would apply.

20 If -- I would request leave of the Court to submit a supplemental
21 brief on that point that -- where there are multiple statutes of limitations
22 used the longest.

23 MS. HANKS: I have an objection to that, Your Honor.

24 THE COURT: The Court's going to sustain the objection.

25 Today was the day for closing arguments and issues. The statute of

1 limitations was brought up during the course of the case previously. And
2 so, all parties had a full opportunity to address it prior to today. And this
3 has been about a month since the trial.

4 Go ahead, counsel. Feel free to continue.

5 MR. NITZ: It was complained that the issue of -- well, first, it
6 was admitted that if it's a five-year statute of limitations, the complaint was
7 brought, was filed within that five year period.

8 If the sale occurred on July 25, 2012, then five years later would
9 be July 25, 2017. And in this case, the complaint was filed, I believe, July
10 12, 2017. So it was close, but the complaint was still filed timely under the
11 five-year statute of limitations.

12 It was challenged that the issue of tender did not arise until the
13 amended complaint in May 2018, I believe. But at that point, it would
14 have related back to the filing of the original complaint.

15 And it's simply a defense to SFR's claim that the deed of trust
16 was extinguished. If the issue of tender as the defense is required to set
17 forth in a claim for quiet title, that claim or defense of tender would relate
18 back to the original -- filing of the original complaint.

19 The -- this issue of statute of limitations was all previously
20 briefed in connection with the respected motions for summary judgment. I
21 would submit that the statute of limitations was five years for a quiet title
22 action, which this is, and the complaint for quiet title was timely filed.

23 The Court was next directed to the issue of delivery. Mr. Jung
24 testified it was the custom and practice that the second letter or tender
25 letter would be hand delivered with the check to Alessi & Koenig

1 I previously cited to the pages of the transcript where Mr. Jung
2 was asked what was the amount of the check that was sent to Alessi &
3 Koenig. And he testified it was \$405.

4 It was challenged that Mr. Jung had no personal knowledge of
5 Exhibit 24, except he did. And once he looked at Exhibit 24, he recalled
6 that this was the letter that was sent. And in particular, the check was the
7 check -- the check for \$450 was sent.

8 MS. HANKS: Objection. Argues facts not in evidence.

9 [Sneeze]

10 THE COURT: Bless you.

11 Counsel, do you have a page reference to where that is by
12 chance since you -- if you don't, that's fine. I just was trying to read along
13 both of them and you all both citing that, so.

14 No worries I don't need to interrupt in the middle of -- go ahead.
15 Just I don't know. You've cited some pages in other case -- in other
16 situations. So I just didn't know if you had a situation on that one. No
17 worries. Thank you, counsel.

18 MR. NITZ: I did and I gave it at the time I first mentioned it. I'd
19 have to --

20 THE COURT: No worries, I'll look it up, thank you.

21 MR. NITZ: Mr. Jung also testified that that letter matched their
22 custom and practice for tender letters or second letters at that time. And
23 when he reviewed the substance of the letter to himself, he agreed that
24 that tender letter that he drafted and he signed was sent with the check.

25 It was questioned, well, if the check was hand delivered to

1 Alessi & Koenig, then how come it doesn't appear in their records? Well,
2 we know from Mr.'s Alessi appearance here on the second -- his second
3 day that some records did not appear in the records that they supplied in
4 response to the *subpoena duces tecum*.

5 He testified that while they may might make a copy and keep a
6 copy in the file, he admitted, based on his hundreds of depositions given,
7 that sometimes it was scanned, sometimes it was not. Sometimes a
8 receipt was signed, sometimes it was not.

9 There was some argument that there was no statement in the
10 status report acknowledging the receipt. And Mr. Alessi testified in that
11 regard. Sometimes it was entered in the status report, sometimes it was
12 not.

13 It was also questioned why, if there was a tender of the super-
14 priority amount back in 2011, why would there be a subsequent request
15 for payoff?

16 That's very simply answered. The original notice of sale
17 referred to a notice of delinquent assessment lien from November 2009.
18 The second and third or the subsequent notice of default also referred to
19 that notice of lien. And the two following notices of sale referred back to
20 that notice of lien.

21 So it only makes sense, if there's still -- if Alessi is still
22 prosecuting the very same lien that was discharged, that Miles Bauer
23 would seek another payoff or make another payoff request, rather than sit
24 on their hands, like is so often exclaimed by the buyers, they took
25 affirmative steps to make sure.

1 So they did another payoff request, expecting by the custom
2 and practice that Alessi would send the statement of the -- they would
3 send a payoff demand with a ledger or statement of account.

4 And they could determine if the current notice of sale did indeed
5 include amounts that were already discharged. I point out that there is
6 only one notice of lien and that's the one from November 2009.

7 Once the tender was made, the super-priority component of the
8 operative lien was discharged. In order for there to be a new lien, the
9 HOA, or in this case Alessi, would have had to record and mail or at least
10 mail a new notice of lien under the Property Plus versus MERS case. So
11 without a new notice of lien, the operative lien had to be the November
12 2009 lien.

13 It was also asked why would Ocwen request excess proceeds if
14 there was a tender? And I would point out that the tender was made at
15 time that BANA had the interest. Mr. Jung was representing the interests
16 of BANA at the time of the original request for payoff and delivery of the
17 check.

18 There was a reference to NRS 51.145, where the lack of a
19 business record can be used to show the nonoccurrence of an event.
20 And my response to that goes back to Mr. Alessi's testimony that
21 sometimes the checks were scanned, sometimes they weren't.

22 Sometimes receipts were given, sometimes they weren't.
23 Sometimes the receipt of a check was noted in the status report,
24 sometimes they weren't. So based on that, there's an issue as to whether
25 the requirements of NRS 51.145 were met.

1 It was argued that there was no proof of a super-priority
2 amount. I beg to differ. Mr. Alessi testified that in 2011, the dues were
3 \$45 a month.

4 MS. HANKS: Objection. Assumes facts not in evidence.

5 MR. NITZ: That was on the first day of testimony. And then,
6 later, he testified in response to Your Honor's question that they were \$45
7 in 2009.

8 MS. HANKS: Objection. Assumes facts not in evidence.

9 THE COURT: Can you -- that one, I have to have you cite me
10 to, because when I looked at the Court's notation, day 3, page 90, at line
11 10 to 12, the Court was just asking Mr. Alessi about the testimony of the
12 prior day for background information. The Court wasn't asking whether
13 that amount was the correct amount.

14 So is there another reference, other than if you don't mind, day
15 3, page 90? I think it was lines 10 through 12. I have double check. Is
16 there some other reference that you're seeing with regards to \$45 and Mr.
17 Alessi?

18 MR. NITZ: Well, the reference that I gave before was to
19 reporter's partial transcript, day 2, when -- and I read it into the record
20 previously.

21 THE COURT: Sure.

22 MR. NITZ: The Court asked Mr. Alessi 45 in 2009?

23 And Mr. Alessi responded yeah.

24 And the Court said okay.

25 THE COURT: Well, wait a second. Okay, can you give me a

1 page number to that, please?

2 MR. NITZ: Page 121.

3 THE COURT: One moment please, thank you. Please
4 continue as I'm looking for it. Thank you so much.

5 MR. NITZ: If you go back a little bit to page -- reporter's partial
6 transcript, page 120, Mr. Alessi, do you recall as you sit here based on
7 your review of this collection file in preparation to testify, what the monthly
8 assessments were for Antelope Homeowners Association for 2009?

9 Answer, I believe they were \$45.

10 Let's recall what the process was. Mr. Alessi testified that they
11 would get a statement of account or ledger from the property manager
12 with a request to proceed with foreclosure. That happened in this case.

13 In Exhibit 30, there is the authorization to proceed, signed by
14 the HOA directing Alessi to proceed with the foreclosure and the collection
15 of the past -- the delinquent assessments.

16 We also know that the assessments were \$45 a month at the
17 relevant time because of the statement -- the payoff demand, Exhibit 23,
18 which showed the \$1,611 of the assessments. And Mr. Alessi was able to
19 demonstrate by review of the pages 171 to 175 that I think it was actually
20 the last page that --

21 THE COURT: Excuse me, are you saying that exhibit came in?

22 MS. HANKS: You know, sorry, I was just about to object, Your
23 Honor.

24 THE COURT: 169 and 170 were the only two pages
25 specifically that came in.

1 [The Court confers with the Clerk]

2 MS. HANKS: I was just about to object, Your Honor, that
3 counsel is referring to testimony that referred to exhibits that weren't
4 admitted.

5 THE COURT: Okay, the Court -- I'm sorry, counsel, please feel
6 free to continue. I'm just double checking. The Clerk's official, yeah, is
7 considering with the Court said and what the Court's notes were.

8 4/17, 19, USB169 and 170, the Court did admit the rest of
9 Exhibit 23. So the Court can't take into consideration over the objection.
10 I'm going to sustain the objection by defense counsel with regards to the
11 rest of those pages.

12 Thank you, counsel. Sorry for the interruption.

13 MR. NITZ: Nonetheless, if you look at his testimony, his
14 testimony where he filled in the gaps and the Court's questions where
15 Your Honor pointed out the disparity between item number 3 out of 15 and
16 the amount in those pages 171 to 175, he felt -- he -- that testimony was
17 not objected to.

18 MS. HANKS: Your Honor, I'm just going to place an objection.
19 I can't possibly read the transcript now. There's no citations. I'm just
20 going to place the objection, because I doesn't trust that it's accurate, so.

21 THE COURT: It was.

22 MS. HANKS: I'll rely on what the transcript said whether I
23 object or not.

24 THE COURT: The Court notes of the objection here during
25 closing argument.

1 Counsel for Plaintiff, Counter-Claimant in the Plaintiff's role,
2 please feel free to proceed.

3 MR. NITZ: If you review the -- his testimony, how could he get
4 to \$1,611 in the payoff demand? His testimony that it was \$45 a month
5 and he multiplied that 45 by 5 months, added it to the existing assessment
6 balance from May 31, 2011, and added in the late fees, and demonstrated
7 that that amount, \$1,611 and I forget the change, was computed, and he
8 filled in that gap.

9 MS. HANKS: Objection. Argues facts not in evidence.

10 THE COURT: The Court notes that, counsel.

11 Feel free to continue.

12 MR. NITZ: And he could -- you could also duplicate his efforts
13 by using USB570 to 577, where --

14 MS. HANKS: Because counsel's pausing, I'll lodge my
15 objection to referring to the exhibit that was only admitted for nonhearsay
16 purposes or it sounds like he's arguing it for hearsay purposes.

17 THE COURT: Counsel, feel -- the Court notes that the Court
18 did admit that page range of Exhibit 30 for nonhearsay purposes, 570 to
19 577. So the Court's only taking into account for any nonhearsay purpose
20 with regards to any closing. Thank you so much.

21 MR. NITZ: And the nonhearsay purpose in this case, it was
22 Your Honor specifically said it would -- you were accepting it as something
23 that Alessi used to generate Exhibits 11, 12, 13, and 14, which would be
24 the notice of default and the notices of sale.

25 And also, that it was -- that the statement of account was used

1 to generate the payoff demand cover letter in Exhibit 23. It was used
2 for -- the statement of account was admitted to be used for all of those
3 purposes.

4 And in each of those cases, Alessi testified their practice was to
5 get the ledger from the HOA or its community manager at the beginning
6 and take that ledger and commence the foreclosure process.

7 In this case, he also testified that Mr. Kerbow would have relied
8 on the statement of account from May 31, 2011 in order to generate the
9 numbers contained in that cover letter, Exhibit 23.

10 Let's think about the purpose of the hearsay rule. Or more
11 specifically, let's think about the purpose of the -- or the philosophy behind
12 the business record exception to the hearsay rule.

13 And that is, if it is good enough for the business to rely on the
14 accuracy of the statement, then it's good enough for the trier of fact.
15 Everything that Alessi did on behalf of Antelope Homeowners Association
16 was based upon the statement of account.

17 It requested it. It received it. It relied on it. It meaning Alessi,
18 the firm.

19 We also know that the notice of lien was only for assessments.
20 While there's a theoretical basis that a super-priority lien can be
21 delinquent assessments up to nine months plus nuisance and abatement
22 charges, there weren't any or at least Mr. Alessi & Koenig was not
23 pursuing them.

24 He testified that the notice of lien was for assessments only.
25 And if you look at that demand letter of Exhibit 23, it shows fines, zero

1 dollars.

2 He also pointed out -- he also testified that while there may
3 have been a nuisance or abatement charges, Alessi & Koenig wasn't
4 prosecuting them and that CAMCO, the property manager, was. So there
5 were no nuisance and abatement charges in this lien by direct testimony
6 and as shown by Exhibit 23, line item number 3.

7 Based on the evidence before the Court, the Court does have
8 subject matter jurisdiction, because U.S. Bank as the beneficiary of record
9 of the deed of trust under the chain of title of the assignments of the deed
10 of trust, it's the party that is aggrieved by SFR's assertion that the deed of
11 trust was extinguished.

12 As far as the claim that the quiet title claim was time barred, the
13 applicable statute is not NRS 11.190, a three-year statute. The applicable
14 statute would either be 11.070 or 11.080, which is a five-year statute.

15 You were asked to conclude that there was no delivery of a
16 check. Mr. Jung testified what their custom and practice was. And he
17 specifically testified that the -- that he sent the \$405 check.

18 MS. HANKS: Objection. Argues facts not in evidence.

19 THE COURT: The Court notes it.

20 MR. NITZ: May I have moment, so I can pull up that citation
21 again?

22 THE COURT: Of course.

23 [Pause]

24 MR. NITZ: I would refer the Court to reporter's partial transcript
25 day 2. Mr. Jung was asked, do you recognize that Exhibit 24 as a letter

1 you sent to Alessi & Koenig?

2 Absolutely.

3 Did you send this letter in your capacity as an attorney for Bank
4 of America?

5 And it was only at that point that there was an objection. And it
6 was an objection that Exhibit 24 hadn't been admitted nor authenticated.
7 Nonetheless, the Court did in fact admit Exhibit 24, the tender letter and
8 the check.

9 Then on reporter's partial transcript, day 1, Mr. Jung was asked
10 at page 28, do you now recall how much the check was that you
11 tendered?

12 Yes.

13 And what was that amount?

14 \$405.

15 That's not just a bare statement. It was do you recall what the
16 amount of the check was that you tendered? And he said \$405. So by
17 their custom and practice, the cover letter and the check would be hand
18 delivered to Alessi and then he was specifically asked do you recall the
19 amount of the check that was tendered?

20 And in -- it was objected that at the time -- at about that same
21 page 28 that he was relying on Exhibit 23, which hadn't been admitted.
22 Nonetheless, this Court did later admit Exhibit 23. And I showed in
23 my -- at pages 169 and 170.

24 MS. HANKS: Lodge my objection, Your Honor. Exhibit 23 was
25 never admitted, except for a portion.

1 THE COURT: Page 169 was.

2 MS. HANKS: 70, yeah.

3 THE COURT: Counsel, would you like to finish up with your
4 allotted time because I'm not taking into account the questions that the
5 Court asked, but you've gone past your additional 30 minutes, but give
6 you another or moment to wrap up, if you'd like.

7 MR. NITZ: Let's go back to my opening statement. And I said
8 when the evidence comes in that there was a tender, that we would
9 request a judgment in favor of U.S. Bank against SFR on the complaint
10 and on SFR's counterclaim.

11 And we do that once again right now. We request a
12 determination by this Court that the deed of trust was not extinguished by
13 the sale to SFR and that SFR took subject to submit it. Thank you.

14 THE COURT: I do appreciate it. Thank you so very much.

15 Okay, so at this juncture, ladies and gentlemen, it's a beautiful
16 time for lunch, because it's after the 12 o'clock hour and now all parties
17 have completed the closing arguments with regards to Plaintiff and
18 Defendant's case.

19 After the lunch hour, we'll be able to come back and do closing
20 arguments with regards Counter-Cross-claimant's claims against
21 Counter/Cross-defendant, okay?

22 So we'll see you back at say 1:30, because by the time
23 everybody gets out of here, okay?

24 MS. HANKS: Sure.

25 THE COURT: I do appreciate it. Thank you so much.

1 MS. HANKS: Thank you.

2 THE MARSHAL: Court is in recess.

3 [Recess taken at 12:12 p.m.]

4 [Trial resumes at 1:42 p.m.]

5 THE COURT: Okay, on the record based on the agreement of
6 the parties. Now is the time for the closing arguments on the
7 Counter/Cross-claimant SFR Investment Pools versus U.S. Bank as
8 Trustee for Merrill Lynch, et cetera.

9 So counsel for SFR, if you'd like to commence, feel free --

10 MR. NITZ: Your Honor, for the Court's edification, we had
11 agreed that Plaintiff's closing would be one hour, Defense closing would
12 be one hour, and Plaintiff's reply 20 minutes.

13 And then we also agreed that Counter-claimant's closing would
14 be 30 minutes, Counter-defendant's closing 20 minutes, and Counter-
15 claimant's reply, whatever is reserved out of the original 30.

16 THE COURT: Sure, okay, perfect. So feel free to commence.

17 MS. HANKS: Lucky for everyone here, I'm going to hopefully
18 take a minute.

19 So Your Honor, this is just SFR's closing argument with respect
20 to our case in chief. Our case in chief is pretty simple. Resources Group
21 has confirmed our burden of proof is simply to prove payment. And under
22 Brillon [phonetic], if we produce a deed, it's presumed valid and the sale
23 that perpetrated the deed is presumed valid.

24 So the deed was admitted as evidence as Exhibit 30, page 599
25 through 600. And the proof of payment is Exhibit 30, Bates stamped page

1 594.

2 So with those, Your Honor, we can submit that SFR has met its
3 burden of proof and I have nothing more to say with that.

4 THE COURT: Okay, I do appreciate it.

5 Feel free, counsel for Counter/Cross-defendant?

6 [Sneeze]

7 THE COURT: Bless you.

8 MR. NITZ: Your Honor, we know from the case, SFR versus
9 U.S. Bank, the September 2014 case that a super-priority -- that a
10 homeowners association lien under NRS 116.3116 is a true super-priority
11 lien, proper foreclosure of which can extinguish the first deed of trust. Let
12 me say that again. Proper foreclosure of which can extinguish the first
13 deed of trust.

14 The proper foreclosure of a homeowners association lien is
15 governed by NRS 116.31162 through 31168 and through incorporation,
16 NRS 107.090, and by implication, NRS 107.080.

17 The basis for SFR's claim for title arises out of the Resources
18 Group. And I think that case is important for the following provisions. It
19 states a foreclosure sale generally terminates a party's legal title to the
20 property. This general rule is subject to certain exceptions, such as where
21 the sale is void.

22 And it goes on, quoting from Grant S. Nelson [phonetic], David
23 Whitman [phonetic], and Brook Hart [phonetic] and others, real estate
24 finance law, noting that a trustee sale is void where there is no
25 authorization to foreclose and that there is no authorization to foreclose

1 when the loan is not in default.

2 To complete a valid foreclosure sale for unpaid assessments in
3 Nevada, a UOA must comply with the provisions set forth in NRS Chapter
4 116.

5 The first thing that we have an absence of proof is the
6 authorization to foreclose.

7 MS. HANKS: Your Honor, I object to this. I believe that was
8 waived. I don't think this was argued. There was no rebuttal case where
9 this was argued in our case in chief. My recollection, there was no
10 rebuttal case to our case in chief.

11 THE COURT: I have noted the objection.

12 Feel free to continue, counsel.

13 MR. NITZ: The Alessi & Koenig collection file was attached as
14 Exhibit 30 with various pages, mainly statements of account removed.
15 But what is missing in that file is a signed authorization to foreclose.

16 There's an unsigned one in there and there's a signed one, but
17 the signed one relates to a different property, not the Marbledoe Ivy
18 property. So on to the Resources Group, the first strike against them is
19 there's no evidence of an authorization to foreclose.

20 The second thing is under 31162 through 8 and 107.090 and
21 the related sections there, there must be a public auction. In this case,
22 there's no evidence that there was a public auction.

23 There was no testimony that there was a public auction. All we
24 know that there was a sale from Alessi on behalf of Homeowners
25 Association to SFR.

1 MS. HANKS: I have the same objection to a waiver.

2 THE COURT: I'm noting it. Thank you.

3 MR. NITZ: It was their burden to come forward with evidence
4 that there was a public auction, that there was a foreclosure sale.
5 Because as Resources Group said, a foreclosure sale generally
6 terminates a party's legal title to the property.

7 The sale and informal sale, other than a public auction, could
8 have not have terminated U.S. Bank's interest under the deed of trust. So
9 there, we have strike 2. There was no public auction, no testimony that
10 there was a public auction, only that there was a sale.

11 And there was reference to the foreclosure deed, or in this
12 case, it's called the trustee's deed upon sale. That trustee's deed upon
13 sale is conclusive of basically only three things that the notice of default
14 was recorded, that the -- I don't have them all. I'm just looking at the
15 trustee's deed here, but also that the notices were given. And at the
16 moment, I forget the third thing.

17 But under NRS 116.31164, I believe, the -- or it's 6 rather,
18 31166, it specifies what the foreclosure deed is conclusive of. We know
19 conclusive is really not applicable after Shadow Wood, but let's assume
20 that the foreclosure deed is conclusive of something. It's only conclusive
21 of those things that are identified in 31166.

22 It's not conclusive that there was a public auction. It's not
23 conclusive what was the purchase price that was paid. In this case, the
24 trustee's deed upon sale said that the amount paid was \$5,950.

25 But we know from SFR's cross-examination of Mr. Alessi, he

1 said he normally would rely on the price in the trustee's deed, but in this
2 case, there was other evidence that instead of 5,950, it was roughly
3 5,000 -- well, 5816.53. His testimony in that regard is at reporter's partial
4 transcript, day 3, at page 95.

5 The trustee's deed upon sale under 31166 is also not
6 conclusive of the date of the sale, or more particularly, the date of the
7 public auction.

8 In this case, the trustee's deed says there was a sale on July
9 25, 2012. But as you may recall, Mr. Alessi noted that USB30 -- I'm sorry
10 Exhibit 30, USB616, says at the very top entry for July 30, 2012, it says
11 what, third-party sale? And he testified that in this case, the third party
12 sale was SFR. And this appears at reporter's partial transcript, day 3, at
13 page 96.

14 So, here, we have a situation where we cannot rely on the
15 trustee's deed upon sale because the amount is wrong. There was no
16 testimony about an actual foreclosure sale.

17 And, also, Mr. Alessi testified that there -- the bidders had to
18 qualify at a sale by demonstrating their financial wherewithal to basically
19 fund whatever their bid price was.

20 In this case, ultimately, SFR didn't pay the money at the
21 foreclosure sale or at any sale on July 25 or on July 30. Instead, we know
22 from the facts of August 2, 2012 that SFR made a payment of 30-odd
23 thousand dollars, \$33,000 or something like that for five different
24 properties, one of which was the Marbledoe or Ivy property.

25 So the payment was made on or about August 2nd, not on July

1 25 or July 30. So based on these facts, we know there was no testimony
2 of a public auction.

3 We know that there was no authorization, signed authorization,
4 to foreclose. And there's a disparity as to what was even paid or when it
5 was even paid by SFR.

6 So based on these challenges, I submit that the trustee's deed
7 upon sale was not effective, could not have been effective to transfer a
8 superior interest to SFR. It required a foreclosure sale, which was
9 lacking.

10 Based on that, I would request that the Court find against SFR
11 and in favor of U.S. Bank on SFR's counterclaim. And once again,
12 reaffirm that any interest -- if they didn't take pursuant to a public auction
13 at a foreclosure sale, then the sale was void and they couldn't have taken
14 a superior interest, a senior interest. So their counterclaim fails.

15 And if they couldn't have taken a senior interest, then our
16 complaint must exceed -- must succeed, that the deed of trust was not
17 extinguished by whatever transaction occurred between Alessi and SFR.

18 So we'd ask for judgment under the complaint in favor of U.S.
19 Bank and a judgment in favor of U.S. Bank on the counterclaim.
20 Submitted.

21 THE COURT: I appreciate it, thank you so much.

22 And you get rebuttal, counsel?

23 MS. HANKS: Your Honor, I'm renewing my objection that all
24 the arguments you heard were waived, as counsel did not set forth any of
25 this evidence in rebuttal to SFR's case in chief. Without waiving that

1 objection, I do want to address substantively.

2 SFR under Nevada law has zero, absolutely zero burden to
3 prove a valid sale. Our only burden is to produce the deed. And
4 Resources Group where a deed wasn't transferred and they actually had
5 to sue to get the deed to transfer, they just had to prove they paid. And
6 we've proven both by the records.

7 And under Nevada law, once we produce the deed, it's
8 presumed that the deed and the sale that was the result of that deed were
9 valid. Its only burden is to do those, not to actually prove the validity of
10 the sale.

11 But setting that aside, if we actually read some of the
12 substantive arguments, I'll address the -- I'm going to go backwards. The
13 problem with the rebuttal case that you heard from the bank is the only
14 adequate result in terms of saying the sale was invalid because a sale
15 didn't happen, a public sale didn't happen, would be to set aside the sale.
16 And yet, you are lacking an indispensable party in that regard now,
17 because the Association's not here.

18 So in order to set aside the sale, I would say you couldn't even
19 grant that, because you'd have to an indispensable party of the
20 Association because it would place not only title back in the name of the
21 homeowner, who would be an additional indispensable party, it would
22 place the lien back in place before it ever got foreclosed.

23 Now let's talk about the first point that counsel made no
24 authority to foreclose. There is absolutely no requirement in NRS Chapter
25 116, none, that there be a signed authorization to foreclose. We won't

1 find it. He didn't cite it. It doesn't exist.

2 What we do know, though, is that there's an unpublished
3 disposition. It's BNY Mellon versus KNP Homes. There's a Westlaw cite
4 for it, 404 P.3rd 403, where the Nevada Supreme Court has said that no
5 objection to the notice of sale on the part of the association, because
6 that's mailed to the association, is *prima facie* evidence that the
7 association authorized the sale. And then they cite a case that indicates
8 that a principal can ratify the conduct of an agent after the fact.

9 But you also have further ratification in the sense that the
10 Association took the proceeds from the sale and also conveyed a deed to
11 SFR, who took possession and title of the property and has since that
12 time owned it and paid the Association dues. So you have two levels of
13 ratification here.

14 The second argument that counsel argued was that there was
15 no evidence of a public auction. Interestingly, if you read the statute, NRS
16 116.311641 only requires that the sale must be conducted in the county in
17 which the common interest community or part of it is situated.

18 And we know if we go to the foreclosure deed, excuse me, the
19 notice of sale and the foreclosure deed, both state that the place of the
20 sale was at Alessi & Koenig's offices, which are located in Clark County,
21 Nevada.

22 And we also note that the Association is located in Clark
23 County, Nevada. So they conformed with the requirements of the statute.

24 If that wasn't enough, we have a -- we have two stipulated facts
25 in this case that an association foreclosure sale happened. At number

1 one in the joint pretrial memo, the parties stipulated to the following fact,
2 the Association foreclosed on the property. And at the sale, SFR placed
3 the highest cash bid. That's a stipulated fact.

4 Counsel can't come in in closing argument to rebuttal to our
5 case in chief, after having not submitted evidence in the rebuttal case, to
6 now argue that fact. It's stipulated.

7 A secondary stipulated fact related to the sale is number 13, the
8 Association's foreclosure sale occurred on July 25th, 2012. No one
9 disputes a sale occurred. That's a stipulated fact.

10 And then number 14, a further stipulated fact is that on August
11 3rd, 2012, a trustee's deed upon sale was recorded in the official records,
12 conveying the property to SFR Investments. So there's no dispute.

13 And so, these are undisputed facts that a foreclosure sale
14 occurred. The mere fact that SFR had to bid and pay cash makes it a
15 public auction.

16 We also know from Exhibit 30 of the fact that the notice of sale
17 was recorded, and published, and posted on the property. Those are all
18 the things that give the world notice of a sale.

19 So those are all evidence that you have before you that this was
20 a public sale, although the statute only states it has to occur in the county
21 of where the property's located.

22 Lastly, there is no requirement that payment be made on the
23 date of the sale. You can read the entire -- the entirety of Chapter 116
24 and you will find nowhere, and counsel didn't cite it, where payment has to
25 made on the date of the sale.

1 NRS 116.31164(3) just merely states that after the sale, the
2 person conducting the sale shall make, execute, and after payment is
3 made, deliver to the purchaser or his successor assigned a deed without
4 warranty, which conveys to the grantee all title of the unit's owner to the
5 unit.

6 No mention of when payment has to be made. And you heard
7 the testimony from Mr. Alessi, the reason why the payment was made
8 after the fact in this case was SFR purchased multiple properties. There's
9 transfer tax related to it and recording fees.

10 And rather than handing over an excess amount of money and
11 waiting for a refund from Alessi, Alessi calculated those exact numbers
12 and then SFR paid the exact figure.

13 That was not a situation only granted to SFR. That was Alessi's
14 course and practice with any of these sales, where there were bidders
15 who came to the sale and bought multiple properties or even one
16 property. That was just an accounting thing that they did.

17 Nevertheless, the statute does not disallow it. It simply says
18 after payment is made, the deed must be delivered. That's what Alessi
19 did.

20 We have not only the stipulated fact that we had a deed given
21 to us, but we have the entry into the record of the deed of Exhibit 30,
22 page -- Bates stamped 599 to 600.

23 And we know from that deed that title was conveyed to SFR,
24 like the statute requires. And we've been the title owner ever since. So
25 other than that, Your Honor, I have nothing further.

1 THE COURT: Okay, well, thank you very much. And based on
2 you all's agreement, you concluded all your rounds of closing argument.

3 MS. HANKS: Yes.

4 THE COURT: The Court's going to have a couple questions for
5 each of the parties if you wish. If you don't wish me to ask any questions,
6 I won't ask any questions. But if you both are in agreement, the Court had
7 a couple questions.

8 And then the Court was also -- well --

9 MS. HANKS: Yes, Your Honor, I would like to answer any
10 questions you have.

11 THE COURT: It's up to you. Since it's closing argument and
12 since it's a bench trial, I can either ask some questions or I can look up
13 some things myself. It's really up to you all.

14 If you want me to -- if you want the opportunity to respond and
15 you both agree, then I'll ask a couple questions. If either of you doesn't
16 wish me to, it doesn't matter one way or another to the Court's standpoint.
17 It's just ease.

18 MS. HANKS: Yes, I --

19 THE COURT: Okay, I was saying to both. I want to make sure
20 everyone understands it doesn't matter what your response is. It's not
21 going to impact my decision whether someone says they do or don't. I
22 can easily look up things. Not a problem.

23 MR. NITZ: Go ahead and ask the questions.

24 THE COURT: Okay, one of the questions was I was going to
25 ask each party just within like two or three minutes in a summation your

1 position as to whether Mr. Jung did or did not state what people -- what he
2 informally called letter number 2, whether actually payment was tendered
3 to Alessi & Koenig or not? That was one question.

4 And the next question goes to the issue with regards to the Rule
5 NRCP 25. I just wanted to give you each a minute or two, wait a minute
6 or two to explain your position because it was cited in Plaintiff's closing
7 arguments in Plaintiff's case in chief as that they would be a proper party
8 because of NRCP 25.

9 So since that was brought up for the first time during closings, I
10 was going to give you each a moment of two if either of you or both of you
11 wish to a moment or two on that.

12 And then the third is since you both referenced that you state
13 there's an outstanding ruling with regards to Mr. Alessi, I think the fair
14 thing to do is to give you each like three or four minutes to argue your
15 position and have the Court say what it's going to do before you all get
16 your findings of fact, conclusions of law, and a ruling on the bench.

17 But if anybody -- because that -- I think the Court sees as
18 distinct because you all both say that something needs to get addressed.
19 And so, it seems to me fair to give you each two, you know, three or four
20 minutes of summation if you want to on your positions, so the Court can
21 make that ruling.

22 And then the fourth was since if there's no objection by
23 Defendant/Counter-claimant --

24 MR. NITZ: Pardon me, Your Honor. I didn't hear a question
25 number 3. I just heard the process.

1 THE COURT: Oh, the question becomes is what do you view
2 as the outstanding issue that needs to be addressed? I'll phrase it as a
3 question.

4 You both said that there's an outstanding issue the Court needs
5 to address, but you both phrased it a little bit differently. So it would be in
6 the most open-ended way, what is the outstanding issue that the parties
7 are referencing when they said that there's an issue that needs to be
8 addressed? And basically, what do you think the Court should do with
9 how you wish it to be addressed?

10 And then, the last is if there was no objection by
11 Defendant/Counter-claimants they had a chance over the lunch break to
12 look into it, I was going to circle back and ensure that you all are all on the
13 same page with Exhibit 30 that was referenced by Plaintiff/Counter
14 claimant's counsel first thing this morning, because the Court -- well, the
15 Court doesn't show that there's anything still outstanding to do.

16 There was a scope of different pages that weren't coming in.
17 There was a scope of pages at 570 to 577 -- 570 to 577, that were coming
18 in for the nonhearsay purposes.

19 But if either of you wanted to have a point of clarification on that
20 and what the Clerk's records show, I was going to see if you all want to
21 address that. And anyone objected to it, then I wasn't, because the
22 Clerk's official record is the Clerk's official record.

23 So those were the four areas/questions the Court had. I guess
24 the last one, if you want me to phrase it in a question-type format, it would
25 be would the parties like the Court to address the issue raised by

1 Plaintiffs/Counter-claimant's counsel this morning about Exhibit 30 and
2 what were the ranges of documents that were or were not included based
3 on the parties' official notes? Then Court could see what each of you all's
4 position if you had a differing on position from what the Clerk's exhibit list
5 is.

6 So that's the four topic areas. What do you all wish to do now
7 that you've heard them? Do you wish to respond? Do you wish not to
8 respond? It would be fine from the Court either way.

9 MS. HANKS: I would like to respond, Your Honor.

10 THE COURT: Okay, I'm only going to do it if both parties are
11 requesting that they get the opportunity to respond. I think that's the fair
12 thing to do because how can we have one side it and one side not? And I
13 said it would be you all's choice.

14 Counsel for Plaintiff/Counter-claimant, would you also like to
15 respond and address those areas or not?

16 MR. NITZ: Yes, Your Honor, but I would request five minutes
17 so I can pull together the exhibits responsive to your questions.

18 THE COURT: Sure, that seems fair. Do you want to reconvene
19 in 10 minutes at 2:20? That meet everyone's needs so you can both
20 prep?

21 MS. HANKS: Sure.

22 THE COURT: And the Court's not taking any additional
23 testimony. These are just clarifying points regarding some issues that
24 came up in your closing, which the Court can either go back and look at
25 myself. Or if you all want an opportunity to respond on that, I thought I'd

1 give you all an opportunity since it's a bench trial.

2 So my understanding, you both want the opportunity, you just
3 want to break beforehand?

4 MS. HANKS: Sure.

5 THE COURT: Counsel for Plaintiff/Counter-claimant; is that
6 correct?

7 MR. NITZ: Yes.

8 THE COURT: Okay, so why don't we come back at 2:20? We
9 can go off the record.

10 [Recess taken at 2:12 p.m.]

11 [Trial resumed at 2:21 p.m.]

12 THE COURT: Okay, did you all have enough time? It's about
13 22 after, 2:22.

14 MS. HANKS: Yes, Your Honor.

15 THE COURT: Yes to both? If you need a moment or two, let
16 me know. Is everyone ready?

17 MS. HANKS: Ready.

18 MR. NITZ: We can proceed.

19 THE COURT: Okay, okay, so I think the way I'm going to do
20 this is just go back and forth about who's going first. Give each three to
21 four minutes on each of this, right? So one shot, right? Three to four
22 minutes, Plaintiff and Defendant.

23 And then the next one, I'm going to have Defendant/Counter-
24 claimant go first and then Plaintiff. Then the third one, I'll have Plaintiff,
25 then Counter-claimant. And the fourth one, I'll have it back the other way.

1 That way, you're each going first on two of them. Does that
2 sound fair to all parties?

3 MS. HANKS: That's very fair.

4 MR. NITZ: Okay.

5 THE COURT: And if you have a difference that you want
6 Defendant to go first on the first one, I don't really care who does 1 and 3
7 and who does 2 and 4. I'm just trying to do 2 and 2.

8 MS. HANKS: It doesn't -- I'm fine either way.

9 THE COURT: Counsel for --

10 MS. HANKS: He's already standing, so I'll let him go.

11 THE COURT: Okay, then I'll let Plaintiff go first. Yours is the
12 Rock Jung tender and the reason why -- okay, then you can respond.
13 And then you're doing the Rule 25 and then.

14 Okay, counsel for Plaintiff. And what we're going to do, 2:22. I
15 said three to four minutes, so I'll say four minutes, which means like, well.

16 MR. NITZ: Thank you, Your Honor. The first question whether
17 Mr. Jung tendered payment. He testified that it was the custom and
18 practice after receiving the payoff request and the ledger or statement of
19 account to calculate the super-priority lien and then have that hand
20 delivered to Alessi.

21 He was asked if he recalled Exhibit 24. Initially, he said he did
22 not. He was then given the opportunity to review the entirety of Exhibit 24
23 and he testified that that refreshed his recollection.

24 He was then asked expressly at reporter's partial transcript 1, at
25 page 28, do you recall how much the check was that you tendered?

1 Answer: Yes.

2 And what was that amount?

3 \$405.

4 So the question is tendered payment. He unequivocally said
5 that he tendered payment of -- tendered the check of \$405.

6 As to the second point, the second question, regarding NRCP
7 25 --

8 THE COURT: Do you want go to that one next? I was --

9 MS. HANKS: No, I thought we were going to do only one.

10 THE COURT: I was having you do one question, then they
11 were going to answer that question, then they would have to go first on
12 the second question. You get the chance to go second on the second
13 question.

14 So we're just going back and forth so that you each had a
15 chance to go first or second and listen to the other side if you wanted to.

16 MR. NITZ: I misunderstood. I thought we had three or four
17 minutes to address them all.

18 THE COURT: Do you need another -- no, you still got time. Do
19 you still want another minute or so? So I was saying -- I was trying to do
20 as fair as possible going back and forth, but if you want another -- I still
21 show you have, before I stop this for a second. You have one minute and
22 38 seconds. So if you want say anything else, you're more than welcome
23 on the first one.

24 MR. NITZ: As I said, he unequivocally testified that the check
25 that he tendered was for \$405. That answers the question.

1 THE COURT: Okay, then just one sec.

2 Go ahead, counsel for SFR.

3 MS. HANKS: Your Honor, that questioning was related to him
4 looking at a document and saying how much did you tender, meaning how
5 much was it for?

6 We never got a definition of what Ms. Lehman was saying when
7 she said tendered. And Mr. Rock Jung didn't say I mean that word as
8 delivery. That's the context that's missing.

9 So what Mr. Nitz wants to argue is that because counsel used
10 the word tendered and said how much was the amount and he looks at
11 the letter and says, oh, yeah, it looks like that check says 405, he's just
12 testifying from having his memory refreshed by looking at the exhibit as
13 somehow that all of a sudden now establishes delivery. It doesn't.

14 There's no testimony about what happened to that letter, when
15 did it go out, or how it went out, what happened when it went out, none of
16 those things.

17 And so, when he was ask actually asked a more poignant
18 question about delivery, i.e. do you recall see sending a tender check in
19 this case? His answer was, "Independently, I don't." And that's at page
20 26, line 17 through 19 of his testimony.

21 So I think Mr. Nitz wants to kind of quibble with, well, that's what
22 we meant by the word tender when we asked or question, but when you
23 look at the context of the testimony, he was just being asked do you know
24 how much the check was and how much the check was did you attached
25 the letter? And that he looked at the letter and was refreshed and then

1 just states the amount.

2 So that's wholly different than testifying, yes, I remember this
3 file. I gave this letter to so and so at my firm. We hired such and such
4 runner service. I know they delivered it on such and such date. I know it
5 because I looked at the run slip. That's all that's missing.

6 And when he was directed, asked do you remember sending it,
7 he said no. And then you have a lack of evidence and all the other stuff.
8 So that's what I have to say with respect to Mr. Jung's testimony.

9 THE COURT: Okay, one second. So then you would be going
10 first and then on to Rule 25.

11 MS. HANKS: Okay.

12 THE COURT: So that counsel's offering to hear your argument
13 and then he can respond. I'm going back and forth --

14 MS. HANKS: Yes.

15 THE COURT: -- of who's going first, so that nobody feels like
16 they have go first each time, okay.

17 MS. HANKS: With respect to substitution NRCP 25, that does
18 not apply in this case because that -- it deals with when at the outset, at
19 the time the actual action was filed, it was filed in the name of the real
20 party in interest.

21 And then that real party in interest subsequently transfers its
22 interest. And now you have a new entity that now is the real party in
23 interest and now the secondary entity has to substitute in.

24 We're missing that in this case. No substitution occurred in this
25 case.

1 What happened in contrast to that scenario is a party who never
2 had an interest, who was not the real party in interest at the time of filing
3 the initial complaint in July of 2016, did not have an interest.

4 And the Rule says at any point in time if the Court lacks subject
5 matter jurisdiction, it must dismiss. So that's why substitution would not
6 apply in this case, Your Honor.

7 THE COURT: Okay, so then you finished? You had another
8 minute and a half.

9 MS. HANKS: No, I don't have anything more to say.

10 THE COURT: Okay, no worries you don't need. Okay.

11 So then counsel for Plaintiff/Counter-defendant, you respond to
12 the Rule 25?

13 MR. NITZ: What NRCP 25 provides is if there is a transfer. If
14 there is a transfer, then the subsequent party can substitute in or can
15 prosecute the claim on behalf of the transferor.

16 There's no question that U.S. Bank succeeded to the interest of
17 Universal and then Greenpoint by the trail of the assignments of the deed
18 of trust. And there's also no question that, in fact it was conceded, that
19 there was assignment of the deed of trust and the note.

20 So in this case, USB -- U.S. Bank as a successor in the interest
21 had a right to prosecute its claims or Defendant's claims either in its own
22 name or under the name of its predecessor in interest, its transferor,
23 Greenpoint or Universal.

24 THE COURT: Okay, which means now the third. One second.
25 Okay, you had a full opportunity to say everything you wished to say on

1 that one, counsel? Because I'll move to the third one.

2 Okay, so then you can go first on the third one, which was the
3 outstanding issue as you view and any outstanding issues. Go ahead.

4 MR. NITZ: In my mind, your question number 3 and your
5 question number 4 blur together. Mr. Alessi provided the certificate of the
6 custodian of records that this was a true and accurate copy of his
7 collection file.

8 It came in as Exhibit 30. With the exception of certain pages,
9 which have been identified several times for the Court, which were all
10 statements of account.

11 And in that regard, there was excluded out USB570 to 577,
12 which the Court indicated could come in for nonhearsay purposes.
13 Namely that it was -- it provided the amounts that Alessi used for
14 generation of the notice of default, the three notices of sale, plus Exhibit
15 23, and USB 169 to 170.

16 The only question really is it's not clear on the record what is to
17 be done with the remaining pages of Exhibit 30 that were objected to.
18 And it was assumed by Ms. Hanks that those pages would be pulled and
19 marked as Exhibit 30.

20 When she proposed 30A, when she proposed that, I agreed
21 with it, but Your Honor deferred the issue to the conclusion of the trial. So
22 I don't -- I think there's an agreement that those pages that they object to
23 or that were excluded should be pulled out and marked separately as
24 Exhibit 30A.

25 As far as the Clerk's official record, it simply says that under

1 Exhibit 30, to be removed 472 to 76, 481 to 85, 487 to 98, 520 to 533, 553
2 to 560, and 585 to 589.

3 And the Clerk's record says 570 to 577 remain for hearsay
4 purposes and -- but the record indicates that it would remain for
5 nonhearsay purposes, other than supporting the generation of those
6 different documents.

7 The notice of default was generated and all the notices of sale
8 were generated from the notice of delinquent assessment lien and the
9 statement of account.

10 There could not have been a notice of default unless there had
11 been a previous notice of delinquent assessment lien, which Mr. Alessi
12 testified would have been generated based on what that was sent to it by
13 the community manager, CAMCO, at the initiation of the collection.

14 THE COURT: Okay, appreciate it. Thank you so much.

15 Counsel for SFR, you have the same opportunity to treat them
16 either together or the same if you wish.

17 MS. HANKS: Okay, I'll address the Exhibit 30.

18 THE COURT: I meant to say together or separate. I -- sorry, I
19 misspoke.

20 MS. HANKS: Sure. It's -- that's okay. I'll do the Exhibit 30.
21 The Exhibit 30, there's no agreement, I want to make that clear, there's no
22 agreement on my part to have them be put in the binder as Exhibit 30A.

23 What happened was the Court excluded those ledgers and the
24 proposal was to have them be proposed Exhibit 30A, while counsel tried
25 to get them admitted, because we had several witnesses after that, that

1 they may have still have come in.

2 You didn't defer anything till the end of the case. It was just a
3 way to carve them out, because it was possible that counsel could get
4 them in through another witness. But at the point we were carving them
5 out, we didn't have those witnesses.

6 That actually didn't come to fruition. They never got admitted.
7 So there is no need to have them as an exhibit. They never got in. They
8 completely were excluded. That was the only reason we marked them as
9 proposed 30A.

10 The only portion that got back in was the Bates stamp 570
11 through 77, which should now still be in Exhibit 30 in the binder, but for
12 limited purpose, not hearsay purpose.

13 That's my recollection. That's my -- and I also found the citation
14 to it, Your Honor. On day 3, at page 67, lines 20 to 25, that's where
15 you've ruled you allow -- counsel offered Exhibit 30, 570 through 77 for
16 nonhearsay purpose.

17 And because you clarified it was for a nonhearsay purpose, you
18 admitted it for the nonhearsay purpose. So there is no Exhibit 30A. It
19 was only ever proposed and it never became a 30A.

20 Lastly, with respect to -- you were addressing the Alessi
21 hearsay issue is that the -- because that was the thing that counsel
22 thought was kind of the same [indiscernible].

23 THE COURT: I'm just giving you the chance to argue it
24 separately or together --

25 MS. HANKS: That's what I thought.

1 THE COURT: -- however you wish to do.

2 MS. HANKS: Since counsel molded it in together, I'll just
3 address it now.

4 My understanding in review of the transcript, it's correct, that is
5 an issue that's still outstanding that you -- at the time of the 52(c) motions
6 or actually let's go back to the transcript.

7 Day 3 at page 90, 5 through 21 and page 91, 4 through 14,
8 which I marked in my closing argument, this is where I renewed the
9 motion to strike Mr. Alessi's testimony based on hearsay, because I
10 confirmed that his recollection of an amount was drawn from the hearsay
11 ledgers that you excluded.

12 You said, okay, Clerk, please carve this out. I'm going to look at
13 this later. And I'm going to look -- because you said you need to look at
14 the question, and how it was asked, and how it was answered.

15 Because what happened was the question and answer
16 happened the day before and then you allowed it. You overruled my
17 objection on the understanding it was based on -- you just had documents
18 that you prepared for in preparation for the testimony.

19 THE COURT: Uh-huh.

20 MS. HANKS: Then when we came back the next morning and I
21 clarified and confirmed that he drew it from those nonadmissible
22 documents, that's when I renewed my objection and did a motion to strike.
23 And that's when you said, okay, I have to look at it in the context and I'll
24 rule on it.

25 And when we left in the 52(c) motions, I even argued it again

1 that you should consider it. And you said that's right, I still have to
2 consider that.

3 And you even indicated that was one of the bases as to why
4 you were denying them without prejudice, because on top of all the other
5 arguments that were being made, you wanted to go back to the transcript
6 and still need to rule on that.

7 So when we left here, when this case -- when we left --

8 THE COURT: Uh-huh.

9 MS. HANKS: -- and we were only coming back for closings,
10 that was my understanding, it was still an issue this Court had to rule on.

11 And so, I'm not aware that it was not -- in other words, I'm not
12 aware that that it's waived or somehow this evaporates just because the
13 Court hasn't done it yet.

14 You still have an opportunity to do it. It's a bench trial and you
15 can have the time and then -- and I took the opportunity to cite the
16 portions of the transcript in my closing, since you have the benefit of that
17 because I did not do that for my oral 52(c) motions. So you still have the
18 opportunity to look at that and decide it.

19 Nevertheless, in the closing, I made sure I had a backup
20 argument in case you ultimately did decide to consider his testimony that
21 was based on hearsay and showed you where he equivocated, where he
22 really couldn't defend, and really say what the amount was for a given
23 year. So that's my take on the Alessi testimony and the Exhibit 30.

24 THE COURT: So counsel for -- Plaintiff/Counter-claimant, in
25 light of the statements made by Defendant, I see you standing. Does that

1 mean you want to address the Alessi or it's up to you.

2 MR. NITZ: Yes.

3 THE COURT: You're more than welcome to if you want to and
4 if you don't --

5 MR. NITZ: We have obviously had a different view of what the
6 unresolved questions were regarding Alessi, so I'd like to address the
7 question regarding the amount.

8 Mr. Alessi testified that in order to prepare for his testimony, he
9 reviewed the collection file and he recalled the monthly dues, monthly
10 assessments as \$45. He testified once that they were that in 2011, he
11 testified also that they were \$45 in 2009.

12 We know that he received -- he requested and received
13 statements of account from the HOA. He testified that he requested and
14 received them and they would not have appeared in proposed Exhibit 30
15 with all those statements of account unless he had actually received them.

16 There was also his testimony, which I cited before, that he took
17 the numbers in Exhibit 30, 169 and 170, and went to the statement of
18 account, and was able to fill in the difference between the amount in the
19 account and the amount in the cover letter or cover fax as \$45 per month.

20 Once again, when Exhibit 74 came up, he did the same thing.
21 He took the amount from the statement of account and went in and
22 calculated the difference in dues between the amount stated in Exhibit 73,
23 the cover letter, and the amount in the statement of account.

24 So there are multiple instances that were not objected to, which
25 the testimony came in, that showed he relied on the information or could

1 have relied on the information in the statement of account which Your
2 Honor admitted.

3 He didn't testify that -- when the question was put to him about
4 what were the assessments, the monthly assessments, he didn't testify
5 what his source was. All he said is he reviewed the collection file, and
6 based on that review, he knew they were \$45 per month.

7 There was some question. He said they were \$45 in 2009. He
8 said they were at \$45 in 2011. And then, there was some equivocation or
9 some question that was put to him. It was -- that his testimony was
10 challenged.

11 What were they -- he said they were \$45 in 2009, 2010, or
12 2011, or all three. That was his exact testimony. They were \$45 in all of
13 those periods.

14 So the testimony should not be stricken because his testimony
15 about the \$45 came in on multiple different occasions on testimony that
16 was not objected to.

17 THE COURT: Okay, well, I'm going to resolve the Alessi issue
18 right now. And the Court's looking, how I phrase things, on page 91 for
19 what this Court was doing when the objection was renewed.

20 Good news is you all ordered transcripts. So what he had said
21 the previous day is what he said the previous day. It's whatever he said
22 the previous day that's in the transcript.

23 The following day, some different questions were asked and he
24 made some other references. And then, they had the renewed objection
25 by Ms. Hanks and saying that now -- see what Ms. Hanks said.

1 Your Honor, I would now move to strike any testimony, it's on
2 page 90, from Mr. Alessi now that I've established that Mr. Alessi drew
3 that amount from a hearsay. I think that was being pulled out yesterday in
4 terms of my objection and now I've established it.

5 The Court counsel for Plaintiff, you're standing. Would you like
6 to respond?

7 Mr. Nitz: Yes, Your Honor, the question put to Mr. Alessi from
8 his -- was from his review from his file. Did he recall what the monthly
9 assessment was in -- and this is now going line 1 on 91.

10 Assessment was in 2011. He said he did. He said it was \$45 a
11 month. And then later, there was some question about whether it was the
12 same in 2009 or 2010. He didn't say what counsel said he did.

13 So then, the Court's response was that's what the Court heard,
14 too. And I wasn't referencing one thing or the other. I just was saying I
15 heard what I heard.

16 The Court when it's reviewing this at the time of preparing its
17 ruling is going to evaluate that and decide whether it can or cannot take it
18 into account, rather than doing on it different memories from different
19 counsel because there's no distinction -- sorry, because there's also
20 distinction in preparation for testimony in looking at different things
21 refreshing your recollection of preparation for testimony versus looking at
22 documents that are not subsequently introduced.

23 And so, the Court has to hear how the questions were phrased
24 and how the questions were before making a determination. So I am
25 deferring that to the time the Court's going to make a decision in the

1 overall case.

2 Question -- I said okay? And I then said Madam Court -- I said
3 record -- I know I didn't reporter, so I believe that is a typo because I'm
4 very clear about recorder, not reporter, but once again, and Madam Court
5 Recorder, can you make a nice little note on that, so I can take care of
6 that?

7 Thank you, Ms. Hanks. Now with respect to [indiscernible] let's
8 go back to Exhibit 30 and I want to go USB593. And then you continue
9 with your questioning.

10 So the Court's going to do what it said. You know, the Court
11 doesn't view that this is an outstanding issue. It was really highlighting for
12 itself that when it's doing its findings of fact, conclusions of law, and
13 looking at all the testimony, the Court has to see is there was the
14 objection raised.

15 The Court made its ruling on the prior day by -- and the Court's
16 ruling was -- let me find the exact page number real quickly. It was
17 argued at that juncture that it was foundational.

18 Now the Court's not adopting either one's perspective of
19 whether 2011 was or was not mentioned the day before, but the Court is
20 just saying that it was, because the Court is both a trier of fact and of the
21 law, has to go back and look at the testimony.

22 So the Court doesn't view this as something outstanding that I
23 didn't rule on. It's just making a note for myself that when I do my findings
24 of fact and conclusions of law, I need to see if I would have to have
25 revisited that objection, because at that time, neither of the parties had

1 presented clear direction.

2 And as I said, it was based on memory. So I was going to look
3 at the actual record and see whether I could or could not take it into
4 account.

5 Similar with a lot of the argument that you all have been raising,
6 during what you called your opening statement and what you called also
7 in your closing argument.

8 You have very different perspectives, which I can appreciate
9 excellent counsel do on what was or was not sustained and what was or
10 not come -- came into the case. And that's why the Court needs to look at
11 the actual transcript.

12 So I don't view it as something outstanding. I think the Court
13 has addressed all the issues.

14 With regards to Exhibit 30, two little issues with Exhibit 30.
15 One, the Clerk has -- and the Court's record's very clear where I said
16 pages 570 to 577 for nonhearsay purposes.

17 The Clerk that was assisting us that day just inadvertently,
18 Clerk's error, had forgotten to write the word "non" on the exhibit index
19 versus what the Court specifically said. In fact, I said that multiple times.

20 So the Clerk today has corrected that inadvertent type -- I won't
21 define it as a typographical error. It was a hand printed error, okay, to
22 make it consistent with the transcript.

23 Does anyone object to that? It's now consistent with the -- you
24 both know it was for nonhearsay purposes, 570 to 577, correct?

25 MS. HANKS: Correct.

1 MR. NITZ: Yes.

2 THE COURT: Okay, so the index has to be corrected. You
3 brought that to the attention. Note that the Clerk inadvertently forgot the
4 word "non". So that has been corrected.

5 With regard to the Bates ranges that were removed from Exhibit
6 30, the Court's going to address that as well right now. They were stated
7 a variety of different times. In looking at one portion of the transcript, it
8 appears that it could have said 520.

9 The Clerk wrote 520 to 533, but in a separate part of the
10 transcript, says that that Bates range should have been 527 to 533.

11 Is there an agreement among the parties whether or not that
12 also wishes a little scrivener's error on the Clerk that was helping us that
13 day?

14 And the intention was 527 to 533. And if either of the parties
15 need to see what affected -- what are the affected pages, we have to just
16 put them up here on the bench and people are more than welcome to
17 come look at them, but 520 to 526 is -- that's my last set. Okay.

18 THE CLERK: Here, Your Honor.

19 THE COURT: So if you are in agreement, then the Clerk
20 modifies it consistent with what the transcript was. If somebody has a
21 difference of opinion, we need to know.

22 So with regards to second issue, there was no 30A ever
23 admitted. It was a range of documents that were separated out, because
24 of the large amount in Exhibit 30 to address the outstanding issues.

25 Subsequently, this Court cannot find anywhere, nor have

1 you -- anyone point to this Court that there was any admission of a 30A.
2 There was merely a separation out for temporary purposes, so that if
3 somebody was going to move to admit different parts of 30A, you didn't
4 have witnesses going and looking at things that specifically had been
5 carved out since there was clarity, so --

6 MR. NITZ: I think -- pardon me.

7 THE COURT: Can I finish please?

8 MR. NITZ: Yes.

9 THE COURT: Thank you so much.

10 So what the Court's going to show you on the bench is three
11 different things. The pile to my far left, the one that says please return to
12 counsel on the record is what the Clerk put together as the grouping of
13 documents that were carved out.

14 The one immediately next to it is pages 520 to 526. That's
15 where there may be a little bit of the Clerk's error in that those should
16 have been included, not excluded.

17 Should have started with 527, but I'm going to hear each party's
18 position. And really, I'm going to take it state -- straight from the
19 transcript, but if you all want to look at that.

20 And then the third grouping is 570 to 577, but I don't think you
21 even need to look at this grouping because you both agree this is the
22 grouping of documents that were admitted for nonhearsay purposes as
23 part of the Exhibit 30.

24 So for this last -- but I got it here on the bench if you all want to
25 look at that. I ask you not move them from the bench, but you're both

1 welcome or when I say both, meaning both sets of counsel or set of
2 counsel are allowed.

3 Feel free to come forward if you want to look at them. We just
4 ask that you not to move them, because they're grouped in those
5 according ways. Okay.

6 Okay, and if you all wish to see, I also have say -- I should say if
7 another pile if you wish to see is the Clerk's exhibit list, where you will see
8 she has added the words "nonhearsay purposes" with her own initials with
9 today's date to make that clerical correction.

10 She has right now put the 527 to 533 to be consistent with the
11 record, but either oral motions be heard on the difference in that, we can
12 do those at well.

13 So either of you want to approach, you both want to approach.
14 I see Mr. Nitz is at bench and counsel for SFR, you've been back and
15 forth, so --

16 MS. HANKS: No, I'm good.

17 THE COURT: So you're good?

18 MS. HANKS: Yeah, I'm good.

19 THE COURT: Okay, so let's be clear on what these are. Okay,
20 I'm going to kind of go from the backwards part. 570 to 577, everyone
21 agrees, was admitted as part of Exhibit 30 for nonhearsay purposes. Is
22 that a correct or an incorrect statement?

23 MS. HANKS: Correct.

24 MR. NITZ: Correct.

25 THE COURT: Okay. Madam Clerk, there, we clarified that

1 point.

2 THE CLERK: Thank you, Your Honor.

3 THE COURT: Okay, so now, the -- for my ease, do you all want
4 me to say the Bates stamps ranges, which is -- in the pile that I said was
5 on the far left, to my far left? Do you all want me to re-state what those
6 are, according to the Clerk's records and somebody disagrees?

7 MS. HANKS: Sure.

8 THE COURT: And then I'm going to stop when we get to that.
9 I'm not going to address right now the 520 to 533 or 527. We're just going
10 to -- I'm going to tell you the way it reads today, what we view as
11 consistent with the record, because there was that little error. If
12 somebody disagrees, then I will hear each party's position on 520 to 526,
13 okay?

14 But here's for Exhibit 30, the following pages were removed.
15 472 to 476, 481 to 485, 487 to 498, initially it said 520 to 533, but the
16 transcript, which I could go back to, these were based on Defendant's
17 bench brief anyway, because I said I was reading from your bench brief
18 and these were there ones that were objected to.

19 Instead of it being 520 to 533, it really should be 527 to 533, but
20 I'm carving that one out for two seconds, if anyone wants to be heard on
21 that. 553 to 560, 585 to 589, and I already dealt with 570 to 577, which
22 was the one section for the nonhearsay purposes.

23 So do you all agree or disagree that those were the Bates
24 stamp ranges that were removed from Exhibit 30? I'm going to ask this in
25 a multi-part question.

1 MS. HANKS: I agree.

2 THE COURT: Okay, do you -- from counsel from since you
3 started first, counsel for defense, do you view it as 520 to 533 or 527 to
4 533?

5 MS. HANKS: It's 527 to 533.

6 THE COURT: Okay.

7 Counsel for Plaintiff/Counter-claimant, you heard the Bates
8 stamp ranges. So do you agree that those are the Bates stamp ranges
9 that the Court removed and I just need the point of clarification of whether
10 you view it as 520 to 533 or 527 to 533?

11 MR. NITZ: I agree 527 to 533, rather than as previously
12 indicated 520 to 533.

13 THE COURT: Okay, otherwise the Bates stamp ranges you all
14 show, I mean, straight from the transcript?

15 MS. HANKS: Yes.

16 MR. NITZ: I didn't look at each page --

17 THE COURT: Okay.

18 MR. NITZ: -- but if you pulled them according to their bench
19 brief and according to the transcript of what they were objecting to, if
20 those are one in the same, that's fine. If you want, I can go ahead and
21 compare what's in your hand to those numbers.

22 THE COURT: Madam Clerk just handed these to me. I will tell
23 you that's a Clerk's job. I don't independent -- I don't pull things from
24 exhibit binders. That's the clerks. I let them stay in their lane. I try and
25 stay in mine other than -- well, let's just say I try and stay in mine.

1 What I mean is if people need helping out on different things, of
2 course, I jump in and help out, but not in this case. This was not
3 something.

4 When I'm looking at the first page of each of these clipped
5 grouping of documents, the first one, two, three, four all -- first page I'll say
6 resident transaction detail, the very last one says PDF complete and it has
7 Antelope and it has similar sets of transaction. I'm showing you both that.

8 So if anyone wants to compare them with their own notes, I'm
9 more than glad to. If anyone wants a page reference of where these were
10 done, I believe it's page 146 of day 5.

11 If anybody wants to cross look at it that way as well or if anyone
12 wants to look at Defendant's bench brief. I assume, Defendant, you have
13 your own bench brief and that the Plaintiff's counsel you don't happen to
14 have it handy. I could go looking through my grouping of documents. I
15 had it here two seconds ago. I can try and find it for you.

16 Does anyone wish the Court to do any of those?

17 MS. HANKS: No, Your Honor.

18 MR. NITZ: I don't have it. I'd like to look at it.

19 THE COURT: Okay.

20 MR. NITZ: The bench brief.

21 THE COURT: Give me one second. Defense counsel, do you
22 have it easier without my notes on it? If not --

23 MS. HANKS: I can pull it on our computer, but I don't have a
24 copy with me.

25 THE COURT: Okay.

1 MS. HANKS: All I have is the chunk of records that I pulled out.

2 THE COURT: Okay, well, if you all don't mind, I circled this on
3 page 4 for the bench brief. I circled it. My only notation was is I circled
4 this.

5 As I was reading off the ranges, I put little checkmarks and then
6 I drew a little line that says nonhearsay only admitted right by the 570 to
7 577. So if no one --

8 MS. HANKS: I have no objection.

9 THE COURT: -- objection. Feel free counsel for Plaintiff, you
10 can -- and if you want to cross-reference it with these, feel free to do so.

11 So 520 to 526 goes back in by agreement. Those -- two
12 seconds. Let's wait to make sure Plaintiff counsel's --

13 THE CLERK: Sure.

14 THE COURT: You can tell the handwriting is neat, that's how
15 you know it's not mine. Well, there's other ways, but it's not mine.

16 [Court confers with the Clerk]

17 THE COURT: And counsel for SFR, did you need to see the
18 exhibit list for any reason other words -- otherwise?

19 MS. HANKS: I don't think so, Your Honor.

20 THE COURT: Okay, does I don't think so mean no?

21 MS. HANKS: Correct.

22 THE COURT: Okay, thanks. I just need like a final answer,
23 sorry, thank you.

24 MS. HANKS: Sorry.

25 THE COURT: Okay, so counsel for Plaintiff/Counter-claimant,

1 you've now had a chance to look at the bench brief, the clerk's official
2 records, and the grouping of documents.

3 Do you have any questions? Do you need anything else? Or
4 does that clarify at least what pages from the Court's ruling were not
5 admitted as part of Exhibit 30 with the caveat 570 to 577 was admitted for
6 its nonhearsay purposes? Is there anything else you need? The shorter
7 way to say it, I'm just was --

8 MR. NITZ: I agree that the stack that I was presented is 472 to
9 76, 481 to 485, 487 to 498, 527 to 533, 553 to 560, and 585 to 589.
10 There's been a repeated statement that I said Exhibit 30A was admitted.
11 And I never said that.

12 I just simply said that it -- and made the request that it be
13 marked in conformity with the prior suggestion by Ms. Hanks and my
14 agreement to that suggestion.

15 THE COURT: Sure, okay. What normally would happen -- and
16 I just -- whether -- I just was clarifying it wasn't admitted. I'm not saying
17 anybody said it was or wasn't. I'm just saying it was not admitted.

18 The normal protocol now would be, since you all have
19 completed all your closing arguments, the Court asked a couple questions
20 you all were -- said you agree that you wish to answer, giving you that
21 opportunity as well, is normally what would happen at this juncture is the
22 Court would say, Madam Clerk, you can release all exhibits that were not
23 admitted in this case.

24 And then, we would offer you the same thing. And we've heard
25 us say, us meaning both me and the Clerk, the Clerk and I, sorry, say is

1 that you can either take them with you today or we ask that you take them
2 the next few days, because we don't know if you got a little cart or means
3 to take them or maybe you did or maybe you didn't, okay.

4 And since Madam Clerk, who's one of three helping us out
5 today and was not the same Madam Clerk who was helping us out on the
6 other day, she may need a little bit of time to ensure that we have the
7 exhibits that are all admitted.

8 So while I would say they would be released, not to have you all
9 sit here and wait while she goes through and confirms each and every
10 one of those, you can easily have the nonadmitted exhibits available for
11 anyone to pick up tomorrow morning or later, or sends runners, whoever's
12 picking them up.

13 So when that grouping of documents that would be returned to
14 counsel would include any exhibits that were not admitted in their entirety,
15 as well as any portions of exhibits, i.e., including the ranges that the Court
16 just read from Exhibit 30 that were not admitted, those would be returned
17 to counsel.

18 That's the normal practice because any nonadmitted exhibits
19 would be returned to counsel. Does that meet the parties' needs or is
20 there something different parties are requesting?

21 MS. HANKS: I'm not requesting anything, Your Honor.

22 MR. NITZ: And I am requesting something slightly different.
23 Rather than simply returning those pages that I just read off, that they be
24 marked as the Court's exhibit, or not the Court's exhibit, but be marked as
25 Exhibit 30A. And then the Clerk's record would indicate that they were

1 offered and not admitted, rather than simply returning them.

2 THE COURT: They still would get returned under your
3 scenario, because everything gets returned. If it's not an admitted exhibit,
4 it gets returned because the only thing that becomes part of the official
5 record is things that were admitted, right?

6 If they're admitted exhibits, because if the Clerks kept all the
7 nonadmitted exhibits, there's not enough room in this whole courthouse.
8 We have room for courtrooms honestly is what the Clerks have told me.
9 I'm trying to give you a visual, because if you think of the years and years
10 and years, there just be no room for it.

11 And so, the only official record is the admitted exhibits, which is
12 why both on jury trials and bench trials, the nonadmitted exhibits or any
13 portions thereof are returned to counsel.

14 Similar with regards to for jury trials and other trials, parties
15 usually provide the Court two sets of exhibits. So the witness copy is
16 returned in its entirety, whether it's exhibits that are or are not admitted,
17 but are the official set, i.e. the one that the Clerk maintains and has the
18 stickers, the only one she keeps or he keeps in this case, she, I'm sorry,
19 Allen [phonetic] helps us out, too, so --

20 MS. HANKS: Right.

21 THE COURT: -- he or she, right, would be the ones that have
22 the sticker that shows for demonstration purposes and number 24 is
23 there's a sticker that the Clerk's office puts in.

24 And it says -- the sticker is usually on the first page. See, these
25 little stickers. It says joint exhibit. It says the exhibit number. Underneath

1 it, it says the case number on the right hand side. It generally says the
2 date the exhibit is admitted.

3 Is that correct, Madam Clerk?

4 THE CLERK: Yes, Your Honor.

5 THE COURT: Okay, so only those that have those stickers on
6 them would be kept. And if it's portions of exhibits that either are
7 replaced, or in this case not admitted as -- they're the only -- the exhibits
8 only admitted in part, not in its entirety. And the nonadmitted portions
9 would be returned to counsel. So I'm hearing what you're saying, but I'm
10 not seeing a distinction.

11 MR. NITZ: Maybe there's not.

12 THE COURT: Okay.

13 MR. NITZ: But what I will do is collect the nonadmitted exhibits
14 or nonadmitted portions of exhibits where portions were admitted and
15 within the next few days.

16 THE COURT: Okay, that would be great. Okay, thank you so
17 very much. We do appreciate it.

18 Okay, so then at this juncture, the Court does not require, but
19 usually parties request that at the conclusion of closing arguments, that if
20 the parties wished to file amended proposed findings of fact and
21 conclusions of law, not adding any additional argument, not adding any
22 additional analysis, not adding Rule 52s or anything like that, but just
23 between the time submitted initially at the beginning of the trial and then
24 towards the end of the trial, then the Court would allow those to be
25 submitted.

1 Is anyone requesting that or not? The Court's fine either way.
2 The Court's perfectly fine, but I just want to make sure that it gets
3 submitted. It's nothing new. All it is is a pure summary of everything
4 that's in the case, but not any argument, additional argument.

5 MR. NITZ: On behalf of the Plaintiff, I would request the
6 opportunity to amend the findings of fact and conclusions of the law that
7 we previously submitted to the Court based upon the evidence submitted.

8 THE COURT: Counsel for Defense/Counter-claimant, are you
9 making a similar request?

10 MS. HANKS: I anticipated your allowance of that, so I already
11 submitted my amended proposed findings of fact and law, so.

12 THE COURT: But the Court -- the Court in no way is requiring
13 anyone to do anything additional. It's just I --

14 MS. HANKS: Yes.

15 THE COURT: -- wouldn't be able to consider one party's if the
16 other party objected to having it.

17 MS. HANKS: No.

18 THE COURT: Since I have a request by Plaintiffs --

19 MS. HANKS: And I have no objections. I already did it
20 presuming that that would be allowed. So I've done it and I'm not going to
21 submit any more.

22 THE COURT: All right. Okay, so then I'd ask --

23 MS. HANKS: Well, that's -- I'm sorry. I'm going to correct the
24 captions. So I am going to submit it again. So yes.

25 THE COURT: And --

1 MR. NITZ: We will.

2 THE COURT: -- when the Court said it didn't look at it, it didn't
3 look at the substance. I looked at the first page just as being the very
4 most recent document, to look at a caption, which ended up not being the
5 best court of action, because it had some typos in it.

6 But anyway, how much time, and I don't give more than usually
7 two weeks because if not, it doesn't -- nothing stays in people's minds and
8 we don't like to -- we need to get these things closed up for everyone's
9 purposes and cleaned up so that you all can move forward with the other
10 cases you have, so.

11 MR. NITZ: Two weeks is fine, Your Honor.

12 THE COURT: Two weeks, okay, great. Then not requiring it,
13 but if anybody wishes to or if anyone wishes what they've already -- we're
14 getting a new caption page.

15 You're going to just put a little note that this is our amended
16 findings of facts and conclusions of law. And as long as I get it within the
17 next two weeks, I'll take a look at it, which since that means today is -- and
18 I'm slowly saying this so Madam Clerk's going to beat me to telling me
19 when the two weeks is.

20 THE CLERK: June 4.

21 THE COURT: June 4, correct. What day is today?

22 MR. NITZ: June 3.

23 THE COURT: Oh, we generally if you want June 3, June 3's
24 fine. We usually don't -- just in fairness to you, we usually don't include
25 the --

1 MR. NITZ: Nonjudicial days?

2 THE COURT: Huh?

3 MR. NITZ: You don't include the nonjudicial days?

4 THE COURT: No, it's usually people say it's the end of the day
5 and they're not going to do it today.

6 MS. HANKS: Today, include today.

7 THE COURT: So they usually ask me two weeks from the
8 following day, but I don't care.

9 MR. NITZ: That's fine.

10 THE COURT: June 3 or June 4, whatever you want.

11 MR. NITZ: June 4 is fine.

12 THE COURT: Whatever you all want is --

13 MR. NITZ: I didn't understand your practice.

14 THE COURT: Yeah, sometimes people ask it one way, some
15 people ask it the other way. If the Clerk says that she's giving you all an
16 extra day, then I figure that's the fair thing to do because it came out of
17 her mouth clear.

18 I don't -- it's perfectly fine. So I'm going to put it on my
19 chambers calendar. We're just going to do just my own little status check
20 on June 7th, okay?

21 THE CLERK: Yes, Your Honor.

22 THE COURT: And that June 7th status check, I'll tell you, may
23 end up being June 14th, depending on how busy I am in trial that first
24 week, okay?

25 Thank you so very much. Is there anything else the Court can

1 do on this case? If not, I'm going to wish you all a nice afternoon.

2 Everything has been concluded and we got slated for a status check or a
3 decision on June 7th.

4 MR. NITZ: Perfect.

5 THE COURT: Does that work for everybody?

6 MS. HANKS: Perfect.

7 THE COURT: Then I say thank you so very much and have a
8 great rest of your afternoon.

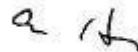
9 MR. NITZ: Thank you, Your Honor.

10 THE COURT: And Madam Court Reporter, we can go
11 off -- Madam Court Recorder --

12 [Proceeding concluded at 3:08 p.m.]

13 * * * * *

14
15
16 ATTEST: I do hereby certify that I have truly and correctly transcribed the
17 audio/video proceedings in the above-entitled case to the best of my ability.

18 

19 _____
20 Chris Hwang
21 Transcriber
22
23
24
25

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REGISTER OF ACTIONS

CASE NO. A-16-739867-C

U.S. Bank, National Association, Plaintiff(s) vs. SFR Investments Pool 1, LLC, Defendant(s)

§
§
§
§
§
§
§

Case Type: **Other Real Property**
Date Filed: **07/12/2016**
Location: **Department 31**
Cross-Reference Case Number: **A739867**
Supreme Court No.: **79235**

PARTY INFORMATION

Counter Claimant	SFR Investments Pool 1, LLC	Lead Attorneys Diana S. Cline <i>Retained</i> 702-485-3300(W)
Counter Defendant	U.S. Bank, National Association	Jamie S Hendrickson <i>Retained</i> 702-348-5934(W)
Cross Claimant	SFR Investments Pool 1, LLC	Diana S. Cline <i>Retained</i> 702-485-3300(W)
Cross Defendant	Mortgage Electronic Registration Inc.	
Defendant	SFR Investments Pool 1, LLC	Diana S. Cline <i>Retained</i> 702-485-3300(W)
Plaintiff	U.S. Bank, National Association	Jamie S Hendrickson <i>Retained</i> 702-348-5934(W)

EVENTS & ORDERS OF THE COURT

DISPOSITIONS	
09/26/2017	Order of Dismissal Without Prejudice (Judicial Officer: Kishner, Joanna S.) Debtors: SFR Investments Pool 1, LLC (Cross Claimant) Creditors: Mortgage Electronic Registration Systems Inc as Beneficiary for Universal American Mortgage Co LLC (Cross Defendant) Judgment: 09/26/2017, Docketed: 09/27/2017
10/05/2017	Order of Dismissal Without Prejudice (Judicial Officer: Kishner, Joanna S.) Debtors: U.S. Bank, National Association (Counter Defendant) Creditors: SFR Investments Pool 1, LLC (Counter Claimant) Judgment: 10/05/2017, Docketed: 10/05/2017 Comment: Certain Claim
07/17/2018	Order of Dismissal Without Prejudice (Judicial Officer: Kishner, Joanna S.) Debtors: Henry E Ivy (Cross Defendant), Freddie S Ivy (Cross Defendant) Creditors: SFR Investments Pool 1, LLC (Cross Claimant) Judgment: 07/17/2018, Docketed: 07/17/2018
10/10/2018	Partial Summary Judgment (Judicial Officer: Kishner, Joanna S.) Debtors: U.S. Bank, National Association (Counter Defendant) Creditors: SFR Investments Pool 1, LLC (Counter Claimant) Judgment: 10/10/2018, Docketed: 10/10/2018
04/23/2019	Order of Dismissal Without Prejudice (Judicial Officer: Kishner, Joanna S.) Debtors: Antelope Homeowners' Association (Defendant) Creditors: U.S. Bank, National Association (Plaintiff)

JA02477

	Judgment: 04/23/2019, Docketed: 04/23/2019
06/18/2019	Order of Dismissal (Judicial Officer: Kishner, Joanna S.) Debtors: SFR Investments Pool 1, LLC (Defendant) Creditors: U.S. Bank, National Association (Plaintiff) Judgment: 06/18/2019, Docketed: 06/18/2019
06/18/2019	Order (Judicial Officer: Kishner, Joanna S.) Debtors: U.S. Bank, National Association (Plaintiff) Creditors: SFR Investments Pool 1, LLC (Defendant) Judgment: 06/18/2019, Docketed: 06/18/2019 Comment: Quiet Title
	OTHER EVENTS AND HEARINGS
07/12/2016	Complaint <i>Complaint Exempt from Arbitration: Action for Quiet Title and Declaratory Relief</i>
07/12/2016	Initial Appearance Fee Disclosure <i>Initial Appearance Fee Disclosure</i>
07/12/2016	Lis Pendens <i>Lis Pendens</i>
07/13/2016	Receipt of Copy <i>Receipt of Copy</i>
07/29/2016	Affidavit of Service <i>Affidavit of Service</i>
08/10/2016	Demand for Security of Costs <i>SFR Investments Pool 1, LLC's Demand for Security of Costs Pursuant to NRS 18.130(1)</i>
08/16/2016	Notice of Posting Bond <i>Notice of Posting Bond</i>
09/02/2016	Motion to Dismiss <i>SFR Investments Pool 1, LLC's Motion to Dismiss Plaintiff's Complaint Pursuant to NRCP 12(b)(6)</i>
09/22/2016	Opposition to Motion to Dismiss <i>U.S. Bank, National Association as Trustee for Merrill Lynch Mortgage Investors Trust, Mortgage Loan Asset-Backed Certificates, Series 2005-A8's Opposition to SFR Investments Pool 1, LLC's Motion to Dismiss Plaintiff's Complaint Pursuant to N.R.C.P. 12(b)(6)</i>
09/26/2016	Reply in Support <i>SFR Investments Pool 1, LLC's Reply in Support of Motion to Dismiss Plaintiff's Complaint Pursuant to NRCP 12(b)(6)</i>
09/29/2016	Receipt of Copy <i>Receipt of Copy</i>
10/04/2016	Motion to Dismiss (9:30 AM) (Judicial Officer Kishner, Joanna S.) <i>SFR Investments Pool 1, LLC's Motion to Dismiss Plaintiff's Complaint Pursuant to NRCP 12(b)(6)</i> Parties Present Minutes Result: Denied Without Prejudice
10/14/2016	Transcript of Proceedings <i>Transcript of Proceedings Re: Defendant's Motion to Dismiss Plaintiff's Complaint Pursuant to NRCP 12(b)(6) -- 10-4-16</i>
10/19/2016	Notice of Lis Pendens <i>Notice of Lis Pendens</i>
10/19/2016	Answer and Counterclaim <i>SFR Investments pool 1, LLC's Answer to Complaint, Counterclaim and Cross-Claim</i>
11/08/2016	Answer to Counterclaim <i>U.S. Bank's Reply to SFR Investments Pool 1, LLC's Counterclaim</i>
11/08/2016	Early Case Conference <i>Notice of Early Case Conference</i>
11/15/2016	Joint Case Conference Report <i>Joint Case Conference Report</i>
11/22/2016	Order Denying Motion <i>Order Denying Defendant's Motion to Dismiss Plaintiff's Complaint Pursuant to NRCP 12(b)(6)</i>
12/01/2016	Notice of Entry <i>Notice of Entry of Order</i>
12/13/2016	Affidavit of Service <i>Affidavit of Service</i>
12/13/2016	Affidavit of Service <i>Affidavit of Service</i>
12/13/2016	Affidavit of Service <i>Affidavit of Service</i>
02/06/2017	Scheduling Order <i>Scheduling Order</i>
03/24/2017	Notice <i>Notice of Removal</i>
04/11/2017	Order to Statistically Close Case <i>Civil Order to Statistically Close Case</i>
09/06/2017	Notice <i>Notice to Adverse Parties and to the Eighth Judicial District Court of Remand of Previously-Removed Case to this Court</i>
09/14/2017	Order of Remand from Federal Court <i>Order Remanding Cases to State Court for Lack of Jurisdiction, and Alternatively, on Equitable Grounds</i>
09/26/2017	Stipulation and Order for Dismissal Without Prejudice <i>Stipulation and Order Dismissing Mortgage Electronic Registration Systems, Inc. Without Prejudice</i>
09/27/2017	Notice of Entry of Stipulation & Order for Dismissal <i>Notice of Entry of Stipulation and Order</i>
10/05/2017	Stipulation and Order <i>Stipulation and Order to Dismiss SFR Investments Pool 1, LLC's Slander of Title Claim Against U.S. Bank, National Association</i>
10/09/2017	Notice of Entry of Stipulation and Order <i>Notice of Entry of Stipulation and Order to Dismiss SFR Investments Pool 1, LLC's Slander of Title Claim Against U.S. Bank, National Association</i>

JA02478

12/06/2017 **Motion**
Plaintiff/Counter-Defendant, U.S. Bank, N.A.'s Motion to Set Status Check Upon Remand

01/09/2018 **Motion** (9:00 AM) (Judicial Officer Kishner, Joanna S.)
Plaintiff/ Counter Defendant U.S. Bank N.A.'s Motion to Set Status Check Upon Remand
[Parties Present](#)
[Minutes](#)
 Result: Trial Date Set

01/09/2018 **Notice**
Notice of Completion of Mediation Pursuant to Nrs 38.310

01/23/2018 **Supplement to List of Witnesses & Documents**
Plaintiff U.S. Bank National Association's First Supplemental Disclosure of Witnesses and Documents

03/13/2018 **Motion to Amend**
Plaintiff U.S. Bank, N.A.'s Motion for Leave to Amend its Complaint

03/15/2018 **Stipulation and Order**
Stipulated Discovery Plan Upon Remand From Bankruptcy Court

04/17/2018 **Motion for Leave** (9:00 AM) (Judicial Officer Kishner, Joanna S.)
Plaintiff U.S. Bank, N.A.'s Motion for Leave to Amend its Complaint
[Parties Present](#)
[Minutes](#)
 Result: Motion Granted

04/18/2018 **CANCELED Motion to Compel** (9:00 AM) (Judicial Officer Bulla, Bonnie)
Vacated - Set in Error
Plaintiff's Motion to Compel Defendant's Deposition;(2) Deem Plaintiff's Requests for Admission as Admitted; and (3) Compel Defendant's Interrogatory Responses

05/08/2018 **Order Granting Motion**
Order Granting Plaintiff U.S. Bank's Motion for Leave to Amend its Complaint

05/08/2018 **Notice of Entry of Order**
Notice of Entry of Order Granting U.S. Bank's Motion for Leave to Amend its Complaint

05/08/2018 **Amended Complaint**
U.S. Bank's First Amended Complaint - Exempt from Arbitration: Action for Quiet Title and Declaratory Relief

05/24/2018 **Summons Electronically Issued - Service Pending**
Summons

05/29/2018 **Answer**
SFR Investment Pool 1, LLC's Answer to First Amended Complaint

05/30/2018 **Summons Electronically Issued - Service Pending**
Summons to Antelope HOA

06/15/2018 **Motion to Strike**
SFR Investments Pool 1, LLC's Motion to Strike Plaintiff's Initial Expert Disclosure

06/18/2018 **Notice of Hearing**
Notice of Hearing (re: SFR Investments Pool 1, LLC's Motion to Strike Plaintiff's Initial Expert Disclosure)

06/28/2018 **Pre Trial Conference** (10:15 AM) (Judicial Officer Kishner, Joanna S.)
[Minutes](#)
 Result: Trial Date Set

07/09/2018 **Opposition and Countermotion**
U.S. Bank's Opposition to SFR Investments Pool I, LLC's Motion to Strike and Countermotion for Late Disclosure of Initial Expert Witness

07/09/2018 **Motion to Dismiss**
Defendant Antelope Homeowners Association's Motion to Dismiss

07/09/2018 **Initial Appearance Fee Disclosure**
Initial Appearance Fee Disclosure

07/09/2018 **Motion for Summary Judgment**
SFR Investments Pool 1 LLC's Motion for Summary Judgment

07/11/2018 **Reply in Support**
SFR Investments Pool 1, LLC's Reply in Support of Its Motion to Strike Plaintiff's Initial Expert Disclosure and Opposition to Bank's Countermotion for Late Disclosure

07/12/2018 **Declaration**
Declaration of Jamie S. Hendrickson, Esq. in Response to June 28, 2018, Order to Show Cause

07/16/2018 **Pre-Trial Disclosure**
SFR Investments Pool 1, LLC's Pre-Trial Disclosures

07/17/2018 **Stipulation and Order**
Stipulation and Order Dismissing Henry E. Ivy and Freddie S. Ivy Without Prejudice

07/17/2018 **Order to Show Cause**
Order to Show Cause

07/18/2018 **Notice of Entry of Stipulation and Order**
Notice of Entry of Stipulation and Order Dismissing Henry E. Ivy and Freddie S. Ivy Without Prejudice

07/19/2018 **Motion to Strike** (9:00 AM) (Judicial Officer Kishner, Joanna S.)
Defendant SFR Investments Pool 1, LLC's Motion to Strike Plaintiff's Initial Expert Disclosure
[Parties Present](#)
 Result: Motion Granted

07/19/2018 **Show Cause Hearing** (9:00 AM) (Judicial Officer Kishner, Joanna S.)
Show Cause Hearing RE: Plaintiff's Counsel
[Parties Present](#)
 Result: Matter Heard

07/19/2018 **Opposition and Countermotion** (9:00 AM) (Judicial Officer Kishner, Joanna S.)
Plaintiff U.S. Bank's Opposition to SFR Investments Pool I, LLC's Motion to Strike and Countermotion for Late Disclosure of Initial Expert Witness
[Parties Present](#)
 Result: Denied

07/19/2018 **CANCELED Show Cause Hearing** (9:00 AM) (Judicial Officer Kishner, Joanna S.)
Vacated - Duplicate Entry

07/19/2018 **All Pending Motions** (9:00 AM) (Judicial Officer Kishner, Joanna S.)
[Parties Present](#)

JA02479

[Minutes](#)
Result: Matter Heard

07/19/2018 **Opposition to Motion to Dismiss**
U.S. Bank's Opposition to Antelope HOA's Motion to Dismiss

07/19/2018 **All Pending Motions** (9:00 AM) (Judicial Officer Kishner, Joanna S.)
[Parties Present](#)
[Minutes](#)
Result: Granted in Part

07/20/2018 **Order Shortening Time**
Defendant Antelope Homeowners' Association Motion to Re-open Discovery, Extend Dispositive Motion Deadline and Continue Trial On Order Shortening Time

07/23/2018 **Notice of Entry**
Notice of Entry of Order

07/24/2018 **Notice**
U.S. Bank's Notice of Intent to Offer Custodian of Records Affidavit Pursuant to NRS 52.260(4)(Alessi & Koenig, LLC)

07/25/2018 **Opposition**
SFR Investments Pool 1, LLC's Limited Opposition to Motion to Re-Open Discovery and Continue Trial and Counter-Motion for Attorneys Fees Against Bank

07/26/2018 **Recorders Transcript of Hearing**
Transcript - All Pending Motions 7/19/18

07/26/2018 **Opposition and Countermotion**
U.S. Bank's Opposition to SFR Investments Pool I, LLC's Motion for Summary Judgment and Countermotion for Summary Judgment

07/27/2018 **Order Shortening Time**
Stipulation and Order to Advance Hearing on Antelope Homeowners' Association's Motion to Dismiss

07/27/2018 **Opposition**
U.S. Bank's Opposition to SFR Investments Pool I, LLC's Countermotion for Attorneys Fees and Costs

07/30/2018 **Objection**
Objections to Pre-Trial Disclosures

07/30/2018 **Initial Appearance Fee Disclosure**
Initial Appearance Fee Disclosure

07/31/2018 **CANCELED Calendar Call** (9:00 AM) (Judicial Officer Kishner, Joanna S.)
Vacated - per Judge

07/31/2018 **Motion to Dismiss** (10:00 AM) (Judicial Officer Kishner, Joanna S.)
Defendant Antelope Homeowners Association's Motion to Dismiss - Set to be heard with the Motion on OST
[Parties Present](#)
07/31/2018 Reset by Court to 07/31/2018
08/14/2018 Reset by Court to 07/31/2018

Result: Denied Without Prejudice

07/31/2018 **Motion** (10:00 AM) (Judicial Officer Kishner, Joanna S.)
Defendant Antelope Homeowners' Association Motion to Re-open Discovery, Extend Dispositive Motion Deadline and Continue Trial On Order Shortening Time
[Parties Present](#)
07/31/2018 Reset by Court to 07/31/2018

Result: Motion Granted

07/31/2018 **Opposition and Countermotion** (10:00 AM) (Judicial Officer Kishner, Joanna S.)
Defendant SFR Investments Pool 1 LLC's Limited Opposition to Motion to Re-Open Discovery and Continue Trial and Counter Motion for Attorney's Fees Against US Bank
[Parties Present](#)
07/31/2018 Reset by Court to 07/31/2018

Result: Denied

07/31/2018 **Errata**
Errata to Objections to Pre-Trial Disclosures

07/31/2018 **Notice of Entry of Order**
Notice of Entry of Order

07/31/2018 **Joint Pre-Trial Memorandum**
Joint Pre-Trial Memorandum

07/31/2018 **Notice of Compliance**
Notice of Compliance

07/31/2018 **All Pending Motions** (10:00 AM) (Judicial Officer Kishner, Joanna S.)
[Parties Present](#)
[Minutes](#)
Result: Matter Heard

08/06/2018 **CANCELED Bench Trial** (9:00 AM) (Judicial Officer Kishner, Joanna S.)
Vacated - per Judge

08/06/2018 **Reply in Support**
SFR Investments Pool 1, LLC's Reply in Support of its Motion for Summary Judgment, Counter-Motion to Strike Plaintiff's Counter-Motion for Summary Judgment and Opposition to Plaintiff's Counter-Motion for Summary Judgment

08/07/2018 **CANCELED Calendar Call** (9:00 AM) (Judicial Officer Kishner, Joanna S.)
Vacated - per Judge

08/08/2018 **Notice**
Notice of Availability to Inspect Collateral File

08/09/2018 **Opposition**
U.S. Bank's Opposition to SFR Investments Pool 1, LLC's Countermotion to Strike U.S. Bank's Countermotion for Summary Judgment

08/14/2018 **Motion for Summary Judgment** (9:30 AM) (Judicial Officer Kishner, Joanna S.)
Defendant/Counter Claimant/Cross Claimant SFR Investments Pool 1 LLC's Motion for Summary Judgment
Result: Granted in Part

08/14/2018 **Opposition and Countermotion** (9:30 AM) (Judicial Officer Kishner, Joanna S.)

JA02480

Plaintiff/Counter Defendant U.S. Bank's Opposition to SFR Investments Pool I, LLC's Motion for Summary Judgment and Countermotion for Summary Judgment
Result: Moot

08/14/2018 **All Pending Motions** (9:30 AM) (Judicial Officer Kishner, Joanna S.)
[Parties Present](#)
[Minutes](#)
Result: Matter Heard

08/14/2018 **Motion to Strike** (9:30 AM) (Judicial Officer Kishner, Joanna S.)
SFR Investment Pool 1, LLC's Counter-Motion to Strike Plt's Counter-Motion for Summary Judgment
Result: Motion Granted

08/15/2018 **CANCELED Bench Trial** (10:00 AM) (Judicial Officer Kishner, Joanna S.)
Vacated - per Judge

08/15/2018 **Notice**
Notice of Compliance

08/21/2018 **Order Denying**
Order Denying The Antelope Homeowners' Association's Motion to Dismiss

08/21/2018 **Order Granting**
Order Granting Motion to Strike Plaintiff's Initial Expert Disclosure

08/21/2018 **Order Granting Motion**
Order Granting Antelope Homeowners' Association Motion to Re-Open Discovery and Continue Trial and Denying SFR's Motion for Attorney's Fees Against US Bank

08/22/2018 **Recorders Transcript of Hearing**
Transcript - All Pending Motions 8/14/18

08/23/2018 **Notice of Entry of Order**
Notice of entry of Order

08/23/2018 **Notice of Entry of Order**
Notice of Entry of Order Granting Motion to Strike Plaintiff's Initial Expert Disclosure

09/07/2018 **Answer**
Defendant Antelope Homeowners Association's Answer and Affirmative Defenses

09/10/2018 **Amended Order Setting Civil Non-Jury Trial**
Amended Order Setting Civil Non Jury Trial, Pre Trial Conference and Calendar Call

09/21/2018 **Recorders Transcript of Hearing**
Transcript - All Pending Motions 7/31/18

10/10/2018 **Order Granting**
Order Granting SFR's Counter-Motion to Strike and Granting in Part and Denying in Part SFR's Motion for Summary Judgment

10/11/2018 **Notice of Entry of Order**
Notice of Entry of Order Granting SFR's Counter-Motion to Strike and Granting in Part and Denying in Part SFR's Motion for Summary Judgment

12/18/2018 **Supplement to List of Witnesses & Documents**
Plaintiff U.S. Bank's National Association's Seventh Supplemental Disclosure of Witnesses and Documents

02/01/2019 **Notice**
Notice of Intent to Offer Custodian of Records Affidavits Pursuant to NRS 52.260(4)

02/12/2019 **Pre Trial Conference** (9:00 AM) (Judicial Officer Kishner, Joanna S.)
[Parties Present](#)
[Minutes](#)
02/14/2019 Reset by Court to 02/12/2019
Result: Trial Date Set

03/29/2019 **Objection**
Objections to U.S. Bank's Amended Pre-Trial Disclosures

04/02/2019 **Joint Pre-Trial Memorandum**
Amended Joint Pre-Trial Memorandum

04/09/2019 **Calendar Call** (9:00 AM) (Judicial Officer Kishner, Joanna S.)
[Parties Present](#)
[Minutes](#)
03/12/2019 Reset by Court to 04/09/2019
Result: Matter Heard

04/15/2019 **Finding of Fact and Conclusions of Law**
Proposed Findings of Fact and Conclusions of Law

04/15/2019 **Trial Brief**
SFR Investments Pool 1, LLC's Trial Brief re Admissibility of Certain Proposed Exhibits

04/15/2019 **Telephonic Conference** (4:15 PM) (Judicial Officer Kishner, Joanna S.)
[Parties Present](#)
[Minutes](#)
Result: Matter Heard

04/15/2019 **Trial Brief**
SFR Investments Pool 1, LLC Trial Brief re Statute of Limitations

04/16/2019 **Bench Trial** (2:00 PM) (Judicial Officer Kishner, Joanna S.)
04/16/2019, 04/17/2019, 04/18/2019, 04/23/2019, 04/24/2019, 05/20/2019
[Parties Present](#)
[Minutes](#)
03/18/2019 Reset by Court to 04/16/2019
Result: Trial Continues

04/16/2019 **Trial Subpoena**
Trial Subpoena to Teralyn Thompson

04/16/2019 **Trial Subpoena**
Amended Trial Subpoena to Corporate Designee/Representative and Custodian of Records for the Clark County Assessor

04/16/2019 **Trial Subpoena**
Amended Trial Subpoena to Corporate Designee for Antelope Homeowners' Association

04/16/2019 **Trial Subpoena**

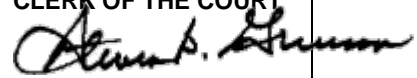
JA02481

	<i>Amended Trial Subpoena to Corporate Designee for Alessi & Koenig, LLC</i>
04/16/2019	Trial Subpoena <i>Trial Subpoena to Corporate Designee for Complete Association Management Company (CAMCO)</i>
04/16/2019	Trial Subpoena <i>Amended Trial Subpoena to Chris Hardin</i>
04/16/2019	Trial Subpoena <i>Trial Subpoena to David Alessi</i>
04/16/2019	Trial Subpoena <i>Amended Trial Subpoena to Rock K. Jung, Esq.</i>
04/16/2019	Trial Subpoena <i>Amended Trial Subpoena to Corporate Designee for SFR Investments Pool 1, LLC</i>
04/17/2019	Trial Brief <i>U.S. Bank's Bench Memorandum Regarding Authentication and Admissibility of Proposed Exhibits 21, 22, 23, 24 and 31</i>
04/18/2019	Trial Memorandum <i>U.S. Bank's Bench Memorandum Regarding Statute of Limitations</i>
04/18/2019	Trial Memorandum <i>U.S. Bank's Bench Memorandum Regarding Standing to Maintain its Claims in this Action and Standing to Enforce the Deed of Trust and Note</i>
04/18/2019	Trial Memorandum <i>U.S. Bank's Bench Memorandum Regarding Pre-Foreclosure Satisfaction of the Superpriority Portion of the HOA's Lien</i>
04/18/2019	Trial Memorandum <i>Bench Memorandum Regarding Whether Defendant is a Bona Fide Purchase is Irrelevant</i>
04/18/2019	Trial Memorandum <i>U.S. Bank's Bench Memorandum Regarding Business Record Exception</i>
04/18/2019	Stipulation and Order <i>Stipulation and Order to Amend Caption</i>
04/18/2019	Notice of Entry of Stipulation and Order <i>Notice of Entry of Stipulation and Order</i>
04/22/2019	Recorders Transcript of Hearing <i>Partial Transcript: Bench Trial Day 1 - Testimony of Rock Jung 4/16/19</i>
04/22/2019	Recorders Transcript of Hearing <i>Partial Transcript: Bench Trial Day 2 - Testimony of Rock Jung and David Alessi 4/17/19</i>
04/22/2019	Recorders Transcript of Hearing <i>Partial Transcript: Bench Trial Day 3 - Continued Testimony of David Alessi 4/18/19</i>
04/23/2019	Stipulation and Order for Dismissal Without Prejudice <i>Stipulation and Order for Dismissal without Prejudice as the Claims between Antelope Homeowners Association and U.S. Bank National Association</i>
04/23/2019	Trial Subpoena <i>Amended Trial Subpoena to Antelope Homeowners' Association</i>
04/23/2019	Notice of Entry of Order <i>Notice of Entry of Order</i>
05/01/2019	Recorders Transcript of Hearing <i>Partial Transcript: Bench Trial Day 1 - 4/16/19</i>
05/01/2019	Recorders Transcript of Hearing <i>Partial Transcript: Bench Trial Day 2 - 4/17/19</i>
05/01/2019	Recorders Transcript of Hearing <i>Partial Transcript: Bench Trial Day 3 - 4/18/19</i>
05/01/2019	Recorders Transcript of Hearing <i>Transcript: Bench Trial Day 4 - 4/23/19</i>
05/01/2019	Recorders Transcript of Hearing <i>Transcript: Bench Trial Day 5 - 4/24/19</i>
05/17/2019	Findings of Fact, Conclusions of Law and Judgment <i>Amended Proposed Findings of Fact, Conclusions of Law and Judgment</i>
05/20/2019	CANCELED Bench Trial (10:00 AM) (Judicial Officer Kishner, Joanna S.) <i>Vacated - Duplicate Entry</i> <i>Closing arguments</i>
06/04/2019	Findings of Fact, Conclusions of Law and Judgment <i>Second Amended Proposed Findings of Fact, Conclusions of Law and Judgment</i>
06/18/2019	Findings of Fact, Conclusions of Law and Judgment <i>Findings of Fact, Conclusions of Law and Judgment</i>
06/19/2019	Notice of Entry of Findings of Fact, Conclusions of Law <i>Notice of Entry of Findings of Fact and Conclusions of Law and Judgment</i>
06/21/2019	CANCELED Status Check (3:00 AM) (Judicial Officer Kishner, Joanna S.) <i>Vacated</i> <i>Status Check: Decision</i> <i>06/07/2019 Reset by Court to 06/21/2019</i>
06/24/2019	Order to Statistically Close Case <i>Civil Order to Statistically Close Case</i>
06/24/2019	Memorandum of Costs and Disbursements <i>SFR Investments Pool 1, LLC's Memorandum of Costs and Disbursements</i>
07/18/2019	Notice of Appeal <i>Notice of Appeal</i>
07/19/2019	Recorders Transcript of Hearing <i>Transcript: Bench Trial Day 6 - 5/20/19</i>
07/19/2019	Case Appeal Statement <i>Case Appeal Statement</i>
12/10/2019	Request <i>Request for Transcripts</i>
01/27/2020	Notice <i>Notice of Disassociation and Withdrawal of Counsel</i>

FINANCIAL INFORMATION

JA02482

Counter Claimant SFR Investments Pool 1, LLC			
	Total Financial Assessment		423.00
	Total Payments and Credits		423.00
	Balance Due as of 01/31/2020		0.00
08/11/2016	Transaction Assessment		223.00
08/11/2016	Efile Payment	Receipt # 2016-77176-CCCLK	(223.00)
07/11/2018	Transaction Assessment		200.00
07/11/2018	Efile Payment	Receipt # 2018-45761-CCCLK	(200.00)
Counter Defendant U.S. Bank, National Association			
	Total Financial Assessment		497.00
	Total Payments and Credits		497.00
	Balance Due as of 01/31/2020		0.00
07/12/2016	Transaction Assessment		270.00
07/12/2016	Efile Payment	Receipt # 2016-66375-CCCLK	(270.00)
07/13/2016	Transaction Assessment		3.00
07/13/2016	Payment (Window)	Receipt # 2016-66870-CCCLK	(3.00)
07/30/2018	Transaction Assessment		200.00
07/30/2018	Efile Payment	Receipt # 2018-50313-CCCLK	(200.00)
07/18/2019	Transaction Assessment		24.00
07/18/2019	Efile Payment	Receipt # 2019-43768-CCCLK	(24.00)
Defendant Antelope Homeowners' Association			
	Total Financial Assessment		223.00
	Total Payments and Credits		223.00
	Balance Due as of 01/31/2020		0.00
07/11/2018	Transaction Assessment		223.00
07/11/2018	Efile Payment	Receipt # 2018-45753-CCCLK	(223.00)



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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7
8 U.S. BANK, NATIONAL
9 ASSOCIATION AS TRUSTEE FOR
10 MERRILL LYNCH MORTGAGE
11 INVESTORS TRUST, MORTGAGE
12 LOAN ASSET-BACKED
13 CERTIFICATES SERIES 2005-A8,

14 Plaintiff,

15 vs.

16 SFR INVESTMENTS POOL 1, LLC,
17 ET AL.,

18 Defendants.

CASE#: A-16-739867

DEPT. XXXI

19
20 BEFORE THE HONORABLE JOANNA S. KISHNER
21 DISTRICT COURT JUDGE
22 TUESDAY, APRIL 16, 2019

23 **RECORDER'S TRANSCRIPT OF BENCH TRIAL - DAY 1**

24 APPEARANCES:

25 For the Plaintiff:

DANA J. NITZ, ESQ.
NATALIE C. LEHMAN, ESQ.

For the Defendant:

KAREN HANKS, ESQ.
JASON G. MARTINEZ, ESQ.

RECORDED BY: SANDRA HARRELL, COURT RECORDER

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Rock Jung

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INDEX OF EXHIBITS

FOR THE PLAINTIFF

MARKED

RECEIVED

None

FOR THE DEFENDANT

MARKED

RECEIVED

1 Las Vegas, Nevada, Tuesday, April 16, 2019

2
3 [Case called at 2:18 p.m.]

4 THE CLERK: On the record.

5 THE COURT: Okay. We're on the record in case 739867,
6 which is now the time for you all's bench trial to start. So, counsel, could
7 I have your appearances please on U. S. Bank National Association, as
8 Trustee for the Merrill Lynch Mortgage Investors Trust Mortgage Loan
9 Asset Pass-Through Certificate, Series 2005-88, Plaintiff v. SFR
10 Investments Pool 1, L.L.C. and Counter/Cross Plaintiff, SFR Investments
11 Pool v. U. S. Bank, what I just said. Go ahead.

12 MR. NITZ: Good afternoon, Your Honor. Dana Nitz and
13 Natalie Lehman on behalf of U. S. Bank.

14 MS. HANKS: Karen Hanks and Jason Martinez for SFR.

15 THE COURT: Okay. We need a catch and cleanup before we
16 commence. Now I understand in something -- we've got one stipulation
17 in sometime between when I was in motion calendar and trial, my first
18 trial of the day today. Correct. That was a stipulation with regards to
19 one of the parties. But I still see other parties still listed in the counter
20 and cross claim.

21 So are they -- I'm looking at your amended joint pretrial
22 memorandum of April 2nd, 2019. I need to make sure what's up with
23 Universal American Mortgage, Henry Ivy and Freddie Ivy, because they
24 still show up in your caption page, and so we need to make sure what's
25 up with them.

1 MS. HANKS: We should have a stipulation that should be
2 heading down to you. I think Bank counsel has it to amend the caption
3 that would take care of all those parties. But all of those parties -- just
4 trying to find it in my pretrial memo.

5 So, MERS, as nominee beneficiary for Universal, was
6 dismissed via stipulation on September 26, 2017. And then July 17th,
7 2018, Henry and Freddie Ivy were dismissed via stipulation. So, I think
8 our stipulation to amend the caption reflects that.

9 THE COURT: Okay.

10 MS. HANKS: But it sounds like you don't have that yet so.

11 THE COURT: We are going to confirm. I know something
12 was in the process. Antelope?

13 MS. HANKS: Antelope is out too, pending that stipulation
14 being signed by the Court, correct.

15 THE COURT: Okay. So, counsel, presumably you would like
16 the Court to move forward. Would you like the stipulation, as long as we
17 get it signed before the end of the trial, that it's viewed as effective as if it
18 were signed before the trial commences and that you are the only two
19 remaining parties, is that correct?

20 MS. HANKS: Yes.

21 MR. NITZ: Yes.

22 THE COURT: Does that meet your needs; is that a stipulation
23 under EDCR 7.50 orally made as if it were in writing, although I
24 appreciate that there's written memorialization that I'm going to shortly
25 get, I hope?

1 MS. HANKS: Yes.

2 MR. NITZ: The stipulation is that there are only the two
3 parties, U. S. Bank and SFR. Is that in question?

4 THE COURT: Does that meet your needs to SFR?

5 MS. HANKS: Yes.

6 THE COURT: Okay. Perfect. Okay. So are you all doing
7 opening statements, or are you moving forward straight to witness
8 testimony. The Court is fine either which way. Obviously, you know I
9 read the pretrial memorandums. I'm sure you're familiar, this is case
10 number -- each case, of course, is unique on each and every one of the
11 facts and the Court in no way -- but this is not my first trial or my first
12 20th or 30th trial in the general topic area. So, what would you all like to
13 do; it's up to you.

14 MS. HANKS: I wasn't planning on doing openings, Your
15 Honor.

16 THE COURT: You were planning?

17 MS. HANKS: I wasn't. I wasn't because of that.

18 THE COURT: It's up to you. It's each party's opportunity.
19 The Court is more glad, if you'd like to, I'm more than glad to listen to it,
20 if you'd rather not, that's perfectly fine. It's really up to each counsel.

21 MR. NITZ: Pardon me one moment, Your Honor.

22 THE COURT: Of course.

23 [Pause]

24 MR. NITZ: Your Honor, we've had complications since our
25 conference call yesterday regarding scheduling. If I can lay them all out.

1 David Alessi was scheduled to testify today. He's -- he is unavailable on
2 Wednesday and Thursday this week. We had also scheduled Rock Jung
3 to testify today. And he, while he's in town tomorrow morning, he has a
4 hearing at 9:00 or 9:30, and then he's immediately traveling out of town.
5 We have the Universal designee here, and he's available today and
6 Friday, but not at all on Thursday.

7 Also, this Friday is a travel day for Ms. Lehman and three of
8 the four of us here have another trial starting on Monday in another
9 department.

10 THE COURT: Sure. What I had understood is you all
11 originally were going to be today and tomorrow. Because of having to
12 start you later today, which I appreciate your accommodation, because
13 of the other case literally just going to deliberations, literally, literally.

14 So, it was today and tomorrow, and then I offered you
15 Thursday after my motion calendar. So, it wasn't impacting Friday or
16 anything differently. And I thought one witness was coming at 1:30 and
17 you all were fine if the witness could come at 2:00. I don't know which
18 witness --

19 MR. NITZ: Yeah.

20 THE COURT: -- is that who's here?

21 MR. NITZ: Yes. And we have the witness here. But the other
22 thing was, we had planned that witness, Rock Jung and Dave Alessi to
23 do today. And --

24 THE COURT: So, is Mr. Alessi here in town or not in town?

25 MR. NITZ: He is here in town. But we have to get Mr. Jung

1 in today so we can't call Mr. Alessi today. And he's not available on
2 Wednesday --

3 THE COURT: So, do you want to get started and that way
4 you can get as many witnesses as you want today in? Because I'm going
5 to have to take a break as I told you. Remember when I said --
6 remember, I offered you a lot of different options on timing. I said to
7 reset. I offered you starting today, I offered you starting tomorrow. I
8 mentioned I had some time next week.

9 So, if you want to start with witnesses right now, we can
10 start with witnesses right now. If you want to do opening statements,
11 we can do opening statements. It's really up to you, counsel. At some
12 point, as I told you, when the jury comes back from deliberations, which
13 may or may not be before the 5:00 hour, I just don't know, we'll have to
14 do the verdict. But whatever you'd like.

15 MR. NITZ: When we had the conference call, we had about
16 10 minutes notice before. We hadn't -- didn't --

17 THE COURT: Sure.

18 MR. NITZ: -- have an opportunity to confer with the
19 witnesses on their availability. We thought we could juggle it around,
20 based on their previously expressed availability. And after we got
21 moved to 2:00, then witnesses became unavailable. So, at this point I
22 would move to continue the trial to permit the orderly presentation of
23 witnesses.

24 THE COURT: Do you not want to at least get the witness who
25 is sitting here started since it's a bench trial. And at least -- well, okay.

1 Let me hear Defense counsel's position.

2 MS. HANKS: I don't know what to do with that. So, I mean I
3 heard Mr. Nitz correctly, I think what he said was because they planned
4 on calling Mr. Alessi and Rock Jung today and we were supposed to
5 start at 10:30, 11:00, and now they're not available for the remainder of
6 our trial. Did I understand that correctly, the trial dates, right?

7 MR. NITZ: Right.

8 MS. HANKS: Okay.

9 THE COURT: How long does this witness -- sorry. Since no
10 one has identified who you are that's why I keep saying this witness.

11 MR. NITZ: This witness back here is our client
12 representative, Harrison Whittaker.

13 MR. WHITTAKER: Harrison Whittaker, Your Honor.

14 THE COURT: Okay.

15 MR. NITZ: He could be sitting up here.

16 THE COURT: Okay. You're more than welcome.

17 MS. HANKS: So, I think -- at least from what I'm hearing --
18 well, he obviously asked for a continuance. I think what I'm hearing is
19 we can start --

20 THE COURT: So why can't Mr. Jung, or Mr. Rock Jung, or
21 David Alessi testify this afternoon? They weren't both going to get done
22 at 11:00 this morning when you all were initially supposed to start. By
23 definition, we would have had an hour, then you would have had the
24 lunch break so there's no way you could have gotten both of those
25 witnesses done regardless, if we started when we were supposed to start

1 or now.

2 MR. NITZ: I disagree, Your Honor. We had a very tight
3 schedule. Our plan was to do Mr. Jung in the morning, and then do the
4 Universal witness, who Mr. King is representing, figuring that witness
5 would be very short, and then the balance of the afternoon would be Mr.
6 Alessi. That's what we planned. And then when we got pushed back to
7 2:00, as you just observed, it would be next to impossible to get Mr.
8 Jung and Mr. Alessi both in.

9 THE COURT: But can we get one of them in? I mean if Mr.
10 Alessi was going to be this afternoon anyway, presumably -- I'm just
11 trying to do the math, realistically, right. You were to start 11:00, okay,
12 10:30, 11:00ish, because I told you 10:30 or subject to my motion
13 calendar and I told you how many matters that I had, 14, 16 matters, so
14 10:30, 11:00ish, right. You would have only had the hour'ish before
15 lunch, we would have had the hour and 15 minute lunch break, so we
16 wouldn't have started again until 1:15, 1:30.

17 And so, while you are missing that hour in the morning and
18 missing an hour after the lunchtime period, unless you were planning on
19 getting Rock Jung and David Alessi both done in that very, very short
20 time period, which historically, does not happen, with even a direct
21 examination of either of them, I don't understand why neither of them
22 are available this afternoon. Shouldn't Mr. Alessi be available right
23 now?

24 MS. LEHMAN: Your Honor, if I may. I was kind of
25 coordinating the witnesses.

1 THE COURT: Sure.

2 MS. LEHMAN: And we were told by Mr. Alessi that he would
3 be available on Thursday. So, when we had our conference yesterday
4 afternoon at 4:00, we were like, okay yes, we can relocate him to
5 Thursday now we had that date open for testimony.

6 THE COURT: Sure.

7 MS. LEHMAN: And just this afternoon, actually on my way
8 over here, I got a call from Mr. Alessi saying he's going to be out of town
9 tomorrow and Thursday, which put part of the kink in our plan to put him
10 on. So, I mean I don't think that we could get him now.

11 THE COURT: Why not?

12 MS. LEHMAN: Because we've got Mr. Jung that needs to go
13 on now.

14 THE COURT: So, you want Mr. Jung right now; so where's
15 Mr. Jung, that would be Rock Jung?

16 MS. LEHMAN: I think the problem is, we wouldn't be able to
17 get Mr. Alessi for the duration of our trial.

18 THE COURT: I'm just trying to say, can't you get one of the
19 two of them and then you'd get who you get and then if we have to work
20 on other witnesses, we work on other witnesses. If you say Mr. Jung's
21 not leaving tomorrow until after his hearings, what does he have an
22 airplane flight or something like that.

23 If we need to start at 8:15 tomorrow, we can start at 8:15
24 before my CV calendar and you can start doing him, if you say he's only
25 going to be a few minutes. Which is what you said --

1 MS. LEHMAN: Oh no, Mr. Jung would be probably around
2 an hour, hour and a half.

3 THE COURT: Okay. Then you understand what Mr. Nitz said
4 doesn't make mathematical sense in light of what you're saying. Those
5 are inconsistent. Because if he was to be an hour to an hour and a half,
6 he would have taken up the whole time when you originally were going
7 to start from 11:00 plus the lunch break. Do you understand, in light of
8 what you're saying?

9 So, there's no way you could have done it. I'm just -- I
10 appreciate you all accommodating starting late today, but I'm not
11 hearing that Mr. Alessi was originally going to be on Thursday, but
12 somehow now said he's out of town, could have somehow gotten today
13 and how Mr. Jung, who is going to take an hour and a half because I
14 offered tomorrow morning because he was only supposed to be really
15 quick before my CV calendar so that we don't interfere with him leaving
16 town, we could do it beforehand, how that makes a difference if you're
17 now saying he's an hour and a half.

18 There's no way you could have in an hour and half, if you do
19 the math, 11:00 to 12:00 gives you an hour plus a half after the lunch
20 break, right, which would have been 1:30 -- I mean that doesn't make
21 sense. If he's here today, let's get him on the stand. If this is your client
22 rep, he's going to be here throughout the entirety of the trial, then he
23 could be at a different time. If he's not going to be here the entirety of
24 the trial, then we can get another one on.

25 MS. LEHMAN: I guess the problem was, that yesterday when

1 we were trying to rearrange the schedule, we told Mr. Alessi we didn't
2 have time for him today because we got moved to 2:00. So, we asked
3 him to come back on Thursday, which he had told us previously he was
4 available. And we sent a message to his assistant because that's the
5 number that we had --

6 THE COURT: Sure.

7 MS. LEHMAN: -- and then this afternoon, we got a call
8 saying Mr. Alessi is not available Wednesday and Thursday. So, we
9 won't be able to put him on as a witness in this current trial setting
10 unless we were to start a witness today and then continue the bulk of the
11 trial another time.

12 THE COURT: Counsel for Defense, what's your position? I
13 mean the Court's not understanding. I appreciate you all's
14 accommodation, but --

15 MS. HANKS: I'm having the same --

16 THE COURT: -- this math is not working out with witnesses
17 so.

18 MS. HANKS: I'm having the same problem you're having,
19 Your Honor. I'm not understanding why -- I understand why Mr. Alessi's
20 not here right now because they called him off and they then told him to
21 come Thursday. I guess I'm not understanding why Mr. Rock's not here,
22 Mr. Rock Jung is not here this afternoon. I'm not understanding it either.
23 So that's where I'm kind of a little perplexed.

24 THE COURT: Where's Rock Jung?

25 MS. LEHMAN: We have asked him to be here at 3:30 so we

1 had prepared for him --

2 THE COURT: Okay. So, he'll be here at 3:30.

3 MS. LEHMAN: -- and for the Universal Mortgage witness.

4 THE COURT: So, why don't we get started on Universal
5 Mortgage and just see where we go, right. We'll get Mr. Jung done. If
6 we have to do it tomorrow morning before my CV calendar, we'll do it
7 tomorrow morning before my CV calendar, finish with Mr. Jung, right.
8 You said a total of an hour and a half, 3:30, we can get this done, right.

9 MS. LEHMAN: I guess our problem is, we don't know when
10 we would get Mr. Alessi on the stand and we need his testimony.

11 THE COURT: Mr. Alessi, is he under subpoena; he had to be
12 here. Was he subpoenaed?

13 MS. LEHMAN: Yes.

14 THE COURT: So, Mr. Alessi's in violation of his subpoena.
15 Why don't you let him know he's in violation of his subpoena then, right.
16 If he was subpoenaed to be here, he's in violation of his subpoena so he
17 needs to be here. But right now, you all are taking time instead of
18 moving forward with this case, which we were more than glad to move
19 forward with the case. Unless both parties agree that you want it
20 continued then --

21 MS. HANKS: I do not, Your Honor. I'm prepped and ready to
22 go.

23 THE COURT: Which is what you said yesterday.

24 MS. HANKS: Yes.

25 THE COURT: Okay. Well, in light of the fact that you've got a

1 witness that's supposed to be here at 3:30, you've got another witness
2 here, it seems to me we start, and Mr. Alessi gets reminded that he's
3 under subpoena, and he needs to be here.

4 MS. HANKS: And just so Your Honor is clear, I do have an
5 objection to the Universal witness, if you want to hear that before we get
6 called. But if we're moving on to that point, I just want to let you know I
7 do have an objection.

8 THE COURT: Okay. So, I go back to my first question. Does
9 anyone want to do opening statements?

10 MR. NITZ: Yes, Your Honor. Very briefly.

11 THE COURT: Okay. Counsel for Plaintiff, feel free. We're
12 going to start with your opening statement then, if you would.

13 **OPENING STATEMENT BY PLAINTIFF**

14 **BY MR. NITZ:**

15 Your Honor, in this case the evidence will show that U. S.
16 Bank owns the loan, it's the holder of the note and the assignee on the
17 assignment of the deed of trust on an interrupted chain of title from the
18 originating lender and it's not a beneficiary. U. S. Bank has standing as
19 the assignee under the -- under the deed of trust to contest
20 extinguishment of the loan and to protect its rights under the deed of
21 trust.

22 Beyond that, the case is very simple. The evidence will show
23 that this is a Miles Bauer tender case. In response to a demand for
24 payoff of the entire lien, Miles Bauer calculated and did tender \$405.00
25 for nine months of unpaid assessments. There were no nuisance or

1 abatement charges at the time of recording of the notice of delinquent
2 assessment lien. The extent of the super priority lien was that nine
3 months of dues. That tender was rejected. Nonetheless, under
4 application of the *Diamond Spur* case, the tender discharged the super
5 priority lien and any sale of the super priority lien, super priority interest
6 was void. Therefore, whatever interest SFR bought, was an interest
7 subordinate to the U. S. Bank's deed of trust.

8 When the evidence comes in as we expect, we will ask for a
9 determination that the deed of trust survived the sale by a lessee to SFR
10 and SFR took subject to the deed of trust. At that point we'll ask for
11 judgment on U. S. Bank's cause for a quiet title and declaratory relief
12 under its complaint and judgment for U. S. Bank and against SFR on
13 SFR's counter claim. Thank you.

14 THE COURT: I do appreciate it. Okay. Thank you. I see I
15 have an objection to the corporate designee for Universal American
16 Mortgage Company because the disclosure is improper because it does
17 not identify an individual. Did you all do a 2.67 conference in this case?

18 MS. HANKS: Yes, we did, Your Honor.

19 MR. NITZ: Yes, Your Honor.

20 THE COURT: And during the 2.67 conference, was it
21 discussed that there was going to be a corporate designee and who that
22 would be and whether there was alternative corporate designees that
23 might be appearing in this case?

24 MS. HANKS: No, Your Honor. Not to my recollection. In
25 fact, I don't even think at the calendar call, that Universal was listed as a

1 witness to be expected to testify. I didn't find out someone from
2 Universal was coming until yesterday. But at no time -- I still don't know
3 the name of the person as I stand here today. So, at no time was an
4 individual identified, which was, as you see, the basis of my objection.

5 THE COURT: Okay. I was looking at the 4/2 amended joint
6 pretrial memorandum. Number 11 says corporate designee, Universal
7 American Mortgage Company. So that's why I was asking whether or
8 not it was discussed at the 2.67 because in order to do your 2.69 pretrial
9 memoranda, you all would have had to discuss and you're required to
10 exchange, as you know, your list of witnesses in addition to your list of
11 exhibits under 2.67 and 2.68 before you provide your 2.69 pretrial
12 memoranda.

13 So, if this issue wasn't raised and it was discussed at the
14 2.67, that's why the Court is asking the question. Because you would
15 have had to discuss it so that issue should have come up.

16 MS. HANKS: Right. So, if you're asking -- so what happened
17 at the 2.67, is we exchanged witnesses and documents and then at that
18 point in time, if memory serves me right, I'm not sure if the 2.67 occurred
19 before the objections to pretrial disclosures were due or after. To the
20 extent that the objections to pretrial disclosures were already completed,
21 I would have placed on the record all my objections to the witnesses and
22 all my objections to documents. And I did object to a generic disclosure
23 of corporate designee of Universal.

24 So, there was no discussion that there was an actual
25 individual associated with this entity. And then when the amended

1 pretrial disclosures were done, that also wasn't rectified. It still had
2 corporate designee.

3 That's my understanding as why it appears that way in the
4 pretrial memo because it's literally a cut and paste from how they
5 disclosed it in the pretrial disclosures. And so, it wasn't until yesterday
6 that I even knew they intended to call anyone from Universal, actually
7 call. Because their pretrial disclosures basically list every witness they
8 put in their 16.1, so they didn't actually narrow it down for the actual
9 pretrial disclosures.

10 But we did object and I did it -- I noted my objection on Page
11 10 of the line four through five of the transcript.

12 THE COURT: Four through five of the transcript --

13 MS. HANKS: The 2.67 transcript, Your Honor.

14 THE COURT: Oh.

15 MS. HANKS: Yes.

16 THE COURT: I know it didn't come before this court yet.

17 MS. HANKS: Sorry. And so, we noted it in the objections to
18 the pretrial disclosures, as well.

19 THE COURT: Okay. Counsel for Plaintiff and Counter
20 Defendant, was there a name provided at any point so that either during
21 discoveries so depositions can be taken and is this designee intended
22 purely as custodian of records in that role, or also to give live testimony?

23 MR. NITZ: The witness is here to give live testimony.
24 Whatever they say, you have the joint pretrial memorandum in front of
25 you, and it specifically identifies corporate designee of Universal

1 American Mortgage Company.

2 THE COURT: But as counsel correctly states, she had already
3 filed her objections to your pretrial disclosures a couple days before, on
4 March 29th. That's why the Court was trying to get the correct
5 chronology.

6 So, what the Court was trying to have an understanding is --
7 3/29/19 is the hard copy document that she referenced, 6:59 p.m., is the
8 objections to the amended pretrial disclosures and that was filed before
9 the joint -- before the amended joint pretrial memorandum which was
10 filed on April 2nd.

11 MR. NITZ: Okay. If they objected to the witness, then it
12 would have been their obligation to bring it to the Court by a motion on
13 order shortening time or something like that. But in this case, all they
14 did was object. And we have -- we clearly designated the corporate
15 designee of Universal. They've been designated, I believe, since the
16 beginning of the case.

17 They never noticed the deposition of that witness. If they
18 had noticed the deposition, then they could find -- could have found out
19 an individual's name. To be honest with the Court, I didn't find out the
20 individual's name until Mr. King showed up with the witness today.

21 THE COURT: Right. But as you know, an R.C.P, whether you
22 take old rules or new rules, right, March 1 or not, so this part doesn't --
23 says you're supposed to identify the witness by name, not by titling. So,
24 what does the Court do about that. Because, required disclosures. I'm
25 going under the old rules and the new rules are even more clear on the

1 topic, 16.1(a), the name and, if known, the address and telephone
2 number of each individual likely to have information discoverable under
3 26(b), including for impeachment, rebuttal, identifying the subjects of
4 information. So, while the address is an if known, the name has always
5 been required.

6 And so, what does the Court do about that since I have
7 timely objections to pretrial disclosures. They don't have to file a motion
8 if they do objections to timely pretrial disclosures, right. Because it says
9 as long as you do the objections to the pretrial disclosures, they remain
10 in effect. It came from the 16.1, then noncompliance with 16.1 isn't a
11 justification that alleviates issues when you have proper and timely
12 objections to joint -- to pretrial disclosures because you're supposed to
13 be timely supplementing them, right. All after 16.1 is supposed to be
14 timely supplemented with the very last supplement to occur 30 days
15 before trial, i.e., the pretrial disclosures.

16 So, if they're impermissibly done at the time of 16.1, not
17 saying that it is a fail-safe, but you have the supplemental opportunity to
18 then substitute an individual's name. And if I have timely objections,
19 what does the Court do. What's each party's suggestion that the Court
20 should do?

21 MR. NITZ: Overrule the objection or grant my prior motion
22 to continue the trial. And if they needed leave to depose the Universal
23 witness, we would agree to that.

24 THE COURT: Counsel for Defense.

25 MS. HANKS: Okay. Let me back -- I mean you've got the

1 time line right, but I want to even go further back. Because we had our
2 original pre- -- they had done original pretrial disclosures. And we
3 objected as far back as July 30th, 2018. Then they did amended pretrial
4 disclosures, and we objected again. Then they listed it in the pretrial
5 memo, and I specifically put a footnote to all their witnesses as to please
6 look at my objections to the witnesses asserted in the objections to
7 pretrial disclosures.

8 So, I have more than preserved the objection. I know you've
9 already stated that, but I wanted to give that timeline. But it's been
10 objected to multiple times. And the 16.1 is clear. You do have to identify
11 the witness by name. The solution is not continue trial so I can fix my
12 error of not following the rules. That's not the way to do it.

13 So, no, my suggestion, Your Honor, the rule mandates that
14 you strike the witness. I'm not sure if the March 1st rule has changed,
15 but I don't think that that would affect us because all of our disclosures
16 closed before the March 1st change in the rule. So, I believe, 16.1(e)
17 would still apply that mandates that failure to comply with 16.1 says
18 shall or shall strike the witness or the document.

19 THE COURT: Now, the changes are my nice little purple
20 ones.

21 MS. HANKS: Oh, great. I'm not sure 16.1(e)(3)(b) changed
22 with the March 1st rules, but I would posture it shouldn't apply to us
23 since all of our disclosures shut down well before that rule changed.

24 THE COURT: That portion doesn't change.

25 MS. HANKS: My understanding is it now says should

1 instead of shall. I don't know if there's a difference to that word.

2 THE COURT: Okay. I'm going back and I'm looking at the
3 prior. I'm trying to see -- I went back to your original joint pretrial
4 memorandum real quickly to see if -- interesting question for SFR. Did
5 you all specifically name an individual?

6 MS. HANKS: For Universal?

7 THE COURT: No, for you. For SFR?

8 MS. HANKS: Yes. We named Christopher Hardin.

9 THE COURT: Where?

10 MS. HANKS: Tamara Morales, or Dave Bembas as our three
11 witnesses.

12 THE COURT: Okay. So that's an interesting question. If you
13 named alternative individuals, which also is not compliant with the rule,
14 because you have to give the name, you can't give alternatives, right,
15 unless the parties have agreed that it could be alternative individuals.
16 Because you can't give a choice of one of three, one of five, one of
17 whatever, right.

18 There's a difference between custom and practice when
19 there's agreement among counsel versus the rule that specifically says
20 you have to give the name of the person who is testifying, not a choice
21 of different options. That's why the Court's asking. Wouldn't the fair
22 thing to do here is to parallel it, in that since one side is giving an option
23 of three names and the other side is giving the designee, that the Court
24 allow both or not allow either?

25 MS. HANKS: You can not allow Mr. Hardin. That will not be

1 any problem for me. But the rule says we have to identify each
2 individual who has information. And because we produced Mr. Bembas
3 or Ms. Morales as our 30(b)(6) for deposition, we always list them in with
4 SFR, as well as Mr. Hardin. Because all three of those individuals will
5 have information, depending on their role in the case. So, we believe,
6 that it is compliant to name all three for SFR.

7 THE COURT: But for purposes of trial --

8 MS. HANKS: That being said, I -- that being said, I'm not
9 trying to call any of those numbers of witnesses right now, and Plaintiff
10 hasn't objected. So, if I listed them like that in the pretrial disclosure and
11 they didn't object, then they would be waiving. But whether I intend to
12 call those witnesses or not, that's not before you right now.

13 So, we can -- that will be a bridge we can cross when it gets
14 there. Right now, I have no intention of calling any of those witnesses
15 for this trial, depending on what I think they can or can't do in our case in
16 chief.

17 So -- but I don't think you can rule on my objection right now
18 to their witness. It's a simple universe. Did they disclose a name of the
19 witness? They did not. Did I timely object? Yes, on multiple occasions.
20 And so that's where it leaves it.

21 THE COURT: Okay. Well, as you can appreciate, the way the
22 Court phrased it is would it be equitable and fair to allow both or none as
23 a potential option. Not saying that the Court had that before it. Because
24 sometimes parties come to nice agreements because it effectuates a
25 good resolution that assists both sides. The Court wasn't saying that the

1 other issue was before me, but often times people like to come to
2 reasonable agreements so that they can move forward in cases and deal
3 with things on the merits.

4 But that being said, counsel for SFR is correct. I have her
5 objection. It is Plaintiff's case in chief right now. Plaintiff is wishing to
6 call its first witness. His first witness has been identified by a title and
7 not a name and nothing has been presented to this Court that that has
8 anyway been waived by SFR. And, in fact, they have timely objected,
9 both last year and this year, each time that designation has been done.

10 An incorrect designation under Rule 16 is not cured by
11 multiple objections by the other side and just saying that it can continue
12 the trial to allow the name of an individual to be asserted because the
13 timing of when it has to be done, has to be done, well, no later than 30
14 days before trial, right. Unless there's good cause. And since it's your
15 witness, has this individual been out of the country, unavailable, some
16 medical issue or something that somehow precluded you knowing who
17 that individual would be?

18 MR. NITZ: I don't know.

19 THE COURT: I'm trying to see if there's any good cause, you
20 know, that the Court should be taking into account.

21 MR. NITZ: I don't know. I don't know what the witness' story
22 is. I haven't conferred with Mr. King about that. But this is -- it's kind of
23 a live in glass houses, don't throw stones sort of thing. It's okay for them
24 to say, okay, we can designate a corporate designee or multiple
25 witnesses, but you can't designate a corporate designee because we

1 object. Well, if it's wrong in the first place, it's wrong in the first place.

2 So, in other words, they would -- they would do something
3 and say it's objectionable when we do the exact same thing. There's a
4 little bit of fairness, good for the goose, good for the gander here.

5 THE COURT: But counsel --

6 MR. NITZ: So, your question was, is it equitable --

7 THE COURT: But they actually didn't do it here. Counsel
8 thought she had. But I went back and looked at the pretrial
9 memorandum, Page 13, they actually, at line 24, do name Mr. Hardin
10 directly. So, the Court was trying to come up with a solution that might
11 have met all parties needs from an equitable standpoint.

12 Once counsel started raising that issue, the Court went back
13 and looked at it to see if the issue was going to come before me,
14 anticipating that you probably would raise that same objection and see if
15 I would be having to address that and there on Page 13, it says
16 Christopher Hardin for SFR Investments Pool 1 [indiscernible]. I just
17 mispronounced your name after all these times you've been in this court,
18 I don't know why. Sorry, it's been a long day. Anyway, it says
19 Christopher Hardin. It's witness number two, line 24 on Page 13. So that
20 alternative one is not. Let me make sure I'm looking at the right pretrial.

21 MS. HANKS: You are, Your Honor.

22 THE COURT: You all referenced a lot of docs, so I was
23 clicking back and forth. So, this -- what I'm referencing, amended joint
24 pretrial memoranda 4/2/2019 at 5:51. So, they actually didn't do what
25 counsel thought they might have done, and their filed document does

1 accurately name a single individual. So that your phrase good for the
2 goose, good for the gander or the Court trying to see if there was a
3 parallel that maybe you both wanted to work a nice counselors'
4 agreement on behalf of your respective parties to see if you wanted to
5 come to some kind of joint agreement to assist both sides, doesn't
6 appear to be equally done, because they've done it correctly.

7 And also, they have raised an objection, and I don't see any
8 objections raised on behalf of your client to their disclosures. So, there
9 is a distinction if it's not raised, as you know, it's specifically waived.
10 And so, I have that distinction also before me.

11 But, getting back to, I have an objection raised, I have your
12 witness. What law or anything can you give me that this witness should
13 be able to appear when he's not properly designated, hasn't been
14 properly designated since Rule 16, does not appear has ever been
15 properly designated, and there has been timely objections, both last year
16 and this year, as represented by counsel. And quickly looking at the
17 couple documents she referenced, has shown that there has been timely
18 objections. So, is there something else the Court should be considering;
19 I'm more than glad to do so?

20 MR. NITZ: Yes, Your Honor. If you'd go back to July 18,
21 2018, U. S. Bank's objections to SFR Investment pretrial disclosures, and
22 there we objected to SFR calling Christopher Hardin, as he was not
23 disclosed as the NRCP 30(b)(6) witness for SFR and was not disclosed as
24 a lay witness likely to have information discoverable under Rule 26(b)
25 identifying the subjects of information.

1 My expectation is, at the time of the pretrial disclosures, the
2 16.1 pretrial disclosures, whenever that happened to be, probably in
3 2016, I would expect that they disclosed, as typical in practice, the
4 corporate designee and custodian of records of SFR at the time of the
5 initial disclosures. And I base that on the fact that they didn't name him
6 as their 30(b)(6) witness, and he was not disclosed as a lay witness. So,
7 he wasn't disclosed initially as a lay witness, and he wasn't designated
8 as their 30(b)(6) witness.

9 THE COURT: Counsel, as counsel for SFR has correctly
10 noted, they have not called that witness so that's not yet before the
11 Court. I can appreciate you're going to raise that equity argument if they
12 attempt to call. The Court's going to have to look through the history of
13 cases. Right now, I have Plaintiff's case in chief, asked you to -- you've
14 done your opening. Defendant has waived their opening. So, then
15 Plaintiff would call their first witness. So, your first witness, I
16 understood, is that you wanted to call the Universal representative, is
17 that correct?

18 MR. NITZ: That's right, Your Honor.

19 THE COURT: So that's the witness that's currently before
20 this Court. That's the only witness this Court has to address at this
21 juncture. Okay. And I have an objection. And what the Court was doing,
22 is looking through the objection for purposes -- remember, this case was
23 removed and then remanded, back in 2017 -- remanded, and so the Court
24 was looking at, for purposes of the most recent trial order and the most
25 recent pretrial disclosures timely objection, was it preserved.

1 Then the Court mentioned the most recent. Counsel for
2 Defendant then raised the fact that it'd even been previously done in
3 2018 and historically had been done. So, then the Court went back to
4 see if there was anything properly done somewhere historically to see if
5 I could really give Plaintiff the benefit of the doubt. That maybe there
6 was some inadvertent error, like you had named the individual in some
7 of your pleadings and then through excusable neglect had dropped the
8 name somewhere else. I was trying to give you the benefit of the doubt
9 by looking at the entire case. Okay.

10 And that's why the Court mentioned the 16.1 disclosures
11 because you could potentially have argued if it was 16.1 disclosures. I
12 was trying to see if I had an excusable neglect argument that maybe you
13 named it along the way, maybe because it was removed and after it got
14 remanded there could have been some excusable neglect that maybe
15 the Court should be taking into account.

16 Once again, trying to give full benefit of the doubt to Plaintiff,
17 right, in opposition to what was being asked to strike the witness for not
18 being properly disclosed. I didn't see it. That's why I was asking those
19 questions. It's not that the Court's going to go back and say because
20 something was raised in 2018 when you have intervening trial orders
21 and you have intervening discovery and different things like that that
22 may or may not count for what may or may not be before me down the
23 road in this trial.

24 Once again, in this case what I was trying to do is give you
25 the whole panoply of potential arguments which was why I was also

1 asking whether or not there was any potential good cause. Whether
2 there was illness, the person wasn't available, may have just came to the
3 company, out of the country, you know what I mean. Anything that's in
4 good cause because I'm trying to look at both the legal parameters, right,
5 specifically when things were properly done. That didn't appear to be
6 the case, right.

7 So, then the Court was trying to say is there any excusable
8 neglect or any equity arguments that the Court should be taking into
9 account. The excusable neglect argument doesn't appear that the Court
10 can take into account because historically, as you acknowledge, from the
11 time of the 16.1 disclosures until today, you've always called it the
12 corporate designee so I can't give the benefit of the doubt there. Didn't
13 do a deposition, so I can't give the benefit of the doubt there, that they
14 would know who that individual is and the information that individual
15 was going to give.

16 So, once again, I was trying to give you the whole case. It
17 doesn't work. I was trying to help you. I was trying to see, once again,
18 the benefit of the doubt to the nonmoving party, right. Full benefit of the
19 doubt.

20 Then I'm trying to look to see if there was any reason why
21 this witness wasn't otherwise available, otherwise wasn't identified.
22 Maybe he refused to say his name beforehand. I'm not saying that
23 anybody would. But, once again, just trying to see is there any good
24 cause whatsoever. So that I take the whole realm of possibilities and
25 fully consider everything before I make my well-reasoned ruling, based

1 on their request not to allow your witness to testify.

2 MR. NITZ: I have no idea what his background is. But I
3 would have one argument based on the Rules.

4 THE COURT: Of course.

5 MR. NITZ: Under Rule 16.1, you have a duty to disclose the
6 witness and whether it's pretrial disclosures or original 16.1, I think, it's
7 in the same rule, you have to disclose the witness by name and address.
8 And why is that? Because if you identify the witness as the corporate
9 designee of so and so, that permits the opposing party to then serve a
10 subpoena or a notice of taking deposition on that individual or company.

11 So, whether that actually has to be an individual's name or a
12 placeholder for the witness until it's determined, I would submit either
13 complies with the rule. Because, like I say, the purpose is so that the
14 parties can conduct orderly discovery. And as long as the -- as long as
15 the corporate designee of Universal was listed at 16.1 or later in any
16 subsequent disclosure, then they would have been able to conduct
17 discovery and take that individual's deposition to find out what that
18 corporation, Universal, knew or didn't know that bar on the issues of the
19 case.

20 THE COURT: Counsel, I hear what you're saying. But,
21 specifically, the drafter's note back is 2005 to this provision, doesn't
22 support what you're saying. It's saying that Nevada has adopted it from
23 the federal and requires, consistent with the federal rule, the revised rule
24 imposes an affirmative duty to disclose certain basic information without
25 any formal discovery request. And you'll see that same advisory note

1 concept as recent as the March 2019.

2 Whether I take the old or I take the new, once again, trying to
3 give you the full benefit, that same concept is required. And then if you
4 look at the additional drafter's notes for the different changes, although
5 that specific language wasn't changed, so it kind of goes back to the first
6 concept, right, back in 2005, it's always been in place. It considers it to
7 be basic information without a formal discovery request.

8 So, I'm hearing what you're saying, but it has a shall. And
9 the distinction there is the name and if known, address and telephone
10 number. It doesn't say a titling or a designation. It does require a name.
11 I have an objection to your individual not being done by name. I have
12 tried to go through the entire case to see if the name has been given at
13 any juncture. I've tried to see if there's any reason why this individual
14 did not provide his name at any juncture, new to the company or
15 anything. I've not been provided that that is a factor.

16 So, I've tried to look at all those equitable arguments. I've
17 tried to look at the history of this entire case to see if the individual's
18 been done by name at any other point. I don't see it. So, I'm not seeing
19 how I can overrule their objection.

20 MR. NITZ: The comment that you just read requires basic
21 information. Whether you disclose it in response to a discovery request
22 or not, it requires basic information. For what purpose. So that they can
23 subpoena that witness, given that basic information and conduct their
24 discovery. And in this case, the basic information was provided by
25 identifying the company and stating the intention to call a corporate

1 designee.

2 So, it meets the spirit of the rule to designate the company
3 and that you plan to use the custodian of records and or the corporate
4 designee --

5 THE COURT: Counsel you --

6 MR. NITZ: -- despite what that comment says.

7 THE COURT: I was just looking to the comments to see if it
8 in any way could support your position and I find that it doesn't. That's
9 why, once again, the rule on its face is clear and unambiguous. I was
10 just trying to see if the comment in any way helped you. Because, once
11 again, you're the nonmoving party, trying to give all benefits to the
12 nonmoving party. Counsel, you're the moving party, you get the final
13 word. Be clear on what your request is and be clear on what supports
14 your request.

15 MS. HANKS: Your Honor, my request is that the witness for
16 Universal be stricken, that U. S. Bank did not properly designate the
17 name of an individual for Universal, pursuant to 16.1 and that
18 16.1(e)(3)(b) mandates that the witness be stricken.

19 THE COURT: Okay. Walk me through how you say you
20 preserved your objection and not waived in any manner.

21 MS. HANKS: My understanding is, U. S. Bank made pretrial
22 disclosures originally in this case, then we would have filed objections to
23 those pretrial disclosures on July 30th, 2018. I specifically objected to
24 the fact that it said corporate designee, saying that it violated the rule,
25 and it did not identify the name of the individual.

1 Prior to that, before the objections were even due under the
2 rules, we had a 2.67 on July 26, 2018, and I placed it on the record of the
3 2.67, which I always have recorded by a court reporter. And then when
4 the Bank did their amended pretrial disclosures, I again objected to the
5 corporate designee as a violation of the rule as it required the name be
6 identified. And then when we got to our pretrial memo, I put a footnote
7 on all of their witnesses to say please see my objections to pretrial
8 disclosures and amended pretrial disclosures. Even though the rule
9 does not require me to put my objections to witnesses in a pretrial
10 memo.

11 THE COURT: I'm looking through the documents that you
12 just cited. Give me a second, please.

13 MS. HANKS: Also, if you really need more, Your Honor.
14 When I got an email yesterday saying that there now is going to be a
15 witness for Universal, which is the first time I heard anyone was coming,
16 I said well, I have objections, we'll take it up with the Court. So, I think
17 I've always been very clear that I would have objections.

18 THE COURT: Do you have the transcript by chance of your
19 2.67?

20 MS. HANKS: I don't -- we should have brought the original.
21 Did you bring the original of the pretrial? We brought our original
22 transcripts. Do we have the 2.67? I didn't bring the 2.67, Your Honor, the
23 original transcript. I do have it on the computer, but I do not have --

24 THE COURT: You have it on the computer?

25 MS. HANKS: I do.

1 THE COURT: Can you pull it up on your computer and show
2 it to Plaintiff's counsel before you show it to the Court, please.

3 MS. HANKS: Sure.

4 THE COURT: While I'm looking at some of the documents
5 that you just referenced. Give me a moment, please.

6 MS. HANKS: Do you have -- I can show it to him on the
7 screen, but I can also hook it up to the system if you have the new
8 system where we can hook into it.

9 THE COURT: It's all Wi-Fi, you can hook up to it.

10 MR. MARTINEZ: You're putting me on the spot.

11 MS. HANKS: I put Jason on the spot.

12 THE COURT: Whichever way you want to do it.

13 MS. HANKS: That way, we don't have to worry about --

14 [Pause]

15 MS. HANKS: I don't know how long it's going to take to
16 download the new version. It's making us update it. So, we have it on
17 the computer, I can show the service to Mr. Nitz.

18 THE COURT: I was going back to -- you said you raised the
19 objection to 2018. Do you have --

20 MS. HANKS: Yeah. The original -- I call them the original --
21 objections to the original pretrial disclosures we filed on 7/30/2018. And
22 then I did amended pretrial disclosures. And I either incorporated or did
23 it again.

24 MR. MARTINEZ: Did it again.

25 MS. HANKS: I did it again.

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[Pause]

MS. HANKS: I'm not sure I have the date of my filed objections to amended pretrial disclosures. Oh, 3/29 -- my daughter's birthday, 3/29/2019.

[Pause]

THE COURT: The Court was also looking -- so the Court saw that there was a notice of custodian of records. The Court's looking at that specific document to see if that assists, 2/1/2019, intent to offer custodian of records, the affidavit. The only one listed there, however, is only custodian of records, David Alessi of Alessi & Koenig.

MS. HANKS: I noticed that, Your Honor.

THE COURT: Once again, I'm trying to see if there's anything that talks about Universal. Although, it really is counsel's -- to let me know if there's anything. So, there was a footnote in your joint pretrial?

MS. HANKS: There was, Your Honor. It's at Page 14, right after U. S. Bank because they list all their witnesses. I say although not required by the rule, SFR incorporates any objections to the witnesses as asserted in its objections to pretrial disclosures and amended pretrial disclosures. Because I know that issue has come up before, so I make sure to put that footnote in pretrial memos now.

THE COURT: There it is. Page 14, lines 27 and 28. Okay.

[Pause]

THE COURT: That's not even local counsel. That's South Pine Island Road, Plantation, Florida, C. T. Corporation Systems. How could they even -- counsel for Plaintiff, I'm hearing your argument, but

1 how could they even really send a deposition notice to a corporate
2 designee, C. T. Corporation Systems, 1200 South Plantation; that doesn't
3 even allow them to send. Your analysis of -- even taking your concept to
4 the spirit of the rule, it doesn't work in this one because corporate
5 designee, Universal American Mortgage Company Inc., c/o C. T.
6 Corporation Systems, 1200 South Pine Island Road, Plantation, Florida
7 33324.

8 For an out of state deposition or they wanted to get an out of
9 state subpoena, it would be interesting how they would be able to even
10 do that and designate that person without any information. Who would
11 they contact, who would they -- it doesn't work. Even your analysis
12 there.

13 So, it's not even like they could reach out to you because
14 you're not listed as the party to whom they would reach to, that you
15 would take responsibility for insuring that happening. I'm not -- I'm
16 listening to all your arguments, trying to give you the full benefit of the
17 doubt, but that's out of state. They'd have to setup and get a deposition
18 subpoena in the State of Florida. How would you go to a Florida court
19 and say I want a corporate designee with just an address?

20 MR. NITZ: It's not just a corporate designee. It identifies the
21 corporation. And you could still get a 30(b)(6) deposition subpoena for
22 the corporation and its corporate designee. And I would submit C. T.
23 Corporation is the registered agent for the corporation in the State of
24 Nevada. So how would you serve -- how could you serve the
25 corporation. You could serve them by --

1 THE COURT: But you can't -- you've listed Florida. That's the
2 thing. I have to go with what you all listed. I can't go with information
3 that's not in the pleadings. You've listed it in Florida. I have to look at
4 this the way that you all listed it, right, in ruling on this.

5 On ruling on the motion to strike, I can't pretend that it says
6 Nevada and other things. I have to look at it as how it's listed. How it's
7 listed is, corporate designee, Universal American Mortgage Company,
8 Inc., c/o C. T. Corporation Systems, 1200 South Pine Island Road,
9 Plantation, Florida 33324.

10 MR. NITZ: The essence of my argument stands. That would
11 be, I would expect that's a registered agent for the corporation. And you
12 can serve a corporation by serving its registered agent.

13 THE COURT: Can you say that as an officer of the court that
14 you know that to be true? You're saying that if a subpoena, Nevada
15 subpoena, they can go into a Florida court and get a subpoena, a state
16 court subpoena, to require that person to appear in a Nevada court,
17 because remember not federal court, right, so no long arm, to come here
18 or to require anything to be done by writing in corporate designee? You
19 understand --

20 MR. NITZ: Where is the requirement that they produce the
21 witness in the State of Nevada? All the time you could get a deposition,
22 a foreign deposition. You could take the deposition wherever the
23 witness happened to be and compel them using the local court to appear
24 for that deposition.

25 So, you notice a 30(b)(6) deposition of the corporation, you

1 serve it on their registered agent in their domiciliary state. In this case it
2 would be C. T. Corporation at the address provided and require them to
3 appear at the deposition.

4 THE COURT: But counsel, you haven't designated as your
5 witness to be quote a 30(b)(6) type of witness, okay. You've listed two
6 different things. That's why this Court asked the question about whether
7 or not witnesses, for purposes of custodian of records versus to provide
8 live testimony. Because those are two different distinct categorizations,
9 rights. If a person is just a custodian of records, the Court would have to
10 listen to one type of argument, right.

11 Because you might already have documents and the person
12 would be authenticating those documents as the custodian of record,
13 correct, versus providing live testimony that the opposing side would
14 only be hearing for the first time in trial. And the distinction there, may
15 or may not cover potential 30(b)(6) topics and how would they know
16 30(b)(6) topics if they don't know who that individual is and that
17 individual's role to know what to do for 30(b)(6) topics.

18 This is going far afield. You're noncompliant. I was trying to
19 give every possible consideration. When I see even the designation is
20 not even in the State of Nevada, that doesn't help Plaintiff's argument, it
21 hurts it. Because it even adds another layer of how they possibly could
22 reach out to quote corporate designee, because that corporate designee
23 means the corporation gets to choose who that person is. It's distinct
24 from if you say it's their 30(b)(6) witness for certain topic areas, right.
25 Corporate designee doesn't say that.

1 That's why the Court was asking the question about
2 corporate designee versus custodian of records. Custodian of records, if
3 it's just pure documents is one thing, but corporate designee is an
4 individual designed by a corporation, presumably here, not on the
5 category of topics for 30(b)(6) witnesses. This is for purposes of trial.
6 They would have an opportunity to find out who this person is, how long
7 the person has been at the company, all the different background
8 information, to find out if the person even has information relative to the
9 dates and times that may be at issue.

10 If they have those names, that's -- I'm not saying they would
11 or wouldn't, of course, not taking a position. But that's where there's a
12 distinction. This isn't a situation where they took a 30(b)(6) deposition
13 and you had to substitute somebody else out because that person is ill,
14 out of -- you know what I mean, or no longer works for the company and
15 you still have the same topic areas of information that still can be
16 inquired upon. Here, it's a blank slate, blank easel if you prefer a more
17 artistic term, right, of what information may or may not be coming down
18 the pike. Hence, the prejudice.

19 Hence, where this Court is going to have to grant their
20 motion to strike. Because I can't find any basis by trying to look at the
21 entire case to see if it's preserved in any manner, to see if there's any
22 equitable or good cause on this individual not being available or
23 anything like that. Throughout the whole case I've asked that question. I
24 see it hasn't been waived in any manner whatsoever, and they have
25 historically shown me throughout this case, it hasn't. That they raised it

1 every time.

2 In fact, they raised it when they didn't need to raise it, even
3 reincorporated it in their pretrial memo, which they didn't need to,
4 reaffirming that they were preserving that objection to putting Plaintiff,
5 Counter Defendant on notice that they weren't going to allow the witness
6 to testify on that basis. Told me it's been since the 16.1 so don't even
7 have that they would have known the witness at some point so they
8 could have inquired of that witness through discovery. And since 16.1
9 affirmatively requires, it had a shall, we can take it as should now, the
10 basic information of the names, not the optional of the address, et
11 cetera.

12 Here we have a name. We have a name then it would be
13 required because the person is planning on giving testimony, and the
14 testimony would be open ended type testimony that they would not
15 have had the benefit of having any understanding of who that individual
16 is, the breadth and depth and would be prejudiced by not being able to
17 prepare for this witness' testimony because they don't know what his
18 title is, his scope of information is and any way that they could prepare
19 for that. That's why the Court is saying that in the testimonial context as
20 a corporate designee.

21 I haven't yet been asked on the role of custodian of records.
22 Because that's why the Court was asking the distinction between the
23 two. So that's my ruling with corporate designee. Is he only being
24 called as corporate designee?

25 MR. NITZ: Yes.

1 THE COURT: Okay. Because my ruling is on that aspect,
2 okay. And I've given my analysis. So, unfortunately, he is stricken.
3 Counsel, would you like to call your next witness.

4 MR. NITZ: Rock Jung.

5 THE COURT: Mr. Jung out in the hallway by chance. Or due
6 here at 3:30, you said?

7 MR. NITZ: Yes, Your Honor.

8 THE COURT: Okay. Well, I think, in fairness -- so at this
9 juncture, is this witness -- was the Universal witness here pursuant to
10 subpoena by one party, two parties, or what?

11 MR. KING: He is here pursuant to a trial subpoena issued by
12 U. S. Bank.

13 THE COURT: Okay. Well and was that trial subpoena to a
14 corporate designee or to someone in an individual capacity? I mean,
15 that wasn't something anyone even brought to the Court's attention
16 about whether or not the trial subpoena had a person's name on it or
17 not. Counsel, did the trial subpoena have a name on it that Defense
18 counsel would have been aware of that I should be taking into
19 consideration?

20 MR. KING: I have a copy of the subpoena here.

21 MS. HANKS: I've never seen the trial subpoena, Your Honor.

22 THE CLERK: Counsel, can I get your name?

23 MS. HANKS: Sorry. Karen -- oh me?

24 THE COURT: Oh, no, no. Asking Mr. -- Ms. Hanks or Mr.
25 King?

1 THE CLERK: Mr. King.

2 MR. KING: My name is Greg King.

3 THE CLERK: Okay.

4 MR. KING: I haven't appeared in this case.

5 THE COURT: He's not in this case. I understand you're just
6 personal counsel.

7 MR. KING: Yes.

8 THE COURT: C. T. Corporation or whom?

9 MR. KING: UAMC, Universal American Mortgage Company.

10 THE COURT: He's just here representing on behalf of that
11 entity, correct. Counsel for Defense, did you not receive a copy of the
12 subpoena?

13 MS. HANKS: I've never seen any trial subpoenas. We're
14 looking on our --

15 THE COURT: Was there a trial subpoena filed?

16 MS. HANKS: I'm looking at my computer records. I don't
17 remember seeing a trial subpoena.

18 THE COURT: I didn't see any trial subpoena filed. But as you
19 can appreciate, today's been a little bit busy and I've -- but I don't --

20 MS. HANKS: We're pulling it up, Your Honor, to see if I can
21 find.

22 THE COURT: I'm looking. There's no trial subpoenas filed
23 that I see. So, feel free to correct me if I'm incorrect. Did you all file any
24 trial subpoenas or provide copy of trial subpoenas to Defense counsel?

25 MR. NITZ: I have no personal knowledge.

1 MS. LEHMAN: It was my understanding that it was, but I
2 don't have personal knowledge whether it was actually filed.

3 MS. HANKS: I definitely don't have it filed. Now I'm
4 checking my discovery to see if it was served.

5 THE COURT: Okay. The Court can quickly -- and you're more
6 than welcome to look. Just because I'll tell you it's been a long day. But
7 I'm looking back on the screen, I can look from 8/21/18 to today, actually
8 to 4/15 shows the last thing that was filed, which was trial briefs.

9 MS. HANKS: I don't have anything in my discovery folder
10 saying that we were served. The only one I had was for Mr. Hardin for
11 SFR because I think they served it on my office, but that's it.

12 THE COURT: Okay. I'm quickly looking from 7/19/18.
13 Anyone's more than welcome to approach if you want to see the
14 Odyssey screen. If anyone thinks that maybe my eyes might be tired by
15 the end of the day. But I'm not seeing any subpoenas filed.

16 MS. HANKS: That comports with our file folder too.

17 THE COURT: Not unless it's titled something incorrectly that
18 I would have no idea about. I mean without me clicking on every single
19 thing, I don't see something that says trial subpoena. If you all titled it
20 something differently and it's truly a trial subpoena, I can't go clicking
21 into every single entry since August 2018.

22 MR. NITZ: While I'm at the bench, Your Honor, Mr. King
23 provided me a copy of the subpoena that was served on C. T.
24 Corporation for U. S. Bank -- I'm sorry, for -- on behalf of U. S. Bank for
25 Universal American Mortgage Company.

1 THE COURT: You're handing it to me. Any objection if I at
2 least look at the subpoena; have you seen it?

3 MS. HANKS: I haven't seen it.

4 THE COURT: Well I don't want to look at something if
5 counsel hasn't at least seen it or been E-served on it. You've had a
6 chance to look at it, counsel, does it mention a name by chance that the
7 Court should be taking into consideration? Mr. Nitz? I don't want to put
8 personal counsel on the spot. Did you see a name that I should be taking
9 into account?

10 MR. NITZ: It doesn't appear to have a name.

11 THE COURT: Okay.

12 MR. NITZ: It says 30(b)(6) corporate designee and or
13 custodian of records for Universal.

14 THE COURT: I appreciate it. You don't need to show it to me
15 if that's what it says. That's what the Court was looking, is if, for some
16 reason the subpoena had a name on it and it had been served upon
17 Defendants, then I would be taking that into consideration. I'm not trying
18 to do some advisory or hypothetical, I'm just trying to explain to you all
19 so you can fully appreciate the Court is trying to look at the full panoply
20 of issues to see if there's anything else I should possibly be taking into
21 account.

22 Not saying I could take it into account, but at least having an
23 understanding that I'm trying to take the world into account. Since the
24 subpoena itself doesn't even have a name, I can't say that the subpoena
25 would have put Defendants on notice. And since Defendants say they

1 never even were served with it --

2 MS. HANKS: Right.

3 THE COURT: I know it's not filed. You all acknowledge it's
4 not -- well it doesn't show up on the Odyssey system so unless you filed
5 it in the wrong case which we wouldn't know about, or unless you filed it
6 under some different titling that we wouldn't know about, it doesn't
7 appear that the subpoenas were filed. So, they wouldn't be on notice
8 from a publicly filed document. Counsel is saying they weren't served
9 with it and even if they were, it still doesn't even -- well you say you
10 weren't served with it.

11 MS. HANKS: We weren't.

12 THE COURT: So, it still doesn't even have a name on it. And
13 not being served on it, presents the additional challenge is they didn't
14 even know -- they've represented as counsel, as officers of the court,
15 that they didn't even know a designee was coming until yesterday, I
16 believe you said, and then you sent an email that you said you objected.

17 MS. HANKS: Correct.

18 THE COURT: So, unfortunately, the motion to strike does
19 have to be granted. I'm now taking and reaffirming my prior statement
20 of saying the motion to strike has to be granted. I've now taken into
21 consideration in reaffirming my decision, if I should have been taking
22 into account the subpoena in any manner that gave any assistance or
23 any further guidance that somehow that might have had a name that
24 would have had the Court revisit the issue. But since it doesn't have a
25 name and since it's not been filed, and since -- do you have any proof

1 that it was served upon Defense counsel that I should be taking into
2 account?

3 MS. LEHMAN: I'm not sure. It was my understanding that it
4 was served but possibly E-served. I don't know if maybe there was an
5 affidavit of service filed rather than the subpoena itself.

6 THE COURT: I just --

7 MS. LEHMAN: Okay.

8 THE COURT: You all tell me; you saw the screen. Did you
9 see an affidavit of service; this Court didn't?

10 MS. HANKS: No.

11 THE COURT: If I'd seen an affidavit of service, I wouldn't
12 have said that, you know. I was looking for something that looked
13 anything like subpoena, affidavit of service, but this is answer, amended
14 order granting civil trial transcript, proposed order, notice of entry of
15 order, supplemental witness list, notice of intent to offer custodian of
16 records, which is the document I looked at just in case, and that was the
17 one that only had David Alessi, objection, joint pretrial, findings of fact,
18 proposed findings of fact, conclusions of law and two trial briefs. Appear
19 to be the public filings between the approximate time period of August
20 21, 2018 to April 15, 2019. I missed an order granting a motion to strike
21 the initial expert disclosure.

22 So, do you want to wait for Mr. Jung at 3:30?

23 MR. NITZ: I could check out in the hall and see if he's here.

24 THE COURT: Feel free to do so. I know I would ask my
25 marshal to do so, but unfortunately, he's watching a jury so.

1 MS. LEHMAN: Mr. Jung texted me that he's on his way, but
2 the rain was causing a delay, the traffic.

3 THE COURT: Oh, I didn't really know it was raining.

4 MS. LEHMAN: So, he was going to text me as soon as he
5 had parked.

6 MS. HANKS: Yeah. It started about 12:30, 1:00.

7 THE COURT: I've been here since about 6:30 this morning.

8 MS. HANKS: It's cold out there too. It's like winter.

9 THE COURT: Okay. So, did he give an indication because he
10 was supposed to be here at 3:30, what time he'd be here? No, okay.

11 So, at this juncture -- well before I segue to that. In light of
12 the Court's ruling, and in light of the subpoena was only by Plaintiff's
13 counsel, is there any reason to ask the corporate designee for Universal,
14 without using its full title, has to remain in this court for any reason? Are
15 you seeking him for custodian of records or anything else?

16 MR. NITZ: We're not seeking him for custodian of records.
17 We're only seeking him for live testimony.

18 THE COURT: Okay.

19 MR. NITZ: Under the subpoena.

20 THE COURT: Okay. Well then, at this juncture, the Court has
21 stricken him in that specific context, so he is --

22 MR. NITZ: For the record, the witness' name is Joseph
23 Roller. He's production manager for Eagle Home Mortgage.

24 THE COURT: For what?

25 MR. NITZ: Eagle Home Mortgage, the successor to

1 Universal.

2 THE COURT: So, he's not even Universal?

3 MR. NITZ: It's a name change.

4 THE COURT: But is that designated anywhere? Okay. Eagle
5 Home Mortgage, I didn't see that on anything, that's why the Court's
6 asking.

7 MS. LEHMAN: No, Your Honor, it's not. We were unaware
8 that Universal changed its name when we issued the subpoena. And we
9 were informed, actually just yesterday morning by counsel, in-house
10 counsel for Universal, that their name had changed to Eagle Home
11 Mortgage and that they had just retained counsel for this appearance.

12 THE COURT: Well, in addition to everything the Court was
13 aware of when it made its ruling and reaffirmed its ruling, I would -- now
14 that I'm being told it's not even Universal, it's Eagle, and that does not
15 exist anywhere, that would not lie in favor of Plaintiff, Counter-
16 Defendant. It would be an additional reason to affirm the Court's -- I
17 don't know when it changed to Eagle, but presumably if they didn't
18 notify you all timely, once again, I don't see any, even taking into
19 account counsel's, Mr. Nitz, your statement about trying to name the
20 people so that someone could get ahold of them, I'm not even sure how
21 you could possibly say Defendant could get ahold of Universal when it's
22 now Eagle. I don't even know if it's Florida or somewhere else.

23 MR. NITZ: Actually, Your Honor, that doesn't make any
24 sense. We served the subpoena on Universal American. It got to Mr.
25 King. If they had served the subpoena on Universal American, it would

1 have gotten to Mr. King too. Whatever the name happens to be
2 presently, it got to them and they were able to appear.

3 THE COURT: Counsel, I'm hearing what you're saying. But
4 when I have a timely objection, and you don't even have the correct
5 name of the individual, there's a reasonable argument as made not only
6 from an objection standpoint, but from Defense counsel, that there's no
7 way they could have prepared for this witness' testimony. And even -- to
8 even have any idea to look into the information to have the
9 understanding to even raise any potential arguments that they may or
10 may not wish to raise on the difference between Universal and Eagle.

11 And the Court's -- basically, the motion to strike has been
12 granted and reaffirmed for a variety of different ways. Counsel for SFR,
13 you're going to need to incorporate that into an order, please.

14 MS. HANKS: Will do.

15 THE COURT: With the additional -- since I've reaffirmed it
16 twice as new information has been presented to the Court, I've tried to
17 take everything into account.

18 So, Eagle, Universal, whatever name you are by, the motion
19 to strike is granted for all the reasons stated. It was a pleasure to see
20 you here in court.

21 MR. KING: Thank you, Your Honor.

22 THE COURT: Thank you so much. So, now of course,
23 anybody is more than welcome to stay and observe, but as far as the
24 witness testimony and the positions stated, the motion to strike was, of
25 course, granted. Did Mr. Jung give an ETA of where he is? When you

1 say he's on his way, I don't know if he's on --

2 MS. LEHMAN: He's on his way. So, he was either driving --
3 it was about 10 minutes ago.

4 THE COURT: But I'm trying to get an idea of on his way. I
5 say that because we did have a situation a year or so ago, Mr. Jung was
6 on his way, and it was two hours later. It was somewhere between an
7 hour -- let me be more accurate. Somewhere between about an hour
8 and 47 minutes later, it was almost two hours later.

9 MS. LEHMAN: Okay.

10 THE COURT: So that's why the Court's trying to get a better
11 understanding of what on its way means.

12 MS. LEHMAN: I would say at least maybe 20 minutes
13 minimum. Because he still needs to park once he gets here.

14 THE COURT: Do you know -- did he give you any indication
15 where he was coming from?

16 MS. LEHMAN: From our office on Buffalo and Sahara, which
17 is about 20 minutes from here.

18 THE COURT: Do we know when he left?

19 MS. LEHMAN: He left about -- I believe it was 10 minutes
20 ago.

21 THE COURT: He left 10 minutes ago to get here at 3:30? Are
22 you telling me he left at 3:15ish to get here at 3:30?

23 MS. LEHMAN: I'm not sure what time he left. He said it's
24 pouring rain, lots of traffic on the freeway, I'll text you after I park, and
25 that was about 10 minutes ago. So, he might have been stuck in traffic

1 at that time.

2 THE COURT: Can you please go out in the hallway. I don't
3 know if he has the type of phone that he can pick up when he's driving.
4 I'm not in any way asking anyone not to, but can you just reach out to
5 him by phone so you're not texting him while he's driving?

6 MS. LEHMAN: I will check in the hallway.

7 THE COURT: I meant to try and call him.

8 MS. LEHMAN: Oh, okay.

9 THE COURT: To get some kind of ETA with regards to when
10 he will be here.

11 MS. LEHMAN: Yes. I will do that.

12 THE COURT: So, let's find out an ETA. I'm going to go off
13 the record for a brief moment because I'm going to just check to see, to
14 make sure in my other case that they're not politely waiting -- for a
15 verdict that they're waiting for me to get off the bench for a quick
16 moment.

17 [Recess at 3:28 p.m., recommencing at 3:34 p.m.]

18 THE COURT: Go on the record, please. Thank you so very
19 much.

20 THE CLERK: On the record.

21 THE COURT: Okay. We're on the record. Thank you,
22 counsel. You were checking to see the estimated time for Mr. Jung
23 because he was supposed to be here at 3:30, and it's now 3:34.

24 MR. NITZ: He just communicated with Ms. Lehman that he
25 had just parked, and he's walking into the courthouse, walking to the

1 courthouse.

2 THE COURT: Okay. Great. Then we'll wait for him. In the
3 meantime, the Court did sign -- received and signed a stipulation to
4 amend the caption that was received, as well as the stipulation and order
5 for dismissal without prejudice as to the claims between Antelope
6 Homeowners Association, U. S. Bank National Association, as well as the
7 stipulation and order to amend the caption. The Court has signed both
8 of these documents. Would counsel like them to be returned or would
9 you like them put in the box?

10 MS. HANKS: Those are yours -- one of them yours. One of
11 them is Bill's.

12 THE COURT: One of them was -- both of them were -- one
13 was sent over by the Wright, Finlay, Zak firm and one was sent over by
14 the Lipson, Neilson firm. So, it's up to you all since I've got -- do you
15 want me to give you the one that's your firm or do you want it just get
16 put in the box for the runner?

17 MR. NITZ: I can take the one for our firm. It might make
18 more sense to just put them both in the box.

19 THE COURT: Pardon?

20 MR. NITZ: It might make more sense to put them both in the
21 box.

22 THE COURT: Well they have been signed in open court so
23 that they can get picked up and make sure that they get timely filed with
24 notice of entry thereof. I have received it. We'll go put this in a box, so
25 we'll wait a moment.

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[Pause]

MR. NITZ: Your Honor, Mr. Jung is in the hall and he's ready to come in.

THE COURT: Oh sure.

MR. NITZ: Since your marshal isn't here, Ms. Lehman went to get him.

THE COURT: Well, of course he can. Sure. So, I do appreciate it. So, counsel for Plaintiff, would you like to call your next witness. And that witness is who, sir?

ROCK JUNG, PLAINTIFF'S WITNESS, SWORN

THE CLERK: Please have a seat and state and spell your name for the record.

THE WITNESS: First name, Rock, R-O-C-K, last name, Jung, J-U-N-G.

THE COURT: Okay, Counsel. You can commence with your questioning at your leisure.

DIRECT EXAMINATION

BY MS. LEHMAN:

Q Mr. Jung, what is your present occupation?

A I am currently an attorney with the law firm, Wright, Finlay & Zak.

Q And are you a Nevada licensed attorney?

A Yes.

Q And how long have you been an attorney?

A Since 2008.

1 Q And you said you're with Wright, Finlay & Zak. How long
2 have you been with Wright, Finlay & Zak?

3 A Since September 2015.

4 Q And what areas of law do you currently practice?

5 A Civil litigation, I'd say with an emphasis on property law.

6 Q And do you practice in the area of Nevada homeowner's
7 association matters?

8 A Yes, I do.

9 Q Where were you employed in October 2011?

10 A With the law firm Miles, Bauer, Bergstrom & Winters.

11 Q And how long did you work with Miles Bauer?

12 A Approximately four and a half years.

13 Q And can you please give me the dates?

14 A Approximately end of October 2009 to March 2014.

15 Q Was Bank of America one of your clients during this time?

16 A Yes.

17 Q And what type of work did you do for Bank of America while
18 you were at Miles Bauer?

19 A Mainly, we dealt with Nevada HOA lien disputes, lots of
20 mediations, and breach of contract cases, and some bankruptcy cases.

21 Q And in your lien dispute matters, what exactly did you do?

22 A We would seek to protect the client's first deed of lien -- first
23 deed of trust lien interest and pay off a super priority amount.

24 Q And did you do this work for Bank of America?

25 A Yes.

1 Q And can you estimate for me the number of times Bank of
2 America hired Miles Bauer to pay off super priority liens?

3 MS. HANKS: Objection. Relevance.

4 THE COURT: Overruled.

5 THE WITNESS: As a firm, during my tenure at Miles Bauer, I
6 would say several thousands, at least 5,000 to 6,000, if not more.

7 BY MS. LEHMAN:

8 Q And can you walk me through the process and procedures of
9 what would happen when you were retained by BANA or Bank of
10 America to do this type of work?

11 A Upon referral from Bank of America regarding Nevada HOA
12 liens, we would open up a file and review the documents. We would
13 then make contact with the entity that was listed in the HOA recorded
14 notice to introduce ourselves and to advise them that we are willing to
15 pay the super priority amount, whatever that amount may be, and that
16 we needed to determine what the super priority amount was, and if we
17 did receive information that would allow us to calculate a super priority
18 amount, we would go ahead and calculate that amount, obtain the funds
19 necessary to calculate pay off that calculated amount, and to deliver a
20 check for that amount, to the HOA or the HOA trustee.

21 Q Do you know who Alessi & Koenig, LLC is?

22 A I do.

23 Q And who is Alessi & Koenig?

24 A They're a law firm, but they also serve as a collection agent
25 or HOA trustee for Nevada HOAs.

1 Q And how do you know about Alessi & Koenig's business?

2 A I know, well, one of two ways, at least. One is that while I
3 worked at Miles, Bauer, Bergstrom & Winters, Alessi & Koenig was an
4 HOA trustee that I communicated with, and that I sought information
5 from them in order to pay off the super priority amount. I also know
6 them as an attorney when I worked there briefly from approximately
7 2014 through 2015.

8 Q Are you able to estimate for me about how many times you
9 think you were involved with HOA lien payments and Alessi & Koenig
10 where Alessi & Koenig was the collection agent?

11 A During my tenure at Miles Bauer, I would say several
12 hundreds.

13 Q Are you familiar with Alessi & Koenig's typical responses to
14 HOA lien payoffs?

15 A I am, and their response did evolve or change during my
16 tenure at Miles Bauer.

17 Q And can you explain what the typical response you would
18 receive?

19 A Well, initially, my --

20 MS. HANKS: Objection, Your Honor. A time period we're
21 talking about.

22 THE COURT: I'm going to sustain the objection for
23 relationship to the case at issue.

24 MS. LEHMAN: Okay.

25 BY MS. LEHMAN:

1 Q In the year, I guess, between 2011 to 2012, can you describe
2 the typical response that you would get when you're trying to make
3 these HOA lien payoffs?

4 A My recollection during that timeframe, Alessi & Koenig
5 would not -- would reject any tendered checks that we sent on the basis
6 of that one that didn't include their fees and costs. And two, if I'm not
7 mistaken, they might've argued that a super priority payoff was
8 premature at that time, absent a bank foreclosure sale, but I definitely
9 remember they rejected it on the basis of the check didn't include their
10 fees and costs.

11 Q So did Alesia & Koenig provide a pay-off demand to you?

12 A For the most part, I recall they did. It would include -- it
13 wasn't specifically for a super priority amount, but it was for everything
14 that was due and owing on the HOA account.

15 Q Can you take a look at Exhibit 31? And I'm going to --

16 THE COURT: Did you all not provide a second copy of the
17 exhibits? You only have the one copy for the witness?

18 MS. LEHMAN: We provided two copies.

19 THE COURT: Two sets. I thought --

20 MS. LEHMAN: Two sets.

21 THE COURT: -- you provided two sets. Do you want to
22 doublecheck? Sorry to hold you up. Feel free to go ahead. You said
23 Exhibit 31?

24 MS. LEHMAN: Yes.

25 THE COURT: Thank you so much.

1 MS. LEHMAN: And --

2 MS. HANKS: Just for the record, Your Honor, it's proposed
3 Exhibit 31. It's not admitted yet.

4 THE COURT: Okay. Thank you.

5 MS. HANKS: Just for clarification.

6 THE COURT: That's what I was just about to be checking.
7 That's why -- thank you.

8 MS. HANKS: That's what I thought.

9 BY MS. LEHMAN:

10 Q If I could direct you to the page that's Bates stamped
11 USB625.

12 A Okay.

13 Q Do you recognize this document?

14 A Yes.

15 Q And how do you recognize it?

16 A This is a letter, what I would call a first letter, that Miles
17 Bauer would send to the HOA trustee upon receipt of the referral from
18 Bank of America.

19 Q And if you'll look on the next page, it's USB626. Do you
20 recognize your signature on that page?

21 A Yes, I do.

22 Q And going back to the previous page, 625, was Douglas Miles
23 one of the partners at the Miles Bauer firm?

24 A Yes, he was.

25 Q Does this document appear to be a true and correct copy of a

1 letter you wrote and sent to Alessi & Koenig on or around 11 -- or
2 October 11, 2011?

3 MS. HANKS: Objection, Your Honor.

4 THE COURT: What was the basis of the objection, Counsel?
5 I heard you say objection. Didn't hear a basis.

6 MS. HANKS: Sorry. She asked if this was a true and correct
7 copy. My objection is he lacks the foundation to establish that he is a
8 custodian of records or person qualified to authenticate the record. I
9 think he said he stopped working for Miles Bauer in March of 2014.

10 THE COURT: The name on this one is his name on this letter.

11 MS. HANKS: He signed it, Your Honor, but I don't know that
12 he can authenticate that it's a true and correct copy. That was the
13 question. So, and I -- that's why we submitted our trial brief in advance.
14 I had an objection to him being a witness. That rule is a qualified person,
15 as that rule is defined in Nevada, to authenticate records. I didn't hear a
16 foundation.

17 THE COURT: You'll have to lay some more foundation so the
18 Court --

19 MS. LEHMAN: Mr. Jung signed -- wrote and signed this
20 letter. He testified that he wrote it and that he signed it.

21 THE COURT: Do you understand the objection that was just
22 raised? Is this the original letter?

23 MS. LEHMAN: The original copy of the letter? No.

24 THE COURT: That was the objection. That's why the Court is
25 asking you to lay a further foundation. I'm going to sustain the objection

1 to lay a further foundation that this witness would know.

2 [Pause]

3 BY MS. LEHMAN:

4 Q So Mr. Jung, do you recognize this as a letter that you
5 drafted?

6 A I do.

7 Q And how is it that you recognize that you drafted this letter?

8 A Because of the language that's contained therein, and just
9 from having done thousands of these letters during my employment at
10 Miles Bauer.

11 Q And did you have a practice of signing the letters that you
12 wrote to HOA trustees, such as this one?

13 A Yes.

14 Q And on page 626, do you recognize your signature on that
15 page?

16 A Yes, I do.

17 MS. LEHMAN: Your Honor, I'd move for admission of page
18 USB625 to 626 in Exhibit 31.

19 THE COURT: Counsel, feel free to start your objection while
20 I'm --

21 MS. HANKS: Your Honor, I still have the same objection as
22 to lack of foundation. She has not established that Mr. Jung is the
23 qualified person or custodian of record under Rule 52.2606A, which
24 defines a custodian of record as an agent to that employee or agent of an
25 employer who has the care, custody, and control of the records of the

1 regularly conducted activity of the employer. My understanding from
2 Mr. Rock is that -- Mr. Jung -- excuse me, Mr. Jung, is that he stopped
3 working at Miles Bauer in March of 2014.

4 THE COURT: Okay. Counsel, noting on the first page of
5 Exhibit 31 that is a custodian of records affidavit.

6 MS. HANKS: I have objections to that, Your Honor. So, if
7 you want to clear it up, then I --

8 THE COURT: Okay. Counsel, why don't you respond to
9 Defense counsel's objection, please?

10 MS. LEHMAN: Mr. Jung recalls drafting this letter. He had a
11 pattern and practice of signing the letters that he wrote for this purpose,
12 and he does recognize his signature on this document, so he can testify
13 as to the authenticity of this document because he drafted it.

14 THE COURT: Okay. Court's going to allow other -- so you
15 can't do it this way, the way you've done these exhibits.

16 MS. LEHMAN: Okay.

17 THE COURT: It's very, very challenging for the Clerk. You all
18 have done these enough that you know you can't do it this way. Two
19 pages and one particular exhibit, and the exhibit usually comes in or
20 doesn't come in, but to do two pages of a particular exhibit presents a
21 very large challenge for the Clerk, but since we're here --

22 MS. HANKS: Your Honor, can I --

23 THE COURT: -- we're just going to do it, so Exhibit 31 --

24 MS. HANKS: Your Honor --

25 THE COURT: -- pages USB625 and USB626.

1 Madam Clerk, I just put the Post-It and a paper clip on the --
2 MS. HANKS: Your Honor, may I just be heard on that issue?

3 THE COURT: Sure.

4 MS. HANKS: Before it's submitted. What I heard from Ms.
5 Lehman is that she's more talking foundational. I don't have any
6 objection that this witness could, if it was authenticated, talk about the
7 letter, and what he did with his time at Miles Bauer. My objection is the
8 first hurdle of admissibility, which is authentication, and Mr. Jung has --
9 she has not established the foundation how the rule is defined as
10 custodian of record or other qualified person.

11 I've read the definition as defined within the rule because I
12 meet that definition. He's not an agent of Miles Bauer and he's not an
13 employee of Miles Bauer, and there's no testimony that he has the care,
14 custody, and control of Miles Bauer records here in 2019 or that he
15 maintained any care, custody, or control of records that he worked on
16 since leaving Miles Bauer in March of 2014.

17 So, I'm not objecting that he couldn't have testified to
18 anything out of the first hurdle. I'm at the first gate of admissibility, not
19 the second gate. So, her response was more the second gate, that he
20 can talk about it, but that's not where we're at. It has not been -- this
21 comes from a file, and he cannot testify that this is a true and correct
22 authentic copy of the letter, the original letter that would be contained in
23 Miles Bauer's records. That's my objections.

24 THE COURT: Okay. Counsel, you want to respond to that?
25 And actually, Court is going to defer the ruling. I thought the objection

1 was to second prong, not the first prong. So, go ahead. Counsel, would
2 you like to respond?

3 MS. LEHMAN: So, we called Mr. Jung as like a lay witness.
4 We called him in his personal capacity for his -- a factual witness, not as
5 a custodian of record.

6 THE COURT: Which is what her point is.

7 MS. HANKS: Yeah.

8 MS. LEHMAN: Okay. I mean --

9 THE COURT: So that's --

10 MS. LEHMAN: -- he wrote my -- I stand on my -- that he
11 wrote this letter, and that he recalls writing it, and that it's his signature,
12 and that he recognizes the signature.

13 THE COURT: Okay, but how does it get the exhibit in as a
14 true and accurate copy of the business record of Miles Bauer versus you
15 asking questions? You're asking to admit it. Of course.

16 [Counsel confer]

17 MS. LEHMAN: So, we would ask that it be admitted, not as a
18 business record, but that it was a communication that Mr. Jung, himself,
19 wrote and sent, but not the fact that this communication was sent to
20 Alessi & Koenig.

21 THE COURT: Counsel?

22 MS. HANKS: And then I would object that it's hearsay, so it's
23 inadmissible. Even before you get past the authentication problem, it's
24 just inadmissible under the hearsay rule.

25 THE COURT: Counsel, you want to respond to --

1 MS. LEHMAN: Well, Mr. Jung is available here to testify, so
2 he could testify as to what was communicated. That would be an in-
3 court statement, rather than an out-of-court statement.

4 THE COURT: Right. The objection isn't to the testimony of
5 Mr. Jung. You understand the objection is to the request to admit the
6 document; is that correct, Defense counsel?

7 MS. HANKS: Yes.

8 THE COURT: To have the document itself come in versus the
9 testimony of Mr. Jung with regards to his communication. If you want to
10 defer seeking its admission and ask them a few questions first, that's
11 also perfectly fine, however you'd like to do it.

12 MS. LEHMAN: Okay, that's fine; yeah. We can do that.

13 THE COURT: It's fine. You can re-admit those in a few
14 minutes, if you prefer. Whatever you wish, is fine with the Court.

15 MS. HANKS: Can I verify that that is Exhibit 31, USB25 --

16 THE COURT: 625, 626.

17 MS. HANKS: 626.

18 THE COURT: Yeah, 625, 626. So, Counsel, feel free to
19 continue, and then if you want to reintroduce when you wish to, feel free
20 to do so, okay?

21 MS. LEHMAN: Okay.

22 BY MS. LEHMAN:

23 Q Mr. Young, what was the purpose of you writing and sending
24 this letter?

25 MS. HANKS: Objection, Your Honor. The witness can't

1 testify about a document that's not admitted. If she wants to close that
2 binder up and ask Mr. Jung if he remembers what he did in 2011 for this
3 particular property, have at it, but she can't then look at the document
4 and testify, and get around the admission of it, by doing it that way.

5 THE COURT: Depending on -- the way that question was
6 phrased, the Court is going to have to sustain that objection. It's not
7 precluding testimony that you may wish to elicit from this witness, but
8 that's -- specifically how you phrased that question in light of where we
9 are procedurally, Counsel is correct. The Court needs to sustain her
10 objection.

11 BY MS. LEHMAN:

12 Q Mr. Jung, previously you testified that when you were
13 retained by Bank of America, you would send an initial letter out to the
14 HOA trustee. Can you explain why you would send an initial letter out to
15 the HOA trustee?

16 A Sure. I would send out an initial letter to the HOA trustee
17 because based on our review of the recorded HOA notice and question,
18 we could not ascertain what the super priority amount was. So, there
19 was information -- contact information and a recorded HOA notice
20 saying to contact this entity to get more information, and that's exactly
21 what we did, contact the entity or HOA trustee to advise them that we
22 wished to pay the super priority amount, and we needed to determine
23 what that amount was.

24 THE COURT: Counsel, would it be of assistance if we took a
25 break for a few moments, and you want to re-visit this issue in a few

1 moments? We can go off --

2 MS. LEHMAN: Sure.

3 THE COURT: -- the record for a few moments.

4 MS. LEHMAN: That's fine.

5 THE COURT: Okay. Okay.

6 MS. HANKS: Just before we go off the record, I just want to
7 invoke the exclusionary rule while he's under oath and testifying that
8 Counsel cannot talk to him. Mr. Jung, that is.

9 THE COURT: This witness is on the stand -- you all know the
10 rules with witnesses on the stand. Okay. So, we're going to go off the
11 record in this case for a brief five to seven minutes.

12 [Recess at 3:57 p.m., recommencing at 4:06 p.m.]

13 THE COURT: Okay. Give Madam Recorder a quick second.
14 We can appreciate she has been --

15 COURT RECORDER: It's just slow.

16 THE COURT: She's been above and beyond switching
17 between cases in here. So very appreciative of the wonderful team
18 that's not in here normally with us, but jumping in to help us out
19 because of our wonderfulness today.

20 COURT RECORDER: On the record.

21 THE COURT: We are back on the record in our trial, and that
22 would be our bench trial, not to be confused, which would be 739867,
23 and we're in the middle of the witness testimony on direct examination
24 of Mr. Jung. Mr. Rock Jung. I'm sorry I keep mispronouncing your
25 name, and I shouldn't by now.

1 Counsel, feel free to proceed with the witness. I'll just follow
2 with the witness --

3 MS. LEHMAN: Thank you, Your Honor.

4 THE COURT: So, the Court has sustained last objection. I
5 think you're moving onto your next question. Feel free to do so.

6 **DIRECT EXAMINATION CONTINUED**

7 **BY MS. LEHMAN:**

8 Q So Mr. Jung, we were talking about the initial
9 correspondence that you had with the HOA trustee when you're making
10 the HOA lien payoffs. Do you recall the -- what you wrote in the letter in
11 this case that was on October 11th, 2011?

12 A For that specific case in time, I don't recall that individually,
13 but it would've been based on the custom and practice of the same type
14 of letters that I wrote during my duration at Miles Bauer.

15 Q Would it refresh your recollection if you were to be able to
16 read that letter?

17 A Sure.

18 Q I'm going to ask you to look at -- we were previously looking
19 at Exhibit 31, but to make it easier for the Court, we have some of these
20 exhibits broken down, so if you could look at Exhibit 22, which is the
21 same letter, and read it to yourself, and let us know if that refreshes your
22 recollection of what you wrote.

23 A Okay.

24 [Witness reviews document]

25 THE WITNESS: Okay.

1 **BY MS. LEHMAN:**

2 Q Mr. Jung, when you wrote this letter, was the information
3 contained in the letter fresh in your memory?

4 A Yes.

5 Q And does the information in this letter reflect that knowledge
6 correctly?

7 MS. HANKS: Objection, Your Honor. The witness is
8 testifying from the document, again.

9 THE COURT: Court is going to overrule that objection
10 because he hasn't said he's reading from the document. He said he's
11 refreshing his recollection, and I'll allow the prior question, the Court is
12 going to allow the answer to this question. He's not reading from the
13 document. He's just saying his recollection is being refreshed from the
14 document, so the question would be appropriate.

15 THE WITNESS: Yes.

16 **BY MS. LEHMAN:**

17 Q And so now, do you recall what -- without looking at the
18 letter, now do you recall what you wrote in the letter?

19 A Yes.

20 Q And what was that?

21 A That was to, once again, introduce who I was and my law
22 firm, who we represented, that in response to a recorded HOA notice
23 that we were willing and able to pay the super priority amount, but we
24 needed more information to allow us to determine that amount, and
25 thereby, we were requesting such information to allow us to make that

1 determination.

2 MS. LEHMAN: Your Honor, I would request under NRS
3 51.125, recorded recollection, that Mr. Jung be allowed to read the
4 evidence -- or read the letter into evidence as it qualifies as an exception
5 to hearsay.

6 THE COURT: Reading it into evidence. I'm not hearing an
7 objection.

8 MS. HANKS: I have an objection. I'm not sure I understand
9 the request. This isn't a recorded recollection. I'm pulling up the rule
10 right now, Your Honor. I don't understand what she's asking the witness
11 to -- she wants the witness to read a hearsay statement into evidence.

12 THE COURT: She cited the rule on its face which does allow,
13 in lieu of a document being introduced, that it can be brought into
14 evidence in certain circumstances, 51.215. Do I have an objection or not?

15 MS. HANKS: It says the memorandum or record may be
16 read into evidence, but may not itself be received unless offered by an
17 adverse party.

18 THE COURT: Right.

19 MS. HANKS: I'm certainly not offering it.

20 THE COURT: Correct, but at present, her request was to read
21 it into the record, not to offer the exhibit into evidence, is what I heard
22 the request was, so that's why I was asking. There was an objection to
23 that request. We stood out, so I wasn't sure if you were raising an
24 objection to that specific request. She's not asking for it to be introduced
25 as an exhibit at this juncture.

1 MS. HANKS: She's asking to -- for the witness to read a
2 hearsay statement into evidence is how I understood it. So, my
3 objection is the document is still hearsay, and there's not been a
4 business record exception established. Now, she thinks it's a recorded
5 recollection, but this just says that defines it as a memorandum or a
6 record concerning the matter. And then it says the memorandum or
7 record may be read into evidence, but may not, itself, be received unless
8 offered by an adverse party. I don't think this qualifies as a recorded
9 recollection.

10 THE COURT: What basis --

11 MS. HANKS: It's a letter, but I don't --

12 THE COURT: On what basis do you make that determination
13 it would --

14 MS. HANKS: I don't think --

15 THE COURT: Have you looked at --

16 MS. HANKS: -- it's a memorandum.

17 THE COURT: Huh?

18 MS. HANKS: I don't think it's a memorandum. I mean, the
19 rule talks about a memorandum or a record. It's not like a medical
20 record, it's not a memorandum. It's an actual letter. It doesn't say letter;
21 it doesn't say correspondence --

22 THE COURT: Are you aware of any case law that is specific
23 to this particular provision and defines a record more clearly than
24 anywhere in this provision that specifies what you can and cannot be a
25 record or a memorandum, and whether or not a letter would fall within

1 the broad definition under the record --

2 MS. HANKS: Am I aware of a case law? I can take time to
3 look at it. I don't have it right handy right now. I'm looking at the rule. It
4 doesn't seem to be what the rule is talking about.

5 THE COURT: The Court is going to overrule the objection for
6 the specific request, but Counsel does understand what you're
7 requesting and in light of what you're requesting, where it may be going.

8 MS. HANKS: Sorry, Your Honor. I have a -- getting back to
9 the rule, he has to have a sufficient recollection. He just testified he
10 recalls. Now, looking at this, he can recall what he did with respect to
11 the initial letter. So, it can't be read it. That's what the very first part
12 says.

13 THE COURT: But read the whole thing in its entirety.

14 MS. HANKS: It says a memorandum of record concerning a
15 matter about which a witness once had knowledge, but now has
16 insufficient recollection to enable the witness to testify fully and accurate
17 is not inadmissible under the hearsay rule if it is shown to have been
18 made when the matter was fresh in the witness's memory, and to reflect
19 that knowledge correctly.

20 I don't think that this witness ever testified that he doesn't
21 insufficiently remember once his memory was refreshed with the letter.
22 So, I don't think he has to read from it now.

23 THE COURT: The Court is appreciative of that, and the Court
24 is appreciative of the interplay between Rule 50 and 51 in this context.
25 At this request that's being made, under that provision, the Court is

1 going to overrule the objection. And I'm sure Counsel realizes by
2 making this request, what they may be precluding down the road, but
3 that's the request as given to me.

4 BY MS. LEHMAN:

5 Q So Mr. Jung, if you would please read Exhibit 22 into the
6 record.

7 A Just beginning where it says, "Dear Sirs"?

8 Q I think beginning with the date and who the letter is directed
9 at.

10 A October 11th, 2011. It's addressed to Adamo Homeowner's
11 Association, care/of Alessi & Koenig, LLC, 9500 West Flamingo Road,
12 Suite 100, Las Vegas, Nevada 89147. It's regarding property address
13 7868 Marbledoe, that's one word, Street, Las Vegas, Nevada 89149, M as
14 in Miles, BBW, file number 11-H1638, sent via First Class Mail.

15 "Dear Sirs, this letter is in response to your notice of sale with
16 regard to the HOA assessment purportedly owed on the above described
17 real property. This firm represents the interest of MERS as nominee for
18 Bank of America, NA, as successor by merger to BAC Home Loan
19 Servicing, LP, herein after BANA, with regard to these issues. BANA is
20 the beneficiary/servicer of the first deed of trust loan secured by the
21 property.

22 As you know, NRS 116.3116 governs liens against units for
23 assessments. Pursuant to NRS 116.3116, the association has a lien on a
24 unit for -- ellipses -- any penalties, fees, charges, late charges, fines and
25 interest charge pursuant to paragraphs J to N, inclusive of subsection 1

1 of NRS 116.3102, are enforceable as assessments under the section.

2 While the HOA may claim a lien under NRS 116.3102, subsection 1,
3 paragraph J through N of the statute clearly provide that such a lien is
4 junior to first deeds of trust, to the extent the lien is for fees and charges,
5 and posed for collection, and/or attorney fees, collection costs, late fees,
6 service charges, and interest.

7 See subsection 2B of NRS 116.3116, which states in pertinent part,
8 a lien under the section is prior to all other liens and encumbrances on a
9 unit except a first security interest on the unit recorded before the date
10 on which the assessment sought to be enforced became delinquent.

11 The lien is also prior to all security interests described in paragraph
12 B, to the extent of the assessments for common expenses, which would
13 have become due in the absence of acceleration during the nine months
14 immediately preceding institution of an action to enforce the lien.

15 Subsection 2B of NRS 116.3116 clearly provides that an HOA lien is
16 prior to all other liens and encumbrances on a unit, except a first security
17 interest on the unit. But such a lien is prior to a first security interest to
18 the extent of the assessments for common expenses, which would have
19 become due during the nine months before institution of an action to
20 enforce the lien.

21 Based on section 2B, a portion of your HOA lien is arguably senior
22 to BANA's first deed of trust, specifically the nine months of assessments
23 for common expenses incurred before the date of your notice of
24 delinquent assessment. For purposes of calculating the nine month
25 period, the trigger date is the date the HOA sought to enforce its lien. It

1 is unclear based upon the information known to date, what amount to
2 nine months of common assessments predating the NOD actually are.

3 That amount, whatever it is, is the amount BANA should be
4 required to rightfully pay to fully discharge its obligations to the HOA per
5 NRS 116.3102, and my client hereby offers to pay that sum upon
6 presentation of adequate proof of the same by the HOA. Please let me
7 know the status of the foreclosure sale that is scheduled for November
8 30th, 2011. My client does not want these issues to become further
9 exacerbated by wrongful HOA sale, and it is my client's goal and intent
10 to have these issues resolved as soon as possible.

11 Please refrain from taking further action to enforce this HOA lien
12 until my client and the HOA have had an opportunity to speak to attempt
13 to fully resolve all issues. Thank you for your time and assistance with
14 this matter. I may be reached by phone directly at 702-942-0412.

15 Please fax the breakdown of the HOA arrears to my attention at
16 702-942-0411. I will be in touch as soon as I've reviewed the same with
17 BANA. Sincerely, Miles Bauer, Bergstrom & Winters, LLP, and there's a
18 signature, that's my name, Rock K. Jung, and there's also a printed -- my
19 printed name, Rock K. Jung, Esquire.

20 Q Thank you. So, Mr. Jung, in this case, do you recall whether
21 you received a response to this letter?

22 A Most -- independently, I don't recall, just given how old this
23 letter is, but I do recall from dealing with Alessi and Koenig, literally
24 hundreds of times, that they would respond by sending me payoff
25 information for all the charges that had allegedly accrued under that

1 particular HOA account in question.

2 So, I would, based on the custom and practice in dealing with
3 Alessi & Koenig when making such a request, I believe they would've
4 responded with payoff information.

5 Q Do you recall what your custom and practice was in
6 responding to a payoff demand from Alessi & Koenig?

7 A Yes. It would be to review the payoff demand and look for
8 any charges that would be part of a super priority amount, and then
9 calculate, based on whatever applicable charges there were, and then
10 tender that amount.

11 Q And when you say tender, what do you mean?

12 A By tender, I mean we would actually have a legal runner
13 hand deliver a check and the calculated super priority amount to the
14 HOA collection agent, or in this case, Alessi & Koenig.

15 Q And how did you calculate the super priority amount?

16 A Well, our understanding is that the super priority amount
17 would be a maximum of nine months of assessment, absent any
18 maintenance or nuisance abatement charges, which I never saw. So
19 basically, it would be nine months of common assessments.

20 Q Do you recall in this case how much the monthly
21 assessments were?

22 A Not off the top of my head; I do not.

23 Q Do you recall in this case how much the tender check that
24 you -- or do you recall sending a tender check in this case?

25 A Independently, I don't, but if this case is true to all the other

1 cases I had with Alessi & Koenig, I do see that there was a letter that I
2 drafted and signed, and that would've then been sent to Alessi & Koenig
3 per Miles Bauer custom and practice, and based on my experience with
4 Alessi & Koenig, they would've responded to their request for more
5 information by giving us the payoff information that contained all the
6 charges on the HOA account, and then we would then calculate the
7 super priority amount based on a review of that information, and then
8 hand deliver a check to Alessi & Koenig.

9 Q If you could take a look at Exhibit 24.

10 A Okay.

11 Q Do you recognize this document?

12 THE COURT: Is this proposed or a stipulated exhibit?

13 MS. HANKS: Proposed.

14 THE COURT: I really appreciate it. Thank you so very much.

15 THE WITNESS: I do.

16 MS. LEHMAN: Okay.

17 BY MS. LEHMAN:

18 Q And how do you recognize it?

19 A This letter is a template driven letter, and I call this letter the
20 second letter or tender letter, meaning this was the cover letter that
21 would accompany a check for the super priority amount, which would be
22 hand delivered that I testified just recently, to the HOA, or the HOA
23 trustee in question.

24 Q And if you turn the page to USB167, is that your signature?

25 A Yes, it is.

1 Q So is it your testimony that you drafted this letter?

2 A Yes, it is.

3 Q And when you drafted this letter, was the contents of the
4 letter fresh in your mind?

5 A Yes, it was.

6 Q And does this letter accurately reflect the information that
7 was in your mind when you drafted this letter?

8 A Yes.

9 Q Okay.

10 MS. HANKS: Objection, Your Honor. I don't know how the
11 witness can testify that it's accurate if he doesn't remember anything.

12 THE COURT: Sustained. It was his prior answer.

13 BY MS. LEHMAN:

14 Q Mr. Jung, if you would review this letter to yourself, would
15 that refresh your recollection?

16 A Yes, I believe it would.

17 Q If you would, take the time to read this letter to yourself,
18 please.

19 [Witness reviews document]

20 THE WITNESS: Okay.

21 BY MS. LEHMAN:

22 Q Do you now recall how much the check was that you
23 tendered?

24 A Yes.

25 Q And what was that amount?

1 A \$405.

2 Q And do you now recall how you came to the figure of \$405?

3 A Yeah. Most likely, it would've been based on assessments,
4 nine months of HOA assessments, absent any nuisance or abatement
5 charges, which once again, I never saw. So, I would base that \$405,
6 most likely, that's the equivalent of nine months of assessments.

7 MS. LEHMAN: Your Honor, I'd like to move for admission of
8 Exhibit 24.

9 MS. HANKS: I have the same objection I had to the --

10 THE COURT: I need to hear the basis of objection.

11 MS. HANKS: Sure.

12 THE COURT: Counsel not saying --

13 MS. HANKS: No, I understand. It's the same objection I had
14 to Exhibit 31 or parts of it that he has not been established as the
15 custodian of records qualified person to authenticate the record, so I
16 think they don't pass the first hurdle of the admissibility, and then it is
17 hearsay, Your Honor.

18 THE COURT: Can you explain your hearsay objection since
19 he has identified that he has written it?

20 MS. HANKS: Well, it's not a court statement offered for the
21 truth of the matter asserted. They're offering it to prove that a check is
22 attached to it in X amount, which is the 405.

23 THE COURT: Okay. Counsel, would you like to respond to
24 the objections raised by opposing counsel?

25 MS. LEHMAN: Yes. It's an exception to hearsay as a

1 recorded recollection under 51.125.

2 THE COURT: That doesn't give it -- counsel, we just went
3 through this colloquy. That doesn't get it admitted, right?

4 MS. LEHMAN: it --

5 THE COURT: It's just got --

6 MS. LEHMAN: It's an objection to hearsay under that rule.

7 THE COURT: 51.125.

8 MS. LEHMAN: Yes.

9 THE COURT: As a recorded recollection, you just asked for
10 this exhibit to be admitted.

11 MS. LEHMAN: As an exception to hearsay; yes. So, he could
12 read it into the record. So, I would -- if it's not going to be admitted then
13 I request that he can read it into the record.

14 THE COURT: What would be your basis? I'm having a
15 challenge here on what's being requested in light of how it's being
16 requested.

17 MS. LEHMAN: Um-hum.

18 THE COURT: For being admitted under 51.125, no because
19 51.125 on its face specifically says it can't be admitted, okay? Because
20 you're not the adverse person. It's -- right? It's on your behalf. So, by
21 definition, it can't come in under that as being admitted, so I have to
22 sustain the objection, your response. By its own language, can't get it
23 admitted.

24 Your next request was what?

25 MS. LEHMAN: Was to have him read it into the record,

1 similar to the last exhibit as a recorded recollection.

2 THE COURT: Am I hearing an objection or not? I'm seeing
3 counsel start to stand up, so I would assume. Counsel?

4 MS. HANKS: My objection is the prong of that rule is he has
5 to be able to attest that it's accurate, and he has testified he has no
6 independent recollection, so how could he tell me this is accurate
7 because it doesn't meet the recorded recollection requirement.

8 THE COURT: Okay. I have to sustain that based on this
9 witness's prior testimony as to this document, his answers -- questions
10 were different on this document. His answers were different on this
11 document, so the ruling has to be consistent with his answers as to this
12 document, so I have to sustain the objection as to this document based
13 on this witness's prior answers.

14 MS. LEHMAN: Okay.

15 THE COURT: Okay.

16 BY MS. LEHMAN:

17 Q So Mr. Jung, you have reviewed the letter in Exhibit 24.
18 You've reviewed it and you testified that you now recall --

19 MS. HANKS: I'm sorry. Were you -- there's a -- are you
20 talking about the noise?

21 THE COURT: Yeah, that noise that's happening, counsel. I'm
22 just -- it has to be coming from somewhere, so either somebody has a
23 phone on that's beeping or someone's computer keeps making that
24 noise because it's not coming anywhere from the Court's side of things.

25 So, whoever has -- whatever you have on, it sounds like

1 somebody's got some kind of notifications or maybe texts coming in or
2 something, now would be a beautiful time to subtly turn off whatever
3 you might be having, because that noise is really interfering with our
4 system.

5 And sorry, Counsel. You were starting --

6 MS. LEHMAN: Uh-huh.

7 THE COURT: -- to speak as that noise was coming on, so I --

8 MS. LEHMAN: Uh-huh.

9 THE COURT: -- didn't hear what you said. So, would you
10 mind please repeating it, and I can address whatever you wish, or if it
11 was to the witness, then the witness can address it.

12 MS. LEHMAN: Sure.

13 BY MS. LEHMAN:

14 Q So Mr. Jung, you reviewed the letter in Exhibit 24, and do
15 you recognize this document?

16 A I do; yes.

17 Q And what is it?

18 A Exhibit 24 is a copy of a letter that I wrote thousands of
19 times, what I call the tender letter or the second letter to the HOA or the
20 HOA trustee, just setting forth the check that would be attached to it and
21 letting them know we're trying to pay the super priority amount based
22 on the information we received from them.

23 Q And if you look on the second page, do you recognize your
24 signature?

25 A I do recognize my signature.

1 Q And do you recall drafting this letter?

2 A Yes, I recall drafting this letter.

3 Q Do you recall the details of the substance of the letter?

4 A Yes, they would've been same as the other thousands of
5 letters I drafted for second letters.

6 Q And does this document appear to be a true and correct copy
7 of the letter that you wrote and sent to Alessi & Koenig on December
8 16th, 2011?

9 MS. HANKS: Objection, Your Honor. That lacks foundation.
10 He hasn't been established as a custodian of records for Miles Bauer to
11 authenticate this document.

12 THE COURT: Sustained with the question, that specific
13 question.

14 BY MS. LEHMAN:

15 Q So Mr. Jung, you wrote this letter, correct?

16 A That's correct; yes.

17 Q And did you write this letter while you were employed with
18 Miles, Bauer, Bergstrom & Winters?

19 A Yes, I did.

20 Q And is the information contained in this letter fresh in your
21 memory at the time that you drafted it?

22 MS. HANKS: Your Honor, objection. He's got to look at the
23 letter to testify to that and it's not admitted yet.

24 THE COURT: Court overrules the objection, the way the
25 question was phrased, and based on the objection cited.

1 THE WITNESS: Yes.

2 BY MS. LEHMAN:

3 Q And based on your review of the letter, does the information
4 reflect that -- is the information correct?

5 A Yes.

6 MS. HANKS: Objection, Your Honor. That lacks foundation.
7 He said he doesn't remember anything about the letter, and then he was
8 refreshed with the letter. He doesn't remember independently anything
9 about the letter.

10 THE COURT: Counsel, would you like to respond?

11 MS. LEHMAN: He drafted this letter. He recalls drafting the
12 letter. He did not recall, until he read the letter, he was then refreshed
13 about the contents. He recalled that he would send these letters and that
14 they would calculate the nine months of assessments. He said that he
15 signed it and he remembered it.

16 So, he's testifying that he remembered writing the letter, but
17 he didn't remember all of the details until he reviewed it and refreshed
18 his recollection.

19 THE COURT: And so, you're seeking what in response to the
20 objection raised by counter-claimant?

21 MS. LEHMAN: That it would be admissible to -- for it to be
22 read into the record under NRS 51.125, as a recorded recollection.

23 THE COURT: Just a second. I'm pulling up a case I dealt
24 with the other week. How, in light of the different answers that he gave
25 with regards to this document, did it fall within what you're seeking

1 under 51.125?

2 MS. LEHMAN: Well, he testified that he wrote this at the
3 time that he was working on the matter, that it was fresh in his mind at
4 the time he wrote it, and that it reflects that knowledge correctly, that he
5 didn't have -- he had an insufficient recollection to testify fully until he
6 reviewed it.

7 THE COURT: He testified that he did recall because you
8 asked, did he recall, and he said yes.

9 MS. LEHMAN: Yeah, he did recall -- he didn't recall all the
10 details of the letter, but he recalled that he wrote the letter.

11 THE COURT: So how did that fall within 51.125 that you're
12 seeking, Counsel?

13 MS. LEHMAN: Because it says it's a memorandum of record
14 concerning a matter about which the witness once had knowledge, but
15 now has insufficient recollection to enable the witness to testify fully and
16 accurately. Under the requirements, you have to show that the record or
17 memorandum was made when the matter was fresh in the witness's
18 memory, and that reflects the knowledge correctly.

19 THE COURT: Counsel, I see you standing. Would you like to
20 say something?

21 MS. HANKS: I would. We have a confusion here, Your
22 Honor, between past recollection -- and like you have a confusion, and I
23 think Counsel has a confusion, so I want to highlight that. A past
24 recorded recollection can only be used if the witness says, I have
25 insufficient knowledge, and then you use that in lieu of what the

1 testimony could've been because the witness doesn't remember.

2 This witness was refreshed with the document. He said, now
3 I remember, and now he can testify once his memory is refreshed, but he
4 can't testify from the document itself, and it still wouldn't be admissible
5 under the hearsay rule.

6 There's no exception to it, so I think we're conflating the two
7 issues, at least that's what it appears that I'm hearing, and so that's why I
8 have the objection of it being admitted because they can use anything to
9 refresh the witness's recollection, but he can't testify from the document
10 and look at it, doesn't look at it anymore, and then can testify what he
11 recalls.

12 So, the only way he can get to a past recollection recorded is
13 if he says, I have completely insufficient knowledge and even you show
14 me this document doesn't refresh my memory.

15 THE COURT: Court is trying to pull up Thomas v. Hardwick,
16 which is a case that deals with this particular situation, 126 Nev. Op. No.
17 16, but I was trying to find the official cite for it so there's clarification
18 with regards to -- okay, we don't have -- hmm, where is the case?

19 Not to be confused with -- okay, well if you look at that case
20 where it talks about -- and that's where it is. In that case, in
21 paraphrasing, it was a doctor's notes where a doctor had a custom in
22 practice of making certain types of notes, right? And the doctor couldn't
23 remember specifically the notes they made on a particular patient, and
24 so the notes were read into the record because the doctor couldn't
25 necessarily do that.

1 The Court is not giving you any legal advice, but I'm trying to
2 -- because we're having a challenge on -- this is not -- it's been used
3 twice in the last month in trials, this provision, but anyway, so that's
4 rubric. This witness has not stated in the parameters of utilizing the case
5 which deals with it in a small manner, okay?

6 MS. LEHMAN: Uh-huh.

7 THE COURT: If you all know of another case -- Thomas v.
8 Hartwick is one of the few cases and I looked at it the first time the other
9 month. Actually, it was actually the last couple weeks. It goes through
10 this analysis. When I'm looking at how that case phrased it, okay, it's a
11 2010 case. Two-thousand -- if not, I'm pretty close. I believe it was 2010.

12 MR. MARTINEZ: Correct.

13 THE COURT: It's on or about 2010.

14 MR. MARTINEZ: May 27th, 2010.

15 THE COURT: Good. I'm in the right year, too. So, I'm sure
16 you're both now looking at the case. If anybody needs the Court to wait
17 a moment while you're looking at it, I have no problem while each party
18 takes a look at it because it might -- no way of saying that that's the only
19 exhaustive case on it because of course, the Court doesn't provide legal
20 advice.

21 If I'm going to mention a case and one party is standing up
22 on a podium, and one party has the advantage of sitting down, if the
23 other party needs a moment to look at the same thing that the other
24 party is looking at, I don't mind waiting a moment or two.

25 Do you need a moment or two?

1 MS. LEHMAN: Yes, Your Honor. And what was the citation
2 for that case?

3 THE COURT: Off the top of my -- I can tell you the year, I can
4 tell you the name of the case --

5 MS. LEHMAN: Okay.

6 THE COURT: -- and I can tell you most of the facts --

7 MS. LEHMAN: So, what was --

8 THE COURT: -- of the underlying case. You also want the
9 specific citation? I know the events of citation. I don't remember off the
10 top -- hold on a second.

11 MS. LEHMAN: Or if counsel for SFR has a citation.

12 MR. MARTINEZ: It's 126 Nev. 142.

13 THE COURT: I appreciate it. I focus on titles, facts, and years
14 for recency, and necessarily remember raising every citation of the
15 hundreds of that, so it's --

16 MS. LEHMAN: I apologize. You might have stated it and
17 that's how they were able to pull it up so quickly.

18 THE COURT: I assume they did a name search. Okay. So,
19 do you need a moment to take a look at that, as well?

20 MS. LEHMAN: Yes, Your Honor, and looking -- seeing as
21 though it is 4:44, the rest of our documents may be going through this
22 type of exercise. I don't know if it would be better for us to start --

23 THE COURT: Okay.

24 MS. LEHMAN: -- in the morning.

25 THE COURT: I mean, is this witness going to have the same

1 -- are these all going to be Miles Bauer documents?

2 MS. LEHMAN: Yes.

3 THE COURT: Some of which he wrote and some of which he
4 didn't write?

5 MS. LEHMAN: The ones that he wrote, there's another one
6 that he did not write, but was received by his office or when he was
7 received by him when he was at Miles Bauer.

8 THE COURT: Okay. The Court's not making any advance
9 rulings. If you both are asking that -- I mean, but I thought this witness
10 was gone at 9:00 or something.

11 MS. HANKS: That's what I thought.

12 MS. LEHMAN: I think he has a court hearing in the morning,
13 so I don't know if you could -- what? Yeah, we could do it right after his
14 hearing in the morning or we could maybe find someone in our office to
15 cover that hearing in the morning.

16 THE COURT: Okay. This court -- tomorrow is Wednesday. I
17 still think tomorrow is -- today is still Tuesday, right?

18 MS. LEHMAN: Yep.

19 MS. HANKS: Yep.

20 THE COURT: Sorry, you know I'm kidding. I knew it was
21 Tuesday. I was just kidding. I'll still be here for several hours. We still
22 have a jury deliberating, so it really doesn't matter. If you're wondering
23 from the Court's standpoint, we still have a jury deliberating, and so my
24 team needs to be here anyway. You've got that ending circumstance.

25 So, if you're wondering from the Court's standpoint, the

1 Court will be fine moving forward. If it's from the counsel's standpoint
2 or a witness client standpoint that you wish to end at the normal time
3 that people end, which is around the 5:00 hour or you need to look into
4 this issue so that it's productive use of you all's time, then the Court's
5 fine either -- and the Court is fine staying, like I said, because we're here
6 waiting for a jury to deliberate anyway, so --

7 MS. HANKS: My only concern is, Your Honor, we have 15
8 minutes, and I thought Mr. Jung had a tight morning schedule
9 tomorrow, so if I can get clarification on how much time in his morning
10 he has --

11 THE COURT: Okay, well the Court has hearing -- the Court
12 has CV calendar tomorrow.

13 MS. HANKS: Right. So, we weren't starting until --

14 THE COURT: But the Court only -- the CV calendar only has
15 three matters. When I say three matters, one of them is a motion in
16 opposition on the same issue, so it's 2-1 matter, and there's a status
17 check on settlement documents, and so while one matter is more hotly
18 contested because of the motion to disqualify counsel, and a
19 countermotion just to disqualify the closing counsel. It'll take a little bit
20 of time.

21 There is a status check on settlement documents, which is
22 why I told you 9:30, because realistically, to get both of those handled,
23 one is going to take just a few minutes.

24 The other one is going to take not too much longer because
25 it's the second round of disqualification motions, o it has what it has, but

1 I want to ensure, of course, all parties in all cases have a full opportunity
2 to be heard.

3 So, 9:30 is what the Court was planning on you all starting
4 tomorrow.

5 MS. LEHMAN: Okay.

6 THE COURT: I don't know other people's schedules. If you
7 all needed --

8 MS. HANKS: So --

9 THE COURT: I thought Mr. Jung --

10 MS. HANKS: -- what would that put -- when does Mr. Jung
11 has to be finished, assuming you can get someone else to finish the
12 hearing.

13 THE WITNESS: Your Honor, if I may, I'll be able to be here
14 by 9:30. I'm just down the hall. I have a 9 a.m. hearing sharp.

15 MS. HANKS: And then when do you need to leave? We
16 were told you had to catch a flight.

17 THE WITNESS: Not until late afternoon, so if we --

18 MS. HANKS: Oh.

19 THE WITNESS: -- could wrap up before we go to lunch
20 break.

21 MS. HANKS: Okay. Then I'm good.

22 THE COURT: So that meets everyone's needs?

23 MS. HANKS: Yeah. Then that should be sufficient. I was
24 just concerned that he had to be out of here by 10. I didn't want to waste
25 15 minutes today.

1 MS. LEHMAN: So, I think it might be a more productive use
2 if we can look into this issue because otherwise, it's just going to
3 reoccur.

4 THE COURT: It's up to you all. I'm here. What would you
5 like to do?

6 MS. LEHMAN: I'd like to adjourn for today and then start
7 back with Mr. Jung tomorrow at 9:30.

8 THE COURT: Does that work okay for Defense counsel?

9 MS. HANKS: It works okay for me.

10 THE COURT: Okay.

11 MS. HANKS: I just want to make sure there's no
12 conversation. I know he works in their office. Make sure that he
13 understands, and they understand that he's still under oath.

14 THE COURT: I'm sure as a witness/officer of the Court/that
15 you understand what you can and cannot do, right?

16 THE WITNESS: Yes, Your Honor.

17 THE COURT: And in no way putting in any additional
18 obligations or lessening any obligations. You understand your various
19 roles, correct?

20 THE WITNESS: Yes, Your Honor.

21 THE COURT: And I'm sure counsel all understand their
22 various roles. Never ask a witness/attorney in their office/officer of the
23 court to do anything that would be inappropriate because I perceive
24 everyone as appropriate counsel that does everything and follows the
25 rules? Right? Right.

1 MS. HANKS: Yes, we understand.

2 MR. NITZ: Right. Your Honor, we won't discuss the merits of
3 this case and his testimony in this case, but obviously he is an associate
4 in my office, so we may need to coordinate with him as far as unrelated
5 matters.

6 THE COURT: All right. I appreciate that. It's the balance of
7 this case and everyone knows the rules.

8 Okay. So, with that, then we're going to wish you a very nice
9 evening in this case for right now. See you back here at 9:30. If you are
10 here a few moments earlier, we may be able to get started earlier. Once
11 again, it's -- you're all scheduled, and the Court anticipates to be here.
12 I'm not sure how late we're going to be here.

13 MS. HANKS: Are we okay to leave our box if we put it --

14 THE COURT: You can leave your boxes in your respective
15 corners, as you normally can, just like in other cases, just because I do
16 have a number of attorneys coming in tomorrow for my motion
17 calendar, and also some attorneys possibly coming in tonight to find out
18 if the jury comes back with a verdict tonight or if they come back and
19 deliberate tomorrow.

20 I don't know exactly what time they will, so if you don't mind,
21 Defendants, counter-claimants, feel free to use the corner over by the
22 sally port, and Plaintiff, counter-defendants, feel free to use it over by the
23 jury box. Just please leave it in areas -- no, no, you can put boxes over
24 there if you want to.

25 MR. NITZ: What's a sally port, Your Honor?

1 THE COURT: Sally port, where the custodies come in.

2 MR. NITZ: Ah.

3 THE COURT: Sally port between the two courtrooms. A
4 place you never want to have to visit unless you're like being shown it
5 when you have Boy Scouts or something, and you're running a tour of
6 the court, you don't want to ever have to be in there for any other
7 reasons and come through the inmate elevator. Yeah, so we can go off
8 the record.

9 [Proceedings concluded at 4:49 p.m.]

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21 ATTEST: I do hereby certify that I have truly and correctly transcribed the
22 audio-visual recording of the proceeding in the above entitled case to the
best of my ability.

23



24

Maukele Transcribers, LLC
Jessica B. Cahill, Transcriber, CER/CET-708

25