

**Case No. 81293**

IN THE SUPREME COURT OF NEVADA

SFR INVESTMENTS POOL 1, LLC, A  
NEVADA LIMITED LIABILITY  
COMPANY,

Appellant,

vs.

U.S. BANK N.A., A NATIONAL  
BANKING ASSOCIATION; AND  
NATIONSTAR MORTGAGE, LLC, A  
FOREIGN LIMITED LIABILITY  
COMPANY,

Respondent.

Electronically Filed  
Jan 19 2021 02:36 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**APPEAL**

from the Eighth Judicial District Court, Clark County  
The Honorable GLORIA STURMAN, District Judge  
District Court Case No. A-14-705563-C

**JOINT APPENDIX VOLUME 7**

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Respectfully submitted by:

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SFR Investments Pool 1, LLC*

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1	5	12/23/2015	SFR Investments Pool 1, LLC's Motion to Dismiss Plaintiff's Third-Party Complaint Pursuant to NRCP 12(b)(6)	JA_0176
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6	28	12/26/2018	Notice of Entry of Findings of Fact and Conclusions of Law in favor of SFR	JA_1196
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Nevada Rules of Civil Procedure  
Part V. Depositions and Discovery

Rule 30

(e) Review by Witness; Changes; Signing. If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by subdivision (f)(1) whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.

DISCLAIMER: THE FOREGOING CIVIL PROCEDURE RULES ARE PROVIDED FOR INFORMATIONAL PURPOSES ONLY. THE ABOVE RULES ARE CURRENT AS OF SEPTEMBER 1, 2016. PLEASE REFER TO THE APPLICABLE STATE RULES OF CIVIL PROCEDURE FOR UP-TO-DATE INFORMATION.

VERITEXT LEGAL SOLUTIONS  
COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

Veritext Legal Solutions is committed to maintaining the confidentiality of client and witness information, in accordance with the regulations promulgated under the Health Insurance Portability and Accountability Act (HIPAA), as amended with respect to protected health information and the Gramm-Leach-Bliley Act, as amended, with respect to Personally Identifiable Information (PII). Physical transcripts and exhibits are managed under strict facility and personnel access controls. Electronic files of documents are stored in encrypted form and are transmitted in an encrypted fashion to authenticated parties who are permitted to access the material. Our data is hosted in a Tier 4 SSAE 16 certified facility.

Veritext Legal Solutions complies with all federal and State regulations with respect to the provision of court reporting services, and maintains its neutrality and independence regardless of relationship or the financial outcome of any litigation. Veritext requires adherence to the foregoing professional and ethical standards from all of its subcontractors in their independent contractor agreements.

Inquiries about Veritext Legal Solutions' confidentiality and security policies and practices should be directed to Veritext's Client Services Associates indicated on the cover of this document or at [www.veritext.com](http://www.veritext.com).

# EXHIBIT “U”



DAVID ALESSI\*

THOMAS BAYARD \*

ROBERT KOENIG\*\*

RYAN KERBOW\*\*\*

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\*\* Admitted to the California, Nevada  
and Colorado Bars

\*\*\* Admitted to the Nevada and California Bar



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&  
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PHONE: 909-861-8300

***FACSIMILE COVER LETTER***

<b>To:</b>	Alex Bhame	<b>Re:</b>	5327 Marsh Butte St./HO #6601
<b>From:</b>	Aileen Ruiz	<b>Date:</b>	Monday, September 13, 2010
<b>Fax No.:</b>		<b>Pages:</b>	1, including cover
		<b>HO #:</b>	6601

Dear Alex Bhame:

This cover will serve as an amended demand on behalf of Shadow Mountain Ranch for the above referenced escrow; property located at 5327 Marsh Butte St., Las Vegas, NV. The total amount due through October, 15, 2010 is \$3,554.00. The breakdown of fees, interest and costs is as follows:

Notice of Intent To Lien -- Nevada	\$95.00
Notice of Delinquent Assessment Lien -- Nevada	\$345.00
Notice of Default	\$395.00
9/13/2010 Demand Fee	\$100.00
<b>Total</b>	<b>\$935.00</b>
<b>1. Attorney and/or Trustees fees:</b>	<b>\$935.00</b>
<b>2. Costs (Notary, Recording, Copies, Mailings, Publication and Posting)</b>	<b>\$550.00</b>
<b>3. Assessments Through October 15, 2010</b>	<b>\$1,284.00</b>
<b>4. Late Fees Through September 13, 2010</b>	<b>\$10.00</b>
<b>5. Fines Through September 13, 2010</b>	<b>\$0.00</b>
<b>6. Interest Through September 13, 2010</b>	<b>\$0.00</b>
<b>7. RPIR-GI Report</b>	<b>\$85.00</b>
<b>8. Title Research (10-Day Mailings per NRS 116.31163)</b>	<b>\$240.00</b>
<b>9. Management Company Audit Fee</b>	<b>\$200.00</b>
<b>10. Management Document Processing &amp; Transfer Fee</b>	<b>\$250.00</b>
<b>11. Progress Payments:</b>	<b>\$0.00</b>
<b>Sub-Total:</b>	<b>\$3,554.00</b>
<b>Less Payments Received:</b>	<b>\$0.00</b>
<b>Total Amount Due:</b>	<b>\$3,554.00</b>

Please have a check in the amount of \$3,554.00 made payable to the Alessi & Koenig, LLC and mailed to the below listed NEVADA address. Upon receipt of payment a release of lien will be drafted and recorded. Please contact our office with any questions.

Please be advised that Alessi & Koenig, LLC is a debt collector that is attempting to collect a debt and any information obtained will be used for that purpose.

JA\_1440

DAVID ALESSI\*  
THOMAS BAYARD\*  
ROBERT KOENIG\*\*  
RYAN KERBOW\*\*\*

\* Admitted to the California Bar  
\*\* Admitted to the California, Nevada  
and Colorado Bar  
\*\*\* Admitted to the California and Nevada Bar



*A Multi-Jurisdictional Law Firm*

9500 West Flamingo Road, Suite 100  
Las Vegas, Nevada 89147  
Telephone: 702-222-4033  
Facsimile: 702-222-4043  
[www.alessikoenig.com](http://www.alessikoenig.com)

ADDITIONAL OFFICES

AGOURA HILLS, CA  
PHONE: 818-735-9600

RENO NV  
PHONE: 775-626-2323  
&  
DIAMOND BAR CA  
PHONE: 909-843-6590

Nevada Licensed Qualified Collection Manager  
AMANDA LOWER

September 8, 2010

Miles, Bauer, Bergstrom & Winters  
2200 Paseo Verde Parkway, Suite 250  
Henderson, NV 89052

Re: Rejection of Partial Payments

Gentlepersons,

This letter will serve to inform you that we are unable to accept the partial payments offered by your clients as payment in full. While we understand how you read NRS 116.3116 as providing a super priority lien only with respect to 9 months of assessments, case authority exists which provides that the association's lien also includes the reasonable cost of collection of those assessments. (see *Korbel Family Trust v. Spring Mountain Ranch Master Association*, Case No. 06-A-523959-C.)

If the association were to accept your offer that only includes assessments, Alessi & Koenig would be left with a lien against the association for our substantial out-of-pocket expenses and fees generated. The association could end up having *lost* money in attempting to collect assessments from the delinquent homeowner.

If you would like to discuss these matters further, please do not hesitate to call.

Sincerely,

Ryan Kerbow, Esq.

DOUGLAS E. MILES \*  
Also Admitted in Nevada and Illinois  
RICHARD J. BAUER, JR. \*  
JEREMY T. BERGSTROM  
Also Admitted in Arizona  
FRED TIMOTHY WINTERS\*  
KEENAN E. McCLENAHAN\*  
MARK T. DOMEYER\*  
Also Admitted in District of  
Columbia & Virginia  
TAMI S. CROSBY\*  
L. BRYANT JAQUEZ \*  
DANIEL L. CARTER \*  
GINA M. CORENA  
WAYNE A. RASH \*  
ROCK K. JUNG  
VY T. PHAM \*  
KRISTA J. NIELSON  
MARK S. BRAUN  
Also Admitted in Iowa & Missouri  
HADI R. SEYED-ALI \*  
ROSEMARY NGUYEN \*  
JORY C. GARABEDIAN  
THOMAS M. MORLAN  
Admitted in California  
KRISTIN S. WEBB \*  
BRIAN H. TRAN \*  
ANNA A. GHAJAR \*



\* CALIFORNIA OFFICE  
1231 E. DYER ROAD  
SUITE 100  
SANTA ANA, CA 92705  
PHONE (714) 481-9100  
FACSIMILE (714) 481-9141

MILES, BAUER, BERGSTROM & WINTERS, LLP  
ATTORNEYS AT LAW SINCE 1985

2200 Pasco Verde Parkway, Suite 250  
Henderson, NV 89052  
Phone: (702) 369-5960  
Fax: (702) 369-4955

September 30, 2010

ALESSI & KOENIG, LLC  
9500 W. FLAMINGO ROAD, SUITE 100  
LAS VEGAS, NV 89147

Re: *Property Address:* 5327 Marsh Butte Street  
HO #: 6601  
LOAN #: 121434068  
*MBBW File No.* 10-H1641

Dear Sir/Madame:

As you may recall, this firm represents the interests of BAC Home Loans Servicing, LP fka Countrywide Home Loans, Inc. (hereinafter "BAC") with regard to the issues set forth herein. We have received correspondence from your firm regarding our inquiry into the "Super Priority Demand Payoff" for the above referenced property. The Statement of Account provided by in regards to the above-referenced address shows a full payoff amount of \$3,554.00. BAC is the beneficiary/servicer of the first deed of trust loan secured by the property and wishes to satisfy its obligations to the HOA. Please bear in mind that:

NRS 116.3116 governs liens against units for assessments. Pursuant to NRS 116.3116:

The association has a lien on a unit for:

...

*any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section*

While the HOA may claim a lien under NRS 116.3102 Subsection (1), Paragraphs (j) through (n) of this Statute clearly provide that such a lien is JUNIOR to first deeds of trust to the extent the lien is for fees and charges imposed for collection and/or attorney fees, collection costs, late fees, service charges and interest. See Subsection 2(b) of NRS 116.3116, which states in pertinent part:

2. A lien under this section is prior to all other liens and encumbrances on a unit except:

(b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent...

**The lien is also prior to all security interests described in paragraph (b) to the extent of the assessments for common expenses...which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien.**

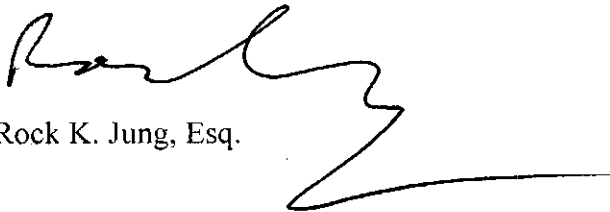
Based on Section 2(b), a portion of your HOA lien is arguably prior to BAC's first deed of trust, specifically the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessment. As stated above, the payoff amount stated by you includes many fees that are junior to our client's first deed of trust pursuant to the aforementioned NRS 116.3102 Subsection (1), Paragraphs (j) through (n).

Our client has authorized us to make payment to you in the amount of \$207.00 to satisfy its obligations to the HOA as a holder of the first deed of trust against the property. Thus, enclosed you will find a cashier's check made out to Alessi & Koenig, LLC in the sum of \$207.00, which represents the maximum 9 months worth of delinquent assessments recoverable by an HOA. This is a non-negotiable amount and any endorsement of said cashier's check on your part, whether express or implied, will be strictly construed as an unconditional acceptance on your part of the facts stated herein and express agreement that BAC's financial obligations towards the HOA in regards to the real property located at 5327 Marsh Butte Street have now been "paid in full".

Thank you for your prompt attention to this matter. If you have any questions or concerns, I may be reached by phone directly at (702) 942-0412.

Sincerely,

*MILES, BAUER, BERGSTROM & WINTERS, LLP*

A handwritten signature in black ink, appearing to read 'Rock K. Jung', with a long horizontal flourish extending to the right.

Rock K. Jung, Esq.

Miles, Bauer, Bergstrom & Winters, LLP Trust Acct

10-H1641

Initials: TLC

Payee: Alessi & Koenig, LLC

Check #: 5169

Date: 9/28/2010

Amount: 207.00

Inv. Date	Reference #	Description	Inv. Amount	Case #	Matter Description	Cost Amount
9/28/2010	6601	To Cure HOA Deficiency	207.00			

Miles, Bauer, Bergstrom & Winters, LLP  
Trust Account

1231 E. Dyer Road, #100  
Santa Ana, CA 92705  
Phone: (714) 481-9100

Bank of America  
1100 N. Green Valley Parkway

Henderson, NV 89074  
16-66/1220  
1020

5169

Date: 9/28/2010

Amount \$\*\*\*\* 207.00

10-H1641  
Loan # 121434088

Pay \$\*\*\*\*\*Two Hundred Seven & No/100 Dollars  
to the order of

Alessi & Koenig, LLC

Check Void After 90 Days

JA\_1444

⑈ 5 1 6 9 ⑈ ⑆ 1 2 2 4 0 0 7 2 4 ⑆ 5 0 1 0 0 6 8 7 6 9 7 3 ⑈

Shadow Mountain Ranch  
8966 Spanish Ridge Ave #100  
Las Vegas, NV 89148

---

Magnolia Gotera  
1090 Twin Creeks Dr  
Salinas, CA 93905

Property Address: 5327 Marsh Butte St.  
Account #: 21103

Code	Date	Amount	Balance	Check#	Memo
Beg Bal	12/31/2008	588.00	588.00		Begin Balance
MA	1/1/2009	23.00	611.00		Monthly Assessment
LF	1/15/2009	10.00	621.00		
MA	2/1/2009	23.00	644.00		Monthly Assessment
LF	2/15/2009	10.00	654.00		
MA	3/1/2009	23.00	677.00		Monthly Assessment
MA	4/1/2009	23.00	700.00		Monthly Assessment
LF	4/16/2009	10.00	710.00		Late Fee Processed
MA	5/1/2009	23.00	733.00		Monthly Assessment
LF	5/16/2009	10.00	743.00		Late Fee Processed
MA	6/1/2009	23.00	766.00		Monthly Assessment
LF	6/16/2009	10.00	776.00		Late Fee Processed
MA	7/1/2009	23.00	799.00		Monthly Assessment
LF	7/16/2009	10.00	809.00		Late Fee Processed
MA	8/1/2009	23.00	832.00		Monthly Assessment
LF	8/16/2009	10.00	842.00		Late Fee Processed
MA	9/1/2009	23.00	865.00		Monthly Assessment
LF	9/16/2009	10.00	875.00		Late Fee Processed
MA	10/1/2009	23.00	898.00		Monthly Assessment
LF	10/16/2009	10.00	908.00		Late Fee Processed
MA	11/1/2009	23.00	931.00		Monthly Assessment
LF	11/16/2009	10.00	941.00		Late Fee Processed
MA	12/1/2009	23.00	964.00		Monthly Assessment
LF	12/16/2009	10.00	974.00		Late Fee Processed
MA	1/1/2010	23.00	997.00		Monthly Assessment
LF	1/16/2010	10.00	1,007.00		Late Fee Processed

---

Level Property Management | 8966 Spanish Ridge Ave #100 | Las Vegas, NV 89148 | 702.433.0149

**Make check payable to: Shadow Mountain Ranch Homeowners Association**

10/20/2010

JA\_1445

# EXHIBIT “V”

1 **AFFT**  
2 Douglas D. Gerrard, Esq.  
3 Nevada Bar No. 4613  
4 [dgerrard@gerrard-cox.com](mailto:dgerrard@gerrard-cox.com)  
5 Fredrick J. Biedermann, Esq.  
6 Nevada Bar No. 11918  
7 [fbiedermann@gerrard-cox.com](mailto:fbiedermann@gerrard-cox.com)  
8 **GERRARD COX LARSEN**  
9 2450 Saint Rose Pkwy., Suite 200  
10 Henderson, Nevada 89074  
11 Phone: (702) 796-4000  
12 *Attorneys for Defendant Nationstar Mortgage, LLC*

13 Melanie D. Morgan, Esq.  
14 Nevada Bar No. 8215  
15 Donna Whittig, Esq.  
16 Nevada Bar No. 11015  
17 1635 Village Center Circle, Suite 200  
18 Las Vegas, Nevada 89134  
19 Telephone: (702) 634-5000  
20 Facsimile: (702) 380-8572  
21 Email: [melanie.morgan@akerman.com](mailto:melanie.morgan@akerman.com)  
22 Email: [donna.wittig@akerman.com](mailto:donna.wittig@akerman.com)  
23 *Attorneys for Defendant Nationstar Mortgage, LLC*  
24 *and Defendant/Counterclaimant/Third-Party Defendant U.S. Bank,*  
25 *National Association, as Trustee for the Certificateholders of the LXS 2006-*  
26 *4N Trust Fund, erroneously pled as U.S. Bank, N.A.*

16 **DISTRICT COURT**  
17 **CLARK COUNTY, NEVADA**

18 **ALESSI & KOENIG, LLC,**  
19 **Plaintiff,**  
20 **v.**

21 **STACY MOORE, an individual; MAGNOLIA**  
22 **GOTERA, an individual; KRISTIN JORDAL, AS**  
23 **TRUSTEE FOR THE JBWNO REVOCABLE**  
24 **LIVING TRUST, a trust; U.S. BANK, N.A., a**  
25 **national banking association; NATIONSTAR**  
26 **MORTGAGE, LLC, a foreign limited liability**  
27 **company; REPUBLIC SILVER STATE**  
28 **DISPOSAL, INC., DBA REPUBLIC SERVICES, a**  
**domestic government entity; DOE INDIVIDUALS**  
**I through X, inclusive; and ROE CORPORATIONS**  
**XI through XX inclusive.**

**Defendants.**

Case No.: A-14-705563-C  
Dept. No.: XVII

**AFFIDAVIT OF FREDRICK J.**  
**BIEDERMANN, ESQ.**



AFFIDAVIT OF FREDRICK J. BIEDERMANN, ESQ.

STATE OF NEVADA            )  
  ) ss.  
COUNTY OF CLARK         )

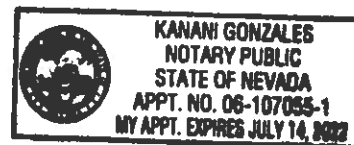
FREDRICK J. BIEDERMANN, ESQ., after being first duly sworn, states and avers as follows:

1. That I am an attorney duly licensed to practice law in the State of Nevada and associate attorney with the law firm of Gerrard Cox Larsen, and counsel for Nationstar Mortgage, LLC in the instant matter.
  2. The discovery deadline this matter was June 1, 2018.
  3. On June 1, 2018, I prepared Nationstar's Second Supplemental Disclosures of Documents and Witnesses, which included the entire collection file from Alessi & Koenig, LLC (the "Collection File").
  4. The Collection File was obtained through HOA Lawyers Group, LLC's website and from the dropbox created pursuant to the procedures established in Alessi & Koenig, LLC's bankruptcy case, Case No. BK-S-16-16593-ABL.
  5. In support of Nationstar's Motion For Reconsideration, I attached the documents found in the Collection File pertaining to the tender made by BAC Home Loan Servicing to Alessi & Koenig, LLC to the Second Supplemental Disclosures.
  6. On June 1, 2018, I served a copy the Second Supplemental Disclosures to all parties in listed in the Master Service List in this matter.
  7. For the sake of efficiency, I did not include the remaining pages from the Collection File as an exhibit to the instant Motion for Reconsideration. However, I will provide the remaining pages from the Collection File upon request for this Court's review.
- FURTHER YOUR AFFIANT SAYETH NAUGHT.

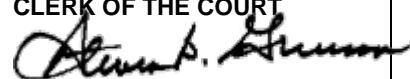
  
By: FREDRICK J. BIEDERMANN, ESQ.

Subscribed and sworn to before me  
this 14th day of January, 2019.

  
Notary Public



# **TAB 31**



**ERR**

Douglas D. Gerrard, Esq.

Nevada Bar No. 4613

[dgerrard@gerrard-cox.com](mailto:dgerrard@gerrard-cox.com)

Fredrick J. Biedermann, Esq.

Nevada Bar No. 11918

[fbiedermann@gerrard-cox.com](mailto:fbiedermann@gerrard-cox.com)

**GERRARD COX LARSEN**

2450 Saint Rose Parkway, Suite 200

Henderson, Nevada 89074

(702) 796-4000

Darren T. Brenner, Esq.

Nevada Bar No. 8386

Donna Wittig, Esq.

Nevada Bar No. 11015

**AKERMAN LLP**

1160 Town Center Drive, Suite 330

Las Vegas, Nevada 89144

Telephone: (702) 634-5000

Facsimile: (702) 380-8572

Email: [darren.brenner@akerman.com](mailto:darren.brenner@akerman.com)

Email: [donna.wittig@akerman.com](mailto:donna.wittig@akerman.com)

*Attorneys for Defendant Nationstar Mortgage, LLC*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

ALESSI & KOENIG, LLC,

Plaintiff,

v.

STACY MOORE, an individual; MAGNOLIA  
GOTERA, an individual; KRISTIN JORDAL,  
AS TRUSTEE FOR THE JBWNO  
REVOCABLE LIVING TRUST, a trust; U.S.  
BANK, N.A., a national banking association;  
NATIONSTAR MORTGAGE, LLC, a foreign  
limited liability company; REPUBLIC SILVER  
STATE DISPOSAL, INC., DBA REPUBLIC  
SERVICES, a domestic government entity;  
DOE INDIVIDUALS I through X, inclusive;  
and ROE CORPORATIONS XI through XX  
inclusive.

Defendants.

Case No.: A-14-705563-C

Dept.: XVII

**ERRATA TO DEFENDANT  
NATIONSTAR MORTGAGE, LLC'S  
MOTION FOR RECONSIDERATION  
AND/OR TO ALTER/AMEND  
JUDGMENT**

1 U.S. BANK, N.A.,  
2 Counterclaimant,  
3 vs.  
4 ALESSI & KOENIG, LLC, a Nevada limited  
liability company,  
Counter-Defendant.

5 U.S. BANK, N.A.,  
6 Third Party Plaintiff,  
7 v.  
8 SFR INVESTMENTS POOL 1, LLC, a Nevada  
limited liability company; INDIVIDUAL DOES  
9 I through X, inclusive; and ROE  
CORPORATIONS I through X, inclusive.  
10 Third Party Defendants.

11 SFR INVESTMENTS POOL 1, LLC, a  
Nevada limited liability company,  
12 Third Party Counterclaimant/Cross-claimant,  
13 vs.  
14 U.S. BANK, N.A.; NATIONSTAR  
MORTGAGE, LLC, a foreign limited liability  
15 company; KRISTIN JORDAL, AS TRUSTEE  
FOR THE JBWNO REVOCABLE LIVING  
16 TRUST, a trust; STACY MOORE, an  
individual; and MAGNOLIA GOTERA, an  
17 individual,  
18 Counter-Defendant/Cross-Defendants.

19  
20 **ERRATA TO DEFENDANT NATIONSTAR MORTGAGE, LLC'S MOTION FOR**  
21 **RECONSIDERATION AND/OR TO ALTER/AMEND JUDGMENT**

22 COMES NOW, Defendant / Cross-Defendant, NATIONSTAR MORTGAGE, LLC  
23 ("Nationstar" or "Defendant"), by and through its attorneys, GERRARD COX LARSEN and  
24 AKERMAN, LLP, and hereby submits its Errata to its Motion For Reconsideration and/or to Alter  
or Amend Judgment (the "Motion") filed on January 14, 2019.

25 Section III of the Motion is amended to correct a few errors made in the section, to provide  
26 clarity to the exhibits cited, and to make minor grammatical changes none of which affect the  
27 substance of the original motion. Accordingly, Section III is amended as follows:  
28

**III.**

**ADMISSIBILITY OF EXHIBITS**

Nationstar requests that this Court take judicial notice of **Exhibit “A”** in accordance with N.R.S. § 47.130, as it is an order from the District Court constituting the record from the instant case.

Nationstar requests that the Court take judicial notice of the following exhibits pursuant to N.R.S. § 47.130: **Exhibits “B”, “C”, “D”, “E”, “H”, “K”, “L”, “M”, “N”, “O”, “P”, and “Q”** as they are self-authenticating documents pursuant to N.R.S. § 52.165 due to these documents being acknowledged with a notarial certificate and recorded in the public records of Clark County, Nevada. **Exhibits “F”, “F-1”, “F-2”, “F-3”, “F-4”, and “F-5”** are supported by the Affidavit of Douglas Miles, Esq. of Miles Bauer & Winters, LLP. **Exhibit “G”** is an affidavit from Rock K. Jung, Esq. **Exhibits “I” and “M”** comprise of account ledgers that were produced by either the HOA or HOA Trustee in response to a Subpoena *Duces Tecum* and are authenticated by the Deposition testimony of David Alessi, attached hereto as **Exhibit “T”**. **Exhibit “R”** is supported by the Declaration of R. Scott Dugan, SRA, Certified General Appraiser and Nationstar’s designated expert witness in this case. **Exhibit “S”** consists of Nationstar’s Second Supplemental Disclosure and is supported by the Affidavit of Fredrick J. Biedermann, Esq. attached hereto as **Exhibit “V”**. **Exhibit “U”** consists of tender related documents which were contained in Alessi & Koenig, LLC’s collection file to the subject Property which is supported by the Affidavit of Custodian of Records, which is attached hereto as **Exhibit “J”**. **Exhibit “U”** is also supported by the Affidavit of Fredrick J. Biedermann, Esq. attached hereto as **Exhibit “V”**.

Dated this 24<sup>th</sup> day of January, 2019.

**GERRARD COX LARSEN**

/s/ Fredrick J. Biedermann, Esq.  
Douglas D. Gerrard, Esq.  
Nevada Bar No. 4613  
Fredrick J. Biedermann, Esq.  
Nevada Bar No. 11918  
2450 Saint Rose Pkwy., Suite 200  
Henderson, Nevada 89074  
*Attorneys for Defendant Nationstar  
Mortgage, LLC*

**CERTIFICATE OF SERVICE**

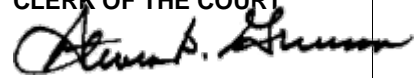
I hereby certify that I am an employee of GERRARD COX LARSEN, and that on the 24<sup>th</sup> day of January, 2019, I served a copy of the **ERRATA TO MOTION FOR RECONSIDERATION AND/OR TO ALTER/AMEND JUDGMENT**, by e-serving a copy on all parties listed in the Master Service List pursuant to Administrative Order 14-2, entered by the Chief Judge, Jennifer Togliatti, on May 9, 2014.

Melanie D. Morgan, Esq.  
Donna Wittig, Esq.  
1635 Village Center Circle, Suite 200  
Las Vegas, Nevada 89134  
*Attorneys for Defendant, Nationstar Mortgage, LLC and Defendant/ Counterclaimant/ Third-Party Defendant U.S. Bank, National Association, as Trustee for the Certificate Holders of the LXS 2006-4N Trust Fund, erroneously plead as U.S. Bank, N.A.*

Diane Cline Ebron, Esq.  
Jacqueline A. Gilbert, Esq.  
Karen L. Hanks, Esq.  
KIM GILBERT EBRON  
7650 Dean Martin Drive, Suite 110  
Las Vegas, Nevada 89139  
*Attorneys for SFR Investment Pool 1, LLC*

/s/ Fredrick J. Biedermann, Esq.  
Fredrick J. Biedermann, an employee of  
GERRARD COX LARSEN

# **TAB 32**



**OPPM**

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

**IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**  
**IN AND FOR THE COUNTY OF CLARK**

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

vs.

STACY MOORE, an individual; MAGNOLIA  
GOTERA, an individual; KRISTIN JORDAL,  
AS TRUSTEE FOR THE JBNWO  
REVOCABLE LIVING TRUST, a trust; U.S.  
BANK, N.A., a national banking association;  
NATIONSTAR MORTGAGE, LLC, a foreign  
limited liability company; REPUBLIC SILVER  
STATE DISPOSAL, INC., DBA REPUBLIC  
SERVICES, a domestic governmental entity;  
DOE INDIVIDUALS I through X, inclusive;  
and ROE CORPORATIONS XI through XX  
inclusive,

Defendants.

U.S. BANK, N.A.,

Counterclaimant,

vs.

ALESSI & KOENIG, LLC, a Nevada limited  
liability company,  
Counter-Defendant.

U.S. BANK, N.A.,

Third-Party Plaintiff,

vs.

SFR INVESTMENTS POOL 1, LLC, a Nevada  
limited liability company; INDIVIDUAL DOES  
I through X, inclusive; and ROE  
CORPORATIONS I through X, inclusive,

Case No. A-14-705563-C

Dept. No. 1

**SFR INVESTMENTS POOL 1 LLC'S  
OPPOSITION TO DEFENDANT  
NATIONSTAR MORTGAGE, LLC'S  
MOTION FOR RECONSIDERATION  
AND/OR TO ALTER/AMEND  
JUDGMENT**

**Hearing date: February 20, 2019**

**Hearing time: 9:00 a.m.**



Third-Party Defendant(s).  
SFR INVESTMENTS POOL 1, LLC, a Nevada  
limited liability company,  
Third-Party Counterclaimant/Cross-Claimant,  
vs.  
U.S. BANK, N.A.; NATIONSTAR  
MORTGAGE, LLC, foreign limited liability  
company; KRISTEN JORDAL, as Trustee for  
the JBWNO REVOCABLE LIVING TRUST, a  
Trust; STACY MOORE, an individual; and  
MAGNOLIA GOTERA, an individual,  
Counter-Defendants/Cross-Defendants.

SFR Investments Pool 1, LLC (“SFR”) hereby files its Opposition to Nationstar Mortgage, LLC’s (the “Bank”) motion for reconsideration and/or to alter/amend judgment.

This opposition is based on the papers and pleadings on file herein, the following memorandum of points and authorities, and such evidence and oral argument as may be presented at the time of the hearing on this matter.

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. INTRODUCTION**

The Bank’s motion must be denied for the following reasons. **First**, this court lacks jurisdiction to review the acts of other district courts, as each district court judge has coequal authority. This matter was reassigned after the order entering summary judgment in SFR’s favor was filed. **Second**, even if were proper for this court to reconsider, which it is not, the Bank fails to satisfy the standard for reconsideration. Nothing in the Nevada Supreme Court’s recent decision of *SFR III*<sup>1</sup> changes the prior Court’s decision. All *SFR III* did was provide the court with the legal effect of a valid tender. The Bank still needs to prove via admissible evidence that a valid tender occurred— which is the Bank’s burden to establish, not SFR’s burden to defeat—and the Bank failed to do that.

Based on the prior court’s findings, the Bank failed to meet its burden on two fronts: 1) to

<sup>1</sup> *Bank of Am., N.A. v. SFR Investments Pool 1, LLC*, 134 Nev. \_\_\_, 427 P.3d 113 (2018), as amended on denial of reh’g (Nov. 13, 2018) (“*SFR III*”).

1 prevail on summary judgment and 2) to withstand SFR's summary judgment. The prior court  
2 entered its Findings of Facts Conclusions of Law ("FFCL") on or about December 26, 2018. The  
3 FFCL state as follows:

4 "...Alessi & Koenig **did not receive** the letter with the check. If Alessi &  
5 Koenig never received the purported tender **there was nothing to reject**.  
6 All the Bank has is a copy of the purported check and a screenshot, neither  
7 of which are properly admissible. Further, Doug Miles was not disclosed  
8 and has defects in his affidavit. The Bank is **lacking admissible evidence**  
9 to establish delivery of the check, or admissible evidence that the check was  
10 rejected without explanation.

11 FFCL, pg. 11:4-9; (Emphasis added).

12 The prior court found that the Bank failed to establish via admissible evidence that it  
13 tendered. This means that the Bank failed to sufficiently satisfy its burden required to defeat SFR's  
14 motion, which necessitated the granting of SFR's motion and denying the Bank's motion. *SFR III*,  
15 does not upend these evidentiary findings by the prior court. *SFR III*'s result might be applicable  
16 here, **IF**, the Bank had admissible evidence of its tender, which it does not. Since the Bank does  
17 not have admissible evidence, the prior court's findings stand. For the reasons stated below, the  
18 Bank's arguments regarding evidence it presented to the court in a reply is not sufficient to meet  
19 the standard for reconsideration. As a result, the prior court's order stands and the instant motion  
20 can be denied.

## 21 **II. ARGUMENT**

### 22 **A. This Court Lacks Authority to Review and Void Another District Court's Order.**

23 Nevada district court judges possess equal and coextensive and concurrent jurisdiction and  
24 power. NRS 3.220. Based on the plain language of NRS 3.220 the district courts lack jurisdiction  
25 to review the acts of other district courts. *Rohlfing v. Second Judicial Dist. Court*, 106 Nev. 902,  
26 906, 803 P.2d 659, 662 (1990). In *Rohlfing*, the Nevada Supreme Court reversed a district court  
27 judge's invalidation of another district court judge's order of dismissal. The Nevada Supreme  
28 Court reiterated this holding in *State v. Sustacha*, when it declared that a district court generally  
cannot set aside another district court's order. 108 Nev. 223, 226, 826 P.2d 959, \*961 (1992).

Here, the parties argued competing motions for summary judgment on August 15, 2018,

1 before the Honorable Judge Villani. The FFCL was filed on or about November 29, 2018. On  
2 December 26, 2018, the notice of entry of order was filed. After the order was entered and noticed,  
3 this case was reassigned to the current department. This Court lacks authority to reconsider Judge  
4 Villani's order as this court possess equal and coextensive and concurrent jurisdiction. Since this  
5 Court lacks authority to reconsider the order, the motion must be denied.

6 **B. The Bank Failed to Meet the Standard for Reconsideration and/or to**  
7 **Alter/Amend Judgment.**

8 Even if it were proper for the Bank to seek Reconsideration, which it is not, the motion still  
9 fails. Reconsideration is not a second bite at the apple, or a second chance to rehash what was  
10 previously before the court. Rather under Nevada law, "[r]econsideration is appropriate only if the  
11 district court (1) is presented with newly discovered evidence, (2) committed clear error or the  
12 initial decision was manifestly unjust, or (3) if there was an intervening change in controlling law."  
13 *Frasure v. United States*, 256 F.Supp.2d 1180, 1183 (D. Nevada 2003) *quoting School Dist. No. 1J*,  
14 *Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).

15 Here, the Bank fails to meet this standard because all the Bank is doing is rehashing its  
16 motion under the guise of new case law, *SFR III*. But even under *SFR III*, the result is the same  
17 because the Bank does not have admissible evidence to prove/establish its "tender." In an attempt  
18 to mislead the court, the Bank argues that it raised the issue that Alessi had the check in its files in  
19 its Reply in support of its MSJ.

20 However, the prior court read all the pleadings, which included the Reply, listened to  
21 argument of counsel and issued its ruling. Nothing the Bank has presented in its motion warrants  
22 reconsideration, because the Bank is presenting the same facts and arguments. The Bank simply  
23 complains that Judge Villani failed to see the evidence in the same way the Bank did. It asks this  
24 Court to consider evidence the Bank did not see as necessary to attach to it Motion to support its  
25 argument that it the deed of trust was not extinguished but, rather, waited until its Reply to produce.  
26 This includes the Affidavit of Rock Jung attached to the Reply. which the Bank argues the prior  
27 court failed to consider. This, again, is nothing other than attempting a second bite at the apple for  
28 this Court to look at the evidence and change Judge Villani's ruling.

1 Even if it were proper for the Bank to seek Reconsideration, which it is not, the motion still  
2 fails. The Bank fails to satisfy the requirement under Rule 59(e). The Nevada Supreme Court  
3 stated “the basic grounds for Rule 59(e) is correcting manifest errors of law or fact, newly  
4 discovered or previously unavailable evidence.” *AA Primo Builders, LLC v. Washington*, 126  
5 Nev. 578, 582, 245 P.3d 1190, 1193 (2010) (*citing Buchanan v. Stanships, Inc.*, 485 U.S. 265, 108  
6 S. CT, 1130, 99 L.Ed.2d 289 (1988)). It is not manifest error that the prior court ruled in SFR’s  
7 favor after reading all the pleadings, presumably including the exhibits attached to the reply, unless  
8 determined not to be “admissible evidence,” and listening to argument of counsel. Additionally,  
9 it is not “newly discovered” evidence as the Bank was able to improperly attach the items to its  
10 Reply and argue the documents at the hearing. As a result, the Bank fails to meet this standard,  
11 which requires this court to deny the instant motion.]

12 **C. The Prior Court Determined the Admissibility of Exhibits.**

13 Judge Villani already decided whether the exhibits were admissible when he entered his  
14 order. It is improper for the Bank to request that the exhibits attached to the instant be admissible  
15 as part of the motion for reconsideration. Accordingly, this request should not be considered by the  
16 court.

17 **D. The Bank Did Not Provide The Prior Court with Admissible Evidence of a Valid**  
18 **Tender and *SFR III* Does Not Change That.**

19 ***1. The Bank Never Disclosed Doug Miles.***

20 Even if it were proper for the Bank to seek Reconsideration, which it is not, the motion still  
21 fails.

22 The prior court found that the Bank failed to disclose Mr. Miles as a witness, and excluded  
23 his affidavit. There being no affidavit, the documents attached to the affidavit likewise cannot be  
24 used, including the check. This means it is immaterial that the Bank has a copy of the check  
25 because in order for the check to be admissible, the Bank needs a witness to authenticate the check,  
26 provide the court with a valid hearsay exception and also lay the foundation. In other words,  
27 authentication + hearsay exception + foundation = admissible evidence. The Bank must meet all  
28

1 **three requirements** to establish admissibility—the failure of one renders the evidence  
2 inadmissible, i.e. the check.

3 Authentication is a condition precedent to admissibility. NRS 52.015. When attempting to  
4 authenticate business records, the records **must be** “authenticated by a custodian of the record or  
5 another qualified person in a signed affidavit.” NRS 52.260(1). Further, the custodian or other  
6 qualified person **must** verify in the affidavit that the record was:

- 7 • Made at or near the time of the act;
- 8 • By or from information transmitted by a person with knowledge; and
- 9 • In the course of the regularly conducted activity.

10 NRS 52.260(2)(a) & (b).

11 Additionally, NRS 52.260(6)(a) defines “custodian of the records” as “an employee or  
12 agent of an employer who has the care, custody and control of the records of the regularly  
13 conducted activity of the employer.” In short, the custodian must be an agent/employee of the  
14 entity whose documents the custodian seeks to authenticate. In other words, the custodian of  
15 company A, who is not an agent/employee of company B, cannot authenticate the records of  
16 company B.

17 Assuming the documents are authentic, the next hurdle is hearsay. Generally, hearsay is an  
18 out-of-court statement offered in evidence to prove the truth of the matter asserted. *See* NRS  
19 51.035 generally. As a general rule, hearsay is inadmissible unless it meets various exceptions or  
20 exemptions. *See* NRS 51.065. When dealing with double hearsay, or hearsay within hearsay, the  
21 general rule of inadmissibility applies unless each part of the combined hearsay conforms to an  
22 exception to the hearsay rule. *See* NRS 51.067.

23 Finally, the final hurdle for admissibility is foundation. Foundation is the basic “who, what,  
24 and why” related to the evidence. In the context of written evidence, there must be a witness who,  
25 with the requisite personal knowledge, must explain the evidence and connect it with the issue in  
26 question.

27 After the proffered witness can meet all three requirements above, then the evidence is  
28 admissible. Here, the Bank relied upon Doug Miles, but the prior court found that Mr. Miles was

1 not properly disclosed and therefore, the Bank was unable to rely on Mr. Miles, or any of the  
2 documents attached to Mr. Miles' affidavit.

3 But, the Court did not stop there. Even if the Court had considered the affidavit, it found  
4 defects in the Miles affidavit itself, those that would have resulted in the same decision in the end.  
5 See FFCL at 4:13-16. The Bank's Motion essentially amounts to a resubmission of their original  
6 MSJ and does nothing to overcome the Court's findings regarding Miles' affidavit. This means that  
7 the check is inadmissible because there is no witness to authenticate the check, provide the court  
8 with a valid hearsay exception and lay the foundation. As such, nothing in *SFR III* changes the prior  
9 court's ruling. See FFCL at pg. 11:7.

10 **2. *Rock Jung is Not a Proper Custodian of Records.***

11 The Bank is also not saved by using the Rock Jung affidavit as he is not a proper custodian  
12 of records. NRS 52.260(6)(a) defines custodian of records as "an employee or agent of an employer  
13 who has the care, custody and control of the records of the regularly conducted activity of the  
14 employer." Rock Jung has not worked for Miles Bauer in the last five years, this means he is not  
15 an "employee or agent of the employer" and he does not have "custody or control of the records."  
16 Since he is not a proper custodian of records, he cannot be relied upon for admissibility of the  
17 check, in that he is unable to authenticate the check, provide the court with a valid hearsay  
18 exception and lay the foundation. The Bank must meet **all three requirements** to establish  
19 admissibility—the failure of one renders the evidence inadmissible, i.e. the check. As such,  
20 nothing in *SFR III* changes the prior court's ruling. See FFCL at pg. 11:7.

21 **3. *The Bank failed to Prove Delivery and Receipt.***

22 *SFR III* decision does not change this outcome. All *SFR III* did was provide guidance on  
23 the **effect** of a valid tender, i.e. established via admissible evidence. Since the Bank was unable to  
24 establish delivery and receipt, those findings are not up-ended by *SFR III*. In order to defeat SFR's  
25 motion for summary judgment, as the nonmoving party, the Bank's opposition **must go beyond** the  
26 assertions and allegations of the pleadings and set forth **specific facts by producing competent**  
27 **evidence** that shows a genuine issue for trial. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).  
28 Because the Bank does not have competent evidence to establish delivery and receipt, the Bank's

1 motion must be denied.

2 As previously stated, the prior Court found that the Bank did not have admissible evidence  
3 to establish delivery and receipt of its tender. *See* FFCL pg. 11:4-9. The Court also found that  
4 “David Alessi testified that Alessi & Koenig did not receive the letter with the check.” *Id.* at 11:4-  
5 5. The Bank failed to overcome the testimony of Alessi. If the Bank failed to establish that it  
6 delivered a check, then logically, the Bank cannot argue that Alessi rejected a check, that it never  
7 received, let alone correlate any action Alessi took to the receipt of an item that it never received.  
8 Accordingly, this argument is insufficient to overcome the evidentiary shortcomings.

9 **E. The Bank Cannot Overcome the Presumptions or Conclusive Recitals**

10 To quiet title in its name, SFR, as the record title holder, need only produce its deed; the  
11 deed and the underlying sale are presumed valid under Nevada law. *Brelia v. Preferred Equities*  
12 *Corp.*, 112 Nev. 663, 670, 918 P.2d 314, 319 (1996); *see also* NRS 47.250(16)-(18). NRS  
13 116.3116(2) gives associations a true super-priority lien, the proper foreclosure of which  
14 extinguishes the title owner’s interest and all junior liens, including a first deed of trust. *SFR*  
15 *Investments Pool I, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 758, 334 P.3d 408, 419 (2014). As the  
16 foreclosure sale is presumed valid, and a valid sale extinguishes all junior interests, the  
17 extinguishment of the title owner’s interest and all junior liens, including a first deed of trust, is  
18 also presumed. Furthermore, in the absence of grounds for equitable relief, the recitals contained  
19 in said deed are conclusively established pursuant to NRS 116.3116(1). *Shadow Wood*  
20 *Homeowners Ass’n, Inc. v. New York Community Bancorp, Inc.*, 132 Nev. —, 366 P.3d 1105,  
21 1110, 1112 (2016). Without equitable grounds, the recitals in the deed are conclusive as to: (1)  
22 default; (2) mailing of the notice of delinquent assessment; (3) recording of the notice of default  
23 and notice of sale; (4) elapsing of 90 days; and (5) giving notice of sale.

24 Therefore, at the very moment of the Association’s foreclosure sale, it is presumed that  
25 SFR obtained title free and clear of all junior interests, including the Bank. Although the Bank  
26 seems to insist one exists, **there is no presumption in favor of the Bank that the super-priority**  
27 **portion of the Association’s lien was satisfied.** Instead, the presumptions and recitals above  
28

1 demonstrate the exact opposite—it is conclusively established (short of an equitable challenge)  
2 that a default existed as to the Association’s entire lien (including the super- and sub-priority  
3 portions) and that the Association’s foreclosure sale was valid, thereby transferring title to SFR  
4 free and clear of all junior interests, including the Bank. In short, SFR sits in the winner’s seat until  
5 proven otherwise. In order to prove otherwise, **the Bank must initiate a lawsuit**. Without such a  
6 lawsuit, the presumptions remain un rebutted and the conclusive recitals remain unchallenged. In  
7 short, if the Bank fails to initiate a lawsuit, the deed of trust remains extinguished.

8 Even when the Bank initiates a lawsuit, the trek up the mountain gets tougher. The Nevada  
9 Supreme Court has held that an association’s notices constitute prima facie evidence that the  
10 association foreclosed on the superpriority portion of the lien. *PNC Bank v. Saticoy Bay*, No.  
11 69595, 395 P.3d 511 (Nev. May 25, 2017) (unpublished disposition); *PNC Bank v. Saticoy Bay*,  
12 No. 69201, 398 P.3d 290 (Nev. Jun. 15, 2017) (unpublished disposition). Furthermore, the deed  
13 language conveying “conveying all its right, title and interest” constitutes prima facie evidence  
14 that the Association foreclosed on the superpriority portion of the lien. *BNY Mellon v. K&P Homes*,  
15 *LLC*, No. 71273, 404 P.3d 403 (Nev. October 20, 2017) (unpublished disposition).

16 All told, at the commencement of a lawsuit, a purchaser, such as SFR, has the presumptions  
17 and conclusive recitals in its favor, **and in addition**, prima facie evidence that a super-priority  
18 portion was foreclosed upon.

19 **F. Statutory Provisions of NRS 116 and Legal Principles Render These**  
20 **Purported “Tenders” Invalid as a Matter of Law.**

21 Even if the Bank could survive the evidentiary failings above, which it cannot, the *SFR III*  
22 decision did not decide the effect of NRS 116.1104 and 116.1108 on the text of the letter, which,  
23 when analyzed, voids the letter. In fact, the *SFR III* decision does not cite these statutory  
24 provisions. *SFR III, supra*. Therefore, *SFR III* is neither persuasive nor controlling with regard to  
25 the legal argument SFR makes in this case.

26 ***1. NRS 116.1108 Governs Which and to What Extent Other General***  
27 ***Principles of Law May Supplement NRS 116 and Bars Applications***  
28 ***that are Inconsistent with the Chapter.***

By its terms, NRS 116.1108 governs the relationship between NRS 116 and other



1 general principles of law. Section 116.1108 provides as follows:

2 The principles of law and equity, including the law of  
3 corporations and any other form of organization authorized  
4 by law of this State, the law of unincorporated associations,  
5 the law of real property, *and the law relative to capacity to*  
6 *contract, principal and agent, eminent domain, estoppel,*  
7 *fraud, misrepresentation, duress, coercion, mistake,*  
8 *receivership, substantial performance, or other validating or*  
9 *invalidating cause supplement the provisions of this chapter,*  
10 *except to the extent inconsistent with this chapter.*<sup>2</sup>

11 NRS 116.1108 (emphasis added).

12 A review of the statute's text and plain meaning highlights the legal infirmities that render  
13 the Bank's purported tender invalid on its face. First, it is only by NRS 116.1108's express terms  
14 that Chapter 116 may be *supplemented* by other general bodies of law. *See id. SFR III* does not  
15 cite this provision in its discussion of the legal and equitable principles encompassed by the Bank's  
16 arguments regarding its purported "tender." *See* 427 P.3d at 116-122. Only by the Legislature  
17 adopting NRS 116.1108 does the concept of "tender" play any role at all in this area of law.  
18 Importantly, other principles of law apply "except to the extent inconsistent with [N.R.S. 116]."  
19 NRS 116.1108.

20 The problem here with the Bank's purported tender is that the insisted upon conditions in  
21 the Miles Bauer Letter are inextricable intertwined with the payment instrument. Here, the Bank's  
22 purported letter represents an offer to enter into a unilateral contract which insisted that as an  
23 express condition to the Association's negotiation, express or implied, of the Bank's purported  
24 payment instrument required the Association to violate NRS 116.1104, which prevents the  
25 Association from altering or waiving provisions of the statutes either through the CC&Rs or  
26 through any agreement with another party. *See* NRS 116.1104. One of those non-waivable  
27 provisions is the super-priority portion of an association lien under NRS 116.3116(2). *See SFR*  
28 *Investments Pool I, LLC. v. U.S. Bank, N.A.*, 130 Nev. 742, 757, 334 p.3d 408, 419 (2014). The

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<sup>2</sup> In 2011, NRS 116.1108 was amended to add the clause "and any other form of organization authorized by the law of this State," which is not material in terms of the arguments presented by SFR here. *See* Chapter 389, SB 304 (2011 Statutes of Nevada; Page 2417).

1 particulars of the letter's requirement of waiver are set forth in detail below.

2 NRS 116.1108 varies in its approach and treatment of general bodies of law. For example,  
3 the statute incorporates the laws of real property and eminent domain generally. *See* NRS  
4 116.1108. However, the treatment of concepts either originating or having specific applications  
5 under the law governing contracts, such as in rendering a contract either void or voidable or  
6 defeating contract formation entirely, are set forth quite specifically. For example, NRS 116.1108  
7 expressly includes coercion, fraud, misrepresentation, duress, mistake, or other invalidating cause.  
8 *See id.* What all of these legal concepts have in common is that they can be relied upon to declare  
9 void contractual obligations or defeat contract formation entirely, in addition to enabling the  
10 Association to seek other forms of relief, as well. Perhaps the most notable provision included in  
11 NRS 116.1108 in this regard, however, is its reference to "the law relative to capacity to contract."  
12 *Id.*

13 The most obvious application of this provision is in harmonizing the Nevada Legislature's  
14 express inclusion of this concept in NRS 116.1108 with the provision in NRS 116.1104. The latter  
15 bars the Association from entering into agreements that vary the provisions of NRS 116 or waive  
16 the Association's rights thereunder, absent the Association's express invocation of a specific  
17 provision of NRS 116 authorizing such agreements or waivers. Simply put, the Association could  
18 not—as a matter of law—enter into the Bank's proffered unilateral contract including the Bank's  
19 insisted-upon conditions which were presented to the Association as part of the Bank's alleged  
20 tender of payment.

21 As set forth more fully below, the conditions upon which the Bank expressly insisted as  
22 part of its purported tender required the Association to categorically waive its right to super-  
23 priority treatment of maintenance, nuisance and abatement charges—rights which are statutorily  
24 conferred upon the Association by NRS 116 and protected by that same chapter. Harmonizing  
25 NRS 116.1108 and 116.1104 requires this Court to find that the Association simply lacked the  
26 capacity to enter into the unilateral contract including the Bank's insisted-upon conditions which  
27 was presented as part of the Bank's purported tender. The Nevada Legislature's express inclusion  
28 of several specific legal principles that can be used to void contractual obligations or defeat

1 formation of agreements or contracts altogether in NRS 116.1108 discussed above serves as  
2 powerful evidence of the Nevada Legislature's express intent that the Association could not  
3 entertain, enter into, or be bound by an agreement or contract like that proposed by the Bank here.  
4 For this reason, and as discussed in greater detail immediately below, the inclusion of the Bank's  
5 insisted-upon condition that the Association categorically waive super-priority treatment for  
6 nuisance and abatement charges as an express condition to receiving the payment included as part  
7 of the Bank's alleged tender violates the express provisions of NRS 116.1104. Inclusion of such  
8 a provision renders the Bank's purported tender here a legal nullity. The Bank cannot establish a  
9 *prima facie* case of a valid tender under *SFR III*. The Bank's arguments based on its alleged tender,  
10 therefore, fail; and, its motion for summary judgment based on its alleged tender should, therefore,  
11 be denied

12 **2. *The Purported Letter and Payment Violates NRS 116.1104 and***  
13 ***Therefore Is Not a Valid "Tender."***

14 The Bank's purported payment is impermissibly conditional, and violates NRS 116.1104,  
15 thereby rendering it legally invalid and of no effect.

16 NRS 116.1104 provides in relevant part as follows:

17 Except as expressly provided in this chapter, *its provisions*  
18 *may not be varied by agreement, and rights conferred by it*  
19 *may not be waived.* Except as otherwise provided in  
20 paragraph (b) of subsection 2 of NRS 116.12075, a declarant  
21 may not act under a power of attorney, or use any other  
22 device, to evade the limitations or prohibitions of this  
23 chapter or the declaration.

24 *Id.* (emphasis added).

25 By its terms, the text of NRS 116.1104 emphatically and unequivocally commands that the  
26 provisions of NRS Chapter 116 cannot be "varied by agreement." This means that neither the  
27 Association nor the Bank—and, for that matter, SFR—can alter or vary provisions of NRS Chapter  
28 116 *in any way* by private agreement. The provisions of NRS 116 are for all intents and purposes  
set in stone.

This is so whether any such agreement takes the form of a bilateral contract resulting from

1 any negotiation(s) between the Bank and the Association, or whether, as here, the Bank’s alleged  
2 “tender” is accompanied by what is essentially an offer by the Bank to the Association to enter  
3 into a unilateral contract with the Bank that can only be accepted by the Association through  
4 performance—by negotiating the payment instrument accompanying the Miles Bauer Letter.

5 In other words, both the Bank and the Association were disabled by operation of NRS  
6 116.1104 from even entertaining entering into any sort of agreement—whether bilateral or  
7 unilateral—that had the effect of altering or varying *in any way* the provisions of NRS 116. By  
8 enacting this provision into law as part of NRS 116, the Nevada Legislature has essentially written  
9 the only permissible “contractual terms” or “agreement” with respect to NRS 116: namely, those  
10 terms must be found in the express text of the statute itself.

11 This conclusion is reinforced when the clause prohibiting variations of NRS 116 by  
12 agreement is coupled with the introductory clause of NRS. § 116.1104. That introductory clause  
13 begins, “[e]xcept as *expressly* provided in this chapter [NRS 116]...” NRS § 116.1104 (emphasis  
14 added). Any entity wishing to vary or alter the provisions of NRS 116 by agreement, therefore,  
15 must be able to identify an express statutory vehicle within NRS 116 itself permitting such an  
16 agreement or variation.

17 Adding further support to this conclusion is the last clause of the NRS 116.1104’s  
18 introductory sentence. That clause provides in relevant part that “...rights conferred by [NRS 116]  
19 *may not be waived.*” NRS 116.1104 (emphasis added). This last clause is addressed in the first  
20 instance to the Association and disables it from waiving its rights under NRS 116, including its  
21 lien priority rights. But this provision is also addressed to other entities, generally, including the  
22 Bank, and places them on notice that the Association’s conduct, whether express or implied, cannot  
23 amount to a waiver of the Association’s statutory rights under NRS 116.

24 **a. The Miles Bauer Letter expressly excludes a portion of what comprises the**  
25 **super-priority portion of an association lien.**

26 The super-priority portion of the Association’s lien is comprised of two portions—the  
27 assessments portion and nuisance-abatement/maintenance charges portion under NRS  
28 116.310312. *SFR III*, 427 P.3d at 117 citing *SFR Investments Pool 1 v. U.S. Bank*, 130 Nev. 742,

1 748, 334 P.3d 408, 412 (2014), and *Horizons at Seven Hills v. Ikon Holdings*, 132 Nev. —, —  
2 —, 373 P.3d 66, 72 (2016).

3 Here, the Miles Bauer Letters specifically **exclude** the abatement portion under NRS  
4 116.310312 when defining what portions of the Association’s lien is entitled to super-priority  
5 status. In fact, Miles Bauer claims the nuisance-abatement/maintenance charges portion is junior.  
6 Specifically, the letter states “[w]hile the HOA may claim a lien under NRS 116.3102 Subsection  
7 (1), Paragraphs (j) through (n) of this Statute clearly provide that such a lien is JUNIOR to first  
8 deeds of trust to the extent the lien is for fees and charges imposed for collection and/or attorney  
9 fees, collection costs, late fees, service charges and interest.” However, **NRS 116.3102(1)(j)**, as it  
10 read in October 2011 and December 2011 (the dates of both letters), states the association “[m]ay  
11 impose and receive any payments, fees or charges ... *for services provided to the units’ owners,*  
12 *including, without limitation, any services provided pursuant to NRS 116.310312.*” (emphasis  
13 added). And, under NRS 116.3116(2), an association lien is prior to a first deed of trust “to the  
14 extent of **any** charges incurred by the association on a unit pursuant to NRS 116.310312. . . .”  
15 (Emphasis added). Thus, any amount incurred pursuant to NRS 116.310312 is prior. Under NRS  
16 116.310312(4),<sup>3</sup> that includes fees, notifications, collection costs and interest. And pursuant to  
17 subsection (6), the lien described in subsection (4) is prior to a first deed of trust. NRS  
18 116.310312(6). Thus, the Miles Bauer Letters insist the Association either vary by agreement the  
19 right afforded by NRS 116 or insist the Association waive such right.

20 Put simply, all fees/charges under NRS 116.310312 are included in the super-priority  
21 portion of the Association’s lien. Yet, the Miles Bauer Letter expressly states that the portion of  
22 the Association’s lien pursuant to NRS 116.310312 is **junior** to the deeds of trust in its inclusion  
23 of 116.3102(1)(j). Therefore, the Miles Bauer Letter contains a **blatant misrepresentation of**  
24 **what constitutes the super-priority portion** and then requires that the Association/Agent accept  
25 the Bank’s presentation of the law. In other words, the Miles Bauer Letter, as presented, **requires**  
26 that the Association/Agent agree, through acceptance, to **subordinate** the abatement portion of its  
27

28 <sup>3</sup> Referencing the version of the statute in place at the time of the letters and foreclosure.

1 lien, which carries a super-priority status, to the deeds of trust. This required agreement to  
2 subordinate the abatement portion to the deed of trust is in direct violation of NRS 116.1104.

3 Holding that the conditions presented in the Miles Bauer Letter regarding subordination of  
4 the abatement portion of the Association's lien are permissible would have the same effect as if a  
5 court held that a mortgage protection clause was enforceable. The Nevada Supreme Court has  
6 definitively held that mortgage protection clauses are unenforceable as a matter of law because  
7 they violate NRS 116.1104. *See SFR*, 334 P.3d at 419 (holding that NRS 116.1104 renders  
8 mortgage protection clauses invalid because they would "require a waiver of the HOA's right to a  
9 priority position for the HOA's super-priority lien."). Under the same logic, the Miles Bauer  
10 Letters require a waiver or vary by agreement of the Association's super-priority position as to the  
11 abatement portion of its lien. Such a waiver is prohibited by NRS 116.1104, which, as a matter of  
12 law, renders the Miles Bauer Letter legally invalid. Because of this the waiver of the abatement  
13 portion is not a condition upon which the Bank has a right to insist, rendering the purported  
14 "tender" impermissibly conditional and therefore invalid.

15 **b. Accepting the Bank's offer to enter into a unilateral contract would result**  
16 **in the Association waiving its right to maintenance, nuisance and**  
17 **abatement charges in any case involving the Bank**

18 In addition, as set forth above, a close examination of the text of the Miles Bauer Letters  
19 reveals they constitute nothing more than an offer from the Bank to the Association to enter into a  
20 unilateral contract that can only be accepted by the Association through performance—by  
21 negotiating the Bank's accompanying payment instrument and, thereby, agreeing to the terms of  
22 the Miles Bauer Letter. The Miles Bauer Letter does not cite to any express language allowing it  
23 and the Association to alter the provisions of NRS 116.3116(2), because it cannot. The Miles Bauer  
24 Letter does not contain a severability provision; thus, if any provision of the Miles Bauer Letter—  
25 as an offer to enter into a unilateral contract—is found to be unenforceable under otherwise  
26 applicable Nevada law, the proposed unilateral contract, as a whole, would also be unenforceable.  
27 The Miles Bauer Letter does not include any representations or warranties that its provisions  
28 expressly track the requirements of NRS 116. It could not because they did not. The Letter as  
written operates at a categorical level—i.e., it categorically excludes maintenance, nuisance and

1 abatement charges. This represents a wholesale variation of NRS 116 that the Association cannot  
2 by law possibly agree to. Put simply, the Association could not negotiate the purported payment  
3 because it would be categorically agreeing to waive any and all maintenance, nuisance and  
4 abatement charges in other cases involving the Bank because the Association would have  
5 stipulated to the principle of law set forth in the Miles Bauer Letter. This, in turn, is why, in a  
6 particular case, the fact of whether abatement charges exist does not matter.

7 So, when faced with such a proposal from the Bank to enter into a unilateral contract that  
8 (i) varied impermissibly the terms of NRS 116 and (ii) essentially called on the Association to  
9 waive its rights under NRS 116 in express violation of NRS 116.1104, the Association was  
10 disabled by law from even entertaining such terms from the Bank. Simply put, the Association  
11 was powerless under law from accepting the Bank's alleged "tender."

12 Combining the expansive and overlapping protections from which the Association  
13 benefits, as well as the express prohibitions to which it is subjected under NRS 116.1104, yields  
14 the conclusion that neither the Association nor the Bank, by word or by deed, could vary the terms  
15 of NRS 116; nor could the Association be found to have waived its rights—either by express  
16 waiver or by implication—absent the invocation of an express provision under NRS 116 that  
17 expressly authorizes variation of the provisions of NRS 116 or a waiver of the Association's rights  
18 under N.RS 116.

19 **G. The Bank's Alleged "Tender" Fails when Analyzed Through the Lens of**  
20 **NRS 116.1104 and 116.1108.**

21 It is against this legal backdrop that the Bank's alleged "tender" must be assessed. As the  
22 *SFR III* Court explained, "[i]n addition to payment in full, valid tender must be unconditional, *or*  
23 *with such conditions on which the tendering party has a right to insist... The only legal conditions*  
24 *which may be attached to a valid tender are either a receipt for full payment or a surrender of*  
25 *the obligation.*" *SFR III*, 427 P.3d at 118. (emphasis added) (internal citation omitted) (citations  
26 omitted) (internal quotation marks omitted). The Bank had no right under NRS 116.1104 to insist  
27 upon terms that required the Association, as an express condition precedent to receiving payment,  
28 vary impermissibly the terms of NRS 116 and waive its rights thereunder in violation of NRS

1 116.1104.

2 Viewed in this manner, the very observations from *SFR III* on which the Bank would rely,  
3 when combined with the background legal principles set forth in the express text of NRS 116.1104,  
4 actually doom the Bank’s alleged “tender” as it cannot in any way, shape, or form be considered a  
5 “valid tender.”

6 **H. This Court Sits in Equity, and the Equities Weigh in Favor of SFR.**

7 The *SFR III* decision confirms the prior published opinions that when looking behind the  
8 conclusive recital of default, the Court sits in equity. *SFR III*, 427 P.3d at 120; *see also Shadow*  
9 *Wood Homeowners Ass’n Inc. v. New York Community Bancorp, Inc.*, 132 Nev. at \_\_\_, 366 P.3d  
10 1105, 1110-12 (2016). Thus, assuming the Court finds that the Bank paid the super-priority portion  
11 (a fact still not established by admissible evidence), the Court still must weigh the equities. Recall,  
12 NRS 116.31166 provides that the recital of “default” is “conclusive against the unit’s former  
13 owner, his heirs, and assign and **all other persons.** NRS 116.3166 (emphasis added). In fact, the  
14 *Shadow Wood* Court recognized the effect such a conclusive recital could have, even in instances  
15 where no default existed, and in order to avoid what they perceived to be a “breathtakingly broad”  
16 reading, the Court found that “courts retain the power to grant **equitable** relief from a defective  
17 foreclosure sale when appropriate despite NRS 116.31166. *Shadow Wood*, 366 P.3d at 1110-1111  
18 (emphasis added). In so holding, it concluded that the “Legislature, through NRS 116.31166’s  
19 enactment, did not eliminate the **equitable** authority of the courts to consider quiet title actions  
20 when an HOA’s foreclosure deed contains conclusive recitals.” *Id.* at 1112 (emphasis added).

21 The *SFR III* decision confirmed that when tender is alleged, the challenge is to the default.  
22 In other words, when a bank allegedly pays the super-priority portion, the claim is there was no  
23 default and thus no power of sale. *SFR III*, 427 P.3d at 121. Now, couple that with the *Shadow*  
24 *Wood* decision (which was an alleged tender case as well): when a party challenges the conclusive  
25 recital of default, the only way for the court to look behind the conclusive recital is to invoke its  
26 powers of equity. The fact that the court sits in equity when analyzing a tender case is further  
27 confirmed by the *SFR III* Court in its analysis of the kept good argument asserted by SFR in that  
28 case. The Court rejected the argument, not under statute, not under common law, but under equity.



1 It specifically cited *Necessity of Keeping Tender Good in Equity*, 12 A.L.R. 938 (1921)  
2 (“Generally, there is no fixed rule in equity which requires a tender to be kept good in the sense in  
3 which that phrase is used at law.”). *SFR III*, 427 P.3d at 120. This makes perfect sense. The *SFR*  
4 *III* Court knew it was sitting in equity as already established by its prior decision in *Shadow Wood*.  
5 But for invoking the inherent powers of equity, neither this Court, nor any other court could ever  
6 look behind the conclusive recital of default.

7 With that in mind, this means that simply proving the delivery of a valid tender does not  
8 end the inquiry; the court sits in equity and “[w]hen sitting in equity...courts must consider the  
9 entirety of the circumstances that bear upon the equities.” *Shadow Wood*, 366 P.3d at 1114  
10 (citations omitted). In the present case, the doctrine of waiver, estoppel and unclean hands are all  
11 in play, and weigh against the Bank and in favor of SFR.

12 **1. Waiver.**

13 Under Nevada law, “[w]aiver requires the intentional relinquishment of a known right.”  
14 *Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 152 P.3d 737, 740  
15 (Nev. 2007) (en banc). To infer intent from a party’s conduct, that conduct “must clearly indicate  
16 the party’s intention.” *Id.* And to infer waiver from conduct, the conduct must be “so inconsistent  
17 with an intent to enforce the right as to induce a reasonable belief that the right has been  
18 relinquished.” *Id.*

19 Here, the Bank alleges it sent payment back in September 2010. Yet it did not file suit after  
20 the sale went forward on January 8, 2014. Instead, this matter began as an interpleader, and it was  
21 not until August 2015 that the Bank alleged it paid the super-priority portion of the lien. To make  
22 matters worse, during this time period of inaction, the Bank was litigating the interpretation of the  
23 statute as if the Association did not have a superior lien. This conduct is in derogation of a claim  
24 that it paid the super-priority portion, and therefore equity dictates that the Bank waived the right  
25 to assert such claim now.

26 **2. Estoppel.**

27 “Equitable estoppel functions to prevent the assertion of legal rights that in equity and good  
28 conscience should not be available due to a party’s conduct.” *In re Harrison Living Tr.*, 112 P.3d

1 1058, 1061-62 (Nev. 2005) (quotation omitted). For equitable estoppel to apply: (1) the party to  
2 be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted  
3 upon, or must so act that the party asserting estoppel has the right to believe it was so intended;  
4 (3) the party asserting the estoppel must be ignorant of the true state of facts; (4) he must have  
5 relied to his detriment on the conduct of the party to be estopped. *Id.* (quotation omitted).

6 **First**, in the present case, the Bank was apprised of the fact that it sent payment to Alessi  
7 in September 2010. **Second**, the Bank, by virtue of its letter and check, must have intended to pay  
8 the super-priority portion (at least what it deemed it to be). **Third**, SFR had no knowledge of the  
9 letter or check, and as such when it purchased this property it believed it was purchasing free and  
10 clear of any deeds of trust. **Fourth**, SFR engaged in litigation with the Bank in other cases for  
11 years prior to this case being filed, and for much of that time, the Bank disputed the interpretation  
12 of the statute. As such, the Bank is equitably estopped from claiming it paid the super-priority  
13 portion this late in the game.

### 14 3. *Unclean Hands.*

15 “The application of the unclean hands doctrine raises primarily a question of fact.” *Dollar*  
16 *Sys., Inc. v. Avcar Leasing Sys., Inc.*, 890 F.2d 165, 173 (9th Cir. 1989). To preclude equitable  
17 relief, the party’s inequitable conduct must be “unconscientious, unjust, or marked by the want of  
18 good faith” and sufficiently connected with the “subject-matter or transaction in litigation.” *Las*  
19 *Vegas Fetish & Fantasy Halloween Ball, Inc.*, 182 P.3d 764, 766 (Nev. 2008) (citing *Income*  
20 *Investors v. Shelton*, 101 P.2d 973, 974 (Wash. 1940)). Two factors must be considered when  
21 assessing if a party’s conduct is sufficiently connected to the action: “(1) the egregiousness of the  
22 misconduct at issue, and (2) the seriousness of the harm caused by the misconduct.” *Id.* In the  
23 present case, the Bank allegedly paid the super-priority in November 2012. Yet, after supposedly  
24 sending this payment did nothing for the next four years (sale occurred on January 8, 2014). All  
25 told, the equities weigh in favor of SFR, not the Bank, and *SFR III* does not change this reality. As  
26 the *Shadow Wood* Court noted, “[e]quitable relief will not be granted to the possible detriment of  
27 innocent third parties.” *Shadow Wood*, at 1115 quoting *Smith v. United States*, 373 F.2d 419, 424  
28 (4th Cir. 1966).

**I. SFR Is a BFP.**

While it is true that in the context of a **proven valid payment of the super-priority portion**, bona fide purchaser status does not matter (at least for now), it is still valid in other equitable challenges to the sale. That being said, SFR submits its bona fide purchaser status has not triggered in this case because the Bank has not raised a valid equitable challenge to the sale. *See Federal National Mortgage Association v. SFR Investments Pool 1, LLC*, 408 P.3d 543, fn. 4 (December 14, 2017) (unpublished disposition). The prior Court's finding that SFR is a BFP is not upset by *SFR III*, because the Bank has failed to prove its equitable challenge to the sale, that it "tendered" via admissible evidence. As a result, the order entered by the prior court does not need to be reconsidered or altered or amended.

**III. CONCLUSION**

For the reasons stated, the Bank's motion should be denied. To the extent this Court determines that reconsideration is appropriate, which it is not, then the best the Bank has done is demonstrate genuine issues of material fact that may be enough to set aside the summary judgment in favor of SFR, but would also preclude summary judgment in favor of the Bank.

DATED February 1, 2019.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 1st day of February, 2019, pursuant to NRCP 5(b), I served via the Eighth Judicial District Court electronic filing system, the foregoing **SFR INVESTMENTS POOL 1 LLC'S OPPOSITION TO DEFENDANT NATIONSTAR MORTGAGE, LLC'S MOTION FOR RECONSIDERATION AND/OR TO ALTER/AMEND JUDGMENT** to the following parties:

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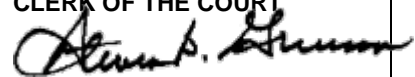
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# **TAB 33**



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*Attorneys for Defendant Nationstar Mortgage, LLC*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

ALESSI & KOENIG, LLC,

Plaintiff,

v.

STACY MOORE, an individual; MAGNOLIA  
GOTERA, an individual; KRISTIN JORDAL,  
AS TRUSTEE FOR THE JBWNO  
REVOCABLE LIVING TRUST, a trust; U.S.  
BANK, N.A., a national banking association;  
NATIONSTAR MORTGAGE, LLC, a foreign  
limited liability company; REPUBLIC SILVER  
STATE DISPOSAL, INC., DBA REPUBLIC  
SERVICES, a domestic government entity;  
DOE INDIVIDUALS I through X, inclusive;  
and ROE CORPORATIONS XI through XX  
inclusive.

Defendants.

Case No.: A-14-705563-C

Dept.: XVII

**REPLY IN SUPPORT OF DEFENDANT  
NATIONSTAR MORTGAGE, LLC'S  
MOTION FOR RECONSIDERATION  
AND/OR TO ALTER/AMEND  
JUDGMENT**

1 U.S. BANK, N.A.,  
2 Counterclaimant,  
3 vs.  
4 ALESSI & KOENIG, LLC, a Nevada limited  
liability company,  
Counter-Defendant.

5 U.S. BANK, N.A.,  
6 Third Party Plaintiff,  
7 v.  
8 SFR INVESTMENTS POOL 1, LLC, a Nevada  
limited liability company; INDIVIDUAL DOES  
9 I through X, inclusive; and ROE  
CORPORATIONS I through X, inclusive.  
10 Third Party Defendants.

11 SFR INVESTMENTS POOL 1, LLC, a  
Nevada limited liability company,  
12 Third Party Counterclaimant/Cross-claimant,  
13 vs.  
14 U.S. BANK, N.A.; NATIONSTAR  
MORTGAGE, LLC, a foreign limited liability  
15 company; KRISTIN JORDAL, AS TRUSTEE  
FOR THE JBWNO REVOCABLE LIVING  
16 TRUST, a trust; STACY MOORE, an  
individual; and MAGNOLIA GOTERA, an  
17 individual,  
18 Counter-Defendant/Cross-Defendants.

19  
20 **REPLY IN SUPPORT OF DEFENDANT NATIONSTAR MORTGAGE, LLC'S MOTION**  
21 **FOR RECONSIDERATION AND/OR TO ALTER/AMEND JUDGMENT**

22 COMES NOW, Defendant / Counter-claimant, NATIONSTAR MORTGAGE, LLC  
23 ("Nationstar") by and through its attorneys, GERRARD COX LARSEN and AKERMAN, LLP, and  
24 hereby file this Reply in Support of its Motion For Reconsideration of the Findings of Facts and  
25 Conclusions of Law ("Motion") entered into this Court on November 29, 2018. This Reply is made  
26 and based upon the pleadings and papers on file, the exhibits, Points and Authorities attached  
27 hereto, the Declarations submitted herewith, and any oral argument the Court may entertain at the  
28 time of the hearing.

Dated this 19<sup>th</sup> day of March, 2017.

**GERRARD COX LARSEN**

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## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I.**

#### **INTRODUCTION**

This lawsuit arises out of a dispute between the parties over the legal effect of a non-judicial foreclosure of real property located at 5327 Marsh Butte Street, Las Vegas, Nevada 89148, Las Vegas, Nevada 89122 (the “Property”) that was conducted by Shadow Mountain Ranch Community Association (“Shadow Mountain” or the “HOA”) through its agent, Alessi & Koenig, LLC (“Alessi” or “HOA Trustee”) after a full tender of the super-priority lien amount had been made by the lender holding the first priority deed of trust.

On November 29, 2018, this Court issued its Findings of Fact and Conclusions of Law (the “FFCL” or “Order”) granting SFR Investments Pool 1, LLC’s (“Plaintiff”) Motion for Summary Judgment against Defendant Nationstar Mortgage, LLC (“Nationstar”). The primary basis of the Court’s ruling was its determination that no admissible evidence had been submitted demonstrating that a full tender of the superpriority portion of the HOA’s lien had been made. However, to reach



1 this decision the Court made the following critical errors of law and failed to consider the following  
2 undisputed evidence, all of which warrants reconsideration.

3       **First**, the Court incorrectly determined that Douglas Miles had not been properly disclosed  
4 as a witness. (See Order at **Exhibit “A”** to the Motion at 4:14-16, 11:7). This was a clear factual  
5 and legal error as Douglas Miles was clearly and undisputedly disclosed in Nationstar’s Second  
6 Supplemental Disclosure of Documents and Witnesses electronically served on June 1, 2018 which  
7 identifies Doug Miles as the person expected to testify as the Corporate Representative of Miles  
8 Bauer. See **Exhibit “S”** to the Motion for Reconsideration at pages 5-6.

9       **Second**, the Court incorrectly determined that the Affidavit of Douglas Miles contained  
10 statutory defects rendering it inadmissible. Setting aside the obvious fact that this same form of  
11 Miles Bauer affidavit has been used in hundreds of cases without issue, the Affidavit of Douglas  
12 Miles meets all criteria of NRS 52.260 and is clearly admissible and properly authenticates the  
13 business records of the Miles Bauer law firm attached to the Affidavit, including the tender payment  
14 and accompanying letter. (See **Exhibit “F”** to the Motion). The Douglas Miles Affidavit contains  
15 the following statements, which are not contested by any evidence and which invalidate the Court’s  
16 ruling, as a matter of law:

17       (i) Douglas Miles is managing partner of the law firm formerly known as Miles, Bauer,  
18 Bergstrom & Winters. (**Exhibit “F”** to the Motion at ¶ 1).

19       (ii) Douglas Miles has personal knowledge of Miles Bauer’s procedures for creating and  
20 maintaining records, (which satisfies the requirements of NRS 52.260(2) for Douglas Miles to be a  
21 “qualified person” to provide the affidavit). (**Exhibit “F”** to the Motion at ¶ 3).

22       (iii) That the records Douglas Miles is authenticating were made “at or near the time of the  
23 occurrence of the matters recorded by persons with personal knowledge of the information in the  
24 records,” (which satisfies the requirements of NRS 52.260(2)(a)). (**Exhibit “F”** to the Motion at ¶  
25 3).

26       (iv) That the records being authenticated were kept in the course of Miles Bauer’s regularly  
27 conducted business activities and as a part of a regular practice of making and keeping such records,  
28 (which satisfies the requirements of NRS 52.260(2)(b)). (**Exhibit “F”** to the Motion at ¶ 3).

1  
2 **Third**, the Court completely failed to consider (for the invalid legal reasons stated above)  
3 the contents of Douglas Miles Affidavit which authenticates the September 30, 2010 letter of Rock  
4 Jung, Esq. sent to Alessi & Koenig and the enclosed tender check for \$207.00. (See **Exhibit “F-**  
5 **5”**).

6 **Fourth**, the Court completely ignored the Affidavit of Rock Jung, Esq. (**Exhibit “G”** to  
7 Motion), the attorney that prepared and sent the September 30, 2010 letter and the tender check to  
8 Alessi & Koenig. The Rock Jung Affidavit contains testimony based upon Mr. Jung’s personal  
9 knowledge and he again authenticates the September 30, 2010 letter and the tender check and makes  
10 it clear these were mailed to Alessi & Koenig. This affidavit clearly satisfies the requirements of  
11 NRS 52.025 to authenticate a document through testimony of a person with personal knowledge.  
12 The Rock Jung Affidavit makes it clear the tender was made and is unrefuted.

13 **Fifth**, the Court ignored the collection file of Alessi & Koenig, (produced under David  
14 Alessi’s custodial affidavit and disclosed at page 7 of Nationstar’s Second Supplemental Disclosure  
15 of Documents and Witnesses electronically served on June 1, 2018). (See **Exhibit “S”** to the  
16 Motion). The Alessi & Koenig file clearly contains a copy of the tender check (See **Exhibits “J”**  
17 and **“S”** to the Motion) and the testimony of David Alessi was that if his file contained the check, he  
18 would believe it had been received. (See Deposition of David Alessi at 24:21-25:25 attached to the  
19 Motion as **Exhibit “T”**).

20 **Sixth**, the Court ignored the clear mandate of NRS 47.250(13) which presumes that “a letter  
21 directed and mailed was received in the regular course of the mail.” See *Resources Group, LLC v.*  
22 *Nevada Association Services*, 135 Nev. Adv. Op. 8 at pg. 9 of *dissent* (March 14, 2019).

23 The Court made another clear error of law when it determined that refusal of the tender was  
24 justified because of the HOA’s honest belief that the tender was insufficient. The Nevada Supreme  
25 Court has explicitly rejected this argument in *BAC Home Loans Servicing, LP v. Premier One*  
26 *Holdings, Inc.*, Case No. 74768 (Nev. Feb. 20, 2019)(unpublished Order of Reversal) and *TRP Fund*  
27 *IV, LLC v. The Bank of New York Mellon*, Case No. 74002 (Nev. Feb. 20, 2019).

1 The Court made yet another clear error of law when it determined that SFR should prevail  
2 because the Bank had failed to record its tender to protect itself from third-party purchasers as  
3 required by Nevada law. This argument was expressly rejected by the Nevada Supreme Court in  
4 *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 134 Nev. Adv. Op. 72, pgs 8-10 (Sept. 13,  
5 2018).

6 The Court made another critical error of law when it determined that SFR's status as a bona  
7 fide purchaser protected it against the tender (of which SFR had no knowledge) because the Bank  
8 failed to protect itself by recording a lis pendens or obtaining preliminary injunction. This argument  
9 was expressly rejected by the Nevada Supreme Court in *Bank of America, N.A. v. SFR Investments*  
10 *Pool 1, LLC*, 134 Nev. Adv. Op. 72, pgs 8-10 (Sept. 13, 2018) which held that "[a] party's status as  
11 a BFP is irrelevant when a defect in the foreclosure proceeding renders the sale void" (*Id.* at 13) and  
12 "[a] valid tender of payment operates to discharge a lien." (*Id.* at 3). *See also Saticoy Bay LLC*  
13 *Series 9014 Salvatore Street v. U.S. Bank N.A.*, Case No. 74217 (Nev. Oct. 12, 2018) (unpublished  
14 Order of Affirmance).

15 Finally, the Court committed an error of law when it determined that if a trustee's deed upon  
16 sale recites that all statutory requirements have been satisfied, a conclusive presumption arises for a  
17 bona fide purchaser that the sale was conducted regularly and properly. The Nevada Supreme Court  
18 rejected this proposition in *Shadow Wood v. New York Community Bancorp*, 132 Nev. Adv. Op. 5,  
19 366 P.3d 1105, 1110 (2016) reasoning that affording conclusive effect to such recitals "would be  
20 'breathhtakingly broad' and 'is probably legislatively unintended.'" *See also RLP-Ampus Place, LLC*  
21 *v. U.S. Bank, N.A.*, Case No. 71883 (Nev. Dec. 22, 2017) (unpublished Order of Affirmance).

22 SFR's Opposition does nothing to change any of these legal arguments, nor can SFR point to  
23 any evidence refuting the clearly admissible evidence establishing that a full tender was made in this  
24 case rendering the sale subject to the Deed of Trust.

25 Finally, it is clear that the law with respect to tender has also significantly changed since the  
26 August 15, 2018 hearing on the competing motions for summary judgment, with the Supreme Court's  
27 decisions in *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 134 Nev. Adv. Op. 72 (Sept. 13,  
28 2018) and *Bank of New York Mellon vs. Thomas Jessop, et al*, 135 Nev. Adv. Op. 7 (Mar. 7, 2019),

1 through which the Nevada Supreme Court held that a formal tender is excused when the party entitled  
2 to payment represents that if a tender is made, it will be rejected. These two recent decisions by the  
3 Nevada Supreme Court refute nearly every defense raised by SFR in this case. Based on the evidence  
4 that was ignored or improperly excluded by the Court and the *Bank of America* and *Bank of New York*  
5 *Mellon's* decisions, Nationstar is entitled to summary judgment.

6 **II.**

7 **STATEMENT OF UNDISPUTED FACTS**

8 SFR does not dispute the facts set forth in Nationstar's Motion for Reconsideration and has  
9 not set forth any admissible evidence to support contrary facts. Only the legal effect of those  
10 undisputed facts is in dispute, although SFR does offer legal challenges to the admissibility of the  
11 unrefuted evidence. Accordingly, the facts are deemed undisputed and should be considered by the  
12 Court on this Motion. *See* E.D.C.R. 2.20(e) & (i); *Collin v. Union Fed. Sav. & Loan Ass'n*, 99 Nev.  
13 284, 300, 662 P.2d 610, 620 (1983) (evidence introduced in support of or opposition to a motion for  
14 summary judgment must be admissible evidence).

15 Nationstar's references the Statement of Undisputed Facts as presented in the original Motion  
16 for Reconsideration and incorporates those facts herein by reference. Furthermore, for the purposes  
17 of this Reply, Nationstar emphasizes the importance of the following undisputed facts:

18 1. On September 2, 2010, MERS as nominee for BAC Home Loans Servicing, LP, fka  
19 Countrywide Home Loans, Inc. ("BAC"), through its counsel, Rock K. Jung, Esq. of the law firm of  
20 Miles, Bauer, Bergstrom & Winters, LLP ("Miles Bauer"), sent a letter to the HOA and HOA Trustee  
21 in response to the HOA NOD requesting the status of the foreclosure sale including the amount due  
22 in arrears. *See* Miles Bauer Affidavit attached to the Motion as **Exhibit "F"** and the Miles Bauer  
23 Letter dated September 2, 2010 attached to Motion as **Exhibit "F-1"**. *See* also **Exhibit "A"** to the  
24 Motion at ¶ 15:10-17. *See* also Affidavit of Rock K. Jung, Esq. attached to Nationstar's Motion as  
25 **Exhibit "G"**.

26 2. On September 8, 2010, in response to Miles Bauer's request, Alessi sent a letter to  
27 Miles Bauer **stating that any partial payments of the HOA's lien would be rejected**, although it  
28 acknowledged that NRS 116.3116 provided that the HOA's super-priority lien is limited to nine

1 months of assessments. See copy of Alessi's Rejection Letter dated September 8, 2010 attached to  
2 Nationstar's Motion as **Exhibit "F-4"** to the Motion.

3 3. On or about September 30, 2010, Miles Bauer delivered a check for \$207.00 to Alessi,  
4 which represented nine months of common assessments at \$23.00 per month ( $\$23.00 \times 9 = \$207.00$ ).  
5 See **Exhibit "F-3"** to the Motion. **In its Order, the Court concluded that the amount of \$207.00**  
6 **in the tendered check was the correct amount of the super-priority lien, as it was nine months**  
7 **of assessments under NRS 116.3116(2).** See **Exhibit "A"** to the Motion at 10:16-18.

8 4. On November 30, 2010, the HOA and its agent, Alessi, released the HOA Lien as  
9 evidenced by that certain Release of Delinquent Assessment Lien recorded in the Official Records of  
10 Clark County, Nevada as Instrument No. 20101130-0003315. As of the date of the Release, the  
11 balance of the HOA Lien, which included delinquent assessments and late fees, was approximately  
12 \$2,545.00 as indicated in Shadow Mountain HOA's account ledger. See Shadow Mountain HOA  
13 Ledger attached to Nationstar's Motion as **Exhibit "I"** which is supported by the Affidavit of David  
14 Alessi as Custodian of Records for Alessi & Koenig, attached to the Motion as **Exhibit "J"**. There  
15 are no nuisance or abatement charges on the HOA's ledger.

16 5. On November 28, 2018, the Court issued its FFCL, in which the Court concluded that  
17 "David Alessi testified that Alessi & Koenig did not receive the Miles Bauer letter with the check. If  
18 Alessi & Koenig never received the purported tender there was nothing to reject." See FFCL at 11:4-  
19 7. However, this finding is clearly erroneous as it is completely inconsistent with the Release and  
20 David Alessi's actual testimony. David Alessi testified about his knowledge of the tendered check in  
21 relevant part is as follows:

22 Q. David, Exhibit J is a letter dated September 30, 2010 from Miles Bauer to Alessi &  
23 Koenig; the third page of which includes a Miles Bauer check payable to Alessi &  
24 Koenig for \$207. Have you seen this document before, or did you see it in your review  
of the collection file?

25 A. I did not.

26 . . . .

26 Q. I mean, do you know if Alessi & Koenig received Exhibit J?

27 A: **I don't know.** I would expect to see either a copy of the check -- and this is  
28 based on my prior testimony in depositions -- either a file -- copy of the check in our  
file, in our production or a reference to the check in the status report or both. **However,**  
**the absence of a reference in the status report and a copy in our check -- in our**  
**file would not lead me to believe conclusively that we didn't receive the check.**

1           See Deposition of David Alessi at 24:21-25:25 attached Nationstar's Motion as **Exhibit "X"**.  
2 (Emphasis Added).

3           The fact that the Alessi file, produced as the business records of Alessi maintained in the  
4 ordinary course of Alessi's business operations, contains a copy of the Miles Bauer letter and tender  
5 check, cannot be refuted and is not refuted by the testimony of David Alessi, who testified "I don't  
6 know" when asked if Alessi had received the tender check.

7  
8           6.       In its FFCL, the Court found that the Affidavit of Doug Miles, Esq., as the corporate  
9 designee and custodian of records for Miles Bauer, was inadmissible to evidence that a check in the  
10 amount of \$207.00 to satisfy the super-priority portion of the HOA's lien was delivered to the HOA  
11 Trustee, because Nationstar failed to properly disclose Douglas Miles as a witness. *See FFCL at 4:16-*  
12 *17.* This was an egregious legal error as Douglas Miles was clearly and undisputedly disclosed in  
13 Nationstar's Second Supplemental Disclosure of Documents and Witnesses electronically served on  
14 June 1, 2018 which identifies Doug Miles as the person expected to testify as the Corporate  
15 Representative of Miles Bauer. *See Exhibit "S"* to the Motion for Reconsideration at pages 5-6.

16  
17           7.       Moreover, in its Reply in Support of Motion for Summary Judgment, Nationstar  
18 included an Affidavit from Rock K. Jung, Esq. as additional evidence that a tender in the amount of  
19 \$207.00 was delivered. A copy of Rock K. Jung's Affidavit is attached to the Motion as **Exhibit "G"**.  
20 Nationstar Mortgage, LLC's Second Supplement Disclosures of Documents and Witnesses served  
21 June 21, 2018, (attached to the Motion as **Exhibit "S"**) clearly disclosed both Rock Jung, Esq. as a  
22 witness (page 4, no. 11) and the Corporate Representative (believed to be Douglas Miles) and/or 30(b)  
23 Witness for Miles, Bauer & Winters, LLP, as a witness (page 5, no. 20).

24  
25           8.       The Affidavit of Rock K. Jung, Esq., who was also disclosed as a witness, confirms  
26 that the Miles Bauer letter and tendered check were delivered to Alessi & Koenig, who immediately  
27 rejected it. Mr. Jung was the attorney who sent the tender check to Alessi & Koenig and has testified  
28

1 based upon his personal knowledge, which is unrefuted. Accordingly, SFR's argument that Nationstar  
2 failed to provide sufficient evidence of a tendered check must be rejected. See **Exhibit "G"** to the  
3 Motion.

4 **III.**

5 **STATEMENT OF AUTHORITIES**

6  
7 **A. THIS COURT HAS JURISDICTION TO HEAR THIS MATTER ON**  
8 **RECONSIDERATION**

9 NRS 3.220 provides as follows concerning the roles of district court judges:

10 The district judges shall possess equal coextensive and concurrent jurisdiction and power.  
11 They each shall have power to hold court in any county of this State. They each shall  
12 exercise and perform the powers, duties and functions of the court and of judges thereof and  
13 of judges at chambers. The decision in an action or proceeding may be written or signed at  
14 any place in the State by the judge who acted on the trial and may be forwarded to and filed  
15 by the clerk, who shall thereupon enter judgment as directed in the decision, or judgment  
16 may be rendered in open court, and, if so rendered, shall be entered by the clerk accordingly.  
17 If the public business requires, each judge may try causes and transact judicial business in  
18 the same county at the same time. Each judge shall have power to transact business which  
19 may be done in chambers at any point within the State, and court shall be held in each  
20 county at least once in every 6 months and as often and as long as the business of the county  
21 requires. All of this section is subject to the provision that each judge may direct and control  
22 the business in his or her own district and shall see that it is properly performed.

23 There is nothing in the plain language of NRS 3.220 that even remotely suggests that a new  
24 district court judge to whom a matter is reassigned is prohibited from reviewing a decision made by  
25 the previous district court judge, and SFR has failed to provide any authority for this baseless  
26 assertion.

27 On the other hand, the Nevada Rules of Civil Procedure and the Eighth Judicial District  
28 Court Rules both permit reconsideration of an order. EDCR 2 .24(b) states in pertinent part:

A party seeking reconsideration of an order... must do so within 10 days after  
service of written notice of the order or judgment unless the time is shortened or  
enlarged by order. A motion for hearing or reconsideration must be served,  
noticed, filed and heard as is any other motion. A motion for reconsideration  
does not toll the 30day period for filing a notice appeal from a final order or  
judgment. (Emphasis Added).

29 Additionally, a court has the inherent authority to reconsider its prior orders. *Trail v.*  
30 *Faretto*, 91 Nev. 401, 536 P. 2d 1026 (1975) ("A court may, for sufficient cause shown, amend,

1 correct, resettle, modify or vacate, as the case may be, an order previously made and entered on  
2 the motion in the progress of the cause or proceeding.").

3 Furthermore, NRCP 60(b) provides another basis for a district court judge to overturn  
4 a previous decision in the case (which certainly would include the order of the previous judge if the  
5 matter is reassigned):

6 On motion and upon such terms as are just, the court may relieve a  
7 party or a party's legal representative from a final judgment, order,  
8 or proceeding for the following reasons: (1) mistake, inadvertence,  
9 surprise, or excusable neglect; (2) newly discovered evidence  
which by due diligence could not have been discovered in time  
to move for a new trial under Rule 59(b ); ... " (Emphasis Added).

10 The instant Motion to Reconsider is brought pursuant to such rules and precedent. SFR's  
11 use of *Rohlfing vs. Second Judicial Dist. Court*, 106 Nev. 902, 906, 803 P.2d 659, 662 (1990) is  
12 completely inapplicable in the instant matter. In *Rohlfing*, the Nevada Supreme Court declared that  
13 a district court judge exceeded his authority by vacating and entering void, *sua sponte*, the order of  
14 another judge, both whom were assigned a criminal proceeding. The decision from *Rohlfing* does  
15 not prohibit a district court judge from reconsidering a decision rendered by its predecessor judge  
16 when a case is reassigned to a new department, as has happened in this case.

17 **B. NATIONSTAR CLEARLY HAS MEET THE LEGAL STANDARD FOR**  
18 **RECONSIDERATION**

19 SFR next argues that Nationstar failed to meet the standard for reconsideration under Nevada  
20 law but curiously cites only to federal cases for its authority. Nevertheless, even under SFR's cited  
21 authority, "[r]econsideration is appropriate if the district court (1) is presented with newly discovered  
22 evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there was an  
23 intervening change in controlling law." *Frasure v. United States*, 256 F.Supp.2d 1180, 1183 (D.  
24 Nevada 2003) quoting *School Dist. No. II, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263  
(9th Cir. 1993).

25 In this case there is no new evidence, but there certainly has been both (i) a change in the  
26 controlling law, and (ii) clear legal and factual errors rendering the FFCL manifestly unjust. This case  
27 is not about merely redressing a disagreement with the Court's findings of fact, as SFR argues. Rather,  
28



1 the Court's decision to grant SFR's Motion for Summary Judgment was "clearly erroneous" because  
2 (1) the Court made clear legal errors in excluding the (unrefuted) evidence of the tender, which was  
3 supported by two separate affidavits authenticating the evidence of tender by those with personal  
4 knowledge of both the business records of Miles Bauer and of the tender being sent, (2) the Court  
5 failed to acknowledge that Nationstar indeed did disclose Douglas Miles as a witness in its disclosures  
6 after SFR falsely represented to the Court that Douglas Miles was not disclosed, (3) the Court  
7 completely misstated the testimony of David Alessi who testified that he did not know if the tender  
8 check was received, and (4) the Court failed to acknowledge the fact that the tendered check was  
9 clearly contained in Alessi's case files which, at a minimum, raised a triable issue of fact that  
10 precluded granting summary judgment in favor of SFR. The FFCL makes it apparent that Judge  
11 Villani did not even consider the Affidavit of Rock Jung, Esq., or Nationstar's disclosures, both of  
12 which demonstrate that a full tender was made in this case. Because the FFCL makes no mention at  
13 all of those crucial pieces of evidence that Nationstar presented to the Court, it is patently obvious  
14 that admissible evidence completely refutes the Court's Order. The Court escaped considering this  
15 evidence by making clearly erroneous legal rulings that the evidence was not admissible. Accordingly,  
16 this Court should grant Nationstar's Motion for Reconsideration, vacate its prior order granting  
17 Plaintiff's Motion for Summary Judgment and grant Nationstar's Motion for Summary Judgment.

18 Furthermore, Nationstar has met the standard for reconsideration because the laws with respect  
19 to tender has significantly changed since the August 15, 2018 hearing on the competing motions for  
20 summary judgment, with the Supreme Court's decision in *Bank of America, N.A. v. SFR Investments*  
21 *Pool I, LLC*, 134 Nev. Adv. Op. 72 (Sept. 13, 2018) which completely invalidates every one of SFR's  
22 defenses in regards to the tender made to Alessi.

23 Finally, new and controlling law was recently issued by the Nevada Supreme Court which  
24 controls the outcome of this case. In *Bank of New York Mellon vs. Thomas Jessop, et al*, 135 Nev.  
25 Adv. Op. 7 (Mar. 7, 2019), the Nevada Supreme Court held that a formal tender is excused when the  
26 party entitled to payment represents that if a tender is made, it will be rejected. *Id.* at 2.

27 Alternatively, the Bank contends that its obligation to tender the superpriority amount  
28 was excused because ACS stated in its fax that it would reject any tender if attempted.

We agree with the Bank, as this is a generally accepted exception to the above-mentioned rule. *Guthrie v. Curnutt*, 417 F.2d 764, 765-66 (10<sup>th</sup> Cir. 1969) (“[W]hen a party, able and willing to do so, offers to pay another a sum of money and is told that it will not be accepted, the offer is a tender without the money being produced.”); *In re Pickel*, 493 B.R. 258, 271 (Bankr. D.N.M. 2013) (“Tender is unnecessary if the other party has stated that the amount due would not be accepted.”); *Mark Turner Props., v. Evans*, 554 S.E.2d 492, 495 (Ga. 2001) (“Tender of an amount due is waived when the party entitled to payment, by declaration *or by conduct*, proclaims that, if tender of the amount due is made, an acceptance of it will be refused.

*Id.* at 7. Just as in the *Jessop* case, here Miles Bauer sent a September 2, 2010 letter to Alessi & Koenig indicating its intent to tender the 9 months of assessments making up the superpriority lien, (Exhibit “F-1” to the Motion), and Alessi & Koenig responded with a September 8, 2010 letter indicating that Alessi & Koenig was “unable to accept the partial payments offered by your clients” because it did not include the collections costs. See Exhibit “F-4” to the Motion.

Based on the evidence that was ignored or improperly excluded by the Court and the *Bank of America* and *Jessop* decisions, reconsideration should be granted and summary judgment should be entered in favor of Nationstar.

C. **THE COURT COMMITTED CLEAR LEGAL ERROR WHEN IT WRONGFULLY EXCLUDED ADMISSIBLE EVIDENCE OF THE TENDER**

1. **Douglas Miles Was Properly Disclosed As A Witness And His Affidavit Was Also Disclosed To SFR In Accordance With NRCP 16.1(a)**

In its Opposition, SFR continues to propagate the lie that Nationstar did not disclose Douglas Miles as a witness to SFR, with absolutely nothing to support its misleading argument. Despite this intentional misrepresentation to the Court, Nationstar properly disclosed both the Miles Bauer law firm and Douglas Miles as potential witnesses when Nationstar made its supplemental disclosure pursuant to NRCP 16.1(a) on June 1, 2018, which included the following:

20. Corporate Representative and/or 30(b) Witness for Miles, Bauer, & Winters, LLP  
575 Anton Road, Suite 300  
Costa Mesa, CA 92626  
Telephone: (714) 432-6503

This witness and/or these witnesses are expected to testify regarding Miles Bauer's knowledge of the HOA's foreclosure and all facts related thereto, including, without

1 limitation, the payment of the super-priority Miles Bauer performed and/or attempted  
2 on U.S. Bank's and Nationstar's behalf. **On information and belief, Doug Miles is**  
3 **likely to testify as the corporate representative, person most knowledgeable, and**  
4 **Rule 30(b)(6) witness for Miles Bauer, and his address is provided in this**  
5 **disclosure.** Nationstar reserves the right to call other corporate representatives,  
6 persons most knowledgeable, and Rule 30(b)(6) witnesses for Miles Bauer on the  
7 topics stated herein, including, without limitation, Rock K. Jung, Esq.

8 *See Exhibit "S" to the Motion at pages 5-6.*

9 In addition, Nationstar also disclosed the entire twenty-nine (29) page Affidavit of Douglas  
10 Miles in its supplemental disclosures, which again constitutes disclosure of this witness. This  
11 supplemental disclosure, of both Doug Miles as a witness and his Affidavit, was presented to the  
12 Court in Nationstar's Reply in Support of its Motion for Summary Judgment, in response to the  
13 same argument being falsely propagated here by SFR. The Court committed clear legal error by  
14 excluding this properly disclosed witness testimony when the witness and Affidavit had been  
15 properly disclosed.

16 **2. Rock Jung Was Disclosed As A Witness Having Personal Knowledge Of The**  
17 **Tender**

18 SFR next claims that the Affidavit of Rock Jung, Esq. is not admissible because he was "not  
19 a proper custodial of records for Miles Bauer." Nevada law provides numerous methods to  
20 authenticate documents by someone other than a custodian of records. Under NRS 52.025, Rock  
21 Jung was clearly allowed to authenticate the tender check and the tender letter based upon his own  
22 personal knowledge, as he sent the letter and the check. SFR attempts to mislead the Court into  
23 thinking that the tender check and tender letter can only be authenticated by a custodian of records,  
24 which is false. Any person with personal knowledge of the documents can authenticate them. NRS  
25 52.025 states "[t]he testimony of a witness is sufficient for authentication or identification if the  
26 witness has personal knowledge that a matter is what it is claimed to be." Rock Jung's Affidavit  
27 clearly provides that he not only has personal knowledge of Miles Bauer's procedures for delivering  
28 a check to the HOA Trustee, but was also the attorney who signed and sent the tender letter along  
with the tender check, to the HOA Trustee in this case. Whether Rock Jung was a custodian of  
records for Miles Bauer is irrelevant. Accordingly, the Court's failure to consider such evidence was  
a clear error of law and warrants reconsideration of the Court's decision.

1  
2 **3. The Bank Provided Admissible Evidence Regarding Delivery and Receipt of the**  
3 **Tendered Check**

4 SFR continues to claim that Nationstar failed to provide evidence that BAC tendered payment  
5 to the HOA Trustee and that the HOA Trustee did not receive the letter and the check. To the contrary,  
6 Nationstar has presented undisputed evidence that the tender was sent and received. Nevertheless,  
7 the Court made numerous clear errors of law and fact in its FFCL which precluded this evidence from  
8 being considered.

9 First, the Court ignored the clear mandate of NRS 47.250(13) which presumes that “a letter  
10 directed and mailed was received in the regular course of the mail.” *See Resources Group, LLC v.*  
11 *Nevada Association Services*, 135 Nev. Adv. Op. 8 at pg. 9 of *dissent* (March 14, 2019). Because  
12 Nationstar has presented evidence that the check and tender letter were sent (Rock Jung Affidavit),  
13 the burden shifts to SFR to prove that it was not received by Alessi to rebut the presumption of NRS  
14 47.250(13). SFR has provided no evidence that the tender check was not received.

15 Second, as stated above SFR intentionally misrepresented to the Court that Douglas Miles was  
16 not disclosed as a witness, and the Court committed clear legal error in excluding the Miles Affidavit,  
17 as set forth above.

18 Third, the Court did not consider or acknowledge the Affidavit of Rock Jung which met all  
19 legal requirements of admissibility.

20 Fourth, the Court failed to acknowledge that the Alessi & Koenig collection file, presented to  
21 the Court in Nationstar’s Reply in Support of Motion for Summary Judgment, contained a copy of the  
22 tender check evidencing that it had been received by Alessi. Nationstar produced the Alessi & Koenig  
23 collection file along with an Affidavit from David Alessi as the Custodian of Records in its Second  
24 Supplemental Disclosures Documents and Witnesses as Bates stamped NATIONSTAR00036-00333.  
25 *See Exhibit “U” to the Motion.*

26 Fifth, the Court inexplicably found that “David Alessi testified that Alessi & Koenig did not  
27 receive the letter with the check. If Alessi & Koenig never received the purported tender there was  
28 nothing to reject.” *See FFCL at 11:4-7.* Incredibly, the deposition transcript of David Alessi, which

was the source of Alessi's testimony, contains no such statement. To the contrary, David Alessi testified that he didn't know whether or not the tendered check was received.

Q. David, Exhibit J is a letter dated September 30, 2010 from Miles Bauer to Alessi & Koenig; the third page of which includes a Miles Bauer check payable to Alessi & Koenig for \$207. Have you seen this document before, or did you see it in your review of the collection file?

A. I did not.

Q. I mean, do you know if Alessi & Koenig received Exhibit J?

A: **I don't know.** I would expect to see either a copy of the check -- and this is based on my prior testimony in depositions -- either a file -- copy of the check in our file, in our production or a reference to the check in the status report or both. **However, the absence of a reference in the status report and a copy in our check -- in our file would not lead me to believe conclusively that we didn't receive the check.**

See Deposition of David Alessi at 24:21-25:25 attached to Nationstar's Motion as **Exhibit "T"** (emphasis added).

David Alessi *never* testified that the HOA Trustee did not receive the check. He testified that *he did not know* whether the HOA Trustee received the check because he did not see the check referenced in Alessi's status report, but his own file contains a copy of the check.

**D. RECITALS IN THE FORECLOSURE DEED ARE NOT CONCLUSIVE PROOF THAT THE HOA FORECLOSURE SALE WAS PROPER AND UNIMPEACHABLE**

The Court also committed clear legal error when it made a legal finding that if a trustee's deed upon sale recites that all statutory requirements have been satisfied, a conclusive presumption arises for a bona fide purchaser that the sale was conducted regularly and properly. The Nevada Supreme Court rejected this proposition in *Shadow Wood v. New York Community Bancorp*, 132 Nev. Adv. Op. 5, 366 P.3d 1105, 1110 (2016) reasoning that affording conclusive effect to such recitals "would be 'breathhtakingly broad' and 'is probably legislatively unintended.'" See also *RLP-Ampus Place, LLC v. U.S. Bank, N.A.*, Case No. 71883 (Nev. Dec. 22, 2017) (unpublished Order of Affirmance).

In *Shadow Wood*, the Supreme Court held, as a matter of law, that deed recitals under NRS 116.3116 cannot be conclusive as to the facts of whether statutory requirements were met. *Id.* The foreclosure deed in *Shadow Wood* contained a recital substantially identical to the recital in this case. Yet, the *Shadow Wood* court concluded that the mere fact that an HOA's foreclosure deed contains

1 the "conclusive recitals" of NRS 116.31166 did not preclude a challenge to the HOA trustee's  
2 foreclosure. *Id.*

3 **E. THE BANK OF AMERICA DECISION REFUTES ALL OF THE LEGAL**  
4 **CONCLUSIONS WHICH SERVE AS THE PREDICATE FOR THE COURT'S**  
5 **ORDER**

6 **1. The Tender Imposed No Impermissible Conditions**

7 In its Opposition, SFR argues that even if the tender was made, the letter accompanying the  
8 tender made the tender conditional and thus the tender did not extinguish the super-priority lien.  
9 SFR's argument has been soundly rejected by the Nevada Supreme Court in *Bank of America*. The  
10 Supreme Court stated, when dealing with the same Miles Bauer letter at issue in this case:

11 In addition to payment in full, valid tender must be unconditional, or with conditions  
12 on which the tendering party has a right to insist. 74 Am. Jur. 2d *Tender* § 22 (2012).  
13 "The only legal conditions which may be attached to a valid tender are either a receipt  
14 for full payment or a surrender of the obligation." *Heath v. L.E. Schwartz & Sons,*  
15 *Inc.*, 203 Ga. App. 91, 416 S.E.2d 113, 114-15 (Ga. Ct. App. 1992); *see also Stockton*  
16 *Theatres, Inc. v. Palermo*, 179 Cal. App. 2d 323, 3 Cal. Rptr. 767, 768 (Ct. App.  
17 1960) (tender of entire judgment with request for satisfaction of judgment was not  
18 conditional); *cf. Steward v. Yoder*, 86 Ill. App. 3d 223, 408 N.E.2d 55, 57, 41 Ill. Dec.  
19 709 (Ill. App. Ct. 1980) (concluding tender with request for accord and satisfaction  
20 was conditional, but not unreasonable)."

21 . . .

22 Although Bank of America's tender included a condition, it had a right to insist on the  
23 condition. Bank of America's letter stated that acceptance of the tender would satisfy  
24 the superpriority portion of the lien, preserving Bank of America's interest in the  
25 property. Bank of America had a legal right to insist on this. SFR's claim that this  
26 made the tender impermissibly conditional because the payment required to satisfy  
27 the superpriority portion of an HOA lien was legally unsettled at the time is  
28 unpersuasive.

29 *See Bank of America* at 5-6; *see also Bank of America, N.A. v. Ferrell Street Trust*, Case No. 70299,  
30 pg. 1-2 (April 27, 2018, Nev.) (unpublished order).

31 The tender facts in this case are virtually identical to the facts in *Bank of America*. The letters  
32 sent along with the tender check in both cases "stated that the HOA's acceptance would be an "express  
33 agreement that [Bank of America]'s financial obligations towards the HOA in regards to the  
34 [Property] have now been 'paid in full.'"" *See Bank of America* at 2; compare **Exhibit "F-5"** to the  
35 Motion. In both cases, the HOA rejected the payment and sold the property at foreclosure to SFR.

1 Thus, under controlling Nevada law, it is clear that the tender imposed no improper conditions and is  
2 valid.

3 **2. There Is No Legal Requirement To Record The Tender For It To Be Valid**

4 The Court also erroneously determined in its FFCL that the Bank failed to record its tender to  
5 protect itself from third-party purchasers, “as required by Nevada law.” See **Exhibit “A”** at 11:3-4.  
6 This argument was expressly rejected by the Nevada Supreme Court in *Bank of America*. *Id.* at 8-10.  
7 This is a clear legal error that should result in both reconsideration and summary judgment being  
8 entered in favor of Nationstar.

9 **3. Bona Fide Purchaser Status Is Legally Irrelevant If A Valid Tender Is Made**

10 The Court also determined erroneously, as a matter of law, that SFR’s status as a bona fide  
11 purchaser protected it against the tender (of which it had no knowledge) because the Bank failed to  
12 protect itself by recording a lis pendens or obtaining preliminary injunction. This position was also  
13 expressly rejected by the Nevada Supreme Court in *Bank of America*. *Id.* at 8-10. In *Bank of America*  
14 the Nevada Supreme Court held that “[a] party’s status as a BFP is irrelevant when a defect in the  
15 foreclosure proceeding renders the sale void” (*Id.* at 13) and “[a] valid tender of payment operates to  
16 discharge a lien.” (*Id.* at 3). See also *Saticoy Bay LLC Series 9014 Salvatore Street v. U.S. Bank N.A.*,  
17 Case No. 74217 (Nev. Oct. 12, 2018) (unpublished Order of Affirmance). Once again the Court made  
18 legal determinations that have been rejected by the intervening decisions of the Nevada Supreme  
19 Court, and must be reconsidered.

20 **4. The Tender Was For The Full Superpriority Portion Of The HOA’s Lien And**  
21 **There Are No Nuisance Or Abatement Charges Included In This Lien**

22 In *Bank of America*, the Nevada Supreme Court also made it clear that “a plain reading of  
23 [NRS 116.3116] indicates that the superpriority portion of an HOA lien includes only charges for  
24 maintenance and nuisance abatement, and nine months of unpaid assessments.” *Id.* at 4. See also  
25 *Horizons at Seven Hills v. Ikon Holdings*, 132 Nev. Adv. Op. 35, 373 P.3d 66, 72 (2016). The Court  
26 correctly noted that the “tender of \$207.00 was the proper amount of the superpriority lien, as it was  
27 nine months of assessments under NRS 116.3116(2).” See **Exhibit “A”** to the Motion at 10:16-18.  
28

1 Notwithstanding this clear law and the Court’s factual determination of the superpriority lien  
2 amount, SFR (without filing any timely motion for reconsideration of its own) now raises another  
3 completely unsupportable argument that the tender was void because the language of the tender letter  
4 required the HOA to waive its statutory right to have its nuisance and abatement charges secured by  
5 its superpriority lien. Of course the tender letter does not say any such thing and this argument fails  
6 under *Bank of America* unless there were actually nuisance and abatement charges, which do not exist  
7 in this case. *See also TRP Fund IV, LLC v. U.S. Bank, N.A.* Case No. 72234 (Nev. Nov. 19, 2018)  
8 (“[b]ecause no maintenance or nuisance abatement costs had been incurred at the time the tender was  
9 made, the tender for 9 months of assessments was sufficient to cure the default as to the superpriority  
10 portion of the HOA’s lien. If the HOA had thereafter incurred such costs, it would have been required  
11 to issue anew foreclosure notices if it sought to afford those costs superpriority status”) citing to  
12 *Property Plus Invs., LLC v. Mortgage Elec. Registrations Sys.*, 133 Nev. Adv. Op. 62, 401 P.3d 728,  
13 731-732 (2017).

14 Consistent with the *Property Plus* decision, the Federal District Court also recently decided  
15 that because the HOA’s notice of delinquent assessments is the relevant date for calculation of the  
16 superpriority amount, any nuisance or abatement charges that accrued after the notice of delinquent  
17 assessments is recorded would not be included in the super-priority lien absent a renewed notice of  
18 delinquent assessments. *Deutsche Bank National Trust Company v. ISLA at South Shores*  
19 *Homeowners Association*, 2018 WL 4682323 (D. Nev. Sept. 28, 2018).

20 **F. REFUSAL OF THE TENDER IS NOT JUSTIFIED BECAUSE OF THE HOA’S**  
21 **HONEST BELIEF THAT THE TENDER WAS INSUFFICIENT**

22 The Court also made a clear error of law in determining that refusal of the tender was justified  
23 because of the HOA’s honest belief that the tender was insufficient. Once again, the Nevada Supreme  
24 Court has explicitly rejected this argument stating that an HOA Trustee’s subjective good faith in  
25 rejecting the tender, because it disagreed with the lender regarding the amounts comprising the  
26 superpriority portion of the HOA’s lien, is legally irrelevant as the tender cured the default as to the  
27 superpriority portion of the lien. *See BAC Home Loans Servicing, LP v. Premier One Holdings, Inc.*,  
28 Case No. 74768 (Nev. Feb. 20, 2019) (unpublished Order of Reversal) (“Premiere One contends that



NAS had a good-faith basis for rejecting the tender - it disagreed with appellant's agent regarding what amounts comprised the superpriority portion of Peccole Ranch's lien. **But NAS's subjective good faith in rejecting the tender is legally irrelevant**, as the tender cured the default as to the superpriority portion of Peccole Ranch's lien by operation of law."). *See also TRP Fund IV, LLC v. The Bank of New York Mellon*, Case No. 74002 (Nev. Feb. 20, 2019) (unpublished Order of Affirmance) ("Appellant contends that Red Rock had a good-faith basis for rejecting the tender - it believed collection costs made up part of the superpriority portion of the HOA's lien. **But Red Rock's subjective good faith in rejecting the tender is legally irrelevant**, as the tender cured the default as to the superpriority portion of the HOA's lien by operation of law.").

**G. EQUITY CANNOT EXPAND PLAINTIFF'S ENCUMBERED INTEREST INTO FREE AND CLEAR TITLE, AND EVEN IF EQUITABLE BALANCING IS REQUIRED, THAT BALANCING WEIGHS IN BANK OF AMERICA'S FAVOR**

SFR called to equity in its Opposition, contending that this Court cannot take away the free and clear title it purports to have acquired for less than 20% of the Property's fair market value because it is an innocent, bona fide purchaser. However, equitable balancing cannot alter the legal effect of BAC's tender or the HOA's decision to foreclose on only its sub-priority lien. To the extent equitable balancing is required, that balancing clearly weighs in Nationstar's favor.

**1. Equity Cannot Alter The Legal Effects Of BAC's Tender Or The HOA's Decision To Foreclose On Its Sub-Priority Lien.**

While quiet title sounds in equity, equity cannot overcome the satisfaction of the super-priority lien, or the fact that the HOA specifically chose to wrongfully foreclose on an extinguished super-priority lien. Although parties' competing equities must be balanced in determining whether to set aside an association's foreclosure sale under *Shadow Wood*, Nationstar' arguments regarding tender and the HOA's intended sub-priority sale do not require that the sale be set aside – they simply require that this Court give the sale the effect required under *Bank of America* – that SFR took title subject to the Deed of Trust. *See Shadow Wood*, 366 P.3d at 1105.

The legal effect of BAC's tender was the extinguishment of the super-priority portion of the HOA's lien before the foreclosure sale. *See Cladianos*, 69 Nev. at 45; *SFR Investments*, 334 P.3d at 413 ("As a practical matter, secured lenders will most likely pay the [9] months' assessments

1 demanded by the association rather than having the association foreclose on the unit.”); *Ikon Holdings*,  
2 373 P.3d at 73 (“the superpriority lien granted by NRS 116.3116(2) ... is limited to an amount equal  
3 to the common expense assessments due during the nine months before foreclosure.”). Because the  
4 super-priority lien was extinguished before the sale, the HOA could foreclose on only the sub-priority  
5 portion of its lien at the foreclosure sale. Because the HOA foreclosed on the sub-priority portion of  
6 its lien, the interest it conveyed to SFR is subject to Nationstar’s Deed of Trust. The *Shadow Wood*  
7 Court did not expand a foreclosure-sale purchaser’s rights beyond those limitations imposed by NRS  
8 116 and long-standing Nevada jurisprudence.

9 NRS 116 expressly prohibits an association’s trustee from delivering a deed with warranties,  
10 and provides that a foreclosure-sale purchaser acquires no greater title than that of the unit’s owner.  
11 See NRS 116.31164(3)(a). This prohibition of warranty deeds tracks well-established Nevada  
12 jurisprudence on the rights of foreclosure-sale purchasers. Foreclosure sales are caveat emptor. See  
13 *Allison Steel*, 86 Nev. at 499 (in the absence of a statute, a purchaser acquires no better title than the  
14 debtor could have conveyed at the time the lien attached). SFR could not acquire a greater interest  
15 than the homeowner had at the foreclosure sale – title encumbered by the Deed of Trust – because no  
16 super-priority lien was foreclosed in this case. Neither equity nor the bona fide purchaser doctrine  
17 can expand SFR’s encumbered title into free and clear title.

18 *Shadow Wood* has no effect on this analysis because there was neither a pre-sale tender nor a  
19 super-priority lien at the time of the association’s foreclosure sale in that case. In *Shadow Wood*, the  
20 bank was the owner of the property at the time of the association’s foreclosure sale, as it foreclosed  
21 on its deed of trust and purchased the property itself at its own foreclosure sale before the association  
22 foreclosed. 366 P.3d at 1107. Consequently, the bank was the homeowner at the time of the  
23 association’s sale, meaning the HOA’s entire lien was superior to the bank’s title as homeowner. *Id.*  
24 Here, in contrast, the Deed of Trust encumbered the Property at the time of the HOA’s foreclosure,  
25 and BAC’s tender extinguished the super-priority lien prior to the HOA’s foreclosure sale.

26 *Shadow Wood* simply noted the steps a lender can take to protect itself if it does not satisfy the  
27 super-priority lien before an association’s foreclosure sale, as the bank failed to do in that case. 366  
28 P.3d at 1107. Failing to follow these steps can be weighed against a first deed of trust beneficiary if

1 it does not satisfy the super-priority lien before the association's foreclosure and the association  
2 chooses to foreclose on that super-priority lien. But if the first deed of trust beneficiary does tender  
3 the super-priority amount before the sale (as Bank of America did here), or the association chooses to  
4 foreclose on its sub-priority lien (as the HOA did here), then equitable balancing is unnecessary  
5 because the sale cannot discharge the deed of trust as a matter of law. Here, equitable balancing could  
6 result in the Deed of Trust being extinguished despite the fact that no lien senior to the Deed of Trust  
7 was foreclosed. Equity does not extend that far, and there would be nothing equitable about that  
8 result.

9 **H. THE BONA FIDE PURCHASER DOCTRINE IS IRRELEVANT BECAUSE THE**  
10 **FORECLOSURE SALE IS VOID**

11 SFR's status as an alleged bona fide purchaser is completely irrelevant in this matter. The  
12 HOA Sale was either void, resulting in no Property interest being transferred to SFR, or the sale was  
13 subject to the Deed of Trust. Under either scenario a bona fide purchaser defense is legally  
14 irrelevant. Even if bona fide purchaser status could provide a windfall to an HOA-sale purchaser  
15 after a sub-priority sale, SFR is not entitled to that windfall because it is not a bona fide purchaser.

16 **1. SFR's Bona Fide Purchaser Status Is Irrelevant As The Sale Is Void**

17 The sale is void where the trustee proceeds without authorization (such as when a  
18 tender has already satisfied the super-priority lien amount), or where "the mortgagee or trustee did  
19 not give statutorily-required notice".<sup>1</sup> 1 Grant S. Nelson, Dale A. Whitman, Ann M. Burkhart & R.  
20 Wilson Freyermuth, *Real Estate Finance Law* § 7:21 (6<sup>th</sup> ed. 2014). This was confirmed by the  
21 Nevada Supreme Court in *Bank of America* when the Court stated:

22 It follows that after a valid tender of the superpriority portion of an HOA's lien, **a**  
23 **foreclosure sale for the entire lien is void as to the super-priority portion,**  
because it cannot extinguish the first deed of trust. (Emphasis added).

24 In *7912 Limbwood Court Trust v. Wells Fargo Bank, N.A.*, 2:13-CV-00506-APG-GWF (D.  
25 Nev. 2015), the United States District Court for the District of Nevada held that under Nevada law,

---

26  
27 <sup>1</sup> Citation to the 11 cases referenced in the 1 Grant S. Nelson treatise in support of this statement are not listed. The  
28 Grant S. Nelson treatise has been extensively cited by the Nevada Supreme Court, including in the *Shadow Wood, Stone Hollow* and *Ferrell Street Trust* decisions and it provides a clear statement of the distinction between void and voidable title.

1 when a sale is void no title passes to a purchaser, even if the purchaser is a bona fide purchaser.  
2 This was recently confirmed by the Nevada Supreme Court in *2713 Rue Toulouse Trust v. Bank of*  
3 *America*, Case 68206 at 3 (Nev. July 20, 2018) (unpublished order), when the Court held that:

4 Finally, although appellant claims it is protected as a bona fide purchaser, we  
5 conclude that appellant's putative status as a bona fide purchaser cannot validate an  
6 otherwise void sale. See Grant S. Nelson, Dale A. Whitman, Ann M. Burkhart & R.  
7 Wilson Freyermuth, *Real Estate Finance Law* § 7:21 (6<sup>th</sup> ed. 2014) ("Some defects  
are so substantial that they render the sale *void*. In this situation, neither legal nor  
equitable title transfers to the sale purchaser....").

8 Accordingly, the distinction between a sale being *void* or *voidable* is that if a sale defect  
9 renders the sale void, no title passes to any subsequent purchaser, not even a bona fide purchaser,  
10 whereas if the defect is merely *voidable* it is subject to a bona fide purchaser defense. Thus, even if  
11 Plaintiff was a bona fide purchaser, its status as such cannot validate a void sale. As a result, Plaintiff's  
12 claim of bona fide purchaser status is legally irrelevant in this case.

#### 13 IV.

#### 14 CONCLUSION

15 WHEREFORE, for the foregoing reasons, Nationstar Mortgage, LLC respectfully requests  
16 that its Motion for Reconsideration be granted, and that summary judgment be entered in favor of  
17 Nationstar Mortgage, LLC and against SFR on all of SFR's claims. The Court's numerous legal  
18 errors and changes in the controlling law mandate reconsideration in this case. Shadow Mountain  
19 Ranch Homeowners Association and its agent Alessi & Koenig, LLC conducted a sub-priority  
20 foreclosure sale after BAC, through its agent Miles Bauer, made an unconditional tender for the full  
21 amount of the HOA's super-priority lien to Alessi & Koenig. As a result, a valid tender was made  
22 to satisfy the super-priority portion of the lien, resulting in SFR purchasing the Property subject to  
23 Nationstar's Deed of Trust and the bona fide purchaser defense is not available SFR.

Dated this 19<sup>th</sup> day of March, 2019.

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**CERTIFICATE OF SERVICE**

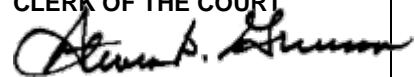
I hereby certify that I am an employee of GERRARD COX LARSEN, and that on the 19<sup>th</sup> day of March, 2019, I served a copy of the **REPLY IN SUPPORT OF DEFENDANT NATIONSTAR MORTGAGE, LLC'S MOTION FOR RECONSIDERATION AND/OR TO ALTER/AMEND JUDGMENT**, by e-serving a copy on all parties listed in the Master Service List pursuant to Administrative Order 14-2, entered by the Chief Judge, Jennifer Togliatti, on May 9, 2014.

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Holders of the LXS 2006-4N Trust Fund, erroneously plead as U.S. Bank, N.A.*

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# **TAB 34**



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*Attorneys for Defendant Nationstar Mortgage, LLC*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

ALESSI & KOENIG, LLC,

Plaintiff,

v.

STACY MOORE, an individual; MAGNOLIA  
GOTERA, an individual; KRISTIN JORDAL, AS  
TRUSTEE FOR THE JBWNO REVOCABLE  
LIVING TRUST, a trust; U.S. BANK, N.A., a  
national banking association; NATIONSTAR  
MORTGAGE, LLC, a foreign limited liability  
company; REPUBLIC SILVER STATE  
DISPOSAL, INC., DBA REPUBLIC SERVICES,  
a domestic government entity; DOE  
INDIVIDUALS I through X, inclusive; and ROE  
CORPORATIONS XI through XX inclusive.

Defendants.

Case No.: A-14-705563-C

Dept.: XXVI

**NOTICE OF ENTRY OF ORDER  
GRANTING NATIONSTAR MORTGAGE,  
LLC'S MOTION FOR  
RECONSIDERATION AND TO  
ALTER/AMEND JUDGMENT**

1 U.S. BANK, N.A.,  
2 Counterclaimant,  
3 vs.

4 ALESSI & KOENIG, LLC, a Nevada limited  
liability company,  
5 Counter-Defendant.

6 U.S. BANK, N.A.,  
7 Third Party Plaintiff,  
8 v.  
9 SFR INVESTMENTS POOL 1, LLC, a Nevada  
limited liability company; INDIVIDUAL DOES I  
through X, inclusive; and ROE CORPORATIONS  
I through X, inclusive.  
10 Third Party Defendants.

11 SFR INVESTMENTS POOL 1, LLC, a  
Nevada limited liability company,  
12 Third Party Counterclaimant/Cross-claimant,  
vs.

13 U.S. BANK, N.A.; NATIONSTAR  
14 MORTGAGE, LLC, a foreign limited liability  
company; KRISTIN JORDAL, AS TRUSTEE  
15 FOR THE JBWNO REVOCABLE LIVING  
TRUST, a trust; STACY MOORE, an  
16 individual; and MAGNOLIA GOTERA, an  
individual,

17 Counter-Defendant/Cross-Defendants.  
18

**NOTICE OF ENTRY OF ORDER  
GRANTING NATIONSTAR  
MORTGAGE, LLC'S MOTION FOR  
RECONSIDERATION AND TO  
ALTER/AMEND JUDGMENT**

19 NOTICE IS HEREBY GIVEN that an **ORDER GRANTING NATIONSTAR MORTGAGE,**  
20 **LLC'S MOTION FOR RECONSIDERATION AND TO ALTER/AMEND JUDGMENT**, was  
21 entered herein on the 28<sup>th</sup> day of June, 2018. A copy of said Order is attached hereto.

22 DATED this 28<sup>th</sup> day of June, 2019.

**GERRARD COX LARSEN**

23 /s/ Douglas D. Gerrard, Esq.  
24 Douglas D. Gerrard, Esq.  
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28

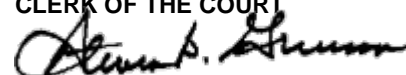


**CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of GERRARD COX LARSEN, and that on the 28<sup>th</sup> day of June, 2018, I served a copy of the **NOTICE OF ENTRY OF ORDER GRANTING NATIONSTAR MORTGAGE, LLC'S MOTION FOR RECONSIDERATION AND TO ALTER/AMEND JUDGMENT**, by e-serving a copy on all parties listed in the Master Service List pursuant to Administrative Order 14-2, entered by the Chief Judge, Jennifer Togliatti, on May 9, 2014.

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*Attorneys for Defendant Nationstar Mortgage, LLC*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

ALESSI & KOENIG, LLC,

Plaintiff,

v.

STACY MOORE, an individual; MAGNOLIA  
GOTERA, an individual; KRISTIN JORDAL,  
AS TRUSTEE FOR THE JBWNO  
REVOCABLE LIVING TRUST, a trust; U.S.  
BANK, N.A., a national banking association;  
NATIONSTAR MORTGAGE, LLC, a foreign  
limited liability company; REPUBLIC SILVER  
STATE DISPOSAL, INC., DBA REPUBLIC  
SERVICES, a domestic government entity;  
DOE INDIVIDUALS I through X, inclusive;  
and ROE CORPORATIONS XI through XX  
inclusive.

Defendants.

Case No.: A-14-705563-C

Dept.: XXVI

**ORDER GRANTING NATIONSTAR  
MORTGAGE, LLC'S MOTION FOR  
RECONSIDERATION AND TO  
ALTER/AMEND JUDGMENT**

1 U.S. BANK, N.A.,  
2 Counterclaimant,  
3 vs.

4 ALESSI & KOENIG, LLC, a Nevada limited  
5 liability company,  
6 Counter-Defendant.

7 U.S. BANK, N.A.,  
8 Third Party Plaintiff,  
9 v.  
10 SFR INVESTMENTS POOL 1, LLC, a Nevada  
11 limited liability company; INDIVIDUAL DOES  
12 I through X, inclusive; and ROE  
13 CORPORATIONS I through X, inclusive.  
14 Third Party Defendants.

15 SFR INVESTMENTS POOL 1, LLC, a  
16 Nevada limited liability company,  
17 Third Party Counterclaimant/Cross-claimant,  
18 vs.  
19 U.S. BANK, N.A.; NATIONSTAR  
20 MORTGAGE, LLC, a foreign limited liability  
21 company; KRISTIN JORDAL, AS TRUSTEE  
22 FOR THE JBWNO REVOCABLE LIVING  
23 TRUST, a trust; STACY MOORE, an  
24 individual; and MAGNOLIA GOTERA, an  
25 individual,  
26 Counter-Defendant/Cross-Defendants.

27 **ORDER GRANTING NATIONSTAR MORTGAGE, LLC'S MOTION FOR**  
28 **RECONSIDERATION AND TO ALTER/AMEND JUDGMENT**

Defendant NATIONSTAR MORTGAGE, LLC'S ("Nationstar") Motion For  
Reconsideration and to Alter / Amend Judgment (the "Motion") was heard on March 26, 2018,  
Douglas D. Gerrard, Esq. of the law firm GERRARD COX LARSEN appeared on behalf of  
Defendant Nationstar, Jason Martinez, Esq. of the law firm KIM GILBERT EBRON appeared on  
behalf of SFR Investments Pool 1, LLC ("SFR").

///

///

///

1 Having reviewed the Motion, Plaintiff SFR's Opposition to the Motion, and Nationstar's  
2 Reply in Support thereof, and being fully informed, the Court finds as follows:

3 1. On January 14, 2019, Nationstar timely filed its Motion for Reconsideration and to  
4 Alter/Amend Judgment ("Motion") related to the Findings of Fact and Conclusions of Law entered  
5 on November 29, 2018 by Judge Villani ("FFCL"), notice of entry of which was completed on  
6 December 26, 2018. On January 7, 2019, this case was randomly reassigned from Judge Villani to  
7 Judge Mary Kay Holthus. On January 31, 2019, SFR filed a Peremptory Challenge of Judge Holthus  
8 resulting in a February 1, 2019 Notice of Department Reassignment to Judge Kenneth Cory. Judge  
9 Cory then recused himself resulting in a February 5, 2019 Notice of Department Reassignment to this  
10 Court.

11 2. This Court now has jurisdiction over this case and has the authority and the right to  
12 consider and decide the Motion, as the entire case has been reassigned to this Court.

13 3. This Court determines that the FFCL contained legal errors in that Douglas Miles was  
14 properly disclosed as a witness in Nationstar's Second Supplemental Disclosure of Documents and  
15 Witnesses which was electronically served on SFR's counsel on June 1, 2018 and that the Affidavit  
16 of Douglas Miles met the criteria of NRS 52.260 as a custodial declaration to authenticate the business  
17 records of the Miles Bauer Bergstrom & Winters law firm, which included the records and letters  
18 related to the tender.

19 4. This Court determines that the FFCL contained a legal error as the documents related  
20 to the tender were also properly authenticated through the Affidavit of Rock Jung, Esq., which  
21 satisfies the requirements of NRS 52.025, as testimony of a person with personal knowledge.

22 5. The Court determines that reconsideration of the FFCL is appropriate because the  
23 records of Miles Bauer Bergstrom & Winters create a genuine issue of material fact regarding whether  
24 a full tender of the super-priority portion of the Association's lien was sent to and received by the  
25 Association's agent, Alessi & Koenig, prior to the HOA completing its sale to SFR.

26 6. Reconsideration is also appropriate because the FFCL failed to apply recent Nevada  
27 Supreme Court authority, including the *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 134  
28 Nev. Adv. Op. 72 (Sept. 13, 2018) decision regarding tender, the defenses to a tender and the impact  
of a tender on SFR's bona fide purchaser defense.

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7. The Court also determines the other legal and factual issues with the FFCL raised in the Motion warrant reconsideration and create genuine issues of material fact which must be decided in a trial.

**THEREFORE, IT IS HEREBY ORDERED** that Nationstar's Motion For Reconsideration and to Alter/Amend Judgment is hereby **GRANTED** and this matter will be set for a trial to determine the issues of material fact which preclude summary judgment.

**IT IS SO ORDERED.**

DATED this 26 day of June, 2019.

  
DISTRICT COURT JUDGE

Prepared and Submitted By:

GERRARD COX LARSEN



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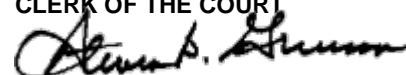
Approved as to Form and Content:

KIM GILBERT EBRON

  
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# **TAB 35**



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*Attorneys for Defendant Nationstar Mortgage, LLC*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

ALESSI & KOENIG, LLC,

Plaintiff,

v.

STACY MOORE, an individual; MAGNOLIA  
GOTERA, an individual; KRISTIN JORDAL,  
AS TRUSTEE FOR THE JBWNO  
REVOCABLE LIVING TRUST, a trust; U.S.  
BANK, N.A., a national banking association;  
NATIONSTAR MORTGAGE, LLC, a foreign  
limited liability company; REPUBLIC SILVER  
STATE DISPOSAL, INC., DBA REPUBLIC  
SERVICES, a domestic government entity;  
DOE INDIVIDUALS I through X, inclusive;  
and ROE CORPORATIONS XI through XX  
inclusive.

Defendants.

Case No.: A-14-705563-C

Dept.: XXVI

**ORDER GRANTING NATIONSTAR  
MORTGAGE, LLC'S MOTION FOR  
RECONSIDERATION AND TO  
ALTER/AMEND JUDGMENT**

1 U.S. BANK, N.A.,  
2 Counterclaimant,  
3 vs.

4 ALESSI & KOENIG, LLC, a Nevada limited  
5 liability company,  
6 Counter-Defendant.

7 U.S. BANK, N.A.,  
8 Third Party Plaintiff,  
9 v.  
10 SFR INVESTMENTS POOL 1, LLC, a Nevada  
11 limited liability company; INDIVIDUAL DOES  
12 I through X, inclusive; and ROE  
13 CORPORATIONS I through X, inclusive.  
14 Third Party Defendants.

15 SFR INVESTMENTS POOL 1, LLC, a  
16 Nevada limited liability company,  
17 Third Party Counterclaimant/Cross-claimant,  
18 vs.  
19 U.S. BANK, N.A.; NATIONSTAR  
20 MORTGAGE, LLC, a foreign limited liability  
21 company; KRISTIN JORDAL, AS TRUSTEE  
22 FOR THE JBWNO REVOCABLE LIVING  
23 TRUST, a trust; STACY MOORE, an  
24 individual; and MAGNOLIA GOTERA, an  
25 individual,  
26 Counter-Defendant/Cross-Defendants.

27 **ORDER GRANTING NATIONSTAR MORTGAGE, LLC'S MOTION FOR**  
28 **RECONSIDERATION AND TO ALTER/AMEND JUDGMENT**

Defendant NATIONSTAR MORTGAGE, LLC'S ("Nationstar") Motion For  
Reconsideration and to Alter / Amend Judgment (the "Motion") was heard on March 26, 2018,  
Douglas D. Gerrard, Esq. of the law firm GERRARD COX LARSEN appeared on behalf of  
Defendant Nationstar, Jason Martinez, Esq. of the law firm KIM GILBERT EBRON appeared on  
behalf of SFR Investments Pool 1, LLC ("SFR").

///

///

///



1 Having reviewed the Motion, Plaintiff SFR's Opposition to the Motion, and Nationstar's  
2 Reply in Support thereof, and being fully informed, the Court finds as follows:

3 1. On January 14, 2019, Nationstar timely filed its Motion for Reconsideration and to  
4 Alter/Amend Judgment ("Motion") related to the Findings of Fact and Conclusions of Law entered  
5 on November 29, 2018 by Judge Villani ("FFCL"), notice of entry of which was completed on  
6 December 26, 2018. On January 7, 2019, this case was randomly reassigned from Judge Villani to  
7 Judge Mary Kay Holthus. On January 31, 2019, SFR filed a Peremptory Challenge of Judge Holthus  
8 resulting in a February 1, 2019 Notice of Department Reassignment to Judge Kenneth Cory. Judge  
9 Cory then recused himself resulting in a February 5, 2019 Notice of Department Reassignment to this  
10 Court.

11 2. This Court now has jurisdiction over this case and has the authority and the right to  
12 consider and decide the Motion, as the entire case has been reassigned to this Court.

13 3. This Court determines that the FFCL contained legal errors in that Douglas Miles was  
14 properly disclosed as a witness in Nationstar's Second Supplemental Disclosure of Documents and  
15 Witnesses which was electronically served on SFR's counsel on June 1, 2018 and that the Affidavit  
16 of Douglas Miles met the criteria of NRS 52.260 as a custodial declaration to authenticate the business  
17 records of the Miles Bauer Bergstrom & Winters law firm, which included the records and letters  
18 related to the tender.

19 4. This Court determines that the FFCL contained a legal error as the documents related  
20 to the tender were also properly authenticated through the Affidavit of Rock Jung, Esq., which  
21 satisfies the requirements of NRS 52.025, as testimony of a person with personal knowledge.

22 5. The Court determines that reconsideration of the FFCL is appropriate because the  
23 records of Miles Bauer Bergstrom & Winters create a genuine issue of material fact regarding whether  
24 a full tender of the super-priority portion of the Association's lien was sent to and received by the  
25 Association's agent, Alessi & Koenig, prior to the HOA completing its sale to SFR.

26 6. Reconsideration is also appropriate because the FFCL failed to apply recent Nevada  
27 Supreme Court authority, including the *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 134  
28 Nev. Adv. Op. 72 (Sept. 13, 2018) decision regarding tender, the defenses to a tender and the impact  
of a tender on SFR's bona fide purchaser defense.

7. The Court also determines the other legal and factual issues with the FFCL raised in the Motion warrant reconsideration and create genuine issues of material fact which must be decided in a trial.

**THEREFORE, IT IS HEREBY ORDERED** that Nationstar's Motion For Reconsideration and to Alter/Amend Judgment is hereby **GRANTED** and this matter will be set for a trial to determine the issues of material fact which preclude summary judgment.


**IT IS SO ORDERED.**

DATED this 26 day of June, 2019.

  
DISTRICT COURT JUDGE


Prepared and Submitted By:

GERRARD COX LARSEN

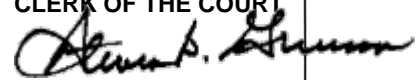
  
Douglas D. Gerrard, Esq.  
Nevada Bar No. 4613  
Fredrick J. Biedermann, Esq.  
Nevada Bar No. 11918  
2450 Saint Rose Pkwy., Ste 200  
Henderson, Nevada 89074  
*Attorney for Defendant*  
*Nationstar Mortgage, LLC*

Approved as to Form and Content:

KIM GILBERT EBRON

  
Diana Ebron, Esq.  
Nevada Bar No. 10580  
Jason G. Martinez, Esq.  
Nevada Bar No. 13375  
7625 Dean Martin Drive, Ste. 110  
Henderson, Nevada 89139  
*Attorneys for SFR Investments*  
*Pool 1, LLC*

# **TAB 36**



SCHTO

DISTRICT COURT  
CLARK COUNTY, NEVADA

ALESSI & KOENIG, Plaintiff(s)

CASE NO.: A-14-705563-C

vs.

Department XXVI

STACY MOORE; MAGNOLIA  
GOTERA; KRISTEN JORDAL AS  
TRUSTEE FOR JBWNO REVOCABLE  
LIVING TRUST; U.S. BANK;  
NATIONSTAR MORTGAGE;  
REPUBLIC SILVER STATE  
DISPOSAL, Defendant(s)

**AMENDED**  
**SCHEDULING ORDER**  
**and ORDER SETTING CIVIL NON-**  
**JURY TRIAL**

This Amended Scheduling Order and Order Setting Civil Non-Jury Trial is entered following the filing of a Stipulation and Order to Continue Trial and extend Discovery Deadlines. This Order may be amended or modified by the Court upon good cause shown.

**IT IS HEREBY ORDERED** that the parties will comply with the following deadlines:

Discovery Cut Off Date:	<b><u>Closed</u></b>
Last Day to file motion to amend or add parties:	<b><u>Closed</u></b>
Initial expert disclosures due:	<b><u>Closed</u></b>
Rebuttal expert disclosures due:	<b><u>Closed</u></b>
Final Date to file or other Dispositive Motions	<b><u>10/26/19</u></b>

**IT IS FURTHER ORDERED THAT:**

A. The above entitled case is set to be tried on a FOUR week STACK to begin **January 6, 2020, at 9:00am.**

B. A Calendar Call will be held on **December 12, 2020, at 9:00am.** Trial Counsel (and any party in proper person) must appear.

JA\_1515

1 C. A **Pre-Trial Conference** will be set at the time of calendar call. Parties  
2 must have the following ready at the Pre Trial Conference:

- 3 1. Two sets of Exhibits, three-hole punched, tabbed, in three ring binders,  
4 with a typed exhibit list and all stipulated exhibits marked;  
5 2. Original depositions;  
6 3. Courtesy copies of legal briefs on trial issues.  
7 4. The Pre-trial Memorandum must be filed, and trial counsel shall bring  
a courtesy copy to the Pre-Trial conference, and ALL parties must  
comply with EDCR 2.67.

8 D. Pursuant to EDCR 2.35, a motion to continue trial due to any discovery  
9 issues or deadlines must be made before this department.

10 E. Orders shortening time will not be signed except in extreme emergencies.  
11 ***AN UPCOMING TRIAL DATE OR VACATION IS NOT AN EXTREME  
12 EMERGENCY - COURT REQUIRES ALL PARTIES TO BE READY  
13 ANYTIME OF THIS STACK***

14 F. Failure of the designated trial attorney or any party appearing in proper  
15 person to appear for any court appearances or to comply with this Order shall result  
16 in any of the following: (1) dismissal of the action (2) default judgment; (3)  
17 monetary sanctions; (4) vacation of trial date; and/or any other appropriate remedy  
or sanction.

G. Counsel must advise the Court immediately when the case settles or is  
otherwise resolved prior to trial. A stipulation which terminates a case by dismissal  
shall indicate whether a Scheduling Order has been filed and, if a trial date has been  
set, the date of that trial.

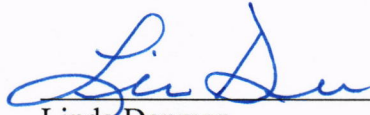
DATED: This 22nd day of October, 2019.

13   
14 GLORIA STURMAN  
15 District Court Judge, Department 26  
16  
17

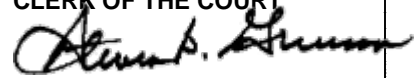
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**CERTIFICATE OF SERVICE**

I hereby certify that on or about the date signed, pursuant to EDCR 8.05(a) and 8.05(f), a copy of this Order was electronically served to the registered parties through the Eighth Judicial District Court's electronic filing system.

  
Linda Denman,  
Judicial Executive Assistant

# **TAB 37**



MELANIE D. MORGAN, ESQ.

Nevada Bar No. 8215

DONNA M. WITTIG, ESQ.

Nevada Bar No. 11015

**AKERMAN LLP**

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*Attorneys for Defendant, Nationstar Mortgage, LLC and Defendant/Counterclaimant/Third-Party Defendant U.S. Bank, National Association, as Trustee for the Certificateholders of the LXS 2006-4N Trust Fund, erroneously pled as U.S. Bank, N.A.*

**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Plaintiff,

vs.

STACY MOORE, an individual; MAGNOLIA GOTERA, an individual; KRISTEN JORDAL, AS TRUSTEE FOR THE JBWNO REVOCABLE LIVING TRUST; U.S. BANK, N.A.; NATIONSTAR MORTGAGE, LLC; REPUBLIC SILVER STATE DISPOSAL, INC., et al.;

Defendants.

U.S. BANK., N.A.,

Counterclaimant,

vs.

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

Counter-

Defendant.

U.S. BANK, N.A.

Third-Party Plaintiff,

vs.

SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company, et al.

Third-Party Defendants.

Case No.: A-14-705563-C

Dept.: ~~-XVII-XXVI~~

**STIPULATION TO REOPEN CLOSED CASE AND RESET TRIAL DATES**

AKERMAN LLP

1635 VILLAGE CENTER CIRCLE, SUITE 200  
LAS VEGAS, NEVADA 89134  
TEL.: (702) 634-5000 - FAX: (702) 380-8572



1 Nationstar Mortgage, LLC (**Nationstar**); U.S. Bank, National Association, as Trustee for the  
2 Certificateholders of the LXS 2006-4N Trust Fund, erroneously pled as U.S. Bank, N.A. (**US Bank**),  
3 and SFR Investments Pool 1, LLC (**SFR**) (collectively, **the Parties**), by and through their counsel of  
4 record, stipulate as follows:

5 1. On August 15, 2018, the Court denied Nationstar and US Bank's Motion for Summary  
6 Judgment and granted SFR's Motion for Summary Judgment;

7 2. On December 6, 2018, the Court entered the Notice of Entry of Findings of Facts and  
8 Conclusions of Law granting SFR's Motion for Summary Judgment;

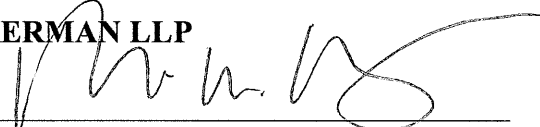
9 3. On January 14, 2019, Nationstar filed its Motion for Reconsideration and/or To  
10 Alter/Amend Judgment;

11 4. On June 28, 2019, the Court entered an Order Granting Nationstar's Motion for  
12 Reconsideration and to Alter/Amend Judgment and held the matter will be set for trial to determine  
13 the issue of material fact related to tender which preclude summary judgment;

14 5. The Court inadvertently statistically closed this case;

15 6. The Parties seek to reopen the case and respectfully request the Court reset all trial  
16 related dates sometime after January 20, 2020.

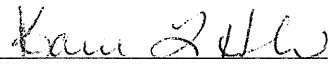
17 **AKERMAN LLP**

18 By:   
19 MELANIE D. MORGAN, ESQ.

20 Nevada Bar No. 8215  
21 DONNA M. WITTIG, ESQ.  
22 Nevada Bar No. 11015  
23 1635 Village Center Circle, Suite 200  
24 Las Vegas, Nevada 89134

25 *Attorneys for Nationstar Mortgage, LLC and*  
26 *Defendant/Counterclaimant/Third-Party*  
27 *Defendant U.S. Bank, National Association,*  
28 *as Trustee for the Certificateholders of the*  
*LXS 2006-4N Trust Fund, erroneously pled*  
*as U.S. Bank, N.A*

**KIM GILBERT EBRON**

By:   
DIANA S. EBRON, ESQ.  
Nevada Bar No. 10580  
JACQUELINE A. GILBERT, ESQ.  
Nevada Bar No. 10593  
KAREN L. HANKS, ESQ.  
Nevada Bar No. 9578  
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Las Vegas, NV 89139

*Attorneys for SFR Investments Pool 1, LLC*

**ORDER**

Based on the stipulation of the parties and good cause appearing,

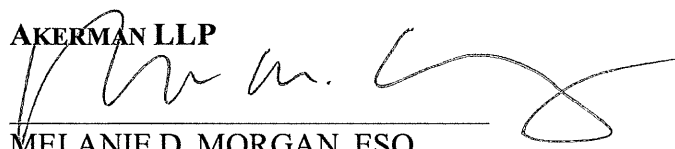
**IT IS ORDERED** that this case is reopened.

**IT IS FURTHER ORDERED** that trial in this matter is scheduled on the Court's trial stack beginning Jan. 6, 2020, 2020, and calendar call is scheduled on Dec. 12, 2020.

  
DISTRICT COURT JUDGE LD

Submitted by:

**AKERMAN LLP**

  
MELANIE D. MORGAN, ESQ.

Nevada Bar No. 8215

DONNA M. WITTIG, ESQ.

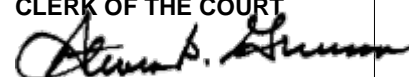
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*Attorneys for Defendant, Nationstar Mortgage,  
LLC and Defendant/Counterclaimant/Third-  
Party Defendant U.S. Bank, National  
Association, as Trustee for the  
Certificateholders of the LXS 2006-4N Trust  
Fund, erroneously pled as U.S. Bank, N.A*

# **TAB 38**



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**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Plaintiff,

vs.

STACY MOORE, an individual; MAGNOLIA GOTERA, an individual; KRISTIN JORDAL, AS TRUSTEE FOR THE JBWNO REVOCABLE LIVING TRUST, a trust; U.S. BANK, N.A., a national banking association; NATIONSTAR MORTGAGE, LLC, a foreign limited liability company; REPUBLIC SILVER STATE DISPOSAL, INC., DBA REPUBLIC SERVICES, a domestic governmental entity; DOE INDIVIDUALS I through X, inclusive; and ROE CORPORATIONS XI through XX inclusive,

Defendants.

U.S. BANK, N.A.,

Counterclaimant,

vs.

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

Counter-Defendant.

U.S. BANK, N.A.,

Third-Party Plaintiff,

vs.

SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company; INDIVIDUAL DOES I through X, inclusive; and ROE CORPORATIONS I through X, inclusive,

Third-Party Defendant(s).

Case No. A-15-705563-C

Dept. No. XXVI

**OBJECTIONS TO AMENDED PRE-TRIAL DISCLOSURES**

SFR Investments Pool 1, LLC, hereby submits its Objections to Nationstar Mortgage, LLC

and U.S. Bank's Amended Pre-Trial Disclosures as follows:

**I. Witnesses**

**Simon Ward Brown, Edward Hyne, Alan Blunt, AJ Loll, Kirsten Trompysz or other corporate representative of Nationstar:** these individual witnesses were not disclosed during the course of discovery; the disclosure of corporate representative is deficient as the rule requires identification of witnesses by name.

**Simon Ward Brown, Edward Hyne, Alan Blunt, AJ Loll, Kirsten Trompysz or other corporate representative of U.S. Bank:** these individual witnesses were not disclosed during the course of discovery; the disclosure of corporate representative is deficient as the rule requires identification of witnesses by name.

**R. Scott Dugan:** this witness' anticipated testimony violates *Hallmark* and *Higgs*; this witness was not disclosed by U.S. Bank.

**Diane DeLoney, Shawn Look, Jessica Woodbridge, Matthew Labrie or other corporate representative of Bank of America, N.A.:** these witnesses were not disclosed during the course of discovery; the disclosure of corporate representative is deficient as the rule requires identification of witnesses by name. No witness for Bank of America was ever disclosed during discovery.

**David Alessi or Corporate designee for Alessi & Koenig:** this disclosure is insufficient as the rule requires identification by name of the witness. David Alessi was not disclosed by U.S. Bank.

**Ashley Livingston or Corporate designee for Shadow Mountain Ranch:** this disclosure is insufficient as the rule requires identification by name of the witness. Ashley Livingston was never disclosed as a witness.

**Corporate Designee for JBWNO Revocable Living Trust:** this disclosure is insufficient as the rule requires identification by name of the witness.

**Doug Miles or Corporate Representative and/or Employee for Miles Bauer:** this disclosure is insufficient as the rule requires identification by name of the witness. Doug Miles was not disclosed during discovery.

**Rock Jung:** Rock Jung was never disclosed by U.S. Bank.

SFR objects to the use of deposition transcripts of witnesses not disclosed and/or taken in other cases under NRCp 32(a)(1) and (4).

**Scott Dugan's Expert Report:** hearsay; violates *Hallmark* and *Higgs*.

**Miles Bauer Borrower affidavit:** hearsay; lacks authenticity; lacks foundation; violate best evidence rule.

**Miles Bauer Affidavit:** hearsay; lacks authenticity; lacks foundation; violate best evidence rule.

**Documents Produced by Alessi:** hearsay; lacks authenticity; lacks foundation.

**Documents produced by Shadow Mountain Community Association:** hearsay; lacks authenticity; lacks foundation.

SFR objects to Nationstar and U.S. Bank's reservation of right to use any document disclosed by any other party. The Rule requires identification of all document and without such identification, SFR cannot properly object.

SFR objects to Nationstar and U.S. Bank’s reservation of right to supplement the list of exhibit and witnesses. The Rule does not permit supplements of pre-trial disclosures.

DATED January 13, 2020

/s/ Jason G. Martinez  
Jason G. Martinez, Esq.  
Nevada Bar No. 13375  
Karen L. Hanks, Esq.  
Nevada Bar No. 9578  
7625 Dean Martin Drive, Suite 110  
Las Vegas, Nevada 89139  
*Attorneys for SFR Investments Pool 1, LLC*

**CERTIFICATE OF SERVICE**

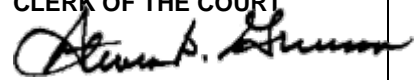
I HEREBY CERTIFY that on this 13rd day of January, 2020, pursuant to NRCP 5(b), I served via the Eighth Judicial District Court electronic filing system, the foregoing **OBJECTIONS TO AMENDED PRE-TRIAL DISCLOSURES**, to the following parties:

<b>Douglas D. Gerrard</b>	dgerrard@gerrard-cox.com
<b>Akerman LLP</b>	akermanLAS@akerman.com
<b>Melanie Morgan</b>	Melanie.morgan@akerman.com
<b>Donna Wittig</b>	Donna.wittig@akerman.com
<b>Fredrick J. Biedermann</b>	fbiedermann@gerrard-cox.com
<b>A&amp;K Eserve</b>	eserve@alessikoenig.com
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<b>Sarah Greenberg Davis</b>	sgreenberg@wrightlegal.net

*/s/ Jason G. Martinez*  
An employee of Kim Gilbert Ebron

# **TAB 39**





**JPTM**

MELANIE D. MORGAN, ESQ.

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*Attorneys for Nationstar Mortgage LLC and U.S. Bank, National Association, as Trustee  
for the Certificateholders of the LXS 2006-4N Trust Fund, erroneously pled as U.S.  
Bank, N.A.*

**EIGHTH JUDICIAL DISTRICT COURT  
CLARK COUNTY, NEVADA**

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

Plaintiff,

vs.

STACY MOORE, an individual; MAGNOLIA  
GOTERA, an individual; KRISTEN JORDAL,  
AS TRUSTEE FOR THE JBWNO  
REVOCABLE LIVING TRUST; U.S. BANK,  
N.A.; NATIONSTAR MORTGAGE, LLC;  
REPUBLIC SILVER STATE DISPOSAL, INC.,  
et al.;

Defendants.

U.S. BANK, N.A.,

Counterclaimant,

vs.

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

Counter-Defendant.

Case No.: A-14-705563-C

Dept.: XXVI

**JOINT PRETRIAL MEMORANDUM**

1 U.S. BANK, N.A.

2 Third-Party Plaintiff,

3 vs.

4 SFR INVESTMENTS POOL 1, LLC, a Nevada  
5 limited liability company, et al.

6 Third-Party Defendants.

7 Nationstar Mortgage LLC, U.S. Bank, N.A., as Trustee for the Certificateholders of the LXS  
8 2006-4N Trust Fund, erroneously pled as U.S. Bank, N.A. and SFR Investments Pool 1, LLC submit  
9 this joint pretrial memorandum pursuant to EDCR 2.67.

10 **I. STATEMENT OF THE CASE**

11 This case involves a January 8, 2014 Association foreclosure sale. U.S. Bank/Nationstar allege  
12 that prior to the sale, on September 2, 2010, MERS as nominee for BAC Home Loans Servicing, LP,  
13 through its counsel, Rock Jung of Miles, Bauer, Bergstrom & Winters, LLP, sent a letter to the  
14 Association and Alessi requesting a superpriority payoff. In response, Alessi provided a payoff with  
15 a total amount due of \$3,544. U.S. Bank/Nationstar further alleged on September 28, 2010, Miles  
16 Bauer sent a check for \$207.00 to Alessi, which represented nine months of common assessments at  
17 \$23.00 per month. At the summary judgment stage, the court found that Alessi's receipt of the check  
18 constituted a genuine issue of material fact for trial.

19 SFR alleges that irrespective of receipt, the deed of trust was terminated pursuant to NRS  
20 106.240. Specifically, SFR alleges that at the latest, U.S. Bank/Nationstar made the loan wholly due  
21 on or about January 22, 2008 by accelerating the payments under the loan. SFR further alleges after  
22 this date, U.S. Bank/Nationstar did not decelerate the loan, and therefore by operation of NRS 106.240,  
23 the deed of trust terminated on January 22, 2018.

24 **II. LIST OF ALL CLAIMS**

25 **A. U.S. BANK'S CLAIMS.**

26 1. Quiet title/declaratory relief. U.S. Bank seeks a declaration its deed of trust survived  
27 the Association foreclosure sale.

28 ///

2. Permanent and preliminary injunction. U.S. Bank seeks an injunction preventing transfer of the property.

**B. SFR'S CLAIMS.**

1. Quiet title/declaratory relief. SFR seeks an order quieting title to the property in its favor and a finding the property is free and clear of the deed of trust.

2. Preliminary and permanent injunction. SFR seeks an injunction preventing transfer of the property.

3. Slander of title. SFR seeks damages from Nationstar stemming from the request for notice it recorded claiming the deed of trust still encumbers the property.

**III. LIST OF AFFIRMATIVE DEFENSES**

**A. U.S. BANK AND NATIONSTAR'S AFFIRMATIVE DEFENSES.**

1. U.S. Bank/Nationstar's interest in the property has priority over SFR's.
2. U.S. Bank/Nationstar are alternatively entitled to entirety of excess proceeds.
3. SFR failed to state a cause of action.
4. SFR failed to mitigate its damages.
5. SFR took title to the property subject to the deed of trust.
6. SFR assumed the risk.
7. HOA foreclosure sale was commercially unreasonable and not conducted in good faith.
8. SFR's claims are barred by the equitable doctrines of laches, unclean hands, and failure to do equity.
9. SFR is not entitled to relief under NRS 116.3116.
10. SFR's claims are void for vagueness and ambiguity.
11. U.S. Bank/Nationstar's acceptance of any excess proceeds does not waive their rights.
12. SFR's claims are barred by the doctrines of waiver and estoppel.
13. HOA foreclosure sale violated U.S. Bank/Nationstar's due process rights.
14. HOA foreclosure sale violated U.S. Bank/Nationstar's procedural due process rights.
15. HOA sale is void under the Supremacy Clause of the United States Constitution.
16. HOA sale is void under the Property Clause of the United States Constitution.

1 17. U.S. Bank/Nationstar or their predecessor-in-interest satisfied the superpriority lien  
2 prior to the HOA sale.

3 18. HOA sale is void under the Contracts Clause of the United States Constitution.

4 **B. SFR'S AFFIRMATIVE DEFENSES.**

5 1. The Bank fails to state a claim upon which relief may be granted.

6 2. The Bank is not entitled to relief from or against SFR, as the Bank has not sustained  
7 any loss, injury, or damage that resulted from any act, omission, or breach by SFR.

8 3. The occurrence referred to in the Third-Party Complaint, and all injuries and damages,  
9 if any, resulting therefrom, were caused by the acts or omissions of the Bank.

10 4. The occurrence referred to in the Third-Party Complaint, and all injuries and damages,  
11 if any, resulting therefrom, were caused by the acts or omissions of a third party or parties over whom  
12 SFR had no control.

13 5. SFR did not breach any statutory or common law duties allegedly owed to the Bank.

14 6. The Bank's claims are barred because SFR complied with applicable statutes and with  
15 the requirements and regulations of the State of Nevada.

16 7. The Bank's claims are barred because the Association and its agents complied with  
17 applicable statutes and regulations.

18 8. The Bank's causes of action are barred in whole or in part by the applicable statutes  
19 of limitations or repose, or by the equitable doctrines of laches, waiver, estoppel, ratification and  
20 unclean hands.

21 9. The Bank is not entitled to equitable relief because it has an adequate remedy at law.

22 10. The Bank has no standing to enforce the first deed of trust and/or the underlying  
23 promissory note.

24 11. The Bank has no standing to enforce the statutes and regulations identified in the  
25 Third-Party Complaint.

26 12. Any purported assignment of the first deed of trust after the Association foreclosure  
27 sale is invalid and unenforceable.

28 ///

13. The first deed of trust and other subordinate interests in the Property were extinguished by the Association foreclosure sale held in accordance with NRS Chapter 116.

14. The Bank has no remedy against SFR because, pursuant to NRS 116.31166, SFR is entitled to rely on the recitals contained in the Association foreclosure deed that the sale was properly noticed and conducted.

15. The Bank has no remedy against SFR because SFR is a bona fide purchaser for value.

16. The Bank's Third-Party Complaint and all claims for relief therein are barred for the Bank's failure to serve proper notice to the Attorney General of the State of Nevada pursuant to NRS 30.130.

17. The Bank's Counterclaim and all claims for relief therein should be dismissed on the ground that the Bank has failed to join necessary or indispensable parties pursuant to NRCP 19, namely the HOA's Agents who recorded a Notice of Delinquent Assessment Lien against the property and ultimately initiated foreclosure of said property.

18. Pursuant to Nevada Rules of Civil Procedure 11, as amended, all possible affirmative defenses may not have been alleged herein insofar as sufficient facts were not available after reasonable inquiry at the time of filing this Answer. Therefore, SFR reserves the right to amend this Answer to assert any affirmative defenses if subsequent investigation warrants.

**IV. LIST OF CLAIMS OR DEFENSES TO BE ABANDONED.**

Slander of title

**V. DOCUMENTS/EXHIBITS TO BE OFFERED OR PRESENTED AT TRIAL BY U.S. BANK**

**A. The following are documents U.S. Bank/Nationstar intend to offer at trial:**

DOCUMENT	BATES #	Objection
Declaration of Covenants, Conditions and Restrictions for Shadow Mountain Ranch	WFZ00001-WFZ00080	
Grant, Bargain, Sale Deed	WFZ00094-WFZ00095	
Deed of Trust	WFZ00096-WFZ00121	
Substitution of Trustee Nevada	WFZ00124	
Notice of Delinquent Assessment	WFZ00126	
Notice of Default and Election to Sell Under Homeowners Association Lien	WFZ00127	
Notice of Default and Election to Sell Under Homeowners Association Lien	WFZ00128	

1	Notice of Default and Election to Sell Under Homeowners Association Lien	WFZ00129	
2	Notice of Trustee's Sale	WFZ00130	
3	Grant Deed	WFZ00131-WFZ00134	
4	Grant Deed	WFZ00135-WFZ00138	
5	Assignment of Deed of Trust	WFZ00139-WFZ00140	
6	Notice of Delinquent Assessment (lien)	WFZ00141	
7	Notice of Violation (Lien)	WFZ00142	
8	Notice of Default and Election to Sell Under Homeowners Association Lien	WFZ00143	
9	Notice of Default and Election to Sell Under Homeowners Association Lien	WFZ00144	
10	Assignment of Deed of Trust	WFZ00145-WFZ00146	
11	Notice of Trustee's Sale	WFZ00147	
12	Trustee's Deed Upon Sale	WFZ00148-WFZ00149	
13	Substitution of Trustee	WFZ00150	
14	Scott Dugan's expert report with attachments	WFZ00151-WFZ00182	Hearsay
15	Miles Bauer Borrower Affidavit with Exhibits	WFZ00183-WFZ00190	Hearsay; lacks authentication; lacks foundation
16	Miles Bauer Affidavit with Exhibits	WFZ00191-WFZ00211	Hearsay; lacks authentication; lacks foundation
17	Foreclosure notices	WFZ00212-WFZ00253	
18	Loan Policy of Title Insurance	WFZ00254-WFZ00276	
19	Documents produced by Alessi	NATIONSTAR00036-00333	Hearsay; lacks authentication; lacks foundation
20	Documents produced by Shadow Mountain Community Association	SMRCA0001-0461	Hearsay; lacks authentication; lacks foundation
21	Note	NATIONSTAR00001-00006	
22	Written discovery responses by all parties.		
23	Check and Receipt	SFR335-336	
24	Rescission of Election to Declare Default	SFR32	
25	Notice of Lien recorded 1/12/10	SFR39	
26	Release of Notice Delinquent Assessment Lien	SFR42	

## VI. DOCUMENTS/EXHIBITS TO BE OFFERED OR PRESENTED AT TRIAL BY SFR

### A. Documents and Exhibits SFR intends to offer at trial:

Document	Bates	Objection
Notice of Default and Election to Sell Under Deed of Trust	SFR 29-30	Relevance

1 **VII. AGREEMENTS AS TO THE LIMITATION OR EXCLUSION OF EVIDENCE**

2 The parties stipulate to the authenticity and admission of certain recorded documents,  
3 specifically:

4 All publically recorded documents.

5 **VIII. LIST OF WITNESSES**

6 **A. U.S. Bank/Nationstar expect to present the following witnesses at trial:**

- 7 1. Edward Hyne, Simon Ward Brown, Alan Blunt, Kristen Trompisch, AJ Loll or  
8 other Corporate Representative for Nationstar Mortgage LLC  
9 c/o Melanie Morgan, Esq. and/or Donna Wittig, Esq.  
10 Akerman LLP  
11 1635 Village Center Circle, Suite 200  
12 Las Vegas, Nevada 89134  
13 Telephone: (702) 634-5000
- 14 2. Edward Hyne, Simon Ward Brown, Alan Blunt, Kristen Trompisch, AJ Loll or  
15 other Corporate Representative for US Bank  
16 c/o Melanie Morgan, Esq. and/or Donna Wittig, Esq.  
17 Akerman LLP  
18 1635 Village Center Circle, Suite 200  
19 Las Vegas, Nevada 89134  
20 Telephone: (702) 634-5000
- 21 3. David Alessi or other Corporate Designee for Alessi & Koenig, LLC  
22 c/o Jeanette McPherson, Esq. and/or Trustee Shelley Krohn, Esq.  
23 Schwartzer McPherson  
24 2850 S. Jones Boulevard, Suite 1  
25 Las Vegas, Nevada 89146  
26 Telephone: (702) 228-7590
- 27 4. Doug Miles or other Corporate Representative  
28 and/or Employee for Miles Bauer  
555 Anton Boulevard, Suite 150  
Costa Mesa, CA 92626  
Telephone: (714) 432-6503
5. Diane DeLoney, Shawn Look, Jessica Woodbridge, Matthew Labrie or other  
Corporate Representative for Bank of America, N.A.  
c/o Melanie Morgan, Esq. and/or Donna Wittig, Esq.  
Akerman LLP  
1635 Village Center Circle, Suite 200  
Las Vegas, Nevada 89134  
Telephone: (702) 634-5000
6. Ashley Livingston or other Corporate Designee for Shadow Mountain Ranch  
Community Association, Inc.  
c/o Registered Agent – Level Property Management  
8966 Spanish Ridge Avenue, #100  
Las Vegas, Nevada 89148

7. Rock K. Jung, Esq.  
Wright Finlay & Zak LLP  
7785 W. Sahara Ave., Suite 200  
Las Vegas, Nevada 89117  
Telephone: (702) 475-7964

**B. U.S. Bank may call the following witnesses at trial if the need arises:**

1. Chris Hardin or other Corporate Designee for SFR Investments Pool 1, LLC  
c/o Kim Gilbert Ebron  
7625 Dean Martin Drive, Suite 110  
Las Vegas, Nevada 89139  
Telephone: (702) 485-3300
2. Corporate Designee for JBWNO Revocable Living Trust  
5327 Marsh Butte Street  
Las Vegas, Nevada 89148
3. R. Scott Dugan, SRA  
R. Scott Dugan Appraisal Company, Inc.  
8930 W. Tropicana Ave., Suite 1  
Las Vegas, Nevada 89147
4. Ryan Kerbow, Esq.  
Phillips, Spallas & Angstadt  
504 S. Ninth Street  
Las Vegas, Nevada 89101
5. Magnolia Gotera  
1275 Via Paraiso  
Salinas, California 93901
6. Stacy Moore  
5327 Marsh Butte Street  
Las Vegas, Nevada 89148

**C. SFR expects to present the following witnesses at trial:**

1. None.

**D. SFR may call the following witnesses at trial if the need arises:**

1. Christopher Hardin
2. Jessica Woodbridge

**IX. STATEMENT OF EACH PRINCIPAL ISSUE OF LAW WHICH MAY BE CONTESTED**

1. Whether U.S. Bank/Nationstar's predecessor-in-interest delivered its tender of the super-priority amount to Alessi & Koenig.

///



2. Whether the tender satisfied the super-priority portion of the Association's lien leaving only the sub-priority portion of the lien at the time of the Association's foreclosure.

3. Whether the deed of trust terminated by operation of NRS 106.240.

**X. ESTIMATED TIME FOR TRIAL**

2 days.

DATED: February 5, 2020.

<p><b>AKERMAN LLP</b></p> <p><i>/s/ Melanie D. Morgan</i>  <b>MELANIE D. MORGAN, ESQ.</b>  Nevada Bar No. 8215  <b>DONNA M. WITTIG, ESQ.</b>  Nevada Bar No. 11015  1635 Village Center Circle, Suite 200  Las Vegas, Nevada 89134</p> <p><i>Attorneys for Nationstar Mortgage LLC and U.S. Bank, National Association, as Trustee for the Certificateholders of the LXS 2006-4N Trust Fund, erroneously pled as U.S. Bank, N.A.</i></p>	<p><b>KIM GILBERT EBRON</b></p> <p><i>/s/ Karen L. Hanks</i>  <b>DIANA S. EBRON, ESQ.</b>  Nevada Bar No. 10580  <b>JACQUELINE A. GILBERT, ESQ.</b>  Nevada Bar No. 10593  <b>KAREN L. HANKS, ESQ.</b>  Nevada Bar No. 9578  <b>JASON G. MARTINEZ, ESQ.</b>  Nevada Bar No. 13375  7625 Dean Martin Drive, Suite 110  Las Vegas, NV 89139</p> <p><i>Attorneys for SFR Investments Pool 1, LLC</i></p>
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**CERTIFICATE OF SERVICE**

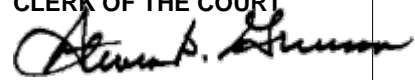
I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on this 5<sup>th</sup> day of February 2020, I caused to be served a true and correct copy of the foregoing **JOINT PRETRIAL MEMORANDUM** in the following manner:

**(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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/s/ Patricia Larsen  
An employee of AKERMAN LLP

# **TAB 40**



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*Attorneys for SFR Investments Pool 1, LLC*

**EIGHTH JUDICIAL DISTRICT COURT****CLARK COUNTY, NEVADA**

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

Plaintiff,

vs.

STACY MOORE, an individual; MAGNOLIA  
GOTERA, an individual; KRISTIN JORDAL,  
AS TRUSTEE FOR THE JBWNO  
REVOCABLE LIVING TRUST, a trust; U.S.  
BANK, N.A., a national banking association;  
NATIONSTAR MORTGAGE, LLC, a foreign  
limited liability company; REPUBLIC SILVER  
STATE DISPOSAL, INC., DBA REPUBLIC  
SERVICES, a domestic governmental entity;  
DOE INDIVIDUALS I through X, inclusive;  
and ROE CORPORATIONS XI through XX  
inclusive,

Defendants.

U.S. BANK, N.A.,

Counterclaimant,

vs.

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

Counter-Defendant.

U.S. BANK, N.A.,

Third-Party Plaintiff,

vs.

SFR INVESTMENTS POOL 1, LLC, a Nevada  
limited liability company; INDIVIDUAL DOES  
I through X, inclusive; and ROE  
CORPORATIONS I through X, inclusive,

Third-Party Defendant(s).

Case No. A-14-705563-C

Dept. No. 17

**SFR INVESTMENTS POOL 1, LLC TRIAL  
BRIEF**

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

Third-Party Counterclaimant/Cross-Claimant,

vs.

U.S. BANK, N.A.; NATIONSTAR MORTGAGE, LLC, foreign limited liability company; KRISTEN JORDAL, as Trustee for the JBWNO REVOCABLE LIVING TRUST, a Trust; STACY MOORE, an individual; and MAGNOLIA GOTERA, an individual,

Counter-Defendants/Cross-Defendants.

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. INTRODUCTION**

This case arises from Shadow Mountain Ranch Community Association's (the "Association") foreclosure of real property commonly referred to as 5327 Marsh Butte Street, Las Vegas, Nevada 89148; Parcel No. 163-30-312-007 (the "Property") on January 8, 2014. SFR made the highest cash bid at the sale, and is current record title holder of the Property. In this case, one of SFR's affirmative defenses is that the Deed of Trust is no longer valid due to the statute of repose in NRS 106.240. Specifically, the Bank accelerated the loan at the latest on January 22, 2008, triggering the ten-year statute of repose under NRS 106.240. Then, the Bank never timely decelerated the loan or enforced the deed of trust by way of a sale prior to the expiration of ten years. Thus, on January 22, 2018—even if it had not previously been extinguished by the Association foreclosure sale—the Deed of Trust terminated/extinguished.

### **II. RELEVANT FACTS**

DATE	FACTS
11/21/05	Deed of Trust identifying Countrywide Home Loans, Inc. as lender, and Mortgage Electronic Registration System, Inc. ("MERS") is nominee-beneficiary, recorded as Instrument No. 20051121-0005567.  Paragraph 22 of the Deed of Trust provides as follows:

	<p><b>22. Acceleration; Remedies.</b> 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</p>
1/22/08	<p>A Notice of Default and Election to Sell Under Deed of Trust recorded against the Property as Instrument No. 20080122-0002564.</p> <p>The Notice of Default indicates a default date of September 1, 2007. The Notice of Default further states:</p> <p>That by reason thereof, the present beneficiary under such deed of trust has executed and delivered to RECONTRUST COMPANY a written Declaration of Default and Demand for sale, and has deposited with RECONTRUST COMPANY such deed of trust and all documents evidencing 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 trust property to be sold to satisfy the obligations secured thereby.</p>
1/22/08	<p>Pursuant to the Notice of Default, at the latest, the loan was accelerated on January 22, 2008.</p>
1/22/08 through 1/22/18	<p>In the next ten years after acceleration day (Jan. 22, 2008), at no time did the Bank execute the power of sale and foreclose.</p> <p>At no time after January 22, 2008 or before January 22, 2018 did the Bank record any document indicating the loan was decelerated, nor did the Bank introduce any documents whereby the borrower was notified the loan was decelerated.</p>

### **III. LEGAL ARGUMENT**

#### **A. The Deed of Trust is Terminated Under NRS 106.240.**

NRS 106.240 provides in relevant part, a "[t]he lien...created of any mortgage or deed of trust upon any real property, appearing of record, and not otherwise satisfied and discharged or

record, shall at the expiration of 10 years after the debt secured by the...deed of trust according to the terms thereof or any recorded written extension thereof become wholly due, terminate, and it shall be conclusively presumed that the debt has been regularly satisfied and the lien discharged.”

In *Pro-Max*, the Nevada Supreme Court noted that the statute of repose found under NRS 106.240 “creates a conclusive presumption that a lien on real property is extinguished ten years after the debt becomes due,” and ruled that “the conclusive presumption contained in NRS 106.240 clearly and unambiguously applies without limitation to all debts secured by deeds of trust on real property.” *Pro-Max Corp. v. Feenstra*, 117 Nev. 90, 94, 97, 16 P.3d 1074, 1076, 1079 (2001). There are two time periods which govern the note and deed of trust. The note is governed by the contracts statute of limitations, *i.e.* six years, and the deed of trust is governed by the statute of repose found in NRS 106.240, *i.e.* ten years. *Facklam v. HSBC Bank*, 401 P.3 1068 (Nev. 2018).

Typically, the statute of repose will not run until ten years from the maturity date of the note. *See 4518 S. 256th, LLC v. Karen L. Gibbons, PS*, 195 Wn. App. 423, 434–35, 382 P.3d 1 (2016); *see also, Edmundson v. Bank of Am.*, 194 Wn. App. 920, 930, 378 P.3d 272 (2016) (“ ‘when recovery is sought on an obligation payable by installments, the statute of limitations runs against each installment from the time it becomes due; that is, from the time when an action might be brought to recover it.’ ”) (quoting *Herzog v. Herzog*, 23 Wn.2d 382, 388, 161 P.2d 142 (1945)). However, **if this maturity date is accelerated, then the statute of repose runs from the accelerated date because by accelerating the due date, the lender has fast-tracked the maturity date.**

In *Coit*, the Nevada Supreme Court recognized due in full language as language which makes the entire note due and therefore changes the date upon which the statute of limitations runs. *First Am. Title Ins. Co. v. Coit*, 412 P.3d 1088 (Nev. 2018) (unpublished). The *Coit* Court in questioning the merits of a lender’s statute of limitations argument stated “we question the merit of that argument in light of the March 2010 notice of default that declared the loan **due in full**.” *Id.* citing *Cf. Clayton v. Gardner*, 107 Nev. 468, 470, 813 P.2d 997, 999 (1991) (emphasis

1 added) (“[W]here contract obligations are payable by installments, the limitations statute begins  
2 to run only with respect to each installment when due, unless the lender exercises his or her  
3 option to declare the entire note due.”); *see also Bank of Am., N.A. v. Madeira Canyon*  
4 *Homeowners Association*, No. 216CV01053RFBDJA, 2019 WL 5963935, at \*3 (D. Nev. Nov.  
5 12, 2019)(noting that the Nevada Supreme Court has endorsed by implication the finding that  
6 acceleration of a note serves to make the full amount “wholly due”).

7 In the present case, it is undisputed on January 22, 2008, the Bank recorded a Notice of  
8 Default in connection with the loan which the Deed of Trust secured. The Notice of Default  
9 unequivocally states “the beneficiary under such deed of trust...**has declared and does hereby**  
10 **declare all sums secured thereby immediately due and payable.**” *See* Notice of Default  
11 (emphasis added.) In light of the language in the Deed of Trust about written notification to the  
12 borrower prior to acceleration, coupled with the default date of September 1, 2007, it is more  
13 likely than not, the Bank made the loan wholly due or accelerated prior to the date of the Notice  
14 of Default. But without doubt, at the latest, on January 22, 2008 the loan was wholly due.

15 By accelerating the loan, the statute of repose in which to enforce the loan via the Deed  
16 of Trust began running on January 22, 2008. The statute of repose then expired on January 22,  
17 2018. The only way the Bank could have stopped the running of the statute of repose was to  
18 timely decelerate the loan or foreclose within ten years. Neither of these events occurred.

19 Because the Note is governed by the six-year contract statute of limitations, timely  
20 deceleration means deceleration within six years of the acceleration date. After the expiration of  
21 six years, if the Bank fails to decelerate, then it is only left with the ability to enforce the deed of  
22 trust. *See Facklam, supra*. Here, there is no evidence the Bank decelerated the loan between  
23 January 22, 2008 and January 22, 2014 (six years from date of acceleration). Further, it is  
24 undisputed the Bank did not foreclose at any point after it accelerated the loan.

25 After acceleration, because the Bank neither timely decelerated the loan nor foreclosed  
26 prior to January 22, 2018, pursuant to NRS 106.240, the Deed of Trust was  
27 terminated/discharged on January 22, 2018.  
28



**B. A Statute of Repose Cannot Be Waived or Tolded; It Operates Automatically.**

NRS 106.240 is a statute of repose. *See Bank of Am., N.A. v. Madeira Canyon Homeowners Association*, No. 2:16-cv-01053-RFB-DJA, 2019 WL 5963935, at \*4 (D. Nev. Nov. 12, 2019). “[A] statute of repose “puts an outer limit on the right to bring a civil action.” *Id.* (quoting *CTS Corp. v. Waldburger*, 573 U.S. 1, 9 (2014)). Statutes of repose “bar causes of action after a certain period of time, regardless of whether damage or an injury has been discovered. *Allstate Ins. Co. v. Furgerson*, 104 Nev. 772, 775, 766 P.2d 904, 907 (1988); *see also* 51 Am.Jur.2d (2011) Limitation of Actions, § 354, pp. 762–763 (“a statute of repose ... nullifies both the right and the remedy”); *id.* § 24, p. 507 (statute of repose “extinguishes the action, or terminates any right to action, after a fixed period of time has elapsed” (fns. omitted)).

Because the time limit in NRS 106.240 expressly qualifies the right, it cannot be waived or tolled. *Cheswold Volunteer Fire Co. v. Lambertson Constr. Co.*, 489 A.2d 413, 421 (Del. 1985) (statute of repose may not be waived because the time limit expressly qualifies the right which the statute creates); *see also, Miller v. Vitner*, 546 S.E.2d 917 (Ga.App. 2001); *Roskam Baking Co. v. Lanham Machinery Co.*, 288 F.3d 895, 903 (6th Cir. 2002) (statute of repose is a substantive provision which may not be waived); *Hinkle v. Henderson*, 85 F.3d 298, 302 (7th Cir. 1996) (statutes of repose, unlike statutes of limitation, may not be waived).

As one Court explained it, “once the period of duration under a statute of repose is expired, there is no suit to avoid, because the statute of repose extinguishes the cause of action, and the failure to plead that statute of repose as an affirmative defense could not resurrect a cause of action that no longer exists.” *Ray & Sons Masonry Contractors v. United States Fidelity, etc. Co.*, 114 S.W.3d 189, 199 (Ark. 2003). Additionally, a statute of repose cannot be tolled. *FDIC v. Rhodes*, 130 Nev. 893, 899, 336 P.3d 961, 965 (2014); *Simmons v. Sonyika*, 614 S.E.2d 27, 30 (Ga.2005).

As a sophisticated banking entity, the Bank is charged with knowledge of the law, including Nevada’s statute of repose in NRS 106.240.

**C. Acceleration = Wholly Due**

Any attempt by the Bank to define “wholly due” as something other than acceleration as defined by the Deed of Trust, which makes “all amounts secured by [the] Deed of Trust immediately due and payable” would be disingenuous. While this should be self-evident, Nevada recognizes lenders can accelerate debts underlying deeds of trust before such “pay the debt in full not later than ...” dates. *See, e.g., Boyes v. Valley Bank of Nevada*, 701 P.2d 1008, 1009-10 (Nev. 1985) (“Valley Bank corresponded with the Boyeses and **demand[ed] that they pay in full their promissory note in accordance with the ‘due-on-sale’ clause contained in paragraph 17 of the deed of trust.**”) (Emphasis added).

In fact, any argument to the contrary makes no sense. *If* the Deed of Trust had a provision stating the underlying debt could not be “wholly due” before the date of maturity, and this date was fixed in stone and could never be altered, even by companion provisions in the deed of trust itself, *then*, by the Bank’s logic, it could NEVER accelerate the debt, and could NEVER foreclose. As the Deed of Trust itself allows, if, as the Bank did here in 2008, exercises the option to accelerate the debt, then the debt clearly is no longer due on the regular maturity date. By the plain language of the Notice of Default, the debt became wholly due on January 22, 2008.

But the biggest problem for the Bank, is its counsel, on behalf of other banks has judicially admitted on at least two occasions wholly due means acceleration or maturity. Specifically, Bank’s counsel argued, “[e]ven if a declaratory relief action based on the enforceability of the deed of trust were subject to a limitations, **NRS 106.240 confirms the statute of limitations on enforcement of the deed of trust ends ten years from acceleration or maturity.**”<sup>1</sup> In another case, Bank’s counsel argued NRS 106.240 “[a]t face value, the statute would prevent a lender from foreclosing on a property secured by a mortgage or deed of trust more than ten years after the term of the mortgage loan, or after it became **wholly due at**

<sup>1</sup> *Carrington Mortgage Services, LLC v. SFR Investments Pool 1, LLC*, Case No. 2:18-CV-00414-APG-VCF, [ECF No. 13, at pg. 6:20-22] (emphasis added.)

an earlier time, such as by acceleration.”<sup>2 3</sup>

What is more, Bank’s counsel, during closing arguments in another trial, argued the following:

MR. STERN: 240 says that a deed of trust remains valid ten years after the loan is fully mature. So if you reach maturity or perhaps acceleration and the loan is wholly due – that’s the actual language in the statute, wholly due – the deed of trust remains valid and, therefore, can be foreclosed for ten years after that.

See *French v. Sweetwater Homeowners’ Association, Inc.* Case No. A-12-677931-C, May 4, 2018 transcript from closing arguments.

These statements constitute judicial admissions. As the Ninth Circuit has noted, “[s]tipulations and admissions in the pleadings are generally binding on the parties and the Court.” *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 225 (9th Cir. 1988). Even if not considered a judicial admission, the Bank is judicially estopped from arguing a contrary position here. As the Ninth Circuit noted, the greater weight of federal authority supports the position that judicial estoppel applies to a party’s stated position, regardless of whether it is an expression of intention, a statement of fact, or a legal assertion. *Helfand v. Gerson*, 105 F.3d 530, 535 (9th Cir. 1997) citing *In re Cassidy*, 892 F.2d 637, 641-42 (7th Cir.), cert. denied, 498 U.S. 812, 111 S.Ct. 48, 112 L.Ed.2d 24 (1990); *Hardwick v. Cuomo*, 891 F.2d 1097, 1105 n. 14 (3d Cir.1989); *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208, 214-15 (1st Cir.1987); *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166-67 (4th Cir.1982). As the Court put it, “the integrity of the judicial process is threatened when a litigant is permitted to gain an advantage by the manipulative assertion of inconsistent positions, factual or legal.” *Id.* In the

<sup>2</sup> See *Fitzwater v. Bank of America, N.A.*, Case No. 2:16-CV-00285-RFB-NJK, [ECF No. 26], BANA’s Reply in support of its Motion to Dismiss; see also Order granting Motion to Dismiss at [ECF No. 30].

<sup>3</sup> See *BNYM v. SFR Investments Pool 1, LLC*, Case No. 2:17-CV-02699-APG-BNW, [ECF No. 26 at pp. 8-9].

present case, the Bank made the loan due in full as of January 22, 2008, and thus the loan was wholly due on this date. Having failed to foreclose prior to January 22, 2018 or to decelerate the loan, under NRS 106.240 the deed of trust is terminated and thus void.

**D. The Bank Never Decelerated the Loan.**

Undoubtedly, the Bank will argue a Rescission recorded on March 20, 2008 decelerated the loan, but this argument is unavailing upon closer examination of the language in the Rescission. Specifically, the Rescission makes no statement the loan is decelerated or that acceleration is cancelled or rescinded. Instead, the language is very specific to only applying to not moving forward with sale. It reads, “this rescission shall not be construed as waiving, curing, extending to, or affecting any default...and it is, and shall be deemed to be only an election without prejudice not to cause a sale...” See Rescission of Notice of Default. Additionally, it is important to recall, more likely than not, the Bank sent a written notification of acceleration prior to the Notice of Default because the Notice states ““has declared all sums due.” Thus, rescinding the Notice of Default does nothing with respect to acceleration.

The Rescission in this case has nearly identical language to a rescission of notice of default in a case wherein U.S. federal district court Judge Boulware determined that NRS 106.240 operated to extinguish a deed of trust for a loan serviced by BANA. *Bank of Am., N.A. v. Madeira Canyon Homeowners Association*, No. 2:16-cv-01053-RFB-DJA, 2019 WL 5963935 (D. Nev. Nov. 12, 2019).

In that case, BANA argued that the rescission of notice of default served to rescind the acceleration. However, the court noted that “nowhere in the document is there any statement that the acceleration of the loan has been rescinded . . . Rather the notice merely states that the beneficiary chose not to elect to sell at that time.” *Id.* at \*4. The court agreed with SFR that more was needed to unequivocally decelerate the loan. *Id.*

While the Notice of Default sufficiently proves the loan became wholly due on January 22, 2008, the Bank will not be able to show it unequivocal decelerated of the loan. Thus, the Deed of Trust terminated on January 22, 2018 by operation of NRS 106.240.

### E. The Statute of Repose Cannot Be Equitably Tolled.

Once again, the statute of repose cannot be tolled; it operates automatically. *FDIC v. Rhodes*, 130 Nev. 893, 899, 336 P.3d 961, 965 (2014). Nevertheless, the doctrine of equitable tolling could never apply in this situation. Equitable tolling focuses on “whether there was excusable delay by the plaintiff: If a reasonable plaintiff would not have known of the existence of a possible claim within the limitations period, then equitable tolling will serve to extend the statute of limitations for filing suit until the plaintiff can gather what information he needs.” *City of N. Las Vegas v. State Local Gov’t Employee-Mgmt. Relations Bd.*, 127 Nev. 631, 640, 261 P.3d 1071, 1077, *see also* Black’s Law Dictionary 618 (9th ed. 2009) (equitable tolling is defined as “[t]he doctrine that the statute of limitations will not bar a claim if the plaintiff, despite diligent efforts, did not discover the injury until after the limitations period had expired”). In that regard, equitable tolling is not applicable when a party simply did not realize the “extent” of his claim. *See City of N. Las Vegas*, 127 Nev. at 640, 261 P.3d at 1077. Equitable tolling is **only** available until the plaintiff has learned enough information to determine whether a claim exists, not to discover the full extent of his or her claim. *Id.*

The Nevada Supreme Court originally adopted the doctrine of equitable tolling in the adjudication of anti-discrimination statutes because those cases presented a situation “[w]here the danger of prejudice to the defendant is absent, and the interests of justice so require, equitable tolling of the limitations period may be appropriate.” *Seino v. Employers Ins. Co. of Nevada*, 121 Nev. 146, 152, 111 P.3d 1107, 1112, 2005 WL 1243159 (2005). The Nevada Supreme Court set forth the following factors to determine whether equitable tolling applies to a case: (1) the diligence of the claimant; (2) the claimant's knowledge of the relevant facts; (3) the claimant's reliance on authoritative statements by the administrative agency that misled the claimant about the nature of the claimant's rights; (4) any deception or false assurances on the part of the employer against whom the claim is made; (5) the prejudice to the employer that would actually result from delay during the time that the limitations period is tolled; and any other equitable considerations appropriate in the particular case. *Id.*

1 In analyzing the Nevada doctrine of equitable tolling, a United States District Court in  
2 South Carolina stated, “[f]rom the court's survey of Nevada case law, it appears that equitable  
3 tolling is a *very* limited doctrine that is rarely applied in civil cases outside of employment  
4 actions or cases involving administrative proceedings. *Walters v. Pella Corp.*, 2:14-CV-00544-  
5 DCN, 2015 WL 2381335, at \*7 (D.S.C. May 19, 2015) (declining to apply the doctrine of  
6 equitable tolling).

7 The Bank could never establish these elements. The Bank was in full control at all times  
8 of the running of the statute of repose. Neither this action, nor the Association foreclosure sale,  
9 in any way affected or interfered with the Bank’s decision to (1) make the loan wholly due; and  
10 (2) never decelerate it. Because the statute of repose cannot be tolled, any argument about  
11 equitable tolling is without merit.

12 **IV. CONCLUSION**

13 Under Nevada law and based on the evidence presented in this case, SFR is entitled to  
14 judgment as a matter of law that the Deed of Trust was terminated/discharged by operation of  
15 the statute of repose in NRS 106.240 pursuant to NRCP 52(c).

16 DATED February 5, 2020.

**KIM GILBERT EBRON**

/s/ Karen L. Hanks

Karen L. Hanks, Esq.

Nevada Bar No. 9578

7625 Dean Martin Drive, Suite 110

Las Vegas, Nevada 89139

*Attorneys for SFR Investments Pool 1, LLC*

**CERTIFICATE OF SERVICE**

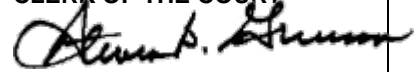
I HEREBY CERTIFY that on this 5th day of February, 2020, pursuant to NRCP 5(b), I served via the Eighth Judicial District Court electronic filing system, the foregoing SFR INVESTMENTS POOL 1, LLC'S TRIAL BRIEF, to the following parties:

**Akerman LLP**                      [Melanie.morgan@akerman.com](mailto:Melanie.morgan@akerman.com)  
[akermanLAS@akerman.com](mailto:akermanLAS@akerman.com)

*/s/ Karen L. Hanks*  
An employee of Kim Gilbert Ebron

# **TAB 41**





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*Attorneys for Nationstar Mortgage LLC and U.S.  
Bank, National Association, as Trustee for the  
Certificateholders of the LXS 2006-4N Trust Fund,  
erroneously pled as U.S. Bank, N.A.*

**EIGHTH JUDICIAL DISTRICT COURT  
CLARK COUNTY, NEVADA**

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

Plaintiff,

vs.

STACY MOORE, an individual; MAGNOLIA  
GOTERA, an individual; KRISTEN JORDAL,  
AS TRUSTEE FOR THE JBWNO  
REVOCABLE LIVING TRUST; U.S. BANK,  
N.A.; NATIONSTAR MORTGAGE, LLC;  
REPUBLIC SILVER STATE DISPOSAL, INC.,  
et al.;

Defendants.

U.S. BANK, N.A.,

Counterclaimant,

vs.

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

Counter-Defendant.

Case No.: A-14-705563-C

Dept.: XXVI

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

**AKERMAN LLP**

1635 VILLAGE CENTER CIRCLE, SUITE 200  
LAS VEGAS, NEVADA 89134  
TEL.: (702) 634-5000 – FAX: (702) 380-8572

1 U.S. BANK, N.A.

2 Third-Party Plaintiff,

3 vs.

4 SFR INVESTMENTS POOL 1, LLC, a Nevada  
5 limited liability company, et al.

6 Third-Party Defendants.

7 This matter proceeded to a bench trial on February 10, 2020. Karen Hanks, Esq. appeared on  
8 behalf of SFR. Melanie Morgan Esq. appeared on behalf of U.S. Bank. Having reviewed and  
9 considered the evidence and arguments of counsel, for the reasons stated on the record and in the  
10 pleadings, and good cause appearing, this Court makes the following findings of fact and conclusions  
11 of law.<sup>1</sup>

12 **FINDINGS OF FACT**

13 1. In 1991, Nevada adopted the Uniform Common Interest Ownership Act as NRS 116,  
14 including NRS 116.3116(2). (FOFCOL<sup>2</sup> at ¶1).

15 2. On June 21, 2000, Shadow Mountain Ranch Community Association (Association)  
16 perfected and gave notice of its lien by recording its Declaration of Covenants, Conditions, and  
17 Restrictions (CC&Rs) in the Official Records of the Clark County Recorder in Book No. 20000621  
18 as Instrument No. 01735. (*Id.* at ¶2).

19 **Property Transfers, The Deed of Trust, and Assignments**

20 3. On November 21, 2005, a Grant, Bargain, Sale Deed was recorded in the Official  
21 Records of the Clark County Recorder as Instrument No. 20051121-0005566, transferring real  
22 property located at 5327 Marsh Butte Street, Las Vegas, Nevada 89148; Parcel No. 163-30-312-007  
23 (the property) to Magnolia Gotera. (*Id.* at ¶3).

24 ///

25  
26 <sup>1</sup> Any findings of fact that are more appropriately conclusions of law shall be so deemed. Any conclusions of law that are  
27 more appropriately findings of fact shall be so deemed.

28 <sup>2</sup> References to "FOF&COL" pertain to the Findings of Fact and Conclusions of Law filed on November 29, 2018 following  
the hearing on SFR, U.S. Bank and Nationstar's competing motions for summary judgment.

1           4.       On November 21, 2005, a Deed of Trust listing Countrywide Home Loans, Inc. as  
2 lender, with Mortgage Electronic Registration Systems, Inc. (MERS) as beneficiary, was recorded in  
3 the Official Records of the Clark County Recorder as Instrument No. 20051121-0005567 (deed of  
4 trust). (*Id.* at ¶4).

5           5.       On May 27, 2011, a Grant Deed transferring the Property to JBWNO Revocable Living  
6 Trust was recorded in the Official Records of the Clark County Recorder as Instrument No.  
7 201105270004010. (*Id.* at ¶7).

8           6.       On May 27, 2011, a Grant Deed transferring the Property to Stacy Moore was recorded  
9 in the Official Records of the Clark County Recorder as Instrument No. 201105270004011. (*Id.* at ¶8).

10          7.       On November 2, 2011, an assignment of deed of trust purportedly transferring the deed  
11 of trust from MERS to U.S. Bank was recorded in the Official Records of the Clark County Recorder  
12 as Instrument. No. 201111070000754. (*Id.* at ¶9).

### 13       **Default and HOA Foreclosure Sale**

14          8.       On May 7, 2008, the HOA recorded a notice of delinquent assessment lien in the  
15 Official Records of the Clark County Recorder as Instrument No. 20080507-0001378 stating the total  
16 amount due as \$957.00. (Jt. Trial Ex. 5).

17          9.       On January 12, 2010, Nevada Association Services (NAS) recorded a notice of lien in  
18 the Official Records of the Clark County Recorder as Instrument No. 201001120002157 stating the  
19 total amount due as \$2,050.00. (Jt. Trial Ex. 31).

20          10.       After two earlier recorded notices, on July 1, 2010, the HOA recorded a third notice of  
21 default and election to sell in the Official Records of the Clark County Recorder as Instrument No.  
22 20100701-0000190 stating the total amount due as \$3,140.00. (Jt. Trial Exs. 6, 7 and 8).

23          11.       On November 30, 2010, the NAS recorded a Release of Notice Delinquent Assessment  
24 Lien as Instrument No. 20101130-0003315 stating its lien recorded on January 12, 2010 as instrument  
25 number 0002157 Book 20100112 is satisfied and released. (Jt. Trial Ex. 32).

26          12.       On September 2, 2010, MERS as nominee for BAC Home Loans Servicing, LP,  
27 through its counsel, Rock Jung of Miles, Bauer, Bergstrom & Winters, LLP, sent a letter to the  
28 Association and Alessi requesting a superpriority payoff. In response, Alessi provided a payoff with

1 a total amount due of \$3,544. On September 28, 2010, Miles Bauer sent a check for \$207.00 to Alessi,  
2 which represented nine months of common assessments at \$23.00 per month. (*See* FOF&COL at 15  
3 in conjunction with order granting Nationstar's motion for reconsideration at ¶¶ 3 and 4).

4 13. Tender of \$207.00 was the proper amount of the superpriority lien, as it was nine  
5 months of assessments under NRS 116.3116(2). (FOF&COL at ¶ P).

6 14. Alessi received the Miles Bauer check and September 28, 2010 letter, but rejected the  
7 payment. (Jt. Trial Ex. 26 at NATIONSTAR00174-176; trial testimony of David Alessi).

8 15. On September 11, 2012, the Association, through its agent, Alessi & Koenig, LLC  
9 (Alessi), recorded another notice of delinquent assessment lien against the property in the Official  
10 Records of the Clark County Recorder as Instrument No. 201209110002023. (*Id.* at ¶10).

11 16. Alessi recorded the September 11, 2012 lien because the identity of the property owner  
12 had changed from Gotera to Moore.

13 17. The September 11, 2012 lien listed the total amount due as \$6,448.00, which includes  
14 the total amounts due in the May 7, 2008 lien. (Jt. Trial Exs. 5, 13 and 26; trial testimony of David  
15 Alessi).

16 18. Alessi never recorded a release of the May 7, 2008 lien. (Trial testimony of David  
17 Alessi).

18 19. On July 5, 2013, the Association recorded a Notice of Default in the Official Records  
19 of the Clark County Recorder as Instrument No. 201307050000950 (NOD). (FOF&COL. at ¶13).

20 20. On December 10, 2013, the Association recorded a Notice of Trustee's Sale in the  
21 Official Records of the Clark County. Recorder as Instrument No. 201307150002689 (Notice of Sale).  
22 (*See id.* at ¶17).

23 21. On January 8, 2014, Alessi held a public non-judicial foreclosure auction for the  
24 property. (*See id.* at ¶20).

25 22. SFR placed the highest cash bid of \$59,000.00. (*See id.* at ¶20).

26 23. The Trustee's Deed Upon Sale was recorded in the Official Records of the Clark County  
27 Recorder as Instrument No. 201401130001460 (Foreclosure Deed). (*Id.* at ¶24).

28 ///

## CONCLUSIONS OF LAW

A. Douglas Miles was properly disclosed as a witness in Nationstar's Second Supplemental Disclosure of Documents and Witnesses which was electronically served on SFR's counsel on June 1, 2019 and that the Affidavit of Douglas Miles met the criteria of NRS 52.260 as a custodial declaration to authenticate the business records of the Miles Bauer Bergstrom & Winters law firm, which included the records and letters related to the tender." (Order granting Nationstar's motion for reconsideration at ¶ 3; Jt. Trial Ex. 23).

B. The documents related to the tender were also properly authenticated through the Affidavit of Rock Jung, Esq., which satisfies the requirements of NRS 52.025, as testimony of a person with personal knowledge." (Order granting Nationstar's motion for reconsideration at ¶ 4).

C. The Nevada Supreme Court held in *Horizon at Seven Hills Homeowners Association v. Ikon Holdings, LLC*, 132 Nev. Adv. Op. 35, at 13 (Nev. April 28, 2016), that the superpriority lien granted by NRS 116.3116(2) does not include an amount for collection fees and foreclosure costs incurred; rather it is limited to an amount equal to the common expense assessments due during the nine months before foreclosure. While this Court acknowledges that in *Horizon at Seven Hills v. Ikon*, the association in question did not foreclose, the Nevada Supreme Court's in depth review of legislative history and statutory interpretation indicates the superpriority portion in question does not include fees and costs. *Id.* at 70. Therefore, the court finds Miles Bauer's tender of \$207.00 was the proper amount of the superpriority lien, as it was nine months of assessments under NRS 116.3116(2). (FOF&COL at ¶ P).

D. In *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408 (2014), the Nevada Supreme Court clearly stated that a first deed of trust holder's pre-foreclosure tender prevents the first deed of trust from being extinguished. 334 P.3d at 414 ("[A]s junior lienholder, [the holder of the first deed of trust] could have paid off the [HOA] lien to avert loss of its security[.]").

E. Here, U.S. Bank's predecessor's attempt to pay the statutory superpriority portion of the Association's lien, prior to the foreclosure sale, extinguished the superpriority portion of the Association's lien pursuant to the tender doctrine.

///

1 F. The Nevada supreme court has held that a lender's tender of the superpriority portion  
2 of the statutory HOA lien extinguishes the superpriority lien, even if the tender is rejected. *Bank of*  
3 *America v. SFR Investments Pool 1, LLC*, 427 P.3d 113, 118-20 (Nev. 2018) (hereinafter ***Diamond***  
4 ***Spur***).

5 G. *Diamond Spur* further confirmed that (1) the letters Miles Bauer routinely sent in  
6 conjunction with its tender check contained only one condition, upon which the tendering party had  
7 the right to insist, and therefore do not contain impermissible conditions; (2) an association or an  
8 association trustee's rejection of the tender check on the basis that it did not satisfy the entire amount  
9 of the lien—or anything more than nine months of assessments and any nuisance abatement charges—is  
10 not a good faith rejection; (3) the tendering party was neither required to record its tender nor “keep it  
11 good” by paying the amount into court in order to discharge the superpriority portion of the  
12 association's lien; and (4) that bona fide purchaser status is irrelevant in superpriority tender cases.  
13 *Id.* at 117-21.

14 H. The tender check at issue in this case constituted a valid tender sufficient to discharge  
15 the superpriority portion of the statutory HOA lien.

16 I. U.S. Bank's predecessor's tender was sufficient to discharge the superpriority portion  
17 of the statutory association lien.

18 J. The tender letter Miles Bauer sent, and Alessi received, in conjunction with its  
19 superpriority payment did not contain any conditions and, therefore, the tender was unconditional.  
20 Even if the tender letter did contain conditions, they were conditions upon which U.S. Bank's  
21 predecessor had the right to insist. *See Diamond Spur*, 427 P.3d at 118.

22 K. U.S. Bank's predecessor was also not required to record notice of its superpriority  
23 tender pursuant to either NRS 111.315 or NRS 106.220. *Id.* at 119. NRS 111.315 does not apply to  
24 the tender because an association's lien does not create, alienate, assign, or surrender an interest in  
25 land. Instead, “it *preserves* a pre-existing interest, which does not require recording.” *Id.* (emphasis  
26 in original). With respect to NRS 106.220, U.S. Bank's predecessor cured the statutory superpriority  
27 portion of the Association's lien by operation of law, as opposed to by recording a written instrument,  
28 and therefore NRS 106.220 is not applicable.

1 L. Nevada law did not require U.S. Bank's predecessor to take any further steps to solidify  
2 the legal effect of its tender, such as paying the money into court. *Id.* at 120. Imposing such a  
3 requirement would “negate[] the purpose behind the unconventional HOA split-lien scheme: prompt  
4 and efficient payment of the HOA assessment fees on defaulted properties.” *Id.*

5 M. Because U.S. Bank's predecessor tendered and satisfied the superpriority portion of the  
6 Association's lien prior to the Association's foreclosure, the Association could only foreclosure on the  
7 sub-priority portion of its lien. Therefore, SFR purchased only the sub-priority portion of the  
8 Association's lien and took the property subject to the Deed of Trust.

9 N. If any of these conclusions of law are more properly considered findings of fact, they  
10 should be so construed.

11 O. The issue of whether the deed of trust was terminated through operation of NRS  
12 106.240 is not properly before the court.

13 P. SFR never plead NRS 106.240 as a defense to U.S. Bank's claim and agreed at the  
14 EDCR 2.67 conference that the only issue for trial was delivery of the tender. SFR never mentioned  
15 NRS 106.240 in response to written discovery. SFR has waived this argument.

16 Q. SFR's claim that the NRS 106.240 argument is included in its affirmative defense  
17 number 8, which generally pled the statute of limitations and statute of repose as a defense to U.S.  
18 Bank's claim. But this is a defense to a cause of action, not an affirmative claim. SFR's affirmative  
19 defense is supposed to defend against the specific claims U.S. Bank made – which have nothing to do  
20 with the enforceability of the loan despite any lapse of time, but rather deals with the effects of the  
21 Association foreclosure sale and pre-sale tender attempts. U.S. Bank did not put NRS 106.240 at issue  
22 in its claims, nor is NRS 106.240 responsive to U.S. Bank's claims.

23 R. Procedurally, to use NRS 106240 as a sword as SFR seeks to do, it would have been  
24 required to file a counterclaim alleging extinguishment of the deed of trust under NRS 106.240. The  
25 statute does not operate automatically. *See Pro-Max Corp. v. Feenstra*, 117 Nev. 90, 97, 16 P.3d  
26 1074, 1079 (2001) (NRS 106.240 asserted as an affirmative claim, providing the lender with the  
27 opportunity to plead affirmative defenses against the extinguishment of the deed of trust under the  
28 statute). SFR never plead the application of NRS 106.240 as a counterclaim. Because SFR never put

1 U.S. Bank on notice of its intent to argue the application of NRS 106.240, SFR has not properly  
2 preserved the claim for trial.

3 **JUDGMENT**

4 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that when Shadow Mountain  
5 Ranch Homeowners Association foreclosed on its lien on January 8, 2014, it foreclosed only on the  
6 sub-priority portion of its lien;

7 **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** the deed of trust, recorded  
8 November 21, 2005, with the Clark County, Nevada Recorder's Office as Instrument No. 20051121-  
9 0005667 remains a valid, secured encumbrance against the property located at 5327 March Butte St.,  
10 Las Vegas, Nevada 89148; APN 163-30-312-007;

11 **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED**, all persons or entities  
12 whom were granted title or an interest in the property through the Association's January 8, 2014  
13 foreclosure sale took such title or interest subject to the deed of trust.

14 **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Notice of Lis  
15 Pendens recorded against the property on August 31, 2015 as Instrument No. 20150831-0001732 is  
16 hereby expunged.

17 **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Notice of Lis  
18 Pendens recorded against the property on March 18, 2016 as Instrument No. 20160318-0000035 is  
19 hereby expunged

20 DATED \_\_\_\_\_, 2020.

21  
22  
23 \_\_\_\_\_  
24 DISTRICT COURT JUDGE  
Case Number: A-14-705563-C  
25  
26  
27  
28



Submitted by:

**AKERMAN LLP**

/s/ Melanie D. Morgan

MELANIE D. MORGAN, ESQ.

Nevada Bar No. 8215

DONNA M. WITTIG, ESQ.

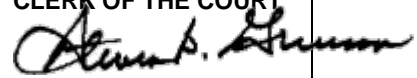
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and U.S. Bank, National Association, as  
Trustee for the Certificateholders of the  
LXS 2006-4N Trust Fund, erroneously  
pled as U.S. Bank, N.A.*

# **TAB 42**



1 RTRAN

2  
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4  
5 DISTRICT COURT  
6 CLARK COUNTY, NEVADA

7 ALESSI AND KOENIG LLC,  
8 Plaintiff,

) CASE#: A-14-705563-C  
)  
) DEPT. XXVI  
)

9 vs.

10 STACY MOORE,  
11 Defendant.  
12

13 BEFORE THE HONORABLE GLORIA STURMAN  
14 DISTRICT COURT JUDGE

15 MONDAY, FEBRUARY 10, 2020

16 **RECORDER'S TRANSCRIPT OF BENCHTRIAL**

17  
18 APPEARANCES:

19 For the Plaintiff:

MELANIE MORGAN, ESQ.  
ARIEL STERN, ESQ.

20  
21 For the Defendant:

KAREN HANKS, ESQ.  
JASON G. MARTINEZ, ESQ.

22  
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25 RECORDED BY: KERRY ESPARZA, COURT RECORDER

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DAVID ALESSI

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<u>FOR THE PLAINTIFF</u>	<u>MARKED</u>	<u>RECEIVED</u>
3, 19		15
33, 34		18
26		40
<u>FOR THE DEFENDANT</u>	<u>MARKED</u>	<u>RECEIVED</u>
None		

1 Las Vegas, Nevada, Monday, February 20, 2010

2

3 [Case called at 10:06:30 a.m.]

4 THE COURT: So first of all, the case, although captioned  
5 Alessi and Koenig vs. Stacy Moore, the parties who remain are U.S. Bank  
6 and SFR Investments. The other parties are all out of the case.

7 THE CLERK: So just those two.

8 THE COURT: Correct. And so this is case 705563. We'll get  
9 appearances for the record.

10 MS. MORGAN: Good morning, Your Honor. Melanie  
11 Morgan and Ariel Stern on behalf of U.S. Bank. We also have Edwin  
12 Hine on behalf of U.S. Bank.

13 THE COURT: Thank you.

14 MS. HANKS: Karen Hanks and Jason Martinez on behalf of  
15 SFR.

16 THE COURT: Thank you. All right. So, counsel, I have the  
17 respective trial briefs of the -- well, it was technically called Defendant's  
18 trial brief, but it is USA's trial brief. And then SFR's trial brief. And then  
19 we also had Ms. Hanks had filed an objection to some amended pretrial  
20 disclosures.

21 So is there anything to discuss before we begin, did you  
22 want to make opening statements, anything to resolve logistically before  
23 we begin, or we just want to start with testimony; how do the parties  
24 prefer to proceed?

25 MS. MORGAN: Your Honor, I'm fine with starting with

1 testimony.

2 THE COURT: Okay.

3 MS. HANKS: Same here.

4 THE COURT: All right. Okay. So then if you wish to begin  
5 then on behalf of U.S. Bank.

6 MS. MORGAN: Yes. My first and only witness that I had  
7 planned on calling in U.S. Bank's case in chief is David Alessi. He has  
8 been subpoenaed and we spoke with his office last Friday and was told  
9 he would be here ready to testify at 10 a.m. I didn't see him in the  
10 hallway.

11 THE COURT: Okay. So David Alessi, do you want to go and  
12 see if anybody's out there. Thank you, Juan.

13 [Pause]

14 THE MARSHAL: There's no one out there, Judge.

15 THE COURT: Okay. So apparently the Marshal indicated  
16 there's nobody waiting in the hall, so.

17 MS. MORGAN: Your Honor, I'd like to go ahead and move to  
18 admit Exhibit 26, which is Alessi and Koenig's collection file based upon  
19 the custodian of records affidavit of David Alessi. That custodian of  
20 records affidavit is included the first page of Exhibit 26. It's Bate  
21 stamped Nationstar00036. And then there are two, three, four, five  
22 pages that appear to have been bate stamped out of order. And so the  
23 second page of Mr. Alessi's COR affidavit is found at Nationstar00042.

24 THE COURT: Thank you. Ms. Hanks?

25 MS. HANKS: I think our concern, Your Honor, which is why

1 the trial is happening is there's a question as to whether some of the  
2 documents in this file, this is actually a true and correct copy of the file;  
3 because when Mr. Alessi was deposed, he was adamant that there was a  
4 certain letter not included in the file.

5           So it's my understanding that's why we wanted Mr. Alessi  
6 here so he could actually confirm this is a true and correct copy,  
7 particularly because of this change in order, it kind of indicates that this  
8 may not be the actual complete file, or something was adjusted.

9           So that's my understanding that's why we're here, is that  
10 was kind of the unclear issue that this Court couldn't decide based on his  
11 deposition testimony because he indicated he did review the file and that  
12 a letter that's in here was not in here, so --

13           THE COURT: I beg your pardon. A letter that is --

14           MS. HANKS: It's the Miles Bauer letter with a check. It's in  
15 this copy, this proposed exhibit, but at the deposition my understanding  
16 is the file was available and at no time did counsel say well, it's right  
17 here. And Mr. Alessi was adamant that he reviewed it with his paralegal,  
18 and it wasn't in there. And so that's my understanding as to why we're  
19 having this entire trial, that Mr. Alessi needed to come and confirm that  
20 what we see, this copy that's kind of out of order, at number 26, is  
21 actually the true and correct copy of the Alessi file now that he's had  
22 time to review it. At least that's my understanding. That's why I object  
23 to it. That's my understanding is the whole reason why we're here, at  
24 least on the issue of the tender.

25           THE COURT: Thank you.

1 MS. MORGAN: At the time of the deposition the file that was  
2 produced with this COR affidavit was not an exhibit to the deposition.  
3 And so it's not as though the whole file was there at the time of the  
4 deposition.

5 The COR affidavit is sufficient to render these documents  
6 admissible. And we really don't even need Mr. Alessi here anyway. I  
7 mean this is the sworn affidavit that this is --

8 THE COURT: Well, for that purpose.

9 MS. MORGAN: Right.

10 THE COURT: For the purpose of acting as custodian of  
11 records for a business record to get the business record into evidence.

12 MS. MORGAN: Correct.

13 THE COURT: The question is, I think as Ms. Hanks has  
14 raised, is that so what?

15 MS. MORGAN: Well, I don't think that a vague reference to  
16 deposition testimony takes away the impact of a valid COR affidavit,  
17 particularly paragraph six that says that the -- these were produced, you  
18 know, Alessi and Koenig is in bankruptcy. And the bankruptcy has put in  
19 certain procedures in place so that these collection files can be obtained.

20 And that process set forth in the bankruptcy court was  
21 followed and in paragraph six it says that they are true and correct  
22 copies and uploads of all of the records in the files that pertain to the  
23 case. And that is sufficient to render these documents admissible. They  
24 are produced pursuant to the bankruptcy procedures set forth and  
25 pursuant to the, you know, state court procedures under COR affidavit.



1                   And so I suppose if Ms. Hanks wants to call Mr. Alessi in her  
2 case in chief and cross-examine him about whether these are true and  
3 correct copies of their collection file, she can do so, but on its face the  
4 affidavit says it is and just a vague reference to a deposition without  
5 anything more doesn't take away from that, particularly when this file  
6 wasn't included as an exhibit to that deposition.

7                   THE COURT: Okay. Thank you. Ms. Hanks?

8                   MS. HANKS: Where I'm -- I guess I'm not understanding,  
9 make sure I'm not vague, because I'm not intending to be vague, you  
10 have a copy of a proposed exhibit here that's out of order with no  
11 explanation. You have a first page of what appears to be David Alessi's  
12 custodian of records affidavit and then there's pages that precede it that  
13 have nothing to do with his affidavit. And then all of a sudden we see  
14 the last page of his affidavit.

15                   The only bate stamp you see on here is Nationstar's bate  
16 stamping. This is the issues that we raised in the motion for  
17 reconsideration.

18                   Now, I can direct the Court to the deposition. I think they  
19 have the original deposition of Mr. Alessi, I don't, where there was at  
20 least the attorney for the bank at that time references Alessi's file, Alessi  
21 and Koenig's file. So I'm not really sure what they have. I'm going off of  
22 what he's saying. And they actually admit certain parts of it. So that's  
23 why it's confusing when Mr. Alessi, in his deposition or sworn  
24 testimony, says in preparation for this deposition, I reviewed the file  
25 related to this property. He confirms some records from that file and the

1 attorney is suggesting that he's talking about that file. Whether it's true  
2 or not, I don't know whether he had the whole file.

3 And then Mr. Alessi's adamant that there is a particular letter  
4 from Miles Bauer that's not contained within that file, which is why  
5 they're trying to admit this whole exhibit, frankly, let's be honest, and  
6 prove delivery. And that's the whole reason why we're having a trial  
7 right now.

8 So my understanding is, we even said this at the motion, we  
9 need to have Mr. Alessi come and testify and clarify whether he needs to  
10 clarify his deposition testimony. Just admitting this record is not going  
11 to do it and that's why I thought we were here.

12 THE COURT: Well, and that was my question, was so  
13 assuming, as you point out, it's not clear. I mean I guess the correlation  
14 error is Nationstar's and not Alessi and Koenig's, because there are, for  
15 some unexplained reason in the middle of an affidavit several pages and  
16 I don't -- so I don't know if the way the exhibit is provided to me here is  
17 consistent with what was provided by Mr. Alessi to Nationstar.

18 MS. HANKS: Right. That's my --

19 THE COURT: I don't know how they got it.

20 MS. HANKS: That's my point.

21 THE COURT: And if this was a problem in their correlation of  
22 and reproduction of his file or if this is really how he produced his file.

23 MS. HANKS: Right, right.

24 THE COURT: It raises a question mark.

25 MS. HANKS: Right.

1 MS. MORGAN: Well, and I think that goes to weight and  
2 credibility, as opposed to admissibility because, really, for this not to be  
3 the Alessi and Koenig collection file for this particular foreclosure would  
4 mean that I suppose that the attorney snuck in a document with a COR  
5 affidavit. You know, that's not what happened.

6 THE COURT: Exactly. But that is your problem, that's your  
7 problem is that you have a document here that is purporting to be a true  
8 and correct copy of a non-party -- well, they're no longer a party. And  
9 the way it is produced, it doesn't make any sense, and I appreciate you  
10 say it just goes to weight and not admissibility, but the problem is,  
11 therefore it's not clear. Was there an error in reproducing it once it was  
12 obtained by your office and your office made this correlation error and  
13 numbering error or was this somehow is this just how it came from  
14 Alessi and Koenig and, you know, they'd have to explain why we have  
15 these documents in the middle of an affidavit. It has nothing to do with  
16 the affidavit.

17 And so it does -- it causes me concerns as to whether this is  
18 in fact a true and correct copy of the file as you obtained it from Alessi  
19 and Koenig or if the error was on your office, fine, that should have been  
20 explained, or is the error at Mr. Alessi's office, then that should have  
21 been explained

22 MS. MORGAN: All right. I would like to take a moment, if I  
23 could, to see where he is.

24 THE COURT: Yeah. And I see no problem with that and, you  
25 know, if he's not available to come in, I mean we've all seen him often

1 enough. I don't know that any of us needs to see him physically present  
2 in the courtroom.

3 MS. HANKS: Oh, no. He can be on the phone, you mean?

4 THE COURT: If he can be on the phone or by a video like, I'm  
5 perfectly happy to accommodate him if it's an issue of getting physically  
6 here.

7 MS. HANKS: I'm just not sure that -- I don't know how we  
8 could get him access to the proposed exhibit we're looking at so he  
9 could actually say yes, this is. But if we could figure that out, then I  
10 agree that's the problem I would only see with the phone issue.

11 THE COURT: Yeah, that is the problem. Explain to him what  
12 it is we're looking at.

13 MS. HANKS: Correct.

14 THE COURT: And whatever it might be that he might have in  
15 front of him.

16 So we'll just go off the record and if you wish to --

17 [Recess taken from 10:18 a.m. to 10:37 a.m.]

18 THE CLERK: We're on, Judge.

19 THE COURT: Ready to go? Okay. All right. So we're going  
20 to go back on the record.

21 Counsel, do we have a report?

22 MS. MORGAN: Yes. I got in touch with David Alessi, and he  
23 said he can be here in an hour. I told him we were about to go back on  
24 the record, and we would speak, and I would let him know.

25 THE COURT: Okay. He's willing to come in in person?

1 MS. MORGAN: Yes.

2 THE COURT: That's preferable, I think, Ms. Hanks, rather  
3 than getting on the phone?

4 MS. HANKS: Yes.

5 THE COURT: Okay. I think it makes more sense for us to  
6 wait for him.

7 MS. MORGAN: Okay.

8 THE COURT: I don't have a problem with that.

9 MS. MORGAN: Okay. So I just didn't know if the Court  
10 would prefer to have him come right after lunch or to come at 11:40.

11 MS. HANKS: We are perfectly fine on time.

12 THE COURT: Okay.

13 MS. HANKS: So there's no worry that we're going to --

14 THE COURT: I mean I did have a committee meeting at  
15 noon, so how long do you think he would take?

16 MS. MORGAN: I don't think he'll take that long, but I could  
17 see it going over 20 minutes, so it might be easier just to have him --

18 THE COURT: Whatever is more convenient for the witness.

19 MS. MORGAN: -- after lunch, like 1:15 or whenever you  
20 planned on --

21 THE COURT: Whatever's more convenient for the witness.

22 MS. HANKS: Let's do that.

23 THE COURT: Do you want to do 1:15?

24 MS. MORGAN: Sure. Sure.

25 THE COURT: Okay. Sure, we'll do 1:15.

1 MR. STERN: And then the other issue, Judge, and we're, I  
2 think, happy to do whatever you want to do with the schedule, we do  
3 have another issue that has nothing to do with Mr. Alessi --

4 THE COURT: Right.

5 MR. STERN: -- that we could either address now or after Mr.  
6 Alessi --

7 THE COURT: Correct. Okay. And so is that the statute of  
8 limitations?

9 MR. STERN: Right.

10 MS. HANKS: Yeah. The 106, yeah.

11 THE COURT: Okay. So unless there's any other testimony  
12 that we want to do now, we could just do argument on that issue.

13 MR. STERN: That's what we were thinking.

14 THE COURT: Okay. Give me a minute.

15 MR. STERN: Use the morning for that.

16 THE COURT: Yeah, okay. So let me -- I've got all the cases  
17 printed and saved here, so let me get my computer back on and I can  
18 print all that up and we'll be ready to go. If that's agreeable, Ms. Hanks,  
19 we'll just do that issue?

20 MS. HANKS: Yeah, I have no problem with that. Just for the  
21 record, I was going to bring it as a 52C motion, so just because we're  
22 kind of doing everything out of order --

23 THE COURT: Out of order.

24 MS. HANKS: -- I didn't want the record not to reflect that  
25 that's how I was intending to bring the issue before the Court.

1 THE COURT: Understood.

2 MR. STERN: I think there's a preliminary step. We have to  
3 resolve some exhibits.

4 THE COURT: Okay.

5 MR. STERN: And so --

6 THE COURT: So other than the Exhibit 26, do we want to  
7 discuss any of the other exhibits?

8 MR. STERN: Yeah, there's two exhibits. There's Exhibit 33,  
9 which is a notice of default that forms the basis of the motion, which we  
10 object to on relevance grounds. And maybe what we should do, Judge,  
11 is have SFR kind of in the quote, unquote, case in chief on the affirmative  
12 defense. We're going a little out of order, but they would offer the  
13 exhibit. We would object and take argument on that if the Court admits  
14 it. Then we could --

15 THE COURT: Do you want to discuss any of the other  
16 exhibits? I mean are there any that you want to make sure you have  
17 admitted to make sure we have a full record? I mean this is a unique  
18 issue. No offense. I'm assuming that whatever we do here, you know,  
19 needs to be -- you've got to preserve your record, so, because it is a legal  
20 issue.

21 MS. HANKS: Yeah. I think we can stipulate to Exhibit 3.

22 MR. STERN: Yes.

23 THE COURT: Exhibit 3 can be admitted and that's the deed  
24 of trust.

25 [Parties confer]

1 MS. HANKS: It's related to the foreclosure deed. That's the  
2 only thing I would stipulate to.

3 MS. MORGAN: The foreclosure deed?

4 MS. HANKS: Yeah, which I don't know --

5 MS. MORGAN: Yes. That is Exhibit 19.

6 MS. HANKS: So I would just -- I think we could stipulate to  
7 Exhibit 19 and Exhibit 3, Your Honor, at this time.

8 THE COURT: 19.

9 MS. HANKS: 19 is the trustee's deed upon sale at SFR after  
10 the association foreclosure sale.

11 THE COURT: All right. So for the record we are admitting  
12 upon stipulation Exhibit 3, the original deed of trust and Exhibit 19, the  
13 trustee's deed upon sale.

14 [Plaintiff's Exhibit 3 and 19 admitted into evidence]

15 MS. HANKS: I don't think it's an original, Your Honor, but  
16 that's not --

17 THE COURT: Well, I don't mean the original of the deed, I  
18 mean the deed of trust that starts the whole thing.

19 MS. HANKS: Yes, yes. I see what you're saying. Yes.

20 THE COURT: The deed of trust in question, I guess.

21 MS. HANKS: Yes. So, yes, so I would ask that Exhibit 33 be  
22 admitted. That's the notice of default, which would be the subject of our  
23 52C motion, and I think counsel has an objection.

24 MR. STERN: Yes, Your Honor. The objection I have is  
25 relevance and the relevance is based on the 106.240 issue not being



1 properly before the Court. It was not pled either as a claim or as an  
2 affirmative defense by us so far at any point. And so it's not an issue. I  
3 think SFR has said that it's a statute of repose. We disagree that it's a  
4 statute of repose.

5 THE COURT: So before we get into arguing the merits of that  
6 statute, with respect to the exhibit itself, the reason you would be  
7 objecting to Exhibit 33 is just relevance that the -- it's not any kind of  
8 foundational issue, it is a recorded document.

9 MR. STERN: No. It's simply relevance. It doesn't speak to  
10 any issue that's actually properly before the Court because 106.240 is not  
11 before the Court. That's the objection.

12 THE COURT: Okay. Got it. Thank you.

13 MS. HANKS: And then, Your Honor, two points on that. We  
14 did plead the statute of repose as an affirmative defense. It's affirmative  
15 defense number eight in our answer to the bank's claim against us so  
16 far. But irrespective of that, the statute of repose is not something that  
17 has to be pled. The case law is clear on that. It's just automatic. It runs  
18 based on certain conduct and what happens with a particular deed of  
19 trust. And that's how all statute of repose operate.

20 And so I think there's a case law that we cite in our trial brief  
21 without getting into the merits of the argument underlying it, but there is  
22 no duty on the part of a party to plead either as a claim or an affirmative  
23 defense, a statute of repose. It's very similar to jurisdiction. It's one of  
24 those things that parties can't waive, they can't do something to change  
25 it. It either exists or it doesn't. And it can be brought up at any time.

1                   And this action, which is on the secondary part of that, the  
2 second point I want to make in terms of relevance, this is a case where  
3 the bank is challenging the effect of the association foreclosure sale and  
4 essentially saying this deed of trust still encumbers the property. And so  
5 irrespective of whether the foreclosure sale had that effect of  
6 extinguishing the deed of trust, it is highly relevant if SFR has an  
7 argument to say hey, there's another thing out there that would make  
8 this deed of trust terminated or extinguished and that it would not be an  
9 ongoing encumbrance against the property. So that's what this entire  
10 action is about. That's why it's relevant.

11                   THE COURT: Okay. Thanks. So it was -- with respect to the  
12 question of if there are -- I mean is it otherwise relevant on other issues?  
13 I believe what I'm hearing Ms. Hanks argue that yes, that's one issue is  
14 106.240, but that there are other issues with respect to --

15                   MR. STERN: I think the only issue is 106.240. The notice of  
16 default only speaks to that. And what Ms. Hanks is saying is that even if  
17 she hadn't pled it and even if it was on the statute of repose, she would  
18 still be allowed to argue it because this is a quiet title case. We, of  
19 course, would disagree with that because you have to, in discovery and  
20 probably in pleadings say what bases you're going to get the remedy on.  
21 Quiet title's the remedy.

22                   I think the foundation of the remedy has to be disclosed  
23 properly and, of course, we disagree that it's the statute of repose at all,  
24 which would be the response to, or I suppose the reply to the point that  
25 you never have to plead a statute of repose. Well, (a) they did plead it in

1 their affirmative defense, but it's not a statute of repose. That's our  
2 position on that.

3 THE COURT: Okay. Thank you.

4 I'm going to admit Exhibit 33 over the objection of U.S. Bank,  
5 and we'll get to the issues of what it does or does not establish  
6 separately. But it's an otherwise admissible document, being a recorded  
7 document, so.

8 MR. STERN: In that case, Judge, we would then ask for the  
9 admission of Exhibit 34.

10 THE COURT: Okay. What I was going to say is, because I  
11 think they can even just ask me to take judicial notice without even  
12 admitting it --

13 MR. STERN: Yes.

14 THE COURT: -- since it's a recorded document. So why not  
15 just admit it and make it part of the record. Okay. So Exhibit 34.

16 MR. STERN: Exhibit 34 is the rescission of Exhibit 33, so  
17 since 33 is in, we'd now ask for 34 to come in.

18 THE COURT: Okay. Thank you very much. Ms. Hanks?

19 MS. HANKS: No objection to Exhibit 34.

20 THE COURT: Okay. So Exhibit 33 is admitted over objection.  
21 Exhibit 34 is admitted without objection.

22 [Exhibit 33 and 34 admitted into evidence]

23 THE COURT: Okay. Great. Thanks.

24 All right. So, Ms. Hanks, with the understanding,  
25 hypothetically speaking, if we would get to that point, you would

1 anticipate making a 52B motion and I don't know if we want to, since  
2 we've got the time now, unless there are any other legal issues we  
3 would need to address, do we want to -- I mean because I don't even  
4 know what we're even going to hear from Mr. Alessi.

5 MS. HANKS: That would be my only concern. If Mr. Alessi  
6 says no, this isn't a true and correct copy, then I'm going to have another  
7 52C motion saying yes. So I don't know how the Court wants to handle  
8 it. I kind of prefer to stay in order --

9 THE COURT: Okay.

10 MS. HANKS: -- but I don't want to waste time, either.

11 THE COURT: Right.

12 MS. HANKS: But I'm also not concerned about the timing. I  
13 don't anticipate that we will not still be able to get wrapped up  
14 completely today. So I prefer to stay in order if that's okay.

15 THE COURT: All right. So what we have was objections to  
16 the amended pretrial disclosures. So with respect to those objections  
17 that you raise, were there other issues that we should be addressing  
18 aside from the trial brief that we can talk about scheduling with respect  
19 to the trial brief?

20 MS. HANKS: No, not based on who they're intending to call,  
21 I don't think there's any -- I objected to the Alessi file, which we've  
22 already talked about today, so no, those objections are still -- I don't think  
23 there's any other objections in there based on what Ms. Morgan said,  
24 she's planning on calling Mr. Alessi and only him.

25 THE COURT: Okay, great. Got it. Okay.

1                   So then with respect to U.S. Bank, and if I understood  
2 correctly, the only witness would be Mr. Alessi, and this is on the  
3 question of delivery.

4                   MS. MORGAN: Potentially. I may need to call another  
5 witness, but I don't think I will need to.

6                   THE COURT: Well, if we are going to wait then until 1:15 for  
7 Mr. Alessi, then I think Ms. Hanks' point may be well taken, that at that  
8 point then we would just wait and hear what he has to say as to whether  
9 we feel we've got -- what he has to say. I don't have the deposition. I  
10 don't know what it was that he -- that would be attempting to impeach  
11 him on or --

12                  MS. MORGAN: That makes sense to me. The issue of  
13 106.240, though, is so separate from the issue of delivery of the tender  
14 that we're okay with arguing that point now while we're here.

15                  THE COURT: Okay. Ms. Hanks?

16                  MS. HANKS: Yeah. My only concern is if -- I guess I'm  
17 looking at it like if I can win on non-delivery, I can be in and out of here  
18 much quicker, so.

19                  THE COURT: Right.

20                  MS. HANKS: I just rather keep it all clean to know --

21                  THE COURT: So rather than create an issue --

22                  MS. HANKS: Right.

23                  THE COURT: -- on appeal --

24                  MS. HANKS: Correct.

25                  THE COURT: -- on the 106.240 issue --

1 MS. HANKS: Correct. Yes.

2 THE COURT: -- if it ends up not being relevant to the  
3 outcome.

4 MS. HANKS: Right.

5 THE COURT: She's got a point on that.

6 MR. STERN: Well, I only have heard her say that 106.240  
7 may not be relevant to the outcome. I would definitely agree with that.

8 MS. HANKS: Well, I didn't say that.

9 MR. STERN: But I may not have heard everything you said.

10 MS. HANKS: I think Judge Sturman was paraphrasing.

11 What I'm saying is if I can win on delivery alone --

12 THE COURT: Right.

13 MS. HANKS: -- then my 52C motion is going to be a one-  
14 liner and then we all go home.

15 THE COURT: Right.

16 MS. HANKS: That's all I'm saying.

17 THE COURT: And so my point being if we are sitting here  
18 talking about 106.240 and we make a ruling on it, then we've created an  
19 issue that may not -- may be totally irrelevant to the outcome of the case.  
20 And should we muddy up our record with that.

21 MS. HANKS: Right.

22 THE COURT: That's how I viewed her --

23 MR. STERN: I think as far as Defense, if they want to do it  
24 that way, we won't get in the way of that.

25 THE COURT: Okay. All right, great. Well, in that case then

1 let's wait for Mr. Alessi. We'll reconvene at 1:15. I apologize to  
2 everybody for the big inconvenience here. If I didn't have this thing  
3 previously scheduled at noon we could have just waited for him and just  
4 worked right straight through, but you know, it's not my meeting,  
5 somebody else called it, so it is scheduled as it's scheduled, so I need to  
6 be there.

7 But, anyway, in the meantime as I said, these are the cases --  
8 I've got to make sure I've got all the ones. These are the ones that I  
9 found that -- *Bank of New York v. MacDonald Ranch*, Judge Gordon,  
10 from 2018. I think I printed three or saved three. That's not the right  
11 ones.

12 Another one that I've got, and again I may not have -- I may  
13 not have felt everything that you guys put in your briefs was relevant.  
14 These are the ones that I saw. *Bank of New York Mellon v. Ruddell*. And  
15 this one was Judge Boulware, March of 2019. And then the other one  
16 was a Nevada Supreme Court, *Pro Max Corporation v. Feenstra*. Those  
17 were the three. If there's anything else that calls the Court's attention,  
18 those were the ones that caught my eyes being particularly on that issue  
19 that I -- all right are there any other ones, are there any newer ones or --

20 MS. HANKS: Not newer ones. We cited the, as you  
21 mentioned Boulware, we cited a November 2019 decision by Judge  
22 Boulware. It's *Bank of America v. Madeira Canyon Homeowners*  
23 *Association*.

24 THE COURT: Okay. M-E-R-I-D-I-A?

25 MS. HANKS: Oh, yes, M-A-D --

1 THE COURT: M-A-D --

2 MS. HANKS: -- E-I-R-A. I can give you the Westlaw citation if  
3 that's easier.

4 THE COURT: Okay.

5 MS. HANKS: I wasn't sure if that's the one that you were  
6 referring to, but it can't be because I don't have [indiscernible] in that  
7 name.

8 THE COURT: If it's available in Westlaw.

9 MS. HANKS: Yeah, it should be. I have a Westlaw citation.

10 THE COURT: Okay.

11 MR. STERN: We have a couple of cases, Your Honor, that we  
12 think are germane.

13 THE COURT: Okay. There's a bankruptcy one. Okay. *Bank*  
14 *of America v. Madeira Canyon Homeowners Association*. It's 596 3936?

15 MS. HANKS: 3935 is what I have. Did I do a typo? Is it case  
16 number 2161053?

17 THE COURT: No. There must be -- there must be additional  
18 ones because this one is again Judge Gordon.

19 MS. HANKS: No, this is definitely Judge Boulware.

20 THE COURT: Okay. Let's see. Maybe we've got more than  
21 one Madeira Canyon case over there at the same time. Okay. So what's  
22 the other one that you've got, then, because the one that came up for me  
23 was --

24 MS. HANKS: Different. 2019 Westlaw 596 3935.

25 THE COURT: Okay.



1 MS. HANKS: *Bank of America v. Madeira Canyon*.

2 THE COURT: Okay. That one didn't pop up for me. All right.  
3 And Mr. Stern, you said you had some others?

4 MR. STERN: Yeah. We had two cases from -- that we cited  
5 in our trial brief on page 8 from the First Circuit, one from the First  
6 Circuit. It's from the District of Massachusetts, both federal cases. It's in  
7 our trial brief starting on line 17, page 8.

8 THE COURT: Okay. I think I found the Judge Boulware one.  
9 Okay. So then page 8. *Gilscott* [phonetic], is that the one?

10 MR. STERN: Yes, Your Honor.

11 THE COURT: *Gilscott* and *Countrywide*?

12 MR. STERN: Yes, Your Honor.

13 THE COURT: Okay. I'll take a look. Okay. All right.

14 MR. STERN: I think those are our cases, Judge.

15 THE COURT: Okay. All right. Thanks so much. We'll be  
16 back at 1:15.

17 [Recess at 10:55 a.m., recommencing at 1:24 p.m.]

18 THE COURT: We're here in case 705563, U. S. Bank vs. SFR.  
19 We'll get appearances of counsel.

20 MS. MORGAN: Melanie Morgan and Ariel Stern, on behalf of  
21 U.S. Bank, and I have with us Edward Hine.

22 THE COURT: Thank you.

23 MS. HANKS: Karen Hanks and Jason Martinez, on behalf of  
24 SFR.

25 THE COURT: Is there anyone in the courtroom who you wish

1 to exclude who are anticipated to be witnesses?

2 MS. MORGAN: No.

3 MS. HANKS: No.

4 THE COURT: Okay. Then we can proceed.

5 MS. MORGAN: US Bank calls David Alessi.

6 THE COURT: Good afternoon, Mr. Alessi. If you'll take the  
7 stand.

8 THE WITNESS: Thank you, Your Honor.

9 THE CLERK: Please remain standing, raise your right hand.

10 DAVID ALESSI, PLAINTIFF'S WITNESS, SWORN

11 THE CLERK: Thank you.

12 THE COURT: You can proceed.

13 THE CLERK: Please state and spell your first and last name  
14 for the record.

15 THE WITNESS: David Alessi, A-L-E-S-S-I.

16 THE CLERK: Thank you.

17 DIRECT EXAMINATION

18 BY MS. MORGAN:

19 Q Good afternoon.

20 A Good afternoon.

21 Q Mr. Alessi, I represent U.S. Bank in this case, and I'll just start  
22 at the beginning. I assume you're familiar with an entity called Alessi  
23 and Koenig?

24 A Yes.

25 Q And what kind of entity is, was Alessi and Koenig?

1           A     Alessi and Koenig was an HOA assessment collection and  
2 general counsel law firm that represented several hundred HOAs in  
3 Nevada and California.

4           Q     Is Alessi and Koenig still in business today?

5           A     No.

6           Q     What is the current status of Alessi and Koenig?

7           A     It filed Chapter 7 in December of 2016.

8           Q     In connection with that bankruptcy, were there procedures  
9 put in place with respect to the disclosure of Alessi's collection files?

10          A     I was, if I'm understanding your question correctly, charged  
11 with the duty to perform PMK responsibilities, 306(b)(6) responsibilities  
12 for Alessi Koenig, as it was winding down.

13          Q     All right. So, I'd like to talk a bit about collection files. Was  
14 Alessi and Koenig acting as the HOA trustee for a number of different  
15 HOAs between 2011 and 2015?

16          A     We were -- we had retainers, legal retainers, as the  
17 assessment collection law firm for many HOAs during that time, yes.

18          Q     And generally, when you hear the term collection file, what  
19 does that mean to you?

20          A     The nonjudicial foreclosure file.

21          Q     And we're talking about nonjudicial HOA foreclosure under  
22 Chapter 116?

23          A     Yes.

24          Q     And just generally, I know no two files are exactly alike, but  
25 generally, what do those types of collection files contain?

1           A     They would contain the account ledger that Alessi Koenig  
2 would receive from the HOA management company, detailing the total  
3 amount of past due assessments, late fees and interest owed the  
4 association. The file could also contain, or would also contain, a pacer, a  
5 printout, confirming whether or not the homeowner is in bankruptcy.  
6 The file would contain a parcel record from the assessor's website,  
7 detailing the legal description of the property.

8           And if the property was in a pre-lien stage, it would have a prelien  
9 notice in the file. And then if it made it to the lien stage, a lien notice  
10 with confirmations of all the mailings, then the NOD, then the NOTS, and  
11 then the trustee's deed upon sale, if it gets that far.

12          Q     Okay. I'd like to refer to the order granting in part and  
13 denying in part, motion for order authorizing procedures for disposition  
14 of excess proceeds, review of debtors books and records and relief from  
15 automatic stay in the bankruptcy action.

16               MS. MORGAN: I believe that's appropriate for judicial notice.

17               THE COURT: Thank you.

18               MS. HANKS: I don't know what she's going to do with it, so  
19 maybe I can just wait to see what she wants to do with it.

20               THE COURT: Okay. Thank you.

21               MS. MORGAN: May I approach the witness?

22               THE COURT: You may, yes.

23 BY MS. MORGAN:

24          Q     Have you seen this order before?

25          A     I believe so, yes.

1           Q     Is this the order that sets forth your obligations with respect  
2 to acting as a custodian of records and 30(b)(6) witness on behalf of  
3 Alessi and Koenig?

4           A     I'm not sure.

5           Q     All right. Let's look at page 2.

6           A     I see in paragraph 14, page 3 of 3, Alessi shall act as  
7 deponent for the debtor pursuant to FRBP 30(b)(6). So, yes.

8           Q     All right. So, I wanted to focus on the language in paragraph  
9 5 there. Well, I'll start with the third order. It says, on page 2, line 6,  
10 ordered that the discovery procedures relating to the files and records  
11 are granted in that, and then subsection one, the files and records  
12 procedures will supersede any prior arrangements between the trustee  
13 and any party and will be deemed to satisfy any existing requirements or  
14 duties of the trustee under applicable law.

15                 Subsection 2, the trustee will not be required to respond to or  
16 comply with any requests related to the files and records. Subsection 3,  
17 the debtors files and records -- and just to be clear, the debtor is Alessi  
18 and Koenig, is that your understanding?

19           A     Yes.

20           Q     Okay. The debtor's files and records are and shall be  
21 maintained and serviced by the debtor's representative, David Alessi,  
22 and Alessi shall certify and ensure that the files and records are properly  
23 maintained and preserved.

24                 So, if we stop there and focus on subsection 3. Have you, in  
25 fact, insured that the files and records of Alessi and Koenig are properly

1 maintained and preserved in accordance with this order?

2 A Yes.

3 Q Explain to us what you've done to accomplish that?

4 A So, Alessi and Koenig, way back in 2006, became a paperless  
5 office. All of our files were contained in a program created by Database  
6 Whiz, Ray Jefferson. He also created the files for several of our  
7 competitors. So, when Alessi and Koenig filed Chapter 7, an entity called  
8 HOA Lawyers Group, owned by Steve Loizzi, took over all those files.  
9 And when I say took over, to the extent -- well, not all of the files, some  
10 of the files, the association did not keep HOALG as their assessment  
11 collection company; they hired a different company. But for the HOAs  
12 that kept HOALG as the collection company and for all of the files that  
13 were part of the bankruptcy that Alessi Koenig had and foreclosures  
14 were done on, HOALG maintained those files in the same way Alessi  
15 Koenig had through an electronic program that was virtually identical to  
16 Alessi Koenig's program. So, the files stayed in the program  
17 electronically.

18 Q All right. So, then if we go to subsection 4, lessee shall bear  
19 all expenses with the maintenance of the files and records. Subsection  
20 5, the lessee shall upload the files and records that are discoverable into  
21 Dropbox so that any interested party may review and download all  
22 relevant documents. Did I read subsection 5 correctly?

23 A Yes.

24 Q Did you, in fact, upload all files and records that are  
25 discoverable into Dropbox?

1           A     When you say you, you're referring to -- I didn't do it  
2 personally.

3           Q     Okay.

4           A     But it was done by HOALG from the -- my understanding is,  
5 yes. I think there was like a \$50 fee that the firm would pay to retrieve  
6 those documents.

7           Q     I guess the better question is, did you -- did you, personally,  
8 ensure that that procedure happened in accordance with the order?  
9 Maybe not with respect to each particular file, but just overall insuring  
10 that the order was complied with?

11          A     Yes. I estimate I've done 500 depositions, so I'm very  
12 familiar with the files and what is in them. My understanding is that, and  
13 it's usually Joanna LaPalma, who was a paralegal with Miles Bauer, and  
14 then Alessi Koenig, and now HOA Lawyers Group, would do a control  
15 copy over all of the documents in the letters and notices tab of the  
16 program. So, the program has various tabs.

17                The tabs -- one tab is all the homeowner information, another tab  
18 may be all fees and costs, another tab may be verification of all the  
19 mailings. And then there's another tab that is the letters and notices tab.  
20 In that tab, is essentially the electronic file. So, she'll just do a copy of all  
21 the documents in there and then upload them as one PDF, copy them  
22 into one PDF, and my understanding is, upload them to the website that  
23 way.

24          Q     All right. And were the uploads completed all at once in  
25 response to this order, or are the uploads completed as requests come

1 in?

2 A As requests come in, I believe.

3 Q Okay. Subsection 6, a lessee shall also place in the Dropbox  
4 file, a certificate of acknowledgement stating that the documents were  
5 provided in accordance with applicable law and discovery rules. Are  
6 true and correct copies of the documents related to the relevant matter  
7 and were uploaded as of the date the Dropbox file was created. The  
8 certification shall further provide that the Dropbox file contains the  
9 records relating to the specific litigation for all pertinent periods and that  
10 the files and records have not been tampered with, destroyed or  
11 otherwise altered by a lessee, or any person or party associated with the  
12 lessee.

13 In the event that a lessee withholds production of a document  
14 based on the claim of attorney client privilege or the attorney work  
15 product doctrine, a lessee shall produce a privilege log to the requesting  
16 party identifying the withheld document with reasonable particularity to  
17 support a motion to compel. The certification shall be sufficient to  
18 establish the authenticity of the origin of the documents under federal  
19 rule of evidence 901 or any equivalent evidentiary rule and no party may  
20 challenge such authentication on the basis that it is not a true and correct  
21 copy of the document as it was originally maintained. All other  
22 evidentiary objections with respect to the documents uploaded by lessee  
23 are hereby reserved.

24 The certification shall be found -- or I'm sorry, the certification shall  
25 be in the form attached hereto as Exhibit 1. And then there's an Exhibit



1 1. Have you executed such certifications in conjunction with the  
2 production of documents obtained through the Dropbox?

3 A I believe so. If we haven't, this would be the first I would  
4 have heard of that.

5 Q All right. I'm going to turn your attention now to volume 1 of  
6 the exhibits. And specifically, the tab 26. It's going to be towards -- it's  
7 going to be the last tab in volume 1.

8 A Okay.

9 Q It should have Bates stamp at the bottom Nationstar00036.

10 A Yes.

11 Q All right. And then I'm going to turn your attention to  
12 Nationstar00042.

13 A Yes.

14 Q All right. Is that your signature on Nationstar00042?

15 A Yes.

16 Q And can you tell us what Nationstar -- the first page 00036,  
17 what that is? Have you seen it before?

18 A Looks to be the beginning of a declaration on my behalf. The  
19 next page is the online status report. It's number 38 and 39.

20 Q Do you know what 41 is?

21 A 41 is -- this tells me that this was an old file. This was -- this  
22 would have been a page that would have been two-hole punched on the  
23 left side of an actual file. So, this is from, looks like February of 2008.  
24 So, it may have been 2008 when we started going paperless. Because  
25 this would have been an actual piece of paper, in an actual file, on the

1 left side of the file that would be two-hole punched. And the calculations  
2 in the column are -- they're labeled there, the fees and the assessments  
3 and all the charges to the file.

4 Q All right. And then what is page 42, Nationstar00042?

5 A 42 is the last -- it should have been -- if it was in the correct  
6 order, it should have been the page that followed 36. It's the second  
7 page of my declaration.

8 Q All right. So, am I correct to understand that pages  
9 Nationstar37 through 41, are not intentionally placed between Nationstar  
10 36 and 42?

11 A Correct.

12 Q So, taking Nationstar 36 and 42 together, is that your  
13 custodian of records affidavit?

14 A Yes.

15 Q And when you execute a custodian of records affidavit, are  
16 you affirming that the documents in the Dropbox are being produced in  
17 accordance with applicable law and discovery rules and are true and  
18 correct copies and uploads of all records in your file that pertain to the  
19 matter?

20 A Yes.

21 Q What's the date of that COR affidavit?

22 A September 2017.

23 Q And as you flip through Exhibit 26, we are not going to go  
24 page by page, but does this look to be a fairly typical Alessi and Koenig  
25 collection file?

1 A Yes.

2 Q If you would please turn to Nationstar000174.

3 A 00174 or 000?

4 Q Sorry. Nationstar00174?

5 A Okay. I'm there.

6 Q All right. If you'd look at 174, 175 and 176 together, have you  
7 seen these documents before?

8 A I don't have a specific recollection of having seen this  
9 particular document, but I have seen letters like this, and probably have  
10 seen this particular one in the past.

11 Q All right. Have you seen letters like this within Alessi and  
12 Koenig's collection files before?

13 A Yes.

14 Q So, does it surprise you to find this in Alessi and Koenig's  
15 collection file?

16 MS. HANKS: Objection. Form.

17 THE COURT: Overruled.

18 BY MS. MORGAN:

19 Q And focusing on Nationstar00176.

20 A Yes.

21 Q What is that document?

22 A 176 is a copy of a check that our office would have received  
23 from Miles Bower, as well as the memo of the check.

24 MS. MORGAN: Your Honor, I'd like to move Exhibit 26.

25 THE COURT: Thank you. 26?

1 MS. HANKS: Your Honor, I would object. But if you would  
2 offer me a little bit of voir dire, I might be able to add to my objection.

3 THE COURT: Certainly.

4 MS. HANKS: Thank you.

5 VOIR DIRE

6 BY MS. HANKS:

7 Q Mr. Alessi, if you could turn, staying within proposed Exhibit  
8 26, if you could turn to page Bate stamp 36 and Bate stamp 42.

9 A Yes.

10 Q And if you need to, I want you to take the time to look at the  
11 two pages. But nowhere do I see anywhere in this affidavit where it  
12 references any specific collection file either by name or number, is that  
13 correct?

14 A Yes.

15 Q Okay. And prior to -- so, am I correct to understand then, in  
16 order to know what affidavit this went to, in other words what collection  
17 file this would go towards, you would have to look at Dropbox?

18 A My assumption would be that this affidavit is for this file  
19 since it's in this file.

20 Q Okay. And I understand that you're making that assumption.  
21 What I'm asking is, in order for you to know what certificate this went to,  
22 what file it related to, would you have to review the Dropbox file to  
23 confirm that or the original Alessi file?

24 A That would help me confirm it, yes.

25 Q Okay. And prior to coming here today for trial, did you look

1 up -- did you look at the Dropbox for Alessi and Koenig and their file  
2 related to a property with an address of 5327 Marsh Butte Street?

3 A I did not look at the Dropbox, no.

4 Q Okay. Did you look at the original Alessi and Koenig file on  
5 the systems of records within the HOA Lawyers Group for the property  
6 5327 Marsh Butte Street?

7 A No. What I did is the same thing I do for all of my  
8 depositions and trial testimony, is I called Joanna LaPalma. And on my  
9 way to the hearing today, her and I went over the file orally to refresh my  
10 recollection of the file. That would usually start with going through of  
11 the status report that you see on 37, 38, 39 and 40. And then I'll ask her a  
12 series of questions that I think might be relevant for today's hearings,  
13 and she'll give me answers.

14 Q Okay.

15 A We'll go through the file that way.

16 Q So, am I correct to understand that as you sit here today, you  
17 would not be able to tell me if all the pages that we have here from 36, to  
18 I think it's bates stamped all the way to 333, is an accurate reflection of  
19 the Alessi and Koenig file related to the Marsh Butte property?

20 A I have no reason to believe that is an inaccurate reflection. It  
21 would be -- yeah. So, to the best of my knowledge, this is an accurate  
22 reflection of our entire file.

23 Q But what are you basing that on; you're basing that on the  
24 assumption that as it appears here, you would think no one would have  
25 tampered with it?

1           A     Well, like I said, I think I've done close to 4 or 500  
2 depositions. I've never had the issue of an improper file having been put  
3 in front of me, to where it was shown that I had a file that was not, in  
4 fact, the file for the subject deposition or trial testimony.

5           Q     Okay. But at least as -- but I am correct to understand though  
6 you have not gone through every page of what we have in Exhibit 26 to  
7 make sure that every page that is in this stack of paperwork is really a  
8 part of the Alessi and Koenig file, correct?

9           A     That is correct.

10          Q     Okay.

11                MS. HANKS: Your Honor, I would just object to the  
12 admission. I think the whole point of this trial is to make sure that Mr.  
13 Koenig [sic] could confirm that because his deposition indicated that the  
14 letter that Ms. Morgan talked about in this stack was not there. That was  
15 Mr. Koenig's [sic] recollection of --

16                THE COURT: Alessi, Mr. Alessi.

17                MS. HANKS: Sorry, I apologize. I did not mean to call you  
18 Mr. Koenig. That's like really bad.

19                So, yes. Mr. Alessi's recollection was that that particular  
20 letter was not in the file.

21                THE COURT: Specifically pages 174 through 176.

22                MS. HANKS: Correct. Correct.

23                THE COURT: Okay.

24                MS. HANKS: So, my understanding is, the lack of that  
25 element being fixed, in other words, him actually going and reviewing

1 the Dropbox file and making sure this is correct, particularly with that  
2 interruption between the affidavit and the fact that the affidavit has no --  
3 nothing in there tying it to this file. So, that's another problem. We  
4 don't know if it's just a separate affidavit. That's why I would object to  
5 the admission at this time.

6 THE COURT: Okay. Well, I just have a few questions. And  
7 so, I think, before I allow the admission, I think some of those questions  
8 do need to be answered. I'm not saying yes or no. I'm just saying --

9 MS. MORGAN: Oh, I'm sorry.

10 THE COURT: I'm not saying yes or no. I'm just saying that I  
11 do think that we do need a little bit more information.

12 MS. MORGAN: Sure.

13 THE COURT: Because for all I know, this is how they did  
14 them with this timeline in the middle of the affidavit. So, that helps me  
15 know what they were doing. Maybe it's normal. Maybe it's not normal.  
16 I don't know.

17 MS. MORGAN: I'll ask.

18 DIRECT EXAMINATION CONTINUED

19 BY MS. MORGAN:

20 Q Mr. Alessi, I'd like to talk a bit about Alessi and Koenig's  
21 normal business practices in responding to document requests and  
22 particularly following the bankruptcy court's order. Was it Alessi and  
23 Koenig's general business practice to execute a custodian of records  
24 certificate when producing a file?

25 A Yes. And the answer is yes.

1 Q All right. And we talked a bit earlier about those four or five  
2 pages in between the first page of the affidavit and the signature page.

3 A That is an anomaly. I don't believe I've seen that before.  
4 Usually, the custodian of records declaration is the first page followed by  
5 the second.

6 Q All right. And --

7 A What I can say is that the online status report that you see  
8 here, would have -- my understanding is obtained online. So, it's not  
9 actually part of our file and that may be one of the reasons why it was  
10 inserted in this location. It wouldn't be part of that copy and paste  
11 procedure that I explained earlier.

12 Q Uh-huh.

13 A Because this document would have been retrieved with the  
14 username and password directly from the website. And that may be a  
15 reason why it is in between the two pages.

16 Q All right.

17 A I don't attribute, for whatever it's worth, any significance to  
18 that though.

19 Q And that's going to be my question. Does that in any way  
20 lead you to believe that the documents contained with your COR affidavit  
21 are anything other than true and correct copies of the file that we're here  
22 talking about today?

23 A Correct. I did hear counsel say that in my deposition, I made  
24 apparently the statement that the letter on 176 was not part of our  
25 original -- I'm sorry, 174 to 176, with the attached check, was not part of



1 our original production. Generally, and there are times where within our  
2 files we did not, as you probably know, keep a copy of the check.

3 Generally, we either had a copy of the letter and the check in the file, and  
4 a note confirming that we had received a copy of the letter and the check  
5 in the status report. One or the other or both of those would take place.

6 Q Uh-huh.

7 A And sometimes neither. Sometimes we neither made a copy  
8 of the check nor noted it in the status report. On this particular file  
9 though, I did ask Jonna if we received a check on this file on my way to  
10 the hearing, and she said we did, we had a copy. So, my understanding  
11 as I sit here, is that this check that is shown on 176 is from our file and  
12 contained within our file.

13 Q All right. And you have no reason to believe that the file has  
14 been tampered with?

15 A No.

16 MS. MORGAN: Your Honor, at this point, again, I'd like to  
17 admit Exhibit 26.

18 THE COURT: I appreciate it. Thank you very much.

19 MS. HANKS: Your Honor, I don't have anything further.

20 THE COURT: Then I'll admit Exhibit 26.

21 THE CLERK: The entire exhibit?

22 THE COURT: The entire exhibit. The entire exhibit?

23 MS. MORGAN: Yes.

24 THE COURT: Yes. Okay. So, the entire exhibit is admitted.

25 [Plaintiff's Exhibit 26 admitted into evidence]

1 MS. MORGAN: I don't have any further questions.

2 THE COURT: All right. Thank you so much. And so, then  
3 Ms. Hanks.

4 MS. HANKS: I don't have any questions, Your Honor.

5 THE COURT: Okay. Thanks. So, is it in the note?

6 MS. HANKS: It's not in the note.

7 MS. MORGAN: It's not in the note.

8 THE COURT: All right. Thanks for coming down. I  
9 appreciate your time.

10 THE WITNESS: Thank you, Your Honor. I appreciate it.  
11 Sorry for being late.

12 THE COURT: No problem. Good to see you again. Thank  
13 you.

14 MS. MORGAN: At this point, U.S. Bank rests.

15 PLAINTIFF RESTS

16 THE COURT: Okay.

17 MS. HANKS: And Your Honor, at this point, we bring up a  
18 52(c) based on the 106.240.

19 THE COURT: Okay. At this point in time then we will  
20 address the legal issue raised in the respective party's trial briefs. So,  
21 Ms. Hanks has brought that as a motion, so she'll address it first.

22 MS. HANKS: Your Honor, I want to direct your attention to  
23 Exhibit 3, which is the deed of trust. And specifically, I want to direct  
24 your attention to paragraph 22. And I'm going to use the Elmo.

25 THE COURT: Thank you. Kerry, we need the Elmo.

1 THE COURT RECORDER: Yes, it is on.

2 THE COURT: All right. Thank you.

3 MS. HANKS: So, I want to direct your attention to Exhibit 22.

4 [Pause]

5 THE COURT: We can discuss it because I've got it here in  
6 front of me with my own blowup.

7 MS. HANKS: Okay. So, if you go to paragraph 22, this is the  
8 deed of trust, and it talks about titled acceleration remedies. And it  
9 indicates that the lender shall give notice to borrower prior to  
10 acceleration following borrower's breach of any covenant or agreement  
11 in the securing instrument. And then it goes through and explains what  
12 the notice shall specify.

13 It has to specify the default, the action required to cure the  
14 default, a date not less than 30 days from the date the notice is given to  
15 the borrower by which the default must be cured and that failure to cure  
16 the default, on or before the date specified in the notice, may result in  
17 acceleration of the sum secured by the security instrument and sale of  
18 the property.

19 Now, what we have here is the next document that I want to  
20 draw your attention to. So, the deed of trust clearly talks about the  
21 lender's ability upon a default to basically accelerate and otherwise make  
22 the loan wholly due based on that default. And that actually happened in  
23 this case. If we go to Exhibit 33, Exhibit 33, at the notice of default. And I  
24 want to highlight certain provisions, and I want to do this on the Elmo so  
25 if we need it, but otherwise, I can walk you through it. You have here a

1 notice of default where it talks about the original sum of the note of  
2 508,000, 250,000, do you see that?

3 THE COURT: Yes.

4 MS. HANKS: Okay. And then, they talk about that there was  
5 an installment, principal and interest and impounds which became due  
6 on September 1st, 2007. So, that's the date of default. They're talking  
7 about you had an installment payment due September 1st, 2007 and  
8 borrower, you didn't make it. So, now you're in default of that and  
9 therefore, by reason of that default, this is the third paragraph, the  
10 present beneficiary under such deed of trust has executed and delivered  
11 to Recon Trust Company, a written declaration of default and demand for  
12 sale and has deposited with Recon Trust Company such deed of trust  
13 and all documents editing obligations secured thereby.

14 And here's where they get to -- and it says and has declared  
15 and does hereby declare all sums secured thereby immediately due and  
16 payable. And I want to stop there because that's the first thing this  
17 notice of default does. That sentence that we're worried about, and what  
18 I'm arguing here today is and has declared and does hereby declare all  
19 sums secured thereby immediately due and payable.

20 That language right there makes the loan wholly due. While  
21 normally the loan wouldn't have matured until 2035, the lender, what we  
22 just saw on the deed of trust, at its option, which it allowed it to do under  
23 paragraph 22 of the deed of trust, now said because you defaulted in  
24 failing to pay that installment on September 1st, 2007, we're now making  
25 the entire loan, the full loan, the whole loan, whatever word you want to

1 use, entirely due and payable now.

2 That's the first thing this notice of default does. Now, the  
3 next sentence says and, that's why it's two clauses, and has elected and  
4 does hereby elect, to cause the trust property to be sold to satisfy the  
5 obligation secured thereby.

6 So, this notice of default does two things. It first says you're  
7 in default, and we're making the loan wholly due. The lender is saying  
8 now it's wholly due. You don't get to keep it as an installment contract  
9 and pay it monthly up until the maturity date, now the whole thing is  
10 due. And two, we're proceeding with our election to sell under the deed  
11 of trust.

12 So, you can look at it as this first clause is talking about we're  
13 making the note wholly due, and the second clause is, we're exercising  
14 our power of sale under the deed of trust. Those are the two things this  
15 document does.

16 Now, we have the statute of repose at NRS 106.240 under the  
17 *Promax* decision, clearly applies to deeds of trust. The very statute talks  
18 about deeds of trust. And it says that once a loan is secured by a deed of  
19 trust becomes fully due, you have 10 years, 10 years from the date a loan  
20 becomes fully due, that a deed of trust secures, if it is not foreclosed  
21 upon, it will be conclusively presumed that the debt was satisfied and  
22 that it essentially terminates or extinguishes the deed of trust that  
23 secured that loan. That's how 106.240 operates.

24 So, when you take the language of 106.240, and you  
25 compare it to what the bank did with respect to the notice of default, that

1 they recorded on January 22nd, 2008, we can look at it and say, at the  
2 latest, because frankly, if you look at the deed of trust, they talk about  
3 giving prior written notification to the borrower before they accelerate,  
4 so there is presumably some type of communication to the borrower  
5 that predates this notice of default. We don't have that in this case, but  
6 we don't need it for this argument.

7           We know, at the latest though, at the latest, the January  
8 22nd, 2008 notice of default makes the loan wholly due. And the reason  
9 why we also know there's probably prior communication is the language  
10 when they say has and does hereby declare. So, they're obviously  
11 referring to something prior to this notice of default. But for purposes of  
12 SFR's argument today, we can just look at the notice of default and use  
13 this as the instrument that makes the loan wholly due.

14           And so, when the bank made the loan at their option wholly  
15 due on January 22nd, 2008, it triggered the running of NRS 106.240. The  
16 10-year clock started running. And so, the bank had two choices once it  
17 started triggering that clock. It needed to foreclose within 10 years, or it  
18 needed to make the loan no longer wholly due. Another term of art you  
19 could use is decelerate it, reinstate it as an installment contract. There is  
20 no evidence that the bank did that in this case. It's undisputed the bank  
21 didn't foreclose and there's no evidence that they reinstated the loan as  
22 an installment loan. It remained wholly due during this time period.

23           So, if we take that and run the clock from January 22nd,  
24 2008, the 10-year clock under 106.240 ran on January 22nd, 2018. So,  
25 irrespective of the association foreclosure sale and irrespective of the

1 bank's tender in this case, the deed of trust is otherwise terminated  
2 because by operation of 106.240. In other words, the sale that occurred  
3 here in January of 2014, even if their tender preserved the deed of trust  
4 from extinguishment and avoided extinguishment, there is a secondary  
5 layer here of 106 that still would say, on January 22nd, 2018, four years  
6 later, that's when your deed of trust terminated. So, it can no longer  
7 encumber the property.

8 Now, I'm going to preempt the argument that I know the  
9 bank is going to argue, which would be the rescission that they recorded  
10 on March 20th, 2008, which is Exhibit 34. And we've got to be really  
11 careful -- oh, I don't have the Elmo, sorry. I'm so used to the Elmo.

12 So, if you look at the rescission of the election to declare  
13 default, I want to focus on the language, and I'm going to have you, if  
14 you could, Your Honor, look at 33 and 34 side by side as I do this. The  
15 most important part I want to highlight in the first paragraph of this  
16 rescission is, it says this rescission shall not, that's the words the bank  
17 chose to use in its own document, shall not be construed as waiving,  
18 curing, extending to or affecting any default, either past, present or  
19 future, under such deed of trust or as impairing any right or remedy  
20 there under.

21 So, I want to stop there because that's the first thing it does.  
22 Now, we have two other clauses which I'm going to mirror with the  
23 notice of default. That's the first thing that this rescission doesn't do. It's  
24 telling everyone we are not waiving, curing or affecting the making the  
25 loan wholly due, what we did in that notice of default. We're not

1 affecting our remedy that we elected to pursue under paragraph 24 of  
2 the -- excuse me, 22 of the deed of trust. So, we're not affecting that first  
3 clause in the notice of default, the part that makes the loan wholly due.  
4 In fact, we're saying you shall not construe it that way.

5           Then you have the second sentence of the rescission. This is  
6 the part of what the rescission is only doing, it's the only part of the  
7 notice of default it's rescinding. And it says and it is and shall be  
8 deemed to be only an election without prejudice not to cause a sale to be  
9 made pursuant to such notice of default and election to sell, and it shall  
10 not in any way alter or change any of the rights, remedies or privileges  
11 secured to beneficiary and or trustee under said deed of trust nor modify  
12 nor alter in any respect any of the terms, covenants, conditions and  
13 obligations therein contained.

14           So, that's the second clause. We have another second clause  
15 in the rescission, and it says, it shall only be deemed an election not to  
16 proceed with sale. So, once again, we have a two part. It's saying we're  
17 not rescinding or making the loan wholly due, what would tie to the  
18 note, we're only rescinding our election to proceed to sale which would  
19 be our right to execute under the deed of trust.

20           And what's interesting is, you can even match the two  
21 clauses together from the notice of default. The notice of default, the  
22 second clause says, has elected and does hereby elect to cause the trust  
23 property to be sold and here they're saying we're rescinding that  
24 election.

25           So, all the rescission does is rescind the second clause in the



1 notice of default, the election to sell. There is no other documents that  
2 are going to be presented before you in this case. Their case in chief is  
3 closed, and even if they did rebuttal, there is no document that's been  
4 produced in this case that would show that they actually rescinded,  
5 cancelled or whatever word you want to use, the first clause in the notice  
6 of default, the part where they made the loan wholly due. There is no  
7 evidence that this loan was ever reinstated as an installment loan, and  
8 now it would be too late. Because once the statute of repose runs, the  
9 106.240, on January 22nd, 2018, the deed of trust is terminated.

10 So, we would ask Your Honor that irrespective of the  
11 association foreclosure sale that you ruled that the deed of trust at  
12 Exhibit 3 was terminated by operation of 106.240 and therefore does not  
13 encumber the property.

14 THE COURT: Thank you.

15 MR. STERN: So, is the Elmo still kaput?

16 THE COURT: Yes.

17 THE CLERK: We can attempt to try it again. I'm following  
18 what they told me, but it still doesn't seem to -- they said if we take a  
19 break, the technician can take a look, Judge. But I can try to -- I've done  
20 everything that they've said.

21 THE COURT: Okay. Give us just a minute.

22 [Pause]

23 MR. STERN: Your Honor, so as the Court already knows,  
24 we're going to make some argument as to whether this is a statute of  
25 repose and whether SFR properly even has presented the issue before

1 the Court.

2 But before going there, I'd like to start where Ms. Hanks kind  
3 of ended it and that is with the Exhibits 33 and 34. Paying attention to  
4 the one thing in Exhibit 33 that Ms. Hanks did not address at all, and she  
5 didn't address it apparently in the hope that nobody would notice. But  
6 we did notice, and we believe the Court should notice.

7 And that is in the second paragraph with the all caps that  
8 starts failure to pay. And there is a sentence at the end of that paragraph  
9 that kills SFR's entire argument at the start. It says, in addition -- so, Ms.  
10 Hanks read to you that there had been a default, that it consisted of this  
11 amount, that it happened on such date and then there's a new sentence  
12 that reads, in addition, the entire principal amount will become due on  
13 12/1/2035. That is a statement of future intent. That is absolutely  
14 inconsistent with the thought that this is an accelerating document. That  
15 statement would make absolutely no sense.

16 And so, if we keep reading that sentence it writes, as a result  
17 of the maturity of the obligation on that date. Another indication that  
18 this loan would not be quote wholly due until that date, that date being  
19 12/1/2035, still 15 years in the future from today's date.

20 So, what do we do with that, Judge. Obviously, there is  
21 additional language, the language that SFR liked, and I'd like to go over  
22 that again. What SFR focused on was the next sentence, excuse me, the  
23 next paragraph, which has the two sentences or the two clauses that SFR  
24 mentions. One of which is the declaration that there's going to be a sale  
25 and the second does hereby declare all sums due are thereby

1 immediately due and payable. All right.

2           So, how do we reconcile that with what we just read in all  
3 caps. Which is that this loan is not actually going to be maturing until  
4 2035. The solution to that is easy, Your Honor. All sums due and  
5 payable can refer to all present sums due and payable. It doesn't have to  
6 mean all accelerated sums. Doesn't mean all sums that will become due  
7 and payable in the future. All it simply says is all sums due and payable.

8           And so, reading the two clauses together, does hereby  
9 declare all sums secured thereby immediately due and payable, in  
10 conjunction with the previous paragraph where it says, in addition, the  
11 entire principal amount will become due on 12/1/2035.

12           There's really only one -- and maybe before we get there,  
13 let's apply our standard construction, you know, rules of construction of  
14 documents. That is that we interpret documents as a whole, giving  
15 meaning to every part and also when some specific language conflicts  
16 with something that's more general, if there is a conflict at all, you favor  
17 the more specific statement. And so, here what SFR wants you to  
18 conclude is, hey, everything was due and payable immediately on  
19 1/22/2008 and the reason we think that is because of this general  
20 language in the third paragraph that we like, all sums due -- hereby  
21 declare all sums due immediately due and payable.

22           However, there's a contradictory but more specific and  
23 written in all caps, statement just before that, the one statement or the  
24 one sentence of that paragraph that SFR did not read to you, which says  
25 exactly the opposite, all sums are not due and payable today, they will

1 be due and payable on 12/1/2035.

2 In order to effectuate an acceleration, you have to be  
3 unequivocal. It has to be an unequivocal assertion of the right to  
4 acceleration. The deed of trust uses the word as acceleration, Ms. Hanks  
5 read that from paragraph 3. I don't think we have to go back there.  
6 Excuse me, Exhibit 3, paragraph 22, talks about the right to accelerate  
7 and how if there's going to be an acceleration, there has to be a pre-  
8 acceleration letter or other communication giving essentially a warning  
9 that that's going to happen.

10 The deed of trust uses the word acceleration. And, in fact,  
11 paragraph 22 in its heading, uses the term acceleration. Nowhere in this  
12 deed of -- in this notice of default and election to sell, did you see the  
13 word acceleration. The bank knows how to trigger acceleration when it  
14 wants to, it uses that very word. It uses that word not only in the deed of  
15 trust but in the letter that it typically sends. We understand that there's  
16 been no letter introduced here but if such letter were consistent with the  
17 terms of the deed of trust, you would see that the letter would be entitled  
18 notice of intent to accelerate. Again, the use of the word acceleration.

19 Again, in Exhibit 33, that's not there. So, what SFR needs to  
20 do is take what they think this notice can accomplish and fit it into what  
21 they perceive 106.240 to say. And just as an initial matter, Your Honor,  
22 this language is not sufficient to trigger an acceleration. At worst for the  
23 bank -- at worst, this is an ambiguous document. And if it's an  
24 ambiguous document, it's not enough because the invocation of  
25 acceleration has to be definite. It cannot be ambiguous.

1                   So, I'd like to step back a little bit and circle back to Exhibits  
2 33 and 34 and a few things after that. Because this is a textbook  
3 example of a trial by ambush. The reason we say that, Your Honor, is  
4 there's a lot that goes into whether a loan is accelerated or not. And in  
5 order to be able to defend against a defense like that, a rebutted defense  
6 of 106.240, the fair and proper thing for SFR to do would have been to  
7 actually give us notice that that's something that they were going to  
8 argue. That's basic notice pleading. That did not happen here. This  
9 statute was not -- or this argument on this statute was not preserved in  
10 any way, affirmative defense number eight notwithstanding.

11                   Now, affirmative defense number eight is a simple, kind of  
12 boilerplate statement that all statutes of repose and limitation, et cetera,  
13 bar the bank's cause of action. The problem with that is 106.240 is not a  
14 statute of repose nor is it a statute of limitations. In previous cases, I've  
15 thought of it as kind of a hybrid of a rule against perpetuities, but I think  
16 in doing a little additional research, the perfect definition for this, and we  
17 borrow it from the two cases from Massachusetts, the one from the first  
18 circuit and the one from the district court of Massachusetts, both federal,  
19 it's an ancient mortgage statute. And its purpose is to clean from the  
20 books mortgages, mortgage loans that are unequivocally and  
21 unquestionably expired.

22                   And that's not the case here, Your Honor, and SFR knows  
23 that, which is why they've described it as a statute of repose. So, I think,  
24 we need to spend a few minutes talking about one of those assumptions.  
25 That's the part that I've explained to you why it's a statute of repose.

1 They just described it as a statute of repose, and they hope that you'll  
2 agree with that. But we're going to push back on that and challenge that  
3 it's a statute of repose.

4 We do that for two reasons. One, because it's not preserved,  
5 it's not part of the affirmative defense, and so the Court should give it no  
6 consideration. But even if the Court goes into the merits of it and  
7 considers the argument on its own terms, even though SFR did not  
8 properly preserve it, here's why it's not a statute of repose.

9 A statute of repose is really not that different from a statute  
10 of limitations. Both statutes measure whether a lawsuit, a cause of  
11 action, is timely. The only difference between the two is that a statute of  
12 limitations begins to run at an accrual point and that accrual point is  
13 when an injury is sustained. Whereas a statute of repose begins with  
14 respect to a milestone defined by the statute itself. And whereas the  
15 statute of limitations does not start until somebody's been injured, a  
16 statute of repose can end before the injury even happens. And this is  
17 why you often see them in the context of construction litigation,  
18 construction defect.

19 Imagine that you have a home, the statute of repose is 10  
20 years, you figure out on year 11 that there's a defect. Under the statute  
21 of limitations analysis, a claim on year 11 is timely. Under statute of  
22 repose it's untimely. That's the only difference between -- and I  
23 understand that you cannot assert equitable defenses to statutes of  
24 repose. That you don't have a discovery rule and all those things. But  
25 look at what section 106.240 does. It does not make a cause of action, a

1 litigation, a lawsuit timely or untimely. If it did, you would find it in  
2 Chapter 11, which is where all of our statutes of limitations and repose,  
3 with the exception of a few here and there, I suppose, that's where you  
4 find them. We find this in the substantive rules of Chapter 106.

5           And what it says is, that the lien of a mortgage, that under  
6 the terms of the mortgage has gone further than 10 years from the  
7 maturity date on the terms of the mortgage or any extension, is deemed  
8 conclusively paid off and the lien is wiped. No mention of litigation.  
9 None. It cannot be a statute of repose for that reason. Could be  
10 something else. We call it an ancient mortgage statute, but it doesn't  
11 accomplish what SFR wants, which is for a hammer to fall on 10 years. It  
12 just doesn't do that.

13           Again, the statute of repose makes litigation timely or in this  
14 case, the cause of action, this case commenced in 2014. I'm not exactly  
15 sure of the specific date, but looking just from the case number, Judge,  
16 it's 2014. And so, let's take the argument SFR offers to its logical  
17 conclusion to show the absurdity of it.

18           They're basically saying that 106.240, as Ms. Hanks just  
19 stated, triggered in January of 2018. But the lawsuit commenced in 2014  
20 at some point. So, some three and a half to four years before the statute,  
21 according to their 52(c) motion was triggered, or actually was expired,  
22 the lawsuit commenced. And so, in what universe does the statute of  
23 limitations or statute of repose expire and preclude a claim that's already  
24 been filed and subject to litigation. It doesn't work that way.

25           So, as a just a concept of procedure of how do we describe

1 the statute, it is not a statute of repose. And that fact opens everything  
2 up. Because it means that we can challenge it by equity, it means we  
3 can challenge it by other criteria, including rebuttal evidence to show  
4 that there has been no acceleration. But just at a foundational level, we  
5 need to get away from this unanalyzed assumption that SFR offered,  
6 which is to call this a statute of repose.

7           There is one federal case, I forget the name of it, but it's the  
8 2019 case from Judge Boulware, in which Judge Boulware agrees with  
9 SFR's argument and describes 106.240 as a statute of repose.

10           THE COURT: Yes.

11           MR. STERN: I would imagine Ms. Hanks will discuss that in  
12 her reply, I would, if I were in her shoes. So, I'll address it now. Judge  
13 Boulware, and I say this with no disrespect to him because I respect him  
14 tremendously, but he just flat out got that wrong. And all you have to do  
15 is look at the citation. So, he describes it as a statute of repose and then  
16 cites to a supreme court and a federal United States Supreme Court case  
17 in support.

18           But if you look at that Supreme Court case, it describes what  
19 a statute of repose is, and it describes it as a statute that requires the  
20 filing of litigation by a certain point. It's measured differently than the  
21 statute of limitations, but it is satisfied if you file the litigation, the  
22 litigation commences timely within that timeframe. So, Judge  
23 Boulware's order, while if I were in SFR's shoes, I would also be showing  
24 it you to, it's just wrong. It's not a statute of repose.

25           So, one more point on that. And this is, I think, subtle but



1 important. If you look at 106.240, read it in its entirety, here's what it  
2 says. Rather than reading in its entirety, reading the pertinent parts for  
3 this point. It tells us that the loan appearing as of record, the language it  
4 uses is at the expiration of 10 years after the debt secured by the deed of  
5 trust, according to the terms thereof, thereof being the deed of trust, of  
6 course, or any recorded extensions.

7           So, the statute itself allows the bank or it doesn't have to be a  
8 bank, any holder of a deed of trust, to extend by recording something.  
9 We will get into the rescission in a minute, but at a conceptual level, how  
10 can you give the owner of the right, the ability in the statute to extend  
11 indefinitely and still call it a statute of repose. It is another logical  
12 inconsistency between what the statute says and what SFR wants it to  
13 say. Just take this case as an example, if we were, let's say on -- so the  
14 notice of default is recorded 1/22/2008, on 1/23/2008 this didn't happen,  
15 but what if the bank had recorded an extension of the loan saying that  
16 instead of being due in 2035, it's going to be due in 2135, extended it by  
17 a hundred years. And then at that point in 2135, it could have extended  
18 it for another hundred years.

19           Now, that may be asinine from a business perspective, but as  
20 far as 106.240 is concerned, it doesn't prohibit that. It's fully consistent  
21 with what 106.240 says, and if that's what it says, it cannot be a statute of  
22 repose, if it gives the holder of the right the ability to extend it in  
23 perpetuity, ad infinitum.

24           So, for those reasons, Judge -- looks like we have some help  
25 here.

1 THE COURT: Before the state -- or if you're ready we could  
2 just interrupt there, what is your preference.

3 MR. STERN: Yeah, we can interrupt.

4 THE COURT: Let's just take a brief -- we'll just go off the  
5 record. We'll go off the record so we can see --

6 [Recess taken from 2:24 p.m. to 2:28 p.m.]

7 THE COURT: Okay. So we're going to go back on the record.

8 MR. STERN: Okay. And just for our record, we just had a  
9 little help with Information Technology. The overhead projector, the  
10 Elmo's working, and for our -- Judge, I'd just like to highlight a couple of  
11 things here where this is exhibit -- first page of Exhibit 33 that's on the  
12 overhead right now which we're -- as you can see, the language in the  
13 third paragraph before the heading, notice, that is for relied on, is  
14 highlighted. I would like to just for completeness highlight in orange the  
15 contradictory language. And to reiterate the point, Judge we have to  
16 read these two in conjunction. We can't just excise out the orange  
17 portion the way SFR apparently wants to do.

18 So I think before the technology break, we were -- I was  
19 addressing whether there's a statute a limitation or statute of repose, we  
20 think that the -- that it is incontrovertible that it's a statute of neither  
21 limitations not repose but an ancient mortgage statute, and with that,  
22 Judge, I'd like to address another conclusory statement that SFR said  
23 without any analysis, hoping that the Court could just go along with but  
24 that we challenge, and that is whether acceleration and wholly due are  
25 one and the same thing, because of course the statute, 106.240 which, by

1 the way, had its hundredth year, had its hundredth anniversary a couple  
2 of years ago, that's a statute from 1917, doesn't use the word  
3 "acceleration", uses the word "wholly due", and so -- and necessary but  
4 analyze the assumption and as far as a motion, is that these two things  
5 are synonymous.

6 We, of course, challenge it. There are a couple of reasons  
7 why we challenge that. First is that wholly due doesn't appear in the  
8 statute just on its own, it appears in conjunction with other things, and  
9 that is language that describes the terms of the deed of trust. In other  
10 words, the statute reads: it shall, from the time that the loan is wholly  
11 due according to the terms thereof. The terms thereof, of course, that  
12 are of the deed of trust itself, and then later on in the statute and in the  
13 extension thereof, that extension, that word thereof once again refers to  
14 the deed of trust itself.

15 Here in Exhibit 33 we have a document that's not the deed of  
16 trust, and so what SFR is implicitly asking you to do is not only to  
17 interpret this in a way that benefits them, but also to incorporate it by  
18 reference into the deed of trust so that the terms of this accelerating,  
19 supposedly accelerating document, then become part of the terms of the  
20 deed of trust, because it's the deed of trust which is the instrument that  
21 is referenced in 106.240, and the Supreme Court in the Promax case has  
22 made clear that it's not going to expand what the statute says. They  
23 have consistently applied a plain meaning, but as so far I ask the Court to  
24 go beyond the plain meaning by waiting wholly due with acceleration.

25 They are different. Acceleration and wholly due do not mean

1 the same thing. So quite apart from the problem that the acceleration  
2 occurs in a different document and therefore is outside the scope of the  
3 statute, even if we were to ignore that, it's still not the case of wholly due  
4 means acceleration and there's a couple of reasons for that. The first  
5 one is temporal, and you will see in the notice of default here in Exhibit  
6 33, it reads in the first sentence after the notice, it says, "You may have  
7 the right to cure the default hereon and reinstate the one obligation  
8 secured by such deed of trust above described." All right.

9           And so there's additional language in this notice giving a  
10 contingent right to the borrower to reinstate the loan, essentially stop the  
11 foreclosure process, put the loan in good standing, and that is, in our  
12 view, completely inconsistent with the concept of wholly due, once -- for  
13 two reasons, once again, wholly due refers to the terms of the deed of  
14 trust, and that's talking about when the loan comes due at maturity.

15           Secondly, as so far implies that there is a certain finality to  
16 wholly due that once alone is wholly due and can never -- and it can  
17 never be not wholly due. And from our perspective there's a certain  
18 logic to that, but that's irreconcilable with the acceleration that's set forth  
19 here because as - if we make the assumption that this document  
20 accelerates, the very fact that it tells a borrower that the borrower can  
21 reinstate contradicts any finality. In other words, it gives the wholly due  
22 a temporal limitation.

23           And so what does wholly mean when we talk about  
24 something being wholly due, does it mean the amount? The amount is  
25 entirely due? Does it mean that it's due and can never be undue? In our

1 view it means potentially both. It certainly doesn't mean what SFR  
2 seems to imply that it means which is that it's just the synonym of  
3 acceleration, and then you wait, and you see what happens. There's  
4 nothing in the statute that supports that. So in our view, the fact that  
5 you can take it back, that you can't decelerate, and acceleration is further  
6 evidence that you just can't do the equivalence that SFR has suggested  
7 of wholly due with acceleration.

8 I'll take one further point on that, Judge. Nevada, of course,  
9 is a judicial -- excuse me, a nonjudicial state where mortgages and deeds  
10 of trust and liens are foreclosed nonjudicially primarily. So and we have  
11 Supreme Court case law on this, that a statute of limitation never affects  
12 a nonjudicial foreclosure. It just doesn't. So if you could -- you can  
13 come into court six years after a loan is fully mature without any  
14 controversy and you would not have a remedy because you would have  
15 a time bar, but you could get nontraditionally and have no such problem,  
16 and we would ask the Court to consider the logic behind it.

17 It's clear in that context that the Court is giving some  
18 procedural safeguard to the defendant in the judicial case that that  
19 defendant doesn't have in the nonjudicial case. In other words, it's the  
20 procedural right, it's not a property right. The way SFR wants to apply  
21 the statute is essentially implying to end the property right after the  
22 expiration of the statute, whenever that date may be. That's another  
23 reason why this is not a statute of repose and this leads to the litigation,  
24 what I described at the beginning here, a trial by ambush of sorts.

25 106.240 is subject to equitable challenge, it is subject to

1 defense. The *Promax* case makes that clear. In *Promax*, there was some  
2 controversy as to whether the statute applied. The beneficial under the  
3 statute in *Promax* didn't even know the statute was there, it was kind of a  
4 fortuitous thing, just like I suspect for SFR in 2014, they probably knew  
5 the statute was there, but it wasn't really a thing. The statute does not  
6 become a thing for SFR until cases like this one, they have nothing else  
7 to say about the tender.

8               So Plan B, the statute was Plan B in *Promax*, as well, and the  
9 Supreme Court says, well, it's there, we're going to apply it, but we're  
10 going to remand for consideration of estoppel. So -- and that's in  
11 *Promax* itself, it's incontrovertible. You can challenge the statute  
12 equitable, and we know from the HOA litigation more recently, where  
13 parties like SFR and other investors have attempted to use the  
14 conclusive presumptions and the trustee's deed as putting any challenge  
15 to the sale beyond the Court's powers, and the Supreme Court has  
16 resisted that very, very strongly, whether they say that you can challenge  
17 it by equitable means or that it's just not as -- I think in the words of one  
18 unpublished decision, as breathtakingly sweeping a legislative intent, as  
19 the investors have said.

20               Those concepts, and in this situation, Judge, where we have  
21 a case that commenced in 2014, it was timely under any statute of  
22 limitation or statute of repose because of the inherent delay in litigation,  
23 two and a-half years after SFR was brought in, this milestone passes,  
24 and at that point an axe falls based on the statute where everybody  
25 knows the reason the bank hasn't foreclosed it is because SFR claims a

1 contrary interest.

2 For the Court to go further and determine that that cannot be  
3 challenged by estoppel or by other equitable doctrine such as waiver, it's  
4 -- it would be a breathtakingly expansive interpretation of 106.240, one  
5 that the statute's plain terms do not support, much less the policy of  
6 resolving cases on the merits.

7 The related point is that if this had been brought up properly  
8 in the litigation and not as an affirmative defense, calling it a statute of  
9 repose when it's clearly not that, the bank would have been able to rebut  
10 any evidence of acceleration, we would have been able to produce the  
11 documents that Ms. Hanks now points out we don't have. We don't have  
12 them because this wasn't an issue.

13 I will go a step further, Judge, and tell you that our witness,  
14 Mr. Hine [phonetic] here, would be able to testify in rebuttal that the loan  
15 is not accelerated and not within the time that SFR suggests, but we --

16 MS. HANKS: I would object to any comment about witness  
17 testimony that didn't get admitted, Your Honor.

18 THE COURT: Thank you. And it's hypothetical.

19 MR. STERN: In response to that, Your Honor, this is proffer.  
20 That --

21 THE COURT: It's hypothetical, yeah.

22 MR. STERN: It's a proffer, that's all it is, but here's what's not  
23 a proffer, here's what's incontrovertible, is that not only was this not  
24 pled, never addressed in summary judgment, never addressed in the  
25 response to the motion for reconsideration, never disclosed in discovery

1 responses, never addressed at any of the 2.67 meetings, never brought  
2 up at calendar calls that took place after January 22nd of 2015, for SFR to  
3 switch horses in the middle of this race and say, you know, this was  
4 never about the HOA foreclosure, you can forget the HOA foreclosure,  
5 we knew -- we know we lost that.

6           Mr. Alessi didn't say what we needed to him to say, we lost  
7 that, but here, we've got this other statute which wasn't even in play  
8 until two and a-half years into this litigation, but we get to win on that  
9 because it's a statute of repose.

10           That doesn't work, Your Honor. If they want to make a claim  
11 on the 106.240 they have to plead it and we have to be afforded the  
12 opportunity to rebut that through the discovery process. At this point,  
13 this is way -- they are barred from raising this.

14           And with some, you know, with some cases, in some  
15 instances, you see something coming, you know what's going to  
16 happen. Either it's pled or it arises in discovery and there's -- for  
17 example, something said in the deposition or in response to  
18 interrogatories that goes beyond what the pleading says, and the court  
19 does a Rule 37 analysis and we're all familiar with that process. None of  
20 that happened here. This is just a Plan B when SFR realized it was out of  
21 arguments against tender. And it's simply not fair and improper under  
22 the rules.

23           This had to be actually raised, and to put it in -- maybe I can  
24 finish the point in this manner, Judge, this case started as a quiet title  
25 HOA foreclosure case, it was litigated as such, it was advanced of such,



1 the documents were requested with that understanding. Mr. Alessi,  
2 other witnesses were disclosed with that understanding in mind. And  
3 here we are at trial telling -- and we hear hey, this is not 116, this is  
4 Chapter 106.

5 I think Ms. Hanks anticipated this when we first made our  
6 objection to Exhibit 33 and said well, you can -- this is quiet title, and you  
7 can basically say whatever you want, and as long as you've asked for the  
8 remedy of quiet title, we disagree with that, Judge. We -- the remedy of  
9 quiet title is of course there, and as so far -- and the bank are free to  
10 bring whatever they want into it as long as they disclose it properly and  
11 preserve it properly in the litigation case.

12 I mean imagine, imagine what would happen if today we  
13 offered a completely new theory based on completely new evidence that  
14 this was paid by the homeowner, and we said well, geez, it's just a quiet  
15 title so it's a different standard, SFR would be hopping mad and  
16 appropriately so. That's just not the way to resolve cases, Judge, and I  
17 think SFR knows that.

18 A couple of words about Exhibit 34. SFR can correctly  
19 anticipate that we're going to be addressing Exhibit 34, and SFR's  
20 approach to this is to say the notice of default did two things, it  
21 accelerated and we're going to tell you that that means the same thing  
22 as wholly due, even though we don't really have any reason to explain  
23 why that is, and it also says that they're going to go to sale and the  
24 rescission, we're just going to call off one but not the other. Again, if  
25 that's what we were going to do, we would have done it explicitly, using

1 the word acceleration.

2 We understand that there's a general reservation of rights  
3 here in Exhibit 34, but the purpose of that, Judge, is to preserve the  
4 ability to go forward to sale, and the purpose of both, Exhibit 33 an  
5 Exhibit 34, when read together, Exhibit 34 for our record, is for course  
6 the rescission of the notice of default, was only to effectuate and then to  
7 rescind a sale. There was a process here, a nonjudicial foreclosure  
8 process intended to reach sale. That's why Exhibit 33 is there. That's  
9 why Exhibit 34 says that the only purpose that it's being recorded it to  
10 stop that process.

11 But we need to also focus on the legal significance of this  
12 and that is -- and we cite, we address this in our trial brief, so I won't  
13 spend too much time on it, but Exhibit 34, once it's recorded, it means  
14 that Exhibit 33 went poof. It's gone. It's not there, as if it never  
15 happened.

16 And I think SFR's reply to that is, well, you said that you're  
17 reserving all these rights and since acceleration is one of the rights that  
18 you have reserved, it doesn't accomplish what you need it to accomplish  
19 which is to take this out of the 10-year statute, but Judge, if we're going  
20 to read Exhibit 34 with that level of specificity against the bank saying  
21 that we have -- that because we've carved out generally all these rights  
22 and that acceleration is one of those rights, and that this is too general a  
23 document to revoke that hypothetical acceleration, right, we have to  
24 apply that same level of specificity to Exhibit 33. In other words, we  
25 have to equal, with equal specificity and clarity invoke acceleration in

1 Exhibit 32, which of course we did not.

2           So if SFR is right about Exhibit 34, it's wrong about Exhibit  
3 33, and its argument it's a nonstarter. Or it has to come up with a good  
4 explanation for why the Court and adjudicating the case fairly is going to  
5 impose, interpret the rules that favor it at each point, and I don't think  
6 they're going to be able to come up with such rule. So that's what we  
7 say about that.

8           Now in conclusion here, Judge, the concept of allowing a  
9 case to be litigated over quiet title having to do with a foreclosure sale,  
10 having that thing be the delay, having SFR knowing full well that there  
11 was a tender, and that their claim to the unimpeded clear title of the  
12 property, forget the deed of trust, was questionable at best.

13           And certainly, I forget the exact date, but I think it's  
14 September 18th of 2018, September, somewhere in September of 2018  
15 the *Diamond Spur* case came out, but even before that, ever before that,  
16 the tender argument had been gaining momentum. In 2015, 2016, 2017,  
17 the relevant time period for this case, when it was being developed in  
18 discovery, when it was being prepared for trial, tender was a thing, and  
19 SFR knew that there was a tender here, and for SFR to be able to run out  
20 the clock through litigation tactics, and I don't criticize SFR for using the  
21 courts, we all have a right to open courts, but if you're going to do that,  
22 you cannot -- and thereby delay your -- the counter-parties property  
23 right, you cannot then say that the delay that was caused by the exercise  
24 of those litigation rights are now used as a sword.

25           This is a classic textbook case of unclean hands, and if

1 anything else, Judge, if the Court accepts SFR's argument, that the  
2 statute applies, that it was preserved, that it's a statute of repose, and all  
3 the other problems, pursuant to the *Promax* case, even if the Court in our  
4 view incorrectly determines it's a repose statute, because *Promax*  
5 remanded it for equitable considerations, the Court should apply equity  
6 here and say that SFR has -- it has problems with unclean hands and  
7 estoppel and cannot having acted without equity, having impeded the  
8 sale of this property through this litigation, then benefit from that very  
9 inequity by denying us the right to exercise the remedy that we know we  
10 are entitled to now because there was a perfect tender. And for those  
11 reasons we ask that you deny SFR's motion and grant judgment in favor  
12 of the bank.

13 THE COURT: Thanks. Ms. Hanks?

14 MS. HANKS: Your Honor, I want to address the kind of -- this  
15 argument that we somehow are required to qualify the statute in some  
16 way, and I don't know if that's really necessary. Judge Boulware did find  
17 it was a statute of repose, I do believe it's a statue of repose, but what I  
18 want to focus on is I don't -- the First Circuit Case that I think counsel's  
19 relying on for that phrase, "ancient mortgage statute" dealt with a  
20 Massachusetts statute that is entirely different than the Nevada statute,  
21 and so it's not a case where it has generic law that kind of be used  
22 persuasively in Nevada. It was dealing with a completely different  
23 statute.

24 We have a published decision, *Promax*, that deals with this  
25 very statute, and aren't asking the Court interpreting the statute, so I

1 would ask you not to even consider it , that First Circuit case.  
2 Nevertheless, I don't really think you need to qualify it. It is a conclusive  
3 presumption. That's how the *Promax* court talks about the statute. You  
4 could call it a conclusive presumption statute. Whatever you want to call  
5 it.

6 That doesn't really win the day for the bank to not call it a  
7 statute of repose, but what it -- the reason why it is a statute of repose  
8 and why there's a confusion as to what action we're talking about is it's  
9 not -- it is not true to way, well, because we started this action to  
10 challenge the association foreclosure sale, this statute, 106.240, could  
11 never cut off an action for us. No. It cuts off the action with respect to  
12 the deed of trust you'll never be able to judicially foreclose or  
13 nonjudicially foreclose.

14 You have a deed of trust by operation of a conclusive  
15 presumption statute in Nevada that is terminated, period, because you  
16 triggered the date for it, to terminate in 10 years. So the statute,  
17 whatever you want to call it, it's simply a statute that gets rid of the debt  
18 and it gets rid of the lien that that is secured by. That's all it does and  
19 that's all we're arguing.

20 And when we argue that and look at the documents I think  
21 what was really apparent is counsel really couldn't talk -- he tries to talk  
22 about the paragraphs, but he misses all the points and wants to just talk  
23 about this esoteric sense of let's qualify the statute. Why? Who cares?  
24 *Promax* says it's a conclusive presumption statute, so I just want to focus  
25 on the statute itself and the evidence we have in the case.

1           So the statute itself that -- we have it in the Promax case but  
2 I'll just read it again, talks about: it's the lien created by of any mortgage  
3 or deed of trust to find a real property appearing of record, we have that  
4 here, and not otherwise satisfy and discharged of record, which we have  
5 that here, shall at the expiration of ten years after the debt secured by  
6 the deed of trust, according to the terms thereof, and I'm going to get to  
7 that point in a second, or any recorded written extension thereof become  
8 wholly due, terminate, and it shall be conclusively presumed the debt  
9 has been regularly satisfied and the lien discharged.

10           And here's the interesting thing about Promax, not one  
11 payment was made on those notes.

12           THE COURT: They were two-year notes.

13           MS. HANKS: Two-year notes, and not one payment was  
14 made, but guess what? They were discharged by virtue of the statute.

15           THE COURT: Right. They were two-year notes.

16           MS. HANKS: Right. They were two-year notes. This is a  
17 longer note, I agree with that, but they made it wholly due on January  
18 22nd, 2008. They moved up the maturity date. The maturity date was  
19 no longer 2035 by virtue of the notice of default. They exercised their  
20 remedy under paragraph 22 of the deed of trust.

21           So I would agree with you, yes, if under -- if we had a similar  
22 example as *Promax*, and this note, we were operating under the maturity  
23 date of 2035, ten years from that date, 2045, this statute would operate  
24 and would terminate the deed of trust. The problem is they moved up  
25 the maturity date. They moved it up to being wholly due on January

1 22nd, 2008 because they exercised their remedy under the deed of trust.

2 And so that brings me to my next point because counsel  
3 argued, well, she wants to ignore the preceding paragraph, that  
4 somehow I'm misleading this Court as to how the document reads.  
5 Well, I'm not doing that. Let's look at the notice of default. Why are we  
6 talking about a preceding paragraph and pretending like it somehow  
7 obviates or it carries over the next two paragraphs? Counsel argues,  
8 let's read it as a whole. Yeah, let's read it as a whole. Don't just cherry-  
9 pick. I'm not cherry-picking. I'm reading it as a whole.

10 Your first paragraph identifies the deed of trust. That's what  
11 this documents doing. You identify the deed of trust, you identify the  
12 amount of the original loan, the whole loan, the whole amount.

13 Then the second paragraph that counsel's talking about, now  
14 you describe in that paragraph what the normal terms of the loan is. It's  
15 an installment loan that would normally not have matured until  
16 December 1st of 2035, but you defaulted, borrower, you didn't pay your  
17 normal installment that was due on September 1st, 2007. Okay.

18 Now what's the next paragraph? Hey, guess what? By virtue  
19 of your default, now we're exercising our remedies under the deed of  
20 trust and we're making the loan wholly due now. We're not going to  
21 wait until 2035. We're doing it now. Now the whole thing is due. You  
22 defaulted.

23 And if you go back to the deed of trust, which this also  
24 mirrors the 106.240 language, it talks about the deed of trust according  
25 to the terms thereof, that's the exact terms we're talking about.

1 Paragraph 22 allows the lender in the event of a default, there's another  
2 way that can make the loan wholly due, too. They talk about it in  
3 another paragraph in the deed of trust, but we're only talking about the  
4 default in the installment payment here, they can make the whole thing  
5 due and immediately proceed to sale. That's what they're talking about  
6 here.

7 So they're saying, look, you normally had an installment  
8 contract that wouldn't have been mature until 2035, and you had  
9 monthly installments, you failed to pay it, now let's go to the next  
10 paragraph. Now we're exercising our right. Not only are we making it  
11 wholly due, we're also going to exercise our power of sale on the deed  
12 of trust.

13 And then here's where it gets really interesting. Then you go  
14 to the last paragraph, and the last paragraph, I forget how to --

15 THE COURT: The enlarge?

16 MS. HANKS: Yeah, because it's that camera, so you're not  
17 supposed to --

18 UNIDENTIFIED SPEAKER: Use the zoom.

19 MS. HANKS: Got it. Yeah. So if you do the last paragraph,  
20 the note we're talking about, it talks about Section NRS 107.080. Okay.  
21 It talks about the statute, and I'm going to reference that section in a  
22 second. Permits certain defaults to be cured upon the payment of the  
23 amounts required by that statutory section, without requiring payment of  
24 that portion of principal and interest which would not be due had no  
25 default occurred.



1                   So if we go to 070.080 -- 107.080, it is a statutory requirement  
2 in Nevada that you are -- that a lender is not allowed to make a loan  
3 wholly due upon default without giving a certain time period, it's 35 days  
4 under the statute, for the borrower to cure that default and avoid the  
5 wholly due clause. In other words, they're still allowed to become  
6 current up to that point of all unpaid installments and interest and late  
7 fees, and then make it an installment contract.

8                   If they don't do that though, if they don't do that, if they don't  
9 exercise their statutory right that Nevada put in place for borrowers, it's  
10 going to remain wholly due. It says the right of reinstatement will  
11 terminate and the property may thereafter be sold, and the trustor may  
12 have the right to bring court action to assert the nonexistence of a  
13 default or any other defense of trustor to acceleration and sale. That's  
14 what it says, acceleration and sale.

15                   So talking about in 107.080, look, we have to give you a time  
16 period in which that you can still pay it up to the current date before the  
17 wholly due, you don't have to pay the whole --

18                   THE COURT: Let's think about what is a statute of repose? A  
19 statute of repose triggers a time by which you file a lawsuit, and this is  
20 what Mr. Stern's argument is, that there is a lawsuit, so how does this --  
21 if the statute of repose bars this, then how do we apply it?

22                   It's -- I'm not sure I agree with Judge Boulware. This concept  
23 of the ancient mortgage statute, I did find one reference to it in Nevada.  
24 It's a very bizarre case about a mining claim, but you know, it's hard to  
25 figure out what they're talking about. But they do the thing that Nevada

1 has, an ancient mortgage statute. They just don't cite to what it is.

2           So in looking at this statute, if you go all the way back to the  
3 first mention of it, which it's only mentioned one time, by Nevada, they  
4 talk -- in *Promax*, they talk about the purpose of the legislature was -- the  
5 intent of the legislature was for the statute to protect bona fide  
6 purchasers, not to let corporations or groups of people get together and  
7 tell one another you do this at a certain time. So the notes were not  
8 extinguished, and they said we conclude that's an error. So that  
9 concept, that the statute of repose is intended to protect BFP's. And so  
10 in *Promax*, they said you're wrong, that's not what it's intended to do.

11           MS. HANKS: I don't know where there's -- I'm not arguing a  
12 statute of repose is only to protect BFP's. I'm sorry, Your Honor. I don't  
13 know.

14           THE COURT: No, this specific statute, the 104.240, they  
15 specifically said the district court was wrong when they said the purpose  
16 of this statute is to protect BFP's.

17           MS. HANKS: Right.

18           THE COURT: You're wrong. You've read it wrong. You have  
19 to look at what the statute says. So you have to look at what the statute  
20 says. And they indicate that your -- this is just wrong, it's plain and  
21 ambiguous, there's no room for construction, and it simply says what it  
22 says, that being a case no further interpretation is required or  
23 permissible. In the plain language of the statute, the deeds are  
24 conclusively presumed to have been satisfied and the note's discharged,  
25 and again, this was -- they had a really short timeframe in *Promax*. It

1 was a two-year note.

2 MS. HANKS: It doesn't matter.

3 THE COURT: And they let it trail and trail and trail and  
4 somebody was involved in a divorce, and then they did all these  
5 transfers, and so they were just laying out there for all for all this period  
6 of time because it was a corporation and they were all self-dealing, is  
7 essentially what the court says. Like, you know, you can't hide behind  
8 that because your two-year-old -- your two-year deadline to become fully  
9 due passed, and you didn't do anything. That's what it means.

10 So whatever your deed of trust says is when it becomes  
11 wholly due is when it becomes wholly due, unless what? It doesn't say  
12 in there unless it's accelerated, it says when does it become wholly due?  
13 It's to get finality. It's an ancient mortgage statute. I think he's right.

14 MS. HANKS: Okay. Regardless of whether you call it -- I'll  
15 accept the fact that it's an ancient mortgage statute. Everything you just  
16 said just supports my argument.

17 THE COURT: Okay.

18 MS. HANKS: Okay? So yes, you're right. It's wholly due by  
19 the deed of trust according to the terms thereof. You did it according to  
20 the terms. You exercised your right under paragraph 22 bank, through  
21 this notice of default.

22 THE COURT: Okay. That's where --

23 MS. HANKS: You --

24 THE COURT: That's where we divert.

25 MS. HANKS: Okay. And that's what I'm arguing.

1 THE COURT: Okay.

2 MS. HANKS: That they did make it wholly due.

3 THE COURT: Uh-huh.

4 MS. HANKS: It's not just by virtue of the maturity date. If  
5 that were the case, Your Honor?

6 THE COURT: Uh-huh.

7 MS. HANKS: If that were the case, you would see a maturity  
8 date in the statute. It doesn't that.

9 THE COURT: Uh-huh.

10 MS. HANKS: It doesn't say only therefore we come on the  
11 maturity date.

12 THE COURT: Uh-huh.

13 MS. HANKS: It doesn't say that, and it gets -- interestingly  
14 enough, that's what the Massachusetts statute says.

15 THE COURT: Uh-huh.

16 MS. HANKS: That's why it's different. Doesn't say maturity  
17 date. And so that's where the *Promax* case does come in handy because  
18 it says you're not allowed, there's no ambiguity here, don't read words  
19 that aren't there, and that's what the bank is asking to do, read maturity  
20 date as the only way a loan can be wholly due. That's ludicrous,  
21 because what they are telling you then -- but I want them to admit that  
22 right now because I have a lot of notice of defaults that are filed against  
23 SFR's property.

24 THE COURT: Uh-huh.

25 MS. HANKS: So if they're telling me that this notice of

1 default that we see in Exhibit 33 was only seeking to collect the  
2 installment payments between September 1st, 2007 and January 22nd,  
3 2008, I want them to admit that in open court. I guarantee you they  
4 won't. They won't say that. When they were exercising this notice of  
5 default and they were going to foreclose, they were going to have a  
6 credit bid of the entire amount of this loan. They are seeking to collect  
7 the entirety of this loan.

8 THE COURT: Uh-huh.

9 MS. HANKS: Not just the installment payments due up to  
10 this date, because you can foreclose like that, you can do that.

11 THE COURT: Sure. Uh-huh.

12 MS. HANKS: They weren't. They were making it wholly due.

13 THE COURT: Uh-huh.

14 MS. HANKS: And if they're saying this type of document  
15 doesn't do that, I want that admission in open court, because I can use  
16 that for other cases in a big way.

17 MR. STERN: I'd be happy to speak in open court, Your  
18 Honor.

19 MS. HANKS: So --

20 THE COURT: No, have a seat.

21 MS. HANKS: But there's no evidence of that. Instead,  
22 they're telling the borrower your whole -- all sums, all, not just the  
23 installments due up to this date.

24 THE COURT: Uh-huh.

25 MS. HANKS: Not part, all sums secured by this deed of trust

1 are due immediately. That's the words they chose to use. There's no  
2 ambiguity, there's no contradictory language as Mr. Stern suggests, it's  
3 very clear. What were you telling the borrower? You owe the whole  
4 thing.

5 THE COURT: Uh-huh.

6 MS. HANKS: And what is the need, what is the need for the  
7 last paragraph explaining the terms in Nevada law under 107.080 that  
8 says, well, we give a little leeway to a borrower, we give a little saving  
9 grace, a 35-day grace period. They don't have to pay the whole lien or  
10 the whole loan to save themselves from foreclosure. They can still pay  
11 just up to the point of the default. That's what it says.

12 THE COURT: Uh-huh.

13 MS. HANKS: And even talks about acceleration in 107, so I  
14 want to read that now. Subsection 3 talks about why you have to give  
15 this 35-day period, Your Honor, and it says: the notice of default and  
16 election to sell must describe the deficiency in performance and  
17 payment, and may contain a notice of intent to declare the entire unpaid  
18 balance due if acceleration is permitted by the obligation secured by the  
19 deed of trust, which we know in this case it is because we see paragraph  
20 22 that's actually entitled "acceleration".

21 But acceleration must not occur if the deficiency in  
22 performance or payment is made good, and any costs, fees, and  
23 expenses, incident to the preparation of or recordation of the notice and  
24 incident to the making good of the deficiency an performance or  
25 payment are paid within the time specified in subsection 2. That's a 35-

1 day period.

2           There is no ambiguity here about acceleration or wholly due.  
3 It all fits, it matches all the language in the NOD, mirrors the deed of trust  
4 paragraph 22, where it has to describe the default, give you that period  
5 to pay it. It mirrors the language in 080 with that period of time where it  
6 says you have a one period -- but there's no evidence that that bar were  
7 reinstated. Done. None. It just continued, and once that reinstatement  
8 period's gone, it even says here, it's done.

9           But you can still -- you can still bring an action though to  
10 dispute the nonexistence of a default, but even again, it says, but after  
11 acceleration. That's what it said, after.

12           THE COURT: All right. Let's talk about another case. So  
13 *Cadle -- Cadle Company* has created a lot, a lot, this one's not recorded  
14 though. *Cadle v. Fountain*.

15           MS. HANKS: Right.

16           THE COURT: A 2001 case, and in that case they accelerated  
17 the note and filed suit, then they dismissed the suit.

18           MS. HANKS: Correct. And they said that wasn't enough.  
19 Correct.

20           THE COURT: That's not sufficient.

21           MS. HANKS: Correct.

22           THE COURT: To -- but they filed a suit.

23           MS. HANKS: Yes.

24           THE COURT: They took action. So here's my question. This  
25 is this whole thing of what if there is a lawsuit pending? And that's the

1 argument here that Mr. Stern has made, is that where there is a lawsuit  
2 pending, then the ten-year statute --

3 MS. HANKS: Is what, tolled? Where's that?

4 THE COURT: -- doesn't apply, I mean, because they -- it was  
5 specifically because they accelerated the note and they filed a lawsuit --

6 MS. HANKS: No.

7 THE COURT: -- in *Cadle*.

8 MS. HANKS: Okay. No.

9 THE COURT: That's what it says.

10 MS. HANKS: So hold on. No, no, what happened in *Cadle*  
11 was they accelerated, yes.

12 THE COURT: Uh-huh.

13 MS. HANKS: They made it wholly due.

14 THE COURT: Right.

15 MS. HANKS: Right, so no confusion, no one's arguing --

16 THE COURT: Right.

17 MS. HANKS: -- acceleration doesn't mean wholly due and  
18 here today, no one's confused there. That bank wasn't confused about  
19 those words. And the court found the mere fact that you dismissed, and  
20 guess what the action was, Your Honor? Not a challenge to some NRS  
21 116 sale, it was a judicial foreclosure action.

22 THE COURT: Uh-huh.

23 MS. HANKS: That's the action they brought. That's the  
24 difference and I want to highlight that in a second.

25 THE COURT: Okay.



1 MS. HANKS: So they brought the judicial foreclosure action  
2 after making the loan wholly due aka accelerated, whatever you want to  
3 call it. The court, the Nevada Supreme Court said the fact that you  
4 dismissed your judicial foreclosure action is not enough and is not clear  
5 and unequivocal to decelerate the loan.

6 THE COURT: Correct.

7 MS. HANKS: That's not enough. Well that's exactly what I'm  
8 arguing here. The *Cadle* case supports what I'm arguing here. That's  
9 exactly what the rescission does. You just opted not to elect to proceed  
10 to sale. You didn't in any way affect your wholly due language in your  
11 notice of default. So *Cadle* is exactly on point with what I'm arguing  
12 here. It'd be no different.

13 I would imagine the Nevada Supreme Court would say, just  
14 like *Cadle*, and your dismissal of the judicial foreclosure action wasn't  
15 enough to take away the acceleration, you had to do something else,  
16 more clear and unequivocal, and the clock is still ticking against you,  
17 bank. That's what happened, the clock was still ticking, they get the  
18 benefit of that, and it's terminated. 106.240 says now your lien is  
19 terminated and the debt is presumed satisfied.

20 THE COURT: Okay.

21 MS. HANKS: Same here.

22 THE COURT: But is it merely --

23 MS. HANKS: But you're looking at it from a lawsuit, any  
24 lawsuit.

25 THE COURT: Is it merely filing a notice of default saying

1 we're defaulting you, this is just -- this is going to start the clock running  
2 on the nonjudicial foreclosure process, and if this goes through, we have  
3 all these options, or is it as they did in *Cadle*, they did that, then they  
4 filed a lawsuit?

5 MS. HANKS: You do not need --

6 THE COURT: They dismissed the lawsuit, and that was -- the  
7 Court said that's where you blew it, you didn't expressly state when you  
8 dismissed that lawsuit that you were decelerating your acceleration.

9 MS. HANKS: Correct.

10 THE COURT: So what is the affect here where you file your  
11 lawsuit? I mean, I'm just not understanding how if you've got a lawsuit  
12 pending, say we're exercising our rights under this note, that the ten  
13 year, which is the equitable argument that Mr. Stern makes, which is  
14 the -- it -- we were in this litigation for all of this period of time, and now  
15 they're going to say because this is dragged out -- you know, Alessi and  
16 Koenig was bankrupt for however much period of time they were  
17 bankrupt, so --

18 MS. HANKS: That's where the distinction is, Your Honor.  
19 The action they brought here --

20 THE COURT: Uh-huh.

21 MS. HANKS: Remember this is an interpleader.

22 THE COURT: Right.

23 MS. HANKS: So when the bank brought in SFR --

24 THE COURT: Right.

25 MS. HANKS: -- it is not a judicial foreclosure action. That's

1 the difference. So he's arguing it, oh, it's any lawsuit. Where does it say  
2 that? No, it's not any lawsuit. You brought a claim challenging the effect  
3 of the NRS 116 foreclosure sale by the association.

4 THE COURT: Right.

5 MS. HANKS: You did not bring a judicial foreclosure action.  
6 But I would still argue that even if they had brought a judicial foreclosure  
7 action, it would have been incumbent upon them to make sure that that  
8 happened within the ten-year time frame and came to the conclusion  
9 because they triggered the date.

10 So I guess the difference -- that's the fundamental difference  
11 I have. There's nothing in 106.240 that says any lawsuit you bring will  
12 toll this, and there's no other statute that talks about that and there's  
13 nothing in Promax that talks about that. So that's where they're coming  
14 from. It's not any lawsuit. You didn't bring a judicial foreclosure action.  
15 You brought an action challenging the foreclosure sale, and it just so  
16 happens that during the tenancy of that action, the clock ran on 106.240.

17 But here's where we get to the equitable; even if you wanted  
18 to determine equities, right, and they say we're unclean hands, my client  
19 did nothing to affect the bank. The bank is always in the power to  
20 accelerate or decelerate its loan at any time within the statute of 106.240.  
21 It's always in their hands.

22 They didn't even have to draft a notice of default in this way.  
23 They decided to do it. And then when they did their rescission and  
24 explicitly said, well, we don't want to affect the acceleration part. We  
25 don't want to affect the wholly due, we're only affecting our power of

1 sale, that was their choice, and then yet they still had time -- they still  
2 had time while this action was pending to file a recession that's more  
3 clearly and unequivocal just like the *Cadle* Court isn't noted -- indicating.

4           They had all -- that was always in their power. So it is  
5 completely absurd to suggest that SFR did anything to prevent them  
6 from decelerating their loan. We couldn't have. There was nothing SFR  
7 could do. We can't control that, just like we can't control when they  
8 make it wholly due. It's always within their power. And they're charged  
9 with knowing the law in Nevada. It's not my fault and it's not my client's  
10 fault that they chose to make their loan wholly due in January of 2008  
11 and then forgot to watch the clock. That's kind of what Pro Max stands  
12 for too, that we don't care. Sorry, guys. We're sorry you didn't know  
13 about this statute in your divorce proceedings. It doesn't change the  
14 fact.

15           And that's the -- and I also want to -- if you really read Pro  
16 Max very carefully, it's very important to understand that when it was  
17 remanded back for the two individuals that were involved in the divorce  
18 proceeding, that was the equitable principle in the estoppel. It was --  
19 because in the divorce proceeding, the parties argue that when we sell  
20 this property, you will get 10 percent.

21           And the *Promax* Court specifically talked about had Judge  
22 McGee known -- this is at page 93. They assured Judge McGee that the  
23 sale of the Verde property to AS would generate enough money to pay  
24 the promissory notes and then pay the proceeds to Jack, the husband  
25 who was getting divorced.

1 Judge McGee later testified that had he known -- had he  
2 known the notes were unenforceable, had he known that 106.240 had  
3 made them terminate essentially, he would have structured the division  
4 of the community assets between Jack and Mary Ann Ferguson  
5 differently. That's what the estoppel they're talking about.

6 SFR has never -- it's completely different estoppel in play in  
7 Pro Max than it is here. There is no estoppel here. SFR has never, ever  
8 taken a position that a deed of trust survived, ever. We're never taken  
9 that position in this case. I don't think we've ever taken it in any case,  
10 frankly. We've never said, hey, don't worry; your deed of trust is still  
11 going to be good. It's still going to encumber my property. We've never  
12 said that. We've never lulled you into a false sense of a security and  
13 then somehow some division of assets happen differently because of it,  
14 or your changed your conduct because of it. We've always taken the  
15 position your deed of trust was extinguished. Always.

16 And in this case, unlike the *Promax* case where 106 had  
17 already ran and everyone's making these representations and actually  
18 getting divisions of assets based on those representations, in this case,  
19 the bank always had it in its power to fix the fact that they made their  
20 loan wholly due.

21 THE COURT: Okay. Well, then let's talk about --

22 MS. HANKS: They just didn't --

23 THE COURT: -- Coyt [phonetic]. Yet another unpublished  
24 decision, and so here, it's a footnote -- they drop it as a footnote.  
25 Similarly, appellant's argument regarding NRS 106.240 was not raised in

1 its summary judgement motion practice, nor was the argument pertinent  
2 to the identified grounds for granting an NRCP 60(b) relief.

3 We questioned the merit of that argument in light of the  
4 March 2010 notice of default that declared the loan due in full. *C.F.*  
5 *Clayton v. Gardner.*

6 MS. HANKS: Right.

7 THE COURT: Where contract obligations are payable by  
8 installments, the limitation statute begins to run only with respect to  
9 each installment when due, unless the lender exercises his or her option  
10 to declare the entire note due.

11 So in this -- and again, in this one, these are all -- I guess the  
12 thing that's odd about all these are that we're talking here about different  
13 types of notes and all these cases and different types of commercial  
14 obligations, and trying to find one where you've got a similar situation to  
15 this one, *Coyt* is probably the closest of any of them because the others  
16 are all these very short commercial agreements between -- in business --  
17 involving business deals. The mining case, *Cadle*, they're all business  
18 deals that are based on, you know, two, five, ten, whatever, notes of a  
19 certain amount of time.

20 So looking for one that is as close as possible, and this is the  
21 closest one I could find, and I can't tell what type of note this was. It  
22 talks about First American Title and Wells Fargo as trustees for Wamo  
23 [phonetic]. And it talks about past certificate. So this seems to me like  
24 this is the closest thing we've got --

25 MS. HANKS: Similar.

1 THE COURT: -- to one of our mortgage cases.

2 MS. HANKS: Right.

3 THE COURT: And it's, again, I can't really tell because they  
4 don't really go into much detail and they just drop a footnote on it.

5 MS. HANKS: Right. And, I mean, I can talk about *Coyt*. It's --  
6 that's more helpful to my argument than it is to the bank, but --

7 THE COURT: Right. Sometimes I understand if this is --

8 MS. HANKS: Right.

9 THE COURT: Because the others, to me, are different  
10 situations and involve different types of loans and different due dates, or  
11 different things happened, and even in the -- and particularly in the case  
12 where, you know, they file a lawsuit and then they dismiss it. I get -- I  
13 understand that one. I get that one entirely. I mean, you triggered  
14 something and then you never untriggered it.

15 But I'm not -- but that was where -- and they specifically say  
16 file the notice of default and file the judicial foreclosure. It was two parts.  
17 So they're like, okay, you've committed. So I'm trying to find one where  
18 they explain to us what's wholly due? What do you have to do to trigger  
19 this, you know, 106.240?

20 MS. HANKS: And I agree with you.

21 THE COURT: And they never really defined it for us.

22 MS. HANKS: I would agree. I think *Coyt* is probably the  
23 most applicable to describing that because in that case, they question  
24 the lender's argument, the marital lender argument, the statute of  
25 limitations hadn't run because the maturity date. And they say, well, no.

1 No. No. No, that's not true because normally that would be true, right,  
2 the six years runs from each installment payment.

3 THE COURT: Right. Uh-huh.

4 MS. HANKS: But when you make the wholly due, you've ran  
5 your six years from now one date. You don't get the benefit of the  
6 maturity date because you just took that whole maturity date, basically  
7 lumped it into one date and said now, today it's due. That's what we  
8 have here. That's why I don't know if there's any confusion as to wholly  
9 due. You made it fully due.

10 I mean, when I looked up the definition of wholly, just so we  
11 get that, you know, the word fully, entirely, totally, all; those are the  
12 words that are used in the regular dictionary for wholly. I don't think  
13 there's any confusion there that that -- and I think the Court case tells us  
14 that, and they even recognize it. And then when we cite *Clayton*, which  
15 is a published decision, like, yeah, normally there's installments and  
16 normally they don't run -- the statute of limitation doesn't run from those  
17 installments.

18 But when you make it wholly -- when you make it -- when  
19 you declare the entire note due, now it runs from that date. You don't  
20 get the benefit of the six years running from each installment. That's  
21 exactly what we're arguing here.

22 THE COURT: Okay.

23 MS. HANKS: It's what you did with the notice of default.

24 THE COURT: And so again, this one, I don't know what it is  
25 they did that triggered that because this was Mr. Sterns argument is that



1 there are different kinds of things banks can send. You can send one of  
2 these notices of default. You can file a judicial foreclosure. Or you can  
3 send -- quote, a quote, acceleration of a note.

4 MS. HANKS: Right.

5 THE COURT: So I've got no idea what was sent in any of  
6 these cases. It doesn't -- they don't' really tell us and explain to us here's  
7 the document that was sent that we consider to have made it, quote,  
8 "wholly due." They never tell us.

9 MS. HANKS: That's true, but I don't think you have to get  
10 there. I think you just have to reject the bank's absurd argument that  
11 when I make the entire loan due, I didn't make it wholly due. I don't even  
12 have -- I don't even know how to square that. What do you mean? You  
13 made the whole entire loan due. Where do you say I'm only electing to  
14 proceed on the installments here? Where do you say that? You don't.

15 In fact, you say all sums. We do -- we have, and we do  
16 hereby declare all sums secured thereby immediately due and payable.  
17 How is that ambiguous? It's not ambiguous. What are you telling the  
18 borrower? You're going to foreclose. You're foreclosing on the entire  
19 debt. Not that, oh, if you pay partial sums, and then here's the point,  
20 that's why I'm acknowledging this last paragraph would make no sense.  
21 Why would you be citing 107.080, which talks about acceleration and  
22 how there's a certain period in time, 35 days, where the borrower can  
23 pay less than the entire note to stay off foreclosure? That's what Nevada  
24 says.

25 Why would you be talking about that in your notice of default

1 if you only intended to foreclose on the installments that were due up  
2 until between September 1st, 2007 and January 1st, 2008? You don't say  
3 that. You don't say that anywhere. The bank doesn't say that. You read  
4 this in context. It says you normally had an installment contract that  
5 would mature in 2035, but you defaulted on September 1st, 2007.

6 Next paragraph, we're exercising our right under the deed of  
7 trust and we're now making -- we're declaring all sums due. There's no  
8 ambiguity there. None. That's just argument of counsel.

9 THE COURT: Okay. So then any time the -- a bank does that  
10 and then sends out this rescission and election -- of election to declare  
11 default -- say for example, somebody did something, made a payment,  
12 reinstated, did something, so they said, okay, we're going to rescind,  
13 which -- because these are not defined by statute. These particular --

14 MS. HANKS: What are not?

15 THE COURT: -- rescission.

16 MS. HANKS: Oh, rescission's not, correct.

17 THE COURT: The rescission comes with -- these type of  
18 notices are -- it's not something that's defined by statute anywhere, and  
19 it's a made up thing.

20 MS. HANKS: And if a -- yeah, if a borrower had paid, Your  
21 Honor, if a borrower had paid within this 35-day grace period and  
22 reinstated the loan, I would expect to see the rescission say that. That's  
23 exactly what the rescission should say. By virtue of payment or  
24 reinstatement under 107. --

25 THE COURT: Right.

1 MS. HANKS: It doesn't. Our rescission doesn't say that.

2 THE COURT: Okay. So you're saying that -- because again,  
3 rescission is a -- it's a made-up thing. It's not defined by statute how  
4 you, quote, "rescind."

5 MS. HANKS: Right.

6 THE COURT: So the -- because I've looked. So the -- in order  
7 to be -- I've looked specific enough under Clayton --

8 MS. HANKS: Correct.

9 THE COURT: -- it would need to say specifically that because  
10 you exercised your rights under -- I mean, if that was a different  
11 situation. If we were talking about somebody reinstated --

12 MS. HANKS: Right.

13 THE COURT: -- to specifically say that you've made your  
14 payments, and therefore we are reinstating you and withdrawing our  
15 previous acceleration. You don't have to pay everything right now.

16 MS. HANKS: Correct. Yes.

17 THE COURT: We're going back to our original terms.

18 MS. HANKS: That would -- yeah, that would -- yeah.

19 THE COURT: Okay.

20 MS. HANKS: I would expect to see that. Exactly. I would  
21 expect to see that.

22 THE COURT: Okay. So where do they just decide we're not  
23 going to go forward with the sale and they simply say we're looking to  
24 not go forward with the sale; we're going to pursue other remedies at  
25 some point in time.

1 MS. HANKS: Right.

2 THE COURT: The ten-year statute -- and again, I'm trying to  
3 figure out, I mean, it doesn't -- that statute doesn't make any sense as  
4 anything other than the, quote, "ancient mortgage statute." It's ten years  
5 from whatever date it was due. Because again, we're talking about on --  
6 in these commercial mortgages, dates that -- and notes that had very  
7 specific short-term dates. Like, you know, self-dealing companies who  
8 say I'm not going to expect any payments on this to your note because  
9 we're all just friends here.

10 That really offended the Court, and I understand why in that  
11 particular case they said -- you know, you can't do it this way. You can't  
12 just be self-dealing and then try to hold somebody else to your self-  
13 dealing, which is essentially what they were doing and -- in Pro Max.  
14 And the court said, no. No. No. No. No. You cannot do that.

15 MS. HANKS: But they didn't -- but in Pro -- that might have  
16 been the facts of Pro Max. You might have had a short note, a two-year  
17 note, but nowhere in Pro Max does the court qualify 106.240's operation  
18 because the note was short.

19 THE COURT: No, that's what I'm saying.

20 MS. HANKS: Yeah, so it doesn't matter if the note's long.

21 THE COURT: It makes sense in the context. It makes sense  
22 in the context of those cases. I understand the application in those  
23 cases. I'm not getting it here where -- because, as was pointed out, this  
24 is a very old statute and the whole concept of mortgages and deeds of  
25 trust sort of evolved over time and are creatures of statute, marginally,

1 except for this concept of rescission, which they just never defined for  
2 us, what is a proper rescission. I've looked for it.

3 MS. HANKS: But *Promax* is -- but *Promax* is the perfect case  
4 in the sense that no one knew about 106.240, right? They admit that.

5 THE COURT: Right.

6 MS. HANKS: Neither *Promax* knew it during the time of the  
7 divorce proceedings, Mary Ann and Jack Feenstra didn't know about it,  
8 and yet it still operates. It doesn't matter you don't know about it. It still  
9 operates.

10 THE COURT: Right.

11 MS. HANKS: So I don't believe the Court says anything in  
12 *Promax* that says, well, we're doing this because it offends us that you  
13 had self-dealings. No, they looked at the statute as an unambiguous,  
14 clear statute requiring no other interpretation. And that's what you're  
15 bound by. You don't have to get whether it makes sense. You don't  
16 have to get at whether how old it is. Old is old; doesn't matter. It's still  
17 good. There's nothing overturning 106.240, and certainly the legislature  
18 could do it if it wanted to. Heck, 116 was old by the time it came around  
19 and reared its ugly head for the banks.

20 THE COURT: Uh-huh.

21 MS. HANKS: It was old. It was almost 20 years old. But  
22 guess what, it affected them. It's still good law. They didn't get to argue,  
23 well, it's just so old, it's just been sitting here, and no one's been doing  
24 anything with it, so it doesn't get a -- it doesn't get enforced against us.  
25 No, that's 106.240 exactly.

1 THE COURT: Right. Okay. And so then again, just before we  
2 wrap up this argument here, the notice of default and election to sale is a  
3 very -- is a really specific thing and it specifically references the entire  
4 principle amount will become due on 12/1/2035, which is consistent with  
5 the deed.

6 MS. HANKS: Correct.

7 THE COURT: That language appears in the deed.

8 MS. HANKS: Correct.

9 THE COURT: So you can read this with the deed; it makes  
10 sense. Okay. And as a result of the maturity, the obligation on that date.  
11 So then it goes into this thing, but you -- the present beneficiary under  
12 the deed of trust has a written declaration of default and demand for sale  
13 and has deposited -- whatever, to go forward with this -- all evidence of  
14 the obligation secured thereby, which is interesting to me because  
15 where's the note?

16 MS. HANKS: It's in the proposed exhibit, Your Honor. The  
17 bank didn't seek to admit it, but --

18 THE COURT: I haven't seen it.

19 MS. HANKS: -- it's in there.

20 THE COURT: And --

21 MS. HANKS: A copy.

22 THE COURT: -- has declared -- and does hereby declare all  
23 sums secured, thereby immediately due and payable and has elected,  
24 and does hereby elect to cause the trust property to be sold to satisfy  
25 this obligation.

1 MS. HANKS: Right.

2 THE COURT: Okay. Fine. But they don't go forward with it.

3 MS. HANKS: Only the election itself.

4 THE COURT: They --

5 MS. HANKS: Only the election itself. That's the key.

6 THE COURT: Right. The don't go --

7 MS. HANKS: That's why I -- that's why I wanted -- that's why  
8 I wanted the ELMO to break up these two paragraphs. This notice of  
9 default does two things. It's that first sentence, declaring all sums due  
10 and payable, making the loan wholly due now.

11 THE COURT: Right.

12 MS. HANKS: Moving up that maturity date, no longer  
13 operating under the typical maturity date and waiting.

14 THE COURT: Right.

15 MS. HANKS: Okay. You go, now it's all due. We're going to  
16 come after all of it. And then the second part is after the and, and then  
17 elects to proceed under foreclosure under the deed of trust.

18 THE COURT: Okay. So this is why I want to go back to this  
19 concept that once you filed suit, and I understand why they said what  
20 they did in *Coyt*. Like, okay, you filed suit, but you dismissed it. Was it  
21 *Coyt* or was it the other one?

22 MS. HANKS: That's *Cadle*.

23 THE COURT: *Cadle*. Where you filed suit and like -- what,  
24 sometime in the 90s, and then you dismissed that. And so what is --  
25 because -- and that one it was very clear; they did a notice of default and

1 they filed their lawsuit.

2 MS. HANKS: Right.

3 THE COURT: And when they dismissed their lawsuit, they  
4 didn't specifically say, oh, we'll reinstate everything.

5 MS. HANKS: Correct.

6 THE COURT: Okay. That one makes sense to me. I get that.  
7 So I'm just not understanding what's the affect where you send out that  
8 notice of default election to sale. It doesn't go forward for whatever  
9 reason, but there's a litigation, and the litigation is, you know, we think  
10 we've got title to this property. So why does that -- the litigation not  
11 protect the bank?

12 MS. HANKS: Because the litigation is not judicial  
13 foreclosure. It's not judicial foreclosure.

14 THE COURT: Okay. But --

15 MS. HANKS: Not once have they brought an enforcement  
16 action. This is not an enforcement action.

17 THE COURT: Right.

18 MS. HANKS: You are -- no matter what you do today, if you  
19 reject my 106 argument and you find they tenured, you will not find --  
20 make a finding that they can enforce the deed of trust.

21 THE COURT: Right.

22 MS. HANKS: That they can foreclose. This will not be a  
23 foreclosure. They will still have to issue a notice of default --

24 THE COURT: Right.

25 MS. HANKS: -- and a notice of sale and either go through the



1 nonjudicial foreclosure process or do a judicial foreclosure. They will  
2 still have to do that process, period.

3 THE COURT: Right.

4 MS. HANKS: And that's where it makes no sense when  
5 counsel says, well, why are we arguing this? I could have not argued  
6 106 today. I could have had you -- we could have had you find, well, it's  
7 at least survived the 116 sale, and then when they immediately filed a  
8 notice of default, I would have brought an action and claimed 106.240  
9 just like *Promax*. We would have been right back to square one, so why  
10 not bring it in the action where you're trying to say the deed of trust is  
11 not extinguished. I'm saying it's extinguished for just another reason.

12 THE COURT: Right.

13 MS. HANKS: But this action is not an enforcement action.  
14 That's where it differs from *Cadle*. But where *Cadle* is helpful and  
15 instructive is that we do have similar conduct. In other words, we have a  
16 notice of default that makes the loan wholly due, and then exercises the  
17 power of sale, right? The only difference in *Cadle* is their judicial  
18 foreclosure action exercised the power of sale. That's how they did it,  
19 right?

20 And then -- and in fact, Your Honor, I don't think they did a  
21 notice of default in *Cadle*. I think the judicial foreclosure did the both, did  
22 the effect of the notice of default here and made the loan wholly due,  
23 and they usually allege that in judicial foreclosure because they have to  
24 if they want to foreclose in the whole lien, and then they actually are  
25 exercising the power of sale via the lawsuit, the judicial foreclosure.

1                   And that's exactly -- and so why *Cadle* is instructive is, it  
2 does those two things, right? The notice of default does those two  
3 things. But the problem with the rescission, it only rescinded the  
4 election to sell. Election to proceed to sale, and that's exactly what *Cadle*  
5 talked about. The fact that you dismissed your judicial foreclosure  
6 action, all it did was basically rescinded your election to proceed through  
7 judicial foreclosure. It doesn't unwind the fact that you made the loan  
8 wholly due.

9                   That's exactly what we have here; we just have different  
10 mechanisms by which they did the wholly due clause and the election to  
11 proceed to sale. That's it. But *Cadle* is exactly on point. It tells this court  
12 what it should do. It has to find that that rescission is not clear and  
13 unequivocal. If you intended bank to rescind this first clause where you  
14 said all sums secured thereby immediately due and payable, you should  
15 have said that in your rescission.

16                  Instead, you used language and said shall not be construed  
17 to affect that default and should only be construed -- shall only be  
18 construed as just not opting the election, just the second clause. So  
19 *Cadle* is exactly on point. And I don't think you should get bogged down  
20 when we get back to *Promax*. Don't get bogged down in whether these  
21 cases don't have exactly the same type of note or exactly the same type  
22 of maturity. Wholly due is wholly due.

23                  Maturity date can be different from one note versus another  
24 note. The bottom line is if you change the date, if you make the whole  
25 thing completely due, you've triggered 106.240. nowhere in the *Promax*

1 case does it ever make a mention that it's only because it was two years  
2 that we're finding this. They went on a strict statutory interpretation and  
3 that's all we're asking for the Court to do here. We don't have to make  
4 sense of it. We don't have to worry about it being old. We don't even  
5 have to worry about it being draconian I think is what Mr. Stern said.  
6 Sorry. That's where you are. You're in Nevada.

7           You had all the power not to make your loan wholly due.  
8 You had all the power in March of 2008 to make your rescission actually  
9 count and rescind both the things you did with your notice of default.  
10 You didn't. Shame on you. It's not draconian.

11           THE COURT: Well, I understand that it's not a judicial  
12 foreclosure, but it's a quiet title. Don't they have a quiet title claim?

13           MS. HANKS: Whatever that means. I mean, it's just an  
14 action saying their money incumbrance is still there, which is why I think  
15 106.240 is a legitimate argument at this point.

16           THE COURT: Uh-huh.

17           MS. HANKS: We can argue two things. We argued one that  
18 the sale was valid, and it was still -- and it did extinguish now. They  
19 claim we knew about tender. That's not true. We don't know until really  
20 today, frankly, because it was in dispute whether it was actually  
21 delivered. And then the other reason why it's extinguished is  
22 irrespective of the NRS 116 sale. You have 106.240 that you triggered,  
23 bank. You triggered it by your own actions.

24           THE COURT: Uh-huh.

25           MS. HANKS: And you failed to untrigger it. That's on you.

1 There's nothing draconian about that. Know the law; know the state  
2 you're in and operate accordingly. You don't get to come to court and  
3 cry foul because you made your loan wholly due in 2008 and then just  
4 sat back.

5 THE COURT: Okay. Okay. All right. I'm going to deny the  
6 motion. I believe having asserted a claim for quiet title, they've  
7 protected their interest here. I don't see how -- otherwise, why would  
8 you do it? It just it doesn't make any sense to me. And I do believe that  
9 this is intended to be a statute to clear up title where people have -- I did  
10 one of these a week ago where there was a cloud on a chain of title and  
11 cleared the cloud on the chain of title.

12 I don't believe this is what this is intended to do if you do  
13 something to protect your interest, and they filed the quiet title. I just  
14 don't see how it can be construed any other way. So denying that, were  
15 there any defense witnesses?

16 MS. HANKS: No, Your Honor.

17 THE COURT: Okay. All right. Any other witnesses -- I mean,  
18 are you going to pursue this rebuttal issue any further or?

19 MS. MORGAN: No, we don't have anything else.

20 THE COURT: Okay. All right. Great. So what? Because as  
21 Ms. Hanks pointed out, this isn't a foreclosure action. So what's the  
22 relief you're looking for?

23 MS. MORGAN: What's the relief?

24 THE COURT: Uh-huh.

25 MS. MORGAN: The deed of trust survived the Chapter 116

1 sale.

2 THE COURT: Okay.

3 MS. MORGAN: We have the evidence that was admitted that  
4 delivery did, in fact, take place because the Miles Bauer letter and check  
5 was in Alessi and Koenig's file. All of the other facts pertinent to the  
6 tender analysis were determined through summary judgment and that  
7 was the only remaining issue with respect to tender. So under *Diamond*  
8 *Spur*, the deed of trust survived the sale due to the pre-sale of tender.

9 THE COURT: Okay. And so because your quieting title,  
10 whatever rights you have under your deed of trust --

11 MS. MORGAN: Right. SFR took its title subject to the deed  
12 of trust.

13 THE COURT: So Ms. Hanks argument that somebody else is  
14 going to decide this. Because if you decide you're going to foreclose on  
15 this, she'll bring it up again and somebody else might decide differently  
16 from me because I'm -- in that ruling, I don't see how I can tell somebody  
17 else what to do.

18 MR. STERN: So if you don't mind us sharing the argument  
19 here, Your Honor because I've been sort of focusing on the 106.240  
20 issue, I think that's it. I think 106.240 has to be decided in the opposition  
21 to Ms. Hanks' motion, as well -- I should say SFR's motion as well as the  
22 objection to Exhibit 33. It was never before the Court in the first place.  
23 That's why when Ms. Hanks on reply conceded that you don't have to  
24 call it a statute to repose, that takes it out of affirmative defense. A, that  
25 means it was never raised before the Court. So SFR can raise it. We can

1 raise it. Maybe they're timely. Maybe they're untimely. Maybe we're  
2 timely; maybe we're untimely. Maybe they're right; maybe we're wrong.  
3 Who knows. Different case.

4 THE COURT: Correct. So --

5 MR. STERN: Different case.

6 THE COURT: -- I am ruling just in this particular case that I  
7 believe that your quiet title action survives 106.240 because it was raised  
8 in the -- I think the answer to the interpleader action.

9 MR. STERN: Yes. We expanded the interpleader to join the  
10 other claims.

11 THE COURT: Joined all parties.

12 MR. STERN: Joined all claims, joined all parties.

13 THE COURT: So it didn't just defend the interpleader.

14 MR. STERN: Right.

15 THE COURT: Brought everything else in and by seeking --

16 MR. STERN: Yeah.

17 THE COURT: -- quiet title. And I can see this is not a judicial  
18 foreclosure action.

19 MR. STERN: It's not.

20 THE COURT: I am not ordering foreclosure. As was pointed  
21 out, this does nothing other than --

22 MR. STERN: It doesn't even require the bank to foreclose.  
23 We can then take 50 years and then make SFR say the argument again.  
24 It'd be real stupid for us to do that, but the Court's order I don't think  
25 would mandate or not mandate anything like that.

1 THE COURT: Okay. I'm not saying what strategically you're  
2 doing here. I do think that it's --

3 MR. STERN: Right.

4 THE COURT: -- I may have a point. But it says 2035, so --

5 MR. STERN: The only thing --

6 THE COURT: -- 2045.

7 MR. STERN: -- the only reservation of rights I would have,  
8 Your Honor, is that I'm speaking here about the remedy.

9 THE COURT: Uh-huh.

10 MR. STERN: That nobody's asked the Court to do anything  
11 else.

12 THE COURT: Right.

13 MR. STERN: However --

14 THE COURT: And that's --

15 MR. STERN: -- I think both sides would be free to bring  
16 things like claim preclusion, issue preclusion if those elements are met in  
17 a future --

18 THE COURT: This is why I want --

19 MR. STERN: -- action.

20 THE COURT: -- this is why I want to make it really clear what  
21 you want in this order.

22 MR. STERN: I think what we want in this order is a finding --  
23 I almost called you Ms. Hanks -- as Ms. Morgan said, a declaratory order  
24 that our deed of trust survived; that there was nothing else placed at  
25 issue.

1 THE COURT: Because of the tender issue survived.

2 MR. STERN: Right, because of the tender issue.

3 THE COURT: The issue itself. There was a perfected tender.

4 MR. STERN: I mean, if I want it to be fully expressing what  
5 we would want in this order, I think the Court's order can and perhaps  
6 should include a statement that SFR could have properly, in this  
7 litigation, brought the 106.240 issue, but didn't. Because that would be  
8 relevant to claim preclusion and issue preclusion in the future. But I  
9 think the Court can omit that from its order and not really bind the  
10 subsequent judge one way or the other as to whether claim or issue  
11 preclusion arise. I think on both sides those are going to be issues we're  
12 going to have to fight through. But the remedy we asked for here was on  
13 the claims that were actually before the Court.

14 THE COURT: Okay.

15 MR. STERN: And that was the quiet title issue. In our view,  
16 106.240 was never before the Court.

17 THE COURT: Got it. Ms. Hanks.

18 MS. HANKS: Okay. So I'm confused.

19 THE COURT: Uh-huh.

20 MS. HANKS: Because if I have counsel saying that the  
21 106.240 issue is not being decided by this Court, then there can be no  
22 claim or issue preclusion later. If it is decided, then I need the findings  
23 so that I can appeal it. That's the problem.

24 THE COURT: And see, that's my question.

25 MR. STERN: Judge --



1 MS. HANKS: Yes. If he wants to say it's not decided, and it's  
2 completely open, there is no issue preclusion or claim preclusion, that's  
3 one thing.

4 MR. STERN: But let's --

5 MS. HANKS: But we can't be half in, half out.

6 MR. STERN: Let me be clear about that, Judge.

7 MS. HANKS: Because I need findings that I have to appeal if  
8 that's going to be the issue.

9 MR. STERN: Let me be clear about that, Judge. The law, as I  
10 understand it, and we just had a difficult argument in the Ninth Circuit,  
11 so I think we know this law pretty well right now, is on the subject of  
12 claim preclusion, it applies to, as long as the parties are in privity, et  
13 cetera, et cetera, it applies to any claims that were or could have been  
14 brought. So the fact that 106.240 is not before the Court is not preclusive  
15 of a claim preclusion issue later on; however, it would be preclusive of  
16 issue preclusion.

17 THE COURT: Okay.

18 MR. STERN: That's what I'm saying.

19 THE COURT: Okay . well, but here -- so here's why I was  
20 saying -- you know, what exactly are we putting in here? Because a  
21 defense was raised. A Rule 52 motion was made at the conclusion of  
22 your Case in Chief, and I ruled against them as a matter of law.

23 MR. STERN: In that case, Judge, I think the Court's order  
24 should be that you've considered it on the merits and ruled against it.

25 THE COURT: Okay. But I believe that Ms. Hanks is correct

1 that there needs to be a record --

2 MS. HANKS: Right. So I need --

3 THE COURT: -- of what that ruling was.

4 MS. HANKS: Yes.

5 THE COURT: And so I considered the 106.240 defense. I  
6 denied the Rule 52 motion on the grounds that I believe that filing the  
7 quiet title action has stayed the preclusive effect of 106.240.

8 MR. STERN: Right.

9 THE COURT: Because it's you're no longer suing those  
10 people on that mortgage. You didn't sue them on that mortgage.

11 MR. STERN: Right. I think that's sufficient, Your Honor. If I  
12 may, there's one -- you know --

13 THE COURT: Who is quieting title in -- your own title in this  
14 property and I don't think 106.240 bars you doing that.

15 MR. STERN: I think that's sufficient for our needs and for us  
16 so far as we can deal with it at appellate argument. However, we -- I  
17 think that's enough for both sides.

18 THE COURT: So --

19 MR. STERN: But I do --

20 MS. HANKS: Yeah, I would -- sorry.

21 MR. STERN: -- I do want to say one thing. I know you've  
22 already made up your mind. I just want to preserve in our -- an issue for  
23 appeal and that is one of the things, one of the prejudices that -- because  
24 I understand that you considered 106.240, but one of the reasons we  
25 argued initially you shouldn't consider it at all because it's not before the

1 Court --

2 THE COURT: Right.

3 MR. STERN: -- is because if it had been timely raised in  
4 litigation, we would have had rights to amend our -- the relief we wanted  
5 to seek reformation of Exhibit 34 to make clear that that was a fully clear  
6 recessionary document.

7 THE COURT: Okay.

8 MR. STERN: I just wanted to get that on the record.

9 THE COURT: Okay. But here's -- 106.240 deals with the  
10 mortgage.

11 MR. STERN: Uh-huh.

12 THE COURT: And it's -- the mortgage is with these people  
13 who have been defaulted.

14 MR. STERN: Right.

15 THE COURT: They're not here anymore. It's a separate  
16 buyer.

17 MR. STERN: Sure.

18 THE COURT: Which is why I thought it was interesting in Pro  
19 Max they specifically talk about the intention -- the District Court said the  
20 intention of the statute is to protect VFPs. That's them. And the  
21 Supreme Court said, no, it's not. It's not about protecting them. So what  
22 is --

23 MR. STERN: Your Honor, I don't think I'm going to have a  
24 better answer than what you've already given.

25 THE COURT: Interesting point.

1 MR. STERN: Yeah.

2 THE COURT: So what my view here is that once you have  
3 filed to quiet your title, and you're not following through on that hold out  
4 mortgage stuff, you have title. A quieted title. Now, I get their point that  
5 I have not judicially foreclosed, but what's a quiet title action?

6 MR. STERN: Right. I think you've determined the rights.

7 THE COURT: Yeah.

8 MS. HANKS: I just need clarification, so I know what the  
9 order's going to read.

10 THE COURT: Exactly.

11 MS. HANKS: They're probably going to take a stab at  
12 drafting it.

13 THE COURT: Yeah.

14 MS. HANKS: So are you making any findings that the notice  
15 of default did make the loan wholly due and that just simply because  
16 they filed their quiet title action that stayed or tolled the ten-year  
17 timeline? That's just where I'm confused.

18 MR. STERN: I don't think you have to reach that, Judge.

19 THE COURT: I don't think I have to reach it. I don't think it  
20 applies.

21 MS. HANKS: So you don't think 106.240 applies?

22 THE COURT: No because this is, as you pointed out, not a  
23 judicial foreclosure action. It's not against some third party. They've  
24 already told us in this other case we're not here to protect third parties. I  
25 don't know why we have it if we're not, but the Supreme Court said it's

1 not to protect third parties. Fine. What is it for? It's to protect  
2 somebody who owes a debt on a mortgage. It's going to be gone after  
3 ten years so that you can clear up your title. Because like I said, I did one  
4 of these like last Thursday. So what have they done? They've protected  
5 their title interest because they've said we want a declaration that the  
6 title should be quieted in the /name of Bank of America. Okay.

7 MR. STERN: I think that's sufficient, and then we'll prepare  
8 the order. Obviously, run it by counsel. I think we understand the  
9 Court's conclusions.

10 THE COURT: Right. But my point being, you have to have it  
11 in there.

12 MR. STERN: Yes.

13 THE COURT: I appreciate your argument that all I need to do  
14 is just say tender, but you've got to have it in there because --

15 MR. STERN: Our order will include your findings about the --  
16 consistent with *Promax*, the purpose of the statute and how it doesn't  
17 apply here for the reasons you've told us, which is that the original  
18 borrowers are gone. This is a transaction involving SFR --

19 THE COURT: Not a third party.

20 MR. STERN: -- a litigation involving [indiscernible] the bank.  
21 You have made a legal determination the statute doesn't apply. A  
22 factual determination on tender, the deed of trust survives, and that's all  
23 we're going to say.

24 THE COURT: Right. I mean --

25 MR. STERN: Yeah. Any way of --

1 THE COURT: -- I guess -- because that's my point.

2 MR. STERN: Right.

3 THE COURT: I'm not understanding why you would -- and  
4 that's why I kind of never understood where Judge Boulware went with  
5 this. Why? You don't have the person who's the noteholder in the case?

6 MR. STERN: Exactly.

7 THE COURT: What does it matter? You're not suing on a  
8 note.

9 MR. STERN: Right, so --

10 THE COURT: You're not suing anybody on this note.

11 MR. STERN: No. No, there's not --

12 THE COURT: I just don't get it.

13 MR. STERN: -- it's just the ram -- eventually --

14 THE COURT: It's just -- my problem is I think it's bizarre. I  
15 don't understand. And that's why I found it really weird that the  
16 Supreme Court so firmly disagreed with the idea that this was to protect  
17 VFPs. Why else would you have that statute but to protect VFPs? It  
18 doesn't make any sense that they said, no, it's not.

19 MR. STERN: Judge, my personal view, maybe I shouldn't get  
20 into this, but I will. It's just an ancient mortgage statute that tended to  
21 clean up --

22 THE COURT: I think it is an ancient statute. And I wish that  
23 they had actually quoted in that footnote in the Mining case, quoted the  
24 statute for us so we'd know that's specifically what they're talking about.

25 MR. STERN: This was just a housekeeping statute. That's all

1 it is. It doesn't give anybody an assignment to rights.

2 THE COURT: I wish they had talked about it, but they didn't.

3 MS. HANKS: What is a housekeeping statute? That is  
4 hilarious.

5 THE COURT: No, it has very real meaning.

6 MS. HANKS: I just want to make sure -- okay. Because I  
7 don't know what a housekeeping statute is.

8 THE COURT: It's to clear up the chain of title. Absolutely to  
9 clear up --

10 MS. HANKS: It's to clear up title. Okay.

11 THE COURT: -- it is absolutely to clear up the chain of title.

12 MS. HANKS: Can I have clarification, though, that because  
13 you believe it's not applicable here because they're not doing an  
14 enforcement action --

15 THE COURT: Right.

16 MS. HANKS: -- you would not make any -- if they do do a  
17 judicial foreclosure or nonjudicial foreclosure, then I might have standing  
18 to bring it and now we're talking about a whole different --

19 THE COURT: Who are they going to foreclose against?

20 MS. HANKS: SFR. We're the title owner. That's who they're  
21 going to foreclose against.

22 THE COURT: That's quite title.

23 MR. STERN: Yeah.

24 THE COURT: Didn't we just do that here?

25 MS. HANKS: No, you did not foreclose. Title is not going to

1 transfer to them, that's the point.

2 MR. STERN: I think --

3 MS. HANKS: They only have a money incumbrance that still  
4 exists on the property. That's all this says.

5 THE COURT: Okay.

6 MS. HANKS: I got to be clear on that.

7 THE COURT: Interesting.

8 MS. HANKS: If you're doing that, then I got to appeal that.

9 My understanding is title is not transferring today. It won't transfer  
10 tomorrow. If they record your findings of fact and conclusions of law, all  
11 it says is that their deed of trust encumbers the property.

12 MR. STERN: SFR will continue to be the owner --

13 THE COURT: Right.

14 MS. HANKS: That's it.

15 MR. STERN: -- of the property until such time as the bank  
16 does something to enforce the foreclosure remedy.

17 THE COURT: Right.

18 MS. HANKS: Which will be nonjudicial foreclosure.

19 MR. STERN: Which could be either nonjudicial or --

20 THE COURT: And that's what I said.

21 MR. STERN: -- judicial, it could be at any time.

22 THE COURT: It's got nothing to do with the mortgage note,  
23 though.

24 MR. STERN: Yeah.

25 THE COURT: It doesn't have anything -- that's why I said, we



1 didn't have --

2 MR. STERN: We will have deficiency rights against SFR.

3 THE COURT: The note's not in the record. I just want to  
4 make it very clear. Nobody admitted the note.

5 MR. STERN: But we cannot sue SFR for money. We have no  
6 deficiency rights against them.

7 THE COURT: That's why I made it clear.

8 MR. STERN: Yes.

9 THE COURT: The note -- nobody brought in the note. It's not  
10 about the note.

11 MR. STERN: Correct. This is not about enforcing the  
12 monetary obligation. It's about the rem enforcing against the property.

13 THE COURT: Correct. Right. And all I'm saying is I'm  
14 quieting title. Whatever remedies you guys pursue after that and I  
15 understand another person at a later time might disagree with my  
16 analysis. So that's why I said I think you need to make sure it's in here.  
17 And how you term -- so I would appreciate it if you would work together  
18 on that because as I said, I know this is going to get appealed.

19 So I believe you need to have something in here that  
20 explains this. That on a quiet title action is just to pursue on your -- a  
21 declaration as to your title, didn't draw that. The quiet title as to your  
22 deed of trust survives.

23 MR. STERN: Uh-huh.

24 THE COURT: I agree with you on that.

25 MR. STERN: Okay.

1 THE COURT: And I think that filing that lawsuit saved it, and I  
2 don't think that the 106.240 --

3 MR. STERN: Applies.

4 THE COURT: -- applies. The person who had the mortgage  
5 isn't there.

6 MR. STERN: Right.

7 THE COURT: Which is why they went off and they dealt with  
8 the other part in *Promax*, in another court.

9 MR. STERN: I think we have it, Judge. I think we're clear.

10 THE COURT: I don't understand why we would have it if it's  
11 not to protect VFPs. But anyway, strange. All right.

12 MR. STERN: Thank you, Judge.

13 MS. HANKS: Thank you.

14 MS. MORGAN: Thank you.

15 THE COURT: You're going to show that, please, to --

16 MR. STERN: Yes.

17 THE COURT: -- Ms. Hanks before you send it over, and we  
18 will --

19 MR. STERN: And I owe Ms. Hanks comments on that other  
20 order.

21 THE COURT: All right. And then I'm sure the clerk will be in  
22 touch with you guys to pick up your exhibit books because, so little came  
23 in, we'll be happy to return these to you. So we'll have Lorna -- Lorna  
24 can return any -- do you want any unadmitted exhibits returned?

25 MS. HANKS: No.