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 20 2021 03:58 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

AMENDED JOINT APPENDIX VOLUME 7

Respectfully submitted by:

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Attorneys for Appellant
SFR Investments Pool 1, LLC

ALPHABETICAL INDEX

Vol.	Tab	Date Filed	Document	Bates Number
1	4	10/05/2015	Alessi & Koenig, LLC's Answer to U.S. Bank, N.A.'s Counterclaim	JA_0152
8	49	09/08/2020	Amended Case Appeal Statement	JA_1735
8	50	09/08/2020	Amended Notice of Appeal	JA_1742
7	36	10/22/2019	Amended Scheduling Order and Order Setting Civil Non-Jury Trial	JA_1514
6	30	01/14/2019	Appendix of Exhibits for Nationstar Mortgage, LLC's Motion for Reconsideration and/or to Alter/Amend Judgment Pursuant to E.D.C.R. 2.27	JA_1246
2	13	06/29/2018	Appendix of Exhibits for Nationstar Mortgage, LLC's Motion for Summary Judgment Pursuant to E.D.C.R. 2.27	JA_0343
3	13	Continued	Appendix of Exhibits for Nationstar Mortgage…	JA_0479
7	30	Continued	Appendix of Exhibits for Nationstar Mortgage…	JA_1435
1	1	08/14/2014	Complaint in Interpleader	JA_0001
3	14	06/29/2018	Cross-Defendant Nationstar Mortgage, LLC's Motion for Summary Judgment	JA_0583
6	29	01/14/2019	Defendant Nationstar Mortgage, LLC's Motion for Reconsideration and/or to Alter/Amend Judgment	JA_1215
7	31	01/24/2019	Errata to Defendant Nationstar Mortgage, LLC's Motion for Reconsideration and/or to Alter/Amend Judgment	JA_1449
5	27	11/29/2018	Findings of Fact and Conclusions of Law in favor of SFR	JA_1180
8	43	04/30/2020	Findings of Fact, Conclusions of Law and Judgment	JA_1675

7	39	02/05/2020	Joint Pretrial Memorandum	JA_1527
8	48	08/12/2020	Nationstar Mortgage LLC and U.S. Bank National Association, as Trustee for the Certificateholders of the LXS 2006-4N Trust Fund's Notice of Cross-Appeal	JA_1731
8	47	08/12/2020	Nationstar Mortgage LLC and U.S. Bank, National Association, as Trustee for the Certificateholders of the LXS 2006-4N Trust Fund's Case Appeal Statement	JA_1725
2	10	03/21/2016	Nationstar Mortgage, LLC and U.S. Bank N.A. as Trustee for the Certificateholders of the LXS 2006-4N Trust Fund's Answer to SFR Investments Pool 1, LLC's Third Party Counterclaims	JA_0324
1	2	11/17/2014	Nationstar Mortgage, LLC's Answer	JA_0032
6	28	12/26/2018	Notice of Entry of Findings of Fact and Conclusions of Law in favor of SFR	JA_1196
8	44	05/04/2020	Notice of Entry of Findings of Fact, Conclusions of Law and Judgment	JA_1684
7	34	06/28/2019	Notice of Entry of Order Granting Nationstar Mortgage, LLC's Motion for Reconsideration and to Alter/Amend Judgment	JA_1501
8	46	08/11/2020	Notice of Entry of Stipulation and Order to Certify the Findings of Fact, Conclusions of Law, and Judgment, Entered April 30, 2020 As to Nationstar Mortgage LLC, U.S. Bank, N.A. and SFR Investments Pool 1, LLC	JA_1709
2	11	06/20/2016	Notice of Voluntary Dismissal of Kristin Jordal, as Trustee for the JBWNO Revocable Living Trust, a Trust without Prejudice	JA_0335
7	38	01/13/2020	Objections to Amended Pre-Trial Disclosures	JA_1522
5	25	08/23/2018	Objections to Pre-Trial Disclosures	JA_1139
5	24	08/16/2018	Objections to SFR Investments Pool 1, LLC's Pretrial Disclosures	JA_1133

3	17	07/19/2018	Opposition to SFR Investments Pool 1, LLC's Motion for Summary Judgment	JA_0704
4	17	Continued	Opposition to SFR Investments Pool 1, LLC's Motion for Summary Judgment	JA_0718
2	8	02/25/2016	Order Denying SFR's Motion to Dismiss Plaintiff's Third-Party Complaint Pursuant to NRCP 12(b)(6)	JA_0297
2	12	03/22/2018	Order Granting Nationstar Mortgage LLC's Motion to Reopen Discovery and Continue Trial Date	JA_0339
7	35	06/28/2019	Order Granting Nationstar Mortgage, LLC's Motion for Reconsideration and to Alter/Amend Judgment	JA_1509
7	41	02/06/2020	Proposed Findings of Fact, Conclusions of Law and Judgment	JA_1551
7	42	02/28/2020	Recorder's Transcript of 2/10/2020 Bench Trial	JA_1561
8	42	Continued	Recorder's Transcript of 2/10/2020 Bench Trial	JA_1674
8	51	09/11/2020	Recorder's Transcript of 3/26/2019 Hearing on Pending Motion for Reconsideration and/or to Alter/Amend Judgment	JA_1747
5	26	09/14/2018	Recorder's Transcript of Hearing: Cross-Defendant Nationstar Mortgage, LLC's Motion for Summary Judgment Counter Claimant SFR Investment Pool 1, LLC's Motion for Summary Judgment	JA_1144
5	22	08/07/2018	Reply in Support of Cross-Defendant Nationstar Mortgage, LLC's Motion for Summary Judgment	JA_1047
7	33	03/19/2019	Reply in Support of Defendant Nationstar Mortgage, LLC's Motion for Reconsideration and/or to Alter/Amend Judgment	JA_1476
3	15	06/29/2018	SFR Investments Pool 1 LLC's Motion for Summary Judgment	JA_0611

4	18	07/20/2018	SFR Investments Pool 1 LLC's Opposition to Cross-Defendant Nationstar Mortgage LLC's Motion for Summary Judgment and U.S. Bank, N.A. as Trustee for the Certificate holders of the LXS 2006-4N Trust Fund's Joinder to Nationstar Mortgage, LLC's Motion (Errata)	JA_0723
7	32	02/01/2019	SFR Investments Pool 1 LLC's Opposition to Defendant Nationstar Mortgage, LLC's Motion for Reconsideration and/or to Alter/Amend Judgment	JA_1454
5	18	Continued	SFR Investments Pool 1 LLC's Opposition to…	JA_0956
5	20	07/24/2020	SFR Investments Pool 1 LLC's Reply in Support of its Motion for Summary Judgment	JA_1029
7	40	02/05/2020	SFR Investments Pool 1, LLC Trial Brief	JA_1538
2	9	03/14/2016	SFR Investments Pool 1, LLC's Answer to Third-Party Complaint, Counterclaim and Cross-Claim	JA_0301
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
5	21	08/02/2018	SFR Investments Pool 1, LLC's Pre-trial Disclosures	JA_1042
2	7	01/27/2016	SFR Investments Pool 1, LLC's Reply in Support of Motion to Dismiss for Failure to Join Indispensable Parties	JA_0290
8	45	07/17/2020	Stipulation and Order to Certify the Findings of Fact, Conclusions of Law and Judgment, Entered April 30, 2020 as to Nationstar Mortgage, LLC, U.S. Bank, N.A. and SFR Investments Pool 1, LLC	JA_1697
7	37	10/23/2019	Stipulation to Reopen Closed Case and Reset Trial Dates	JA_1518
8	53	02/10/2020	Trial Exhibit 19- Trustee's Deed Upon Sale (WFZ00148-WFZ00149)	JA_1798
8	54	02/10/2020	Trial Exhibit 26 – Alessi & Koenig File	JA_1801

9	54	Continued	Trial Exhibit 26 – Alessi & Koenig File	JA_1913
8	52	2/10/2020	Trial Exhibit 3- Deed of Trust (WFZ0094-WFZ00121)	JA_1771
9	55	02/10/2020	Trial Exhibit 33- Notice of Default and Election to Sell under Deed of Trust (SFR29-SFR30)	JA_2100
9	56	02/10/2020	Trial Exhibit 34- Rescission of Notice of Default and Election to Sell under Deed of Trust (SFR32)	JA_2103
1	6	12/24/2015	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.'s Opposition to SFR Investment Pool 1, LLC's Motion to Dismiss Pursuant to 12(b)(6)	JA_0184
2	6	Continued	U.S. Bank National Association as Trustee for the Certificateholders of the LXS 2006-4N…	JA_240
5	19	07/20/2018	U.S. Bank, N.A. as Trustee for the Certificate holders of the LXS 2006-4N Trust Fund's Joinder to Nationstar Mortgage LLC's Opposition to SFR Investments Pool 1, LLC's Motion for Summary Judgment	JA_1025
3	16	07/02/2018	U.S. Bank, N.A. As Trustee for the Certificateholders of the LXS 2006-4N Trust Fund's Joinder to Nationstar Mortgage LLC's Motion for Summary Judgment	JA_0700
5	23	08/08/2018	U.S. Bank, N.A. as Trustee for the Certificateholders of the LXS 2006-4N Trust Fund's Joinder to Nationstar Mortgage LLC's Reply in Support of Motion for Summary Judgment	JA_1129
1	3	08/18/2015	U.S. Bank, N.A.'s Answer, Counterclaim, and Third-Party Complaint	JA_0044

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Vol.	Tab	Date Filed	Document	Bates Number
1	1	08/14/2014	Complaint in Interpleader	JA_0001
1	2	11/17/2014	Nationstar Mortgage, LLC's Answer	JA_0032
1	3	08/18/2015	U.S. Bank, N.A.'s Answer, Counterclaim, and Third-Party Complaint	JA_0044
1	4	10/05/2015	Alessi & Koenig, LLC's Answer to U.S. Bank, N.A.'s Counterclaim	JA_0152
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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3	13	Continued	Appendix of Exhibits for Nationstar Mortgage…	JA_0479
3	14	06/29/2018	Cross-Defendant Nationstar Mortgage, LLC's Motion for Summary Judgment	JA_0583
3	15	06/29/2018	SFR Investments Pool 1 LLC's Motion for Summary Judgment	JA_0611
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5	20	07/24/2020	SFR Investments Pool 1 LLC's Reply in Support of its Motion for Summary Judgment	JA_1029
5	21	08/02/2018	SFR Investments Pool 1, LLC's Pre-trial Disclosures	JA_1042
5	22	08/07/2018	Reply in Support of Cross-Defendant Nationstar Mortgage, LLC's Motion for Summary Judgment	JA_1047
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7	30	Continued	Appendix of Exhibits for Nationstar Mortgage…	JA_1435
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8	44	05/04/2020	Notice of Entry of Findings of Fact, Conclusions of Law and Judgment	JA_1684

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9	56	02/10/2020	Trial Exhibit 34- Rescission of Notice of Default and Election to Sell under Deed of Trust (SFR32)	JA_2103

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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.

EXHIBIT “U”

DAVID ALESSI*

THOMAS BAYARD *

ROBERT KOENIG**

RYAN KERBOW***

* Admitted to the California Bar

** Admitted to the California, Nevada and Colorado Bars

*** Admitted to the Nevada and California Bar

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RENO NV
PHONE: 775-626-2323
&
DIAMOND BAR CA
PHONE: 909-861-8300

FACSIMILE COVER LETTER

To:	Alex Bhame	**Re:**	5327 Marsh Butte St./HO #6601
From:	Aileen Ruiz	**Date:**	Monday, September 13, 2010
Fax No.:		**Pages:**	1, including cover
		HO #:	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
Total		$935.00

1.	**Attorney and/or Trustees fees:**	$935.00
2.	**Costs (Notary, Recording, Copies, Mailings, Publication and Posting)**	$550.00
3.	**Assessments Through October 15, 2010**	$1,284.00
4.	**Late Fees Through September 13, 2010**	$10.00
5.	**Fines Through September 13, 2010**	$0.00
6.	**Interest Through September 13, 2010**	$0.00
7.	**RPIR-GI Report**	$85.00
8.	**Title Research (10-Day Mailings per NRS 116.31163)**	$240.00
9.	**Management Company Audit Fee**	$200.00
10.	**Management Document Processing & Transfer Fee**	$250.00
11.	**Progress Payments:**	$0.00
Sub-Total:		$3,554.00
Less Payments Received:		$0.00
Total Amount Due:		$3,554.00

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.

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

ALESSI KOENIG
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

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, Bergrstom & 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 Asociation*, 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 *
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* CALIFORNIA OFFICE
1231 E. DYER ROAD
SUITE 100
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PHONE (714) 481-9100
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MILES, BAUER, BERGSTROM & WINTERS, LLP
ATTORNEYS AT LAW SINCE 1985

2200 Paseo 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

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			

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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
10-H1641
Loan # 121434068

5169

Date: 9/28/2010

Amount $**** 207.00

Check Void After 90 Days

Pay $*****Two Hundred Seven & No/100 Dollars
to the order of
Alessi & Koenig, LLC

Security features. Details on back.

JA_1444

⑈5169⑈ ⑆122400724⑆ 501006[illegible] NATIONSTAR00176

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

Make check payable to: Shadow Mountain Ranch Homeowners Association

10/20/2010

EXHIBIT “V”

AFFT
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Fredrick J. Biedermann, Esq.
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Email: melanie.morgan@akerman.com
Email: donna.wittig@akerman.com

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.

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. 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

KANANI GONZALES
NOTARY PUBLIC
STATE OF NEVADA
APPT. NO. 06-107055-1
MY APPT. EXPIRES JULY 14, 2022

GERRARD, COX & LARSEN
2450 St. Rose Parkway, Suite 200
Henderson, Nevada 89074
(702) 796-4000

TAB 31

ERR
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Email: 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

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,

v.

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 Defendants.

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

vs.

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

Counter-Defendant/Cross-Defendants.

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

COMES NOW, Defendant / Cross-Defendant, NATIONSTAR MORTGAGE, LLC ("Nationstar" or "Defendant"), by and through its attorneys, GERRARD COX LARSEN and 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.

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

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2450 St. Rose Parkway, Suite 200
Henderson, NV 89074
O:(702)796-4000 F:(702)796-47848

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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 24th day of January, 2019.

GERRARD COX LARSEN

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

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of GERRARD COX LARSEN, and that on the 24th 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.

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

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Attorneys for SFR Investment Pool 1, LLC

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

TAB 32

OPPM
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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 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,

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.

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

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.

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

SFR Investments Pool 1, LLC ("SFR") hereby files its 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*[1] 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

[1] *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*").

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

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

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

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

II. ARGUMENT

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

Nevada district court judges possess equal and coextensive and concurrent jurisdiction and power. NRS 3.220. Based on the plain language of NRS 3.220 the district courts lack jurisdiction to review the acts of other district courts. *Rohlfing v. Second Judicial Dist. Court*, 106 Nev. 902, 906, 803 P.2d 659, 662 (1990). In *Rohlfing*, the Nevada Supreme Court reversed a district court judge's invalidation of another district court judge's order of dismissal. The Nevada Supreme 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,

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

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

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

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

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

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

C. The Prior Court Determined the Admissibility of Exhibits.

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

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

1. The Bank Never Disclosed Doug Miles.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. The Bank failed to Prove Delivery and Receipt.

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

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motion must be denied.

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

E. The Bank Cannot Overcome the Presumptions or Conclusive Recitals

To quiet title in its name, SFR, as the record title holder, need only produce its deed; the deed and the underlying sale are presumed valid under Nevada law. *Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 670, 918 P.2d 314, 319 (1996); *see also* NRS 47.250(16)-(18). NRS 116.3116(2) gives associations a true super-priority lien, the proper foreclosure of which extinguishes the title owner's interest and all junior liens, including a first deed of trust. *SFR Investments Pool I, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 758, 334 P.3d 408, 419 (2014). As the foreclosure sale is presumed valid, and a valid sale extinguishes all junior interests, the extinguishment of the title owner's interest and all junior liens, including a first deed of trust, is also presumed. Furthermore, in the absence of grounds for equitable relief, the recitals contained in said deed are conclusively established pursuant to NRS 116.31166(1). *Shadow Wood Homeowners Ass'n, Inc. v. New York Community Bancorp, Inc.*, 132 Nev. ——, 366 P.3d 1105, 1110, 1112 (2016). Without equitable grounds, the recitals in the deed are conclusive as to: (1) default; (2) mailing of the notice of delinquent assessment; (3) recording of the notice of default and notice of sale; (4) elapsing of 90 days; and (5) giving notice of sale.

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

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

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

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

F. Statutory Provisions of NRS 116 and Legal Principles Render These Purported "Tenders" Invalid as a Matter of Law.

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

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

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

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general principles of law. Section 116.1108 provides as follows:

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

NRS 116.1108 (emphasis added).

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

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

[2] 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).

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

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

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

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

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

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

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

NRS 116.1104 provides in relevant part as follows:

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

Id. (emphasis added).

By its terms, the text of NRS 116.1104 emphatically and unequivocally commands that the provisions of NRS Chapter 116 cannot be "varied by agreement." This means that neither the Association nor the Bank—and, for that matter, SFR—can alter or vary provisions of NRS Chapter 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

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

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

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

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

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

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

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

Here, the Miles Bauer Letters specifically **exclude** the abatement portion under NRS 116.310312 when defining what portions of the Association's lien is entitled to super-priority status. In fact, Miles Bauer claims the nuisance-abatement/maintenance charges portion is junior. Specifically, the letter states "[w]hile 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." However, **NRS 116.3102(1)(j)**, as it read in October 2011 and December 2011 (the dates of both letters), states the association "[m]ay impose and receive any payments, fees or charges … ***for services provided to the units' owners, including, without limitation, any services provided pursuant to NRS 116.310312***." (emphasis added). And, under NRS 116.3116(2), an association lien is prior to a first deed of trust "to the extent of **any** charges incurred by the association on a unit pursuant to NRS 116.310312. . . ." (Emphasis added). Thus, any amount incurred pursuant to NRS 116.310312 is prior. Under NRS 116.310312(4),[3] that includes fees, notifications, collection costs and interest. And pursuant to subsection (6), the lien described in subsection (4) is prior to a first deed of trust. NRS 116.310312(6). Thus, the Miles Bauer Letters insist the Association either vary by agreement the right afforded by NRS 116 or insist the Association waive such right.

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

[3] Referencing the version of the statute in place at the time of the letters and foreclosure.

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

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

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

In addition, as set forth above, a close examination of the text of the Miles Bauer Letters reveals they constitute nothing more than an offer from the Bank to the Association to enter into a unilateral contract that can only be accepted by the Association through performance—by negotiating the Bank's accompanying payment instrument and, thereby, agreeing to the terms of the Miles Bauer Letter. The Miles Bauer Letter does not cite to any express language allowing it and the Association to alter the provisions of NRS 116.3116(2), because it cannot. The Miles Bauer Letter does not contain a severability provision; thus, if any provision of the Miles Bauer Letter—as an offer to enter into a unilateral contract—is found to be unenforceable under otherwise applicable Nevada law, the proposed unilateral contract, as a whole, would also be unenforceable. The Miles Bauer Letter does not include any representations or warranties that its provisions 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

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

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

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

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

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

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116.1104.

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

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

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

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

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

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

1. Waiver.

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

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

2. ***Estoppel.***

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

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

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

3. Unclean Hands.

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

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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.

KIM GILBERT EBRON

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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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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

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,

v.

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 Defendants.

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

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

Counter-Defendant/Cross-Defendants.

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

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

Dated this 19th 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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Finally, the Court committed an error of law when it determined 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 'breathtakingly 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).

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

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

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

II.

STATEMENT OF UNDISPUTED FACTS

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

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

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

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

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

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

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

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

> 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.**

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

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

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

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

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

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

III.

STATEMENT OF AUTHORITIES

A. THIS COURT HAS JURISDICTION TO HEAR THIS MATTER ON RECONSIDERATION

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

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

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

On the other hand, the Nevada Rules of Civil Procedure and the Eighth Judicial District 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).

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

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

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

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, 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).

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

B. <u>NATIONSTAR CLEARLY HAS MEET THE LEGAL STANDARD FOR RECONSIDERATION</u>

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

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

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

Furthermore, Nationstar has met the standard for reconsideration because the laws with respect to tender has significantly changed since the August 15, 2018 hearing on the competing motions for summary judgment, with the Supreme Court's decision in *Bank of America, N.A. v. SFR Investments Pool 1, LLC,* 134 Nev. Adv. Op. 72 (Sept. 13, 2018) which completely invalidates every one of SFR's defenses in regards to the tender made to Alessi.

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

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

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> 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 (10th 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

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

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

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

2. <u>Rock Jung Was Disclosed As A Witness Having Personal Knowledge Of The Tender</u>

SFR next claims that the Affidavit of Rock Jung, Esq. is not admissible because he was "not a proper custodial of records for Miles Bauer." Nevada law provides numerous methods to authenticate documents by someone other than a custodian of records. Under NRS 52.025, Rock Jung was clearly allowed to authenticate the tender check and the tender letter based upon his own personal knowledge, as he sent the letter and the check. SFR attempts to mislead the Court into thinking that the tender check and tender letter can only be authenticated by a custodian of records, which is false. Any person with personal knowledge of the documents can authenticate them. NRS 52.025 states "[t]he testimony of a witness is sufficient for authentication or identification if the witness has personal knowledge that a matter is what it is claimed to be." Rock Jung's Affidavit clearly provides that he not only has personal knowledge of Miles Bauer's procedures for delivering 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.

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

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

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

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

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

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

Fifth, the Court inexplicably found that "David Alessi testified that Alessi & Koenig did not receive the letter with the check. If Alessi & Koenig never received the purported tender there was 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 'breathtakingly 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

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

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

1. The Tender Imposed No Impermissible Conditions

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

> In addition to payment in full, valid tender must be unconditional, or with conditions on which the tendering party has a right to insist. 74 Am. Jur. 2d *Tender* § 22 (2012). "The only legal conditions which may be attached to a valid tender are either a receipt for full payment or a surrender of the obligation." *Heath v. L.E. Schwartz & Sons, Inc.*, 203 Ga. App. 91, 416 S.E.2d 113, 114-15 (Ga. Ct. App. 1992); *see also Stockton Theatres, Inc. v. Palermo*, 179 Cal. App. 2d 323, 3 Cal. Rptr. 767, 768 (Ct. App. 1960) (tender of entire judgment with request for satisfaction of judgment was not conditional); *cf. Steward v. Yoder*, 86 Ill. App. 3d 223, 408 N.E.2d 55, 57, 41 Ill. Dec. 709 (Ill. App. Ct. 1980) (concluding tender with request for accord and satisfaction was conditional, but not unreasonable)."
>
> . . .
>
> Although Bank of America's tender included a condition, it had a right to insist on the condition. Bank of America's letter stated that acceptance of the tender would satisfy the superpriority portion of the lien, preserving Bank of America's interest in the property. Bank of America had a legal right to insist on this. SFR's claim that this made the tender impermissibly conditional because the payment required to satisfy the superpriority portion of an HOA lien was legally unsettled at the time is unpersuasive.

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

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

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

2. <u>There Is No Legal Requirement To Record The Tender For It To Be Valid</u>

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

3. <u>Bona Fide Purchaser Status Is Legally Irrelevant If A Valid Tender Is Made</u>

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

4. <u>The Tender Was For The Full Superpriority Portion Of The HOA's Lien And There Are No Nuisance Or Abatement Charges Included In This Lien</u>

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

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

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

F. <u>REFUSAL OF THE TENDER IS NOT JUSTIFIED BECAUSE OF THE HOA'S HONEST BELIEF THAT THE TENDER WAS INSUFFICIENT</u>

The Court also made a clear error of law in determining that refusal of the tender was justified because of the HOA's honest belief that the tender was insufficient. Once again, the Nevada Supreme Court has explicitly rejected this argument stating that an HOA Trustee's subjective good faith in rejecting the tender, because it disagreed with the lender regarding the amounts comprising the superpriority portion of the HOA's lien, is legally irrelevant as the tender cured the default as to the superpriority portion of the lien. *See BAC Home Loans Servicing, LP v. Premier One Holdings, Inc*., 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

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

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

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

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

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

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

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

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

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

> It follows that after a valid tender of the superpriority portion of an HOA's lien, **a 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).

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

[1] Citation to the 11 cases referenced in the 1 Grant S. Nelson treatise in support of this statement are not listed. The 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.

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

> Finally, although appellant claims it is protected as a bona fide purchaser, we conclude that appellant's putative status as a bona fide purchaser cannot validate an otherwise void sale. *See* Grant S. Nelson, Dale A. Whitman, Ann M. Burkhart & R. Wilson Freyermuth, *Real Estate Finance Law* § 7:21 (6th 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….).

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

IV.

CONCLUSION

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

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Dated this 19th day of March, 2019.

GERRARD COX LARSEN

/s/ *Fredrick J. Biedermann, Esq.*
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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 19th 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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/s/ *Fredrick J. Biedermann, Esq.*
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TAB 34

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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

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,

v.

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 Defendants.

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

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

Counter-Defendant/Cross-Defendants.

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

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

DATED this 28th day of June, 2019.

GERRARD COX LARSEN

/s/ Douglas D. Gerrard, Esq.
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Fredrick J. Biedermann, Esq.
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Attorneys for Defendant Nationstar Mortgage, LLC

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of GERRARD COX LARSEN, and that on the 28th 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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/s/ Esther K. Medellin .
Esther K. Medellin, an employee of
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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

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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,
v.
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 Defendants.

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

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

Counter-Defendant/Cross-Defendants.

ORDER GRANTING NATIONSTAR MORTGAGE, LLC'S MOTION FOR 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").

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

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

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

3. This Court determines that the FFCL contained legal errors in that 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, 2018 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.

4. This Court determines that the FFCL contained a legal error as 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.

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

6. Reconsideration is also appropriate because the FFCL failed to apply recent Nevada Supreme Court authority, including the *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 134 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

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Approved as to Form and Content:

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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

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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,
v.
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 Defendants.

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

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

Counter-Defendant/Cross-Defendants.

ORDER GRANTING NATIONSTAR MORTGAGE, LLC'S MOTION FOR 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").

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

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

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

3. This Court determines that the FFCL contained legal errors in that 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, 2018 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.

4. This Court determines that the FFCL contained a legal error as 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.

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

6. Reconsideration is also appropriate because the FFCL failed to apply recent Nevada Supreme Court authority, including the *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 134 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

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Fredrick J. Biedermann, Esq.
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Attorney for Defendant
Nationstar Mortgage, LLC

Approved as to Form and Content:

KIM GILBERT EBRON

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TAB 36

SCHTO

DISTRICT COURT
CLARK COUNTY, NEVADA

ALESSI & KOENIG, Plaintiff(s) vs. STACY MOORE; MAGNOLIA GOTERA; KRISTEN JORDAL AS TRUSTEE FOR JBWNO REVOCABLE LIVING TRUST; U.S. BANK; NATIONSTAR MORTGAGE; REPUBLIC SILVER STATE DISPOSAL, Defendant(s)	CASE NO.: A-14-705563-C Department XXVI **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:	**Closed**
Last Day to file motion to amend or add parties:	**Closed**
Initial expert disclosures due:	**Closed**
Rebuttal expert disclosures due:	**Closed**
Final Date to file or other Dispositive Motions	**10/26/19**

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.

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

1. Two sets of Exhibits, three-hole punched, tabbed, in three ring binders, with a typed exhibit list and all stipulated exhibits marked;
2. Original depositions;
3. Courtesy copies of legal briefs on trial issues.
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.

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

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

F. Failure of the designated trial attorney or any party appearing in proper person to appear for any court appearances or to comply with this Order shall result in any of the following: (1) dismissal of the action (2) default judgment; (3) 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.

GLORIA STURMAN
District Court Judge, Department 26

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

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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

Nationstar Mortgage, LLC (**Nationstar**); 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. (**US Bank**), and SFR Investments Pool 1, LLC (**SFR**) (collectively, **the Parties**), by and through their counsel of record, stipulate as follows:

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

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

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

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

5. The Court inadvertently statistically closed this case;

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

AKERMAN LLP

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KIM GILBERT EBRON

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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, 2019, 2020.

DISTRICT COURT JUDGE

Submitted by:

AKERMAN LLP

MELANIE D. MORGAN, ESQ.
Nevada Bar No. 8215
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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.	Case No. A-15-705563-C Dept. No. XXVI **OBJECTIONS TO AMENDED PRE-TRIAL DISCLOSURES**
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).	

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

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

I. Witnesses

Simon Ward Brown, Edward Hyne, Alan Blunt, AJ Loll, Kirsten Trompisz 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 Trompisz 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.

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Ryan Kerbow: Ryan Kerbow was never disclosed as a witness.

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

II. Depositions

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).

III. Documents

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

KIM GILBERT EBRON

/s/ Jason G. Martinez
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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:

Douglas D. Gerrard	dgerrard@gerrard-cox.com
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Donna Wittig	Donna.wittig@akerman.com
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/s/ *Jason G. Martinez*
An employee of Kim Gilbert Ebron

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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

U.S. BANK, N.A.

Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

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

I. STATEMENT OF THE CASE

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

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

II. LIST OF ALL CLAIMS

A. U.S. BANK'S CLAIMS.

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

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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.

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

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

B. SFR'S AFFIRMATIVE DEFENSES.

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

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

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

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

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

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

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

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

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

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

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

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

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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	

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

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VII. AGREEMENTS AS TO THE LIMITATION OR EXCLUSION OF EVIDENCE

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

All publically recorded documents.

VIII. LIST OF WITNESSES

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

1. Edward Hyne, Simon Ward Brown, Alan Blunt, Kristen Trompisz, AJ Loll or other Corporate Representative for Nationstar Mortgage LLC
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

2. Edward Hyne, Simon Ward Brown, Alan Blunt, Kristen Trompisz, AJ Loll or other Corporate Representative for US Bank
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

3. David Alessi or other Corporate Designee for Alessi & Koenig, LLC
c/o Jeanette McPherson, Esq. and/or Trustee Shelley Krohn, Esq.
Schwartzer McPherson
2850 S. Jones Boulevard, Suite 1
Las Vegas, Nevada 89146
Telephone: (702) 228-7590

4. Doug Miles or other Corporate Representative
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

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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. <u>STATEMENT OF EACH PRINCIPAL ISSUE OF LAW WHICH MAY BE CONTESTED</u>

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

///

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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.

AKERMAN LLP */s/ Melanie D. Morgan* MELANIE D. MORGAN, ESQ. Nevada Bar No. 8215 DONNA M. WITTIG, ESQ. Nevada Bar No. 11015 1635 Village Center Circle, Suite 200 Las Vegas, Nevada 89134 *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.*	**KIM GILBERT EBRON** */s/ Karen L. Hanks* DIANA S. EBRON, ESQ. Nevada Bar No. 10580 JACQUELINE A. GILBERT, ESQ. Nevada Bar No. 10593 KAREN L. HANKS, ESQ. Nevada Bar No. 9578 JASON G. MARTINEZ, ESQ. Nevada Bar No. 13375 7625 Dean Martin Drive, Suite 110 Las Vegas, NV 89139 *Attorneys for SFR Investments Pool 1, LLC*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on this 5th day of 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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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.	Case No. A-14-705563-C Dept. No. 17 **SFR INVESTMENTS POOL 1, LLC TRIAL BRIEF**
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).	

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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.

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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:

	22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to
1/22/08	A Notice of Default and Election to Sell Under Deed of Trust recorded against the Property as Instrument No. 20080122-0002564. The Notice of Default indicates a default date of September 1, 2007. The Notice of Default further states: 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.
1/22/08	Pursuant to the Notice of Default, at the latest, the loan was accelerated on January 22, 2008.
1/22/08 through 1/22/18	In the next ten years after acceleration day (Jan. 22, 2008), at no time did the Bank execute the power of sale and foreclose. 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.

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

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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

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

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

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

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

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

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B. A Statute of Repose Cannot Be Waived or Tolled; 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.

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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 **demanded 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."**[1] In another case, Bank's counsel argued NRS 106.240 "[a]t face value, the statute would prevent a lender form 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**

[1] *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."[2] [3]

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

[2] *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].

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

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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.

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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.*

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

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

IV. CONCLUSION

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

DATED February 5, 2020.

KIM GILBERT EBRON

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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

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

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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

U.S. BANK, N.A.

Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

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

FINDINGS OF FACT

1. In 1991, Nevada adopted the Uniform Common Interest Ownership Act as NRS 116, including NRS 116.3116(2). (FOFCOL[2] at ¶1).

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

Property Transfers, The Deed of Trust, and Assignments

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

///

[1] Any findings of fact that are more appropriately conclusions of law shall be so deemed. Any conclusions of law that are more appropriately findings of fact shall be so deemed.

[2] 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.

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

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

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

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

Default and HOA Foreclosure Sale

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

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

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

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

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

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

13. 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).

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

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

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

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

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

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

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

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

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

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

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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 and 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.

///

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUDGMENT

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

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

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

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

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

DATED _____, 2020.

_____
DISTRICT COURT JUDGE
Case Number: A-14-705563-C

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TAB 42

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Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

ALESSI AND KOENIG LLC, Plaintiff, vs. STACY MOORE, Defendant.	CASE#: A-14-705563-C DEPT. XXVI

BEFORE THE HONORABLE GLORIA STURMAN
DISTRICT COURT JUDGE

MONDAY, FEBRUARY 10, 2020

RECORDER'S TRANSCRIPT OF BENCHTRIAL

APPEARANCES:

For the Plaintiff: MELANIE MORGAN, ESQ.
ARIEL STERN, ESQ.

For the Defendant: KAREN HANKS, ESQ.
JASON G. MARTINEZ, ESQ.

RECORDED BY: KERRY ESPARZA, COURT RECORDER

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FOR THE DEFENDANT	MARKED	RECEIVED
None		

Las Vegas, Nevada, Monday, February 20, 2010

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

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

THE CLERK: So just those two.

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

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

THE COURT: Thank you.

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

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

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

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

testimony.

THE COURT: Okay.

MS. HANKS: Same here.

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

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

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

[Pause]

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

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

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

THE COURT: Thank you. Ms. Hanks?

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

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

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

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

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

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

THE COURT: Thank you.

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

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

THE COURT: Well, for that purpose.

MS. MORGAN: Right.

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

MS. MORGAN: Correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. HANKS: That's my point.

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

MS. HANKS: Right, right.

THE COURT: It raises a question mark.

MS. HANKS: Right.

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

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

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

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

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

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

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

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

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

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

MS. HANKS: Correct.

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

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

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

THE CLERK: We're on, Judge.

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

Counsel, do we have a report?

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

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

MS. MORGAN: Yes.

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

MS. HANKS: Yes.

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

MS. MORGAN: Okay.

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

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

MS. HANKS: We are perfectly fine on time.

THE COURT: Okay.

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

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

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

THE COURT: Whatever is more convenient for the witness.

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

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

MS. HANKS: Let's do that.

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

MS. MORGAN: Sure. Sure.

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

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

THE COURT: Right.

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

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

MR. STERN: Right.

MS. HANKS: Yeah. The 106, yeah.

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

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

THE COURT: Okay. Give me a minute.

MR. STERN: Use the morning for that.

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

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

THE COURT: Out of order.

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

THE COURT: Understood.

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

THE COURT: Okay.

MR. STERN: And so --

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

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

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

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

MR. STERN: Yes.

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

[Parties confer]

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

MS. MORGAN: The foreclosure deed?

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

MS. MORGAN: Yes. That is Exhibit 19.

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

THE COURT: 19.

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay. Got it. Thank you.

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

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

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

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

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

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

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

THE COURT: Okay. Thank you.

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

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

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

MR. STERN: Yes.

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

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

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

MS. HANKS: No objection to Exhibit 34.

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

[Exhibit 33 and 34 admitted into evidence]

THE COURT: Okay. Great. Thanks.

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

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

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

THE COURT: Okay.

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

THE COURT: Right.

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

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

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

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

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

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

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

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

THE COURT: Okay. Ms. Hanks?

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

THE COURT: Right.

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

THE COURT: So rather than create an issue --

MS. HANKS: Right.

THE COURT: -- on appeal --

MS. HANKS: Correct.

THE COURT: -- on the 106.240 issue --

MS. HANKS: Correct. Yes.
THE COURT: -- if it ends up not being relevant to the outcome.
MS. HANKS: Right.
THE COURT: She's got a point on that.
MR. STERN: Well, I only have heard her say that 106.240 may not be relevant to the outcome. I would definitely agree with that.
MS. HANKS: Well, I didn't say that.
MR. STERN: But I may not have heard everything you said.
MS. HANKS: I think Judge Sturman was paraphrasing. What I'm saying is if I can win on delivery alone --
THE COURT: Right.
MS. HANKS: -- then my 52C motion is going to be a one-liner and then we all go home.
THE COURT: Right.
MS. HANKS: That's all I'm saying.
THE COURT: And so my point being if we are sitting here talking about 106.240 and we make a ruling on it, then we've created an issue that may not -- may be totally irrelevant to the outcome of the case. And should we muddy up our record with that.
MS. HANKS: Right.
THE COURT: That's how I viewed her --
MR. STERN: I think as far as Defense, if they want to do it that way, we won't get in the way of that.
THE COURT: Okay. All right, great. Well, in that case then

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

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

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

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

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

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

THE COURT: M-A-D --

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

THE COURT: Okay.

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

THE COURT: If it's available in Westlaw.

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

THE COURT: Okay.

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

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

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

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

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

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

MS. HANKS: Different. 2019 Westlaw 596 3935.

THE COURT: Okay.

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

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

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

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

MR. STERN: Yes, Your Honor.

THE COURT: *Gilscott* and *Countrywide*?

MR. STERN: Yes, Your Honor.

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

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

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

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

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

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

THE COURT: Thank you.

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

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

to exclude who are anticipated to be witnesses?

MS. MORGAN: No.

MS. HANKS: No.

THE COURT: Okay. Then we can proceed.

MS. MORGAN: US Bank calls David Alessi.

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

THE WITNESS: Thank you, Your Honor.

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

DAVID ALESSI, PLAINTIFF'S WITNESS, SWORN

THE CLERK: Thank you.

THE COURT: You can proceed.

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

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

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MS. MORGAN:

Q Good afternoon.

A Good afternoon.

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

A Yes.

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

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

Q Is Alessi and Koenig still in business today?

A No.

Q What is the current status of Alessi and Koenig?

A It filed Chapter 7 in December of 2016.

Q In connection with that bankruptcy, were there procedures put in place with respect to the disclosure of Alessi's collection files?

A I was, if I'm understanding your question correctly, charged with the duty to perform PMK responsibilities, 306(b)(6) responsibilities for Alessi Koenig, as it was winding down.

Q All right. So, I'd like to talk a bit about collection files. Was Alessi and Koenig acting as the HOA trustee for a number of different HOAs between 2011 and 2015?

A We were -- we had retainers, legal retainers, as the assessment collection law firm for many HOAs during that time, yes.

Q And generally, when you hear the term collection file, what does that mean to you?

A The nonjudicial foreclosure file.

Q And we're talking about nonjudicial HOA foreclosure under Chapter 116?

A Yes.

Q And just generally, I know no two files are exactly alike, but generally, what do those types of collection files contain?

A They would contain the account ledger that Alessi Koenig would receive from the HOA management company, detailing the total amount of past due assessments, late fees and interest owed the association. The file could also contain, or would also contain, a pacer, a printout, confirming whether or not the homeowner is in bankruptcy. The file would contain a parcel record from the assessor's website, detailing the legal description of the property.

And if the property was in a pre-lien stage, it would have a prelien notice in the file. And then if it made it to the lien stage, a lien notice with confirmations of all the mailings, then the NOD, then the NOTS, and then the trustee's deed upon sale, if it gets that far.

Q Okay. I'd like to refer to the order granting in part and denying in part, motion for order authorizing procedures for disposition of excess proceeds, review of debtors books and records and relief from automatic stay in the bankruptcy action.

MS. MORGAN: I believe that's appropriate for judicial notice.

THE COURT: Thank you.

MS. HANKS: I don't know what she's going to do with it, so maybe I can just wait to see what she wants to do with it.

THE COURT: Okay. Thank you.

MS. MORGAN: May I approach the witness?

THE COURT: You may, yes.

BY MS. MORGAN:

Q Have you seen this order before?

A I believe so, yes.

Q Is this the order that sets forth your obligations with respect to acting as a custodian of records and 30(b)(6) witness on behalf of Alessi and Koenig?

A I'm not sure.

Q All right. Let's look at page 2.

A I see in paragraph 14, page 3 of 3, Alessi shall act as deponent for the debtor pursuant to FRBP 30(b)(6). So, yes.

Q All right. So, I wanted to focus on the language in paragraph 5 there. Well, I'll start with the third order. It says, on page 2, line 6, ordered that the discovery procedures relating to the files and records are granted in that, and then subsection one, the files and records procedures will supersede any prior arrangements between the trustee and any party and will be deemed to satisfy any existing requirements or duties of the trustee under applicable law.

Subsection 2, the trustee will not be required to respond to or comply with any requests related to the files and records. Subsection 3, the debtors files and records -- and just to be clear, the debtor is Alessi and Koenig, is that your understanding?

A Yes.

Q Okay. The debtor's files and records are and shall be maintained and serviced by the debtor's representative, David Alessi, and Alessi shall certify and ensure that the files and records are properly maintained and preserved.

So, if we stop there and focus on subsection 3. Have you, in fact, insured that the files and records of Alessi and Koenig are properly

maintained and preserved in accordance with this order?

A Yes.

Q Explain to us what you've done to accomplish that?

A So, Alessi and Koenig, way back in 2006, became a paperless office. All of our files were contained in a program created by Database Whiz, Ray Jefferson. He also created the files for several of our competitors. So, when Alessi and Koenig filed Chapter 7, an entity called HOA Lawyers Group, owned by Steve Loizzi, took over all those files. And when I say took over, to the extent -- well, not all of the files, some of the files, the association did not keep HOALG as their assessment collection company; they hired a different company. But for the HOAs that kept HOALG as the collection company and for all of the files that were part of the bankruptcy that Alessi Koenig had and foreclosures were done on, HOALG maintained those files in the same way Alessi Koenig had through an electronic program that was virtually identical to Alessi Koenig's program. So, the files stayed in the program electronically.

Q All right. So, then if we go to subsection 4, lessee shall bear all expenses with the maintenance of the files and records. Subsection 5, the lessee shall upload the files and records that are discoverable into Dropbox so that any interested party may review and download all relevant documents. Did I read subsection 5 correctly?

A Yes.

Q Did you, in fact, upload all files and records that are discoverable into Dropbox?

A When you say you, you're referring to -- I didn't do it personally.

Q Okay.

A But it was done by HOALG from the -- my understanding is, yes. I think there was like a $50 fee that the firm would pay to retrieve those documents.

Q I guess the better question is, did you -- did you, personally, ensure that that procedure happened in accordance with the order? Maybe not with respect to each particular file, but just overall insuring that the order was complied with?

A Yes. I estimate I've done 500 depositions, so I'm very familiar with the files and what is in them. My understanding is that, and it's usually Joanna LaPalma, who was a paralegal with Miles Bauer, and then Alessi Koenig, and now HOA Lawyers Group, would do a control copy over all of the documents in the letters and notices tab of the program. So, the program has various tabs.

The tabs -- one tab is all the homeowner information, another tab may be all fees and costs, another tab may be verification of all the mailings. And then there's another tab that is the letters and notices tab. In that tab, is essentially the electronic file. So, she'll just do a copy of all the documents in there and then upload them as one PDF, copy them into one PDF, and my understanding is, upload them to the website that way.

Q All right. And were the uploads completed all at once in response to this order, or are the uploads completed as requests come

in?

A As requests come in, I believe.

Q Okay. Subsection 6, a lessee shall also place in the Dropbox file, a certificate of acknowledgement stating that the documents were provided in accordance with applicable law and discovery rules. Are true and correct copies of the documents related to the relevant matter and were uploaded as of the date the Dropbox file was created. The certification shall further provide that the Dropbox file contains the records relating to the specific litigation for all pertinent periods and that the files and records have not been tampered with, destroyed or otherwise altered by a lessee, or any person or party associated with the lessee.

In the event that a lessee withholds production of a document based on the claim of attorney client privilege or the attorney work product doctrine, a lessee shall produce a privilege log to the requesting party identifying the withheld document with reasonable particularity to support a motion to compel. The certification shall be sufficient to establish the authenticity of the origin of the documents under federal rule of evidence 901 or any equivalent evidentiary rule and no party may challenge such authentication on the basis that it is not a true and correct copy of the document as it was originally maintained. All other evidentiary objections with respect to the documents uploaded by lessee are hereby reserved.

The certification shall be found -- or I'm sorry, the certification shall be in the form attached hereto as Exhibit 1. And then there's an Exhibit

1. Have you executed such certifications in conjunction with the production of documents obtained through the Dropbox?

A I believe so. If we haven't, this would be the first I would have heard of that.

Q All right. I'm going to turn your attention now to volume 1 of the exhibits. And specifically, the tab 26. It's going to be towards -- it's going to be the last tab in volume 1.

A Okay.

Q It should have Bates stamp at the bottom Nationstar00036.

A Yes.

Q All right. And then I'm going to turn your attention to Nationstar00042.

A Yes.

Q All right. Is that your signature on Nationstar00042?

A Yes.

Q And can you tell us what Nationstar -- the first page 00036, what that is? Have you seen it before?

A Looks to be the beginning of a declaration on my behalf. The next page is the online status report. It's number 38 and 39.

Q Do you know what 41 is?

A 41 is -- this tells me that this was an old file. This was -- this would have been a page that would have been two-hole punched on the left side of an actual file. So, this is from, looks like February of 2008. So, it may have been 2008 when we started going paperless. Because this would have been an actual piece of paper, in an actual file, on the

left side of the file that would be two-hole punched. And the calculations in the column are -- they're labeled there, the fees and the assessments and all the charges to the file.

Q All right. And then what is page 42, Nationstar00042?

A 42 is the last -- it should have been -- if it was in the correct order, it should have been the page that followed 36. It's the second page of my declaration.

Q All right. So, am I correct to understand that pages Nationstar37 through 41, are not intentionally placed between Nationstar 36 and 42?

A Correct.

Q So, taking Nationstar 36 and 42 together, is that your custodian of records affidavit?

A Yes.

Q And when you execute a custodian of records affidavit, are you affirming that the documents in the Dropbox are being produced in accordance with applicable law and discovery rules and are true and correct copies and uploads of all records in your file that pertain to the matter?

A Yes.

Q What's the date of that COR affidavit?

A September 2017.

Q And as you flip through Exhibit 26, we are not going to go page by page, but does this look to be a fairly typical Alessi and Koenig collection file?

A Yes.
Q If you would please turn to Nationstar000174.
A 00174 or 000?
Q Sorry. Nationstar00174?
A Okay. I'm there.
Q All right. If you'd look at 174, 175 and 176 together, have you seen these documents before?
A I don't have a specific recollection of having seen this particular document, but I have seen letters like this, and probably have seen this particular one in the past.
Q All right. Have you seen letters like this within Alessi and Koenig's collection files before?
A Yes.
Q So, does it surprise you to find this in Alessi and Koenig's collection file?
MS. HANKS: Objection. Form.
THE COURT: Overruled.
BY MS. MORGAN:
Q And focusing on Nationstar00176.
A Yes.
Q What is that document?
A 176 is a copy of a check that our office would have received from Miles Bower, as well as the memo of the check.
MS. MORGAN: Your Honor, I'd like to move Exhibit 26.
THE COURT: Thank you. 26?

MS. HANKS: Your Honor, I would object. But if you would offer me a little bit of voir dire, I might be able to add to my objection.

THE COURT: Certainly.

MS. HANKS: Thank you.

VOIR DIRE

BY MS. HANKS:

Q Mr. Alessi, if you could turn, staying within proposed Exhibit 26, if you could turn to page Bate stamp 36 and Bate stamp 42.

A Yes.

Q And if you need to, I want you to take the time to look at the two pages. But nowhere do I see anywhere in this affidavit where it references any specific collection file either by name or number, is that correct?

A Yes.

Q Okay. And prior to -- so, am I correct to understand then, in order to know what affidavit this went to, in other words what collection file this would go towards, you would have to look at Dropbox?

A My assumption would be that this affidavit is for this file since it's in this file.

Q Okay. And I understand that you're making that assumption. What I'm asking is, in order for you to know what certificate this went to, what file it related to, would you have to review the Dropbox file to confirm that or the original Alessi file?

A That would help me confirm it, yes.

Q Okay. And prior to coming here today for trial, did you look

up -- did you look at the Dropbox for Alessi and Koenig and their file related to a property with an address of 5327 Marsh Butte Street?

A I did not look at the Dropbox, no.

Q Okay. Did you look at the original Alessi and Koenig file on the systems of records within the HOA Lawyers Group for the property 5327 Marsh Butte Street?

A No. What I did is the same thing I do for all of my depositions and trial testimony, is I called Joanna LaPalma. And on my way to the hearing today, her and I went over the file orally to refresh my recollection of the file. That would usually start with going through of the status report that you see on 37, 38, 39 and 40. And then I'll ask her a series of questions that I think might be relevant for today's hearings, and she'll give me answers.

Q Okay.

A We'll go through the file that way.

Q So, am I correct to understand that as you sit here today, you would not be able to tell me if all the pages that we have here from 36, to I think it's bate stamped all the way to 333, is an accurate reflection of the Alessi and Koenig file related to the Marsh Butte property?

A I have no reason to believe that is an inaccurate reflection. It would be -- yeah. So, to the best of my knowledge, this is an accurate reflection of our entire file.

Q But what are you basing that on; you're basing that on the assumption that as it appears here, you would think no one would have tampered with it?

A Well, like I said, I think I've done close to 4 or 500 depositions. I've never had the issue of an improper file having been put in front of me, to where it was shown that I had a file that was not, in fact, the file for the subject deposition or trial testimony.

Q Okay. But at least as -- but I am correct to understand though you have not gone through every page of what we have in Exhibit 26 to make sure that every page that is in this stack of paperwork is really a part of the Alessi and Koenig file, correct?

A That is correct.

Q Okay.

MS. HANKS: Your Honor, I would just object to the admission. I think the whole point of this trial is to make sure that Mr. Koenig [sic] could confirm that because his deposition indicated that the letter that Ms. Morgan talked about in this stack was not there. That was Mr. Koenig's [sic] recollection of --

THE COURT: Alessi, Mr. Alessi.

MS. HANKS: Sorry, I apologize. I did not mean to call you Mr. Koenig. That's like really bad.

So, yes. Mr. Alessi's recollection was that that particular letter was not in the file.

THE COURT: Specifically pages 174 through 176.

MS. HANKS: Correct. Correct.

THE COURT: Okay.

MS. HANKS: So, my understanding is, the lack of that element being fixed, in other words, him actually going and reviewing

the Dropbox file and making sure this is correct, particularly with that interruption between the affidavit and the fact that the affidavit has no -- nothing in there tying it to this file. So, that's another problem. We don't know if it's just a separate affidavit. That's why I would object to the admission at this time.

THE COURT: Okay. Well, I just have a few questions. And so, I think, before I allow the admission, I think some of those questions do need to be answered. I'm not saying yes or no. I'm just saying --

MS. MORGAN: Oh, I'm sorry.

THE COURT: I'm not saying yes or no. I'm just saying that I do think that we do need a little bit more information.

MS. MORGAN: Sure.

THE COURT: Because for all I know, this is how they did them with this timeline in the middle of the affidavit. So, that helps me know what they were doing. Maybe it's normal. Maybe it's not normal. I don't know.

MS. MORGAN: I'll ask.

DIRECT EXAMINATION CONTINUED

BY MS. MORGAN:

Q Mr. Alessi, I'd like to talk a bit about Alessi and Koenig's normal business practices in responding to document requests and particularly following the bankruptcy court's order. Was it Alessi and Koenig's general business practice to execute a custodian of records certificate when producing a file?

A Yes. And the answer is yes.

Q All right. And we talked a bit earlier about those four or five pages in between the first page of the affidavit and the signature page.

A That is an anomaly. I don't believe I've seen that before. Usually, the custodian of records declaration is the first page followed by the second.

Q All right. And --

A What I can say is that the online status report that you see here, would have -- my understanding is obtained online. So, it's not actually part of our file and that may be one of the reasons why it was inserted in this location. It wouldn't be part of that copy and paste procedure that I explained earlier.

Q Uh-huh.

A Because this document would have been retrieved with the username and password directly from the website. And that may be a reason why it is in between the two pages.

Q All right.

A I don't attribute, for whatever it's worth, any significance to that though.

Q And that's going to be my question. Does that in any way lead you to believe that the documents contained with your COR affidavit are anything other than true and correct copies of the file that we're here talking about today?

A Correct. I did hear counsel say that in my deposition, I made apparently the statement that the letter on 176 was not part of our original -- I'm sorry, 174 to 176, with the attached check, was not part of

our original production. Generally, and there are times where within our files we did not, as you probably know, keep a copy of the check. Generally, we either had a copy of the letter and the check in the file, and a note confirming that we had received a copy of the letter and the check in the status report. One or the other or both of those would take place.

Q Uh-huh.

A And sometimes neither. Sometimes we neither made a copy of the check nor noted it in the status report. On this particular file though, I did ask Jonna if we received a check on this file on my way to the hearing, and she said we did, we had a copy. So, my understanding as I sit here, is that this check that is shown on 176 is from our file and contained within our file.

Q All right. And you have no reason to believe that the file has been tampered with?

A No.

MS. MORGAN: Your Honor, at this point, again, I'd like to admit Exhibit 26.

THE COURT: I appreciate it. Thank you very much.

MS. HANKS: Your Honor, I don't have anything further.

THE COURT: Then I'll admit Exhibit 26.

THE CLERK: The entire exhibit?

THE COURT: The entire exhibit. The entire exhibit?

MS. MORGAN: Yes.

THE COURT: Yes. Okay. So, the entire exhibit is admitted.

[Plaintiff's Exhibit 26 admitted into evidence]

MS. MORGAN: I don't have any further questions.

THE COURT: All right. Thank you so much. And so, then Ms. Hanks.

MS. HANKS: I don't have any questions, Your Honor.

THE COURT: Okay. Thanks. So, is it in the note?

MS. HANKS: It's not in the note.

MS. MORGAN: It's not in the note.

THE COURT: All right. Thanks for coming down. I appreciate your time.

THE WITNESS: Thank you, Your Honor. I appreciate it. Sorry for being late.

THE COURT: No problem. Good to see you again. Thank you.

MS. MORGAN: At this point, U.S. Bank rests.

PLAINTIFF RESTS

THE COURT: Okay.

MS. HANKS: And Your Honor, at this point, we bring up a 52(c) based on the 106.240.

THE COURT: Okay. At this point in time then we will address the legal issue raised in the respective party's trial briefs. So, Ms. Hanks has brought that as a motion, so she'll address it first.

MS. HANKS: Your Honor, I want to direct your attention to Exhibit 3, which is the deed of trust. And specifically, I want to direct your attention to paragraph 22. And I'm going to use the Elmo.

THE COURT: Thank you. Kerry, we need the Elmo.

THE COURT RECORDER: Yes, it is on.

THE COURT: All right. Thank you.

MS. HANKS: So, I want to direct your attention to Exhibit 22.

[Pause]

THE COURT: We can discuss it because I've got it here in front of me with my own blowup.

MS. HANKS: Okay. So, if you go to paragraph 22, this is the deed of trust, and it talks about titled acceleration remedies. And it indicates that the lender shall give notice to borrower prior to acceleration following borrower's breach of any covenant or agreement in the securing instrument. And then it goes through and explains what the notice shall specify.

It has to specify the default, the action required to cure the default, a date not less than 30 days from the date the notice is given to the borrower by which the default must be cured and that failure to cure the default, on or before the date specified in the notice, may result in acceleration of the sum secured by the security instrument and sale of the property.

Now, what we have here is the next document that I want to draw your attention to. So, the deed of trust clearly talks about the lender's ability upon a default to basically accelerate and otherwise make the loan wholly due based on that default. And that actually happened in this case. If we go to Exhibit 33, Exhibit 33, at the notice of default. And I want to highlight certain provisions, and I want to do this on the Elmo so if we need it, but otherwise, I can walk you through it. You have here a

notice of default where it talks about the original sum of the note of 508,000, 250,000, do you see that?

THE COURT: Yes.

MS. HANKS: Okay. And then, they talk about that there was an installment, principal and interest and impounds which became due on September 1st, 2007. So, that's the date of default. They're talking about you had an installment payment due September 1st, 2007 and borrower, you didn't make it. So, now you're in default of that and therefore, by reason of that default, this is the third paragraph, the present beneficiary under such deed of trust has executed and delivered to Recon Trust Company, a written declaration of default and demand for sale and has deposited with Recon Trust Company such deed of trust and all documents editing obligations secured thereby.

And here's where they get to -- and it says and has declared and does hereby declare all sums secured thereby immediately due and payable. And I want to stop there because that's the first thing this notice of default does. That sentence that we're worried about, and what I'm arguing here today is and has declared and does hereby declare all sums secured thereby immediately due and payable.

That language right there makes the loan wholly due. While normally the loan wouldn't have matured until 2035, the lender, what we just saw on the deed of trust, at its option, which it allowed it to do under paragraph 22 of the deed of trust, now said because you defaulted in failing to pay that installment on September 1st, 2007, we're now making the entire loan, the full loan, the whole loan, whatever word you want to

use, entirely due and payable now.

That's the first thing this notice of default does. Now, the next sentence says and, that's why it's two clauses, and has elected and does hereby elect, to cause the trust property to be sold to satisfy the obligation secured thereby.

So, this notice of default does two things. It first says you're in default, and we're making the loan wholly due. The lender is saying now it's wholly due. You don't get to keep it as an installment contract and pay it monthly up until the maturity date, now the whole thing is due. And two, we're proceeding with our election to sell under the deed of trust.

So, you can look at it as this first clause is talking about we're making the note wholly due, and the second clause is, we're exercising our power of sale under the deed of trust. Those are the two things this document does.

Now, we have the statute of repose at NRS 106.240 under the *Promax* decision, clearly applies to deeds of trust. The very statute talks about deeds of trust. And it says that once a loan is secured by a deed of trust becomes fully due, you have 10 years, 10 years from the date a loan becomes fully due, that a deed of trust secures, if it is not foreclosed upon, it will be conclusively presumed that the debt was satisfied and that it essentially terminates or extinguishes the deed of trust that secured that loan. That's how 106.240 operates.

So, when you take the language of 106.240, and you compare it to what the bank did with respect to the notice of default, that

they recorded on January 22nd, 2008, we can look at it and say, at the latest, because frankly, if you look at the deed of trust, they talk about giving prior written notification to the borrower before they accelerate, so there is presumably some type of communication to the borrower that predates this notice of default. We don't have that in this case, but we don't need it for this argument.

We know, at the latest though, at the latest, the January 22nd, 2008 notice of default makes the loan wholly due. And the reason why we also know there's probably prior communication is the language when they say has and does hereby declare. So, they're obviously referring to something prior to this notice of default. But for purposes of SFR's argument today, we can just look at the notice of default and use this as the instrument that makes the loan wholly due.

And so, when the bank made the loan at their option wholly due on January 22nd, 2008, it triggered the running of NRS 106.240. The 10-year clock started running. And so, the bank had two choices once it started triggering that clock. It needed to foreclose within 10 years, or it needed to make the loan no longer wholly due. Another term of art you could use is decelerate it, reinstate it as an installment contract. There is no evidence that the bank did that in this case. It's undisputed the bank didn't foreclose and there's no evidence that they reinstated the loan as an installment loan. It remained wholly due during this time period.

So, if we take that and run the clock from January 22nd, 2008, the 10-year clock under 106.240 ran on January 22nd, 2018. So, irrespective of the association foreclosure sale and irrespective of the

bank's tender in this case, the deed of trust is otherwise terminated because by operation of 106.240. In other words, the sale that occurred here in January of 2014, even if their tender preserved the deed of trust from extinguishment and avoided extinguishment, there is a secondary layer here of 106 that still would say, on January 22nd, 2018, four years later, that's when your deed of trust terminated. So, it can no longer encumber the property.

Now, I'm going to preempt the argument that I know the bank is going to argue, which would be the rescission that they recorded on March 20th, 2008, which is Exhibit 34. And we've got to be really careful -- oh, I don't have the Elmo, sorry. I'm so used to the Elmo.

So, if you look at the rescission of the election to declare default, I want to focus on the language, and I'm going to have you, if you could, Your Honor, look at 33 and 34 side by side as I do this. The most important part I want to highlight in the first paragraph of this rescission is, it says this rescission shall not, that's the words the bank chose to use in its own document, shall not be construed as waiving, curing, extending to or affecting any default, either past, present or future, under such deed of trust or as impairing any right or remedy there under.

So, I want to stop there because that's the first thing it does. Now, we have two other clauses which I'm going to mirror with the notice of default. That's the first thing that this rescission doesn't do. It's telling everyone we are not waiving, curing or affecting the making the loan wholly due, what we did in that notice of default. We're not

affecting our remedy that we elected to pursue under paragraph 24 of the -- excuse me, 22 of the deed of trust. So, we're not affecting that first clause in the notice of default, the part that makes the loan wholly due. In fact, we're saying you shall not construe it that way.

Then you have the second sentence of the rescission. This is the part of what the rescission is only doing, it's the only part of the notice of default it's rescinding. And it says and it is and shall be deemed to be only an election without prejudice not to cause a sale to be made pursuant to such notice of default and election to sell, and it shall not in any way alter or change any of the rights, remedies or privileges secured to beneficiary and or trustee under said deed of trust nor modify nor alter in any respect any of the terms, covenants, conditions and obligations therein contained.

So, that's the second clause. We have another second clause in the rescission, and it says, it shall only be deemed an election not to proceed with sale. So, once again, we have a two part. It's saying we're not rescinding or making the loan wholly due, what would tie to the note, we're only rescinding our election to proceed to sale which would be our right to execute under the deed of trust.

And what's interesting is, you can even match the two clauses together from the notice of default. The notice of default, the second clause says, has elected and does hereby elect to cause the trust property to be sold and here they're saying we're rescinding that election.

So, all the rescission does is rescind the second clause in the

notice of default, the election to sell. There is no other documents that are going to be presented before you in this case. Their case in chief is closed, and even if they did rebuttal, there is no document that's been produced in this case that would show that they actually rescinded, cancelled or whatever word you want to use, the first clause in the notice of default, the part where they made the loan wholly due. There is no evidence that this loan was ever reinstated as an installment loan, and now it would be too late. Because once the statute of repose runs, the 106.240, on January 22nd, 2018, the deed of trust is terminated.

So, we would ask Your Honor that irrespective of the association foreclosure sale that you ruled that the deed of trust at Exhibit 3 was terminated by operation of 106.240 and therefore does not encumber the property.

THE COURT: Thank you.

MR. STERN: So, is the Elmo still kaput?

THE COURT: Yes.

THE CLERK: We can attempt to try it again. I'm following what they told me, but it still doesn't seem to -- they said if we take a break, the technician can take a look, Judge. But I can try to -- I've done everything that they've said.

THE COURT: Okay. Give us just a minute.

[Pause]

MR. STERN: Your Honor, so as the Court already knows, we're going to make some argument as to whether this is a statute of repose and whether SFR properly even has presented the issue before

the Court.

But before going there, I'd like to start where Ms. Hanks kind of ended it and that is with the Exhibits 33 and 34. Paying attention to the one thing in Exhibit 33 that Ms. Hanks did not address at all, and she didn't address it apparently in the hope that nobody would notice. But we did notice, and we believe the Court should notice.

And that is in the second paragraph with the all caps that starts failure to pay. And there is a sentence at the end of that paragraph that kills SFR's entire argument at the start. It says, in addition -- so, Ms. Hanks read to you that there had been a default, that it consisted of this amount, that it happened on such date and then there's a new sentence that reads, in addition, the entire principal amount will become due on 12/1/2035. That is a statement of future intent. That is absolutely inconsistent with the thought that this is an accelerating document. That statement would make absolutely no sense.

And so, if we keep reading that sentence it writes, as a result of the maturity of the obligation on that date. Another indication that this loan would not be quote wholly due until that date, that date being 12/1/2035, still 15 years in the future from today's date.

So, what do we do with that, Judge. Obviously, there is additional language, the language that SFR liked, and I'd like to go over that again. What SFR focused on was the next sentence, excuse me, the next paragraph, which has the two sentences or the two clauses that SFR mentions. One of which is the declaration that there's going to be a sale and the second does hereby declare all sums due are thereby

immediately due and payable. All right.

So, how do we reconcile that with what we just read in all caps. Which is that this loan is not actually going to be maturing until 2035. The solution to that is easy, Your Honor. All sums due and payable can refer to all present sums due and payable. It doesn't have to mean all accelerated sums. Doesn't mean all sums that will become due and payable in the future. All it simply says is all sums due and payable.

And so, reading the two clauses together, does hereby declare all sums secured thereby immediately due and payable, in conjunction with the previous paragraph where it says, in addition, the entire principal amount will become due on 12/1/2035.

There's really only one -- and maybe before we get there, let's apply our standard construction, you know, rules of construction of documents. That is that we interpret documents as a whole, giving meaning to every part and also when some specific language conflicts with something that's more general, if there is a conflict at all, you favor the more specific statement. And so, here what SFR wants you to conclude is, hey, everything was due and payable immediately on 1/22/2008 and the reason we think that is because of this general language in the third paragraph that we like, all sums due -- hereby declare all sums due immediately due and payable.

However, there's a contradictory but more specific and written in all caps, statement just before that, the one statement or the one sentence of that paragraph that SFR did not read to you, which says exactly the opposite, all sums are not due and payable today, they will

be due and payable on 12/1/2035.

In order to effectuate an acceleration, you have to be unequivocal. It has to be an unequivocal assertion of the right to acceleration. The deed of trust uses the word as acceleration, Ms. Hanks read that from paragraph 3. I don't think we have to go back there. Excuse me, Exhibit 3, paragraph 22, talks about the right to accelerate and how if there's going to be an acceleration, there has to be a pre-acceleration letter or other communication giving essentially a warning that that's going to happen.

The deed of trust uses the word acceleration. And, in fact, paragraph 22 in its heading, uses the term acceleration. Nowhere in this deed of -- in this notice of default and election to sell, did you see the word acceleration. The bank knows how to trigger acceleration when it wants to, it uses that very word. It uses that word not only in the deed of trust but in the letter that it typically sends. We understand that there's been no letter introduced here but if such letter were consistent with the terms of the deed of trust, you would see that the letter would be entitled notice of intent to accelerate. Again, the use of the word acceleration.

Again, in Exhibit 33, that's not there. So, what SFR needs to do is take what they think this notice can accomplish and fit it into what they perceive 106.240 to say. And just as an initial matter, Your Honor, this language is not sufficient to trigger an acceleration. At worst for the bank -- at worst, this is an ambiguous document. And if it's an ambiguous document, it's not enough because the invocation of acceleration has to be definite. It cannot be ambiguous.

So, I'd like to step back a little bit and circle back to Exhibits 33 and 34 and a few things after that. Because this is a textbook example of a trial by ambush. The reason we say that, Your Honor, is there's a lot that goes into whether a loan is accelerated or not. And in order to be able to defend against a defense like that, a rebutted defense of 106.240, the fair and proper thing for SFR to do would have been to actually give us notice that that's something that they were going to argue. That's basic notice pleading. That did not happen here. This statute was not -- or this argument on this statute was not preserved in any way, affirmative defense number eight notwithstanding.

Now, affirmative defense number eight is a simple, kind of boilerplate statement that all statutes of repose and limitation, et cetera, bar the bank's cause of action. The problem with that is 106.240 is not a statute of repose nor is it a statute of limitations. In previous cases, I've thought of it as kind of a hybrid of a rule against perpetuities, but I think in doing a little additional research, the perfect definition for this, and we borrow it from the two cases from Massachusetts, the one from the first circuit and the one from the district court of Massachusetts, both federal, it's an ancient mortgage statute. And its purpose is to clean from the books mortgages, mortgage loans that are unequivocally and unquestionably expired.

And that's not the case here, Your Honor, and SFR knows that, which is why they've described it as a statute of repose. So, I think, we need to spend a few minutes talking about one of those assumptions. That's the part that I've explained to you why it's a statute of repose.

They just described it as a statute of repose, and they hope that you'll agree with that. But we're going to push back on that and challenge that it's a statute of repose.

We do that for two reasons. One, because it's not preserved, it's not part of the affirmative defense, and so the Court should give it no consideration. But even if the Court goes into the merits of it and considers the argument on its own terms, even though SFR did not properly preserve it, here's why it's not a statute of repose.

A statute of repose is really not that different from a statute of limitations. Both statutes measure whether a lawsuit, a cause of action, is timely. The only difference between the two is that a statute of limitations begins to run at an accrual point and that accrual point is when an injury is sustained. Whereas a statute of repose begins with respect to a milestone defined by the statute itself. And whereas the statute of limitations does not start until somebody's been injured, a statute of repose can end before the injury even happens. And this is why you often see them in the context of construction litigation, construction defect.

Imagine that you have a home, the statute of repose is 10 years, you figure out on year 11 that there's a defect. Under the statute of limitations analysis, a claim on year 11 is timely. Under statute of repose it's untimely. That's the only difference between -- and I understand that you cannot assert equitable defenses to statutes of repose. That you don't have a discovery rule and all those things. But look at what section 106.240 does. It does not make a cause of action, a

litigation, a lawsuit timely or untimely. If it did, you would find it in Chapter 11, which is where all of our statutes of limitations and repose, with the exception of a few here and there, I suppose, that's where you find them. We find this in the substantive rules of Chapter 106.

And what it says is, that the lien of a mortgage, that under the terms of the mortgage has gone further than 10 years from the maturity date on the terms of the mortgage or any extension, is deemed conclusively paid off and the lien is wiped. No mention of litigation. None. It cannot be a statute of repose for that reason. Could be something else. We call it an ancient mortgage statute, but it doesn't accomplish what SFR wants, which is for a hammer to fall on 10 years. It just doesn't do that.

Again, the statute of repose makes litigation timely or in this case, the cause of action, this case commenced in 2014. I'm not exactly sure of the specific date, but looking just from the case number, Judge, it's 2014. And so, let's take the argument SFR offers to its logical conclusion to show the absurdity of it.

They're basically saying that 106.240, as Ms. Hanks just stated, triggered in January of 2018. But the lawsuit commenced in 2014 at some point. So, some three and a half to four years before the statute, according to their 52(c) motion was triggered, or actually was expired, the lawsuit commenced. And so, in what universe does the statute of limitations or statute of repose expire and preclude a claim that's already been filed and subject to litigation. It doesn't work that way.

So, as a just a concept of procedure of how do we describe

the statute, it is not a statute of repose. And that fact opens everything up. Because it means that we can challenge it by equity, it means we can challenge it by other criteria, including rebuttal evidence to show that there has been no acceleration. But just at a foundational level, we need to get away from this unanalyzed assumption that SFR offered, which is to call this a statute of repose.

There is one federal case, I forget the name of it, but it's the 2019 case from Judge Boulware, in which Judge Boulware agrees with SFR's argument and describes 106.240 as a statute of repose.

THE COURT: Yes.

MR. STERN: I would imagine Ms. Hanks will discuss that in her reply, I would, if I were in her shoes. So, I'll address it now. Judge Boulware, and I say this with no disrespect to him because I respect him tremendously, but he just flat out got that wrong. And all you have to do is look at the citation. So, he describes it as a statute of repose and then cites to a supreme court and a federal United States Supreme Court case in support.

But if you look at that Supreme Court case, it describes what a statute of repose is, and it describes it as a statute that requires the filing of litigation by a certain point. It's measured differently than the statute of limitations, but it is satisfied if you file the litigation, the litigation commences timely within that timeframe. So, Judge Boulware's order, while if I were in SFR's shoes, I would also be showing it you to, it's just wrong. It's not a statute of repose.

So, one more point on that. And this is, I think, subtle but

important. If you look at 106.240, read it in its entirety, here's what it says. Rather than reading in its entirety, reading the pertinent parts for this point. It tells us that the loan appearing as of record, the language it uses is at the expiration of 10 years after the debt secured by the deed of trust, according to the terms thereof, thereof being the deed of trust, of course, or any recorded extensions.

So, the statute itself allows the bank or it doesn't have to be a bank, any holder of a deed of trust, to extend by recording something. We will get into the rescission in a minute, but at a conceptual level, how can you give the owner of the right, the ability in the statute to extend indefinitely and still call it a statute of repose. It is another logical inconsistency between what the statute says and what SFR wants it to say. Just take this case as an example, if we were, let's say on -- so the notice of default is recorded 1/22/2008, on 1/23/2008 this didn't happen, but what if the bank had recorded an extension of the loan saying that instead of being due in 2035, it's going to be due in 2135, extended it by a hundred years. And then at that point in 2135, it could have extended it for another hundred years.

Now, that may be asinine from a business perspective, but as far as 106.240 is concerned, it doesn't prohibit that. It's fully consistent with what 106.240 says, and if that's what it says, it cannot be a statute of repose, if it gives the holder of the right the ability to extend it in perpetuity, ad infinitum.

So, for those reasons, Judge -- looks like we have some help here.

THE COURT: Before the state -- or if you're ready we could just interrupt there, what is your preference.

MR. STERN: Yeah, we can interrupt.

THE COURT: Let's just take a brief -- we'll just go off the record. We'll go off the record so we can see --

[Recess taken from 2:24 p.m. to 2:28 p.m.]

THE COURT: Okay. So we're going to go back on the record.

MR. STERN: Okay. And just for our record, we just had a little help with Information Technology. The overhead projector, the Elmo's working, and for our -- Judge, I'd just like to highlight a couple of things here where this is exhibit -- first page of Exhibit 33 that's on the overhead right now which we're -- as you can see, the language in the third paragraph before the heading, notice, that is for relied on, is highlighted. I would like to just for completeness highlight in orange the contradictory language. And to reiterate the point, Judge we have to read these two in conjunction. We can't just excise out the orange portion the way SFR apparently wants to do.

So I think before the technology break, we were -- I was addressing whether there's a statute a limitation or statute of repose, we think that the -- that it is incontrovertible that it's a statute of neither limitations not repose but an ancient mortgage statute, and with that, Judge, I'd like to address another conclusory statement that SFR said without any analysis, hoping that the Court could just go along with but that we challenge, and that is whether acceleration and wholly due are one and the same thing, because of course the statute, 106.240 which, by

the way, had its hundredth year, had its hundredth anniversary a couple of years ago, that's a statute from 1917, doesn't use the word "acceleration", uses the word "wholly due", and so -- and necessary but analyze the assumption and as far as a motion, is that these two things are synonymous.

We, of course, challenge it. There are a couple of reasons why we challenge that. First is that wholly due doesn't appear in the statute just on its own, it appears in conjunction with other things, and that is language that describes the terms of the deed of trust. In other words, the statute reads: it shall, from the time that the loan is wholly due according to the terms thereof. The terms thereof, of course, that are of the deed of trust itself, and then later on in the statute and in the extension thereof, that extension, that word thereof once again refers to the deed of trust itself.

Here in Exhibit 33 we have a document that's not the deed of trust, and so what SFR is implicitly asking you to do is not only to interpret this in a way that benefits them, but also to incorporate it by reference into the deed of trust so that the terms of this accelerating, supposedly accelerating document, then become part of the terms of the deed of trust, because it's the deed of trust which is the instrument that is referenced in 106.240, and the Supreme Court in the Promax case has made clear that it's not going to expand what the statute says. They have consistently applied a plain meaning, but as so far I ask the Court to go beyond the plain meaning by waiting wholly due with acceleration.

They are different. Acceleration and wholly due do not mean

the same thing. So quite apart from the problem that the acceleration occurs in a different document and therefore is outside the scope of the statute, even if we were to ignore that, it's still not the case of wholly due means acceleration and there's a couple of reasons for that. The first one is temporal, and you will see in the notice of default here in Exhibit 33, it reads in the first sentence after the notice, it says, "You may have the right to cure the default hereon and reinstate the one obligation secured by such deed of trust above described." All right.

And so there's additional language in this notice giving a contingent right to the borrower to reinstate the loan, essentially stop the foreclosure process, put the loan in good standing, and that is, in our view, completely inconsistent with the concept of wholly due, once -- for two reasons, once again, wholly due refers to the terms of the deed of trust, and that's talking about when the loan comes due at maturity.

Secondly, as so far implies that there is a certain finality to wholly due that once alone is wholly due and can never -- and it can never be not wholly due. And from our perspective there's a certain logic to that, but that's irreconcilable with the acceleration that's set forth here because as - if we make the assumption that this document accelerates, the very fact that it tells a borrower that the borrower can reinstate contradicts any finality. In other words, it gives the wholly due a temporal limitation.

And so what does wholly mean when we talk about something being wholly due, does it mean the amount? The amount is entirely due? Does it mean that it's due and can never be undue? In our

view it means potentially both. It certainly doesn't mean what SFR seems to imply that it means which is that it's just the synonym of acceleration, and then you wait, and you see what happens. There's nothing in the statute that supports that. So in our view, the fact that you can take it back, that you can't decelerate, and acceleration is further evidence that you just can't do the equivalence that SFR has suggested of wholly due with acceleration.

I'll take one further point on that, Judge. Nevada, of course, is a judicial -- excuse me, a nonjudicial state where mortgages and deeds of trust and liens are foreclosed nonjudicially primarily. So and we have Supreme Court case law on this, that a statute of limitation never affects a nonjudicial foreclosure. It just doesn't. So if you could -- you can come into court six years after a loan is fully mature without any controversy and you would not have a remedy because you would have a time bar, but you could got nontraditionally and have no such problem, and we would ask the Court to consider the logic behind it.

It's clear in that context that the Court is giving some procedural safeguard to the defendant in the judicial case that that defendant doesn't have in the nonjudicial case. In other words, it's the procedural right, it's not a property right. The way SFR wants to apply the statute is essentially implying to end the property right after the expiration of the statute, whenever that date may be. That's another reason why this is not a statute of repose and this leads to the litigation, what I described at the beginning here, a trial by ambush of sorts.

106.240 is subject to equitable challenge, it is subject to

defense. The *Promax* case makes that clear. In Promax, there was some controversy as to whether the statute applied. The beneficial under the statute in Promax didn't even know the statute was there, it was kind of a fortuitous thing, just like I suspect for SFR in 2014, they probably knew the statute was there, but it wasn't really a thing. The statute does not become a thing for SFR until cases like this one, they have nothing else to say about the tender.

So Plan B, the statute was Plan B in *Promax*, as well, and the Supreme Court says, well, it's there, we're going to apply it, but we're going to remand for consideration of estoppel. So -- and that's in *Promax* itself, it's incontrovertible. You can challenge the statute equitable, and we know from the HOA litigation more recently, where parties like SFR and other investors have attempted to use the conclusive presumptions and the trustee's deed as putting any challenge to the sale beyond the Court's powers, and the Supreme Court has resisted that very, very strongly, whether they say that you can challenge it by equitable means or that it's just not as -- I think in the words of one unpublished decision, as breathtakingly sweeping a legislative intent, as the investors have said.

Those concepts, and in this situation, Judge, where we have a case that commenced in 2014, it was timely under any statute of limitation or statute of repose because of the inherent delay in litigation, two and a-half years after SFR was brought in, this milestone passes, and at that point an axe falls based on the statute where everybody knows the reason the bank hasn't foreclosed it is because SFR claims a

contrary interest.

For the Court to go further and determine that that cannot be challenged by estoppel or by other equitable doctrine such as waiver, it's -- it would be a breathtakingly expansive interpretation of 106.240, one that the statute's plain terms do not support, much less the policy of resolving cases on the merits.

The related point is that if this had been brought up properly in the litigation and not as an affirmative defense, calling it a statute of repose when it's clearly not that, the bank would have been able to rebut any evidence of acceleration, we would have been able to produce the documents that Ms. Hanks now points out we don't have. We don't have them because this wasn't an issue.

I will go a step further, Judge, and tell you that our witness, Mr. Hine [phonetic] here, would be able to testify in rebuttal that the loan is not accelerated and not within the time that SFR suggests, but we --

MS. HANKS: I would object to any comment about witness testimony that didn't get admitted, Your Honor.

THE COURT: Thank you. And it's hypothetical.

MR. STERN: In response to that, Your Honor, this is proffer. That --

THE COURT: It's hypothetical, yeah.

MR. STERN: It's a proffer, that's all it is, but here's what's not a proffer, here's what's incontrovertible, is that not only was this not pled, never addressed in summary judgment, never addressed in the response to the motion for reconsideration, never disclosed in discovery

responses, never addressed at any of the 2.67 meetings, never brought up at calendar calls that took place after January 22nd of 2015, for SFR to switch horses in the middle of this race and say, you know, this was never about the HOA foreclosure, you can forget the HOA foreclosure, we knew -- we know we lost that.

Mr. Alessi didn't say what we needed to him to say, we lost that, but here, we've got this other statute which wasn't even in play until two and a-half years into this litigation, but we get to win on that because it's a statute of repose.

That doesn't work, Your Honor. If they want to make a claim on the 106.240 they have to plead it and we have to be afforded the opportunity to rebut that through the discovery process. At this point, this is way -- they are barred from raising this.

And with some, you know, with some cases, in some instances, you see something coming, you know what's going to happen. Either it's pled or it arises in discovery and there's -- for example, something said in the deposition or in response to interrogatories that goes beyond what the pleading says, and the court does a Rule 37 analysis and we're all familiar with that process. None of that happened here. This is just a Plan B when SFR realized it was out of arguments against tender. And it's simply not fair and improper under the rules.

This had to be actually raised, and to put it in -- maybe I can finish the point in this manner, Judge, this case started as a quiet title HOA foreclosure case, it was litigated as such, it was advanced of such,

the documents were requested with that understanding. Mr. Alessi, other witnesses were disclosed with that understanding in mind. And here we are at trial telling -- and we hear hey, this is not 116, this is Chapter 106.

I think Ms. Hanks anticipated this when we first made our objection to Exhibit 33 and said well, you can -- this is quiet title, and you can basically say whatever you want, and as long as you've asked for the remedy of quiet title, we disagree with that, Judge. We -- the remedy of quiet title is of course there, and as so far -- and the bank are free to bring whatever they want into it as long as they disclose it properly and preserve it properly in the litigation case.

I mean imagine, imagine what would happen if today we offered a completely new theory based on completely new evidence that this was paid by the homeowner, and we said well, geez, it's just a quiet title so it's a different standard, SFR would be hopping mad and appropriately so. That's just not the way to resolve cases, Judge, and I think SFR knows that.

A couple of words about Exhibit 34. SFR can correctly anticipate that we're going to be addressing Exhibit 34, and SFR's approach to this is to say the notice of default did two things, it accelerated and we're going to tell you that that means the same thing as wholly due, even though we don't really have any reason to explain why that is, and it also says that they're going to go to sale and the rescission, we're just going to call off one but not the other. Again, if that's what we were going to do, we would have done it explicitly, using

the word acceleration.

We understand that there's a general reservation of rights here in Exhibit 34, but the purpose of that, Judge, is to preserve the ability to go forward to sale, and the purpose of both, Exhibit 33 an Exhibit 34, when read together, Exhibit 34 for our record, is for course the rescission of the notice of default, was only to effectuate and then to rescind a sale. There was a process here, a nonjudicial foreclosure process intended to reach sale. That's why Exhibit 33 is there. That's why Exhibit 34 says that the only purpose that it's being recorded it to stop that process.

But we need to also focus on the legal significance of this and that is -- and we cite, we address this in our trial brief, so I won't spend too much time on it, but Exhibit 34, once it's recorded, it means that Exhibit 33 went poof. It's gone. It's not there, as if it never happened.

And I think SFR's reply to that is, well, you said that you're reserving all these rights and since acceleration is one of the rights that you have reserved, it doesn't accomplish what you need it to accomplish which is to take this out of the 10-year statute, but Judge, if we're going to read Exhibit 34 with that level of specificity against the bank saying that we have -- that because we've carved out generally all these rights and that acceleration is one of those rights, and that this is too general a document to revoke that hypothetical acceleration, right, we have to apply that same level of specificity to Exhibit 33. In other words, we have to equal, with equal specificity and clarity invoke acceleration in

Exhibit 32, which of course we did not.

So if SFR is right about Exhibit 34, it's wrong about Exhibit 33, and its argument it's a nonstarter. Or it has to come up with a good explanation for why the Court and adjudicating the case fairly is going to impose, interpret the rules that favor it at each point, and I don't think they're going to be able to come up with such rule. So that's what we say about that.

Now in conclusion here, Judge, the concept of allowing a case to be litigated over quiet title having to do with a foreclosure sale, having that thing be the delay, having SFR knowing full well that there was a tender, and that their claim to the unimpeded clear title of the property, forget the deed of trust, was questionable at best.

And certainly, I forget the exact date, but I think it's September18th of 2018, September, somewhere in September of 2018 the *Diamond Spur* case came out, but even before that, ever before that, the tender argument had been gaining momentum. In 2015, 2016, 2017, the relevant time period for this case, when it was being developed in discovery, when it was being prepared for trial, tender was a thing, and SFR knew that there was a tender here, and for SFR to be able to run out the clock through litigation tactics, and I don't criticize SFR for using the courts, we all have a right to open courts, but if you're going to do that, you cannot -- and thereby delay your -- the counter-parties property right, you cannot then say that the delay that was caused by the exercise of those litigation rights are now used as a sword.

This is a classic textbook case of unclean hands, and if

anything else, Judge, if the Court accepts SFR's argument, that the statute applies, that it was preserved, that it's a statute of repose, and all the other problems, pursuant to the *Promax* case, even if the Court in our view incorrectly determines it's a repose statute, because *Promax* remanded it for equitable considerations, the Court should apply equity here and say that SFR has -- it has problems with unclean hands and estoppel and cannot having acted without equity, having impeded the sale of this property through this litigation, then benefit from that very inequity by denying us the right to exercise the remedy that we know we are entitled to now because there was a perfect tender. And for those reasons we ask that you deny SFR's motion and grant judgment in favor of the bank.

THE COURT: Thanks. Ms. Hanks?

MS. HANKS: Your Honor, I want to address the kind of -- this argument that we somehow are required to qualify the statute in some way, and I don't know if that's really necessary. Judge Boulware did find it was a statute of repose, I do believe it's a statue of repose, but what I want to focus on is I don't -- the First Circuit Case that I think counsel's relying on for that phrase, "ancient mortgage statute" dealt with a Massachusetts statute that is entirely different than the Nevada statute, and so it's not a case where it has generic law that kind of be used persuasively in Nevada. It was dealing with a completely different statute.

We have a published decision, *Promax*, that deals with this very statute, and aren't asking the Court interpreting the statute, so I

would ask you not to even consider it , that First Circuit case. Nevertheless, I don't really think you need to qualify it. It is a conclusive presumption. That's how the *Promax* court talks about the statute. You could call it a conclusive presumption statute. Whatever you want to call it.

That doesn't really win the day for the bank to not call it a statute of repose, but what it -- the reason why it is a statute of repose and why there's a confusion as to what action we're talking about is it's not -- it is not true to way, well, because we started this action to challenge the association foreclosure sale, this statute, 106.240, could never cut off an action for us. No. It cuts off the action with respect to the deed of trust you'll never be able to judicially foreclose or nonjudicially foreclose.

You have a deed of trust by operation of a conclusive presumption statute in Nevada that is terminated, period, because you triggered the date for it, to terminate in 10 years. So the statute, whatever you want to call it, it's simply a statute that gets rid of the debt and it gets rid of the lien that that is secured by. That's all it does and that's all we're arguing.

And when we argue that and look at the documents I think what was really apparent is counsel really couldn't talk -- he tries to talk about the paragraphs, but he misses all the points and wants to just talk about this esoteric sense of let's qualify the statute. Why? Who cares? Promax says it's a conclusive presumption statute, so I just want to focus on the statute itself and the evidence we have in the case.

So the statute itself that -- we have it in the Promax case but I'll just read it again, talks about: it's the lien created by of any mortgage or deed of trust to find a real property appearing of record, we have that here, and not otherwise satisfy and discharged of record, which we have that here, shall at the expiration of ten years after the debt secured by the deed of trust, according to the terms thereof, and I'm going to get to that point in a second, or any recorded written extension thereof become wholly due, terminate, and it shall be conclusively presumed the debt has been regularly satisfied and the lien discharged.

And here's the interesting thing about Promax, not one payment was made on those notes.

THE COURT: They were two-year notes.

MS. HANKS: Two-year notes, and not one payment was made, but guess what? They were discharged by virtue of the statute.

THE COURT: Right. They were two-year notes.

MS. HANKS: Right. They were two-year notes. This is a longer note, I agree with that, but they made it wholly due on January 22nd, 2008. They moved up the maturity date. The maturity date was no longer 2035 by virtue of the notice of default. They exercised their remedy under paragraph 22 of the deed of trust.

So I would agree with you, yes, if under -- if we had a similar example as *Promax,* and this note, we were operating under the maturity date of 2035, ten years from that date, 2045, this statute would operate and would terminate the deed of trust. The problem is they moved up the maturity date. They moved it up to being wholly due on January

22nd, 2008 because they exercised their remedy under the deed of trust.

And so that brings me to my next point because counsel argued, well, she wants to ignore the preceding paragraph, that somehow I'm misleading this Court as to how the document reads. Well, I'm not doing that. Let's look at the notice of default. Why are we talking about a preceding paragraph and pretending like it somehow obviates or it carries over the next two paragraphs? Counsel argues, let's read it as a whole. Yeah, let's read it as a whole. Don't just cherry-pick. I'm not cherry-picking. I'm reading it as a whole.

Your first paragraph identifies the deed of trust. That's what this documents doing. You identify the deed of trust, you identify the amount of the original loan, the whole loan, the whole amount.

Then the second paragraph that counsel's talking about, now you describe in that paragraph what the normal terms of the loan is. It's an installment loan that would normally not have matured until December 1st of 2035, but you defaulted, borrower, you didn't pay your normal installment that was due on September 1st, 2007. Okay.

Now what's the next paragraph? Hey, guess what? By virtue of your default, now we're exercising our remedies under the deed of trust and we're making the loan wholly due now. We're not going to wait until 2035. We're doing it now. Now the whole thing is due. You defaulted.

And if you go back to the deed of trust, which this also mirrors the 106.240 language, it talks about the deed of trust according to the terms thereof, that's the exact terms we're talking about.

Paragraph 22 allows the lender in the event of a default, there's another way that can make the loan wholly due, too. They talk about it in another paragraph in the deed of trust, but we're only talking about the default in the installment payment here, they can make the whole thing due and immediately proceed to sale. That's what they're talking about here.

So they're saying, look, you normally had an installment contract that wouldn't have been mature until 2035, and you had monthly installments, you failed to pay it, now let's go to the next paragraph. Now we're exercising our right. Not only are we making it wholly due, we're also going to exercise our power of sale on the deed of trust.

And then here's where it gets really interesting. Then you go to the last paragraph, and the last paragraph, I forget how to --

THE COURT: The enlarge?

MS. HANKS: Yeah, because it's that camera, so you're not supposed to --

UNIDENTIFIED SPEAKER: Use the zoom.

MS. HANKS: Got it. Yeah. So if you do the last paragraph, the note we're talking about, it talks about Section NRS 107.080. Okay. It talks about the statute, and I'm going to reference that section in a second. Permits certain defaults to be cured upon the payment of the amounts required by that statutory section, without requiring payment of that portion of principal and interest which would not be due had no default occurred.

So if we go to 070.080 -- 107.080, it is a statutory requirement in Nevada that you are -- that a lender is not allowed to make a loan wholly due upon default without giving a certain time period, it's 35 days under the statute, for the borrower to cure that default and avoid the wholly due clause. In other words, they're still allowed to become current up to that point of all unpaid installments and interest and late fees, and then make it an installment contract.

If they don't do that though, if they don't do that, if they don't exercise their statutory right that Nevada put in place for borrowers, it's going to remain wholly due. It says the right of reinstatement will terminate and the property may thereafter be sold, and the trustor may have the right to bring court action to assert the nonexistence of a default or any other defense of trustor to acceleration and sale. That's what it says, acceleration and sale.

So talking about in 107.080, look, we have to give you a time period in which that you can still pay it up to the current date before the wholly due, you don't have to pay the whole --

THE COURT: Let's think about what is a statute of repose? A statute of repose triggers a time by which you file a lawsuit, and this is what Mr. Stern's argument is, that there is a lawsuit, so how does this -- if the statute of repose bars this, then how do we apply it?

It's -- I'm not sure I agree with Judge Boulware. This concept of the ancient mortgage statute, I did find one reference to it in Nevada. It's a very bizarre case about a mining claim, but you know, it's hard to figure out what they're talking about. But they do the thing that Nevada

has, an ancient mortgage statute. They just don't cite to what it is.

So in looking at this statute, if you go all the way back to the first mention of it, which it's only mentioned one time, by Nevada, they talk -- in *Promax*, they talk about the purpose of the legislature was -- the intent of the legislature was for the statute to protect bona fide purchasers, not to let corporations or groups of people get together and tell one another you do this at a certain time. So the notes were not extinguished, and they said we conclude that's an error. So that concept, that the statute of repose is intended to protect BFP's. And so in Promax, they said you're wrong, that's not what it's intended to do.

MS. HANKS: I don't know where there's -- I'm not arguing a statute of repose is only to protect BFP's. I'm sorry, Your Honor. I don't know.

THE COURT: No, this specific statute, the 104.240, they specifically said the district court was wrong when they said the purpose of this statute is to protect BFP's.

MS. HANKS: Right.

THE COURT: You're wrong. You've read it wrong. You have to look at what the statute says. So you have to look at what the statute says. And they indicate that your -- this is just wrong, it's plain and ambiguous, there's no room for construction, and it simply says what it says, that being a case no further interpretation is required or permissible. In the plain language of the statute, the deeds are conclusively presumed to have been satisfied and the note's discharged, and again, this was -- they had a really short timeframe in Promax. It

was a two-year note.

MS. HANKS: It doesn't matter.

THE COURT: And they let it trail and trail and trail and somebody was involved in a divorce, and then they did all these transfers, and so they were just laying out there for all for all this period of time because it was a corporation and they were all self-dealing, is essentially what the court says. Like, you know, you can't hide behind that because your two-year-old -- your two-year deadline to become fully due passed, and you didn't do anything. That's what it means.

So whatever your deed of trust says is when it becomes wholly due is when it becomes wholly due, unless what? It doesn't say in there unless it's accelerated, it says when does it become wholly due? It's to get finality. It's an ancient mortgage statute. I think he's right.

MS. HANKS: Okay. Regardless of whether you call it -- I'll accept the fact that it's an ancient mortgage statute. Everything you just said just supports my argument.

THE COURT: Okay.

MS. HANKS: Okay? So yes, you're right. It's wholly due by the deed of trust according to the terms thereof. You did it according to the terms. You exercised your right under paragraph 22 bank, through this notice of default.

THE COURT: Okay. That's where --

MS. HANKS: You --

THE COURT: That's where we divert.

MS. HANKS: Okay. And that's what I'm arguing.

THE COURT: Okay.

MS. HANKS: That they did make it wholly due.

THE COURT: Uh-huh.

MS. HANKS: It's not just by virtue of the maturity date. If that were the case, Your Honor?

THE COURT: Uh-huh.

MS. HANKS: If that were the case, you would see a maturity date in the statute. It doesn't that.

THE COURT: Uh-huh.

MS. HANKS: It doesn't say only therefore we come on the maturity date.

THE COURT: Uh-huh.

MS. HANKS: It doesn't say that, and it gets -- interestingly enough, that's what the Massachusetts statute says.

THE COURT: Uh-huh.

MS. HANKS: That's why it's different. Doesn't say maturity date. And so that's where the *Promax* case does come in handy because it says you're not allowed, there's no ambiguity here, don't read words that aren't there, and that's what the bank is asking to do, read maturity date as the only way a loan can be wholly due. That's ludicrous, because what they are telling you then -- but I want them to admit that right now because I have a lot of notice of defaults that are filed against SFR's property.

THE COURT: Uh-huh.

MS. HANKS: So if they're telling me that this notice of

default that we see in Exhibit 33 was only seeking to collect the installment payments between September 1st, 2007 and January 22nd, 2008, I want them to admit that in open court. I guarantee you they won't. They won't say that. When they were exercising this notice of default and they were going to foreclose, they were going to have a credit bid of the entire amount of this loan. They are seeking to collect the entirety of this loan.

THE COURT: Uh-huh.

MS. HANKS: Not just the installment payments due up to this date, because you can foreclose like that, you can do that.

THE COURT: Sure. Uh-huh.

MS. HANKS: They weren't. They were making it wholly due.

THE COURT: Uh-huh.

MS. HANKS: And if they're saying this type of document doesn't do that, I want that admission in open court, because I can use that for other cases in a big way.

MR. STERN: I'd be happy to speak in open court, Your Honor.

MS. HANKS: So --

THE COURT: No, have a seat.

MS. HANKS: But there's no evidence of that. Instead, they're telling the borrower your whole -- all sums, all, not just the installments due up to this date.

THE COURT: Uh-huh.

MS. HANKS: Not part, all sums secured by this deed of trust

are due immediately. That's the words they chose to use. There's no ambiguity, there's no contradictory language as Mr. Stern suggests, it's very clear. What were you telling the borrower? You owe the whole thing.

THE COURT: Uh-huh.

MS. HANKS: And what is the need, what is the need for the last paragraph explaining the terms in Nevada law under 107.080 that says, well, we give a little leeway to a borrower, we give a little saving grace, a 35-day grace period. They don't have to pay the whole lien or the whole loan to save themselves from foreclosure. They can still pay just up to the point of the default. That's what it says.

THE COURT: Uh-huh.

MS. HANKS: And even talks about acceleration in 107, so I want to read that now. Subsection 3 talks about why you have to give this 35-day period, Your Honor, and it says: the notice of default and election to sell must describe the deficiency in performance and payment, and may contain a notice of intent to declare the entire unpaid balance due if acceleration is permitted by the obligation secured by the deed of trust, which we know in this case it is because we see paragraph 22 that's actually entitled "acceleration".

But acceleration must not occur if the deficiency in performance or payment is made good, and any costs, fees, and expenses, incident to the preparation of or recordation of the notice and incident to the making good of the deficiency an performance or payment are paid within the time specified in subsection 2. That's a 35-

day period.

There is no ambiguity here about acceleration or wholly due. It all fits, it matches all the language in the NOD, mirrors the deed of trust paragraph 22, where it has to describe the default, give you that period to pay it. It mirrors the language in 080 with that period of time where it says you have a one period -- but there's no evidence that that bar were reinstated. Done. None. It just continued, and once that reinstatement period's gone, it even says here, it's done.

But you can still -- you can still bring an action though to dispute the nonexistence of a default, but even again, it says, but after acceleration. That's what it said, after.

THE COURT: All right. Let's talk about another case. So *Cadle -- Cadle Company* has created a lot, a lot, this one's not recorded though. *Cadle v. Fountain.*

MS. HANKS: Right.

THE COURT: A 2001 case, and in that case they accelerated the note and filed suit, then they dismissed the suit.

MS. HANKS: Correct. And they said that wasn't enough. Correct.

THE COURT: That's not sufficient.

MS. HANKS: Correct.

THE COURT: To -- but they filed a suit.

MS. HANKS: Yes.

THE COURT: They took action. So here's my question. This is this whole thing of what if there is a lawsuit pending? And that's the

argument here that Mr. Stern has made, is that where there is a lawsuit pending, then the ten-year statute --

MS. HANKS: Is what, tolled? Where's that?

THE COURT: -- doesn't apply, I mean, because they -- it was specifically because they accelerated the note and they filed a lawsuit --

MS. HANKS: No.

THE COURT: -- in *Cadle*.

MS. HANKS: Okay. No.

THE COURT: That's what it says.

MS. HANKS: So hold on. No, no, what happened in *Cadle* was they accelerated, yes.

THE COURT: Uh-huh.

MS. HANKS: They made it wholly due.

THE COURT: Right.

MS. HANKS: Right, so no confusion, no one's arguing --

THE COURT: Right.

MS. HANKS: -- acceleration doesn't mean wholly due and here today, no one's confused there. That bank wasn't confused about those words. And the court found the mere fact that you dismissed, and guess what the action was, Your Honor? Not a challenge to some NRS 116 sale, it was a judicial foreclosure action.

THE COURT: Uh-huh.

MS. HANKS: That's the action they brought. That's the difference and I want to highlight that in a second.

THE COURT: Okay.

MS. HANKS: So they brought the judicial foreclosure action after making the loan wholly due aka accelerated, whatever you want to call it. The court, the Nevada Supreme Court said the fact that you dismissed your judicial foreclosure action is not enough and is not clear and unequivocal to decelerate the loan.

THE COURT: Correct.

MS. HANKS: That's not enough. Well that's exactly what I'm arguing here. The *Cadle* case supports what I'm arguing here. That's exactly what the rescission does. You just opted not to elect to proceed to sale. You didn't in any way affect your wholly due language in your notice of default. So *Cadle* is exactly on point with what I'm arguing here. It'd be no different.

I would imagine the Nevada Supreme Court would say, just like *Cadle*, and your dismissal of the judicial foreclosure action wasn't enough to take away the acceleration, you had to do something else, more clear and unequivocal, and the clock is still ticking against you, bank. That's what happened, the clock was still ticking, they get the benefit of that, and it's terminated. 106.240 says now your lien is terminated and the debt is presumed satisfied.

THE COURT: Okay.

MS. HANKS: Same here.

THE COURT: But is it merely --

MS. HANKS: But you're looking at it from a lawsuit, any lawsuit.

THE COURT: Is it merely filing a notice of default saying

we're defaulting you, this is just -- this is going to start the clock running on the nonjudicial foreclosure process, and if this goes through, we have all these options, or is it as they did in *Cadle*, they did that, then they filed a lawsuit?

MS. HANKS: You do not need --

THE COURT: They dismissed the lawsuit, and that was -- the Court said that's where you blew it, you didn't expressly state when you dismissed that lawsuit that you were decelerating your acceleration.

MS. HANKS: Correct.

THE COURT: So what is the affect here where you file your lawsuit? I mean, I'm just not understanding how if you've got a lawsuit pending, say we're exercising our rights under this note, that the ten year, which is the equitable argument that Mr. Stern makes, which is the -- it -- we were in this litigation for all of this period of time, and now they're going to say because this is dragged out -- you know, Alessi and Koenig was bankrupt for however much period of time they were bankrupt, so --

MS. HANKS: That's where the distinction is, Your Honor. The action they brought here --

THE COURT: Uh-huh.

MS. HANKS: Remember this is an interpleader.

THE COURT: Right.

MS. HANKS: So when the bank brought in SFR --

THE COURT: Right.

MS. HANKS: -- it is not a judicial foreclosure action. That's

the difference. So he's arguing it, oh, it's any lawsuit. Where does it say that? No, it's not any lawsuit. You brought a claim challenging the effect of the NRS 116 foreclosure sale by the association.

THE COURT: Right.

MS. HANKS: You did not bring a judicial foreclosure action. But I would still argue that even if they had brought a judicial foreclosure action, it would have been incumbent upon them to make sure that that happened within the ten-year time frame and came to the conclusion because they triggered the date.

So I guess the difference -- that's the fundamental difference I have. There's nothing in 106.240 that says any lawsuit you bring will toll this, and there's no other statute that talks about that and there's nothing in Promax that talks about that. So that's where they're coming from. It's not any lawsuit. You didn't bring a judicial foreclosure action. You brought an action challenging the foreclosure sale, and it just so happens that during the tenancy of that action, the clock ran on 106.240.

But here's where we get to the equitable; even if you wanted to determine equities, right, and they say we're unclean hands, my client did nothing to affect the bank. The bank is always in the power to accelerate or decelerate its loan at any time within the statute of 106.240. It's always in their hands.

They didn't even have to draft a notice of default in this way. They decided to do it. And then when they did their rescission and explicitly said, well, we don't want to affect the acceleration part. We don't want to affect the wholly due, we're only affecting our power of

sale, that was their choice, and then yet they still had time -- they still had time while this action was pending to file a recession that's more clearly and unequivocal just like the *Cadle* Court isn't noted -- indicating.

They had all -- that was always in their power. So it is completely absurd to suggest that SFR did anything to prevent them from decelerating their loan. We couldn't have. There was nothing SFR could do. We can't control that, just like we can't control when they make it wholly due. It's always within their power. And they're charged with knowing the law in Nevada. It's not my fault and it's not my client's fault that they chose to make their loan wholly due in January of 2008 and then forgot to watch the clock. That's kind of what Pro Max stands for too, that we don't care. Sorry, guys. We're sorry you didn't know about this statute in your divorce proceedings. It doesn't change the fact.

And that's the -- and I also want to -- if you really read Pro Max very carefully, it's very important to understand that when it was remanded back for the two individuals that were involved in the divorce proceeding, that was the equitable principle in the estoppel. It was -- because in the divorce proceeding, the parties argue that when we sell this property, you will get 10 percent.

And the *Promax* Court specifically talked about had Judge McGee known -- this is at page 93. They assured Judge McGee that the sale of the Verde property to AS would generate enough money to pay the promissory notes and then pay the proceeds to Jack, the husband who was getting divorced.

Judge McGee later testified that had he known -- had he known the notes were unenforceable, had he known that 106.240 had made them terminate essentially, he would have structured the division of the community assets between Jack and Mary Ann Ferguson differently. That's what the estoppel they're talking about.

SFR has never -- it's completely different estoppel in play in Pro Max than it is here. There is no estoppel here. SFR has never, ever taken a position that a deed of trust survived, ever. We're never taken that position in this case. I don't think we've ever taken it in any case, frankly. We've never said, hey, don't worry; your deed of trust is still going to be good. It's still going to encumber my property. We've never said that. We've never lulled you into a false sense of a security and then somehow some division of assets happen differently because of it, or your changed your conduct because of it. We've always taken the position your deed of trust was extinguished. Always.

And in this case, unlike the *Promax* case where 106 had already ran and everyone's making these representations and actually getting divisions of assets based on those representations, in this case, the bank always had it in its power to fix the fact that they made their loan wholly due.

THE COURT: Okay. Well, then let's talk about --

MS. HANKS: They just didn't --

THE COURT: -- Coyt [phonetic]. Yet another unpublished decision, and so here, it's a footnote -- they drop it as a footnote. Similarly, appellant's argument regarding NRS 106.240 was not raised in

its summary judgement motion practice, nor was the argument pertinent to the identified grounds for granting an NRCP 60(b) relief.

We questioned the merit of that argument in light of the March 2010 notice of default that declared the loan due in full. *C.F. Clayton v. Gardner*.

MS. HANKS: Right.

THE COURT: Where contract obligations are payable by installments, the limitation statute begins to run only with respect to each installment when due, unless the lender exercises his or her option to declare the entire note due.

So in this -- and again, in this one, these are all -- I guess the thing that's odd about all these are that we're talking here about different types of notes and all these cases and different types of commercial obligations, and trying to find one where you've got a similar situation to this one, *Coyt* is probably the closest of any of them because the others are all these very short commercial agreements between -- in business -- involving business deals. The mining case, *Cadle*, they're all business deals that are based on, you know, two, five, ten, whatever, notes of a certain amount of time.

So looking for one that is as close as possible, and this is the closest one I could find, and I can't tell what type of note this was. It talks about First American Title and Wells Fargo as trustees for Wamo [phonetic]. And it talks about past certificate. So this seems to me like this is the closest thing we've got --

MS. HANKS: Similar.

THE COURT: -- to one of our mortgage cases.

MS. HANKS: Right.

THE COURT: And it's, again, I can't really tell because they don't really go into much detail and they just drop a footnote on it.

MS. HANKS: Right. And, I mean, I can talk about *Coyt*. It's -- that's more helpful to my argument than it is to the bank, but --

THE COURT: Right. Sometimes I understand if this is --

MS. HANKS: Right.

THE COURT: Because the others, to me, are different situations and involve different types of loans and different due dates, or different things happened, and even in the -- and particularly in the case where, you know, they file a lawsuit and then they dismiss it. I get -- I understand that one. I get that one entirely. I mean, you triggered something and then you never untriggered it.

But I'm not -- but that was where -- and they specifically say file the notice of default and file the judicial foreclosure. It was two parts. So they're like, okay, you've committed. So I'm trying to find one where they explain to us what's wholly due? What do you have to do to trigger this, you know, 106.240?

MS. HANKS: And I agree with you.

THE COURT: And they never really defined it for us.

MS. HANKS: I would agree. I think *Coyt* is probably the most applicable to describing that because in that case, they question the lender's argument, the marital lender argument, the statute of limitations hadn't run because the maturity date. And they say, well, no.

No. No. No, that's not true because normally that would be true, right, the six years runs from each installment payment.

THE COURT: Right. Uh-huh.

MS. HANKS: But when you make the wholly due, you've ran your six years from now one date. You don't get the benefit of the maturity date because you just took that whole maturity date, basically lumped it into one date and said now, today it's due. That's what we have here. That's why I don't know if there's any confusion as to wholly due. You made if fully due.

I mean, when I looked up the definition of wholly, just so we get that, you know, the word fully, entirely, totally, all; those are the words that are used in the regular dictionary for wholly. I don't think there's any confusion there that that -- and I think the Court case tells us that, and they even recognize it. And then when we cite *Clayton*, which is a published decision, like, yeah, normally there's installments and normally they don't run -- the statute of limitation doesn't run from those installments.

But when you make it wholly -- when you make it -- when you declare the entire note due, now it runs from that date. You don't get the benefit of the six years running from each installment. That's exactly what we're arguing here.

THE COURT: Okay.

MS. HANKS: It's what you did with the notice of default.

THE COURT: And so again, this one, I don't know what it is they did that triggered that because this was Mr. Sterns argument is that

there are different kinds of things banks can send. You can send one of these notices of default. You can file a judicial foreclosure. Or you can send -- quote, a quote, acceleration of a note.

MS. HANKS: Right.

THE COURT: So I've got no idea what was sent in any of these cases. It doesn't -- they don't' really tell us and explain to us here's the document that was sent that we consider to have made it, quote, "wholly due." They never tell us.

MS. HANKS: That's true, but I don't think you have to get there. I think you just have to reject the bank's absurd argument that when I make the entire loan due, I didn't make it wholly due. I don't even have -- I don't even know how to square that. What do you mean? You made the whole entire loan due. Where do you say I'm only electing to proceed on the installments here? Where do you say that? You don't.

In fact, you say all sums. We do -- we have, and we do hereby declare all sums secured thereby immediately due and payable. How is that ambiguous? It's not ambiguous. What are you telling the borrower? You're going to foreclose. You're foreclosing on the entire debt. Not that, oh, if you pay partial sums, and then here's the point, that's why I'm acknowledging this last paragraph would make no sense. Why would you be citing 107.080, which talks about acceleration and how there's a certain period in time, 35 days, where the borrower can pay less than the entire note to stay off foreclosure? That's what Nevada says.

Why would you be talking about that in your notice of default

if you only intended to foreclose on the installments that were due up until between September 1st, 2007 and January 1st, 2008? You don't say that. You don't say that anywhere. The bank doesn't say that. You read this in context. It says you normally had an installment contract that would mature in 2035, but you defaulted on September 1st, 2007.

Next paragraph, we're exercising our right under the deed of trust and we're now making -- we're declaring all sums due. There's no ambiguity there. None. That's just argument of counsel.

THE COURT: Okay. So then any time the -- a bank does that and then sends out this rescission and election -- of election to declare default -- say for example, somebody did something, made a payment, reinstated, did something, so they said, okay, we're going to rescind, which -- because these are not defined by statute. These particular --

MS. HANKS: What are not?

THE COURT: -- rescission.

MS. HANKS: Oh, rescission's not, correct.

THE COURT: The rescission comes with -- these type of notices are -- it's not something that's defined by statute anywhere, and it's a made up thing.

MS. HANKS: And if a -- yeah, if a borrower had paid, Your Honor, if a borrower had paid within this 35-day grace period and reinstated the loan, I would expect to see the rescission say that. That's exactly what the rescission should say. By virtue of payment or reinstatement under 107. --

THE COURT: Right.

MS. HANKS: It doesn't. Our rescission doesn't say that.

THE COURT: Okay. So you're saying that -- because again, rescission is a -- it's a made-up thing. It's not defined by statute how you, quote, "rescind."

MS. HANKS: Right.

THE COURT: So the -- because I've looked. So the -- in order to be -- I've looked specific enough under Clayton --

MS. HANKS: Correct.

THE COURT: -- it would need to say specifically that because you exercised your rights under -- I mean, if that was a different situation. If we were talking about somebody reinstated --

MS. HANKS: Right.

THE COURT: -- to specifically say that you've made your payments, and therefore we are reinstating you and withdrawing our previous acceleration. You don't have to pay everything right now.

MS. HANKS: Correct. Yes.

THE COURT: We're going back to our original terms.

MS. HANKS: That would -- yeah, that would -- yeah.

THE COURT: Okay.

MS. HANKS: I would expect to see that. Exactly. I would expect to see that.

THE COURT: Okay. So where do they just decide we're not going to go forward with the sale and they simply say we're looking to not go forward with the sale; we're going to pursue other remedies at some point in time.

MS. HANKS: Right.

THE COURT: The ten-year statute -- and again, I'm trying to figure out, I mean, it doesn't -- that statute doesn't make any sense as anything other than the, quote, "ancient mortgage statute." It's ten years from whatever date it was due. Because again, we're talking about on -- in these commercial mortgages, dates that -- and notes that had very specific short-term dates. Like, you know, self-dealing companies who say I'm not going to expect any payments on this to your note because we're all just friends here.

That really offended the Court, and I understand why in that particular case they said -- you know, you can't do it this way. You can't just be self-dealing and then try to hold somebody else to your self-dealing, which is essentially what they were doing and -- in Pro Max. And the court said, no. No. No. No. No. You cannot do that.

MS. HANKS: But they didn't -- but in Pro -- that might have been the facts of Pro Max. You might have had a short note, a two-year note, but nowhere in Pro Max does the court qualify 106.240's operation because the note was short.

THE COURT: No, that's what I'm saying.

MS. HANKS: Yeah, so it doesn't matter if the note's long.

THE COURT: It makes sense in the context. It makes sense in the context of those cases. I understand the application in those cases. I'm not getting it here where -- because, as was pointed out, this is a very old statute and the whole concept of mortgages and deeds of trust sort of evolved over time and are creatures of statute, marginally,

except for this concept of rescission, which they just never defined for us, what is a proper rescission. I've looked for it.

MS. HANKS: But *Promax* is -- but *Promax* is the perfect case in the sense that no one knew about 106.240, right? They admit that.

THE COURT: Right.

MS. HANKS: Neither *Promax* knew it during the time of the divorce proceedings, Mary Ann and Jack Feenstra didn't know about it, and yet it still operates. It doesn't matter you don't know about it. It still operates.

THE COURT: Right.

MS. HANKS: So I don't believe the Court says anything in *Promax* that says, well, we're doing this because it offends us that you had self-dealings. No, they looked at the statute as an unambiguous, clear statute requiring no other interpretation. And that's what you're bound by. You don't have to get whether it makes sense. You don't have to get at whether how old it is. Old is old; doesn't matter. It's still good. There's nothing overturning 106.240, and certainly the legislature could do it if it wanted to. Heck, 116 was old by the time it came around and reared its ugly head for the banks.

THE COURT: Uh-huh.

MS. HANKS: It was old. It was almost 20 years old. But guess what, it affected them. It's still good law. They didn't get to argue, well, it's just so old, it's just been sitting here, and no one's been doing anything with it, so it doesn't get a -- it doesn't get enforced against us. No, that's 106.240 exactly.

THE COURT: Right. Okay. And so then again, just before we wrap up this argument here, the notice of default and election to sale is a very -- is a really specific thing and it specifically references the entire principle amount will become due on 12/1/2035, which is consistent with the deed.

MS. HANKS: Correct.

THE COURT: That language appears in the deed.

MS. HANKS: Correct.

THE COURT: So you can read this with the deed; it makes sense. Okay. And as a result of the maturity, the obligation on that date. So then it goes into this thing, but you -- the present beneficiary under the deed of trust has a written declaration of default and demand for sale and has deposited -- whatever, to go forward with this -- all evidence of the obligation secured thereby, which is interesting to me because where's the note?

MS. HANKS: It's in the proposed exhibit, Your Honor. The bank didn't seek to admit it, but --

THE COURT: I haven't seen it.

MS. HANKS: -- it's in there.

THE COURT: And --

MS. HANKS: A copy.

THE COURT: -- 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 this obligation.

MS. HANKS: Right.

THE COURT: Okay. Fine. But they don't go forward with it.

MS. HANKS: Only the election itself.

THE COURT: They --

MS. HANKS: Only the election itself. That's the key.

THE COURT: Right. The don't go --

MS. HANKS: That's why I -- that's why I wanted -- that's why I wanted the ELMO to break up these two paragraphs. This notice of default does two things. It's that first sentence, declaring all sums due and payable, making the loan wholly due now.

THE COURT: Right.

MS. HANKS: Moving up that maturity date, no longer operating under the typical maturity date and waiting.

THE COURT: Right.

MS. HANKS: Okay. You go, now it's all due. We're going to come after all of it. And then the second part is after the and, and then elects to proceed under foreclosure under the deed of trust.

THE COURT: Okay. So this is why I want to go back to this concept that once you filed suit, and I understand why they said what they did in *Coyt*. Like, okay, you filed suit, but you dismissed it. Was it *Coyt* or was it the other one?

MS. HANKS: That's *Cadle*.

THE COURT: *Cadle*. Where you filed suit and like -- what, sometime in the 90s, and then you dismissed that. And so what is -- because -- and that one it was very clear; they did a notice of default and

they filed their lawsuit.

MS. HANKS: Right.

THE COURT: And when they dismissed their lawsuit, they didn't specifically say, oh, we'll reinstate everything.

MS. HANKS: Correct.

THE COURT: Okay. That one makes sense to me. I get that. So I'm just not understanding what's the affect where you send out that notice of default election to sale. It doesn't go forward for whatever reason, but there's a litigation, and the litigation is, you know, we think we've got title to this property. So why does that -- the litigation not protect the bank?

MS. HANKS: Because the litigation is not judicial foreclosure. It's not judicial foreclosure.

THE COURT: Okay. But --

MS. HANKS: Not once have they brought an enforcement action. This is not an enforcement action.

THE COURT: Right.

MS. HANKS: You are -- no matter what you do today, if you reject my 106 argument and you find they tenured, you will not find -- make a finding that they can enforce the deed of trust.

THE COURT: Right.

MS. HANKS: That they can foreclose. This will not be a foreclosure. They will still have to issue a notice of default --

THE COURT: Right.

MS. HANKS: -- and a notice of sale and either go through the

nonjudicial foreclosure process or do a judicial foreclosure. They will still have to do that process, period.

THE COURT: Right.

MS. HANKS: And that's where it makes no sense when counsel says, well, why are we arguing this? I could have not argued 106 today. I could have had you -- we could have had you find, well, it's at least survived the 116 sale, and then when they immediately filed a notice of default, I would have brought an action and claimed 106.240 just like *Promax*. We would have been right back to square one, so why not bring it in the action where you're trying to say the deed of trust is not extinguished. I'm saying it's extinguished for just another reason.

THE COURT: Right.

MS. HANKS: But this action is not an enforcement action. That's where it differs from *Cadle*. But where *Cadle* is helpful and instructive is that we do have similar conduct. In other words, we have a notice of default that makes the loan wholly due, and then exercises the power of sale, right? The only difference in *Cadle* is their judicial foreclosure action exercised the power of sale. That's how they did it, right?

And then -- and in fact, Your Honor, I don't think they did a notice of default in *Cadle*. I think the judicial foreclosure did the both, did the effect of the notice of default here and made the loan wholly due, and they usually allege that in judicial foreclosure because they have to if they want to foreclose in the whole lien, and then they actually are exercising the power of sale via the lawsuit, the judicial foreclosure.

And that's exactly -- and so why *Cadle* is instructive is, it does those two things, right? The notice of default does those two things. But the problem with the rescission, it only rescinded the election to sell. Election to proceed to sale, and that's exactly what *Cadle* talked about. The fact that you dismissed your judicial foreclosure action, all it did was basically rescinded your election to proceed through judicial foreclosure. It doesn't unwind the fact that you made the loan wholly due.

That's exactly what we have here; we just have different mechanisms by which they did the wholly due clause and the election to proceed to sale. That's it. But *Cadle* is exactly on point. It tells this court what it should do. It has to find that that rescission is not clear and unequivocal. If you intended bank to rescind this first clause where you said all sums secured thereby immediately due and payable, you should have said that in your rescission.

Instead, you used language and said shall not be construed to affect that default and should only be construed -- shall only be construed as just not opting the election, just the second clause. So *Cadle* is exactly on point. And I don't think you should get bogged down when we get back to *Promax*. Don't get bogged down in whether these cases don't have exactly the same type of note or exactly the same type of maturity. Wholly due is wholly due.

Maturity date can be different from one note versus another note. The bottom line is if you change the date, if you make the whole thing completely due, you've triggered 106.240. nowhere in the *Promax*

case does it ever make a mention that it's only because it was two years that we're finding this. They went on a strict statutory interpretation and that's all we're asking for the Court to do here. We don't have to make sense of it. We don't have to worry about it being old. We don't even have to worry about it being draconian I think is what Mr. Stern said. Sorry. That's where you are. You're in Nevada.

You had all the power not to make your loan wholly due. You had all the power in March of 2008 to make your rescission actually count and rescind both the things you did with your notice of default. You didn't. Shame on you. It's not draconian.

THE COURT: Well, I understand that it's not a judicial foreclosure, but it's a quiet title. Don't they have a quiet title claim?

MS. HANKS: Whatever that means. I mean, it's just an action saying their money incumbrance is still there, which is why I think 106.240 is a legitimate argument at this point.

THE COURT: Uh-huh.

MS. HANKS: We can argue two things. We argued one that the sale was valid, and it was still -- and it did extinguish now. They claim we knew about tender. That's not true. We don't know until really today, frankly, because it was in dispute whether it was actually delivered. And then the other reason why it's extinguished is irrespective of the NRS 116 sale. You have 106.240 that you triggered, bank. You triggered it by your own actions.

THE COURT: Uh-huh.

MS. HANKS: And you failed to untrigger it. That's on you.

There's nothing draconian about that. Know the law; know the state you're in and operate accordingly. You don't get to come to court and cry foul because you made your loan wholly due in 2008 and then just sat back.

THE COURT: Okay. Okay. All right. I'm going to deny the motion. I believe having asserted a claim for quiet title, they've protected their interest here. I don't see how -- otherwise, why would you do it? It just it doesn't make any sense to me. And I do believe that this is intended to be a statute to clear up title where people have -- I did one of these a week ago where there was a cloud on a chain of title and cleared the cloud on the chain of title.

I don't believe this is what this is intended to do if you do something to protect your interest, and they filed the quiet title. I just don't see how it can be construed any other way. So denying that, were there any defense witnesses?

MS. HANKS: No, Your Honor.

THE COURT: Okay. All right. Any other witnesses -- I mean, are you going to pursue this rebuttal issue any further or?

MS. MORGAN: No, we don't have anything else.

THE COURT: Okay. All right. Great. So what? Because as Ms. Hanks pointed out, this isn't a foreclosure action. So what's the relief you're looking for?

MS. MORGAN: What's the relief?

THE COURT: Uh-huh.

MS. MORGAN: The deed of trust survived the Chapter 116

sale.

THE COURT: Okay.

MS. MORGAN: We have the evidence that was admitted that delivery did, in fact, take place because the Miles Bauer letter and check was in Alessi and Koenig's file. All of the other facts pertinent to the tender analysis were determined through summary judgment and that was the only remaining issue with respect to tender. So under *Diamond Spur*, the deed of trust survived the sale due to the pre-sale of tender.

THE COURT: Okay. And so because your quieting title, whatever rights you have under your deed of trust --

MS. MORGAN: Right. SFR took its title subject to the deed of trust.

THE COURT: So Ms. Hanks argument that somebody else is going to decide this. Because if you decide you're going to foreclose on this, she'll bring it up again and somebody else might decide differently from me because I'm -- in that ruling, I don't see how I can tell somebody else what to do.

MR. STERN: So if you don't mind us sharing the argument here, Your Honor because I've been sort of focusing on the 106.240 issue, I think that's it. I think 106.240 has to be decided in the opposition to Ms. Hanks' motion, as well -- I should say SFR's motion as well as the objection to Exhibit 33. It was never before the Court in the first place. That's why when Ms. Hanks on reply conceded that you don't have to call it a statute to repose, that takes it out of affirmative defense. A, that means it was never raised before the Court. So SFR can raise it. We can

raise it. Maybe they're timely. Maybe they're untimely. Maybe we're timely; maybe we're untimely. Maybe they're right; maybe we're wrong. Who knows. Different case.

THE COURT: Correct. So --

MR. STERN: Different case.

THE COURT: -- I am ruling just in this particular case that I believe that your quiet title action survives 106.240 because it was raised in the -- I think the answer to the interpleader action.

MR. STERN: Yes. We expanded the interpleader to join the other claims.

THE COURT: Joined all parties.

MR. STERN: Joined all claims, joined all parties.

THE COURT: So it didn't just defend the interpleader.

MR. STERN: Right.

THE COURT: Brought everything else in and by seeking --

MR. STERN: Yeah.

THE COURT: -- quiet title. And I can see this is not a judicial foreclosure action.

MR. STERN: It's not.

THE COURT: I am not ordering foreclosure. As was pointed out, this does nothing other than --

MR. STERN: It doesn't even require the bank to foreclose. We can then take 50 years and then make SFR say the argument again. It'd be real stupid for us to do that, but the Court's order I don't think would mandate or not mandate anything like that.

THE COURT: Okay. I'm not saying what strategically you're doing here. I do think that it's --

MR. STERN: Right.

THE COURT: -- I may have a point. But it says 2035, so --

MR. STERN: The only thing --

THE COURT: -- 2045.

MR. STERN: -- the only reservation of rights I would have, Your Honor, is that I'm speaking here about the remedy.

THE COURT: Uh-huh.

MR. STERN: That nobody's asked the Court to do anything else.

THE COURT: Right.

MR. STERN: However --

THE COURT: And that's --

MR. STERN: -- I think both sides would be free to bring things like claim preclusion, issue preclusion if those elements are met in a future --

THE COURT: This is why I want --

MR. STERN: -- action.

THE COURT: -- this is why I want to make it really clear what you want in this order.

MR. STERN: I think what we want in this order is a finding -- I almost called you Ms. Hanks -- as Ms. Morgan said, a declaratory order that our deed of trust survived; that there was nothing else placed at issue.

THE COURT: Because of the tender issue survived.

MR. STERN: Right, because of the tender issue.

THE COURT: The issue itself. There was a perfected tender.

MR. STERN: I mean, if I want it to be fully expressing what we would want in this order, I think the Court's order can and perhaps should include a statement that SFR could have properly, in this litigation, brought the 106.240 issue, but didn't. Because that would be relevant to claim preclusion and issue preclusion in the future. But I think the Court can omit that from its order and not really bind the subsequent judge one way or the other as to whether claim or issue preclusion arise. I think on both sides those are going to be issues we're going to have to fight through. But the remedy we asked for here was on the claims that were actually before the Court.

THE COURT: Okay.

MR. STERN: And that was the quiet title issue. In our view, 106.240 was never before the Court.

THE COURT: Got it. Ms. Hanks.

MS. HANKS: Okay. So I'm confused.

THE COURT: Uh-huh.

MS. HANKS: Because if I have counsel saying that the 106.240 issue is not being decided by this Court, then there can be no claim or issue preclusion later. If it is decided, then I need the findings so that I can appeal it. That's the problem.

THE COURT: And see, that's my question.

MR. STERN: Judge --

MS. HANKS: Yes. If he wants to say it's not decided, and it's completely open, there is no issue preclusion or claim preclusion, that's one thing.

MR. STERN: But let's --

MS. HANKS: But we can't be half in, half out.

MR. STERN: Let me be clear about that, Judge.

MS. HANKS: Because I need findings that I have to appeal if that's going to be the issue.

MR. STERN: Let me be clear about that, Judge. The law, as I understand it, and we just had a difficult argument in the Ninth Circuit, so I think we know this law pretty well right now, is on the subject of claim preclusion, it applies to, as long as the parties are in privity, et cetera, et cetera, it applies to any claims that were or could have been brought. So the fact that 106.240 is not before the Court is not preclusive of a claim preclusion issue later on; however, it would be preclusive of issue preclusion.

THE COURT: Okay.

MR. STERN: That's what I'm saying.

THE COURT: Okay . well, but here -- so here's why I was saying -- you know, what exactly are we putting in here? Because a defense was raised. A Rule 52 motion was made at the conclusion of your Case in Chief, and I ruled against them as a matter of law.

MR. STERN: In that case, Judge, I think the Court's order should be that you've considered it on the merits and ruled against it.

THE COURT: Okay. But I believe that Ms. Hanks is correct

that there needs to be a record --

MS. HANKS: Right. So I need --

THE COURT: -- of what that ruling was.

MS. HANKS: Yes.

THE COURT: And so I considered the 106.240 defense. I denied the Rule 52 motion on the grounds that I believe that filing the quiet title action has stayed the preclusive effect of 106.240.

MR. STERN: Right.

THE COURT: Because it's you're no longer suing those people on that mortgage. You didn't sue them on that mortgage.

MR. STERN: Right. I think that's sufficient, Your Honor. If I may, there's one -- you know --

THE COURT: Who is quieting title in -- your own title in this property and I don't think 106.240 bars you doing that.

MR. STERN: I think that's sufficient for our needs and for us so far as we can deal with it at appellate argument. However, we -- I think that's enough for both sides.

THE COURT: So --

MR. STERN: But I do --

MS. HANKS: Yeah, I would -- sorry.

MR. STERN: -- I do want to say one thing. I know you've already made up your mind. I just want to preserve in our -- an issue for appeal and that is one of the things, one of the prejudices that -- because I understand that you considered 106.240, but one of the reasons we argued initially you shouldn't consider it at all because it's not before the

Court --

THE COURT: Right.

MR. STERN: -- is because if it had been timely raised in litigation, we would have had rights to amend our -- the relief we wanted to seek reformation of Exhibit 34 to make clear that that was a fully clear recessionary document.

THE COURT: Okay.

MR. STERN: I just wanted to get that on the record.

THE COURT: Okay. But here's -- 106.240 deals with the mortgage.

MR. STERN: Uh-huh.

THE COURT: And it's -- the mortgage is with these people who have been defaulted.

MR. STERN: Right.

THE COURT: They're not here anymore. It's a separate buyer.

MR. STERN: Sure.

THE COURT: Which is why I thought it was interesting in Pro Max they specifically talk about the intention -- the District Court said the intention of the statute is to protect VFPs. That's them. And the Supreme Court said, no, it's not. It's not about protecting them. So what is --

MR. STERN: Your Honor, I don't think I'm going to have a better answer than what you've already given.

THE COURT: Interesting point.

MR. STERN: Yeah.

THE COURT: So what my view here is that once you have filed to quiet your title, and you're not following through on that hold out mortgage stuff, you have title. A quieted title. Now, I get their point that I have not judicially foreclosed, but what's a quiet title action?

MR. STERN: Right. I think you've determined the rights.

THE COURT: Yeah.

MS. HANKS: I just need clarification, so I know what the order's going to read.

THE COURT: Exactly.

MS. HANKS: They're probably going to take a stab at drafting it.

THE COURT: Yeah.

MS. HANKS: So are you making any findings that the notice of default did make the loan wholly due and that just simply because they filed their quiet title action that stayed or tolled the ten-year timeline? That's just where I'm confused.

MR. STERN: I don't think you have to reach that, Judge.

THE COURT: I don't think I have to reach it. I don't think it applies.

MS. HANKS: So you don't think 106.240 applies?

THE COURT: No because this is, as you pointed out, not a judicial foreclosure action. It's not against some third party. They've already told us in this other case we're not here to protect third parties. I don't know why we have it if we're not, but the Supreme Court said it's

not to protect third parties. Fine. What is it for? It's to protect somebody who owes a debt on a mortgage. It's going to be gone after ten years so that you can clear up your title. Because like I said, I did one of these like last Thursday. So what have they done? They've protected their title interest because they've said we want a declaration that the title should be quieted in the /name of Bank of America. Okay.

MR. STERN: I think that's sufficient, and then we'll prepare the order. Obviously, run it by counsel. I think we understand the Court's conclusions.

THE COURT: Right. But my point being, you have to have it in there.

MR. STERN: Yes.

THE COURT: I appreciate your argument that all I need to do is just say tender, but you've got to have it in there because --

MR. STERN: Our order will include your findings about the -- consistent with *Promax*, the purpose of the statute and how it doesn't apply here for the reasons you've told us, which is that the original borrowers are gone. This is a transaction involving SFR --

THE COURT: Not a third party.

MR. STERN: -- a litigation involving [indiscernible] the bank. You have made a legal determination the statute doesn't apply. A factual determination on tender, the deed of trust survives, and that's all we're going to say.

THE COURT: Right. I mean --

MR. STERN: Yeah. Any way of --

THE COURT: -- I guess -- because that's my point.

MR. STERN: Right.

THE COURT: I'm not understanding why you would -- and that's why I kind of never understood where Judge Boulware went with this. Why? You don't have the person who's the noteholder in the case?

MR. STERN: Exactly.

THE COURT: What does it matter? You're not suing on a note.

MR. STERN: Right, so --

THE COURT: You're not suing anybody on this note.

MR. STERN: No. No, there's not --

THE COURT: I just don't get it.

MR. STERN: -- it's just the ram -- eventually --

THE COURT: It's just -- my problem is I think it's bizarre. I don't understand. And that's why I found it really weird that the Supreme Court so firmly disagreed with the idea that this was to protect VFPs. Why else would you have that statute but to protect VFPs? It doesn't make any sense that they said, no, it's not.

MR. STERN: Judge, my personal view, maybe I shouldn't get into this, but I will. It's just an ancient mortgage statute that tended to clean up --

THE COURT: I think it is an ancient statute. And I wish that they had actually quoted in that footnote in the Mining case, quoted the statute for us so we'd know that's specifically what they're talking about.

MR. STERN: This was just a housekeeping statute. That's all

it is. It doesn't give anybody an assignment to rights.

THE COURT: I wish they had talked about it, but they didn't.

MS. HANKS: What is a housekeeping statute? That is hilarious.

THE COURT: No, it has very real meaning.

MS. HANKS: I just want to make sure -- okay. Because I don't know what a housekeeping statute is.

THE COURT: It's to clear up the chain of title. Absolutely to clear up --

MS. HANKS: It's to clear up title. Okay.

THE COURT: -- it is absolutely to clear up the chain of title.

MS. HANKS: Can I have clarification, though, that because you believe it's not applicable here because they're not doing an enforcement action --

THE COURT: Right.

MS. HANKS: -- you would not make any -- if they do do a judicial foreclosure or nonjudicial foreclosure, then I might have standing to bring it and now we're talking about a whole different --

THE COURT: Who are they going to foreclose against?

MS. HANKS: SFR. We're the title owner. That's who they're going to foreclose against.

THE COURT: That's quite title.

MR. STERN: Yeah.

THE COURT: Didn't we just do that here?

MS. HANKS: No, you did not foreclose. Title is not going to

transfer to them, that's the point.

MR. STERN: I think --

MS. HANKS: They only have a money incumbrance that still exists on the property. That's all this says.

THE COURT: Okay.

MS. HANKS: I got to be clear on that.

THE COURT: Interesting.

MS. HANKS: If you're doing that, then I got to appeal that. My understanding is title is not transferring today. It won't transfer tomorrow. If they record your findings of fact and conclusions of law, all it says is that their deed of trust encumbers the property.

MR. STERN: SFR will continue to be the owner --

THE COURT: Right.

MS. HANKS: That's it.

MR. STERN: -- of the property until such time as the bank does something to enforce the foreclosure remedy.

THE COURT: Right.

MS. HANKS: Which will be nonjudicial foreclosure.

MR. STERN: Which could be either nonjudicial or --

THE COURT: And that's what I said.

MR. STERN: -- judicial, it could be at any time.

THE COURT: It's got nothing to do with the mortgage note, though.

MR. STERN: Yeah.

THE COURT: It doesn't have anything -- that's why I said, we

didn't have --

MR. STERN: We will have deficiency rights against SFR.

THE COURT: The note's not in the record. I just want to make it very clear. Nobody admitted the note.

MR. STERN: But we cannot sue SFR for money. We have no deficiency rights against them.

THE COURT: That's why I made it clear.

MR. STERN: Yes.

THE COURT: The note -- nobody brought in the note. It's not about the note.

MR. STERN: Correct. This is not about enforcing the monetary obligation. It's about the rem enforcing against the property.

THE COURT: Correct. Right. And all I'm saying is I'm quieting title. Whatever remedies you guys pursue after that and I understand another person at a later time might disagree with my analysis. So that's why I said I think you need to make sure it's in here. And how you term -- so I would appreciate it if you would work together on that because as I said, I know this is going to get appealed.

So I believe you need to have something in here that explains this. That on a quiet title action is just to pursue on your -- a declaration as to your title, didn't draw that. The quiet title as to your deed of trust survives.

MR. STERN: Uh-huh.

THE COURT: I agree with you on that.

MR. STERN: Okay.

THE COURT: And I think that filing that lawsuit saved it, and I don't think that the 106.240 --

MR. STERN: Applies.

THE COURT: -- applies. The person who had the mortgage isn't there.

MR. STERN: Right.

THE COURT: Which is why they went off and they dealt with the other part in *Promax*, in another court.

MR. STERN: I think we have it, Judge. I think we're clear.

THE COURT: I don't understand why we would have it if it's not to protect VFPs. But anyway, strange. All right.

MR. STERN: Thank you, Judge.

MS. HANKS: Thank you.

MS. MORGAN: Thank you.

THE COURT: You're going to show that, please, to --

MR. STERN: Yes.

THE COURT: -- Ms. Hanks before you send it over, and we will --

MR. STERN: And I owe Ms. Hanks comments on that other order.

THE COURT: All right. And then I'm sure the clerk will be in touch with you guys to pick up your exhibit books because, so little came in, we'll be happy to return these to you. So we'll have Lorna -- Lorna can return any -- do you want any unadmitted exhibits returned?

MS. HANKS: No.