

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

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

Appellant/Cross-Respondent,

vs.

U.S. BANK N.A., A NATIONAL  
BANKING ASSOCIATION, AS  
TRUSTEE FOR THE  
CERTIFICATEHOLDERS OF THE  
LXS 2006-4N TRUST FUND,  
ERRONEOUSLY PLED AS U.S.  
BANK, N.A., AND NATIONSTAR  
MORTGAGE, LLC, A FOREIGN  
LIMITED LIABILITY COMPANY,

Respondents/Cross-Appellants.

Supreme Court No. B1200 Electronically Filed  
Mar 18 2021 06:12 p.m.  
District Court Case No. A-14-705563  
Elizabeth A. Brown  
Clerk of Supreme Court

**APPEAL**

From the Eighth Judicial District Court, Department XXVI  
The Honorable Gloria Sturman, District Judge  
District Court Case No. A-14-705563-C

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**RESPONDENTS/CROSS-APPELLANTS' SUPPLEMENTAL APPENDIX**

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DATED: March 18, 2021.

### AKERMAN LLP

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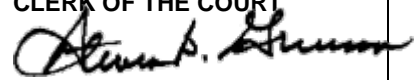
*Attorneys for Respondents/Cross-Appellants*

## **CERTIFICATE OF SERVICE**

I certify that I electronically filed on March 18, 2021, the foregoing **RESPONDENTS/CROSS-APPELLANTS' SUPPLEMENTAL APPENDIX** with the Clerk of the Court for the Nevada Supreme Court by using the Court's electronic file and serve system. I further certify that all parties of record to this appeal are either registered with the Court's electronic filing system or have consented to electronic service and that electronic service shall be made upon and in accordance with the Court's Master Service List.

I declare that I am employed in the office of a member of the bar of this Court at whose discretion the service was made.

/s/ Patricia Larsen  
An employee of AKERMAN LLP



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14 *Bank, N.A.*

15 **EIGHTH JUDICIAL DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

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

19 Plaintiff,

20 vs.

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

28 Defendants.

Case No.: A-14-705563-C

Dept.: XXVI

**DEFENDANTS' TRIAL BRIEF**

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

Counterclaimant,

vs.

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

Counter-Defendant.

1 U.S. BANK, N.A.

2 Third-Party Plaintiff,

3 vs.

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

6 Third-Party Defendants.

7 Nationstar Mortgage LLC, U.S. Bank, N.A., as Trustee for the Certificateholders of the LXS  
8 2006-4N Trust Fund, erroneously pled as U.S. Bank, N.A. (**U.S. Bank**), (collectively, **defendants**)  
9 submit the following trial brief.

10 **I. BRIEF STATEMENT OF FACTS**

11 This matter involves a January 8, 2014 Association foreclosure sale. Prior to the foreclosure,  
12 Miles Bauer tendered payment to Alessi & Koenig (**Alessi**) in the amount of \$207 (\$23/mo. x 9  
13 months). Alessi rejected the check and proceeded to foreclose with SFR acquiring its interest at the  
14 foreclosure.

15 **II. SCOPE OF TRIAL IS LIMITED TO DELIVERY OF THE TENDER.**

16 The scope of this trial is narrow. Following orders on motions for summary judgment and a  
17 motion for reconsideration, the only remaining issue is whether the check for the superpriority portion  
18 of the Association's lien was delivered to Alessi & Koenig.

19 **A. Motions for summary judgment.**

20 On January 3, 2019, the court entered Findings of Fact and Conclusions of Law concluding  
21 the Association's foreclosure extinguished U.S. Bank's deed of trust. The Court adopted detailed  
22 findings of fact, including that the "tender of \$207 was the proper amount of the superpriority lien, as  
23 it was nine months of assessments under NRS 116.3116(2)". (**Ex. A**, FOF&COL at ¶ P). However,  
24 the court found that Alessi's rejection of the tender was in good faith, Nationstar failed to record  
25 evidence of the tender to put potential bidders in notice, and SFR was a bona fide purchaser.

26 Notably, the hearing on these motions for summary judgment occurred in August 2018, prior  
27 to the Nevada Supreme Court's September 13, 2018 decision in *Bank of America, N.A. v. SFR*  
28 *Investments Pool 1, LLC*, 134 Nev. Adv. Op. 72 (Sept. 13, 2018) (***Diamond Spur***). In *Diamond Spur*,

1 the Nevada Supreme Court found that a virtually identical tender of the superpriority portion of an  
2 association's lien satisfies that portion of the lien resulting in the buyer taking the property subject to  
3 the deed of trust.

4 **B. Motion for Reconsideration.**

5 On January 14, 2019, Nationstar timely filed a motion for reconsideration and to alter/amend  
6 judgment. The court found the findings of fact and conclusions of law contained legal errors and  
7 reconsideration was appropriate.

8 The order granting reconsideration finds that "Douglas Miles was properly disclosed as a  
9 witness in Nationstar's second supplemental disclosure, and the Affidavit of Douglas Miles met the  
10 criteria of NRS 52.260 as a custodial declaration to authenticate the business records of the Miles  
11 Bauer Bergstrom & Winters law firm, which included the records and letters related to the tender."  
12 (**Ex. B**, order granting motion to reconsider at p. 3). The order further finds that "the documents related  
13 to the tender were also properly authenticated through the Affidavit of Rock Jung, Esq., which satisfies  
14 the requirements of NRS 52.025, as testimony of a person with personal knowledge." *Id.* Finally, the  
15 found reconsideration is appropriate because the findings of fact and conclusions of law failed to apply  
16 recent Nevada Supreme Court authority, including *Diamond Spur*, defenses to tender and the impact  
17 of a tender on SFR's bona fide purchaser defense. The court did not disturb the prior finding the  
18 \$207.00 amount was the correct superpriority amount. This left one remaining issue of fact for trial:  
19 Did Alessi & Koenig receive the tender? (*See Exs. A and B; Ex. C*, Minutes from hearing on motion  
20 for reconsideration stating, "COURT FINDS there were questions of fact if tender was received . . .").

21 **C. EDCR 2.67 Conference.**

22 On December 6, 2019, counsel participated in the EDCR 2.67 conference and agreed that the  
23 only issue remaining for trial was delivery. Specifically, counsel engaged I the following exchange:

24 **Mr. Martinez** (counsel for SFR): As to the documents, once we put together the binders, we  
25 can talk about stipulating to which exhibits are actually going to come in. This case seems to be  
26 narrowed down to delivery –

27 **Ms. Wittig** (counsel for Nationstar and U.S. Bank: Yeah. Okay.

28 **Mr. Martinez:** -- based on the recon.

1           **Ms. Wittig:** Yep. That was my understanding, as well. I have the orders here, in case we  
2 needed to review. But, yeah, it's just the delivery of the tender, right?

3           **Mr. Martinez:** Correct.

4           **Ms. Wittig:** Okay.

5           **Mr. Martinez:** Whether or not Alessi actually received it.

6           **Ms. Wittig:** So sender, delivery –

7           **Mr. Martinez:** And received.

8           **Ms. Wittig:** Yeah. Well, once and the same, I think. Yeah.

9           **Mr. Martinez:** Yeah. Just to determine that tender actually made it there is what I can glean  
10 from the order on the recon.

11           **Ms. Wittig:** Okay. That's my understanding too.

12 **(Ex. D, transcript from EDCR 2.67 conference at 3:22 – 4:20).**

13           Counsel agreed during the EDCR 2.67 conference that the issues for trial in the joint pretrial  
14 order would be limited.

15           **Ms. Wittig:** So the statements of issues at trial would be whether tender was delivered?

16           **Mr. Martinez:** Yeah. Appears to be. And – let me double-check, it it'll load. Yeah. It will  
17 be surrounding the tender. And, like I said, the order on the reconsideration is still interlocutory. So  
18 I understand that the court has narrowed some of the scope of what we're going to be doing in trial,  
19 but anything surrounding the tender might be on the table should the court entertain the argument.  
20 **(Id. at 11:21 – 12:6).**

21           After confirming that the trial is limited to the issue of delivery, SFR included a completely  
22 new argument in the joint pretrial memo. For the first time, SFR argues that the deed of trust was  
23 terminated through operation of NRS 106.240. This issue is not properly before the court. However,  
24 out of an abundance of caution, defendants submit this trial brief addressing SFR's surprise eleventh-  
25 hour claim.

26 **III. NRS 106.240 HAS NEVER BEEN AN ISSUE IN THIS LITIGATION AND SHOULD**  
27 **NOT BECOME AN ISSUE NOW.**

28           NRS 106.240 has no applicability here. **First**, 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

1 the tender. **Second**, NRS 106.240 is not a statute of limitations, or a statute of repose. Instead, NRS  
2 106.240 is a substantive statute completely independent of any of the issues placed in controversy  
3 here. The statute is a sword, not a shield. It cannot be used as a tool to win litigation after it starts.  
4 **Third**, even if the court construed it as a statute of repose and believed it was applicable here, NRS  
5 106.240 only applies based on the date the loan becomes "wholly due" according to the express terms  
6 of the deed of trust—it is not triggered by acceleration. Such an interpretation would be breathtakingly  
7 overbroad and legislatively unintended. Even if it was, the acceleration occurred at the earliest when  
8 the notice of default was recorded in 2008 and was timely decelerated by a rescission notice recorded  
9 just a few months later in 2008. **Fourth**, SFR should not be allowed to invoke NRS 106.240 because  
10 it has unclean hands. It caused the delay in defendants' foreclosure by contesting the validity of U.S.  
11 Bank's deed of trust for over four years in litigation, only to concoct a new theory the deed of trust  
12 extinguished by virtue of NRS 106.240 on the eve of trial. The court should not reward SFR for  
13 preventing defendants from foreclosing during litigation, by allowing it to turn around and claim they  
14 waited too long to foreclose.

15 **I. ARGUMENT.**

16 **A. NRS 106.240 does not apply here.**

17 Until now, SFR's theory in this case has been the HOA sale in January 2014 extinguished U.S.  
18 Bank's deed of trust because defendants or their predecessors failed to satisfy the superpriority portion  
19 of the HOA lien. SFR now raises a new legal argument, that NRS 106.240 extinguished U.S. Bank's  
20 deed of trust because U.S. Bank did not foreclose before January 22, 2018. But, SFR never raised this  
21 argument in its pleadings, during discovery, or in summary judgment briefing. SFR did not reference  
22 NRS 106.240 in its affirmative defenses, counterclaims, or discovery responses. Nationstar  
23 propounded interrogatories in 2018 seeking, in detail, all facts supporting SFR's contention "U.S.  
24 Bank's security interest in the Property was extinguished by the HOA foreclosure sale." SFR failed to  
25 assert NRS 106.240 when responding to the interrogatories and failed to reasonably supplement to  
26 identify an NRS 106.240 defense, at any point in time. SFR waived the argument.

27 SFR will likely argue it included the NRS 106.240 argument in its affirmative defense number  
28 8, which generally pled statutes of limitations and statutes of repose as a defense to U.S. Bank's quiet

1 title/declaratory relief claim. But this is a defense to a cause of action, not an affirmative claim. It is  
2 supposed to defend against the specific claim U.S. Bank made—which has nothing to do with the  
3 enforceability of the loan despite any lapse of time, but rather deals with the effects of the 2014  
4 foreclosure sale and pre-sale tender attempts. U.S. Bank did not put the issue of the borrower's default  
5 under the deed of trust in its claim, nor is NRS 106.240 responsive to U.S. Bank's claim.

6 Further, SFR filed its answer and counterclaims in March 2016, before the date SFR now  
7 alleges NRS 106.240 extinguished U.S. Bank's deed of trust. The statute of repose was pled at a time  
8 when there was no bar under any possible iteration of NRS 106.240. NRS 106.240 cannot be the  
9 statute of limitations or repose referenced by SFR in its affirmative defenses because it could not apply  
10 at the time. And SFR never moved to amend. Accordingly, SFR never fairly noticed defendants of  
11 this alleged defense.

12 Nor can SFR use NRS 106.240 as a sword because procedurally SFR only arguably presented  
13 it as an affirmative defense. *See In re Paul Potts Builders, Inc.*, 608 F.2d 1279, 1282 (9th Cir. 1979);  
14 *see also Dubin v. Harrell*, 79 Nev. 467, 472, 386 P.2d 729, 731 (1963) (limitations statute are defensive  
15 weapons only). In other words, it has only been presented as a defense to the claim that the deed of  
16 trust survived the sale.

17 To use NRS 106.240 as a sword as SFR seeks to do, procedurally SFR would have had to file  
18 a counterclaim alleging extinguishment of the deed of trust under NRS 106.240. The statute does not  
19 operate automatically. *See Pro-Max Corp. v. Feenstra*, 117 Nev. 90, 97, 16 P.3d 1074, 1079 (2001)  
20 (NRS 106.240 asserted as an affirmative claim, providing the lender with the opportunity to plead  
21 affirmative defenses against the extinguishment of the deed of trust under the statute). SFR did not  
22 plead NRS 106.240 in its counterclaims. SFR must plead this statute offensively and in a manner that  
23 puts defendants on notice. It has not done so here.

24 **B. NRS 106.240 is not a statute of limitations or repose.**

25 SFR will likely rely on a federal district court case to argue that NRS 106.240 is a statute of  
26 repose. *See Bank of Am., N.A. v. Madeira Canyon Homeowners Association*, 2019 WL 5963935, at \*4  
27 (D. Nev. Nov. 12, 2019). It is not. The court in *Madeira Canyon* cited *CTS Corp v. Waldburger*, 573  
28 U.S. 1 (2014) to conclude that NRS 106.240 is a statute of repose, but erred in applying the case.

1 *Waldburger* stated: "A statute of repose. . . puts an outer limit on the right to bring a civil action. That  
2 limit is measured not from the date on which the claim accrues but instead from the date of the last  
3 culpable act or omission of the defendant. A statute of repose bars any suit that is brought after a  
4 specified time since the defendant acted (such as by designing or manufacturing a product), even if  
5 this period ends before the plaintiff suffered a resulting injury." *Waldburger*, 573 U.S. at 8 (internal  
6 quotation marks and brackets omitted). NRS 106.240 exists to extinguish deeds of trust where a lender  
7 fails to record a satisfaction of lien or otherwise release it after the debt is wholly due and extinguished  
8 by its own terms. It is a substantive statute inapplicable here.

9 Even if NRS 106.240 could operate as a statute of repose, it cannot do so when its purported  
10 "time-bar" accrued during the litigation. A statute of repose is designed to "encourage plaintiffs to  
11 bring actions in a timely manner, and for many of the same reasons [as a statute of limitations]. But  
12 the rationale has a different emphasis. Statutes of repose effect a legislative judgment that a defendant  
13 should be free from liability after the legislatively determined period of time." *Waldburger*, 573 U.S.  
14 at 9 (citing to C.J.S. § 7, at 24) (internal quotation marks omitted). "[A]t some point, a defendant  
15 should be able to put past events behind him." *Id.* (citation omitted). The Nevada supreme court  
16 similarly explains: "'Statutes of repose' bar causes of action *after* a certain period of time, regardless  
17 of whether damage or injury has been discovered. In contrast, 'statutes of limitation' foreclose suits  
18 *after* a fixed period of time following occurrence or discovery of an injury." *Allstate Ins. Co. v.*  
19 *Furgerson*, 107 Nev. 772, 775 n. 2, 766 P.2d 904, 906 n. 2 (1988) (emphasis added); *see also*  
20 *Davenport v. Comstock Hills-Reno*, 118 Nev. 389, 391-92, 46 P.3d 62, 64 (2002).

21 Importantly, to bar an action, both a statute of limitations and a statute of repose must have  
22 accrued *prior to the complaint being filed*. A rule that requires the object of the litigation to be  
23 terminated based on events which occurred in the middle of litigation is neither a limitations nor repose  
24 statute. You cannot win a litigation by invoking a statute of repose that accrued *after* the litigation  
25 has commenced. That's common sense. But that is precisely what SFR tries to do by invoking NRS  
26 106.240 now. NRS 106.240 cannot be a statute of repose—it is a substantive statute completely  
27 independent of the issues placed in controversy in this matter. But, even if it could be, a statute of  
28 repose is not a tool to win the litigation after it starts.

1           **C.      NRS 106.240 has not yet been triggered.**

2           The debt secured by the subject property was never wholly due, so NRS 106.240 has not yet  
3           been triggered. And, even if acceleration of a loan can trigger NRS 106.240, U.S. Bank or its  
4           predecessor or agent timely decelerated the debt.

5                   **1.      "Wholly due" does not mean "acceleration"**

6           Nevada Revised Statute 106.240, by its plain language, mandates the debt is not presumptively  
7           extinguished until it becomes "wholly due." The statute unambiguously states the lien "shall expire at  
8           the expiration of 10 years after the debt secured by the mortgage or deed of trust ***according to the***  
9           ***terms thereof*** or any written extension thereof." NRS 106.240 (emphasis added). By its own terms,  
10          the "deed of trust according to the terms thereof" does not mature until December 1, 2035. (Jt. Trial  
11          **Ex. 3** deed of trust.) The statute does not contemplate, as SFR will argue, that a recorded document  
12          other than the "mortgage or deed of trust" or a "recorded written extension thereof" can trigger the ten-  
13          year time period. SFR misinterprets the "wholly due" language. It does not mean "acceleration."

14          Authority interpreting similar "obsolete" or "ancient" mortgage statutes, or "marketable title  
15          acts," supports this strict construction and interpretation of NRS 106.240. For example,  
16          Massachusetts' obsolete mortgages statute prohibits foreclosure more than five years "from the  
17          expiration of the term or from the maturity date." *Gelfatt v. U.S. Bank, N.A.*, 321 F. Supp. 3d 202,  
18          204–05 (D. Mass. 2018). The United States District Court rejected an argument that acceleration of  
19          the debt advances the five-year deadline, concluding, "The statute contains no language supporting  
20          plaintiff's interpretation that the acceleration of the maturity date of a note affects the maturity date of  
21          the related mortgage." *Id.*

22          The First Circuit similarly rejected arguments that an acceleration notice shortened the time by  
23          which a secured lender must foreclose under the obsolete mortgages statute. *Harry v. Countrywide*  
24          *Home Loans, Inc.*, 902 F.3d 16, 19 (1st Cir. 2018) ("there is no suggestion in either [the obsolete  
25          mortgages] statute, or [Massachusetts Supreme Court authority] that the acceleration of a note has any  
26          impact on the limitations period for a mortgagee's right to foreclose.").

27          The policy of ancient mortgages statutes, like NRS 106.240, also supports this interpretation  
28          because the overall policy of the statute is to "streamline conveyancing and provide remedies to clear

1 title blemished by mortgages," which is not served by "changing the enforceable period of the  
2 mortgage as a result of acceleration on the note." *Junior et al v. Wells Fargo Bank, N.A. et al*, 2017  
3 WL 1199768, at \*1 (D. Mass. Mar. 30, 2017); *see also Cunningham v. Haley*, 501 So.2d 649, 652  
4 (Fla. App. 1986) ("Good public policy decrees that there be a limit to which these matters are permitted  
5 to adversely affect the marketability of land titles. The past should not be able to forever rule the  
6 present from the grave.").<sup>1</sup>

7 At least one treatise interprets the "wholly due" language as referring to the date of loan  
8 maturity. *See* 3 Patton & Palomar on Land Titles § 567 (3d ed.) § 567 - Mortgages, deeds of trust, and  
9 release. The interpretation makes sense because the statute addresses when the debt is presumed  
10 satisfied. *See* NRS 106.240. The only time all amounts owed is certain is at maturity. After maturity,  
11 the only way to satisfy a loan is through payment in full. In contrast, a lender can decelerate an  
12 accelerated loan at any time before maturity. It would not serve the statute's purpose to allow a debt  
13 to be presumptively extinguished ten years after acceleration. To hold it does would eviscerate Nevada  
14 authority finding no statute of limitations exists to conduct a nonjudicial foreclosure. *Facklam v.*  
15 *HSBC Bank USA*, 133 Nev. Adv. Op. 65, 2017 WL 4077379, at \*2-3 (Nev. Sept. 14, 2017) ("lenders  
16 are not barred from foreclosing on mortgaged property merely because the statute of limitations for  
17 contractual remedies on the note has passed.").

18 This interpretation is also consistent with the only Nevada supreme court case to address the  
19 issue, *Pro-Max Corp. v. Feenstra*, 117 Nev. 90, 16 P.3d 1074 (2001). In *Feenstra*, the supreme court  
20 concluded a lien for a mortgage loan which, by its express recorded terms became due in 1984, did  
21 not expire until 1994—10 years after the maturity date identified in the deed of trust. Just as the Nevada  
22 Supreme Court in *Feenstra* refused to read in a bona fide purchaser limitation or a notarization  
23 requirement to NRS 106.240, no court should read into NRS 106.240 a reduction of the 10-year period  
24 upon acceleration of the debt underlying the deed of trust where no such language appears in the  
25 statute, and no instrument other than the deed of trust and a written, recorded extension thereof can  
26

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27 <sup>1</sup> The sparse legislative history of NRS 106.240 supports its use as "a basis for clearing a title."  
28 March 13, 1965 comments of Mr. Hale to AB 426.

1 affect the outer limit of foreclosure. To permit a notice of default or any other document to re-set the  
2 "wholly due" date of a deed of trust under NRS 106.240 amends the statute without legislative action  
3 to insert such verbiage.<sup>2</sup>

4 SFR can cite to no authority supporting its flawed conclusion that NRS 106.240 can alter the  
5 terms of an agreement between the lender and its borrower. The statute exists for the purpose of  
6 extinguishing—by operation of law—deeds of trust where a lender fails to record a satisfaction of lien  
7 or otherwise release after the debt is "wholly due" and extinguished by its own terms. Interpreting  
8 the statute in the manner SFR advances alleviates debtors on their loan obligations without any  
9 available recourse by the lender years or even decades before a loan is due to be repaid and lends itself  
10 to a scenario where borrowers could strategically default in hopes of duping lenders into not recording  
11 rescissions, thus giving unscrupulous borrowers the windfall of a satisfied mortgage by default.

12 Because the deed of trust has not become "wholly due," NRS 106.240's ten-year time period  
13 has not been triggered.

## 14 2. The loan was decelerated

15 Acceleration only occurs when the lender exercises its optional right to accelerate the debt.  
16 Acceleration must be "exercised in a manner so clear and unequivocal that it leaves no doubt as to the  
17 lender's intention." *Clayton v. Gardner*, 813 P.2d 997, 999 (1991) (quoting *U.S. v. Feterl*, 849 F.2d  
18 354, 357 (8th Cir. 1988)). Some "affirmative action by the creditor must be taken to make it known  
19 to the debtor that [the creditor] has exercised his option to accelerate." *Feterl*, 849 F.2d at 357; *see*  
20

---

21 <sup>2</sup> Limiting the "wholly due" date exclusively to the recorded deed of trust or record extension  
22 thereof also makes sense because acceleration or deceleration can be accomplished *outside* any  
23 recorded document, and those examining title records should be able to determine the "wholly due"  
24 date solely from public records. *See, e.g.*, George E. Osborne, HANDBOOK ON THE LAW OF  
25 MORTGAGES 621–23 (2d ed. 1970) (describing emerging trend of states to create "ancient mortgage"  
26 statutes allowing one to merely check the record and refer to a calendar to determine whether a very  
27 old mortgage continues to cloud title), *cited in Farmers Home Admin. v. Muirhead*, 42 F.3d 964, 968  
28 n.7 (5th Cir. 1995); *see also Hersh Prop., LLC v. McDonald's Corp.*, 588 N.W.2d 728, 734 (Minn.  
1999); (Minnesota's Marketable Title Act designed to make "a determination of title [] possible from  
an examination of documents in the chain of title recorded in the 40-year period preceding the  
search."); *see also Ramiller v. Ramiller*, 18 N.W.2d 622, 624–26 (Iowa 1945) (holding that statute did  
not permit proof of mortgage's due date from anything "other than the record of the mortgage"; "The  
statute in question was evidently designed to *make the record show* to all whether or not any given  
mortgage was valid and enforceable [sic].") (emphasis in original).

1 *also Andra R. Miller Designs LLC v. US Bank NA*, 418 P.3d 1038, 1042 (Ariz. App. 2018).

2 Similarly, the Nevada supreme court recognizes the right to decelerate, but says that because  
3 "an affirmative act is necessary to accelerate a mortgage, the same is needed to decelerate.  
4 Accordingly, a declaration, when appropriate, must be clearly communicated by the lender/holder of  
5 the note to the obligor." *Cadle Company II, Inc. v. Fountain*, 281 P.2d 1158 (Nev. Feb. 26, 2009)  
6 (unpublished).

7 Here, Recontrust Company, acting as an agent for the beneficiary of the deed of trust, recorded  
8 a notice of default and election to sell under the deed of trust on January 22, 2008. (**Jt. Trial Ex. 33**,  
9 notice of default.) Recontrust recorded a rescission of election to declare default under the deed of  
10 trust just a few months later in March 2008. (**Ex. 34**, notice of rescission.) At least one Nevada federal  
11 district court has recognized recording a notice of rescission "supports deceleration of the outstanding  
12 mortgage" making it wholly due as of the date of maturity—not ten years after a purported  
13 acceleration. *Valin v. Nationstar Mortg., LLC*, No. 2:19-CV-01785-GMN-DJA, 2019 WL 5697171,  
14 at \*4 (D. Nev. Nov. 4, 2019). In *Valin*, the court considered the very same language as in the notice  
15 of rescission here. *Compare id.* at \*3 with Ex. C. While the *Valin* court considered plaintiffs'  
16 likelihood of success on the merits—because it was considering whether to grant injunctive relief—  
17 rather than ruling on the actual merits, its decision nonetheless supports a finding the loan, if  
18 accelerated by the notice of default, was also decelerated. *See also Ouzenne v. Deutsche Bank Nat.*  
19 *Tr. Co.*, 2017 WL 1437297, at \*8 (S.D. Tex. April 24, 2017) ("a note holder can abandon acceleration  
20 unilaterally by sending a notice of rescission" and "[w]hen acceleration is abandoned, the original  
21 maturity date is restored").

22 Several other jurisdictions have held a lender or servicer that exercises its option to accelerate  
23 the loan may also abandon it. *Khan v. GBAK Props., Inc.*, 371 S.W.3d 347, 353 (Tex. App.—Houston  
24 [1st Dist.] 2012, no pet.); *Dallas Joint Stock Land Bank v. King*, 167 S.W.2d 245, 247 (Tex. Civ.  
25 App.—Fort Worth 1942, writ ref'd). As the United States District Court for the Southern District of  
26 Texas acknowledged, acceleration is a "drastic course of action" and allowing the lender to rescind a  
27 prior acceleration allows the lender and borrower "to prioritize other matters and postpone foreclosure  
28 to the benefit of both parties." *Callan v. Deutsche Bank Nat'l Trust Co. Americas*, 93 F. Supp. 3d 725,

1 738 (S.D. Tex. March 21, 2015) (noting also "lenders are hesitant to foreclose on a homestead and  
2 there is no basis for courts to disallow them from rescinding such a drastic course of action  
3 [acceleration].").

4 To the extent SFR seeks to rely on *Bank of Am., N.A. v. Madeira Canyon Homeowners*  
5 *Association*, 2019 WL 5963935 (D. Nev. Nov. 12, 2019), it is distinguishable. In *Madeira Canyon*,  
6 the court concluded the recorded notice of default accelerated the loan. *Id.* at \*3. Here, the bank's  
7 notice of default was recorded on January 22, 2008. (Ex. C.) Recontrust Company recorded a  
8 rescission of the notice of default less than two months later—and long before the commencement of  
9 this action in 2014. Accordingly, because the debt secured by the deed of trust either never became  
10 "wholly due," or because any acceleration was decelerated, NRS 106.240 was never triggered and  
11 could not have extinguished U.S. Bank's deed of trust in 2018.

12 **D. SFR should be estopped from invoking NRS 106.240 because it has unclean hands.**

13 The unclean hands doctrine generally bars a party from receiving equitable relief because of  
14 that party's own inequitable conduct. The unclean hands doctrine precludes a party from attaining an  
15 equitable remedy when that party's connection with the subject matter or transaction in litigation has  
16 been unconscientious, unjust, or lacks good faith. *Las Vegas Fetish & Fantasy Halloween Ball Inc.,*  
17 *v. Ahern Rentals, Inc.*, 124 Nev. 272, 275-276, 182 P.3d 764, 766 (2008).

18 SFR should be estopped from asserting NRS 106.240 as a defense in this case, where the only  
19 reason U.S. Bank had not foreclosed by 2018 is because SFR continued to litigate whether U.S. Bank's  
20 deed of trust survived the HOA's foreclosure sale. To the extent SFR argues equitable doctrines like  
21 tolling cannot defend against the operation of NRS 106.240, SFR is wrong and contradicts binding  
22 Nevada supreme court case authority on the issue. In *Pro-Max*, the only published Nevada supreme  
23 court case to address NRS 106.240, the supreme court remanded the case to the district court for it to  
24 consider evidence on whether the plaintiffs should be estopped from asserting NRS 106.240 under the  
25 circumstances. 117 Nev. 90, 97, 16 P.3d 1074, 1079 (2001).

26 Here, the evidence shows SFR should be estopped from invoking NRS 106.240 as a means to  
27 extinguish the deed of trust. SFR cannot lay in wait, delaying the sale via litigation, especially in light  
28 of its discovery responses which make no reference to NRS 106.240, to then ambush defendants with

1 a new defense on the eve of trial, that the deed of trust was extinguished in 2018 by virtue of NRS  
2 106.240. The court should not tolerate SFR's manufacturing of a new theory of extinguishment of the  
3 deed of trust due to its own delays of foreclosure through litigation. SFR does not have clean hands  
4 and should not be allowed to invoke NRS 106.240 now.

5 **II. CONCLUSION.**

6 This trial is limited to the issue of delivery of presale tender to Alessi & Koenig. NRS 106.240  
7 is not applicable here. NRS 106.240 is not a defense to U.S. Bank's claim, which alleges its deed of  
8 trust survived the HOA's foreclosure sale. SFR never expressly plead NRS 106.240 as a defense in  
9 any event, and it is neither a statute of limitations or repose. To the contrary, SFR represented at the  
10 EDCR 2.67 meeting that the only issue remaining for trial was delivery, albeit while preserving other  
11 arguments relating to tender. Certainly, SFR never even hinted at NRS 106.240 at the 2.67 conference.  
12 SFR cannot invoke the statute on the eve of trial, and argue the statute accrued and extinguished U.S.  
13 Bank's deed of trust well after the litigation commenced. Even if it could, U.S. Bank's deed of trust  
14 never became "wholly due," or if it did, it was decelerated before the ten-year clock ran under NRS  
15 106.240, meaning its deed of trust was never extinguished. SFR should be estopped from attempting  
16 to assert this claim of extinguishment so late in the game, particularly where its own actions in  
17 contesting U.S. Bank's deed of trust in litigation is what caused U.S. Bank's delay in foreclosing.

18 Dated this 4<sup>th</sup> day of February, 2020.

19 **AKERMAN LLP**

20 /s/ Melanie D. Morgan

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

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of AKERMAN LLP, and that on this 4<sup>th</sup> day of February, 2020, I caused to be served a true and correct copy of the foregoing **DEFENDANTS' TRIAL BRIEF RE: NRS 106.240**, 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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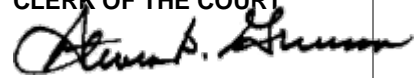
I declare that I am employed in the office of a member of the bar of this Court at whose discretion the service was made.

/s/ Jill Sallade

An employee of AKERMAN LLP

# **EXHIBIT A**

# **EXHIBIT A**



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

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

Plaintiff,

vs.

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

Defendants.

U.S. BANK, N.A.,

Counterclaimant,

vs.

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

Counter-Defendant.

U.S. BANK., N.A.

Third-Party Plaintiff,

Case No.: A-14-705563-C

Dept. No.: XVII

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

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, 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.

PLEASE TAKE NOTICE that on November 29<sup>th</sup>, 2018 **Findings of Fact and  
Conclusions of Law** were entered. A copy of said Findings of Fact and Conclusions of Law are  
attached hereto.

DATED this 26<sup>th</sup> day of December, 2018.

**KIM GILBERT EBRON**

/s/Diana S. Ebron

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 26<sup>th</sup> day of December, 2018, pursuant to NRCP 5(b), I served via the Eighth Judicial District Court electronic filing system, the foregoing **NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW** to the following parties:

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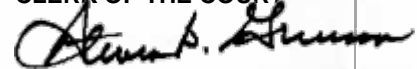
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**IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

**IN AND FOR THE COUNTY OF CLARK**

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

Plaintiff,

vs.

Case No. A-14-705563-C

Dept. No. 17

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,

**FINDINGS OF FACT AND CONCLUSIONS  
OF LAW**

**KIM GILBERT EBRON**

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**RECEIVED BY  
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OCT 01 2018**

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.

This matter came before the Court on August 15, 2018 on SFR Investments Pool 1, LLC's ("SFR") Motion for Summary Judgment, Nationstar Mortgage, LLC's ("Nationstar") Motion for Summary Judgment and U.S. Bank, N.A.'s ("U.S. Bank") (collectively referred to as "Bank") Joinder to Nationstar's Motion for Summary Judgment. Jason G. Martinez, Esq. appeared on behalf of SFR. Douglas D. Gerrard, Esq. appeared on behalf of Nationstar. Donna Wittig, Esq. appeared on behalf of Nationstar and U.S. Bank.

Having reviewed and considered the full briefing 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.<sup>1</sup>

#### **FINDINGS OF UNDISPUTED FACT**

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

2. On June 21, 2000, Shadow Mountain Ranch Community Association (the "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.

3. On November 21, 2005, a Grant, Bargain, Sale Deed was recorded in the Official

<sup>1</sup> 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.

1 Records of the Clark County Recorder as Instrument No. 20051121-0005566, transferring real  
2 property located at 5327 Marsh Butte Street, Las Vegas, Nevada 89148; Parcel No. 163-30-312-  
3 007 (the "Property") to Magnolia Gotera ("Gotera").

4 4. On November 21, 2005, a Deed of Trust listing Countrywide Home Loans, Inc.  
5 ("Countrywide" or "Lender") as lender, with Mortgage Electronic Registration Systems, Inc.  
6 ("MERS") as beneficiary, was recorded in the Official Records of the Clark County Recorder as  
7 Instrument No. 20051121-0005567 ("DOT").

8 5. The DOT contained a Planned Unit Development Rider that allowed the Lender to  
9 pay the Gotera association assessments and add that amount to the Gotera debt to Lender.

10 6. The DOT also included language that allowed the lender to "do and pay for  
11 whatever is reasonable or appropriate to protect [its] interest in the Property ... [including]  
12 but...not limited to: (a) paying any sums secured by a lien which has priority over [the DOT]; (b)  
13 appearing in court; and (c) paying reasonable attorney's fees to protect its interest."

14 7. On May 27, 2011, a Grant Deed transferring the Property to JBWNO Revocable  
15 Living Trust was recorded in the Official Records of the Clark County Recorder as Instrument  
16 No. 201105270004010.

17 8. On May 27, 2011, a Grant Deed transferring the Property to Stacy Moore  
18 ("Moore") was recorded in the Official Records of the Clark County Recorder as Instrument No.  
19 201105270004011.

20 9. On November 2, 2011, an Assignment of Deed of Trust purportedly transferring  
21 the DOT from MERS to U.S. Bank was recorded in the Official Records of the Clark County  
22 Recorder as Instrument No. 201111020000754.

23 10. On September 11, 2012, the Association, through its agent, Alessi & Koenig, LLC  
24 ("Alessi"), recorded a Notice of Delinquent Assessment Lien ("NODA") against the Property in  
25 the Official Records of the Clark County Recorder as Instrument No. 201209110002023.

26 11. Pursuant to NRS 116.31162(1)(a), the NODA states the cumulative amount of  
27 assessments and other sums due, describes the unit which the lien is imposed, and names the  
28 record owner of the unit.

12. Pursuant to NRS 116.31162(1)(a), the NODA was mailed to Moore.

13. Pursuant to NRS 116.31162(b), after more than 30 days elapsed from the date of mailing the NODA, on July 5, 2013, the Association recorded its Notice of Default in the Official Records of the Clark County Recorder as Instrument No. 201307050000950 ("NOD"). The NOD contains the same information as the NODA, and describes the deficiency, states the name and address of the person authorized to enforce the lien, and contains in 14-point bold type: WARNING! IF YOU FAIL TO PAY THE AMOUNT SPECIFIED IN THIS NOTICE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE!

14. U.S. Bank admits it received the NOD.

15. The Bank proffered a letter dated September 2, 2010, executed by Rock K. Jung, Esq. of the law firm of Miles, Bauer, Bergstrom & Winters ("Miles Bauer") and addressed to the Association and Alessi and the Bank proffered a letter dated September 28, 2010, enclosing a check for \$207.00, also addressed to the Association and Alessi. The Bank sought to authenticate these records through the affidavit of Doug Miles. However, the Court finds that because Doug Miles was never disclosed and his affidavit contains defects as alleged by SFR, these records are inadmissible. Therefore, Nationstar/U.S. Bank failed to provide admissible evidence to establish delivery of the check, or admissible evidence that the check was rejected without explanation.

16. On October 1, 2013, an Assignment of Deed of Trust purportedly transferring the DOT from Bank of America, N.A. to Nationstar was recorded in the Official Records of the Clark County Recorder as Instrument No. 201310010002401.

17. Pursuant to NRS 116.311635, after expiration of 90 days, 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"). Pursuant to NRS 116.311635(3), the Notice of Sale contains the amount necessary to satisfy the lien and contains 14-bold type: WARNING! A SALE OF YOUR PROPERTY IS IMMINENT! UNLESS YOU PAY THE AMOUNT SPECIFIED IN THIS NOTICE BEFORE THE SALE DATE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE. YOU MUST ACT BEFORE THE SALE DATE. IF YOU HAVE ANY QUESTIONS, PLEASE CALL ALESSI &

1 KOENIG AT 702-222-4033. IF YOU NEED ASSISTANCE, PLEASE CALL THE  
2 FORECLOSURE SECTION OF THE OMBUDSMAN'S OFFICE, NEVADA REAL ESTATE  
3 DIVISION, AT 1-877-829-9907 IMMEDIATELY.

4 18. Pursuant to NRS 116.311635, the Notice of Sale was posted on the Property in a  
5 conspicuous place. The Notice of Sale was posted at three public places within Clark County for  
6 20 consecutive days. The Notice of Sale was published in the Nevada Legal News for three  
7 consecutive weeks.

8 19. The Notice of Sale was mailed to all requisite parties, and others, including, but  
9 not limited to, U.S. Bank, Bank of America, Nationstar, MERS, Moore and the Ombudsman.

10 20. On January 8, 2014, Alessi held a public non-judicial foreclosure auction for the  
11 Property and SFR placed the highest cash bid of \$59,000.00. As the Notice of Sale references the  
12 NODA, the Association's lien included assessments pursuant to NRS 116.3116. and, therefore,  
13 included amounts that constituted the super-priority portion of the lien.

14 21. The Association sale met all the requirements of NRS 116.31164.

15 22. There were multiple bidders in attendance at the sale.

16 23. Pursuant to NRS 116.31164(3)(a), after SFR paid the money to Alessi, Alessi  
17 made, executed, and delivered a deed to SFR, which vested title in SFR.

18 24. The Trustee's Deed Upon Sale was recorded in the Official Records of the Clark  
19 County Recorder as Instrument No. 201401130001460 ("Foreclosure Deed").

20 25. As recited in the Foreclosure Deed, "[a]ll requirements of law regarding the  
21 mailing of copies of notices and the posting and publication of the copies of the Notice of Sale  
22 have been complied with."

23 26. Prior to the Association sale, no release of the super-priority portion of the lien  
24 was recorded against the Property.

25 27. Prior to the Association sale, no lis pendens was recorded against the Property.

26 28. SFR's agent, Christopher Hardin, stated in his declaration that SFR had no reason  
27 to doubt the recitals in the Foreclosure Deed that all noticing requirements were satisfied in  
28 compliance with NRS 116 *et seq.* The recitals regarding default and noticing have been supported

1 by evidence of mailings and remain undisputed.

2 29. Mr. Hardin declared that neither he nor SFR had any relationship with the  
3 Association besides owning property within the community. There was no evidence presented to  
4 the draw this assertion into question.

5 30. Mr. Hardin declared that neither he nor SFR had any relationship with A&K, the  
6 Association's agent, beyond attending auctions, bidding, and occasionally purchasing properties  
7 at publicly-held auctions. There was no evidence presented to draw this assertion into question.

8 31. Default against Stacy Moore was entered on June 27, 2018.

9 32. Default against Magnolia Gotera was entered June 27, 2018.

10 CONCLUSIONS OF LAW

11 A. Summary judgment is appropriate "when the pleadings and other evidence on file  
12 demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is  
13 entitled to a judgment as a matter of law.'" *Wood v. Safeway*, 121 Nev. 724, 729, 121 P.3d 1026,  
14 1029 (2005). Additionally, "[t]he purpose of summary judgment 'is to avoid a needless trial when  
15 an appropriate showing is made in advance that there is no genuine issue of fact to be tried, and  
16 the movant is entitled to judgment as a matter of law.'" *McDonald v. D.P. Alexander & Las Vegas*  
17 *Boulevard, LLC*, 121 Nev. 812, 815, 123 P.3d 748, 750 (2005) quoting *Coray v. Hom*, 80 Nev.  
18 39, 40-41, 389 P.2d 76, 77 (1964). Moreover, the non-moving party "must, by affidavit or  
19 otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have  
20 summary judgment entered against [it]." *Wood*, 121 Nev. at 732, 121 P.3d at 1031. The non-  
21 moving party "is not entitled to build a case on the gossamer threads of whimsy, speculation, and  
22 conjecture." *Id.* Rather, the non-moving party must demonstrate specific facts as opposed to  
23 general allegations and conclusions. *LaMantia v. Redis*, 118 Nev. 27, 29, 38 P.3d 877, 879  
24 (2002); *Wayment v. Holmes*, 112 Nev. 232, 237, 912 P.2d 816, 819 (1996). Though inferences  
25 are to be drawn in favor of the non-moving party, an opponent to summary judgment, must show  
26 that it can produce evidence at trial to support its claim or defense. *Van Cleave v. Kietz-Mill Minit*  
27 *Mart*, 97 Nev. 414, 417, 633 P.2d 1220, 1222 (1981).

28 B. While the moving party generally bears the burden of proving there is no genuine

1 issue of material fact, in this case, there are a number of presumptions that this Court must  
2 consider in deciding the issues, including:

3 1. Recorded title is presumed valid. *See Breliant v. Preferred Equities Corp.*,  
4 112 Nev. 663, 670, 918 P.2d 314, 319 (1996)("[T]here is a presumption in favor of the  
5 record titleholder.")

6 2. Foreclosure sales and the resulting deeds are presumed valid. NRS  
7 47.250(16)-(18) (stating that there are disputable presumptions "[t]hat the law has been  
8 obeyed[,] "[t]hat a trustee or other person, whose duty it was to convey real property to  
9 a particular person, has actually conveyed to that person, when such presumption is  
10 necessary to perfect the title of such person or a successor in interest[,] "[t]hat private  
11 transactions have been fair and regular[,] and "[t]hat the ordinary course of business has  
12 been followed.").

13 3. A foreclosure deed issued pursuant to NRS 116.31164 that "recit[es]  
14 compliance with notice provisions of NRS 116.31162 through NRS 116.31168 "is  
15 conclusive" as to the recitals "against the unit's former owner, his or her heirs and assigns  
16 and all other persons" unless a party like Nationstar can establish that it is entitled to  
17 equitable relief from a defective sale. *Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 132  
18 Nev. Adv. Op. 5, 1105 (2016); *SFR Investments Pool I, LLC v. U.S. Bank, N.A.*, 130 Nev.  
19 Adv. Op. 75, 334 P.3d 408, 411-412 (2014) (citing NRS 116.31166(2)).

20 4. That "[i]f the trustee's deed recites that all statutory notice requirements  
21 and procedures required by law for the conduct of the foreclosure have been satisfied, a  
22 rebuttable presumption arises that the sale has been conducted regularly and properly; this  
23 presumption is conclusive as to a bona fide purchaser." *Moeller v. Lien*, 30 Cal. App. 4th  
24 822, 831-32, 30 Cal. Rptr. 777, 783 (1994)(emphasis added); *see also* 4 Miller & Starr,  
25 Cal. Real Estate (3d ed. 2000) Deeds of Trust and Mortgages § 10:211, pp. 647-652; 2  
26 Bernhardt, Cal. Mortgage and Deed of Trust Practice (Cont.Ed.Bar 2d ed. 1990) § 7:59,  
27 pp. 476-477).

28 C. These presumptions "not only fix[] the burden of going forward with evidence, but

1 it also shifts the burden of proof.” *Yeager v. Harrah's Club, Inc.*, 111 Nev. 830, 835, 897 P.2d  
2 1093, 1095 (1995)(citing *Vancheri v. GNLV Corp.*, 105 Nev. 417, 421, 777 P.2d 366, 368 (1989)).  
3 “These presumptions impose on the party against whom it is directed the burden of proving that  
4 the nonexistence of the presumed fact is more probable than its existence.” *Id.* at 842 (citing NRS  
5 47.180).

6 D. Thus, Bank bore the burden of proving it was more probable than not that the  
7 Association sale and the resulting Foreclosure Deed were invalid. This burden has been confirmed  
8 in the recent case of *Nationstar Mortgage, LLC v. Saticoy Bay Series 2227 Shadow Canyon*, 133  
9 Nev. \_\_\_, \_\_\_, 405 P.3d 641, 646 (2017) (“...Nationstar has the burden to show that that the sale  
10 should be set aside in light of Saticoy Bay’s status as the record title holder[.]” (citing *Breliant*,  
11 112 Nev. at 669, 918 P.2d at 318; NRS 47.250(16); NRS 116.31166(10-(2); and *Shadow Wood*  
12 *Homeowners Ass’n, Inc. v. New York Community Bankcorp, Inc.*, 132 Nev. \_\_\_, \_\_\_, 366 P.3d  
13 1105, 1111 (noting that NRS 107.030(8) provided the language in NRS 116.31166)).

14 E. Bank failed to meet its burden of proving it was more probable than not that the  
15 Association sale and the resulting Foreclosure Deed were invalid.

16 F. Pursuant to *SFR*, NRS 116.3116(2) gives associations a true super-priority lien,  
17 the non-judicial foreclosure of which extinguishes a first deed of trust. *SFR*, 334 P.3d at 419.

18 G. A properly conducted foreclosure sale conducted pursuant to NRS 116.31162-  
19 NRS 116.31168, like all foreclosure sales, extinguishes the title owner’s interest in real property  
20 and all junior liens and encumbrances, including deeds of trust.

21 H. The Association foreclosure sale vested title in SFR “without equity or right of  
22 redemption.” *SFR*, 334 P.3d at 412 (citing NRS 116.31166(3)).

23 I. These sales vest the purchaser with absolute title. *In re Grant*, 303 B.R. 205, 209  
24 (Bankr. D. Nev. 2003).

25 J. If the sale is properly, lawfully and fairly carried out, <sup>the Bank</sup> ~~the Bank~~ cannot unilaterally  
26 create a right of redemption in [itself]. *Golden v. Tomiyasu*, 79 Nev. 503, 518 (1963).

27 K. Here, the sale was a non-judicial foreclosure sale conducted pursuant to NRS  
28 116.31166(2). The COURT FINDS the sale vested in SFR title without equity or right of

1 redemption and title must be quieted in favor of SFR.

2 L. *Shadow Wood* holds that the deed recitals are conclusive, unless a party like the  
3 Bank can establish that it is entitled to equitable relief from a defective sale. *Shadow Wood HOA*  
4 *v. N.Y. Cmty. Bancorp.*, 132 Nev. Adv. Op. 5, 1105 (2016). Here, ~~the Bank~~ <sup>Nationstar</sup> has not established  
5 that this was a defective sale. As the purchaser at the Association foreclosure sale, SFR need only  
6 show the Trustee's Deed Upon Sale to be entitled to quiet title free and clear of the deed of trust  
7 since there was no defective sale. The COURT FINDS the deed recitals are conclusive.

8 M. The Bank is not entitled to equitable relief. The Nevada Supreme Court stated that  
9 when a BFP has no notice of a pre-sale dispute, such as an attempted tender, equity cannot be  
10 granted to the tendering party, who could defeat any BFP status by giving notice of an attempt to  
11 pay. Equitable relief cannot be granted to a party who ignored earlier remedies and allowed a BFP  
12 to purchase the property, when the relief would be to the detriment to the BFP. Here, the Bank  
13 failed to adequately protect its interest. It failed to try for earlier remedies and allowed a BFP to  
14 purchase the property. The COURT FINDS equitable relief is no longer available to the Bank.

15 N. The Foreclosure Deed and Sale are Presumed Valid. SFR contends that the Bank  
16 cannot overcome the presumptions that (1) the Association and its agent obeyed the law, (2) the  
17 property was conveyed to SFR, (3) the Association foreclosure sale was fair and regular, and  
18 conducted in the ordinary course of business. The COURT FINDS the DOT was extinguished by  
19 the Association foreclosure sale and since the property was conveyed to SFR, SFR is entitled to  
20 summary judgment on its claim for quiet title and permanent injunction. The Bank has not  
21 overcome the conclusive presumption that the foreclosure sale and resulting deed are valid, and  
22 SFR can rely on the conclusive recitals in the foreclosure deed.

23 O. To prevail on a claim for unjust enrichment, U.S. Bank must show that it conferred  
24 a benefit on SFR, that SFR appreciated such benefit, and there was acceptance and retention by  
25 [SFR] of such benefit under circumstances such that it would be inequitable for [SFR] to retain  
26 the benefit without payment of the value thereof. *Unionamerica Mtg. v. McDonald*, 97 Nev. 210  
27 212 (1981). Under NRCP 16.1(a)(1)(C), a party is required to produce, without awaiting a  
28 discovery request . . . [a] computation of any category of damages claimed. U.S. Bank contends

1 that SFR has benefited from U.S. Bank's payment of taxes, insurance, and homeowner s  
2 association assessments since the time of the HOA sale. However, U.S. Bank has not proven this  
3 to be true nor produced evidence that any such payments were made. Further, U.S. Bank has never  
4 disclosed any special damages under NRCP 16.1 on this issue. There being no evidence that U.S.  
5 Bank paid any monies toward the property or that SFR benefited from these payments, therefore,  
6 the COURT FINDS U.S. Bank's claim for unjust enrichment fails as a matter of law.

7 P. ~~The Bank~~ <sup>Nationstar</sup> contends a proper tender was made on 9/2/10 for the amount of \$207.00  
8 which represented the statutory super-priority amount of the HOA s lien at \$23.00 per month for  
9 months, thereby discharging the super priority lien in dispute. The Nevada Supreme Court held  
10 in *Horizons at Seven Hills v. Ikon Holdings*, 132 Nev. Adv. Op 35, 373 P.3d 66 (2016) that the  
11 superpriority lien granted by NRS 116.3116(2) does not include an amount for collection fees and  
12 foreclosure costs incurred; rather it is limited to an amount equal to the common expense  
13 assessments due during the nine months before foreclosure. While this Court acknowledges that  
14 in *Horizons at Seven Hills v. Ikon*, the association in question did not foreclose, the Nevada  
15 Supreme Court's in depth review of legislative history and statutory interpretation indicates the  
16 superpriority portion in question does not include fees and costs. *Id.* at 70. Therefore, the COURT  
17 FINDS said tender of \$207.00 was the proper amount of the superpriority lien, as it was nine  
18 months of assessments under NRS 116.3116(2).

19 Q. The question then hinges on whether this tender precludes SFR from taking said  
20 property free and clear of the DOT, or whether SFR takes said property subject to the DOT. The  
21 Court looks to whether refusal of the tender was grounded on an honest belief that the tender was  
22 insufficient. See, 59 C.J.S. Mortgages 582 (2016); *Bank of Am., N.A. v. Rugged Oaks Investments,*  
23 *LLC*, 68504, 2016 WL 5219841, at \*1 (Nev. Sept. 16, 2016)( It has been held... that a good and  
24 sufficient tender on the day when payment is due will relieve the property from the lien of the  
25 mortgage, except where the refusal [of payment] was... grounded on an honest belief that the  
26 tender was insufficient. ). ~~The Bank's~~ <sup>Nationstar's</sup> tender of the past due assessments in the amount of \$207.00  
27 occurred on 9/2/10, which was rejected by the HOA Trustee. However, SFR did not have  
28 knowledge of this tender, either by inquiry notice or constructive notice. ~~The Bank~~ <sup>Nationstar</sup> has failed to

1 set forth sufficient information that proper notice of the tender was provided, such that individuals  
2 or entities would be put on notice of the same. The Association rejected the payment in good faith.  
3 ~~The Bank~~ <sup>Nationstar</sup> failed to record its performance so as to protect itself from third-party purchasers as  
4 required by NV law. David Alessi testified that Alessi & Koenig did not receive the letter with  
5 the check. If Alessi & Koenig never received the purported tender there was nothing to reject. All  
6 the Bank has is a copy of the purported check and a screenshot, neither of which are properly  
7 admissible. Further, Doug Miles was not disclosed and has defects in his affidavit. The Bank is  
8 lacking admissible evidence to establish the delivery of the check, or admissible evidence that the  
9 check was rejected without explanation. Thus, SFR was a bona fide purchaser ("BFP"). A  
10 subsequent purchaser is bona fide purchaser under common-law principles if it takes the property  
11 for a valuable consideration and without notice of the prior equity, and without notice of facts  
12 which upon diligent inquiry would be indicated and from which notice would be imputed to him,  
13 if he failed to make such inquiry. *Bailey v. Butner*, 64 Nev. 1, 19, 176 P.2d 226, 234 (1947)  
14 (emphasis omitted); see also *Moore v. De Bernardi*, 47 Nev. 33, 54, 220 P. 544, 547 (1923) (The  
15 decisions are uniform that the bona fide purchaser of a legal title is not affected by any latent  
16 equity founded either on a trust, [e]ncumbrance, or otherwise, of which he has no notice, actual  
17 or constructive.). The Nevada Supreme Court has further held, that [w]here the complaining party  
18 has access to all the facts surrounding the questioned transaction and merely makes a mistake as  
19 to the legal consequences of his act, equity should normally not interfere, especially where the  
20 rights of third parties might be prejudiced thereby. *Shadow Wood*, 366 P.3d at 1116 (quoting  
21 *Nussbaumer v. Sup. Ct. in & for Yuma Cty.*, 107 Ariz. 504, 489 P.2d 843, 846 (1971)). In *Shadow*  
22 *Wood*, the Nevada Supreme Court held that [c]onsideration of harm to potentially innocent third  
23 parties is especially pertinent where [the lender] did not use the legal remedies available to it to  
24 prevent the property from being sold to a third party, such as by seeking a temporary restraining  
25 order and preliminary injunction and filing a lis pendens on the property. *Shadow Wood*, 366 P.3d  
26 at 1114 fn. 7. Here, ~~the Bank~~ <sup>Nationstar</sup> was in the position to take any number of simple steps to avoid a  
27 BFP issue and simply failed to take such action. The Bank has failed to offer any evidence to  
28 refute that SFR had no knowledge of a prior equity and paid valuable consideration. Lastly, in the

1 Hardin declaration, SFR provided evidence of being a BFP The COURT FINDS Nationstar failed  
2 to protect its interest in said property, and SFR is a BFP.

3 R. ~~The Bank~~ <sup>Nationstar</sup> contends the sales price at the HOA foreclosure sale was grossly  
4 inadequate and was commercially unreasonable. To set aside an association foreclosure sale on a  
5 theory of commercial unreasonableness there must be a showing of grossly inadequate price, plus,  
6 fraud, unfairness, or oppression. *Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 132 Nev. Adv. Op.  
7 5, 366 P.3d 1105, 1112 (2016) (citing *Long v. Towne*, 98 Nev. 11, 13, 639, P.2d 528, 530 (1982));  
8 *See also Centeno v. JP Morgan Chase Bank, N.A.*, 67365, 2016 WL 1122449, at \*1 (Nev. Mar.  
9 18, 2016)(unpublished Order Vacating and Remanding)(Holding a low sales price is not a basis  
10 for voiding a foreclosure sale absent fraud, unfairness, oppression...); *See also Golden v.*  
11 *Tomiyasu*, 79 Nev. 503, 514, 387 P.2d 989, 995 (1963) (stating that, while a power-of-sale  
12 foreclosure may not be set aside for mere inadequacy of price, it may be if the price is grossly  
13 inadequate and there is in addition proof of some element of fraud, unfairness, or oppression  
14 (internal quotation omitted))). The Supreme Court of Nevada recently clarified that in Nevada,  
15 courts retain the power to grant equitable relief from a defective [association] foreclosure sale  
16 when appropriate .... *Shadow Wood Homeowners Ass'n, Inc. v. New York Cmty. Bancorp, Inc.*,  
17 366 P.3d 1105, 1110 (Nev.2016) (en banc). [D]emonstrating that an association sold a property  
18 at its foreclosure sale for an inadequate price is not enough to set aside a foreclosure sale; there  
19 must also be a showing of fraud, unfairness, or oppression. *Id.* (citing *Long*, 98 Nev. 11, 639 P.2d  
20 530). In considering whether equity supports setting aside the sale in question, the Court is to  
21 consider any other factor bearing on the equities, including actions or inactions of both parties  
22 seeking to set aside the sale and the impact on a bona fide purchaser for value. *Id.* at 1114 (finding  
23 courts must consider the entirety of the circumstances that bear upon the equities). Here, ~~the Bank~~ <sup>Nationstar</sup>  
24 contends that the sale should be set aside under equitable principles because the sale of the  
25 Property for less than 20% of its fair market value is grossly inadequate. The Court, however,  
26 does not find this argument to be persuasive. The analysis for finding fraud, unfairness, or  
27 oppression applies to the seller (HOA) and purchaser, not whatever mistake may have occurred  
28 by the HOA in rejecting tender or accepting payments from the Borrower. *See Golden v.*

1 *Tomiyasu*, 79 Nev. 503, 513, 387 P.2d 989, 994 (reviewing fraud and collusion between the  
2 foreclosing trustee and bidders, not fraud, unfairness, or oppression in the underlying trustee s  
3 substantive actions). *See also Centeno v. JP Morgan Chase Bank, N.A.*, 67365, 2016 WL  
4 1122449, at \*1 (Nev. Mar. 18, 2016)(unpublished Order Vacating and Remanding)(Holding a  
5 low sales price is not a basis for voiding a foreclosure sale absent fraud, unfairness, oppression...).

6 Because the Bank failed to set forth material issues of fact demonstrating some fraud, unfairness,  
7 or oppression with the actual sale to demonstrate commercial unreasonableness, the COURT  
8 FINDS the sale in question was commercially reasonable.

9 S. On 8/31/15, Nationstar recorded a lis pendens against the property. NRS 14.015  
10 sets forth the requirements for maintaining a lis pendens on a property. Here, when Nationstar  
11 recorded the lis pendens, it did not have a pending action that was for (1) foreclosure or (2) that  
12 affected title or possession of the property and still has no pending claims against SFR today. The  
13 NRCP30(b)(6) deposition of U.S. Bank and Nationstar, concedes that Nationstar only services  
14 the loan and that it does not have an interest in the promissory note or deed of trust. Because  
15 Nationstar lacked any basis to record the lis pendens against the property in the first place and  
16 still lacks basis to maintain it, SFR is entitled to a judgment from this Court on its slander of title  
17 claim against Nationstar and that the lis pendens be expunged.

18 T. Pursuant to NRS 116.31166(2), when SFR made the highest bid and purchased the  
19 property at the Association sale, it obtained the title of the unit's owner without equity or right of  
20 redemption. Thus, any interest Moore and/or Gotera could claim in the property was extinguished.  
21 On 6/27/18 default was entered against Moore and Gotera for failing to answer SFR s complaint.

22 U. As a result of the Association's non-judicial foreclosure sale, the DOT was  
23 extinguished. As such, SFR is entitled to summary judgment on its claim for quiet title and a  
24 permanent injunction.

25 V. Any attempt to foreclose on the DOT by the Bank would be invalid as the DOT  
26 was extinguished by the Association sale.

27 W. Any assignment, sale, or transfer of the DOT by the Bank has no legal effect  
28 because the DOT was extinguished by the Association sale.

1 X. Any attempt to take or maintain possession of the Property by the Bank would be  
2 invalid because its interest in the Property, if any, was extinguished by the Association sale.

3 **ORDER**

4 **IT IS ORDERED, ADJUDGED, AND DECREED** that SFR's Motion for Summary  
5 Judgment is **GRANTED**.

6 **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that Nationstar's  
7 Motion for Summary Judgment is **DENIED**.

8 **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that U.S. Bank's Joinder  
9 to Nationstar's Motion for Summary Judgment is **DENIED**.

10 **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Association's  
11 non-judicial foreclosure sale relating to real property located at 5327 Marsh Butte Street, Las  
12 Vegas, Nevada 89148; Parcel No. 163-30-312-007 extinguished the DOT recorded against the  
13 Property in the Official Records of the Clark County Recorder as Instrument No. 20051121-  
14 0005567.

15 **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that Nationstar has no  
16 further right, title, or interest in real property located at 5327 Marsh Butte Street, Las Vegas,  
17 Nevada 89148; Parcel No. 163-30-312-007, and is hereby permanently enjoined from taking any  
18 further action to cloud SFR's title to the Property or enforce the now extinguished DOT, including  
19 but not limited to initiating, or continuing to initiate, foreclosure proceedings and from selling or  
20 transferring the Property.

21 **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that U.S. Bank has no  
22 further right, title, or interest in real property located at 5327 Marsh Butte Street, Las Vegas,  
23 Nevada 89148; Parcel No. 163-30-312-007, and is hereby permanently enjoined from taking any  
24 further action to cloud SFR's title to the Property or enforce the now extinguished DOT, including  
25 but not limited to initiating, or continuing to initiate, foreclosure proceedings and from selling or  
26 transferring the Property.

27 ...

28 ...

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

1 **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that title to real property  
2 located at 5327 Marsh Butte Street, Las Vegas, Nevada 89148; Parcel No. 163-30-312-007 is  
3 hereby quieted in favor of SFR.

4 **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that JUDGMENT be  
5 entered in favor of SFR pursuant to this ORDER.

6 **IT IS SO ORDERED.**

7 DATED this 26 day of Nov, 2018.

8 

9 DISTRICT COURT JUDGE


10 Jm

11 Respectfully Submitted By:

Approved as to Form and Content By:

12 **KIM GILBERT EBRON**

**AKERMAN LLP**

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Mortgage, LLC

21 Approved as to Form and Content By:

22 **GERRARD COX LARSEN**

23 Competing Order to be Submitted  
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25 Nevada Bar No. 4613  
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# **EXHIBIT B**

# **EXHIBIT B**

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*Attorneys for Defendant Nationstar Mortgage, LLC*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

ALESSI & KOENIG, LLC,

Plaintiff,

v.

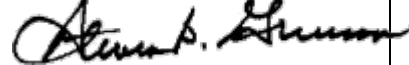
STACY MOORE, an individual; MAGNOLIA  
GOTERA, an individual; KRISTIN JORDAL, AS  
TRUSTEE FOR THE JBWNO REVOCABLE  
LIVING TRUST, a trust; U.S. BANK, N.A., a  
national banking association; NATIONSTAR  
MORTGAGE, LLC, a foreign limited liability  
company; REPUBLIC SILVER STATE  
DISPOSAL, INC., DBA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

Defendants.

Case No.: A-14-705563-C

Dept.: XXVI

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



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

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

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

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

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

17  
18 Counter-Defendant/Cross-Defendants.

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

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

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

**GERRARD COX LARSEN**

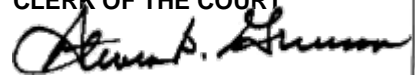
23 /s/ Douglas D. Gerrard, Esq.  
24 Douglas D. Gerrard, Esq.  
25 Fredrick J. Biedermann, Esq.  
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27 *Attorneys for Defendant Nationstar*  
*Mortgage, LLC*

**CERTIFICATE OF SERVICE**

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

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*Attorneys for Defendant Nationstar Mortgage, LLC*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

ALESSI & KOENIG, LLC,

Plaintiff,

v.

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

Defendants.

Case No.: A-14-705563-C

Dept.: XXVI

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

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

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

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

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

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

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

///

///

///

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

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

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

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

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

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

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

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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*Attorneys for SFR Investments*  
*Pool 1, LLC*

# **EXHIBIT C**

# **EXHIBIT C**

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[Search](#) [Refine Search](#) [Close](#)

Location : District Court Civil/Criminal [Help](#)

## REGISTER OF ACTIONS

CASE NO. A-14-705563-C

Alessi and Koenig LLC, Plaintiff(s) vs. Stacy Moore, Defendant(s)

§  
§  
§  
§  
§

Case Type: Other Civil Matters  
 Date Filed: 08/14/2014  
 Location: Department 26  
 Cross-Reference Case Number: A705563

### PARTY INFORMATION

Counter Claimant	SFR Investments Pool 1 LLC	Lead Attorneys Diana S. Ebron <i>Retained</i> 702-485-3300(W)
Counter Claimant	US Bank NA	Melanie D. Morgan <i>Retained</i> 702-634-5000(W)
Counter Defendant	Alessi and Koenig LLC	Huong Lam <i>Retained</i> <del>702-233-9303(W)</del>
Counter Defendant	US Bank NA	Melanie D. Morgan <i>Retained</i> 702-634-5000(W)
Cross Claimant	SFR Investments Pool 1 LLC	Diana S. Ebron <i>Retained</i> 702-485-3300(W)
Cross Defendant	Gotera, Magnolia	
Cross Defendant	Jordal, Kristin	
Cross Defendant	Moore, Stacy	
Cross Defendant	Nationstar Mortgage LLC	Melanie D. Morgan <i>Retained</i> 702-634-5000(W)
Defendant	Gotera, Magnolia	
Defendant	JBWNO RevocableLiving Trust	
Defendant	Moore, Stacy	
Defendant	Nationstar Mortgage LLC	Melanie D. Morgan <i>Retained</i> 702-634-5000(W)
Defendant	Franklin Silver State Disposal	

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EVENTS & ORDERS OF THE COURT

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03/26/2019 | **Motion For Reconsideration** (9:00 AM) (Judicial Officer Sturman, Gloria)  
*Defendant Nationstar Mortgage, LLC's Motion for Reconsideration and/or To Alter/Amend Judgment*

**Minutes**

02/20/2019 9:00 AM

02/21/2019 3:00 AM

03/26/2019 9:00 AM

- Following extensive arguments by counsel, COURT FINDS there were questions fact if tender was received and if the affidavit of counsel was sufficient to overcome testimony of the custodian of records; this Court can reconsider the issues since the case was reassigned; COURT THEREFORE ORDERED, Motion GRANTED.

Parties Present

Return to Register of Actions

# **EXHIBIT D**

# **EXHIBIT D**

1 IN RE:

2 ALESSI & KOENIG, LLC

3 VS.

Cause No.  
A-14-705563-C

4 STACY MOORE

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13 REPORTER'S TRANSCRIPT OF PROCEEDINGS

14 RE EDCR 2.67 CONFERENCE

15 Taken on Friday, December 6, 2019

16 By a Certified Court Reporter

17 At 10:02 a.m.

18 At 1635 Village Center Circle  
Suite 200  
19 Las Vegas, Nevada

20

21

22

23

24

25 Reported by: Alexander J. Nagle, CCR 923



1 APPEARANCES:

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1 MS. WITTIG: All right. So prior to  
2 coming on the record, we exchanged our list of  
3 documents, exhibits and witness list, and objections.

4 I gave you, Jason, U.S. Bank's  
5 disclosures; Nationstar's should be the same. And we  
6 served all these, anyway.

7 MR. MARTINEZ: Yeah. I have copies of all  
8 the served disclosures, and we objected to both  
9 pretrial disclosures.

10 MS. WITTIG: Okay. Awesome. And I'll  
11 just incorporate all the objections that we served  
12 prior and keep those.

13 MR. MARTINEZ: Yeah. And I'll just note  
14 that what I handed to you prior to going on the record  
15 was copies of all of our disclosures, as well as  
16 objections to U.S. Bank and Nationstar's pretrial  
17 disclosures.

18 The only thing -- the only thing I want to  
19 put on the record, even though it's in the disclosures,  
20 is the objections to the witnesses.

21 MS. WITTIG: Okay.

22 MR. MARTINEZ: As to the documents, once  
23 we put together the binders, we can talk about  
24 stipulating to which exhibits are actually going to  
25 come in. This case seems to be narrowed down to



1 delivery --

2 MS. WITTIG: Yeah. Okay.

3 MR. MARTINEZ: -- based on the recon.

4 MS. WITTIG: Yep. That was my  
5 understanding, as well. I have the orders here, in  
6 case we needed to review. But, yeah, it's just the  
7 delivery of the tender, right?

8 MR. MARTINEZ: Correct.

9 MS. WITTIG: Okay.

10 MR. MARTINEZ: Whether or not Alessi  
11 actually received it.

12 MS. WITTIG: So sender, delivery --

13 MR. MARTINEZ: And received.

14 MS. WITTIG: Yeah. Well, one and the  
15 same, I think. Yeah.

16 MR. MARTINEZ: Yeah. Just to determine  
17 that tender actually made it there is what I can glean  
18 from the order on the recon.

19 MS. WITTIG: Okay. That's my  
20 understanding too.

21 MR. MARTINEZ: That being said, I'll just  
22 go quickly through my witness objections, and then --  
23 the documents are in here -- and then, like I said,  
24 we'll figure out which documents we'll stipulate  
25 whatever to once we get the binders all together --



1 MS. WITTIG: Okay.

2 MR. MARTINEZ: -- and do the pretrial  
3 memo. I believe the -- this is -- I'm reading from our  
4 objections to Nationstar -- or excuse me -- U.S. Bank's  
5 disclosures.

6 We objected to Simon Ward Brown, Aaron  
7 Richardson, Edward Hein, and, four, other corporate  
8 representative of Nationstar, because those witnesses  
9 were not disclosed during discovering, and simply  
10 disclosing a corporate representative is deficient for  
11 purposes of pretrial disclosures. It must be  
12 identified by name.

13 We also objected to the corporate  
14 representative of Nationstar because of the fact that  
15 it was not identified by name.

16 Matt Labowe [phonetic]. The testimony  
17 violates Hallmark and Higgs, and it was never disclosed  
18 by U.S. Bank.

19 David Alessi or corporate designee of  
20 Alessi & Koenig. This disclosure is insufficient  
21 because the rule also requires identification by name  
22 of the corporate designee for Alessi & Koenig, and  
23 David Alessi was never disclosed as a witness by  
24 U.S. Bank.

25 Ashley Livingston or corporate designee



1 for Shadow Mountain Ranch, again, is deficient because  
2 it doesn't identify the name of the witness for the  
3 corporate designee, and Ashley Livingston was never  
4 disclosed by U.S. Bank.

5 Corporate designee for JBWNO Revocable  
6 Living Trust. This disclosure is insufficient because  
7 it doesn't identify the witness by name.

8 Doug Miles or corporate designee for Miles  
9 Bauer. This disclosure is insufficient because it  
10 doesn't identify the witness by name, and Doug -- as to  
11 the corporate designee -- and Doug Miles was never  
12 disclosed as a witness.

13 Rock Jung, who was never disclosed as a  
14 witness by U.S. Bank.

15 Ryan Kerbow was never disclosed as a  
16 witness.

17 I'm going to go to our objections to  
18 Nationstar's pretrial disclosures. There's a couple  
19 differences, so I'll move through them, anyway.

20 Corporate representative of Nationstar.  
21 No witness was identified by name, and that's in  
22 violation of the rule.

23 Corporate designee for Countrywide Home  
24 Loans. No witness was identified by name. That's in  
25 violation of the rule.



1 Corporate representative of U.S. Bank.  
2 It's insufficient because it doesn't identify the  
3 witness by name, which is in violation of the rule.

4 Corporate designee for Shadow Mountain  
5 Ranch, insufficient because it does not identify the  
6 witness by name, in violation of the rule.

7 Corporate designee for Alessi & Koenig.  
8 Does not identify the witness by name, which is in  
9 violation of the rule.

10 Ryan Kerbow. This witness was never  
11 disclosed in discovery.

12 Corporate designee for Miles Bauer. This  
13 disclosure is insufficient, as the rule requires  
14 identification by name of that witness, and that was in  
15 violation of the rule.

16 Corporate designee for Level Property  
17 Management. Same objection, that they were  
18 insufficient, as it does not identify the witness by  
19 name.

20 Scott Dugan. Anticipated testimony  
21 violates Hallmark and Higgs.

22 And then we have a reservation of rights  
23 to call any witness's name by any other party or need  
24 for rebuttal or impeachment. All witnesses must be  
25 identified. And we object to the reservation of a



1 right to supplemental list of witnesses because the  
2 rule does not allow supplements of pretrial  
3 disclosures.

4 And then I have two final witness  
5 objections: Ashley Livingston, who was not disclosed  
6 during discovery; and Doug Miles who was not disclosed  
7 during discovery.

8 MS. WITTIG: I don't think we need to,  
9 like, address these objections here during this  
10 conference, but I do want to say I thought one of the  
11 orders -- reconsideration order, specifically -- said  
12 that Doug Miles was disclosed.

13 MR. MARTINEZ: That's my recollection, as  
14 well, that he was -- that Judge Sturman ultimately  
15 found that -- wait a second. Let me see if I can find  
16 it in the order.

17 MS. WITTIG: Paragraph 3.

18 MR. MARTINEZ: Yeah. So paragraph 3 of  
19 the order granting reconsideration or to alter judgment  
20 in any case is that, "This court determines that the  
21 findings of fact and conclusions of law contained legal  
22 errors in that Douglas Miles was properly disclosed as  
23 a witness in Nationstar's second supplemental  
24 disclosure of documents and witnesses, which was  
25 electronically served on SFR's counsel on June 1,



1 2018."

2 Obviously, this is just a reservation of  
3 our objection. We still disagree with that. But  
4 moving forward, I understand that that is the ruling of  
5 the court. However, this order granting motion for  
6 reconsideration is an interlocutory order, so at the  
7 time of trial, we still have the right to raise that  
8 argument, and if the court were to change its mind,  
9 ultimately agree with us, nothing would prevent the  
10 court from doing that. Other than that, I don't think  
11 I have anything else to add.

12 MS. WITTIG: Okay. Usually, I at least  
13 try to get some stipulations. I think we've at least  
14 agreed to the scope of the trial.

15 MR. MARTINEZ: Yeah.

16 MS. WITTIG: What about -- usually I get,  
17 from opposing counsel, stipulations as to the  
18 authenticity of recorded documents.

19 MR. MARTINEZ: I'm generally fine with  
20 most of the recorded documents. Certainly, the HOA  
21 notices, I have no objection to those documents coming  
22 in.

23 MS. WITTIG: So the notice of delinquent  
24 assessment lien, the notice of default, the notice of  
25 sale, and the foreclosure deed, I'm assuming?



1 MR. MARTINEZ: Correct. And, also, we  
2 don't have any objections to the CC&Rs. And the only  
3 objections it looks like we have, and I'll maintain  
4 them for now, are the ones in our -- objections to your  
5 pretrial disclosures about essentially the chain of  
6 title as to the bank. Deed of trust, any assignments  
7 related to those deeds of trust, we have objections  
8 based on hearsay, lacks authenticity, lacks foundation,  
9 and best evidence rule.

10 MS. WITTIG: Okay. So you're going to  
11 object at trial as to -- if we bring a copy of what we  
12 disclosed? What if you disclose the same document, are  
13 you objecting to that?

14 MR. MARTINEZ: Still object to those.

15 And then -- let's see. I mean, I can go  
16 through all of these, but some of these I think we can  
17 work out when we put together the binder, depending on  
18 what documents you're going to use now that the scope  
19 is a little bit narrow.

20 MS. WITTIG: Yeah. We probably won't even  
21 need most of these, anyway.

22 MR. MARTINEZ: Yeah. That's why I figured  
23 we would just hash that out once we get the binders  
24 together --

25 MS. WITTIG: That's fine.



1 MR. MARTINEZ: -- if that works.

2 MS. WITTIG: Yeah. Just for pretrial memo  
3 purposes, are you amending any claims or differences?

4 MR. MARTINEZ: Not at this time.

5 MS. WITTIG: Neither are we.

6 MR. MARTINEZ: I don't see that we have,  
7 like, a slander of title claim or anything like that.

8 MS. WITTIG: As far as the pretrial memo  
9 and, like, the background and the facts and everything  
10 like that, do you want to get into the whole history of  
11 the case leading up to this limited scope of trial, do  
12 you think? Maybe just a little bit of background and  
13 the court's prior findings.

14 MR. MARTINEZ: Yeah. I think we can  
15 highlight the court's prior findings and use that to  
16 kind of determine where we're going. We may --  
17 obviously, to some of the things, even though we  
18 disagree with what the court found, we may put a  
19 reservation of an objection there.

20 MS. WITTIG: Sure.

21 So the statements of issues at trial would  
22 be whether tender was delivered?

23 MR. MARTINEZ: Yeah. Appears to be.

24 And -- let me double-check, if it'll load. Yeah. It  
25 will be surrounding the tender. And, like I said, the



1 order on the reconsideration is still interlocutory.

2 So I understand that the court has  
3 narrowed some of the scope of what we're going to be  
4 doing in trial, but anything surrounding the tender  
5 might be on the table should the court entertain the  
6 argument.

7 MS. WITTIG: Okay. What do you mean,  
8 anything surrounding tender?

9 MR. MARTINEZ: Essentially the arguments  
10 we presented in our motions for summary judgment about  
11 nondisclosure, those kinds of things, in case -- like I  
12 said, this order is interlocutory, so should she agree  
13 with our argument that Doug Miles was not disclosed, if  
14 she entertains the argument, we reserve the right to  
15 raise that, too; although I understand that,  
16 essentially, this is boiling down to delivery.

17 MS. WITTIG: Okay. I got it. You'll  
18 raise whatever you need to raise at trial.

19 MR. MARTINEZ: Yeah.

20 MS. WITTIG: And, you know, we'll just --

21 MR. MARTINEZ: At least for purposes of  
22 assuring it's preserved for appeal.

23 MS. WITTIG: Sure. That's fine.

24 Obviously, we disagree to that, but --

25 MR. MARTINEZ: Yeah.



1 MS. WITTIG: -- you can raise -- you'll  
2 raise it, anyway. How long do you think this trial  
3 will last?

4 MR. MARTINEZ: One full day, maybe. Maybe  
5 a day and a half.

6 MS. WITTIG: Yeah. I would say -- let's  
7 just do one to two days.

8 MR. MARTINEZ: That's fine.

9 MS. WITTIG: That way, we'll have it  
10 reserved if we need it.

11 MR. MARTINEZ: Yeah. And I think that's  
12 what I represented to Judge Sturman when she asked me  
13 at the recon.

14 MS. WITTIG: Okay. All right. Anything  
15 else we need to address?

16 MR. MARTINEZ: No. I think that's it.  
17 You'll take a crack at the pretrial memo?

18 MS. WITTIG: Yeah.

19 MR. MARTINEZ: Okay. And do you want to  
20 put together the exhibit -- the first -- we'll do a  
21 joint binder, but obviously --

22 MS. WITTIG: Yeah.

23 MR. MARTINEZ: -- joint does not mean I  
24 stipulate to the admission of all those documents.  
25 Just so we can use one binder.



1 MS. WITTIG: Yes.

2 MR. MARTINEZ: Perfect. That's it.

3

4 (Whereupon the proceeding

5 was concluded at 10:15 a.m.)

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REPORTER'S CERTIFICATE

STATE OF NEVADA     )  
                                  )   ss.  
COUNTY OF CLARK    )

I, Alexander J. Nagle, a Certified Court  
Reporter licensed by the State of Nevada, do hereby  
certify:

That I reported the taking of the EDCR 2.67  
CONFERENCE on Friday, December 6, 2019, commencing at  
the hour of 10:02 a.m. That I thereafter transcribed  
my said stenographic notes via computer-aided  
transcription into written form, and that the  
typewritten transcript of said conference is a  
complete, true and accurate transcription of my said  
stenographic notes taken down at said time.

I further certify that I am not a relative,  
employee or independent contractor of counsel involved  
in said action; nor a person financially interested in  
said action; nor do I have any other relationship that  
may reasonably cause my impartiality to be questioned.

IN WITNESS WHEREOF, I have subscribed my name  
this 23rd day of December, 2019.

---

Alexander J. Nagle, CCR 923

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**Yep** 4:4

**RECORDING REQUESTED BY:  
WHEN RECORDED MAIL TO:**

Owner of Record  
1008 SIR JAMES BRIDGE WAY  
LAS VEGAS, NV 89145

TS No. 08-0083737

Title Order No. G853248

138-31-417-004

Inst #: 201002110003253

Fees: \$15.00

N/C Fee: \$0.00

02/11/2010 11:55:01 AM

Receipt #: 229716

Requestor:

FIDELITY NATIONAL DEFAULT S

Recorded By: ADF Pgs: 2

DEBBIE CONWAY

CLARK COUNTY RECORDER

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**RESCISSION OF ELECTION TO DECLARE DEFAULT  
NEVADA**

NOTICE IS HEREBY GIVEN that RECONTRUST COMPANY, acting as an agent for the Beneficiary does hereby rescind, cancel and withdraw the Notice of Default and Election to Sell hereinafter described, provided, however, that this rescission 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 thereunder, 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 such Deed of Trust, nor modify, nor alter in any respect any of the terms, covenants, conditions or obligations therein contained. Said NOTICE OF DEFAULT AND ELECTION TO SELL under Deed of Trust specifically described therein was:

Recorded on 08/04/2008, as Instrument No. 3270, in Book 20080804, Page \_\_\_\_\_, of Official Records of Clark County, Nevada.

The DEED OF TRUST affected by this notice recorded on 12/30/2005 as Instrument No. 0002055 in Book 20051230 Page ., executed by CHRIS M PETERSON, A MARRIED MAN AS HIS SOLE & SEPARATE PROPERTY, as Trustor in Clark County, Nevada.

DATED: February 05, 2010

RECONTRUST COMPANY, as agent for the Beneficiary

State of: Texas )  
County of: Tarrant )BY: Khadija Gulley  
Khadija Gulley, ~~Team Member~~ Assistant Secretary

On 2/8/2010 before me Elsie E. Kroussakis, personally appeared  
Khadija Gulley Assistant Secretary, know to me (or proved to me on the oath of  
\_\_\_\_\_ or through \_\_\_\_\_) to be the person whose name is subscribed to the  
foregoing instrument and acknowledged to me that he/she executed the same for the purposes and  
consideration therein expressed.  
Witness my hand and official seal.

Elsie E. Kroussakis  
Notary Public's Signature

