IN THE SUPREME COURT OF THE STATE OF NEVADA

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AIRMOTIVE INVESTMENTS, LLC, A NEVADA LIMITED LIABILITY COMPANY, Appellant, vs. BANK OF AMERICA, N.A., Respondent.	Supreme Court No. 80373

APPEAL

From the Eighth Judicial District Court,
The Honorable Stefany A. Miley, District Judge
District Court Case No. A-12-654840-C

JOINT APPENDIX - VOLUME 5

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DISTRICT COURT

CLARK COUNTY, NEVADA

***

AIRMOTIVE INVESTMENTS, LLC, a Nevada limited liability company, Plaintiff, vs. BANK OF AMERICA, GENEVIEVE UNIZA-ENRIQUEZ, DOES 1 THROUGH 20, AND ROE CORPORATIONS 1 THROUGH 20, INCLUSIVE, Defendants. BANK OF AMERICA, N.A. Counterclaimant, vs. AIRMOTIVE INVESTMENTS, LLC, Counter-Defendant.	Case No. A-12-654840-C Dept. No. XXIII **Date of Hearing: July 30, 2019** **Time of Hearing: 9:30 a.m.**

OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

COMES NOW, Plaintiff, LAS VEGAS DEVELOPMENT GROUP, LLC, by and through its attorneys, ROGER P. CROTEAU & ASSOCIATES, LTD., and hereby presents its Opposition to Defendant, Bank of America, N.A.'s, Motion for Summary Judgment. This

Opposition is made and based upon the attached memorandum of points and authorities, all pleadings, papers and documents on file herein, and any oral argument that the Court may entertain at the hearing of this matter.

DATED this 16th day of July, 2019.

ROGER P. CROTEAU & ASSOCIATES, LTD.

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

For the past several years, the purchasers of real properties at homeowners association lien foreclosure sales have been embroiled in litigation with purportedly secured deed of trust holders such as the Defendant herein, BANK OF AMERICA, N.A. (*"BANA" or the "Bank"*), regarding the force and effect of NRS §116.3116, which provides an HOA with a superpriority lien on an individual homeowner's property for up to nine months of unpaid HOA dues. In a nutshell, the purchasers of these properties have always asserted that HOA lien foreclosure sales served to extinguish all junior liens, including a first position deed of trust, pursuant to black letter lien law. Deed of trust holders such as the Bank incorrectly asserted that their security interests survived the HOA lien foreclosure sales.

The conflicting positions of the purchasers and the purported secured mortgage holders were the subject of significant dispute for a lengthy period of time. However, on September 18, 2014, the Nevada Supreme Court, in the matter of *SFR Investments Pool I, LLC v. U.S. Bank, N.A.*, 130 Nev. ___, 334 P.3d 408, 2014 WL 4656471 (Adv. Op. No. 75, Sept. 18, 2014),

definitively determined that the foreclosure of a HOA's superpriority lien does indeed extinguish a first deed of trust, stating as follows:

> We must decide whether this is a true priority lien such that its foreclosure extinguishes a first deed of trust on the property and, if so, whether it can be foreclosed nonjudicially. We answer both questions in the affirmative and therefore reverse.

"The SFR decision made winners out of the investors who purchased foreclosure properties in HOA sales and losers of the lenders who gambled on the opposite result, elected not to satisfy the HOA liens to prevent foreclosure, and thus saw their interests wiped out by sales that often yielded a small fraction of the loan balance." *Freedom Mortg. Corp. v. Las Vegas Dev. Grp., LLC*, 2015 U.S. Dist. LEXIS 66249, 1-2 (D. Nev. May 19, 2015) (Dorsey, J.).

Pursuant to its decision in *SFR Investments*, the Nevada Supreme Court resolved the divergent opinions that previously existed in the state and federal courts of the State of Nevada regarding the force, effect and interpretation of NRS §116.3116 *et seq*. In doing so, the Nevada Supreme Court clarified that the statute provides a homeowners association with a true superpriority lien over real property that can and does extinguish a first deed of trust when non-judicially foreclosed. *Id.* The Nevada Supreme Court also recognized that a foreclosure deed "reciting compliance with notice provisions of NRS 116.31162 through NRS 116.31168 'is conclusive' as to the recitals 'against the unit's former owner, his or her heirs and assigns and all other persons.'" *See id.* at *3 (citing NRS 116.3116.31166(2)). Moreover, the Nevada Supreme Court specifically found that N.R.S. Chapter 116 did not violate U.S. Bank's due process rights, stating that "the Nevada Legislature has written NRS Chapter 116 to allow nonjudicial foreclosure of HOA liens, subject to the special notice requirements and protections handcrafted by the Legislature in NRS 116.31162 through NRS 116.31168." *SFR Invs. Pool 1, LLC*, 334 P.3d 408 at 417. (Emphasis added).

STATEMENT OF FACTS

At issue herein is real property commonly known as 6279 Downpour Court, Las Vegas, Nevada 89110. Third Amended Complaint (*"TAC"*), ¶6. The Property is located within a common interest community governed by the Palo Verde Homeowners' Association (*"HOA"*).

Id. The Property was the subject of a homeowners association lien foreclosure sale conducted on behalf of HOA dated April 12, 2011 (*"HOA Foreclosure Sale"*). TAC, ¶24.

Las Vegas Development Group, LLC (*"LVDG"*), purchased the Property by successfully bidding at the HOA Foreclosure Sale in accordance with N.R.S. 116.3116, *et seq*. TAC, ¶25. Thereafter, a Trustee's Deed Upon Sale (*"HOA Foreclosure Deed"*) was recorded in the Official Records of the Clark County Recorder, vesting title to the Property in the name of LVDG. TAC, ¶26. Pursuant to Nevada law as interpreted by the Nevada Supreme Court in the matter of *SFR Investments*, the HOA Foreclosure Sale served to extinguish all then-existing subordinate security interests in the Property.

On or about August 12, 2004, Defendant, GENEVIEVE UNIZA-ENRIQUEZ (*"Former Owner"*), acquired title to and ownership of the Property. TAC, ¶11. Former Owner obtained one or more mortgages and/or lines of credit secured by the Property. TAC, ¶13. In conjunction with said loan, on June 30, 2006, a deed of trust was recorded against the Property in the Office of the Recorder of Clark County, Nevada, as Instrument No. 20060630-0002110 (*"First Deed of Trust*"). A copy of the First Deed of Trust is attached hereto and incorporated herein by reference as Exhibit 1.

The First Deed of Trust – which was obviously drafted by the Bank or its predecessor – specifically required that the Former Owner pay all assessments and other charges related to the Property, stating as follows:

> **4. Charges; Liens.** Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property **which can attain priority over this Security Instrument**, leasehold payments or ground rents on the Property, if any, and **Community Association Dues**, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.
>
> **Borrower shall promptly discharge any lien which has priority over this Security Instrument** unless Borrower (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. **If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying this**

> **lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.**
> . . .
>
> **9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument.** If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceedings that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, **for enforcement of a lien which may attain priority over this Security Instrument** or to enforce laws or regulations, or (c) Borrower has abandoned the Property, then **Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument**, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. **Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument**, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.
>
> **Any amounts disbursed under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with interest, upon notice from Lender to Borrower requesting payment.**

See Exhibit 1 (Emphasis added). Moreover, the First Deed of Trust included a Planned Unit Development Rider (*"PUD Rider"*), again specifically recognizing the obligation of the Former Owner to pay assessments to the HOA and the ability and right of the lender to pay the assessments should the Former Owner default and fail to do so. See Exhibit 1. The PUD Rider provided as follows:

> **A. PUD Obligations.** Borrower shall perform all of Borrower's obligations under the PUD's Constituent Documents. The "Constituent Documents" are the (i) Declaration; (ii) articles of incorporation, trust instrument or any equivalent document which creates the Owners Association. Borrower shall promptly pay, when due, all dues and assessments imposed pursuant to the Constituent Documents.
> . . .
>
> **F. Remedies.** If Borrower does not pay PUD dues and assessments when due, then Lender may pay them. Any amounts disbursed by Lender under this Paragraph F shall become additional debt of Borrower secured by the Security Instrument. Unless Borrower and Lender agree to other terms of payment, these

> amounts shall bear interest from the date of disbursement at the Note rate and shall be payable, with interest, upon notice from Lender to Borrower requesting payment.

See Exhibit 2. The First Deed of Trust was thereafter assigned to BAC Home Loans Servicing LP, predecessor to the Bank, on or about June 28, 2010. See Exhibit 2, attached hereto and incorporated herein by reference.

It is readily apparent based upon the explicit terms of the First Deed of Trust and the PUD Rider that the Bank was fully aware (1) of the existence of HOA; (2) of the fact that assessments must be paid to HOA; and (3) that a lien such as the HOA Lien could obtain priority over the First Deed of Trust. Moreover, it is clear that (1) the Bank provided itself with various remedies in the event that such a lien came into existence, including the right to satisfy the lien; and (2) in the event that the Bank paid any amounts to satisfy a lien that possessed priority over its security interest, the Bank was entitled to add any and all amounts that it paid to the outstanding balance owed by the borrower and the repayment of such sums would have been secured by the First Deed of Trust. Thus, the Bank was fully protected had it simply satisfied the superpriority portion of the HOA Lien. It has presented no argument nor evidence that it even attempted to do so.

As recognized by both the First Deed of Trust and PUD Rider, by virtue of her ownership of the Property, Former Owner was a member of the HOA and accordingly was obligated to pay HOA assessments pursuant to the terms of the CC&Rs. TAC, ¶17. See also Exhibit 1. At some point in time during her ownership of the Property, Former Owner failed to pay these assessments. TAC, ¶18. As a result, HOA caused a Notice of Delinquent Assessment Lien Homeowners Association (*"HOA Lien"*) to be recorded on April 1, 2010. TAC, ¶19. See also Exhibit 3, attached hereto and incorporated herein by reference. Thereafter, HOA caused a notice of default and election to sell to be recorded on July 14, 2010. TAC, ¶20. See also Exhibit 4, attached hereto and incorporated herein by reference.

HOA caused a notice of homeowner's association sale to be recorded on November 18, 2010. TAC, ¶22. See also Exhibit 5, attached hereto and incorporated herein by reference. On or about April 12, 2011, HOA caused the HOA Foreclosure Sale to be conducted pursuant to the

powers conferred by the Nevada Revised Statutes 116.3116, 116.31162, 116.31163 and 116.31164; the CC&Rs; the Notice of Delinquent Assessment Lien; and the Notice of Default and Election to Sell. TAC, ¶24. LVDG appeared at the HOA Foreclosure Sale and presented the prevailing bid, thereby purchasing the Property. TAC, ¶25. On or about April 13, 2011, the HOA Foreclosure Deed was recorded in the Official Records of the Clark County Recorder, vesting title to the Property in the name of LVDG. TAC, ¶26. See also Exhibit 6, attached hereto and incorporated herein by reference. LVDG was thereafter the rightful owner of the Property, free and clear of any encumbrances. On or about December 16, 2016, LVDG conveyed the Property to Plaintiff, Airmotive Investments, LLC (*"Airmotive"*). See Exhibit 7, attached hereto and incorporated herein by reference. Airmotive was thereafter substituted as the Plaintiff in this litigation.

LEGAL ARGUMENT

1. STATEMENT OF THE LAW

Pursuant to N.R.C.P. 56, two substantive requirements must be met before a Court may grant a motion for summary judgment: (1) there must be no genuine issue as to any material fact; and, (2) the moving party must be entitled to judgment as a matter of law. *Fyssakis v. Knight Equipment Corp.*, 108 Nev. 212, 826 P.2d 570 (1992). Summary judgment is appropriate under NRCP 56 when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *Wood v. Safeway*, 121 Nev. Adv. Op. 73, 121 P.3d 1026 (October, 2005) citing *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. at 713, 57 P.3d at 87 (2003). In deciding whether these requirements have been met, the Court must first determine, in the light most favorable to the non-moving party "whether issues of material fact exist, thus precluding judgment by summary proceeding." *National Union Fire Ins. Co. of Pittsburgh v. Pratt & Whitney Canada, Inc.*, 107 Nev. 535, 815 P.2d 601, 602 (1991). The Supreme Court has indicated that Summary Judgment is a drastic remedy and that the trial judges should exercise great care in granting such motions. *Pine v. Leavitt*, 84 Nev. 507, 445

P.2d 942 (1968); *Oliver v. Barrick Goldstrike Mines*, 111 Nev. 1338, 905 P.2d 168 (1995).

2. <u>THE EVIDENCE SUPPORTING THIS MOTION WAS NOT TIMELY DISCLOSED AND MUST THEREFORE BE EXCLUDED</u>

As a preliminary matter, the evidence supporting this motion was not timely disclosed and must be excluded. As a result, the instant motion must be summarily denied because the Bank has presented no admissible evidence indicating that Fannie Mae possessed any interest in the First Deed of Trust.

The parties hereto stipulated to re-open discovery pursuant to a stipulation and order filed herein on September 24, 2018. Pursuant to said stipulation, the parties agreed that discovery would be re-opened and extended until March 6, 2019. The Bank thereafter disclosed its First Supplemental Disclosures containing the documents relied upon herein on March 6, 2019 at 4:29 p.m. See Exhibit 8, attached hereto and incorporated herein by reference. **<u>Thus, the disclosures were effectively served 31 minutes before the close of discovery.</u>** The instant Motion was filed on April 5, 2019, approximately 30 days later.

NRCP 26(e) provides in pertinent part as follows:

> **(e) Supplementing Disclosures and Responses.**
> (1) **In General.** A party who has made a disclosure under Rule 16.1, 16.2, or 16.205 — or responded to a request for discovery with a disclosure or response — is under a duty to timely supplement or correct the disclosure or response to include information thereafter acquired if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

Moreover, NRCP 36(c) provides as follows:

> (c) **Failure to Disclose, to Supplement an Earlier Response, or to Admit.**
> (1) **Failure to Disclose or Supplement. <u>If a party fails to provide information or identify a witness as required by Rule 16.1(a)(1), 16.2(d) or (e), 16.205(d) or (e), or 26(e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless</u>**. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
> (A) may order payment of the reasonable expenses, including attorney fees, caused by the failure;
> (B) may inform the jury of the party's failure; and
> (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(1).

As stated above, the Bank effectively served the documents it relies upon in conjunction with the instant motion **31 minutes** prior to the close of business on the day that discovery closed. This was the case although the parties agreed to extend discovery approximately 6 months before, on or about September 24, 2018. Moreover, it is readily apparent that the Bank possessed the evidence long before it was disclosed.

While the Bank's failure to disclose the subject information until minutes before the close of discovery might be excusable under certain circumstances, a cursory review of the documents indicates that it had possessed them for months. Indeed, the Declaration of Graham Babin is dated January 10, 2019 – approximately 2 months before the date on which discovery closed. Moreover, the screenshots attached to Mr. Babin's declaration were generated on January 7, 2019. See Motion, Exhibit B. Under such circumstances, the failure to timely disclose the documents is not excusable.

It is abundantly clear that the Bank possessed the information upon which it intended to rely for months prior to the date on which it was disclosed. While the information was undoubtedly in the possession of the Bank and its attorneys, the Bank chose to sit on the information for over two months before disclosing it at 4:29 p.m. on the close of discovery. This could hardly be anything less than a calculated effort to deny the Plaintiff any opportunity to investigate or conduct discovery of its own.

Pursuant to NRCP 26(e), the Bank was under an obligation to "**timely** supplement" its disclosures. It failed to do so although it is patently obvious that it possessed the documents relied upon in this Motion for at least approximately 2 months before they were disclosed in the last minutes of the discovery period. Pursuant to NRCP 37(c)(1), the Bank is "not allowed to use that information or witness to supply evidence on a motion, at a hearing." The Declaration of Graham Babin and the documents attached thereto must be disallowed and stricken because they were not timely disclosed in compliance with the rules of civil procedure. Because the Bank has submitted no admissible evidence in association with its Motion, the instant Motion must be denied.

3. THE HOA FORECLOSURE SALE PRESUMPTIVELY EXTINGUISHED THE FIRST DEED OF TRUST AS A MATTER OF LAW

For the Bank to succeed in this action, it must prove that its claim to the property is superior to all others. *Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 669 (1996). ("In a quiet title action, the burden of proof rests with the plaintiff to prove good title in himself."). However, in a quiet title case, a presumption exists in favor of the record title holder. *Id.* Thus, a presumption exists herein in favor of Airmotive. In addition to the presumption that exists in favor of the record title holder, various other statutory presumptions also exist in favor of the Airmotive.

Pursuant to *SFR Investments*, the Nevada Supreme Court has determined that the non-judicial foreclosure of an HOA lien extinguishes a first deed of trust. Pursuant to N.R.S. 116.31166(1), the recitals made in the HOA Foreclosure Deed are conclusive proof of the matters recited, e.g., that the process complied with the applicable law for foreclosure of HOA liens. Specifically, N.R.S. §116.31166(1) states as follows:

> 1. The recitals in a deed made pursuant to NRS 116.31164 of:
> (a) Default, the mailing of the notice of delinquent assessment, and the recording of the notice of default and election to sell;
> (b) The elapsing of the 90 days; and
> (c) The giving of notice of sale,
> are conclusive proof of the matters recited.

The conclusive recitals concern default, notice, and publication of the [notice of sale], all statutory prerequisites to a valid HOA lien foreclosure sale as stated in NRS 116.31162 through NRS 116.31164, the sections that immediately precede and give context to NRS 116.31166." *Shadow Wood Homeowners Assoc., Inc. v. N.Y. Cmty. Bancorp, Inc.*, 366 P.3d 1105, 1110 (Nev. 2016).

Aside from the conclusive recitals of the HOA Foreclosure Deed, Nevada law provides that the HOA Foreclosure Sale and the resulting HOA Foreclosure Deed are both presumed valid. N.R.S. 47.250(16)-(18) (stating that there are disputable presumptions "that the law has been obeyed"; "that a trustee or other person, whose duty it was to convey real property to a particular person, has actually conveyed to that person, when such presumption is necessary to

perfect the title of such person or a successor in interest"; "that private transactions have been fair and regular"; and "that the ordinary course of business has been followed."). A presumption not only fixes the burden of going forward with evidence, but it also shifts the burden of proof. *Yeager v. Harrah's Club, Inc.*, 111 Nev. 830, 834, 897 P.2d 1093, 1095 (1995) (citing *Vancheri v. GNLV Corp.*, 105 Nev. 417, 421, 777 P.2d 366, 368 (1989).) In order to overcome these presumptions, the party against whom they are directed bears the burden of proving that the nonexistence of the presumed fact is more probable than its existence. *Id*. (citing N.R.S. 47.180.).

In this case, the HOA Foreclosure Deed recites the fact that the HOA Foreclosure Sale complied with all requirements of law. See Exhibit 6. NRS 47.240(6) provides that conclusive presumptions include "[a]ny other presumption which, by statute, is expressly made conclusive." Because NRS 116.31166 contains exactly such an expressly conclusive presumption, the recitals in the HOA Foreclosure Deed are "conclusive proof" of the default of the Former Owner and that the HOA complied with all notice and mailing requirements related to the HOA Foreclosure Sale set forth in NRS 116.31162 through 116.31168. It naturally follows that the First Deed of Trust was extinguished at the time of the HOA Foreclosure Sale and the Bank thereafter possessed no security interest in the Property. As discussed further below, if the Bank disputed this fact, it was required to timely an action to contest the HOA Foreclosure Sale.

The conclusive presumptions contained in NRS 116.31166 are consistent with the common law presumption that "[a] nonjudicial foreclosure sale is presumed to have been conducted regularly and fairly; one attacking the sale must overcome this common law presumption 'by pleading and proving an improper procedure and the resulting prejudice.'" *Fontenot v. Wells Fargo Bank*, 198 Cal. App. 4th 256, 272, 129 Cal. Rptr. 3d 467 (2011). Furthermore, "[t]he conclusive presumption precludes an attack by the trustor on a trustee's sale to a bona fide purchaser even though there may have been a failure to comply with some required procedure which deprived the trustor of his right of reinstatement or redemption." *Moeller v. Lien*, 25 Cal. App. 4th 822, 831, 30 Cal. Rptr. 777 (1994). The detailed and comprehensive

statutory requirements for a foreclosure sale are indicative of a public policy which favors a final and conclusive foreclosure sale as to the purchaser. See Miller & Starr, California Real Property 3d §10:210.

Notwithstanding the foregoing, courts retain the equitable authority to consider quiet title actions when a HOA's foreclosure deed contains statutorily conclusive recitals. *Shadow Wood,* 366 P.3d 1105, 1112. While NRS 116.3116 accords certain deed recitals conclusive effect—*e.g.*, default, notice, and publication of the notice of sale—it does not conclusively, as a matter of law, preclude a bank from success on its quiet title claim. *See Shadow Wood*, 366 P.3d at 1112 (rejecting contention that NRS 116.31166 defeats, as a matter of law, action to quiet title). Thus, the question is whether the Bank can demonstrate sufficient grounds to justify setting aside the foreclosure sale. *See id.* "When sitting in equity . . . courts must consider the entirety of the circumstances that bear upon the equities. This includes considering the status and actions of all parties involved, including whether an innocent party may be harmed by granting the desired relief." *Id*. Here, the Bank has presented no such grounds.

While the Nevada Supreme Court has repeatedly held that the proper foreclosure of a homeowners association's superpriority lien serves to extinguish a first deed of trust, both the Ninth Circuit Court of Appeals and Nevada Supreme Court have held that NRS §116.3116 *et seq.* is ineffective to extinguish a deed of trust where the deed of trust and corresponding loan were owned by Fannie Mae or Freddie Mac while they were under conservatorship of the FHFA. See *Berezovsky v. Moniz*, 2017 U.S. App. LEXIS 16272 (9th Cir. Nev. Aug. 25, 2017); See also *Saticoy Bay LLC Series 9641Christine View v. Fannie Mae*, 417 P.3d 363, 2018 Nev. LEXIS 37, 134 Nev. Adv. Rep. 36, 2018 WL 2293648. These decision are based upon §4617(j)(3) of the Housing and Economic Recovery Act of 2008 (*"HERA"*), which has commonly been referred to as the "Federal Foreclosure Bar." Notably, however, in *Christine View*, the subject deed of trust had been assigned to Fannie Mae via a recorded assignment. Such is rarely the case and most certainly is not the case herein. Indeed, the First Deed of Trust was assigned to BANA. See Exhibit 2. No indication exists in the chain of title that the First Deed of Trust was ever

assigned to Fannie Mae or Freddie Mac.

While HERA may protect a deed of trust from extinguishment as a matter of law under certain circumstances, the First Deed of Trust herein was not protected for a variety of reasons. Specifically, the Federal Foreclosure Bar should not be applied in this case because the Bank has failed to sufficiently prove that Fannie Mae owned the First Deed of Trust at the time of the HOA Foreclosure Sale. The self-serving evidence presented quite simply fails to establish that Fannie Mae in fact owned the First Deed of Trust at the applicable time. Moreover, as discussed herein, an abundance of conflicting information exists in the chain of title, including the assignment related to the First Deed of Trust.

In this case, unlike *Christine View*, at the time of the HOA Foreclosure Sale, the recorded chain of title was devoid of any evidence of Fannie Mae's claimed ownership of the loan and First Deed of Trust and its claim was therefore unenforceable against a subsequent purchaser as a matter of Nevada law. This is the case because Fannie Mae ignored Nevada's recording statutes, which required that its interest be recorded. Because Fannie Mae ignored these requirements of law, its interest – even if it existed – was and is invalid as against Airmotive and its predecessors.

Based upon the foregoing, it is readily apparent that the First Deed of Trust was extinguished as a matter of law at the time of the HOA Foreclosure Sale. Having negligently allowed its security interest to be extinguished, the Bank now desperately asserts that the HOA Foreclosure Sale was invalid or that it otherwise did not extinguish the subordinate lien. As demonstrated below, the Bank is not entitled to Summary Judgment in its favor. Instead, based upon the undisputed facts, Summary Judgment must be entered which confirms that the First Deed of Trust was extinguished as matter of law.

4. <u>OWNERSHIP OF THE FIRST DEED OF TRUST</u>

Pursuant to the instant action, the Bank alleges that Fannie Mae acquired ownership of the Loan associated with the First Deed of Trust in August, 2006. Motion, p. 3, ll. 4-5. This allegation is critical to the Bank's claim that the First Deed of Trust was not extinguished pursuant to the Federal Foreclosure Bar that precludes a homeowners association lien foreclosure

sale from extinguishing property interests that they claim to be owned by Fannie Mae or Freddie Mac. However, absolutely nothing in the chain of title related to the Property indicates that the Federal Foreclosure Bar is applicable in this case.

The First Deed of Trust was recorded on June 30, 2006. See Exhibit 1. The First Deed of Trust provided on its face that the "Lender" was Utah Financial, Inc. (*"Utah Financial"*) and that Mortgage Electronic Registration Systems (*"MERS"*) was the beneficiary. *Id*. This remained the case for approximately 4 years until June 28, 2010, when the First Deed of Trust was assigned by MERS to the Bank's predecessor my merger, BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing, LP, pursuant to an Assignment of Deed of Trust recorded on June 30, 2010. See Exhibit 2. Pursuant to the Assignment of Deed of Trust, MERS assigned "all beneficial interest under [the First Deed of Trust] . . together with the note or notes therein described or referred to, the money due and to become due thereon with interest, and all rights accrued or to accrue under said deed of trust/mortgage." *Id*. Upon information and belief, no further assignment of the First Deed of Trust has occurred to this date.

The documents in the recorded chain of title indicate that BANA – and not Fannie Mae – is the owner of the First Deed of Trust. At the very least, questions of material fact exist which preclude summary judgment.

5. THE BANK IS PRECLUDED FROM ASSERTING THE FEDERAL FORECLOSURE BAR BASED UPON THE STATUTE OF LIMITATIONS

It is well settled in Nevada that a cause of action accrues when "the aggrieved party knew, or reasonably should have known, of the facts giving rise to the damage or injury." *Nevada State Bank v. Jamison Partnership*, 106 Nev. 792, 800, 801 P.2d 1377, 1382 (1990). In this case, the Bank's alleged interest in the Property was called into question at the time of the HOA Foreclosure Sale due to NRS 116.3116(2), which gives priority to that portion of an HOA lien consisting solely of unpaid HOA assessments accrued during the nine months immediately preceding institution of an action to enforce the lien." The HOA Foreclosure Sale took place on April 12, 2011.

In this case, the Bank did not raise the Federal Foreclosure Bar as a defense herein until at the earliest March 26, 2015, when it filed its Answer to Second Amended Complaint. 12 U.S.C. §4617(b)(12) sets forth the statute of limitations for actions brought by FHFA, stating as follows:

> **(12) Statute of limitations for actions brought by conservator or receiver**
> (A) **In general**
> Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Agency as conservator or receiver shall be—
> (i) in the case of any contract claim, the longer of—
> (I) the 6-year period beginning on the date on which the claim accrues; or
> (II) the period applicable under State law; and
> (ii) in the case of any tort claim, the longer of—
> (I) the 3-year period beginning on the date on which the claim accrues; or
> (II) the period applicable under State law.

In this case, the Bank failed to take any action to contest the HOA Foreclosure Sale until at least March 26, 2015. Thus, the Bank's claims were filed more than 3 years after the HOA Foreclosure Sale took place on April 12, 2011.

Pursuant to 12 U.S.C. §4617(b)(12), in the case of contract claims, FHFA is entitled to bring suit within 6 years from the time the claim accrued. In the case of tort claims, FHFA is entitled to bring claims within 3 years from the time the claim accrued. In this case, the claims and defenses brought by the Bank – which are purportedly based upon the authority of FHFA – are based upon neither contract nor tort. To the contrary, the claims are for declaratory relief. These claims are premised upon HERA and therefore premised upon statute. As a result, they were subject to a 3 year statute of limitations pursuant to NRS 11.190.

It is undisputed that neither the Bank nor Fannie Mae took any action to contest the HOA Foreclosure Sale until prompted by the filing of this action. Even then, they failed to raise the defense of the Federal Foreclosure Bar until March 26, 2015. This was beyond the 3-year statute of 12 U.S.C. §4617(b)(12). Because the Bank delayed taking action for over 3 years after the HOA Foreclosure Sale, it is barred from raising the Federal Foreclosure Bar as a defense herein. Summary Judgment must be denied.

6. THE BANK HAS FAILED TO PRESENT SUFFICIENT EVIDENCE PROVING THAT FANNIE MAE OWNED THE FIRST DEED OF TRUST AT THE TIME OF THE HOA FORECLOSURE SALE

As discussed above, the documents that exist in the recorded chain of title related to the Property, including the First Deed of Trust and the assignment of the First Deed of Trust are devoid of any indication that Fannie Mae ever owned any interest in the First Deed of Trust or loan. Nonetheless, the Bank argues that Fannie Mae owned the First Deed of Trust at the time of the HOA Foreclosure Sale.

The instant Motion relies in large part upon the Declaration of Graham Babin, Assistant Vice President of Fannie Mae. See Motion, Exhibit B. Attached to the self-serving Declaration of Mr. Babin are purported screen shots from the computer systems of Fannie Mae. However, all of the screen shots are dated January 7, 2019 – **nearly 8 years** AFTER the HOA Foreclosure Sale took place on April 12, 2011. *Id.*

Given the nature of the evidence presented, which was created nearly 8 years after the HOA Foreclosure Sale had been completed, it has no probative value to show what the ownership of the loan and First Deed of Trust was at the time that the HOA Foreclosure Sale took place. This is particularly true given the fact that all of the documents that exist in the recorded chain of title related to the Property directly contradict this information. Specifically, all documents that exist in the chain of title indicate that the Bank and not Fannie Mae was the holder of the First Deed of Trust and associated loan. At the very least, very significant questions of material fact exist which preclude summary judgment.

7. FANNIE MAE HELD NO ENFORCEABLE PROPERTY INTEREST AT THE TIME OF THE HOA FORECLOSURE SALE

12 U.S.C. 4617(j)(3) applies only to proven property of FHFA, stating as follows:

> No **property of the Agency** shall be subject to levy, attachment, garnishment, foreclosure, garnishment, foreclosure, or sale without consent of the Agency, nor shall an involuntary lien attach to the **property of the Agency.**

12 U.S.C. 4617(j)(3) (emphasis added). In this case, it is clear that neither FHFA nor Fannie

Mae possessed any property interest related to the Property at the time of the HOA Foreclosure Sale. As such, the Federal Foreclosure Bar is inapplicable to this matter. On the contrary, BANA was the holder of the First Deed of Trust. See Exhibit 2.

a. Nevada State Law Defines "property of the Agency."

Nowhere in HERA does Congress define the term "property." *See* 12 U.S.C. 4517. Matters left open in a federal statute are governed by state law. *See Shady Grove Orthopedic Assocs v. Allstate Ins. Co.*, 559 U.S. 393, 415-416 (2010) ("That is unacceptable when it comes as the consequence of judge-made rules to fill supposed 'gaps' in positive federal law…For where neither the Constitution nor a statute provides the rule of decision or authorizes a federal court to supply one,'state law must govern because there can be no other law.'" (citations omitted)(internal citation omitted); *O'Melveny & Myers v. F.D.I.C.,*512 U.S. 79, 85 (1994) ("Nor would we adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law.") (emphasis added). Even the *Berezovsky* court recognized that any analysis using 4617(j)(3) begins with state law. *Berezovsky*, 869 F.3d at 932 ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state."), citing *Erie*) 304 U.S. at 78.

This necessarily means that Nevada law defines the rights (i.e. property), which must first be established before the remedy (i.e. preventing foreclosure extinguishment of Agency property) can be triggered. Because only the remedial aspects of §4617(j)(3) have preemptive effect under the Supremacy Clause of the Federal Constitution, failure to establish the right makes the remedy unavailable.

b. The Deed of Trust Defines the Property Interest.

In *Leyva*, the Nevada Supreme Court described a deed of trust as the instrument that discloses the identity of the person who is foreclosing. *Leyva v. National Default Servicing Corp.*, 127 Nev. 470, ___, 255 P.3d 1275, 1279 (2011). "A deed of trust is an instrument that 'secure[s] the performance of an obligation or the payment of any debt."… The Nevada

Supreme Court has previously held that a deed of trust 'constitutes a conveyance of land as defined by N.R.S. 111.010." *Id.* Absent a proper assignment of a deed of trust, a mortgagee lacks standing to pursue foreclosure proceedings against a mortgagor. *Id.*

In *Edelstein*, the Nevada Supreme Court drew the following distinctions between the rights associated with holding a deed of trust versus the rights that inure to a noteholder when the note and deed of trust are split:

> To enforce the obligation by nonjudicial foreclosure and sale, "[t]he deed and note must be held together *because the holder of the note is only entitled to repayment, and does not have the right under the deed to use the property as a means of satisfying repayment*."… "Conversely, the holder of the deed alone does not have a right to repayment and, thus, does not have an interest in foreclosing on the property to satisfy repayment."

Edelstein v. Bank of New York Mellon, 128 Nev. 505, 512, 286 P.3d 249, 254 (2012) (emphasis added) (citation omitted).

Citing *Leyva*, the *Edelstein* court went on to note that "transfers of deeds of trust and mortgage notes are distinctly separate." *Id.* at 517, 286 P.3d at 257. Importantly, the *Edelstein* Court held that, "And a beneficiary [of a deed of trust] is entitled to a ***distinctly different set of rights from a noteholder***." *Id.* at 520, 286 P.3d at 259. It is this distinction that dooms the Bank and Fannie Mae here. In the present case, when the gavel fell at the HOA Foreclosure Sale, BANA was the recorded beneficiary of the First Deed of Trust. Therefore, BANA, and only BANA, had a property interest – Fannie Mae did not. Thus, Fannie Mae has not and cannot prove the right i.e. "property" to trigger the remedy of the Federal Foreclosure Bar. While Fannie Mae may very well have still retained the *in personam* claims against the borrower/mortgagor if, for the sake of argument, it actually possessed an interest in the First Deed of Trust, this does not change the fact that Fannie Mae did not have a property interest at the time of the HOA Foreclosure Sale under existing Nevada law.

8. <u>IN ORDER FOR ITS CLAIMED SECURITY INTEREST TO BE ENFORCEABLE, FANNIE MAE WAS REQUIRED TO RECORD ITS INTEREST</u>

The Bank has alleged Fannie Mae acquired the loan associated with the First Deed of

Trust in August 2006, and that Fannie Mae has owned the loan ever since. Although the loan was purportedly sold to Fannie Mae, it is apparent that the First Deed of Trust remained with MERS until it was later assigned to BANA, together with the Note, by way of the Assignment recorded on June 30, 2010. See Exhibits 2. BANA remains the party with a recorded interest in the First Deed of Trust to this very day.

Property interests are created and defined by state law. *Butner v. United States*, 440 U.S. 48, 55 (1979). In *Butner*, the United States Supreme Court further stated that the "justifications for application of state law are not limited to ownership interests; they apply with equal force to security interests." *Id*. State recording acts do not interfere with any federal policy as there is no federal recording system for the type of mortgages here involved. *United States v. View Crest Garden Apts., Inc.,* 268 F.2d 380, 383 (9th Cir. 1959).

As proven by the First Deed of Trust and the related assignment, no recorded interest in the Property was conveyed to Fannie Mae at any time before the First Deed of Trust was extinguished at the time of the HOA Foreclosure Sale. Because Fannie Mae possessed no recorded interest in the Property at the time of the Foreclosure Sale, the Bank's reliance on the protections of §4617(j)(3) are entirely inapplicable to this matter and summary judgment is inappropriate.

a. Nevada Law Requires that Property Interests be Recorded

Assuming for the sake of argument that the Federal Foreclosure Bar serves to preempt NRS Chapter 116, Fannie Mae or Freddie Mac must still hold a valid property interest in order for the Federal Foreclosure Bar to be applicable. Notwithstanding the provisions of Section 4617(j)(3), Fannie Mae is not relieved of its obligations to comply with Nevada's recording laws.

Fannie Mae is obligated to comply with NRS Chapter 111's conveyance statutes and the Statute of Frauds, respecting the memorializing and recording of an interest in real property. Due to Fannie Mae's failure to record any interest in the First Deed of Trust prior to the HOA Foreclosure Sale, Fannie Mae never acquired an enforceable property interest in the Property, which is either recognizable under Nevada law or circumscribed under federal law and that was

superior to LVDG's recorded interest. In the instant case, no property of Fannie Mae or of FHFA was the subject of levy, attachment, garnishment, foreclosure or sale. This is so because, at the time of the HOA Foreclosure Sale and the subsequent conveyance to Airmotive as a bona fide purchaser, Fannie Mae had never recorded any interest in the Property as required by Nevada law.

Under Nevada law, a deed of trust is a conveyance of land that must comply with the statute of frauds. *Leyva v. National Default Servicing Corp.*, 127 Nev. Adv. Op. 40, 255 P.3d 1275, 1279 (2011). In *Leyva*, the Nevada Supreme Court stated:

> A deed of trust is an instrument that "secure[s] the performance of an obligation or the payment of any debt." NRS 107.020. This court has previously held that a deed of trust **"constitutes a conveyance of land as defined by NRS 111.010."** *Ray v. Hawkins*, 76 Nev. 164, 166, 350 P.2d 998, 999 (1960). (Emphasis added).

Moreover, NRS 111.010(1) states that a 'Conveyance' shall be construed to embrace every instrument in writing, except a last will and testament, whatever may be its form, and by whatever name it may be known in law, by which any estate or interest in lands is **created, alienated, assigned or surrendered**. *Id.* (emphasis added). Thus, it is clear that a deed of trust is a "conveyance" pursuant to Nevada law.

Nevada is a race notice state. *See Buhecker v. R.B. Petersen & Sons Const. Co., Inc.*, 112 Nev. 1498, 929 P.2d 937 (1996). The purpose of recording an interest in real property is to give the public notice of the interest and to inform subsequent purchasers of any potential adverse claims against the property. To that end, NRS 111.315 provides as follows:

> **NRS 111.315 Recording of conveyances and instruments: Notice to third persons.** Every conveyance of real property, and every instrument of writing setting forth an agreement to convey any real property, or whereby any real property may be affected, proved, acknowledged and certified in the manner prescribed in this chapter, to operate as notice to third persons, shall be recorded in the office of the recorder of the county in which the real property is situated or to the extent permitted by NR 105.010 to 105.080, inclusive, in the Office of the Secretary of State, but shall be valid and binding between the parties thereto without such record.

Because the First Deed of Trust constitutes a "conveyance" under Nevada law, the failure to record is fatal to Fannie Mae's claimed interest as against subsequent purchasers like Airmotive,

because the unrecorded interest is expressly void pursuant to Nevada law:

> **NRS 111.325 Unrecorded conveyances void as against subsequent bona fide purchaser for value when conveyance recorded.**
> Every conveyance of real property within this State hereafter made, which shall not be recorded as provided in this chapter, shall be **void** as against any subsequent purchaser, in good faith and for valuable consideration, of the same real property, or any portion thereof, where his or her own conveyance shall be first duly recorded. (Emphasis added)

Similarly, NRS 106.220(1) requires any change in priority of a deed of trust to be recorded:

> Any instrument by which any mortgage or deed of trust of, lien upon or interest in real property is subordinated or waived **as to priority**, must, ..,, be recorded in the office of the recorder of the county in which the property is located, and from the time any of the same are so filed for record operates as constructive notice of the contents there of to all persons. The instrument is not enforceable under this chapter or chapter 107 of NRS unless and until it is recorded.

(Emphasis added). Here, it is undisputed that no notice of any change of priority related to the First Deed of Trust was ever recorded vis a vis the HOA Lien. Under such circumstances, the First Deed of Trust is unenforceable as against Airmotive pursuant to the provisions of NRS 106.220.

The Ninth Circuit Court of Appeals noted NRS §106.210 in the matter of *Berezovsky*. *Berezovsky*, 2017 U.S. App. LEXIS 16272 at n. 7. However, it did not consider those Nevada recording statutes that expressly provide that unrecorded interests are **void** as against a subsequent purchaser for value. As a result, *Berezovsky* is not dispositive of this action even if this Court chooses to rely upon it. Because Fannie Mae failed to timely record its interest as required by law, said interest was rendered void by virtue of NRS §111.315 and 111.325 at least insofar as LVDG and Airmotive are concerned. Under such circumstances, summary judgment cannot be appropriate.

b. Because Fannie Mae's Claimed Interest Has Never Been Recorded, There is No Notice of It and No One Could Ever Obtain Consent from FHFA

It is disingenuous for the Bank, FHFA, Fannie Mae, or anybody else, to argue that a homeowners association lien foreclosure sale is invalid because someone failed to obtain

FHFA's consent to the foreclosure. Prior to FHFA's announcement that it "will not consent" to any Association's foreclosure, there has never been any reason for any homeowners association to believe that it was required to obtain FHFA's consent. To the contrary, the documents governing the contractual relationship between Fannie Mae, Freddie Mac and their servicers make very clear the fact that a servicer is required to protect the priority of the associated deeds of trust. Specifically, pursuant to a bulletin dated February 14, 2014, Freddie Mac specifically warned its servicers, including Wells Fargo, as follows:

> To maintain the priority of a Freddie Mac Mortgage, we require Servicers to pay any condominium, HOA and PUD regular assessments that are assessed prior to the foreclosure sale date that are, or may become, a lien prior to a Freddie Mac Mortgage or that, if not paid, would result in the subordination of Freddie Mac's interest in the Mortgaged Premises.

See http://www.freddiemac.com/singlefamily/guide/bulletins/pdf/bll1402.pdf (last visited January 25, 2019). Notably, this bulletin was published long after HERA was enacted and well before the Nevada Supreme Court issued its decision in *SFR Investments*.

Similarly, as early as April 11, 2012, a Fannie Mae servicer was required to "protect the priority of the mortgage lien and [] clear all liens for delinquent [HOA dues and condo assessments. . .]" See https://www.fanniemae.com/content/announcement/svc1205.pdf (last visited January 25, 2019). Fannie Mae and Freddie Mac knew that such protection was necessary because an HOA's lien possessed priority over their security interests in jurisdictions which adopted the UCIOA. Indeed, the Fannie Mae Single-Family Servicing Guide dated March 14, 2012, very specifically provided as follows:

> When the HOA of a PUD or condo project notifies the servicer that a borrower is 60 days delinquent in the payment of assessments or charges levied by the association, the servicer should advance the funds to pay the charges if necessary to protect the priority of Fannie Mae's mortgage lien. If the project is located in a state that has adopted the Uniform Condominium Act (UCA), the Uniform Common Interest Ownership Act (UCIOA), or a similar statute that provides for up to six months of delinquent regular condo assessments to have lien priority over the mortgage lien, Fannie Mae will reimburse the servicer for up to six months of such advances.

See https://www.fanniemae.com/content/guide/svc031412.pdf (last visited January 25, 2019). It is clear that the Bank, Fannie Mae and Freddie Mac knew that Nevada Revised Statute 116.3116

et seq. allowed homeowners association liens to extinguish first deeds of trust for many years.

It is readily apparent that neither homeowners associations nor any other parties had any reason to know that consent was demanded by FHFA. On the contrary, consent was given pursuant to Fannie Mae and Freddie Mac's own governing documents. At the very least, Fannie Mae acknowledged in its own governing documents that a homeowners association lien would "have lien priority over the mortgage lien." The Bank seems to allege that the HOA should have known of Fannie Mae's alleged interest in the First Deed of Trust without even constructive notice thereof. Meanwhile, the Bank ignores the fact that the contract between Fannie Mae and its servicers very specifically required that the servicers "advance the funds to pay the charges if necessary to protect the priority of Fannie Mae's mortgage lien." Moreover, Fannie Mae agreed to "reimburse the servicer for up to six months of such advances." It is abundantly clear that Fannie Mae's servicers breached their agreement with Fannie Mae by allowing the First Deed of Trust to be extinguished.

The United States Supreme Court has held that in conducting a foreclosure sale, one is not required to engage in impracticable and extended searches or to make extraordinary efforts to discover the identity and whereabouts of a mortgagee whose identity is not in the public record." *Mennonite Bd. Of Missions v. Adams*, 462 U.S. 791, 798 fn 4 (1983). This is exactly the situation herein where Fannie Mae, contrary to Nevada law, failed and refused to record a single document indicating that it possessed any interest in the Property at any time prior to the HOA Foreclosure Sale. As a result, it was impossible for the homeowners association to seek or obtain consent from FHFA. Likewise, it was impossible for an innocent purchaser such as LVDG or Airmotive to know that it would purchase real property subject to an existing lien that was unextinguishable.

Although Fannie Mae failed and refused to abide by Nevada's recording laws, and although its servicer clearly breached its contract with Fannie Mae, the Bank asserts that the First Deed of Trust was unaffected by the HOA Foreclosure Sale because Fannie Mae was the owner of the First Deed of Trust. This result is fundamentally unfair to LVDG and Airmotive, as bona

fide purchasers who were never notified of any alleged claim by Fannie Mae due to Fannie Mae's failure and refusal to comply with Nevada law. Because Fannie Mae failed to comply with NRS 111.315 and NRS 111.325, Fannie Mae's unrecorded interest is unenforceable as to Airmotive and summary judgment in favor of the Bank is inappropriate.

9. EVEN IF FANNIE MAE HAD AN INTEREST IN THE PROPERTY AT THE TIME OF THE HOA FORECLOSURE SALE, IT CANNOT BE ASSERTED AGAINST AIRMOTIVE BECAUSE IT WAS UNRECORDED

As discussed above, it is wholly without dispute that no interest of Fannie Mae was ever recorded in relation to the First Deed of Trust prior to the HOA Foreclosure Sale. As a result, IF Fannie Mae possessed any interest, it is undisputed that Fannie Mae and its purported servicers violated NRS 111.315 and NRS 111.325. It is further undisputed that Fannie Mae's purported interest was thus ineffective and void as against LVDG and Airmotive, subsequent purchasers for value.

The Bank asserts that *In re Montierth*, 354 P.3d 648 (Nev. 2015) constitutes its saving grace. However, the Bank's expansive reading of *Montierth* goes directly against both its holding and Nevada's recording laws. The Bank claims that in *Montierth* the Nevada Supreme Court "adopts this Restatement approach" to a situation where MERS was the beneficiary of record and Deutsche Bank had acquired the related promissory note. Based on this faulty reading, the Bank goes on to argue that a purported owner's unrecorded property interest is preserved against all parties in all cases where its servicer appears as record beneficiary. Because the fact pattern in this case is not the same as that in *Montierth*, this Court should hold that Fannie Mae cannot assert an unrecorded property interest against Airmotive, a third party bona fide purchaser.

a. *Montierth* did not adopt the Restatement in its entirety

In *Montierth*, a deed of trust was executed by Bryce and Maile Montierth (*the "Montierths"*) in favor of 1st National Lending Services, with MERS listed as the beneficiary. *Montierth*, 131 Nev. at ___, 354 P.3d at 649. The deed of trust specifically stated that MERS was

the beneficiary "solely as nominee for Lender and Lender's successor and assigns[]" and that "MERS h[eld] only legal title to the interests granted by Borrower in this Security Instrument[.]" *Id*. In addition to the deed of trust, the Montierths executed a promissory note and, in that note, specifically acknowledged that it could be transferred to another party. *Id*. The promissory note was subsequently transferred to Deutsche Bank. *Id*. While Deutsche Bank did not record its interest in the property by way of an assignment, it did record a NOD against the property to initiate foreclosure proceedings against the Montierths. *Id*. Deutsche Bank also participated in foreclosure mediation with the Montierths, albeit unsuccessfully. *Id*. After Deutsche Bank recorded another NOD against the property, the Montierths filed for bankruptcy protection. *Id*. When Deutsche Bank moved to lift the automatic stay to proceed with its foreclosure proceedings, the Montierths argued that Deutsche Bank lacked standing because the note and deed of trust were not unified—Deutsche Bank held the note and MERS was the beneficiary of the deed of trust. *Id*. at 650.

Based on the foregoing facts, the Nevada Supreme Court ruled that a loan owner can maintain a secured property interest **against a mortgagor** by possession of the note and if it is clear that the beneficiary of record on the deed of trust was merely acting as an agent for another party (i.e. the one holding the note), then the deed of trust and note can be considered unified to initiate a foreclosure action against a mortgagor. *Id*. at 649-51. Contrary to the Bank's assertions, the Nevada Supreme Court did not adopt the entire Restatement in *Montierth*. On the contrary, it agreed with the Restatement approach in one limited situation. The Nevada Supreme Court held that "foreclosure is not impossible if there is either a principal agent relationship between the note holder and the mortgage holder, or the mortgage holder 'otherwise has authority to foreclose in the [note holder]'s behalf.'" *Id*. at 651.

What the Bank ignores and fails to understand is the Nevada Supreme Court's express statement that "a security interest attaches to the property as between the mortgagor and mortgagee upon execution and as **against third parties upon recordation**." *Monteirth*, 354 P.3d at 650 (emphasis added). Thus, the Nevada Supreme Court specifically recognized that a security

interest attaches at different times depending on the parties involved. For actions between the mortgagor and mortgagee, the property interest is effective upon execution. For actions against third parties, the property interest is effective only upon recordation. The instant case obviously involves the latter of the two circumstances.

As Deutsche Bank's unrecorded interest in the property was being asserted against the borrowers, not a third party where recordation would be necessary, the Nevada Supreme Court ruled that Deutsche Bank had a valid property interest that could be asserted against the Montierths. *Id*. at 650-51. The Bank seeks to extend *Montierth* to say that an owner's unrecorded property interest (i.e. Fannie Mae and its attendant defenses) can be asserted against a third party (i.e. Airmotive) without recordation. Expansion of *Montierth* in this manner directly contravenes its holding that a security interest attaches against third parties only upon recordation.

b. *Montierth* is consistent with Nevada's recording statutes

NRS 106.210 provides that "[a]ny assignment of a mortgage of real property…and any assignment of the beneficial interest under a deed of trust must be recorded…[and] shall operate as constructive notice of the contents thereof to all persons." NRS 106.210 goes on to state, "A mortgage of real property…which has been assigned may not be enforced unless and until the assignment is recorded[]." Put simply, NRS 106.210 mandates the recordation of a property interest before it can be asserted against a third party. While NRS 106.210 has been amended since Fannie Mae purportedly acquired the First Deed of Trust at issue herein, this statute is in keeping with the Nevada Supreme Court's holding in *Montierth*: that a security interest attaches with respect to third parties only upon recordation. The *Montierth* holding is also in keeping with NRS 111.325, which discusses unrecorded conveyances with respect to bona fide purchasers, stating:

> Every conveyance of real property within this State hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real property, or any portion thereof, where his or her own conveyance shall be first duly recorded.

Nevada law requires the recordation of property interests before those interests can be

asserted against third parties. Here, Nationstar and Fannie Mae are attempting to assert an unrecorded property interest—and any attendant defense—against Airmotive, a third party bona fide purchaser, in direct violation of Nevada's recording statutes and the Nevada Supreme Court's holding in *Montierth*. To have a valid claim or defense against Airmotive, Fannie Mae was required to record its alleged interest in the Property prior to the HOA Foreclosure Deed. It did not and its claimed interest (and its associated defenses) are thus unenforceable as against Airmotive.

c. A loan owner's property interest is not maintained by having a servicer appear as the beneficiary of record

Again, it is undisputed in this case that no purported interest of Fannie Mae was ever documented in the chain of title related to the Property prior to the HOA Foreclosure Sale. *Montierth* involved a limited situation in which a loan owner was seeking standing to initiate foreclosure proceedings against a mortgagor. A loan owner's standing to assert an unrecorded property interest against a third party bona fide purchaser, like in this case, is a very different situation.

Additionally, in *Montierth*, it was clear that MERS was acting only as an agent for another party. The deed of trust specifically stated that MERS was the beneficiary "solely as nominee for Lender and Lender's successor and assigns[]" and that "MERS h[eld] only legal title to the interests granted by Borrower in this Security Instrument[.]" *Montierth*, 354 P.3d at 649. In *Edelstein*, the Nevada Supreme Court found that the use of the word "nominee" was enough to create an agency relationship. *Edelstein v. Bank of New York Mellon*, 128 Nev. Adv. Op. 48, 286 P.3d 249, 258 (2012). Where it was clear that MERS was only acting as an agent for another party, the Nevada Supreme Court held that it would be fair to treat Deutsche Bank and MERS as the same entity under the principal agent relationship for the purpose of reunification and foreclosure against the Montierths. *Montierth* 354 P.3d at 649-51. Such clarity does not exist in this case.

In this case, no document in the recorded chain of title gave any inkling that Fannie Mae

or any party other then BANA owned the First Deed of Trust at the time of the HOA Foreclosure Sale. Indeed, while the First Deed of Trust was assigned to BANA, no assignment of the First Deed of Trust to Fannie Mae was ever recorded. Because it was not clear to say the least, from the recorded documents that Fannie Mae possessed any interest whatsoever in the First Deed of Trust, the instant case is extremely distinguishable from *Montierth*.

"Generally, the purpose of recording statutes is to provide subsequent purchasers with knowledge concerning the state of title for real property." *Hines v. Nat'l Default Servicing Corp.*, No. 62128, 2015 WL 4611941, at *3 (Nev. July 31, 2015) (*quoting State Dep't of Taxation v. Kawahara*, 131 Nev. Adv. Op. 42, 351 P.3d 746, 747 (2015)). While recording a document imparts constructive notice of its contents, "it does not impart constructive notice of information not presented in the document." *Id.* In *Edelstein*, the Nevada Supreme Court specifically recognized the pitfalls of having a servicer appear as the beneficiary of record for another entity:

> It is prudent to have the recorded beneficiary be the actual beneficiary and not just a shell for the 'true' beneficiary. In Nevada, the purpose of recording a beneficial interest under a deed of trust is to provide 'constructive notice…to all persons. NRS 106.210. To permit an entity that is not really the beneficiary to record itself as the beneficiary would defeat the purpose of the recording statute and encourage a lack of transparency.

Edelstein, 286 P.3d at 259.

Recording an interest is particularly important where a party is claiming an elevated status based on its ownership interest, as in this case. Because Fannie Mae never recorded an assignment in its favor prior to the HOA Foreclosure Sale, Fannie Mae did not have a valid interest in the Property that could be properly asserted against Airmotive.

The Bank asserts that *Montierth* supports its argument that a loan owner has a recognized property interest where its servicer appears as the beneficiary of record. The Bank's argument fails due to one very important distinction: Airmotive was not the borrower. Here, the Bank is asserting a property interest against a third party bona fide purchaser. It bears repeating that the Nevada Supreme Court very specifically held that, "a security interest attaches to the property . . . **as against third parties upon recordation**." *Montierth*, 354 P.3d at 650 (Emphasis added).

Thus, for Fannie Mae to have a property interest that could be asserted against Airmotive, a third party bona fide purchaser, it was required to record that interest. And while the Bank is correct that nothing requires a loan owner to record its interest, the failure to record has its consequences. This is particularly true where a loan owner is seeking sanctuary in a federal provision that is only available to protect that particular loan owner's property interests. Because Fannie Mae failed to record its alleged interest in the Property prior to the HOA Foreclosure Sale and the recording of the HOA Foreclosure Deed, it cannot assert this interest against Airmotive now and it cannot rely upon the Federal Foreclosure Bar.

10. <u>THE BALANCE OF EQUITIES WEIGHS IN FAVOR OF AIRMOTIVE</u>

Although the First Deed of Trust explicitly authorized BANA to take legal action to protect itself and its security interest and although any and all associated costs could also be recovered pursuant to the terms of the First Deed of Trust and PUD Rider, no evidence exists in this case that BANA did anything at all in response to the foreclosure notices related to the HOA Foreclosure Sale.

LVDG appeared at the HOA Foreclosure Sale in good faith and purchased the the Property. See Exhibit 6. It did so without any knowledge that the subordinate First Deed of Trust was purportedly inextinguishable. This would not have been the case had BANA and Fannie Mae simply recorded Fannie Mae's interest as required by Nevada law.

It is difficult to conceive how the balance of the equities could possibly weigh in favor of the Bank as against Airmotive. Airmotive is a wholly innocent party while the Bank and/or Fannie Mae possessed the knowledge and means to prevent the HOA Foreclosure Sale from taking place. LVDG purchased the Property in good faith. BANA sat on its hands and watched.

BANA is a sophisticated business entity with a market capitalization of hundreds of billions of dollars. BANA was aware that a dispute existed regarding the amount owed the HOA. Nonetheless, it did NOTHING after in response to the HOA foreclosure notices. BANA's inattention and inaction on the one hand can hardly outweigh Airmotive's good faith purchase where Airmotive was denied any knowledge due to BANA and Fannie Mae's failure to

properly record their interests.

CONCLUSION

For the reasons set forth above, the instant Motion must be denied. At the very least, questions of material fact exist which must be adjudicated by the trier of fact.

DATED this 16th day of July, 2019.

ROGER P. CROTEAU & ASSOCIATES, LTD.

/s/ Timothy E. Rhoda
ROGER P. CROTEAU, ESQ.
Nevada Bar No. 4958
TIMOTHY E. RHODA, ESQ.
Nevada Bar No. 7878
9120 West Post Road, Suite 100
Las Vegas, Nevada 89148
(702) 254-7775
Attorney for Plaintiff
LAS VEGAS DEVELOPMENT GROUP, LLC

CERTIFICATE OF SERVICE

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that I am an employee of ROGER P. CROTEAU & ASSOCIATES, LTD. and that on the 17th day of July, 2019, I caused a true and correct copy of the foregoing document to be served on all parties as follows:

X VIA ELECTRONIC SERVICE: through the Eighth Judicial District Court's Odyssey e-file and serve system.

___ VIA U.S. MAIL: by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as indicated on service list below in the United States mail at Las Vegas, Nevada.

___ VIA FACSIMILE: by causing a true copy thereof to be telecopied to the number indicated on the service list below.

___ VIA PERSONAL DELIVERY: by causing a true copy hereof to be hand delivered on this date to the addressee(s) at the address(es) set forth on the service list below.

/s/ Timothy E. Rhoda
An employee of ROGER P. CROTEAU & ASSOCIATES, LTD.

EXHIBIT 1

EXHIBIT 1

20060630-0002110

Fee: $35.00
N/C Fee: $25.00

06/30/2006 09:39:29
T20060115643
Requestor:
FIRST AMERICAN TITLE COMPANY OF NEVAD

Frances Deane DGI
Clark County Recorder Pgs: 22

C 22

PIN #: 140-34-413-075
After Recording Return To:
UTAH FINANCIAL, INC.
4001 SOUTH 700 EAST STE 100
SALT LAKE CITY, UT 84107
ATTN: FUNDING DEPARTMENT

Grantee:
UTAH FINANCIAL, INC.
4001 SOUTH 700 EAST STE 100, SALT LAKE CITY, UT 84107

Mail Tax Statement To:
UTAH FINANCIAL, INC.
4001 SOUTH 700 EAST STE 100
SALT LAKE CITY, UT 84107

1

[Space Above This Line For Recording Data]

DEED OF TRUST

UNIZA-ENRIQUEZ
Loan #: [redacted]
MIN: 100254105060621040
PIN: 140-34-413-075

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) "Security Instrument" means this document, which is dated JUNE 22, 2006, together with all Riders to this document.
(B) "Borrower" is GENEVIEVE UNIZA-ENRIQUEZ, A MARRIED WOMAN AS HER SOLE AND SEPARATE PROPERTY.. Borrower is the trustor under this Security Instrument.
(C) "Lender" is UTAH FINANCIAL, INC.. Lender is a CORPORATION organized and existing under the laws of UT. Lender's address is 4001 SOUTH 700 EAST STE 100, SALT LAKE CITY, UT 84107.
(D) "Trustee" is FIRST AMERICAN TITLE.
(E) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. **MERS is the beneficiary under this Security Instrument.** MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.
(F) "Note" means the promissory note signed by Borrower and dated JUNE 22, 2006. The Note states that Borrower owes Lender THREE HUNDRED SIXTY THOUSAND AND 00/100 Dollars (U.S. $360,000.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than JULY 1, 2036.
(G) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."

(H) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.
(I) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

☒ Adjustable Rate Rider	☐ Condominium Rider	☐ Second Home Rider
☐ Balloon Rider	☒ Planned Unit Development Rider	☐ Biweekly Payment Rider
☐ 1-4 Family Rider	☐ Other(s) [specify]	

(J) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.
(K) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.
(L) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.
(M) "Escrow Items" means those items that are described in Section 3.
(N) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.
(O) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.
(P) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.
(Q) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. Section 2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.
(R) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS. This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in the COUNTY (Type of Recording Jurisdiction) of CLARK (Name of Recording

Jurisdiction):
SEE EXHIBIT "A"
which currently has the address of 6279 DOWNPOUR COURT, LAS VEGAS, Nevada 89110 ("Property Address").

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property." Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges. Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. Application of Payments or Proceeds. Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to

reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. Funds for Escrow Items. Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to

Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

4. Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as

mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. Occupancy. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. Preservation, Maintenance and Protection of the Property; Inspections. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. Borrower's Loan Application. Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. Borrower shall not surrender the leasehold estate and interests herein conveyed or terminate or cancel the ground lease. Borrower shall not, without the express written consent of Lender, alter or amend the ground lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

10. Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of

making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

(b) Any such agreements will not affect the rights Borrower has - if any - with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this

Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

12. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

13. Joint and Several Liability; Co-signers; Successors and Assigns Bound. Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section

20) and benefit the successors and assigns of Lender.

14. Loan Charges. Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

16. Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

17. Borrower's Copy. Borrower shall be given one copy of the Note and of this Security Instrument.

18. Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower

is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. Sale of Note; Change of Loan Servicer; Notice of Grievance. The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

21. Hazardous Substances. As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option, and without further demand, may invoke the power of sale, including the right to accelerate full payment of the Note, and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If Lender invokes the power of sale, Lender shall execute or cause Trustee to execute written notice of the occurrence of an event of default and of Lenders' election to cause the Property to be sold, and shall cause such notice to be recorded in each county in which any part of the Property is located. Lender shall mail copies of the notice as prescribed by Applicable Law to Borrower and to the persons prescribed by Applicable Law. Trustee shall give public notice of sale to the persons and in the manner prescribed by Applicable Law. After the time required by Applicable Law, Trustee, without demand on

Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Trustee may postpone sale of all or any parcel of the Property by public announcement at the time and place of any previously scheduled sale. Lender or its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable Trustee's and attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

23. Reconveyance. Upon payment of all sums secured by this Security Instrument, Lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and all notes evidencing debt secured by this Security Instrument to Trustee. Trustee shall reconvey the Property without warranty to the person or persons legally entitled to it. Such person or persons shall pay any recordation costs. Lender may charge such person or persons a fee for reconveying the Property, but only if the fee is paid to a third party (such as the Trustee) for services rendered and the charging of the fee is permitted under Applicable Law.

24. Substitute Trustee. Lender at its option, may from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder. Without conveyance of the Property, the successor trustee shall succeed to all the title, power and duties conferred upon Trustee herein and by Applicable Law.

25. Assumption Fee. If there is an assumption of this loan, Lender may charge an assumption fee of U.S. $0.00.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Genevieve Uniza-Enriquez 10/23/06

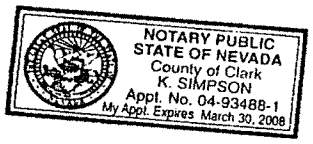
- BORROWER - GENEVIEVE UNIZA-ENRIQUEZ - DATE -

[Space Below This Line for Acknowledgment]

STATE OF Nevada

COUNTY OF Clark

This instrument was acknowledged before me on June 23rd 2006 by Genevieve Ursua Enriquez.



Notary Public

My Commission Expires: 3/30/08

EXHIBIT 'A'

PARCEL I:

LOT 75 OF CHARLESTON AND FOGG (A COMMON INTEREST COMMUNITY), AS SHOWN BY MAP THEREOF ON FILE IN BOOK 113 OF PLATS, PAGE 40, IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA

PARCEL II:

A NON-EXCLUSIVE EASEMENT FOR INGRESS, EGRESS, USE AND ENJOYMENT, LANDSCAPING AND PUBLIC UTILITIES PURPOSES ON, OVER AND ACROSS THE "PRIVATE DRIVES/ P.U.E." AND "COMMON AREAS" AS DELINEATED ON SAID MAP, AND AS FURTHER DEFINED BY THAT CERTAIN DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS AND GRANT AND RESERVATION OF EASEMENTS FOR PALO VERDE RANCH RECORDED MARCH 12, 2004 IN BOOK 20040312, AS DOCUMENT NUMBER 01067, OF OFFICIAL RECORDS, CLARK COUNTY, NEVADA.

PLANNED UNIT DEVELOPMENT RIDER

UNIZA-ENRIQUEZ
Loan #: [redacted]
MIN: 100254105060621040

THIS PLANNED UNIT DEVELOPMENT RIDER is made this 22ND day of JUNE, 2006, and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust or Security Deed (the "Security Instrument") of the same date, given by the undersigned (the "Borrower") to secure Borrower's Note to UTAH FINANCIAL, INC., (the "Lender") of the same date and covering the Property described in the Security Instrument and located at:

6279 DOWNPOUR COURT, LAS VEGAS, NV 89110
[Property Address]

The Property includes, but is not limited to, a parcel of land improved with a dwelling, together with other such parcels and certain common areas and facilities, as described in THE COVENANTS, CONDITIONS AND RESTRICTIONS FILED OF RECORD THAT AFFECT THE PROPERTY (the "Declaration"). The Property is a part of a planned unit development known as

CHARLESTON & FOGG
[Name of Planned Unit Development]

(the "PUD"). The Property also includes Borrower's interest in the homeowners association or equivalent entity owning or managing the common areas and facilities of the PUD (the "Owners Association") and the uses, benefits and proceeds of Borrower's interest.

PUD COVENANTS. In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows:

A. PUD Obligations. Borrower shall perform all of Borrower's obligations under the PUD's Constituent Documents. The "Constituents Documents" are the: (i) Declaration; (ii) articles of incorporation, trust instrument or any equivalent document which creates the Owners Association; and (iii) any by-laws or other rules or regulations of the Owners Association. Borrower shall promptly pay, when due, all dues and assessments imposed pursuant to the Constituent Documents.

B. Property Insurance. So long as the Owners Association maintains, with a generally accepted insurance carrier, a "master" or "blanket" policy insuring the Property which is satisfactory to Lender and which provides insurance coverage in the amounts (including deductible levels), for the periods, and against loss by fire, hazards included within the term "extended coverage," and any other hazards, including, but not limited to, earthquakes and floods, for which Lender requires insurance, then: (i) Lender waives the

provision in Section 3 for the Periodic Payment to Lender of the yearly premium installments for property insurance on the Property; and (ii) Borrower's obligation under Section 5 to maintain property insurance coverage on the Property is deemed satisfied to the extent that the required coverage is provided by the Owners Association policy.

What Lender requires as a condition of this waiver can change during the term of the loan.

Borrower shall give Lender prompt notice of any lapse in required property insurance coverage provided by the master or blanket policy.

In the event of a distribution of hazard insurance proceeds in lieu of restoration or repair following a loss to the Property, or to common areas and facilities of the PUD, any proceeds payable to Borrower are hereby assigned and shall be paid to Lender. Lender shall apply the proceeds to the sums secured by the Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

C. Public Liability Insurance. Borrower shall take such actions as may be reasonable to insure that the Owners Association maintains a public liability insurance policy acceptable in form, amount, and extent of coverage to Lender.

D. Condemnation. The proceeds of any award or claim for damages, direct or consequential, payable to Borrower in connection with any condemnation or other taking of all or any part of the Property or the common areas and facilities of the PUD, or for any conveyance in lieu of condemnation, are hereby assigned and shall be paid to Lender. Such proceeds shall be applied by Lender to the sums secured by the Security Instrument as provided in Section 11.

E. Lender's Prior Consent. Borrower shall not, except after notice to Lender and with Lender's prior written consent, either partition or subdivide the Property or consent to: (i) the abandonment or termination of the PUD, except for abandonment or termination required by law in the case of substantial destruction by fire or other casualty or in the case of a taking by condemnation or eminent domain; (ii) any amendment to any provision of the "Constituent Documents" if the provision is for the express benefit of Lender; (iii) termination of professional management and assumption of self-management of the Owners Association; or (iv) any action which would have the effect of rendering the public liability insurance coverage maintained by the Owners Association unacceptable to Lender.

F. Remedies. If Borrower does not pay PUD dues and assessments when due, then Lender may pay them. Any amounts disbursed by Lender under this paragraph F shall become additional debt of Borrower secured by the Security Instrument. Unless Borrower and Lender agree to other terms of payment, these amounts shall bear interest from the date of disbursement at the Note rate and shall be payable, with interest, upon notice from Lender to Borrower requesting payment.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this PUD Rider.

Genevieve Uniza-Enriquez 10/23/06

- BORROWER - GENEVIEVE UNIZA-ENRIQUEZ - DATE -

Doc ID#:

ADJUSTABLE RATE RIDER
(MTA-Twelve Month Average Index - Payment Caps)

UNIZA-ENRIQUEZ
Loan #: [redacted]
PIN: 140-34-413-075
MIN: 100254105060621040

THIS ADJUSTABLE RATE RIDER is made this 22ND day of JUNE, 2006, and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Security Deed (the "Security Instrument") of the same date given by the undersigned ("Borrower") to secure Borrower's Adjustable Rate Note (the "Note") to UTAH FINANCIAL, INC. ("Lender") of the same date and covering the property described in the Security Instrument and located at:

6279 DOWNPOUR COURT, LAS VEGAS, NV 89110
[Property Address]

THE NOTE CONTAINS PROVISIONS THAT WILL CHANGE THE INTEREST RATE AND THE MONTHLY PAYMENT. THERE MAY BE A LIMIT ON THE AMOUNT THAT THE MONTHLY PAYMENT CAN INCREASE OR DECREASE. THE PRINCIPAL AMOUNT TO REPAY COULD BE GREATER THAN THE AMOUNT ORIGINALLY BORROWED, BUT NOT MORE THAN THE MAXIMUM LIMIT STATED IN THE NOTE.

ADDITIONAL COVENANTS: In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agrees as follows:

A. INTEREST RATE AND MONTHLY PAYMENT CHANGES
The Note provides for changes in the interest rate and the monthly payments, as follows:

2. INTEREST
(A) Interest Rate

Interest will be charged on unpaid Principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of 1.750%. The interest rate I will pay may change.

The interest rate required by this Section 2 is the rate I will pay both before and after any default described in Section 7(B) of the Note.

(B) Interest Rate Change Dates

The interest rate I will pay may change on the 1ST day of AUGUST, 2006, and on that day every month thereafter. Each date on which my interest rate could change is called an "Interest Rate Change Date." The new rate of interest will become effective on each Interest Rate Change Date. The interest rate may change monthly, but the monthly payment is recalculated in accordance with Section 3.

(C) Index

Beginning with the first Interest Rate Change Date, my adjustable interest rate will be based on an Index. The "Index" is the "Twelve-Month Average" of the annual yields on actively traded United States Treasury Securities adjusted to a constant maturity of one year as published by the Federal Reserve Board in the Federal Reserve Statistical Release entitled "Selected Interest Rates (H.15)" (the "Monthly Yields"). The Twelve Month Average is determined by adding together the Monthly Yields for the most recently available twelve months and dividing by 12. The most recent Index figure available as of the date 15 days before each Interest Rate Change Date is called the "Current Index."

If the Index is no longer available, the Note Holder will choose a new index that is based upon comparable information. The Note Holder will give me notice of this choice.

(D) Calculation of Interest Rate Changes

Before each Interest Rate Change Date, the Note Holder will calculate my new interest rate by adding THREE AND ONE-HALF percentage point(s) 3.500% ("Margin") to the Current Index. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). This rounded amount will be my new interest rate until the next Interest Rate Change Date. My interest will never be greater than 9.950%. Beginning with the first Interest Rate Change Date, my interest rate will never be lower than the Margin.

3. PAYMENTS

(A) Time and Place of Payments

I will make a payment every month.

I will make my monthly payments on the 1ST day of each month beginning on AUGUST 1, 2006. I will make these payments every month until I have paid all the Principal and Interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on JULY 1, 2036, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at 4001 SOUTH 700 EAST STE 100, SALT LAKE CITY, UT 84107 or at a different place if required by the Note Holder.

(B) Amount of My Initial Monthly Payments

Each of my initial monthly payments until the first Payment Change Date will be in the amount of U.S. $1,286.08 unless adjusted under Section 3(F).

(C) Payment Change Dates

My monthly payment may change as required by Section 3(D) below beginning on the 1ST day of AUGUST, 2007, and on that day every 12th month thereafter. Each of these dates is called a "Payment Change Date." My monthly payment also will change at any time Section 3(F) or 3(G) below requires me to pay a different monthly payment. The "Minimum Payment" is the minimum amount Note Holder will accept

for my monthly payment which is determined at the last Payment Change Date or as provided in Section 3(F) or 3(G) below. If the Minimum Payment is not sufficient to cover the amount of the interest due then negative amortization will occur.

I will pay the amount of my new Minimum Payment each month beginning on each Payment Change Date or as provided in Section 3(F) or 3(G) below.

(D) Calculation of Monthly Payment Changes

At least 30 days before each Payment Change Date, the Note Holder will calculate the amount of the monthly payment that would be sufficient to repay the unpaid Principal that I am expected to owe at the Payment Change Date in full on the maturity date in substantially equal payments at the interest rate effective during the month preceding the Payment Change Date. The result of this calculation is called the "Full Payment." Unless Section 3(F) or 3(G) apply, the amount of my new monthly payment effective on a Payment Change Date, will not increase by more than 7.5% of my prior monthly payment. This 7.5% limitation is called the "Payment Cap." This Payment Cap applies only to the Principal and Interest payment and does not apply to any escrow payments Lender may require under the Security Instrument. The Note Holder will apply the Payment Cap by taking the amount of my Minimum Payment due the month preceding the Payment Change Date and multiplying it by the number 1.075. The result of this calculation is called the "Limited Payment." Unless Section 3(F) or 3(G) below requires me to pay a different amount, my new Minimum Payment will be the lesser of the Limited Payment and the Full Payment. I also have the option to pay the Full Payment for my monthly payment.

(E) Additions to My Unpaid Principal

Since my monthly payment amount changes less frequently than the interest rate, and since the monthly payment is subject to the payment limitations described in Section 3(D), my Minimum Payment could be less than or greater than the amount of the interest portion of the monthly payment that would be sufficient to repay the unpaid Principal I owe at the monthly payment date in full on the Maturity Date in substantially equal payments. For each month that my monthly payment is less than the interest portion, the Note Holder will subtract the amount of my monthly payment from the amount of the interest portion and will add the difference to my unpaid Principal, and interest will accrue on the amount of this difference at the interest rate required by Section 2. For each month that the monthly payment is greater than the interest portion, the Note Holder will apply the payment as provided in Section 3(A).

(F) Limit on My Unpaid Principal; Increased Monthly Payment

My unpaid Principal can never exceed the Maximum Limit equal to **ONE HUNDRED FIFTEEN** percent (**115.000%**) of the Principal amount I originally borrowed. My unpaid Principal could exceed that Maximum Limit due to Minimum Payments and interest rate increases. In that event, on the date that my paying my monthly payment would cause me to exceed that limit, I will instead pay a new monthly payment. This means that my monthly payment may change more frequently than annually and such payment changes will not be limited by the 7.5% Payment Cap. The new Minimum Payment will be in an amount that would be sufficient to repay my then unpaid Principal in full on the Maturity Date in substantially equal payments at the current interest rate.

(G) Required Full Payment

On the **FIFTH** Payment Change Date and on each succeeding fifth Payment Change Date thereafter, I will begin paying the Full Payment as my Minimum Payment until my monthly payment changes again. I also will begin paying the Full Payment as my Minimum Payment on the final Payment Change Date.

(H) Payment Options

After the first Interest Rate Change Date, Lender may provide me with up to three (3) additional payment options that are **greater** than the Minimum Payment, which are called "Payment Options." I may be given the following Payment Options:

(i) **Interest Only Payment:** the amount that would pay the interest portion of the monthly payment at the current interest rate. The Principal balance will not be decreased by this Payment Option and it is only available if the interest portion exceeds the Minimum Payment.
(ii) **Fully Amortized Payment:** the amount necessary to pay the loan off (Principal and Interest) at the Maturity Date in substantially equal payments.
(iii) **15 Year Amortized Payment:** the amount necessary to pay the loan off (Principal and Interest) within a fifteen (15) year term from the first payment due date in substantially equal payments. This monthly payment amount is calculated on the assumption that the current rate will remain in effect for the remaining term.

These Payment Options are only applicable if they are greater than the Minimum Payment.

B. TRANSFER OF THE PROPERTY OR A BENEFICIAL INTEREST IN BORROWER

Section 18 of the Security Instrument entitled "Transfer of the Property or a Beneficial Interest in Borrower" is amended to read as follows:

Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law. Lender also shall not exercise this option if: (a) Borrower causes to be submitted to Lender information required by Lender to evaluate the intended transferee as if a new loan were being made to the transferee; and (b) Lender reasonably determines that Lender's security will not be impaired by the loan assumption and that the risk of a breach of any covenant or agreement in this Security Instrument is acceptable to Lender.

To the extent permitted by Applicable Law, Lender may charge a reasonable fee as a condition to Lender's consent to the loan assumption. Lender may also require the transferee to sign an assumption agreement that is acceptable to Lender and that obligates the transferee to keep all the promises and agreements made in the Note and in this Security Instrument. Borrower will continue to be obligated under the Note and this Security Instrument unless Lender releases Borrower in writing.

If Lender exercises the option to require immediate payment in full, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Adjustable Rate Rider.

Genevieve Uniza-Enriquez 10/23/06

- BORROWER - GENEVIEVE UNIZA-ENRIQUEZ - DATE -

EXHIBIT 2

EXHIBIT 2

Inst #: 201006300004065
Fees: $14.00
N/C Fee: $0.00
06/30/2010 03:27:38 PM
Receipt #: 409485
Requestor:
FIDELITY NATIONAL DEFAULT S
Recorded By: DXI Pgs: 1
DEBBIE CONWAY
CLARK COUNTY RECORDER

FIDELITY NATIONAL
RECORDING REQUESTED BY:
RECONTRUST COMPANY, N.A.
AND WHEN RECORDED MAIL DOCUMENT TO:
BAC Home Loans Servicing, LP
400 COUNTRYWIDE WAY SV-35
SIMI VALLEY, CA 93065

TS No. 10-0071205
TITLE ORDER#: 100375035NVGTI
APN 140-34-413-075

CORPORATION ASSIGNMENT OF DEED OF TRUST NEVADA

FOR VALUE RECEIVED, THE UNDERSIGNED HEREBY GRANTS, ASSIGNS AND TRANSFER TO:
BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING LP

ALL BENEFICIAL INTEREST UNDER THAT CERTAIN DEED OF TRUST DATED 06/22/2006, EXECUTED BY: GENEVIEVE UNIZA-ENRIQUEZ, A MARRIED WOMAN AS HER SOLE AND SEPARATE PROPERTY.,TRUSTOR: TO FIRST AMERICAN TITLE., TRUSTEE AND RECORDED AS INSTRUMENT NO. 0002110 ON 06/30/2006, IN BOOK 20060630, OF OFFICIAL RECORDS IN THE COUNTY RECORDER'S OFFICE OF CLARK COUNTY, IN THE STATE OF NEVADA.

DESCRIBING THE LAND THEREIN: AS MORE FULLY DESCRIBED IN SAID DEED OF TRUST.

TOGETHER WITH THE NOTE OR NOTES THEREIN DESCRIBED OR REFERRED TO, THE MONEY DUE AND TO BECOME DUE THEREON WITH INTEREST, AND ALL RIGHTS ACCRUED OR TO ACCRUE UNDER SAID DEED OF TRUST/MORTGAGE.

DATED: June 25, 2010

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

State of: Texas)
County of: Tarrant)

BY: _____
Khadija Gulley, Assistant Secretary

JUN 2 8 2010

On _____ before me Elsie E. Krousseakis, personally appeared Khadija Gulley, Asst. Secty, know to me (or proved to me on the oath of _____ or through _____) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he/she executed the same for the purposes and consideration therein expressed.
Witness my hand and official seal.

_____
Notary Public's Signature

ELSIE E KROUSSAKIS
Notary Public
STATE OF TEXAS
My Comm. Exp. 10-14-11

EXHIBIT 3

EXHIBIT 3

Inst #: 201004010001086
Fees: $15.00
N/C Fee: $0.00
04/01/2010 10:50:35 AM
Receipt #: 294131
Requestor:
CAMCO
Recorded By: BGN Pgs: 2
DEBBIE CONWAY
CLARK COUNTY RECORDER

Return to:
Attn: Kelly Mitchell
Absolute Collection Services, LLC
PO Box 12117
Las Vegas, NV 89112
(702) 531-3394 phone

APN # 140-34-413-075

Notice of Delinquent Assessment Lien

This NOTICE OF DELINQUENT ASSESSMENT is being given pursuant to N.R.S. 117.70 et seq. or N.R.S. 116.3115 et. Seq. and N.R.S. 116.3116 through 116.31168 et. Seq. and the provisions of the Declaration of Covenants, Conditions and Restrictions (CC&Rs) of the Homeowners Association as follows:

Association Claimant: Palo Verde Ranch HOA Declarations of CC&Rs recorded 3/12/04 Instrument No: 01067, Book No.: 20040312, Page No:__ County of CLARK, and any and all amendments or annexations of record thereto.

The description of the common interest development unit against which this notice is being recorded is as follows: Legal Unit No.: 6279 Downpour Ct., Charleston & Fogg Plat Book 113 Page 40 Lot 75

The reputed owner is: GENEVIEVE UNIZA-ENRIQUEZ

Common address: 6279 Downpour Ct., Las Vegas NV 89110

Owner's mailing address: Same

DELINQUENCY #A1259

Total Amount due as of 03/31/10	$754.56

Additional monies shall accrue under this claim at the rate of the claimant's periodic assessments, plus permissible late charges, costs of collection and interest and other charges, if any, that shall accrue subsequent to the date of this notice.

The acting agency for enforcement on this lien is:

ABSOLUTE COLLECTION SERVICES, LLC
PO BOX 12117
LAS VEGAS NV 89112
(702) 531-3394

DATED: 03/31/2010

RICHARD KAYE, Trustee Sales Officer

STATE OF NEVADA
COUNTY OF CLARK

On 3/31/10 before me, the undersigned, a Notary Public in and for said county, personally appeared, RICHARD KAYE personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is subscribed to the within Instrument and acknowledged to me that he/she executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the Instrument.

WITNESS my hand and official seal.

Kelly Mitchell
KELLY MITCHELL, Notary Public

KELLY MITCHELL
Notary Public, State of Nevada
Appointment No. 08-7504-1
My Appt. Expires July 10, 2012

EXHIBIT 4

EXHIBIT 4

Inst #: 201007140001222
Fees: $16.00
N/C Fee: $0.00
07/14/2010 09:49:23 AM
Receipt #: 424836
Requestor:
CAMCO
Recorded By: GILKS Pgs: 3
DEBBIE CONWAY
CLARK COUNTY RECORDER

Return to:
Attn: Kelly Mitchell
Absolute Collections Services, LLC
PO Box 12117
Las Vegas, NV 89112
(702) 531-3394

APN # 140-34-413-075
TS NO: A1259
Title Order No:

NOTICE OF DEFAULT AND ELECTION TO SELL UNDER NOTICE OF DELINQUENT ASSESSMENT

WARNING! IF YOU FAIL TO PAY THE AMOUNT SPECIFIED IN THIS NOTICE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE! You may have the legal right to bring your account in good standing by paying all of your past due payments plus permitted costs and expenses within the time permitted by law for reinstatement of your account. No sale date may be set until ninety (90) days from the date this notice of default may be recorded or mailed. The amount is **$1749.65** as of **July 13, 2010** and will increase until your account becomes current. Upon your written request, **Palo Verde Ranch HOA** will give you a written itemization of the entire amount you must pay. You and the Association may mutually agree in writing prior to the time the notice of sale is posted to, amount other things, (1) provide additional time in which to cure the default by transfer of the property or otherwise; or (2) establish a schedule of payments in order to cure your default; or both (1) and (2). Following the expiration of the time period previously referred to, unless a separate written agreement between you and the Association permits a longer period, you have only the legal right to stop the sale of your property by paying the entire amount demanded by the Association.

To find out the amount you must pay, or to arrange for payment to stop the foreclosure, contact the following trustee who has been authorized by the Association to enforce its lien by sale: Absolute Collection Services, LLC, PO Box 12117, Las Vegas, NV 89112, 702-531-3394.

THIS NOTICE is given pursuant to NRS 117.070 et. Seq. or NRS 116.3115 et. Seq. and NRS 116.3116 through 116.31168 et. Seq., and pursuant to that certain Notice of

Delinquent Assessment Lien, recorded on **4/01/10** as Document no. 0001086 book **20100401** of Official Records in the office of the Recorder of Clark County, State of Nevada.

Owner: **Genevieve Uniza-Enriquez**
Property Address: **6279 Downpour Ct, Las Vegas, NV 89110**

Legal Description-shown on the Subdivision map recorded in Book No.**113** Page(s) **40** Inclusive, of Maps of the County of Clark, State of Nevada.

If you have any questions, you should contact a lawyer. Notwithstanding the fact that your property is in foreclosure, you may offer your property for sale, provided the sale is concluded prior to the conclusion of the foreclosure.

REMEMBER, YOU MAY LOSE LEGAL RIGHTS IF YOU DO NOT TAKE PROMPT ACTION

NOTICE IS HEREBY GIVEN THAT: Absolute Collection Services, LLC, is the duly appointed Trustee/Agent authorized by the Association, pursuant to the terms contained in that certain Declaration of Covenants, Conditions and Restrictions, Recorded on **3/12/04** as document number **01067-20040312** of Official Records in the Office of the Recorder of Clark County, Nevada, and any and all amendments or annexations of record thereto, describing the land therein. That the beneficial Interest under said Notice of Delinquent Assessment is presently held by the Association. That a breach of, and default in, the obligation for which said Covenants, Conditions and Restrictions as security has occurred in that the payment(s) have not been made of:

Periodic assessments, less credits and offsets, plus any late charges, interest, fees, charges, collection costs, trustee's fees, and attorney fees, if any.

That by reason thereof, the present Association under such Covenants, Conditions and Restrictions, has executed and delivered to said Trustee, a written Declaration and Demand for Sale, and has deposited with said duly appointed Trustee, such Covenants, Conditions and Restrictions and all documents evidencing the obligations secured thereby, and has declared and does hereby declare all sums secured thereby immediately due and payable and has elected and does hereby elect to cause the herein described property, liened by said Association, to be sold to satisfy the obligations secured thereby.

PLEASE NOTE THAT WE ARE A DEBT COLLECTOR.

Date: 7/13/10

Absolute Collection Services, LLC as Trustee

Richard Kaye, Trustee Sale Officer

STATE OF NEVADA
COUNTY OF CLARK

On 7/13/10 before me, the undersigned, a Notary Public in and for said county, personally appeared, Richard Kaye personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is subscribed to the within Instrument and acknowledged to me that he/she executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the Instrument.

WITNESS my hand and official seal.

Kelly Mitchell Notary Public

KELLY MITCHELL
Notary Public, State of Nevada
Appointment No. 08-7504-1
My Appt. Expires July 10, 2012

EXHIBIT 5

EXHIBIT 5

Inst #: 201011180001542
Fees: $15.00
N/C Fee: $25.00
11/18/2010 09:18:10 AM
Receipt #: 582556
Requestor:
CAMCO
Recorded By: ARO Pgs: 2
DEBBIE CONWAY
CLARK COUNTY RECORDER

Return to:
Attn: Kelly Mitchell
Absolute Collections Services, LLC
PO Box 12117
Las Vegas, NV 89112
(702) 531-3394

APN # 140-34-413-075
TS NO: A1259.
Title Order No: 072210-4-J
HOA: Palo Verde Ranch HOA

NOTICE OF TRUSTEE'S SALE

WARNING! A SALE OF YOUR PROPERTY IS IMMINENT! UNLESS YOU PAY THE AMOUNT SPECIFIED IN THIS NOTICE BEFORE THE SALE DATE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE. YOU MUST ACT BEFORE THE SALE DATE. IF YOU HAVE ANY QUESTIONS, PLEASE CALL ABSOLUTE COLLECTION SERVICES, LLC AT 702-531-3394. IF YOU NEED ASSISTANCE, PLEASE CALL THE FORECLOSURE SECTION OF THE OMBUDSMAN'S OFFICE, NEVADA REAL ESTATE DIVISION AT 877-829-9907 OR 702-486-4480 IMMEDIATELY.

You are in default under a Notice of Delinquent Assessment LIEN, dated APRIL 1, 2010. Unless you take action to protect your property, it may be sold at public sale. If you need an explanation of the nature of the proceedings against you, you should contact a lawyer.

NOTICE IS HEREBY GIVEN THAT: On JANUARY 11, 2011 at 4:00 PM, at the front entrance to Absolute Collection Services, LLC, 1820 E Sahara Ave #111, Las Vegas NV 89104, under the power of sale pursuant to the terms of those certain covenants conditions and restrictions recorded on MARCH 12, 2004 as instrument number 01067 Book 20040312 of official records of Clark County, as the duly appointed agent and pursuant to Notice of Delinquent Assessment LIEN, recorded on 4/1/10 as Document No. 0001086 in Book 20100401 of Official Records in the Office of the Recorder of Clark County, Nevada, **WILL SALE AT PUBLIC AUCTION TO THE HIGHEST BIDDER FOR CASH**, (payable at time of sale in lawful money of the United States) all right, title and interest in the following commonly known property as:

Address: 6279 DOWNPOUR CT.
City, State, Zip: LAS VEGAS NV 89110

The owner(s) of said property as of the date of the recording of said lien is purported to be:

GENEVIEVE UNIZA-ENRIQUEZ

The undersigned agent disclaims any liability for any incorrectness of the street address and other common designation, if any, shown herein. Said sale will be made, but without covenant or warranty, expressed or implied, regarding title, possession, or encumbrances, to pay the remaining principal sum due under said Notice of Delinquent Assessment Lien, with interest thereon, as provided in said notice, advances, if any, estimated fees, charges, and expenses of the Trustee, to-wit:

$2,873.86 Estimated Accrued interest and additional advances, if any, will increase this figure prior to sale.

The Notice of Default and Election to Sell the described property was recorded on JULY 14, 2010 as instrument 0001222 Book 20100714 in the official records of Clark County.

PLEASE NOTE THAT WE ARE A DEBT COLLECTOR

Date: 11/18/10

Absolute Collection Service, LLC
1820 E Sahara Ave #111
Las Vegas NV 89104
702-531-3394

Richard Kaye, Trustee's Sale Officer

STATE OF NEVADA
COUNTY OF CLARK

On 10/19/10 before me, the undersigned, a Notary Public in and for said county, personally appeared, Richard Kaye personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is subscribed to the within Instrument and acknowledged to me that he/she executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the Instrument.

WITNESS my hand and official seal.

Kelly Mitchell, Notary Public

KELLY MITCHELL
Notary Public, State of Nevada
Appointment No. 08-7504-1
My Appt. Expires July 10, 2012

EXHIBIT 6

EXHIBIT 6

Inst #: 201104130000953
Fees: $16.00 N/C Fee: $0.00
RPTT: $22.95 Ex: #
04/13/2011 09:13:03 AM
Receipt #: 738696
Requestor:
CAMCO
Recorded By: MSH Pgs: 4
DEBBIE CONWAY
CLARK COUNTY RECORDER

APN: 140-34-413-075

WHEN RECORDED MAIL DEED AND
TAX STATEMENTS TO:

Las Vegas Development Group, LLC
397 3rd Ave, Ste A
Chula Vista CA 91910

Title No. A1259
Account NO. 77983
TS No. 072210-4-J

SPACE ABOVE THIS LINE FOR RECORDER'S USE

TRUSTEE'S DEED UPON SALE

The undersigned declares:

1)	The grantee herein WAS NOT the foreclosing beneficiary	
2)	The amount of the unpaid debt together with costs was	$4,001.00
3)	The amount paid by the grantee at the trustee sale was	$4,001.00
4)	The documentary transfer tax is	$ 22.95
5)	City Judicial District of LAS VEGAS	

And **Absolute Collection Services, LLC.**, as the duly appointed Trustee under the Notice of Delinquent Assessment hereinafter described, does hereby GRANT and CONVEY, but without warranty, express or implied, to: **Las Vegas Development Group, LLC, 397 3rd Ave, Ste A, Chula Vista CA 91910**

(herein called Grantee), all of its right, title and interest in and to that certain property situated in the County of CLARK, State of NEVADA, described as follows:

6279 Downpour Ct., Las Vegas NV 89110

Legal Description-shown on the Subdivision map recorded in Book No. 113 Page(s) 40 Inclusive, of Maps of the Country of Clark, State of Nevada; See Exhibit A Attached

AGENT STATES THAT:
This conveyance is made pursuant to the powers granted to PALO VERDE RANCH HOA and conferred upon appointed trustee by the provisions of the Nevada Revised Statutes, the PALO VERDE RANCH HOA governing documents (CC&R's) recorded as instrument number 01067 Book 20040312 on MARCH 12. 2004 and that certain Notice of Delinquent Assessment Lien recorded on APRIL 1, 2010 instrument number 0001086

Book 20100401 Official Records of CLARK County; and pursuant to NRS 117.070 et Seq. or NRS 116.3115 et Seq and NRS 116.3116 through 116.31168 et Seq. The name of the owner(s) of the property (trustor) was: GENEVIEVE UNIZA-ENRIQUEZ

Default occurred as set forth in a Notice of Default and Election to Sell, recorded on JULY 14, 2010 as instrument 0001222 Book 20100714 which was recorded in the office of the recorder of said county. Absolute Collection Services, LLC. Has complied with all requirements of law including, but not limited to, the elapsing of 90 days, mailing of copies of Notice of Delinquent Assessment and Notice of Default and the posting and publication of the Notice of Sale. Said property was sold by said agent, on behalf of PALO VERDE RANCH HOA at public auction on April 12, 2011 at the place indicated on the Notice of Sale. Grantee being the highest bidder at such sale, became the purchaser of said property and paid therefore to said agent the amount bid $4,001.00 in lawful money of the United States, or by satisfaction, pro tanto, of the obligations then secured by the Delinquent Assessment Lien.

Dated:April 13, 2011

By Richard Kaye on behalf of Absolute Collection Services

STATE OF NEVADA)
COUNTY OF CLARK)

On 4/13/11 before me, Kelly Mitchell, personally appeared Richard Kaye personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged that he/she executed the same in his/her authorized capacity, and that by signing his/her signature on the instrument, the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and seal.

Kelly Mitchell

Kelly Mitchell, Notary Public

KELLY MITCHELL
Notary Public, State of Nevada
Appointment No. 08-7504-1
My Appt. Expires July 10, 2012

EXHIBIT "A"

THE LAND REFERRED TO IN THIS REPORT IS SITUATED IN THE STATE OF NEVADA, COUNTY OF CLARK, CITY OF LAS VEGAS, AND DESCRIBED AS FOLLOWS:

PARCEL I:
LOT 75 OF CHARLESTON AND FOGG (A COMMON INTEREST COMMUNITY), AS SHOWN BY MAP THEREOF ON FILE IN BOOK 113 OF PLATS, PAGE 40, IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA

PARCEL II:
A NON-EXCLUSIVE EASEMENT FOR INGRESS, EGRESS, USE AND ENJOYMENT, LANDSCAPING AND PUBLIC UTILITIES PURPOSES ON, OVER AND ACROSS THE "PRIVATE DRIVES/ P.U.E." AND "COMMON AREAS" AS DELINEATED ON SAID MAP, AND AS FURTHER DEFINED BY THAT CERTAIN DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS AND GRANT AND RESERVATION OF EASEMENTS FOR PALO VERDE RANCH RECORDED MARCH 12, 2004 IN BOOK 20040312, AS DOCUMENT NUMBER 01067, OF OFFICIAL RECORDS, CLARK COUNTY, NEVADA

STATE OF NEVADA
DECLARATION OF VALUE FORM

1. Assessor Parcel Number(s)
   a. 140-34-413-075
   b. _____
   c. _____
   d. _____

2. Type of Property:
   a. ☐ Vacant Land b. ☒ Single Fam. Res.
   c. ☐ Condo/Twnhse d. ☐ 2-4 Plex
   e. ☐ Apt. Bldg f. ☐ Comm'l/Ind'l
   g. ☐ Agricultural h. ☐ Mobile Home
   ☐ Other _____

FOR RECORDER'S OPTIONAL USE ONLY
Book: _____ Page: _____
Date of Recording: _____
Notes:

3. a. Total Value/Sales Price of Property — $ 4001.00
   b. Deed in Lieu of Foreclosure Only (value of property) — ( )
   c. Transfer Tax Value: — $ 4001.00
   d. Real Property Transfer Tax Due — $ 22.95

4. **If Exemption Claimed:**
   a. Transfer Tax Exemption per NRS 375.090, Section _____
   b. Explain Reason for Exemption: _____

5. Partial Interest: Percentage being transferred: _____ %

The undersigned declares and acknowledges, under penalty of perjury, pursuant to NRS 375.060 and NRS 375.110, that the information provided is correct to the best of their information and belief, and can be supported by documentation if called upon to substantiate the information provided herein. Furthermore, the parties agree that disallowance of any claimed exemption, or other determination of additional tax due, may result in a penalty of 10% of the tax due plus interest at 1% per month. Pursuant to NRS 375.030, the Buyer and Seller shall be jointly and severally liable for any additional amount owed.

Signature: _____ Capacity: Member, Grantee

Signature: _____ Capacity: _____

SELLER (GRANTOR) INFORMATION (REQUIRED)

Print Name: Absolute Collection Services
Address: PO Box 12117
City: Las Vegas
State: NV Zip: 89112

BUYER (GRANTEE) INFORMATION (REQUIRED)

Print Name: Las Vegas Development Group LLC
Address: 397 3RD Ave Suite
City: CHULA VISTA
State: CA Zip: 91910

COMPANY REQUESTING RECORDING
Print Name: CAMCO
Address: PO Box 12117
City: Las Vegas

Escrow #: N/A-foreclosure
State: NV Zip: 89112

As a public record this form may be recorded/microfilmed

EXHIBIT 7

EXHIBIT 7

(6-2

Inst #: 20170307-0000183
Fees: $20.00 N/C Fee: $0.00
RPTT: $0.00 Ex: #003
03/07/2017 08:03:10 AM
Receipt #: 3025633
Requestor:
JOHN JENTZ
Recorded By: RNS Pgs: 6
DEBBIE CONWAY
CLARK COUNTY RECORDER

RECORDING COVER PAGE

(Must be typed or printed clearly in BLACK ink only and avoid printing in the 1" margins of document)

APN# 140-34-413-075
(11 digit Assessor's Parcel Number may be obtained at: http://redrock.co.clark.nv.us/assrrealprop/ownr.aspx)

TITLE OF DOCUMENT

(DO NOT Abbreviate)

Grant Deed

re-recording to include missing Exhibit A

Document Title on cover page must appear EXACTLY as the first page of the document to be recorded.

RECORDING REQUESTED BY:

Jon Jentz

RETURN TO: Name Airmotive Investments, LLC

Address 6360 E Sahara Ave

City/State/Zip Las Vegas, NV 89142

MAIL TAX STATEMENT TO: (Applicable to documents transferring real property)

Name Airmotive Investments, LLC

Address 6360 E Sahara Ave

City/State/Zip Las Vegas, NV 89142

This page provides additional information required by NRS 111.312 Sections 1-2.
An additional recording fee of $1.00 will apply.
To print this document properly, do not use page scaling.
Using this cover page does not exclude the document from assessing a noncompliance fee.
P:\Common\Forms & Notices\Cover Page Template Feb2014

THIS SPACE PROVIDED FOR RECORDER'S USE ONLY:

Inst #: 20170105-0002749
Fees: $18.00 N/C Fee: $0.00
RPTT: $0.00 Ex: #001
01/05/2017 02:38:06 PM
Receipt #: 2975139
Requestor:
LAS VEGAS DEVELOPMENT GROUP
Recorded By: DXI Pgs: 3
DEBBIE CONWAY
CLARK COUNTY RECORDER

(3) 1

PARCEL NUMBER: 140-34-413-075
WHEN RECORDED RETURN TO:
Airmotive Investments, LLC
6360 E Sahara Ave
Las Vegas, Nevada, 89142

GRANT DEED

THE GRANTOR(S),

- Las Vegas Development Group, LLC, Jon Jentz, Managing Member,

for and in consideration of: One Dollar ($1.00) and other good and valuable consideration grants

to the GRANTEE(S):

- AIRMOTIVE INVESTMENTS, LLC, JON JENTZ, MANAGING MEMBER, 6360 E SAHARA AVE, LAS VEGAS, Clark County, Nevada, 89142,

the following described real estate, situated in Las Vegas, in the County of Clark, State of Nevada:

(LEGAL DESCRIPTION): Legal Description-shown on the Subdivision map recorded in Book No. 113 Page(s) 40 Inclusive, of Maps of the County of Clark, State of Nevada, See Exhibit A Attached

Description is as it appears in Document No. 201104130000953, Official Records, Clark County, Nevada.

Property address: 6279 Downpour Ct., Las Vegas NV, 89110.

Subject to existing taxes, assessments, liens, encumbrances, covenants, conditions, restrictions, rights of way and easements of record the grantor hereby covenants with the Grantee(s) that Grantor is lawfully seized in fee simple of the above granted premises and has good right to sell and convey the same.

Tax Parcel Number: 140-34-413-075

Mail Tax Statements To:
AIRMOTIVE INVESTMENTS,
LLC
6360 E SAHARA AVE
LAS VEGAS, Nevada 89162

Grantor Signatures:

DATED: December 16, 2016

Jon Jentz, Managing Member, on behalf of
Las Vegas Development Group, LLC
6360 E Sahara Ave
Las Vegas, Nevada, 89142

STATE OF ~~NEVADA~~ California, COUNTY OF ~~CLARK~~ San Diego, ss:

This instrument was acknowledged before me on this 16th day of December, 2016 by Jon Jentz, Managing Member, on behalf of Las Vegas Development Group, LLC.

Hope Rose
Notary Public
Signature of person taking acknowledgment

HOPE ROSE
COMM. # 2060866
NOTARY PUBLIC-CALIFORNIA
SAN DIEGO COUNTY
MY COMM. EXP. MAR. 13, 2018

Notary Public
Title (and Rank)

My commission expires 3-13-2018

EXHIBIT "A"

THE LAND REFERRED TO IN THIS REPORT IS SITUATED IN THE STATE OF NEVADA, COUNTY OF CLARK, CITY OF LAS VEGAS, AND DESCRIBED AS FOLLOWS:

PARCEL I:

LOT 75 OF CHARLESTON AND FOGG (A COMMON INTEREST COMMUNITY); AS SHOWN BY MAP THEREOF ON FILE IN BOOK 113 OF PLATS, PAGE 40, IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA.

PARCEL II:

A NON-EXCLUSIVE EASEMENT FOR INGRESS, EGRESS, USE AND ENJOYMENT, LANDSCAPING AND PUBLIC UTILITIES PURPOSES ON , OVER AND ACROSS THE "PRIVATE DRIVES/P.U.E." AND "COMMON AREAS" AS DELINEATED ON SAID MAP, AND AS FURTHER DEFINED BY THAT CERTAIN DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS AND GRANT AND RESERVATION OF EASEMENTS FOR PALO VERDE RANCH RECORDED MARCH 12, 2004 IN BOOK 20040312, AS DOCUMENT NUMBER 01607, OF OFFICIAL RECORDS

, CLARK COUNTY, NEVADA

STATE OF NEVADA
DECLARATION OF VALUE

1. Assessor Parcel Number(s)
   a) 140-34-413-075
   b) _____
   c) _____
   d) _____

2. Type of Property:
   a) ☐ Vacant Land b) ☑ Single Fam. Res.
   c) ☐ Condo/Twnhse d) ☐ 2-4 Plex
   e) ☐ Apt. Bldg f) ☐ Comm'l/Ind'l
   g) ☐ Agricultural h) ☐ Mobile Home
   i) ☐ Other _____

FOR RECORDERS OPTIONAL USE ONLY
BOOK _____ PAGE _____
DATE OF RECORDING: _____
NOTES: _____

3. Total Value/Sales Price of Property: $ 1.00
   Deed in Lieu of Foreclosure Only (value of property) (_____
   Transfer Tax Value: $ _____
   Real Property Transfer Tax Due: $ _____

4. If Exemption Claimed:
   a. Transfer Tax Exemption per NRS 375.090, Section # 01
   b. Explain Reason for Exemption: Transfer between affiliated business entities with identical common ownership

5. Partial Interest: Percentage being transferred: 100 %

The undersigned declares and acknowledges, under penalty of perjury, pursuant to NRS 375.060 and NRS 375.110, that the information provided is correct to the best of their information and belief, and can be supported by documentation if called upon to substantiate the information provided herein. Furthermore, the parties agree that disallowance of any claimed exemption, or other determination of additional tax due, may result in a penalty of 10% of the tax due plus interest at 1% per month.

Pursuant to NRS 375.030, the Buyer and Seller shall be jointly and severally liable for any additional amount owed.

Signature _____ **Capacity** Managing Member

Signature _____ **Capacity** Managing Member

SELLER (GRANTOR) INFORMATION (REQUIRED)	BUYER (GRANTEE) INFORMATION (REQUIRED)
Print Name: Las Vegas Development Group, LLC	Print Name: Airmotive Investments, LLC
Address: 6360 E Sahara Ave	Address: 6360 E Sahara Ave
City: Las Vegas	City: Las Vegas
State: NV Zip: 89142	State: NV Zip: 89142

COMPANY/PERSON REQUESTING RECORDING
(required if not the seller or buyer)
Print Name: _____ Escrow # _____
Address: _____
City: _____ State: _____ Zip: _____

(AS A PUBLIC RECORD THIS FORM MAY BE RECORDED/MICROFILMED)

STATE OF NEVADA
DECLARATION OF VALUE

1. Assessor Parcel Number(s)
   a. 140-34-413-075
   b. _____
   c. _____
   d. _____
2. Type of Property:
   a. ☐ Vacant Land b. ☑ Single Fam. Res.
   c. ☐ Condo/Twnhse d. ☐ 2-4 Plex
   e. ☐ Apt. Bldg f. ☐ Comm'l/Ind'l
   g. ☐ Agricultural h. ☐ Mobile Home
   ☐ Other

FOR RECORDERS OPTIONAL USE ONLY
Book_____ Page:_____
Date of Recording: _____
Notes:

3.a. Total Value/Sales Price of Property $ 1.00
   b. Deed in Lieu of Foreclosure Only (value of property) ( )
   c. Transfer Tax Value: $
   d. Real Property Transfer Tax Due $

4. **If Exemption Claimed:**
   a. Transfer Tax Exemption per NRS 375.090, Section 3
   b. Explain Reason for Exemption: re-recording to include missing Exhibit A

5. Partial Interest: Percentage being transferred: 100 %

The undersigned declares and acknowledges, under penalty of perjury, pursuant to NRS 375.060 and NRS 375.110, that the information provided is correct to the best of their information and belief, and can be supported by documentation if called upon to substantiate the information provided herein. Furthermore, the parties agree that disallowance of any claimed exemption, or other determination of additional tax due, may result in a penalty of 10% of the tax due plus interest at 1% per month. Pursuant to NRS 375.030, the Buyer and Seller shall be jointly and severally liable for any additional amount owed.

Signature _____ Capacity: Managing Member

Signature _____ Capacity: Managing Member

SELLER (GRANTOR) INFORMATION (REQUIRED)	**BUYER (GRANTEE) INFORMATION (REQUIRED)**
Print Name: Las Vegas Development Group, L	Print Name: Airmotive Investment, LLC
Address: 6360 E Sahara Ave	Address: 6360 E Sahara Ave
City: Las Vegas	City: Las Vegas
State: NV Zip: 89142	State: NV Zip: 89142

COMPANY/PERSON REQUESTING RECORDING (Required if not seller or buyer)

Print Name:	Escrow #
Address:	
City:	State: Zip:

AS A PUBLIC RECORD THIS FORM MAY BE RECORDED/MICROFILMED

EXHIBIT 8

EXHIBIT 8

ELECTRONICALLY SERVED
3/6/2019 4:29 PM

SDIS
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Email: jared.sechrist@akerman.com

Attorneys for Bank of America, N.A.

DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company, Plaintiff, vs. BANK OF AMERICA, N.A.; GENEVIEVE UNIZA-ENRIQUEZ; DOES 1 through 20, and ROE CORPORATIONS 1 through 20, inclusive, Defendants.	Case No.: A-12-654840-C Dept. No.: XXIII **BANK OF AMERICA, N.A.'S FIRST SUPPLEMENTAL DISCLOSURES**
BANK OF AMERICA, N.A., Counterclaimant, vs. LAS VEGAS DEVELOPMENT GROUP, LLC, Counter-Defendant.	

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LAS VEGAS, NEVADA 89134
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Defendant/Counterclaimant Bank of America, N.A. makes its first supplemental disclosures of documents and witnesses pursuant to NRCP 16.1. All supplemental information appears in **bold face** type.

A. LIST OF WITNESSES

The following persons are known or reasonably believed to have knowledge of facts relevant to the allegations of any pleading filed by any party to this action, including persons having knowledge of rebuttal or impeachment evidence. Bank of America discloses the following list of witnesses, specifically reserving the right to supplement this initial disclosure to add the names of

persons who may have relevant information, including expert witnesses, if subsequent information and investigation so warrant.

1. Corporate Representative for Bank of America, N.A.
800 Samoset Drive
Mail Code DE5-024-02-08
Newark, DE, 19713

This witness will testify regarding relevant facts and information relating to Bank of America's lien on subject property.

2. Corporate Representative for First American Title
Contact Information Unknown

This witness will testify regarding relevant facts and information relating to Bank of America's lien on subject property.

3. Corporate Representative for ReconTrust Company, Inc.
Contact Information Unknown

This witness will testify regarding relevant facts and information relating to Bank of America's lien on subject property.

4. Corporate Representative for National Default Servicing Corporation
Contact Information Unknown

This witness will testify regarding relevant facts and information relating to the liens on subject property of Utah Financial, Inc. and Bank of America.

5. Corporate Representative and/or board members and/or employees of
Palo Verde Ranch Homeowners Association
c/o Complete Association Management Company, LLC
5980 S Durango Dr. Ste 131
Las Vegas, Nevada 89113

This witness is expected to testify regarding relevant facts and information relating to the nonjudicial foreclosure sale relevant to this litigation.

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6. Corporate Representative for Absolute Collection Services, Inc.
c/o Shane D. Cox, Esq.
8440 W. Lake Mead Blvd., Ste. 210
Las Vegas, Nevada 89128
Telephone: (702) 531-3394

This witness is expected to testify regarding relevant facts and information relating to the liens on subject property and the nonjudicial foreclosure sale relevant to this litigation.

7. Corporate Representative for Las Vegas Development Group, LLC
c/o Roger P. Croteau, Esq. and/or Timothy E. Rhoda, Esq.
9120 West Post Road, Suite 100
Las Vegas, Nevada 89148
Telephone: (702) 254-7775

This witness is expected to testify regarding relevant facts and information relating to the nonjudicial foreclosure sale and subsequent sale of the property relevant to this litigation.

8. Corporate Representative for Airmotive Investments, LLC
c/o Roger P. Croteau, Esq.
9120 West Post Road, Suite 100
Las Vegas, Nevada 89148
Telephone: (702) 254-7775

This witness is expected to testify regarding relevant facts and information relating to the nonjudicial foreclosure sale and subsequent sale of the property relevant to this litigation.

9. Genevieve Uniza-Enriquez
Contact Information Unknown

This witness is expected to testify regarding relevant facts and information relating to the nonjudicial foreclosure sale relevant to this litigation.

10. Corporate Representative of Federal National Mortgage Association (Fannie Mae)
3900 Wisconsin Ave. NW
Washington, DC 20016

This person is expected to testify regarding Fannie Mae's ownership of the note and Deed of Trust associated with the purchase of the property at issue in this litigation.

Bank of America reserves the right to call any person listed by any other parties to testify at the trial of this action, and further reserves the right to supplement this list of witnesses as additional persons become known to Bank of America.

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B. LIST OF DOCUMENTS

Bank of America discloses the following documents bates-stamped numbers BANA(Enriquez)0001 - BANA(Enriquez)0436. Redacted portions of these documents contain information such as dates of birth, banking information, and social security numbers. Bank of America specifically reserves the right to supplement this initial disclosure to add relevant documents, if subsequent information and investigation so warrants. Bank of America also includes any documents in the disclosures of other parties to this action.

1. Deed of Trust, Instrument No. 20060630-0002110, Bates No. BANA(Enriquez)0001 – BANA(Enriquez)0022.

2. Substitution of Trustee and Full Reconveyance, Instrument No. 20060714-0001826, Bates No. BANA(Enriquez)0023 – BANA(Enriquez)0024.

3. Notice of Delinquent Assessment Lien, Instrument No. 201004010001086, Bates No. BANA(Enriquez)0025. – BANA(Enriquez)0026.

4. Notice of Default/Election To Sell Under Deed of Trust, Instrument No. 201006250003864, Bates No. BANA(Enriquez)0027 - BANA(Enriquez)0028.

5. Corporation Assignment of Deed of Trust, Instrument No. 201006300004065, Bates No. BANA(Enriquez)0029.

6. Substitution of Trustee, Instrument No. 201006300004066, Bates No. BANA(Enriquez)0030 – BANA(Enriquez)0031.

7. Notice of Default and Election to Sell Under Notice of Delinquent Assessment, Instrument No. 201007140001222, Bates No. BANA(Enriquez)0032 – BANA(Enriquez)0034.

8. Notice of Trustee's Sale, Instrument No. 201011180001542, Bates No. BANA(Enriquez)0035 – BANA(Enriquez)0036.

9. Rescission of Election to Declare Default, Instrument No. 201103300004230, Bates No. BANA(Enriquez)0037 – BANA(Enriquez)0038.

10. Notice of Default/Election to Sell Under Deed of Trust, Instrument No. 201104050002542, Bates No. BANA(Enriquez)0039 – BANA(Enriquez)0040.

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11. Notice of Default/Election to Sell Under Deed of Trust, Instrument No. 201104050002463, BANA(Enriquez)0041 – BANA(Enriquez)0042.

12. Trustee's Deed Upon Sale, Instrument No. 201104130000953, Bates No. BANA(Enriquez)0043 – BANA(Enriquez)0046.

13. Release of Lien, Instrument No. 201104200000394, Bates No. BANA(Enriquez)0047.

14. Rescission of Election to Declare Default, Instrument No. 201112220004870, Bates No. BANA(Enriquez)0048 – BANA(Enriquez)0049.

15. Certificate – Foreclosure Mediation Program, Instrument No. 201112290000315, Bates No. BANA(Enriquez)0050.

16. Notice of Trustee's Sale, Instrument No. 201112290000316, Bates No. BANA(Enriquez)0051 – BANA(Enriquez)0052.

17. Notice of Pendency of Action, Instrument No. 201201200001280, Bates Nos. BANA(Enriquez)0053 – BANA(Enriquez)0055.

18. Notice of Trustee's Sale under Deed of Trust, Instrument No. 201204120002494, Bates Nos. BANA(Enriquez)0056 – BANA(Enriquez)0057.

19. Notice of Trustee's Sale under Deed of Trust, Instrument No. 201207250002736, Bates No. BANA(Enriquez)0058 - BANA(Enriquez)0059.

20. Substitution of Trustee, Instrument No. 201311180000980, Bates No. BANA(Enriquez)0060.

21. Grant Deed, Instrument No. 20170105-0002749, Bates No. BANA(Enriquez)0061 - BANA(Enriquez)0063.

22. Grant Deed, Instrument No. 20170307-0000183, Bates Nos. BANA(Enriquez)0064 – BANA(Enriquez)0069.

23. Copies of notices related to notice of foreclosure sale from Bank of America's business records, Bates No. BANA(Enriquez)0070 - BANA(Enriquez)0086.

24. Bank of America's business records showing Fannie Mae ownership of loan, Bates No. BANA(Enriquez)0087 - BANA(Enriquez)0090.

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25. Fannie Mae Lender Letter LL-2015-04, Bates Nos. BANA(Enriquez)0000-BANA(Enriquez)0091.

26. Statement on Servicer Reliance on the Housing and Economic Recovery Act of 2008 in Foreclosures Involving Homeownership Associations from the Federal Housing Finance Agency, Bates Nos. BANA(Enriquez)0092.

27. Statement on HOA Super-Priority Lien Foreclosures from the Federal Housing Finance Agency, Bates No. BANA(Enriquez)0093.

28. Documents produced by Palo Verde Homeowners Association in response to subpoena *duces tecum*, Bates Nos. BANA(Enriquez)0094 - BANA(Enriquez)0393.

29. MERS system rules in effect at time of HOA sale, Bates Nos. BANA(Enriquez)0394 - BANA(Enriquez)0436.

30. **Promissory Note, Bates no. BANA(Enriquez)0437 through 443.**

31. **Payoff Quote, Bates no. BANA(Enriquez)0444 through BANA(Enriquez)0446.**

32. **Declaration of Graham Babin with Fannie Mae business records, Bates no. BANA(Enriquez)0447 through BANA(Enriquez)0553.**

33. **Fannie Mae MBS Processed Schedule of Mortgages, Bates no. BANA(Enriquez)0554 through BANA(Enriquez)0685.**

34. **Documents produced by Absolute Collection Services, LLC in response to subpoena *duces tecum*, Bates no. BANA(Enriquez)0686 through BANA(Enriquez)0792.**

35. **Absolute Collection Services, LLC Post-Foreclosure Timeline, Bates no. BANA(Enriquez)0793.**

36. Fannie Mae Servicing Guide, an interactive version of which is publicly available at: https://www.fanniemae.com/content/guide/servicing/index.html.[1] A static, PDF copy of the most recent version of the Servicing Guide is available at **https://www.fanniemae.com/content/guide/**

[1] There are two places to find the prior versions of the servicing guide: (1) Go to the link in the above footnote and click "Show All" on the left side of the page under "PDF Version." (2) Go to https://www.fanniemae.com/singlefamily/guides, click on "Allregs.com" on right side of page under "Fannie Mae Single-Family Guides via AllRegs."

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svc021319.pdf, and a static, PDF copy of the version of the March 2012 Servicing Guide in effect at the time of the HOA sale is available at https://www.fanniemae.com/content/guide/svc042810.pdf.

37. Fannie Mae Selling Guide, an interactive version of which is publicly available at: https://www.fanniemae.com/content/guide/selling/index.html.[2]

Upon entry of an appropriate protective order, Bank of America will produce other relevant documents that may contain personally identifiable financial information to the extent such documents exist.

C. COMPUTATION OF DAMAGES

If the Court enters an order finding that the HOA foreclosure sale extinguished the Deed of Trust, Bank of America seeks all damages proximately caused by the wrongful foreclosure of the Property include including, but not limited to, the entire principal and interest secured by the Deed of Trust and all attorneys' fees and costs pursuant to the terms of the Note and Deed of Trust, including post-judgment attorneys' fees and costs. Bank of America may also seek damages for taxes, insurance and association dues it has paid since Plaintiff acquired its interest, if any, in the Property. These damages cannot be computed until after entry of an order, if so entered, determining that the Deed of Trust was extinguished by the HOA Sale.

Bank of America also seeks any unjust enrichment of the HOA in an amount at least equal to the difference between the true super-priority portion of its lien and the amount the HOA actually recovered from the foreclosure proceeds, which can be calculated by deducting six months of assessments from the amount the HOA collected as a result of the HOA foreclosure sale. If the Court enters an order finding that the HOA foreclosure sale did not extinguish the Deed of Trust, Bank of America seeks damages for neglect and waste during the pendency of this action and also seeks to recover any rents to which Bank of America would be entitled. These amounts cannot be computed at present because they are ongoing.

...

[2] To access prior versions of the Selling Guide, go to https://www.fanniemae.com/singlefamily/guides, and click on "Allregs.com" on right side of page under "Fannie Mae Single-Family Guides via AllRegs."

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D. INSURANCE AGREEMENTS

Bank of America is not aware of any insurance agreements at this time, and specifically reserve the right to supplement this disclosure to add relevant information, if subsequent information and investigation so warrant.

DATED: March 6, 2019.

AKERMAN LLP

/s/ Jared M. Sechrist
DARREN T. BRENNER, ESQ.
Nevada Bar No. 8386
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on this 6th day of March, 2019 I caused to be served a true and correct copy of foregoing **BANK OF AMERICA, N.A.'S FIRST SUPPLEMENTAL DISCLOSURES**, in the following manner:

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

Roger P. Croteau, Esq.
Timothy E. Rhoda, Esq.
ROGER P. CROTEAU & ASSOCIATES
2810 W. Charleston Blvd., #75
Las Vegas, NV 89102

Attorneys for Las Vegas Development Group, LLC

/s/ Patricia Larsen
An employee of AKERMAN LLP

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RIS

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Email: jared.sechrist@akerman.com

Attorneys for Bank of America, N.A.

DISTRICT COURT

CLARK COUNTY, NEVADA

AIRMOTIVE INVESTMENTS, LLC, a Nevada limited liability company, Plaintiff, v. BANK OF AMERICA, N.A.; GENEVIEVE UNIZA-ENRIQUEZ; DOES 1 through 20, and ROE CORPORATIONS 1 through 20, inclusive, Defendants.	Case No.: A-12-654840-C Dept. No.: XXIII **BANK OF AMERICA, N.A.'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**
AND ALL RELATED CLAIMS.	

Defendant Bank of America, N.A. hereby files its reply in support of its motion for summary judgment.

INTRODUCTION

As discussed in Bank of America's Motion for Summary Judgment, federal law provides that while Fannie Mae is in FHFA conservatorship, none of its property "shall be subject to . . . foreclosure . . . without the consent of [FHFA]." 12 U.S.C. § 4617(j)(3) (the **Federal Foreclosure Bar**).[1] The Nevada Supreme Court and Ninth Circuit have held that the Federal Foreclosure Bar preempts the State Foreclosure Statute and protects an Enterprise's lien from extinguishment in an HOA sale. That precedent controls this case: Unrefuted evidence proves that Fannie Mae was the owner of the loan while its servicer, Bank of America, appeared as the recorded beneficiary of the

[1] This brief adopts the definitions in Bank of America's motion for summary judgment (**MSJ**).

deed of trust at the time of the HOA Sale. Consequently, the Federal Foreclosure Bar protected Fannie Mae's property interest and precluded LVDG from acquiring title to the Property free and clear of Fannie Mae's deed of trust.

In its opposition, LVDG argues that the Federal Foreclosure Bar does not apply here, claiming that (1) Fannie Mae did not own the loan under Nevada law because Bank of America, rather than Fannie Mae, was the record beneficiary of the deed of trust; (2) Bank of America submitted insufficient evidence to prove Fannie Mae's ownership interest in the loan on the date of the HOA Sale; (3) consent to the extinguishment of Fannie Mae's property can be implied; (4) LVDG is a bona fide purchaser, thereby defeating the protections of the Federal Foreclosure Bar; and (5) Bank of America's HERA-based defenses and counterclaims are time barred under the applicable statute of limitations.

These arguments are familiar and unpersuasive, and they contradict recent binding precedent from the Nevada Supreme Court confirming that Bank of America's position is correct. *Daisy Trust v. Wells Fargo Bank, N.A.*, 445 P.3d 846, 2019 WL 3366241 (Nev. 2019). *Daisy Trust* follows a series of published and unpublished Nevada Supreme Court decisions, and published Ninth Circuit decisions, that similarly held in favor of FHFA, the Enterprises, and their servicers in cases raising the same legal issues as those presented here. *See, e.g.*, *Saticoy Bay LLC Series 9641 Christine View v. Fannie Mae*, 417 P.3d 363 (Nev. 2018); *JPMorgan Chase Bank, N.A. v. Guberland LLC-Series 2*, No. 73196, 2019 WL 2339537, at *1 (Nev. May 31, 2019) (***Guberland II***); *CitiMortgage, Inc. v. TRP Fund VI, LLC*, No. 71318, 2019 WL 1245886, at *1 (Nev. Mar. 14, 2019); *FHFA v. SFR Invs. Pool 1*, 893 F.3d 1136 (9th Cir. 2018), *cert. denied*, No. 18-670, 2019 WL 1886041 (U.S. Apr. 29, 2019); *Berezovsky v. Moniz*, 869 F.3d 923 (9th Cir. 2017). This Court should follow these authorities and find that Fannie Mae's deed of trust continues to encumber the Property. Accordingly, this Court should grant summary judgment in Bank of America's favor.

LEGAL ARGUMENT

I. Nevada Law Recognizes Fannie Mae's Property Interest

LVDG argues that Fannie Mae lacked an "enforceable property interest" because Bank of America was beneficiary of record of the deed of trust at the time of the HOA Sale. *See, e.g.*, Opp.

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16. But the Nevada Supreme Court and the Ninth Circuit have repeatedly held that under Nevada law, a loan owner maintains a secured property interest when its contractually authorized representative is record beneficiary of the associated deed of trust. *See, e.g.*, *In re Montierth*, 354 P.3d 648 (Nev. 2015) (en banc) (relying on Restatement (Third) of Property: Mortgages § 5.4 (1997) (**Restatement**)); *Daisy Trust*, 2019 WL 3366241, at *3; *Berezovsky*, 869 F.3d at 932. It makes no difference that Bank of America, rather than Fannie Mae, was record beneficiary of the deed of trust: the deed of trust and all assignments *were recorded* properly under Nevada law and Nevada Supreme Court precedent.

A. *Daisy Trust* and *Montierth* Control the Question of Fannie Mae's Property Interest

The Nevada Supreme Court held in *Montierth*—and reaffirmed in the context of the Enterprises and their servicers in *Daisy Trust*—that when a loan owner has an agency or contractual relationship with the record beneficiary of a deed of trust, the loan owner maintains a secured property interest. *See Montierth*, 354 P.3d at 650-51; *Daisy Trust*, 2019 WL 3366241, at *3; *see also Guberland II*, 2019 WL 2339537, at *1. Following *Montierth*, the Nevada Supreme Court has held in almost a dozen cases that the owner of a loan maintains its property interest where its contractually authorized representative serves as record beneficiary of the associated deed of trust.

Most recently, the Nevada Supreme Court reaffirmed in a published decision that under *Montierth*, "even though a promissory note and accompanying deed of trust may be 'split,' the note nevertheless remains fully secured by the deed of trust when the record deed of trust beneficiary is in an agency relationship with the note holder." *Daisy Trust*, 2019 WL 3366241, at *3. And in *Guberland II*, the court reiterated that where there is a contractual relationship between the beneficiary of the deed of trust and the loan holder, "the loan holder maintains secured status under the deed of trust even when not named as the deed's record beneficiary." 2019 WL 2339537, at *1. In *Noonan*, the Nevada Supreme Court cited *Montierth* for the proposition that "it is an acceptable practice for a loan servicer to serve as the beneficiary of record for the actual deed of trust beneficiary." *Noonan v. Bayview Loan Servicing, LLC*, No. 73665, 74525, 2019 WL 1552690, at *2 (Nev. Apr. 8, 2019) (unpublished disposition).

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In short, the Nevada Supreme Court has repeatedly held that a loan owner "need not be the beneficiary of record on a deed of trust so long as it has a principal-agent relationship with the named beneficiary." *Wild Calla*, 2019 WL 1423107, at *1; *see also, e.g.*, *Nationstar Mortg., LLC v. Guberland LLC-Series 3* (*Guberland I*), No. 70546, 2018 WL 3025919, at *2 (Nev. June 15, 2018) (unpublished disposition) (recognizing that "the note holder retains a secured interest where the mortgage holder has authority to foreclose on behalf of the note holder"); *CitiMortgage, Inc. v. TRP Fund VI, LLC*, No. 71318, 2019 WL 1245886, at *1 (Nev. Mar. 14, 2019) (unpublished disposition) (stating that "the record beneficiary need not be the actual owner of the loan"); *CitiMortgage v. SFR*, 2019 WL 289690 at *2 (confirming that "[a servicer's] status as the recorded deed-of-trust beneficiary does not create a question of material fact regarding whether [the Enterprise] owns the subject loan").

The Ninth Circuit has also applied *Montierth* to protect a loan owner's property interest when the owner's servicer is record beneficiary of the deed of trust. In *Berezovsky*, the court held that Freddie Mac's property interest "is valid and enforceable under Nevada law," though "the recorded deed of trust … omitted Freddie Mac's name." 869 F.3d at 932; *see also, e.g.*, *FHFA v. SFR*, 893 F.3d at 1149 ("Nor did the absence of the Enterprises' names in the mortgage loans' local recording documents at the time of the HOA sales undercut the Enterprises' interests."). Accordingly, under *Montierth* and the Nevada Supreme Court's decisions applying *Montierth*, ownership of the Note and deed of trust was transferred to Fannie Mae when it purchased the loan in August 2006, and Fannie Mae maintained ownership of the loan at the time of the April 11, 2011 HOA Sale.

LVDG contends that *Montierth* does not provide controlling law because *Montierth* focused only on the relationship between a borrower and lender and not third parties. Opp. at 24-27. But the Nevada Supreme Court has foreclosed any attempt to distinguish *Montierth* by applying it directly to synonymous facts in a published decision, *Daisy Trust*. 2019 WL 3366241, at *3. In that case, the Nevada Supreme Court confirmed that there was no requirement for "[an Enterprise] to publicly record its ownership interest," and that such a holding was "consistent with … *Montierth*." *Daisy Trust*, 2019 WL 3366241, at *3.

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LVDG also cites *Edelstein* and *Leyva* to support its assertion that Fannie Mae's name needs to appear in the public record to have an interest in the deed of trust, but these cases do not contradict Bank of America's interpretation, or the Nevada Supreme Court's recent application, of *Montierth*. Opp. at 20-22, 28 (citing *Edelstein v. Bank of New York Mellon*, 286 P.3d 249, 259-61 (Nev. 2012) and *Leyva v. Nat'l Default Servicing Corp.*, 255 P.3d 1275, 1279 (Nev. 2011)). Rather, *Edelstein*, *Leyva*, and *Montierth* fit neatly into a simple taxonomy that applies the same governing law to differing fact patterns where the loan owner and record deed-of-trust beneficiary have different types of relationships, or a lack thereof. But as *Daisy Trust* confirms, it is *Montierth* that applies here, where a loan servicer, authorized by the loan owner to perform tasks on its behalf, is the record beneficiary. *Daisy Trust*, 2019 WL 3366241, at *3.

Furthermore, LVDG's claim that Fannie Mae's ownership interest is contrary to Nevada's recording statutes misunderstands those statutes. Opp. at 18-21. Nothing in Nevada's recording law requires recording of changes in ownership of a loan in order for the purchaser to have a legal property interest. *See Daisy Trust*, 2019 WL 3366241, at *3; *Guberland Series 2*, 2019 WL 2339537, at *2.

B. LVDG Cannot Rely on the Statute of Frauds

LVDG implies that Fannie Mae's property interest does not comply with Nevada's statute of frauds. *See* Opp. at 19-20. But the statute of frauds applies only "where there is a definite possibility of fraud," and there is none here. *See Azevedo v. Minister*, 471 P.2d 661, 663 (Nev. 1970). No one other than Fannie Mae claims to own the loan.

Furthermore, LVDG lacks standing to raise a statute-of-frauds defense because it was not party to Fannie Mae's purchase of the loan. It is well established that "[o]nly parties to a contract and their transferees and successors can take advantage of the Statute of Frauds," Restatement of (Second) of Contracts § 144 (2019 Update). The Nevada Supreme Court has confirmed that "[t]he defense of the statute of frauds is personal, and available only to contracting parties or their successors in interest." *Harmon v. Tanner Motor Tours of Nev., Ltd.*, 377 P.2d 622, 628 (Nev. 1963); *see also Easton Bus. Opportunities, Inc. v. Town Exec. Suites*, 230 P.3d 827, 832 n.4 (Nev. 2010) (declining to apply statute of frauds *sua sponte* because obligor of assigned right was not party

to the agreement); *In re Circle K Corp.*, 127 F.3d 904, 908 (9th Cir. 1997). In *Harmon*, the Nevada Supreme Court held that a "stranger to [an] alleged agreement" could not challenge the legal sufficiency of the writings purportedly making up that agreement. *Id.*

Nothing in NRS 111.205 suggests that the legislature intended to negate those principles as to transfers involving an "estate or interest in land." LVDG cannot try to invalidate the transaction on statute-of-frauds grounds because it was not a party to the transaction. *See, e.g.*, *Wells Fargo Bank, N.A. v. Pine Barrens Street Trust*, No. 2:17-cv-1517-RFB-VCF, 2019 WL 1446951, at *6 (D. Nev. Mar. 31, 2019) ("Because Pine Barrens was not a party to the sale of the loan to Fannie Mae, it cannot assert a defense based on the statute of frauds."); *Ditech Fin., LLC v. Vegas Prop. Servs., Inc.*, No. 2:17-cv-3050-RFB-NJK, 2019 WL 1428685, at *4 (D. Nev. Mar. 30, 2019) (similar).

LVDG also is independently barred from invoking the statute of frauds because the writing requirement does not apply to transactions that have been fully performed by at least one party. *See* NRS 104.2201(3)(c); *accord Forsythe v. Brown*, No. 3:10-cv-716, 2011 WL 5190673 (D. Nev. Oct. 27, 2011); *Edwards Indus., Inc. v. DTE/BTE, Inc.*, 923 P.2d 569, 574 (Nev. 1996); *Azevedo*, 471 P.2d at 664; *Micheletti v. Fugitt*, 134 P.2d 99, 103 (Nev. 1943). The reason is simple: the statute of frauds is meant to ensure that the parties intended a transaction to close; the transaction's actual closing establishes that intention conclusively. Allowing the statute of frauds to operate as a defense when one party has partially or fully performed would in effect turn the doctrine into "an instrument of fraud." *Evans v. Lee*, 12 Nev. 393, 398 (1877). Fannie Mae's acquisition of the loan closed long ago.

II. Undisputed Evidence Establishes That Fannie Mae Had a Property Interest at the Time of the HOA Sale

A. The Evidence Establishes Fannie Mae's Interest in the Property

LVDG's contention that Bank of America has provided "no admissible evidence" of Fannie Mae's ownership of the loan and the existence of a servicing relationship between Fannie Mae and Bank of America is wrong. *See, e.g.*, Opp. at 9. The Nevada Supreme Court's decision in *Daisy Trust* confirms that a proffer of similar evidence to that submitted here—business records, an employee declaration, and relevant Guide provisions—"sufficiently demonstrated that [the

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Enterprise] owned the loan on the date of the foreclosure sale." *Daisy Trust*, 2019 WL 3366241, at *5. And a few months earlier, in *Wild Calla*, the Nevada Supreme Court reversed a district court decision awarding summary judgment to an HOA sale purchaser and held that the Federal Foreclosure Bar applied to protect Freddie Mac's property interest, concluding that "Freddie Mac presented evidence of its ownership and relationship with M&T Bank and MERS" through "an employee affidavit" and "internal database printouts." 2019 WL 1423107, at *1.

Likewise, in *CitiMortgage v. SFR*, the Nevada Supreme Court agreed that evidence similar to that proffered here—"deposition testimony of Freddie Mac's NRCP 30(b)(6) witness, affidavit, and relied-upon business records"—established Freddie Mac's ownership of the loan and that CitiMortgage "[was] Fannie Mae's loan servicer" with standing to assert the Federal Foreclosure Bar. *CitiMortgage, Inc. v. SFR*, 2019 WL 289690 at *1-2 & n.1. The business records and declaration testimony proffered here likewise prove Fannie Mae's property interest and Bank of America's role as servicer of the loan.

Several Ninth Circuit decisions similarly hold that an Enterprise's business records, supported by a declaration from a qualified employee, provide sufficient evidence to establish the Enterprise's property interest under Nevada law. *See, e.g., Berezovsky*, 869 F.3d at 932-33 & n.8 (Freddie Mac's "database printouts" were "admissible business records" sufficient to support a "valid and enforceable" property interest under Nevada law); *Elmer v. JPMorgan Chase & Co.*, 707 F. App'x 426, 428 (9th Cir. 2017) (holding that employee declaration and business record printouts were "reliable and uncontroverted evidence of Freddie Mac's interest in the property on the date of the foreclosure").

Bank of America has produced records from Fannie Mae's Servicer & Investor Reporting (SIR) platform, which "contains information regarding mortgage loans acquired and owned by Fannie Mae" and is "kept in the course of Fannie Mae's regularly conducted business activity." MSJ Exhibit B. The records show that the "acquisition date" of the loan was August 1, 2006, and that Fannie Mae maintained ownership of the loan through the present date. *See id.* The records also show that Bank of America serviced the loan on Fannie Mae's behalf at the time of the HOA Sale and continued to service the loan today. *Id.* The submitted business records are "reliable and

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uncontroverted evidence of [the Enterprise]'s interest in the property on the date of the foreclosure." *Elmer*, 707 F. App'x at 428; *see Daisy Trust*, 2019 WL 3366241, at *4-5. Accordingly, the evidence is more than sufficient to establish Fannie Mae's ownership of the loan and its contractual relationship with Bank of America, its loan servicer.

B. LVDG's Challenges to the Evidence Fail

Unable to present any evidence to create a genuine issue of material fact, LVDG instead argues that Bank of America's evidence is insufficient or inadmissible for several reasons, each of which lacks merit. *See, e.g.*, Opp. at 13-14, 16-18.

LVDG claims that the publicly recorded documents, specifically, the assignments of the deed of trust to Bank of America and later Fannie Mae, "contradict[]" the business records demonstrating that Fannie Mae owned the loan. Opp. at 13-14, 16. But as explained above, under Nevada law, the fact that Bank of America appeared as beneficiary of record at the time of the HOA Sale does not negate or undercut Fannie Mae's ownership interest. *Daisy Trust*, 2019 WL 3366241, at *3-4; *Berezovsky*, 869 F.3d at 932 ("Although the recorded deed of trust here omitted Freddie Mac's name, Freddie Mac's property interest is valid and enforceable under Nevada law."); *CitiMortgage v. SFR*, 2019 WL 289690, at *2 (holding that a servicer's "status as the recorded deed of trust beneficiary does not create a question of material fact regarding whether Fannie Mae owns the subject loan"). The assignment of the deed of trust from MERS to Bank of America is entirely consistent with Bank of America appearing as the record beneficiary of the deed of trust in its capacity as Fannie Mae's servicer, not as owner of the loan.

Indeed, LVDG's argument ignores the plain language of the assignment. The assignment says nothing about transferring ownership of the loan. Rather, it states that it is transferring the "beneficial interest" of the deed of trust. *See* Opp. at 14 (citing assignment). That transfer of the beneficial interest under the deed of trust originally in the name of MERS does not contradict Fannie Mae's ownership of the deed of trust. MERS remained as beneficiary of the deed of trust "solely as nominee for Lender and Lender's successors and assigns," including the Lender's successor as owner, Fannie Mae. *See id.* Thus, MERS had only a beneficial interest in the deed of trust to transfer to Bank of America.

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The principle of *nemo dat quod non habet—i.e.*, one cannot give what one does not have—confirms that the use of assignment language could not enlarge the property rights MERS had and could transfer to Bank of America. *See Mitchell v. Hawley*, 83 U.S. 544, 550 (1872). Indeed, an "assignee stands in the shoes of the assignor and ordinarily obtains only the rights possessed by the assignor at the time of the assignment, and no more." 6A C.J.S. Assignments § 111; *see also* 55 Am. Jur. 2d Mortgages § 944 (An "assignee of a mortgagee's interest in a mortgage gains only the rights the assignor had at the time of the assignment."). The language thus must be read in conjunction with these principles of assignment law and in the context of the Fannie Mae-Bank of America contractual relationship. The assignment transferred only a limited interest in the deed of trust between the beneficiaries of record. The assignment could not and did not transfer ownership of the note or the deed of trust because the Lender conveyed that interest to Fannie Mae in 2006.

LVDG next alleges that Fannie Mae's employee declaration is "self-serving" and not probative of Fannie Mae's ownership interest. Opp. at 13, 16. LVDG provides no basis for its assertion that the declaration is "self-serving," and the claim is flatly contradicted by the fact that the declaration seeks only to introduce evidence from Fannie Mae's business records, which Fannie Mae maintains and uses in its regular course of business of owning millions of loans. *See* MSJ Exhibit B. Indeed, courts routinely dismiss challenges to database records of financial institutions as evidence of facts about the loans they own or service. *See, e.g., Curley v. Wells Fargo & Co.*, No. 13-CV-03805 NC, 2015 WL 4623658, at *4 (N.D. Cal. July 31, 2015) (finding admissible testimony from a bank employee supported by the bank's business records); *Bever v. Cal-W. Reconveyance Corp.*, No. 1:11-CV-1584 AWI SKO, 2014 WL 5500940, at *7 (E.D. Cal. Oct. 30, 2014) (same).

Similarly, LVDG posits that, because the business records are dated January 2019, they are not probative of the interest Fannie Mae possessed at the time of the HOA Sale in April 2011. Opp. at 16. LVDG seems to suggest that these business records were prepared for litigation, and thus are not admissible business records. This argument is groundless. A business record may include data prepared in the ordinary course of business and later printed out for presentation in court. *See e.g., U-Haul, Int'l, Inc. v. Lumbermens Mut. Cas. Co.*, 576 F.3d 1040, 1043-44 (9th Cir. 2009). The fact that business database records "were printed out . . . for purposes of this litigation does not impact

the admissibility [of those records]." *Gen. Ins. Co. of Am. v. United States Fire Ins. Co.*, 886 F.3d 346, 349 (4th Cir. 2018). "[S]o long as the original computer data compilation was prepared pursuant to a business duty in accordance with regular business practice, the fact that the hard copy offered as evidence was printed for purposes of litigation does not affect its admissibility." *United States v. Hernandez*, 913 F.2d 1506, 1512-13 (10th Cir. 1990). That is exactly what was done here—indeed, the Nevada Supreme Court cited *U-Haul* in confirming that materially identical business records from Freddie Mac were admissible evidence of loan ownership. *Daisy Trust*, 2019 WL 3366241, at *4-5; *see also Berezovsky*, 869 F.3d. at 932 n.8.

III. Bank of America Timely Disclosed its Evidence.

LVDG's argument that Bank of America failed to timely disclose evidence that supports its Federal Foreclosure Bar defense is disingenuous and rings hollow in light of the fact that LVDG agreed to reopen discovery. LVGD concedes that Bank of America's disclosures were made on March 6, 2019 – the date that discovery closed. This is timely under Nevada law. LVDG had every opportunity to conduct discovery on Bank of America's Federal Foreclosure Bar defense and failed to do so.

Bank of America asserted the Federal Foreclosure Bar defense in its Answer to LVDG's Second Amended Complaint, which was filed on March 26, 2015. Bank of America disclosed Fannie Mae as a witness in its initial disclosures, and disclosed its own screenshots "showing Fannie Mae's ownership" of the loan. Also with its initial disclosures, Bank of America disclosed a copy of Fannie Mae's lending letter that instructed its servicers to assert the Federal Foreclose Bar defense on its behalf, multiple statements from FHFA relating to the Federal Foreclosure Bar, and a link to Fannie Mae's servicing guide. If LVDG wanted further evidence of Fannie Mae's ownership months, or even years, prior to the close of discovery, it had ample opportunity to make such a request. However, LVDG served no discovery requests and noticed no depositions. Bank of America cannot be blamed for LVDG's failure to conduct any discovery whatsoever. In accordance with the deadline set by this Court – and agreed to be the parties – Bank of America timely disclosed the evidence upon which it intended to rely in its Motion for Summary Judgment. LVDG provides no legal basis to deny summary judgment to Bank of America on the basis that timely disclosures

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were made. The Court should disregard this argument and hold the proper party – LVDG – responsible for its own failure to conduct discovery in the four years since Bank of America first asserted the Federal Foreclosure Bar as a defense.

IV. FHFA Did Not Consent to the Extinguishment of the Deed of Trust

LVDG argues that FHFA implicitly consented to the extinguishment of Fannie Mae's interest because Fannie Mae's guidelines instruct its servicers to protect the priority of liens against HOA sales and has developed no procedures for a party like LVDG to obtain consent. Opp. at 21-24. LVDG's arguments fail as a matter of law.

LVDG's arguments fail, first, because FHFA's consent cannot be implied. As the Nevada Supreme Court held in interpreting the statute, "[t]he Federal Foreclosure Bar cloaks the FHFA's 'property with Congressional protection unless or until [the FHFA] affirmatively relinquishes it.' … In other words, 'the Federal Foreclosure Bar does not require [the FHFA] to actively resist foreclosure.'" *Christine View*, 417 P.3d at 368 (quoting *Berezovsky*, 869 F.3d at 929). Indeed, any silence or inaction on the part of FHFA "may be attributed to their knowledge that FHFA's interests cannot be foreclosed without its consent, rather than as an indicator that they consented to the extinguishment of FHFA's interests." *Opportunity Homes, LLC v. Freddie Mac*, 169 F. Supp. 3d 1073, 1077 (D. Nev. 2016).

LVDG does not offer evidence that it ever sought, much less obtained, FHFA's consent to the extinguishment of Fannie Mae's property interest. Moreover, FHFA has publicly announced that it "has not consented, and will not consent in the future, to the foreclosure or other extinguishment of any Fannie Mae or Freddie Mac lien or other property interest in connection with HOA foreclosures of super-priority liens." MSJ Exhibit K.

LVDG cites the provisions of Fannie Mae's Guide and servicing bulletins to argue that, because Fannie Mae's publications acknowledge that HOA liens may take priority over Fannie Mae's lien interests, Fannie Mae has consented to extinguishment of its liens. *See* Opp. at 22-23. But this compares apples to oranges. While these provisions direct servicers to pay a limited amount of unpaid assessments if such payment is necessary to protect the priority of Fannie Mae's mortgage lien, they do not contemplate extinguishment of the lien. So LVDG's argument confuses a *loss of*

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priority—which is discussed in the Guide—with *extinguishment*—which is not. The Federal Foreclosure Bar does not prevent a limited portion of an HOA's lien from taking a superpriority position under Nevada law; it simply prevents the foreclosure on that lien from extinguishing an Enterprise deed of trust. Accordingly, it is consistent for Fannie Mae to direct its servicers in its Guide to try to protect the *priority* of its liens when possible, while the Federal Foreclosure Bar protects those liens from *extinguishment*. Thus, the cited provision never suggests that Fannie Mae's interest can be extinguished without FHFA's affirmative consent.

Even if these provisions concerned extinguishment, LVDG's argument would confuse the relationship between the Guide and the Federal Foreclosure Bar. The Guide, which embodies Fannie Mae's instructions to servicers, applies whether Fannie Mae is in conservatorship or not. The Federal Foreclosure Bar, by contrast, applies only for the duration of conservatorship (or receivership). Thus, the Guide may include instructions to servicers that only would be necessary should the statutory protection not be in effect.

LVDG's argument that consent should be implied because it is "impossible for the homeowners association to seek or obtain consent from FHFA," Opp. at 23, also fails. First, no one argues that *the HOA* must obtain FHFA's consent to foreclose; the borrower's title interest is not property of the Enterprises and so the HOA may foreclose on its lien and pass title on to a third party purchaser, like LVDG. Second, it is incorrect that LVDG had no way to seek consent. FHFA is a public agency with easily discoverable contact information; LVDG could have contacted FHFA to request consent. LVDG's problem is that it never made the inquiry.

V. LVDG Is Not a Bona Fide Purchaser, But Even If It Were, the Federal Foreclosure Bar Still Applies

LVDG contends that its status as a bona fide purchaser protects it from any claim based on Fannie Mae's interest in the Property. Opp. at 23-24. LVDG has produced no evidence to support a finding that it is a bona fide purchaser. Under Nevada law, it bears the burden to prove its affirmative defense that it was a bona fide purchaser. Nev. Rev. Stat. § 111.325; *see also Berge v. Fredericks*, 95 Nev. 183, 185, 591 P.2d 246, 248 (1979) (explaining that the putative bona fide purchaser "was required to show that legal title had been transferred to her before she had notice of

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the prior conveyance to appellant"). In fact, the Nevada Supreme Court has confirmed in several HOA-sale cases that it is the HOA-sale purchaser's burden to show it is a bona fide purchaser. *See Bank of America, N.A. v. Ferrell Street Trust*, 2018 WL 2021560, at *1 (Nev. Apr. 27, 2018) (unpublished) (citing Bailey v. Butner, 64 Nev. 1, 7, 176 P.2d 226, 229 (1947) ("[The right to protection as a bona fide purchaser is ordinarily regarded as an affirmative defense[.]")); *Telegraph Rd. Trust v. Bank of America, N.A.*, 383 P.3d 754 (Table), 2016 WL 5400134 (Nev. Sep. 16, 2016) (unpublished); *see also ALP-Ampus Place, LLC v. U.S. Bank, N.A.*, 408 P.3d 557 (Table), 2017 WL 6597148, at *1 (Nev. Dec. 22, 2017) (unpublished) ("[A] putative BFP must introduce some evidence to support its BFP status beyond simply claiming that status."). As stated above, LVDG offers no evidence in support of its assertion that it is an innocent third party purchaser, apart from blanket assertions that it purchased the Property in good faith.

Even so, the Nevada Supreme Court has rejected this argument; in *Daisy Trust*, the Court held that it need not even address the bona fide purchaser argument in light of its holding that a loan owner's interest need not be recorded in its own name. 2019 WL 3366241, at *3. In any event, not only is LVDG *not* a bona fide purchaser, but if state law were reinterpreted to make it one, the state bona fide purchaser laws would be preempted by the Federal Foreclosure Bar.

First, LVDG was not a bona fide purchaser because it had "actual knowledge, constructive notice of, or reasonable cause to know that there exists . . . adverse rights, title, or interest to, the real property." NRS 111.180. It is immaterial whether the statute renders an *unrecorded* deed of trust invalid against a subsequent bona fide purchaser—the deed of trust embodying Fannie Mae's interest was recorded at the time of the HOA Sale. As the Nevada Supreme Court recently recognized, because "Nevada law does not require the deed of trust to name the note owner," so long as the deed of trust is recorded in conformance with NRS 106.210, the HOA Sale purchaser "ha[s] notice of the deed of trust and is not a bona fide purchaser." *Guberland II*, 2019 WL 2339537, at *2. It similarly held in *Daisy Trust* that NRS 111.325, which provides that "[e]very conveyance of real property within this State ... which shall not be recorded ... shall be void as against any subsequent purchaser, in good faith and for a valuable consideration" is not implicated by ownership interests like Fannie Mae's. *See* 2019 WL 3366241, at *3.

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Moreover, the deed of trust stated that the note, along with the deed of trust, "can be sold one or more times without prior notice to Borrower." *See* ECF No. 144-1. In fact, the face of the deed of trust also identifies it as a "NEVADA-Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT," indicating that an Enterprise might have an interest in the deed of trust. *Id.* This language on the face of the deed of trust is "some record notice that the loan might be sold to Fannie Mae." *Nationstar Mortg. LLC v. Tow Props., LLC II,* No. 2:17-cv-01770-APG-VCF, 2018 WL 2014064, at *6 (D. Nev. April 27, 2018)). In addition, the original beneficiary of the deed of trust was MERS, who appeared as nominee on behalf of the original lender *and the lender's successors and assigns*. Thus, LVDG was on notice that other parties might have an interest.

Second, even if Nevada's bona fide purchaser statutes were read to protect LVDG from Fannie Mae's property interest because Fannie Mae's servicer appeared as the deed of trust's record beneficiary, the Federal Foreclosure Bar would preempt the bona fide purchaser statutes. *JPMorgan Chase Bank, N.A. v. GDS Fin. Servs.*, No. 2:17-cv-02451-APG-PAL, 2018 WL 2023123, at *3 (D. Nev. May 1, 2018); *U.S. Bank Home Mortg. v. Jensen*, No. 3:17-cv-0603-MMD-VPC, 2018 WL 3078753, at *2 (D. Nev. June 20, 2018). The Nevada Supreme Court has addressed this point, recognizing that "authority suggest[s] that the Federal Foreclosure Bar would preempt Nevada's law on bona fide purchasers." *Guberland I*, 2018 WL 3025919, at *2 n.3 (citing *GDS Fin. Servs.*, 2018 WL 2023123, at *3).

Indeed, the conflict between the Federal Foreclosure Bar and the bona fide purchaser statutes, as LVDG would interpret them, is obvious. The Federal Foreclosure Bar automatically bars any nonconsensual extinguishment through foreclosure of any interest in property held by Fannie Mae while in conservatorship. LVDG's interpretation would allow state HOA lien sales to extinguish Fannie Mae's property interests whenever the associated deed of trust appeared in the name of Fannie Mae's nominee or servicer, an arrangement otherwise permitted under Nevada law. Federal law thus precludes what state law would permit: extinguishment of Fannie Mae's deed of trust. *See Crocus Hill*, 2019 WL 2425669, at *5.

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VI. Bank of America's Invocation of the Federal Foreclosure Bar Is Timely

LVDG also suggests that Bank of America's defenses and counterclaims invoking the Federal Foreclosure Bar are untimely because they were filed in March 2015, more than three years, but less than four, after the HOA Sale in April 2011. *See* Opp. at 15. According to LVDG, the applicable statute of limitations is Nevada's three-years, under NRS 11.190. However, Bank of America's invocation of the Federal Foreclosure Bar is subject to *at least* a four-year limitations period, if a limitations period applies at all, and is therefore timely.

A. Bank of America's HERA-Based *Defenses* Are Not Subject to a Limitations Period

As an initial matter, Bank of America's invocation of the Federal Foreclosure Bar as a defense to LVDG's claims is not subject to a limitations period. It is axiomatic that claims are subject to limitations periods; legal theories are not. *See* 54 C.J.S. Limitations of Actions § 2 ("A statute of limitations fixes a time beyond which the courts generally cannot entertain a cause of action" and are "aimed at lawsuits, not at the consideration of particular issues in lawsuits."). The Nevada Supreme Court has recognized that a HERA-based defense to a quiet title claim by an HOA sale purchaser, as LVDG has asserted here, is not itself a standalone claim. In *Nationstar Mortgage, LLC v. SFR Investments Pool 1, LLC*, 396 P.3d 754, 757-58 (Nev. 2017), the court recognized that Nationstar was "not attempting to use the Supremacy Clause to assert a cause of action against [the purchaser]," but rather "merely argued that Freddie Mac's property is not subject to foreclosure while it is in conservatorship under federal law." Accordingly, Bank of America's invocation of the Federal Foreclosure Bar as a defense to LVDG's claims relates back to the filing of LVDG's complaint. If LVDG's complaint was timely (and it was), then so, too, are Bank of America's defenses.

B. If Any Statute of Limitations Applies, It Is HERA's Six-Year Period

Were a limitations period to apply, Bank of America's defenses and quiet title counterclaim are timely under 12 U.S.C. § 4617(b)(12)(A) six-year statute of limitations:

> [T]he applicable statute of limitations with regard to any action *brought by the Agency as conservator or receiver* shall be—
>
> (i) in the case of any contract claim, the longer of—
>
> (I) the 6-year period beginning on the date on which the claim accrues; or

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(II) the period applicable under State law; and

(ii) in the case of any tort claim, the longer of—

(I) the 3-year period beginning on the date on which the claim accrues; or

(II) the period applicable under State law.

12 U.S.C. § 4617(b)(12)(A) (emphasis added). FHFA need not be a party for this limitations period to apply. Courts routinely apply the statute and the companion statute applicable to FDIC receiverships to claims in which another party asserts a statutory protection that attached to property of the conservatorship or receivership. *See, e.g.*, *United States v. Thornburg*, 82 F.3d 886, 890 (9th Cir. 1996) (holding that an assignee of the federal government could invoke an identical six-year statute of limitations provision under 28 U.S.C. § 2415(a)); *FDIC v. Bledsoe*, 989 F.2d 805, 811 (5th Cir. 1993) ("assignees of the FDIC . . . are entitled to the same six year period of limitations as the FDIC [under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989]).

HERA's statute of limitations provision recognizes only two categories of claims—contract claims and tort claims. While LVDG posits that the statute is inapplicable because quiet-title claims do not fit squarely into either category, Opp. at 15, that argument has been rejected by numerous courts. The Second Circuit, for example, citing Section 4617(b)(12)'s broad language, has held that "Congress intended to prescribe *comprehensive* time limitations for '*any action*' that the Agency might bring as conservator." *See FHFA v. UBS Americas Inc.*, 712 F.3d 136, 143, 144 (2d Cir. 2013) (emphases in original). Accordingly, courts must determine whether any claim brought by the Conservator is best classified as arising in contract or in tort. *See In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, 900 F. Supp. 2d 1055, 1067-68 (C.D. Cal. 2012).

While a quiet-title claim generally does not fit neatly into the "contract" or "tort" category, Bank of America's quiet-title claim fits more naturally into HERA's contract category because it seeks to validate a contractually created interest in the property.[2] LVDG argues that the six-year period ought not apply here because Bank of America's claims seek declaratory relief and are based on statute, Opp. at 15, but that argument misses the mark. The mortgage lien here "is an interest in property created by contract," which secures the grantor's contractual obligation to repay the amount

[2] Bank of America is not aware of any federal or state case law that classifies a quiet-title claim as a subcategory of either tort or contract claims. To the contrary, several courts have expressly distinguished between these three categories of claims. *See Heyman v. Kline*, 344 F. Supp. 1081, 1086 (D. Conn. 1970).

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owed. *Smith v. FDIC*, 61 F.3d 1552, 1561 (11th Cir. 1995). Although this action to protect the deed of trust is not one to enforce the contract directly, it arises from the same contractual relationship and obligations. Fannie Mae and FHFA's counterclaims and defenses are thus grounded in the contractual relationship between the borrower and the lender when creating the loan. Fannie Mae succeeded to the lender's interests when it purchased the loan in August 2006. "Indeed, because a mortgage lien is an interest in property created by contract" an action to determine whether the lien survives an HOA Sale "is clearly a contract action." *Smith*, 61 F.3d at 1561.

Therefore, FHFA and Fannie Mae's invocation of the Federal Foreclosure Bar is subject to the six-year statute of limitations for contract claims in Section 4617(b)(12)(A). Since the HOA Sale took place in April 2011, and Fannie Mae filed its quiet title counterclaim in March 2015, the defenses and counterclaims are timely.

Moreover, even if the Court determines that FHFA and Fannie Mae's quiet-title counterclaim cannot be squarely classified as either a tort or contract claim, it is federal policy for the longer statute of limitations to apply in the event of ambiguity in a federal statute such as HERA. As the Ninth Circuit has explained, "[w]hen choosing between multiple potentially-applicable statutes, *as a matter of federal policy the longer statute of limitations should apply*." *Wise v. Verizon Commc'ns, Inc.*, 600 F.3d 1180, 1187 n.2 (9th Cir. 2010) (noting that federal policy should determine which state statute of limitations applied to an ERISA benefits claim) (emphasis added); *accord FDIC v. Former Officers & Directors of Metro. Bank*, 884 F.2d 1304, 1307 (9th Cir. 1989) (where there is a "'substantial question' which of two conflicting statutes of limitation to apply, the court should apply the longer" (citation omitted)).[3] The Court should do so here.

…

…

…

[3] The *FDIC* court evaluated the very similar statute of limitations extender provided to the FDIC in its capacity as a government agency. The Ninth Circuit determined that there was a substantial question in characterizing the FDIC's breach of fiduciary duty claims as either tort or contract. *Id.* Accordingly, it applied the rule that the longer period should apply. *Id; see also In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, 900 F. Supp. 2d 1055, 1066 (C.D. Cal. 2012) (holding that "ambiguous statutes of limitation are to be interpreted in [FHFA's] favor" (citing *FDIC v. Former Officers and Dirs. Of Metro. Bank*, 884 F.2d 1304, 1309 (9th Cir. 1989)).

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C. At Minimum, the Limitations Period Would Be Five or Four Years

Even if this Court finds that FHFA and Fannie Mae's defenses and claims are more akin to a tort claim, and that there is no ambiguity that would counsel towards selecting the longer limitations period, then the claim is still timely. The HERA provision regarding tort claims requires that "the longer of" the three-year period *or* the relevant period under state law applies. 12 U.S.C. § 4617(b)(12)(A)(ii). FHFA and Fannie Mae's quiet-title counterclaim and defenses would be subject to a five-year period under NRS 11.070 or 11.080 or a four-year period under NRS 11.220.

The five-year period of NRS 11.070 applies to claims or defenses "*founded upon the title* to real property," where "*the person prosecuting the action* or making the defense, *or* under whose title the action is prosecuted or the defense is made, *or the … grantor of such person,* was seized or possessed of the premises in question." NRS 11.070 (emphases added). Here, the defenses and counterclaims readily satisfy each of the two statutory requirements.

First, they are "founded upon … title." For example, FHFA and Fannie Mae's counterclaim is denominated quiet *title*. And that reflects the substance of the dispute, which is whether the HOA conveyed clear *title* to the buyer, or whether Fannie Mae's deed of trust continued to encumber the buyer's *title*.[4] Thus, courts routinely apply NRS 11.070 to quiet-title claims brought by lienholders seeking to confirm the validity of their security interest. *See Bank of New York Mellon Trust Co., N.A. v. Jentz*, No. 2:15-cv-1167-RCJ-CWH, 2016 WL 4487841, at *2-3 (D. Nev. Aug. 24, 2016).[5]

Second, Fannie Mae's "grantor" is the former homeowner/borrower—a person who was unquestionably "seized or possessed of the premises" at the time of the HOA Sale. *See* NRS 107.410 ("'Borrower' means a natural person who is a mortgagor or *grantor of a deed of trust under a residential mortgage loan.*") (emphasis added). There is no dispute that here, the borrower on the note and grantor of the deed of trust which Fannie Mae owns—had possession of the Property up

[4] Nevada's Supreme Court has described deeds of trust as "encumbering … title." *Philip v. EMC Mortg. Corp.*, 381 P.3d 650 (Nev. 2012) (unpublished).

[5] *See also Wells Fargo Bank, N.A. v. United States*, No. 2:10-cv-1546-JCM-GWF 2013 WL 2551518, at *3 (D. Nev. June 10, 2013) ("[Bank] plaintiff's claim for quiet title … is GRANTED. Plaintiff's deed of trust fully encumbers the title to the property."); *Ocwen Loan Servicing, LLC v. Operture, Inc.*, No. 2:17-cv-1026-GMN-CWH, 2018 WL 1092337, at *1 (D. Nev. Feb. 28, 2018) (ordering in servicer's quiet title case that "the deed of trust continues to encumber title").

until the HOA Sale in April 2011, less than five years before the Answer and Counterclaim was filed. Because NRS 11.070 applies where *either* a quiet title plaintiff itself, "*or the … grantor of such person,* was seized or possessed of the premises in question," whether Fannie Mae was "seized or possessed of the premises," is irrelevant. NRS 11.070 (emphasis added)).

FHFA and Fannie Mae's defenses and counterclaim are also timely under NRS 11.080's five-year limitations period:

> No action for the recovery of real property, or for the recovery of the possession thereof other than mining claims, shall be maintained, unless it appears that the plaintiff or the plaintiff's ancestor, predecessor or grantor was seized or possessed of the premises in question, within 5 years before the commencement thereof.

NRS 11.080's broad statutory language demonstrates that its scope includes various types of property dispute claims. That the Nevada legislature expressly exempted a non-title interest from the statute (mining claims) confirms that it applies to disputes about a variety of property interests, including lien interests.

This interpretation is confirmed by how the statute has been employed by Nevada courts. Most recently, the Nevada Supreme Court cited NRS 11.080 in a case involving a dispute between a lienholder and a purchaser at an HOA foreclosure sale, the same dispute central to this case. *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan Chase Bank, N.A.*, 388 P.3d 226, 232 (Nev. 2017). Federal courts across this District have also cited NRS 11.080 in similar contexts. *See U.S. Bank Home Mortg. v. Jensen*, No. 3:17-cv-00603-MMD-VPC, 2018 WL 3078753, at *4 (D. Nev. June 20, 2018); *Scott*, 605 F. App'x at 600; *Bank of Am., N.A. v. Desert Canyon Homeowners Ass'n*, No. 2:17-cv-0663-MMD-NJK, 2017 WL 4932912, at *2 (D. Nev. Oct. 31, 2017); *Nationstar Mortg., LLC v. Falls at Hidden Canyon Homeowners Ass'n*, No. 2:15-cv-1287-RCJ-NJK, 2017 WL 2587926, at *3 (D. Nev. June 14, 2017). These decisions adopt a broad interpretation of NRS 11.080 to cover quiet-title claims, such as that brought by FHFA and Fannie Mae here, that seek to confirm the continuing existence of a deed of trust after an HOA sale.

Alternatively, and at a minimum, the four year state catch-all statute of limitations applies to quiet title counterclaims like Bank of America's here. *See* NRS 11.220. The HOA Sale took place in April 2011, and Fannie Mae filed its counterclaims less than four years later in March 2015.

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Therefore, even if the four year statute of limitations provided by NRS 11.220 applies here, Bank of America's counterclaims are timely.

CONCLUSION

For these reasons, the Court should grant Bank of America's motion for summary judgment and enter a declaration that LVDG's interest in the Property, if any, is subject to the deed of trust.

DATED: September 5, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on this 5th day of September 2019 I caused to be served a true and correct copy of foregoing **BANK OF AMERICA, N.A.'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**, in the following manner:

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

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DISTRICT COURT

CLARK COUNTY, NEVADA

AIRMOTIVE INVESTMENTS LLC, Plaintiff, vs. BANK OF AMERICA, ET AL., Defendants.	CASE#: A-12-654840-C DEPT. XXIII

BEFORE THE HONORABLE STEFANY MILEY,
DISTRICT COURT JUDGE

TUESDAY, SEPTEMBER 10, 2019

RECORDER'S TRANSCRIPT OF PROCEEDINGS

BANK OF AMERICA, N.A.'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

For the Plaintiff: ROGER P. CROTEAU, ESQ.

For Bank of America: DARREN T. BRENNER, ESQ.

RECORDED BY: MARIA GARIBAY, COURT RECORDER

Las Vegas, Nevada, Tuesday, September 10, 2019

[Case called at 10:03 a.m.]

MR. BRENNER: Good morning.

THE COURT: Hi.

MR. CROTEAU: Morning Your Honor.

THE COURT: Hello.

MR. CROTEAU: Roger Croteau for Airmotive Investments.

MR. BRENNER: Darren Brenner for Bank of America.

THE COURT: Hi, good morning.

MR. BRENNER: I've said that -- I must have said it 500 times in this courtroom.

THE COURT: All righty. Good morning everybody. So this is Bank of America's motion for summary judgment. I have an opposition by the plaintiff. You know, there was a lot of discussions, there was a lot of reply -- responses in the opposition, but I think the biggest issue in this case is the applicability of Federal Foreclosure Bar, whether the property was in fact owned by Fannie at the time of the subject HOA sale and whether the Federal Foreclosure Bar would apply.

MR. BRENNER: And there was some the -- the briefing, most if not all the briefing, maybe except for the reply, was before *Daisy Trust* which I think knocked out at least a couple of the -- the whole kitchen sink was briefed, but at least two or three of the issues got knocked out by *Daisy Trust*.

I -- I wrote as my -- my notes the -- the big issues -- the big

points were *Daisy Trust*, statute of frauds, statute of limitations. They raised a disclosure issue. You want me to address any of those, the -- I don't -- I don't need to talk just to be heard.

MR. CROTEAU: That's a first.

THE COURT: That was --

MR. BRENNER: Someone's a comedian today.

THE COURT: I know Mr. Croteau has his moments. All righty. Yeah.

MR. CROTEAU: Mr. Brenner and I do a number of cases together, Your Honor. So if I may, the -- the issue I have --

MR. BRENNER: Sure, it's not my motion or anything.

MR. CROTEAU: Well we -- we briefed -- yeah, sit down.

So we briefed all of this. The -- the -- the fundamental issue I think is two things. Look, I don't like the evidence issue. I mean, you know, 4:26 on the last day of stipulated extended discovery but -- I have an issue with it, it's in the record. Okay.

But the real issue I think is the SOL. I mean they are bound by the statute of limitations --

THE COURT: You know, I know that you said -- I know that means statute of limitations --

MR. CROTEAU: Oh I'm sorry.

THE COURT: No, no, no. But I'm telling you that when you said that, that's not the first --

MR. CROTEAU: And I'm not that.

THE COURT: -- acronym that went through my mind.

MR. CROTEAU: I'm not that at all. In your other analysis, I am not that guy. I'm not the one that's got that problem.

THE COURT: I never thought about that far how like statute of limitations and the other out of luck just kind of --

MR. CROTEAU: Yeah, yeah, yeah. Got it.

THE COURT: -- go together, but okay.

MR. CROTEAU: Got it. Well, maybe he's out of luck. Not me.

THE COURT: Okay.

MR. CROTEAU: I probably shouldn't have used that. All right. But it's -- it's -- I think it's a statute of limitations issue and quite frankly, I'll be honest with you. I'm arguing that Friday in the Ninth Circuit. And --

THE COURT: Well good, are you going to get some good case law for us?

MR. CROTEAU: Well I don't know. If I win, yes. Depends what side you're sitting on.

THE COURT: I guess good is a matter of --

MR. CROTEAU: But --

THE COURT: -- what side.

MR. CROTEAU: But it should be -- well, candidly, Your Honor, that's a case we prevailed on in federal court that I'm arguing in the Ninth Circuit --

THE COURT: Okay.

MR. CROTEAU: -- that was taken up by the bank and the

argument is whether it's three years, four years or five years. And -- and because it's created by statute, all right, the -- the -- the rights that are created under HERA arise out of a statute, and 116 is a statute. The most you can apply in these cases is three years, all right, as the statute of limitations in which to do something, and the trigger is the HOA foreclosure deed recording date.

In this particular case, that's 4/12/11. The first time they ever raised it in any pleadings as a defense or anything else is 3/26 of '15 and -- and that is more than the three years. So I submit to you that that probably is the fundamental issue.

Look, if Your Honor accepts their evidence and if Your Honor allows their evidence in and if Your Honor goes with all of that and -- and doesn't go with the rest of the stuff that's been briefed, fundamentally you're down to whether or not they're timely bringing a motion and whether or not they timely have brought their issue to quiet the title in the name of Fannie and Freddie. And that's really the issue.

You know I think we briefed it. I think it's -- it's sufficiently before Your Honor. I know Your Honor reads this stuff. It's just that -- that's fundamentally what I see the problem to be. And from our perspective, it's a win/lose on the entire case as a result of that.

You know, though I'm still arguing my other points obviously vigorously, but I think for Your Honor's presentation and focus I think the statute of limitations presents a -- a -- a dispositive aspect to this case. There's no tender. There's no specter [phonetic] of tender. This is simply whether or not Fannie and Freddie brought their claim.

Obviously there's no specter that at any point in time our record on appeal -- I'm sorry, our record with the recorder's office ever had any notice that Fannie or Freddie existed, whether or not the loans were ever owned, nothing, zero, and still doesn't to this date that I'm aware of. So I mean that's kind of the lay of the land --

THE COURT: Seems like they rarely show up though.

MR. CROTEAU: They do show it though. Honestly, Your Honor, with all due respect --

THE COURT: But not in every case.

MR. CROTEAU: -- they do find in some cases where they actually do record and assign. And -- and -- and in -- and in -- oh heck, trying to remember the case name. Whatever, one of the seminal cases that were heard in this -- is it *Shadow Wood*? I think it was *Shadow Wood*. Where they said that, you know, Fannie and Fredddie, but that was a recorded Fannie and Freddie at the time of the foreclosure sale in that case. And that's -- oh *Christine View*. I'm sorry, it's *Christine View*.

THE COURT: Which one?

MR. CROTEAU: *Christine View*. But that's one of the ones where it was actually recorded, and that's when it was -- was much simpler. If it's in the chain of title and it's recorded as of the date of the foreclosure sale, you really have no argument. I concede that.

But the argument in this case is undisclosed Fannie/Freddie, undisclosed at any place that any buyer could ever search for or find, never tolled, and then the three years passes. I submit to you the statute of limitations under HERA and -- and that's contained at 40 --

well, 12 USC 4617(b)(12) says three years.

And there is no tort and -- and -- and what's been interpreted and a lot of it's been through the federal court system as well is they've looked at it and said okay, we have these two contractual dates, but they -- we got to state law and Boulware's done a great job with this frankly in -- in a lot of his rulings, but you go to state law and you do the math and you look at what -- what fits. It's not a quiet title action, all right, because they've never been seized of the property. The only way the bank can bring a quiet title action per se is that they had possession or ownership. They didn't. They never did. So that -- that statute doesn't apply. It's not a five-year quiet title.

It's not a four-year contract. It's not a four-year catchall. It is three years because it's based specifically on a statute and only on a statute. And if you apply the three years, that's what we're left with. They didn't meet the three-year requirement. The first disclosure 3/26 of '15, the foreclosure sale deed was recorded on 4/12/11, and I'll stand on the papers and the filings and that argument.

THE COURT: All right.

MR. BRENNER: *Daisy Trust* destroyed the argument that you have to record Fannie Mae's interest. That -- that's express. I -- I can give the Court a pinpoint cite. I -- I don't believe unless I'm misunderstanding --

MR. CROTEAU: No, I -- I --

MR. BRENNER: -- the argument --

MR. CROTEAU: I -- I -- no.

THE COURT: No I think his argument -- and let me -- I think what we've streamlined it to is question does the Federal Foreclosure Bar apply, and then, you know, did they own it at the time, et cetera. And if yes, would the statute of limitations bar that? And secondarily, would it matter that it did not show up on the chain of title and you're arguing for that second point that *Daisy Trust* got rid of that question.

MR. BRENNER: Yeah, and I don't see that as even a remote area of dispute. I think if -- and I didn't bring the opinion with me because I didn't -- no -- no offense to counsel, I didn't realize that people were still disputing --

MR. CROTEAU: I'll -- I'll -- I'll --

MR. BRENNER: -- *Daisy Trust*.

MR. CROTEAU: I will concede with counsel *Daisy Trust* did say it doesn't need to be recorded. All I meant by that was there was no active notice to any buyer at that -- at that time that it occurred so then the foreclosure bar was -- is -- is what we deal with.

THE COURT: So --

MR. BRENNER: All right, so then it's just an irrelevant argument because it doesn't matter if there was notice to the purchaser of Fannie Mae's interest. There's not a single case that says that --

THE COURT: So that leaves us with the applicability -- well the Federal Foreclosure Bar whether they owned it at the time whether there's adequate proof of that issue.

MR. BRENNER: Okay.

THE COURT: And assuming there is, would that matter be

hindered by the statute of limitations?

MR. BRENNER: All right. I'm assuming we've moved -- moved past the evidentiary disclosure issue because I wasn't sure coming here whether or not they're refuting that they received initial disclosures from us identifying Fannie and what have you, but I'm just going to move to the statute of limitations.

THE COURT: I think that's the biggest issue.

MR. BRENNER: Yeah. There's no statute of limitations; it's an affirmative defense. There's no such thing as a statute of limitation for affirmative defense. We don't need a Ninth Circuit case, we don't need a Nevada Supreme Court case because we already have Nevada Supreme Court law and it's cited in our briefs.

The statute of limitations only applies to an affirmative claim, not to a counterclaim. Clear established law. There is no case counsel will be able to point to that says no it also applies to a statute of limitations because that case does -- to an affirmative defense because that case does not exist. In fact, the opposite cases exist. And we have pled -- as counsel mentioned in 2015 we pled HERA as an affirmative defense.

In addition to that, Your Honor, we also have our counterclaims. You shouldn't find that the statute of limitations bars the counter- -- I mean we win no matter what on the affirmative defense.

Your Honor, do you need me help you find something? I see you're looking. Is there something I can help pinpoint for you in the briefs?

THE COURT: No, but I appreciate your assistance.

MR. BRENNER: Yeah.

THE COURT: I was just looking through the -- the printouts from Fannie Mae.

MR. BRENNER: Okay. At any rate, we win on our affirmative defense. You don't need to reach our -- our -- our counterclaims. If you do reach our counterclaims, the statute of limitations as conceded in the briefs under the Federal Foreclosure Bar is six years for contract.

There's a separate three-year statute of limitations for torts. You know forget all the quiet title stuff. I mean there -- we're -- we're talking about both parties argue the first layer of the analysis is the federal statute of limitations for the Federal Foreclosure Bar for the same reason the Federal Foreclosure Bar preempts Chapter 116 because it's federal law.

And there is a six-year statute of limitations for breach of contract and a three-year statute of limitations for torts. So the -- so the Court's got to figure out where do I plug this case into. It's not a tort. Definitely it's not a tort. It is close- --

THE COURT: And he concedes that.

MR. BRENNER: Yeah. It is closer -- well if it's not a tort, then it's done because that's a three-year statute of limitations. That only leaves us with the six-year statute of limitations for contract, and what the federal law says and again we've cited Your Honor to these cases. They're federal cases on how construe federal law. They're *Wise v. Verizon* and *FDIC versus Metro Bank* and both of them say when in

doubt, the court is to apply the longer statute of limitations. So that's where we're at only on the counterclaims because again no statute of limitations on affirmative defenses.

The third layer is even if we brush federal law aside in the case Mr. Croteau was on that went to the Ninth -- I'm sorry, the Nevada Supreme Court, the Nevada Supreme Court said that statute of limitations for quiet title is five years. And that's directly out of -- out of the statutes themselves so under any formulation we prevail. I know there other arguments. Was there anything else that I needed to address?

THE COURT: [No audible response.]

MR. CROTEAU: Just briefly and I'll keep it brief. And I'm -- the one that went to the Nevada Supreme Court was my case and it was the five years, but that's when the party alleging -- it was our client who was the owner was alleging quiet title and that's why it applied. It's not the Bank's case. That was the whole point. Because the Bank was arguing exactly the opposite.

But what I guess the -- the issue is this is that Section 12, 4617(b)(12) states that notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the agency as conservator or receiver shall be -- in the case of a contract claim it's the six years, or the period applicable under state law. And it goes on to say in the case of any tort claim, the longer of three-year period beginning on date on which claim accrues.

What the federal courts have done, for the most part, is said

well there are other types of claims. And -- and we're not saying that the statute is to be read to include nothing but a tort claim or contract claim.

And in this particular case, which claim arises under Nevada state law? If it's a -- if it's a -- I mean we've been sued for anything from unjust enrichment to, you know -- well, the point being is that they've applied the three-year statute of limitations across the board, many of the judges have done so.

Again, that's my Ninth Circuit argument on Friday is exactly this issue. What is it, three, four or five? And -- and there isn't an issue in the federal system anyway that it's interpreting this particular statute, 4617(b)(12), that suggest there isn't a statute of limitations that applies. The question is only how long it is.

And in this particular case, the more enlightened vision view and -- and the one that I'm going to be promoting anyway is three years. Because we look at our state law, okay? It's not a catchall. Tell me what it is. Tell me how HERA does anything that's not statutory. Tell me how 116 is anything but statutory. Right, there's nothing.

So you have to look to a statute to get where you're going. It's only roadmap you get there with. I have no contract with these folks. We have no privity contract. My client as the owner of the property has no privity contract with Fannie, has no privity contract with the lender, nothing, zero. There's no contract.

So -- so you look to the other statutes and that's where you -- you have to interpret what the statute means and what it's intended to mean. And -- and as there are other claims, there are other issues. The

statute of limitations were -- were enacted by Congress. They -- they were done so for a reason. It's not because they were ignored. You know, put -- and I made this argument before, but think about it this way. If HERA's an absolute federal foreclosure bar, why put a statute of limitation in? Should be forever, right? The fact that it's even there indicates look, the federal government, even though it's federal government, has time to which to do something.

And there is absolutely no dispute, and I don't think counsel would dispute with me, the actual date -- date of notice is going to be your recorded notice of sale of the property when it's gone into somebody else's name. And that occurred in this particular case 4/12 of '11. Done. So from 4/12 of '11 to the time they brought the Federal Foreclosure Bar, it was been more than three years.

One thing counsel I disagree with on, counsel made the argument that I can't bring up statute of limitations because it was an affirmative defense. Counsel fails to mention that when the Bank asserts a claim, which it did in this case; it was counterclaimant, and asserts a claim for quiet title against my client, it triggers it.

And the case law says you can't use statute of limitations defense as a sword and a shield. You -- you're stuck with one or the other. And when you start using it as sword and a shield the same time it becomes a sword which means it's applicable for dismissal under statute of limitations.

And -- and that's the way the case law runs there. It's very convoluted, frankly. Didn't really understand it myself and I've had to

brief it a few times and go through this, but it's very convoluted. But you can't use it both ways. You can't sit back at one level and say I could raise it at any time, or I can bring counterclaims and say well my counterclaim statute of limitations defense maybe is gone, but my defenses to the statute of limitations in my answer are not. Doesn't work that way. You either bring a counterclaim or you don't. If you bring a counterclaim, it triggers your statute of limitations.

And -- and that's kind of the way this works. You cannot use it as a sword and a shield at the same time and get different results. That's the point of the case law. So -- and if you want supplemental briefing on that be happy to do it, but that's kind of the issue at least from our perspective.

MR. BRENNER: My motion if I may briefly have the last word, Your Honor. It is convoluted because the case law doesn't exist. There's no case that says if you're barred from an affirmative claim that you're barred from presenting an affirmative defense -- it just doesn't exist. You know, counsel would have to show that (indiscernible) supplemental briefing it's not in the briefs that we have.

There's no federal court, there's no judge that I'm aware of despite hundreds of cases that has ever held there's a three-year statute of limitations that applies to a quiet title claim. There's no judge who has tried to, you know, jam that square peg into a round hole for liability created by statute. That's the three years.

Liability created by statute -- this is not a liability case. This is a quiet title case. Every federal judge who has not applied the five-year

statute of limitations -- these are non-HERA cases by the way. I'm not aware of a judge who's applied a statute of limitations in a HERA case. Every federal judge --

MR. CROTEAU: Boulware.

MR. BRENNER: I'm not aware of it. You may be, but every federal judge, including Boulware, has applied a four-year statute of limitations. They've said if it's not the five-year statute of limitations as per the Nevada Supreme Court in the unpublished case, then it falls -- and again, we're talking about the layer where it goes to state court where we ignore federal court. Then it falls into the four-year catchall statute of limitations.

I sat in front of Judge Dorsey when she did it yesterday. I've sat in front of Judge Gordon when they've done it, Judge Jones, Judge Navarro, they -- they each applied the five year. The only time a three-year statute of limitations is applied is in relation to a damages claim against the HOA for liability created by a statute, violation of the duty to -- of good faith or wrongful foreclosure.

In this case, we are -- even if we go to the catchall and ignore and -- and -- and we want to ignore Mr. Croteau's own opinion from the Nevada Supreme Court that it's five years, we are within the four-year period of statute of limitations. And again, that's just for our counterclaims. There -- Your Honor will not find a case that says if we're barred on counterclaims that we're also barred from presenting a defense. In fact you'll find cases that say just the opposite.

THE COURT: Okay.

MR. CROTEAU: If you want a second to comment? Just a second. Boulware was four years and he reversed himself and said -- after more pensive thought about it, he says it's not four, has to be three because based on statute. And he changed his subsequent rulings on that issue. So I submit that and --

THE COURT: Okay. I'll get this out soon.

MR. CROTEAU: Thank you, Your Honor.

MR. BRENNER: Thank you.

[Hearing concluded at 10:21 a.m.]

* * * * * *

ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual proceedings in the above-entitled case to the best of my ability.

Tracy A. Gegenheimer, CER-282, CET-282
Court Recorder/Transcriber

DISTRICT COURT
CLARK COUNTY, NEVADA

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AIRMOTIVE INVESTMENTS, LLC, a Nevada limited liability Company, Plaintiff, v. BANK OF AMERICA, GENEVIEVE UNIZA-ENRIQUEZ, DOES 1 THROUGH 20, AND ROE CORPORATIONS 1 THROUGH 20, INCLUSIVE, Defendants.	CASE NO.: A-12-654840-C DEPARTMENT XXIII DECISION & ORDER

I. INTRODUCTION

This matter came before the Court on September 10, 2019 for defendant Bank of America's Motion for Summary Judgment against plaintiff Airmotive Investments, LLC's claims for quiet title and declaratory relief. Bank of America also requests Summary Judgment in favor of its own counterclaims for quiet title and declaratory relief against Airmotive Investments, LLC. Defendant Bank of America filed its Motion for Summary Judgment on April 5, 2019. Plaintiff Airmotive Investments, LLC filed its opposition on July 17, 2019. Defendant Bank of America filed its Reply on September 5, 2019.

Bank of America's Reply cites the Nevada Supreme Court's recent binding precedent in *Daisy Trust v. Wells Fargo* in support of its Motion for Summary Judgment. *See infra* p. 4. At the hearing, Plaintiff conceded that per the *Daisy Trust* holding, Fannie Mae does not need to be the beneficiary of record to establish its ownership interest. While it was undisputed the real property in question was owned by Fannie Mae, Plaintiff

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asserted that defendant Bank of America's Affirmative Defense of the Federal Foreclosure Bar was nonetheless barred, based upon the Statute of Limitations. Furthermore, Plaintiff asserted that Bank of America's counterclaims were also barred by the Statute of Limitations.

Having considered the papers on file and the relevant law, the Court enters the following Decision and Order on defendant Bank of America's Motion for Summary Judgment against plaintiff Airmotive Investments, LLC's claims for quiet title and declaratory relief, as well as Bank of America's counterclaims for quiet title and declaratory relief against Airmotive Investments, LLC.

II. STATEMENT OF FACTS

At issue before the Court is real property known as 6279 Downpour Court, Las Vegas, Nevada 89110 (Property). A Deed of Trust listing defendant Genevieve Uniza-Enriquez as the borrower was executed on June 23, 2006, and was recorded on June 30, 2006. Fannie Mae became the successor to the Lender and acquired ownership of the Deed of Trust in August 2006 by purchasing the Loan.

On April 12, 2011, the Property was purchased by Las Vegas Development Group, LLC at a Home Owner's Association (HOA) Foreclosure Sale in accordance with N.R.S. 116.3116. Fannie Mae maintained its ownership at the time of the HOA Sale and Bank of America was the servicer of the Loan for Fannie Mae. At no time did Fannie Mae consent to the sale extinguishing or foreclosing its interest in the Property.

Las Vegas Development Group, LLC filed the instant Complaint on January 17, 2012, filed a Second Amended Complaint on August 1, 2013, and filed its Third Amended Complaint on February 29, 2016. Defendant Bank of America first claimed the affirmative defense of The Federal Foreclosure Bar in its Answer to the Second Amended Complaint

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on March 26, 2015. Bank of America also asserted its counterclaims against Plaintiff at that time.

Las Vegas Development Group, LLC conveyed its interest in the Property to Plaintiff through a recorded Grant Deed on March 7, 2017.

III. DISCUSSION

A. Legal Standard

Rule 56(a) of the Nevada Rules of Civil Procedure governs Motions for Summary Judgment. NRCP 56(a). The pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court must demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *See Id.*; *Wood v. Safeway*, 121 P.3d 1026 (Nev. 2005). A court must accept the nonmoving party's properly supported factual allegations as true, and it must draw all reasonable inferences in the nonmoving party's favor. *Michaels v. Sudeck*, 810 P.2d 1212, 1213 (Nev. 1991).

In determining whether a fact is material, the court shall look to the substantive law of the claims and only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Wood*, 121 P.3d at 1030. Nevada courts no longer follow the "slightest doubt" standard that applied before *Wood*; the courts follow the federal summary judgment standard. *Id.* at 1031, 1037.

B. Defendant Bank of America's Motion for Summary Judgment against plaintiff Airmotive Investments, LLC's claims for quiet title and declaratory relief

1. The Federal Foreclosure Bar Applies

HOAs are provided with a "superpriority" lien pursuant to NRS 116.3116(2) that, when properly foreclosed, extinguishes a first deed of trust. *SFR Investments Pool 1, LLC*

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v. U.S. Bank, N.A., 130 Nev. 742 (Nev. 2014); NRS 116.3116(2). Commonly known as the Federal Foreclosure Bar, 12 U.S.C. § 4617 (HERA) has a provision stating "No property of the Agency shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the Agency, nor shall any involuntary lien attach to the property of the Agency." 12 U.S.C. § 4617(j)(3) (2012). This preempts NRS 116.3116(2) and prevents an HOA foreclosure sale from extinguishing the first deed of trust in those circumstances. *Saticoy Bay LLC Series 9641 Christine View v. Federal National Mortgage Ass'n*, 417 P.3d 363, 367-68 (Nev. 2018).

After Bank of America filed its Motion for Summary Judgment, but before the present hearing before the Court, the Nevada Supreme Court provided further guidance to the District Courts on claims involving Fannie Mae or Freddie Mac. In *Daisy Trust v. Wells Fargo Bank, N.A.* the Nevada Supreme Court held that Fannie Mae and Freddie Mac need not be the beneficiary of record to establish their ownership interests. *Daisy Tr. V. Wells Fargo Bank, N.A.*, 445 P.3d 846, 849 (Nev. 2019). Furthermore, the deed of trust beneficiary is not required to produce the loan servicing agreement or original promissory note in order to establish that Fannie Mae or Freddie Mac owned the loan at the time of the foreclosure sale, and that the Federal Foreclosure Bar prevents any sale from extinguishing the deed of trust. *Id.* at 849-50. The Nevada Supreme Court has affirmed a recent summary judgment decision from this Court based on the *Daisy Trust* holding. *RH Kids, LLC v. Nationstar Mortg., LLC*, No. 76300, 2019 WL 4390764, at *1 (Nev. Sept. 12, 2019).

2. Neither Bank of America's Federal Foreclosure Bar Defense nor its counterclaims are untimely.

Any action brought by FHFA is governed by the statute of limitations set forth in HERA. These timing requirements are stated as follows:

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> (12) Statute of limitations for actions brought by conservator or receiver
> (A) In general
> Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Agency as conservator or receiver shall be—
> (i) in the case of any contract claim, the longer of—
> (I) the 6-year period beginning on the date on which the claim accrues; or
> (II) the period applicable under State law; and
> (ii) in the case of any tort claim, the longer of—
> (I) the 3-year period beginning on the date on which the claim accrues; or
> (II) the period applicable under State law.

12 U.S.C. §4617(b)(12). In the case of contract claims, FHFA must bring suit within six years from the time the claim accrued. FHFA must bring claims within three years from the time the claim accrued for any torts claims.

In Nevada, NRS 11.190 governs the statute of limitations for most claims arising under Nevada law. Relevant here, NRS 11.190 defines the statute of limitations as three years for "an action upon a liability created by statute, other than a penalty or forfeiture." NRS 11.190(3)(a). The Nevada Revised Statutes apply a four-year statute of limitation for "an action for relief, not hereinbefore provided for." NRS 11.220. This "catch-all" time frame hast been applied for equitable quiet-title claims brought by Freddie Mac, rather than the three-year statute of limitation in NRS 11.190(3)(a). *See Fed. House. Fin. Agency v. LN Mgmt. LLC, Series 2937 Barboursville*, 369 F. Supp. 3d 1101, 1111 (D. Nev. 2019).

A five-year period exists under NRS 11.070 and NRS 11.080, both statutes relating to the possession of real property. NRS 11.070 states:

> No cause of action or defense to an action, **founded upon the title to real property**, or to rents or to services out of the same, shall be effectual, unless it appears **that the person prosecuting the action or making the defense**, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor, **or grantor of such person**, was seized or possessed of the premises in question within 5 years before the

> committing of the act in respect to which said action is prosecuted or defense made.

NRS 11.070 (emphases added). NRS 1.080 states:

> No action for the recovery of real property, or for the recovery of the possession thereof other than mining claims, shall be maintained, unless it appears that the plaintiff or the plaintiff's ancestor, predecessor or grantor was seized or possessed of the premises in question, within 5 years before the commencement thereof.

NRS 11.080.

Plaintiff does not deny that the *Daisy Trust* holding applies to the present facts. Plaintiff does, however, assert that defendant Bank of America's Federal Foreclosure Bar defense is untimely. Bank of America filed its Federal Foreclosure Bar defense along with its counterclaims in March 2015, just under four years after the HOA Sale in April 2011. Plaintiff argues that Bank of America's raised defense is based upon neither contract nor tort. Rather, being premised upon statute, the Federal Foreclosure Bar is subject to a three-year statute of limitations pursuant to NRS 11.190. Because neither Bank of America nor Fannie Mae asserted the Federal Foreclosure Bar as a defense until March 26, 2015, more than three years after the HOA Foreclosure Sale, Plaintiff believes this defense is untimely. Plaintiff asks the Court to deny Bank of America's Motion for Summary Judgment against Plaintiff's claims for that reason.

Plaintiff next argues that because Bank of America's counterclaims are for declaratory relief, and are premised upon HERA, they are also subject to a three-year statute of limitations. Like the Federal Foreclosure Bar defense, the counterclaims were not asserted until March 26, 2015, more than three years after the HOA Foreclosure Sale. Because these claims are premised upon a statute they are subject to the three-year statute of limitations allowed under NRS 11.190 and this Court should deny Bank of America's Motion for Summary Judgment in regard to its counterclaims.

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In response Bank of America claims that its invocation of the Federal Foreclosure Bar as a defense to Plaintiff's claims is not subject to a statute of limitations period. Raising the defense against a quiet title claim such as this one is not itself a stand-alone claim. *Nationstar Mortgage, LLC v. SFR Investments Pool 1, LLC*, 396 P.3d 754, 757-58 (Nev. 2017) (Recognizing that arguing property owned by Freddie Mac is not subject to foreclosure while it is in conservatorship under federal law based on the Supremacy Clause is not akin to asserting a cause of action). Bank of America further asserts that if any statute of limitations applies, it would be the six-year limitation found in HERA. 12 U.S.C. § 4617(b)(12)(A).

Bank of America points out that while a quiet-title claim does not fit neatly into the "contract" or "tort" category provided by HERA, it is closer to the contract category because it seeks to validate a contractually created interest in the Property. The counterclaims and defenses arise from the contractual relationship between the borrower and the lender when creating the loan, which was purchased by Fannie Mae in August 2006. "Because a mortgage lien is an interest in property created by contract, an action to enforce that lien is clearly a contract action." *Smith v. FDIC*, 61 F.3d 1552, 1561 (11th Cir. 1995). This means that the invocation of the Federal Foreclosure Bar is subject to the six-year statute of limitations prescribed by HERA and Bank of America's defense is timely.

Further, even if the Court cannot classify Bank of America's quiet-title counterclaim as either a tort or contract claim, Bank of America points this Court to two Ninth Circuit cases as support for its argument that the longer statute of limitations should apply in the event of ambiguity. When there is a substantial question regarding which statute of limitations should apply between two conflicting statutes, the court should apply the longer. *FDIC v. Former Officers & Directors of Metro.* Bank, 884 F.2d 1304, 1307

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(9th Cir. 1989). More recently in *Wise v. Verizon Communications*, the Ninth Circuit stated that even if they were not bound by precedence, they would have chosen the longer statute of limitations when presented with multiple potentially-applicable statutes. *Wise v. Verizon Commc'ns, Inc.*, 600 F.3d 1180, 1187 n.2 (9th Cir. 2010). While neither of these cases apply to HERA, the *FDIC* court evaluated very similar statute of limitations provided to the FDIC in its capacity as a government agency where the FDIC's breach of fiduciary duty claims were being characterized as either tort or contract.

Bank of America lastly asserts that at minimum, the statute of limitations would be five or four years. The counterclaim brought by Bank of America is for quiet title. The claims here satisfy the elements of NRS 11.070. The present dispute is whether the HOA conveyed clear title to the buyer, or whether the deed of trust owned by Fannie Mae continued to encumber the buyer's title. Fannie Mae's "grantor" is the former borrower, who was "seized or possessed of the premises" once the home was sold at the HOA Foreclosure Sale. And because NRS 11.070 applies to either a quiet title plaintiff, or to the "grantor", the five-year statute of limitations would apply.

Bank of America also points to the broad statutory language of NRS 11.080 and says that the Nevada Supreme Court has applied its five-year limitations in a case involving a dispute between a lienholder and a purchaser at an HOA Foreclosure Sale. *See Saticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan Chase Bank, N.A.*, 388 P.3d 226, 232 (Nev. 2017). Finally, the four-year "catch-all" statute of limitations from NRS 11.220 should apply at a bare minimum. Because Bank of America asserted its Federal Foreclosure Bar defense and filed its counterclaims within four years of the HOA Foreclosure Sale, its actions are timely and the Court should grant Bank of America's

motion for summary judgment and enter a declaration that Plaintiff's interest in the Property is subject to the deed of trust.

Based on the foregoing, COURT FINDS, there is no genuine issue of material fact the subject loan was owned by Fannie Mae at the time of the HOA sale. Further, COURT FINDS, there is no genuine issue of material fact Fannie Mae did not consent to the HOA sale per NRS Chapter 116.

COURT FINDS, Defendant Bank of America's Federal Foreclosure Bar defense is not barred by the statute of limitations. Plaintiff has failed to convince the Court that the defense should be barred at all, as it is not a stand-alone action. Even if a statute of limitations attaches to the action, COURT FINDS, that at a minimum the statute of limitations would be the four-year period prescribed in NRS 11.220. Pursuant to the Nevada Supreme Court's holding in *Daisy Trust v. Wells Fargo*, COURT FINDS, that the Federal Foreclosure Bar precluded Plaintiff from acquiring title to the Property free and clear of Fannie Mae's property interest.

Based on Fannie Mae's ownership of the Deed of Trust in the Property and Bank of America timely asserting the Federal Foreclosure Bar, COURT ORDERS, defendant Bank of America's Motion for Summary Judgment on plaintiff Airmotive Investments, LLC's claims for quiet title and declaratory relief is GRANTED.

COURT FINDS, that defendant Bank of America's counterclaims for quiet title and declaratory relief against plaintiff are timely as they fall within NRS 11.220's four-year limitation period and were brought within four years from the HOA Foreclosure Sale. Further, there are no genuine issues of material fact related to defendant Bank of America's Motion for Summary Judgment on its counterclaims for quiet title and declaratory relief against Plaintiff Airmotive Investments, LLC.

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Therefore, COURT ORDERS, defendant Bank of America's Motion for Summary Judgment on its counterclaims for quiet title and declaratory relief against Plaintiff is GRANTED.

It is so ORDERED.

IV. ORDER

For the foregoing reasons, COURT HEREBY ORDERS, Defendant's Motion for Summary Judgment as to Plaintiff's Claims for quiet title and declaratory relief is GRANTED.

COURT FURTHER ORDERS, Defendant's Motion for Summary Judgment as to Defendant's counterclaims for quiet title and declaratory relief is GRANTED.

Dated this 10-17-19 day of September, 2018.

HONORABLE STEFANY A. MILEY
DISTRICT COURT JUDGE
DEPARTMENT XXIII

CERTIFICATE OF SERVICE

I hereby certify that on or about the date signed, a copy of this Decision and Order was electronically served and/or placed in the attorney's folders maintained by the Clerk of the Court and/or transmitted via facsimile and/or mailed, postage prepaid, by United States mail to the proper parties as follows: Roger P. Croteau, Esq., and Darren T. Brenner, Esq.

By: _____
Carmen Alper
Judicial Executive Assistant
Department XXIII