MICHAEL F. BOHN, ESQ.
Nevada Bar No.: 1641
mbohn@bohnlawfirm.com
LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.
2260 Corporate Circle, Suite 480
Henderson, Nevada 89074
(702) 642-3113 / (702) 642-9766 FAX

Attorney for appellant

SUPREME COURT

STATE OF NEVADA

SATICOY BAY LLC SERIES 8149 PALACE MONACO Appellant, vs. WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE STRUCTURED ADJUSTABLE RATE MORTGAGE LOAN TRUST, MORTGAGE PASS THROUGH CERTIFICATES SERIES 2005-11; Respondent	CASE NO.: 81453

JOINT APPENDIX 5

Michael F. Bohn, Esq.
Law Office of Michael F. Bohn, Esq., Ltd.
2260 Corporate Circle, Suite 140
Henderson, Nevada 89074
(702) 642-3113/ (702) 642-9766 FAX

Attorney for Appellant

Aaron D. Lancaster, Esq.
WRIGHT, FINLAY & ZAK, LLP
7785 W. Sahara Ave., Ste. 200
Las Vegas, NV 89117

Attorney for Respondent

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RPLY
MICHAEL F. BOHN, ESQ.
Nevada Bar No.: 1641
mbohn@bohnlawfirm.com
ADAM R. TRIPPIEDI, ESQ.
Nevada Bar No.: 12294
atrippiedi@bohnlawfirm.com
LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.
2260 Corporate Circle, Suite 480
Henderson, NV 89074
(702) 642-3113/ (702) 642-9766 FAX
Attorneys for Plaintiff/Counterdefendant
Saticoy Bay LLC Series 8149 Palace Monaco

DISTRICT COURT

CLARK COUNTY, NEVADA

SATICOY BAY LLC SERIES 8149 PALACE MONACO, Plaintiff, vs. ROBERT NARDIZZI a/k/a ROBERT A. NARDIZZI; MONACO LANDSCAPE MAINTENANCE ASSOCIATION, INC.; WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE STRUCTURED ADJUSTABLE RATE MORTGAGE LOAN TRUST, MORTGAGE PASS THROUGH CERTIFICATES SERIES 2005-11, Defendants.	CASE NO.: A-18-770245-C DEPT. NO.: XXVIII **SATICOY BAY LLC SERIES 8149 PALACE MONACO'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**
WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE STRUCTURED ADJUSTABLE RATE MORTGAGE LOAN TRUST, PASSTHROUGH CERTIFICATES SERIES 2005-11, Counterclaimant, vs. SATICOY BAY LLC SERIES 8149 PALACE MONACO; MONACO LANDSCAPE MAINTENANCE ASSOCIATION; and RED ROCK FINANCIAL SERVICES, LLC, Counterdefendants.	

Plaintiff/Counterdefendant, Saticoy Bay LLC Series 8149 Palace Monaco, by and through its attorneys, the Law Offices of Michael F. Bohn, Esq., Ltd., hereby submits its reply in support of its motion for summary judgment filed October 28, 2019, and in response to Wells Fargo Bank National Association, as Trustee for the Structured Adjustable Rate Mortgage Loan Trust, Pass-Through Certificates Series 2005-11's ("**defendant**") opposition filed November 18, 2019. This reply is based upon the points and authorities contained herein.

LEGAL ARGUMENT

1. Defendant's mislabeled "quiet title" claims are barred by Nevada's statutes of limitation.

On page 10 of its opposition, defendant states "[t]he cause of action is, after all, denominated as one to quiet *title*." (Emphasis in original) However, defendant is not attempting to quiet title to the property in its name, its request is more accurately described as an attempt to have this court order that its deed of trust remains a valid encumbrance against the subject property. For this reason the three or four year statute of limitations bar plaintiff's claims.

i. The five year statute of limitations found in NRS 11.070 or NRS 11.080 are not applicable because plaintiff does not actually seek to possess the property.

In its opposition defendant contends that the three and four year statutes of limitations in NRS chapter 11 do not apply to its claims. Instead, agues that the five year statute of limitations found in NRS 11.070 or NRS 11.070 apply to banks' claims.

It is undisputed that plaintiff bank has never held title to the property. Plaintiff has also never had possession of the property. A quiet title claim requires either a claim for title or possession of property, and since plaintiff bank is simply seeking that its deed of trust remain a valid interest on the property, its claim is not for quiet title. Accordingly, NRS 11.080 does not apply to the facts in this case.

NRS 11.080 reads as follows:

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

The plain language of NRS 11.080 shows that its five year statute of limitations applies only to actions "for the **recovery** of real property, or for the recovery of the **possession** thereof..." Emphasis added. The Nevada Supreme Court has discussed quiet title claims and defined them as follows:

> A quiet title claim requires the court to determine who holds superior title to a land parcel. See NRS 40.010. **Such a claim directly relates to an individual's right to possess and use his or her property**.

McKnight Family, LLP v. Adept Mgmt., 129 Nev. 610, 616, 310 P.3d 555, 559 (2013) (Emphasis added).

Furthermore, the title to NRS 11.080 includes the word "seisen," which is defined as "possession of a freehold estate in land; ownership." *See* Black's Law Dictionary at 1362 (7th ed. 1999). NRS 11.080 states: The term "seisen" is centuries-old and refers to possession under a claim of freehold ownership. In Carlson v. Sullivan, 146 F. 476, 478 (9th Cir. 1906), the Ninth Circuit Court of Appeals stated:

> In Savage v. Savage, 19 Or. 112, 116 23 Pac. 890, 891, 20 Am. St. Rep. 795, which was an action for partition of lands, the court, after construing the provisions of the Code, said: 'Seisin and possession, as now understood, mean the same thing. To constitute seisin in fact, there must be an actual possession of the land; for a seisin in law there must be a right of immediate possession according to the nature of the interest, whether corporeal or incorporeal. 1 Wash. Real Prop. 62. Under this view there can be no seisin in law where there is not a present right of entry. And where the life tenant is in possession, there being no present right of entry in the remainderman or reversioner, they are not constructively seised, and neither can maintain a suit as plaintiff for partition. The authorities generally sustain this view'- citing cases.

Plaintiff's complaint does not include any factual allegations regarding plaintiff's seisen or possession of the Property prior to the HOA foreclosure sale, so it is impossible for plaintiff's complaint to state a claim for quiet title.

Plaintiff's complaint does not seek to recover real property, nor does it seek possession of real property.

For the same reasoning as applies to NRS 11.080, NRS 11.070 does not apply to plaintiff's complaint. NRS 11.070 provides:

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

The statute does not apply to defendant's claims because defendant only claims to hold a lien interest in the property. Defendant's counterclaim is not "founded upon the title to real property, or to rents or to services out of the same." The counterclaim is based on a deed of trust recorded against the property. Defendant has no claim of title to the property, and it seeks only to validate its lien in the property. Thus, the claim is not "founded upon the title to real property," and defendant has never "seized or possessed of the premises." Thus, NRS 11.070 does not apply here either.

At page 12 of its opposition, in its sections discussing NRS 11.070 and NRS 11.080, defendant cites Saticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan Chase Bank, N.A., 133 Nev. Adv. Op. 3, 388 P.3d 226 (2017) ("Gray Eagle"), for the proposition that a complaint for quiet title is governed by a five-year statute of limitations for a quiet title action. However, in making this conclusion, the Nevada Supreme Court was referring to the quiet title action filed by the owner of the property in that case, Saticoy Bay - Gray Eagle, which had "purchased Lots 21 and 26 at the HOA foreclosure sale held in 2013." Id. at 232. The Nevada Supreme Court made no reference to claims by a lender seeking to protect its deed of trust. Thus, the Gray Eagle decision has no bearing on defendant's claims.

Defendant also argues at page 13 that the statute of limitations "did not begin to run until September 18, 2014," because that is the date the Nevada Supreme Court issued its decision in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., a National Banking Association as Trustee for the Certificate Holders of the Banc of America Mortgage Pass-Through Certificates, Series 2008-A, 130 Nev. 742 (2014) ("**the SFR decision**"). However, the issue of super-priority liens had actually been litigated for more than two years prior to the SFR decision. Additionally, the initial appeal from which the SFR decision was rendered was initially filed on April 25, 2013. By the time the HOA foreclosed in the instant matter on December 3, 2013, the opening and answering briefs in the SFR case had already been filed. Thus, defendant cannot argue it was unaware of any risk to its deed of trust when this issue was already being hotly litigated and appealed when the HOA foreclosed. Further, the Nevada Supreme Court has already ruled that the SFR decision applies retroactively to HOA foreclosures which took place prior to the issuance of the SFR decision. K&P Homes v. Christiana Tr., 133 Nev. 364, 365, 398 P.3d 292,

293 (2017). Accordingly, defendant's argument that the statute of limitations did not run until the Nevada Supreme Court rendered the SFR decision fails.

2. Wells Fargo lacked standing to assert a purported claim before the Nevada Real Estate Division ("NRED") on December 29, 2015, over two years after the HOA foreclosure sale.

The defendant bank seeks to circumvent the application of Nevada law to its time-barred counterclaims by asserting, albeit wrongheadedly, that its claims were tolled by the filing of a claims before the Nevada Real Estate Division, pursuant to NRS 38.310. To the contrary, as Wells Fargo lacked standing to assert the purported claims and the nature of the purported claims, encompassed under NRS 38.310, is patently distinguishable from the quiet title claim, which is the subject of the instant litigation. NRS 38.310 provides, in relevant part, as follows:

> No civil action based upon a claim relating to [t]he interpretation, application or enforcement of any covenants, conditions or restrictions applicable to residential property . . . or [t]he procedures used for increasing, decreasing or imposing additional assessments upon residential property, may be commenced in any court in this State unless the action has been submitted to mediation.

Additionally, Nev. Rev. Stat. § 38.310(1) (2) provides that a "court shall dismiss any civil action which is commenced in violation of the provisions of subsection 1." Nev. Rev. Stat. § 38.310(2). A "civil action" includes any actions for monetary damages or equitable relief. See Nev. Rev. Stat. § 38.300(3). However, the types of claims which are subject to mediation, under NRS 38.310, have been consistently interpreted to exclude quiet title claims.

In McKnight Family, L.L.P. v. Adept Mgmt., 310 P.3d 555 (Nev. 2013) the Nevada Supreme Court concluded that a quiet title claim, such as set forth in Wells Fargo's counterclaim, is exempt from NRS 38.310. Therein, the Court held:

> "A quiet title claim requires the court to determine who holds superior title to a land parcel. See NRS 40.010. Such a claim directly relates to an individual's right to possess and use his or her property. Therefore, it is not a civil action as defined in NRS 38.300(3) and, accordingly, is exempt from NRS 38.310."

In the instant case, Wells Fargo has attempted to circumvent the applicable statutes of limitation,

by asserting tolling, pursuant to NRS 38.310, predicated on claims that were not property subject to mediation under the statute. It remains that both of both of the substantive causes of action, set forth in Wells Fargo's counterclaim, are time-barred.

This statute applies to claims involving the HOA and/or a homeowner where the parties have a dispute over the meaning of the CC&Rs. The statute does not apply to claims relating to extinguishment of a first deed of trust between a bank/lender and the purchaser at an HOA foreclosure. Accordingly, while the NRS 38.350 may toll the statute of limitations for claims defendant and/or plaintiff have against the property owner, NRS 38.350 does not toll the statute of limitations for defendant's claims against plaintiff. Thus, NRS 38.310 does not apply to defendant's claim that its deed of trust survived the HOA's foreclosure.

As defendant's claims are barred by the statute of limitations, this Court should enter an order granting plaintiff's motion for summary judgment.

3. The HOA did not comply with NAC 116.090 to be treated as a limited-purpose association.

Defendant argues that based on NRS 116.1201(2) and the language of the HOA's Declaration of Covenants, Conditions, Restrictions, Reservations, and Easements" ("**the CC&Rs**"), the HOA is a limited-purpose association that is not governed by NRS Chapter 116. However, the CC&Rs do not meet the statutory requirements to grant the HOA limited-purpose association status. Accordingly, the HOA was not and is not a limited purpose association in reality.

NRS 116.1201(5) states in part:

5. The Commission shall establish, by regulation:

> (a) The criteria for determining whether an association, a limited-purpose association or a common-interest community satisfies the requirements for an exemption or limited exemption from any provision of this chapter....

NRS 116.015 defines the word "Commission" to mean "the Commission for Common-Interest Communities and Condominium Hotels created by NRS 116.600."

NRS 116.600(1) created the Commission, and NRS 116.600(2) describes its membership and appointments. On its website, the Nevada Real Estate Division defines the Commission as "a seven-member body, appointed by the governor that acts in an advisory capacity to the Division, adopts regulations, and conducts disciplinary hearings."

As provided by NRS 116.1201(5)(a), the Nevada Real Estate Division and the Commission adopted NAC 116.090, which provides in part:

> **NAC 116.090 "Limited-purpose association" interpreted.** (NRS 116.1201, 116.615)
>
> 1. An association is a limited-purpose association pursuant to subparagraph (1) of paragraph (a) of subsection 6 of NRS 116.1201 if:
>
> (a) The association has been created for the sole purpose of maintaining the common elements consisting of landscaping, public lighting or security walls, or trails, parks and open space;
>
> (b) The declaration states that the association has been created as a landscape maintenance association; **and**
>
> (c) The declaration expressly prohibits:
>
> (1) The association, and not a unit's owner, from enforcing a use restriction against a unit's owner;
>
> (2) The association from adopting any rules or regulations concerning the enforcement of a use restriction against a unit's owner; **and**
>
> (3) The imposition of a fine or any other penalty against a unit's owner for a violation of a use restriction. (emphasis added)

NAC 116.090 sets forth the requirements for determining whether an HOA is a limited-purpose association, and NRS 116.1201(5)(a) expressly incorporates the Commission's criteria. Thus, in determining whether the HOA is truly a limited-purpose association under NRS 116.1201, this Court must look to the requirements of NAC 116.090.

NAC 116.090(1) has three sub-parts that are connected by the word "and" that appears at the end of NAC 116.090(b). NAC 116.090(c) has three sub-parts that are connected by the word "and" at the end of NAC 116.090(c)(2). As a result, there are five (5) separate requirements that must be met

before an association qualifies for the exception from NRS Chapter 116 provided by NRS 116.1201(2).

i. According to the express provisions in the CC&Rs, the HOA was not created for the sole purpose of maintaining common elements as required by NAC 116.090(1)(a).

The first requirement under NAC 116.090(1)(a) is that the association "has been created **for the sole purpose** of maintaining the common elements", including landscaping. (emphasis added)

Although the preamble on page 2 of the CC&Rs states that "the Project shall be deemed to be a limited expense planned community under NRS Sections 116.110368 and 116.1203(1)(b)," the CC&Rs do not state the HOA was formed for the sole purpose of landscape maintenance. Thus, by the wording of NAC 116.090(a), the CC&Rs do not meet this specific statutory requirement.

Additionally, by the very words contained in the CC&Rs, the HOA was not created for the sole purpose of maintaining common areas. The CC&Rs grant the HOA the power to enforce various use restrictions (see below); grant easements (Article 5); obtain insurance (Article 12); annex property (Article 13; bring civil actions (Article 17.3); and others. This is far afield of simply maintaining landscape.

ii. The CC&Rs do not comply with NAC 116.090(1)(c)(2).

NAC 116.090(1)(c)(2) also requires that the CC&Rs expressly prohibit the association from "adopting any rules or regulations concerning the enforcement of a use restriction against a unit's owner." The CC&Rs in the present case do not include this required language.

To the contrary, pages 8 through 12 of the CC&Rs contain 16 different use restrictions, some of which contain different subparts. These use restrictions range from prohibiting "noxious or offensive activity or noise" at the properties (Section 3.2); prohibiting using homes for "a public boarding house, sanitarium, hospital, asylum, or institution of any kindred nature" (Section 3.3); prohibiting mining and drilling (3.4); restricting the use of off-road vehicles (3.6); restrictions on the height of fences, walls, and the like (3.7); extensive description of drainage requirements (3.9);

allowing the declarant (the builder) to access each individual lot to remedy any issues (3.11); and many more.

Not only do the CC&Rs fail to state, as required by NAC 116.090(1)(B), that the HOA cannot enforce use restrictions; to the contrary, the CC&Rs contain a litany of use restrictions. In fact, Section 3.11 of the CC&Rs states "Each Owner of a Lot agrees that he will permit free access upon such Lot by Declarant for the purpose of remedying any default under, or **enforcing any provision of, this Declaration**.... (Emphasis added). Section17.3 also states that "the Association... shall have the right, but not the duty, to enforce any or all of the provisions of this Declaration...." Thus, the HOA does not meet limited purpose association status.

iii. The CC&Rs do not comply with NAC 116.090(1)(c)(3).

Finally, NAC 116.090(1)(c)(3) requires the CC&Rs to explicitly prohibit the imposition of a fine against a unit owner for violation of a use restriction. The CC&Rs contain no such prohibition. This omission in and of itself disqualifies the HOA from limited purpose association status. Notably, the fine prohibition is separate and distinct from NAC 116.090(1)(c)(1)'s prohibition on enforcing use restrictions. Accordingly, the CC&Rs do not contain a prohibition on fines. This means the HOA may choose to enforce fines for violations of the use restrictions, many of which have nothing to do with the common areas. Thus, the CC&Rs do not meet the conjunctive NAC requirements on this basis, and the HOA is not limited-purpose.

Because multiple provisions in the CC&Rs violate the limitations imposed by NAC 116.090 for the HOA to be a "limited-purpose association," the exception in NRS 116.1201(2) does not apply to the HOA or the foreclosure sale held in the present case.

4. Defendant has not proven the former owner's payments extinguished the HOA's super-priority lien.

Beginning at page 18 of its opposition, defendant argues "[t]he partial payments made by Nardizzi satisfied the superpriority portion of the HOA's lien." However, defendant has not provided any proof that the HOA actually applied Nardizzi's payments to the super-priority portion of the HOA lien. Accordingly, defendant's opposition, insofar as it is based on homeowner payments, fails.

In Nguyen v. Calhoun, 105 Cal. App. 4th 428, 129 Cal. Rptr. 2d 436 (2003), the court stated:

> "The trustor-mortgagor or the person who alleges that a debt has been paid has the burden of proving payment." (4 Miller & Starr, Cal. Real Estate, supra, Deeds of Trusts and Mortgages, § 10:71, p. 217, fn. omitted.)

In Resources Group, LLC, as Trustee of the East Sunset Road Trust v. Nevada Association Services, Inc., 135 Nev. Adv. Op. 8, 437 P.3d 154, 158-159 (2019), the Nevada Supreme Court cited Nguyen v. Calhoun and held that the property owner in that case failed to meet his burden to prove that the cure payment mailed by the property owner was received by the foreclosure agent before the purchaser at the foreclosure sale paid the high bid. Thus, it is defendant's burden to show the homeowner payments were made, were applied to the super-priority lien, and were sufficient to extinguish the entire super-priority lien.

In the facts section of its opposition, defendant goes through painstaking detail and breaks down deposition testimony from Red Rock. Defendant also attaches as exhibits various ledgers and "payment allocation reports" from Red Rock. On that basis, defendant argues that it has proven Nardizzi's payments were applied to the super-priority portion of the HOA lien. The problem with defendant's evidence and argument is that none of it comes from the HOA. Red Rock is not the HOA. Red Rock's ledgers and reports are not the HOA's ledgers and reports. If defendant had provided a statement, accounting, or deposition testimony from the HOA stating that the HOA applied Nardizzi's payments to the super-priority portion of the HOA's lien, that would be a different scenario. But all we have in this case are documents and statements from Red Rock. Red Rock's internal documents do not prove what the HOA did with any payments it may have received. Thus, defendant has failed to meet its burden that there is no genuine issue of material fact on the homeowner payment issue because defendant has not provided any evidence as to what the HOA did with the payments it may have received.

Attached as Exhibit 9 to defendant's motion for summary judgment is the deposition transcript of Sara Trevino, the witness appearing on behalf of Red Rock. Defendant cites extensively to Ms. Trevino's deposition transcript. However, again, because Ms. Trevino is an employee of Red Rock,

and not of the HOA or its management company, Ms. Trevino cannot make any legitimate representations regarding how the HOA applied any payments it may have received.

Red Rock's documentation indicates it received a total of $909.00 from Nardizzi. See Exhibit 6 to defendant's motion for summary judgment, which is an "Account Detail" from Red Rock dated December 3, 2013. Specifically, pages 4 and 5 of Red Rock's Account Detail states Red Rock received a $404.00 payment on May 30, 2013; a $169.00 payment on July 5, 2013; a $168.00 payment on July 26, 2013; and a $168.00 payment on August 27, 2013, totaling $909.00.

Ms. Trevino testified in her deposition that of the $404.00 payment, Red Rock kept $275.00 and sent $129.00 to the HOA. Page 80, lines 8-11. Of the $169.00 payment, Red Rock sent $94.00 to the HOA. Page 83, lines 16-22. Of the first $168.00 payment, Red Rock sent the entire $168.00 to the HOA. Page 85, lines 15-19. And of the second $168.00 payment, Red Rock forwarded the entire $168.00 to the HOA. Page 87, lines 11-13. This is a total of $559.00. However, defendant has failed to provide any testimony or evidence from the HOA as to how the HOA applied these payments to Mr. Nardizzi's account. By the time of these payments - well into 2013 - Mr. Nardizzi's account had been delinquent since January 1, 2009, a period of approximately four and a half years. By July 2010, Mr. Nardizzi had missed four semi-annual $114.00 assessments, as well as six semi-annual $120.00 assessments, for a total of $1,176.00. Further, the HOA charging interest and late fees for four and a half years. The late fees were $20.00 per year, for a total of $100.00. The interest totaled $146.55. Thus, the amount due to the HOA was $1,422.55. Mr. Nardizzi's payments of $559.00 are less than 40% of the total amount owed. Thus, clearly Mr. Nardizzi never paid off the entire HOA lien and defendant needs to show further evidence proving the payments were applied to the super-priority portion of the lien. Accordingly, without having a ledger or testimony from the HOA as to how the HOA applied Nardizzi's payments to his account, defendant has not met its burden.

At page 18 of its opposition, defendant cites to Saticoy Bay LLC Series 2141 Golden Hill v. JPMorgan Chase Bank, 408 P.3d 558 (Nev. 2017), better known as Golden Hill, in support of its argument that Nardizzi's payments extinguished the super-priority lien. However, Golden Hill is

distinguished from the instant matter because in Golden Hill, the Nevada Supreme Court stated that "[t]he record contains undisputed evidence that the former homeowner made payments sufficient to satisfy the superpriority component of the HOA's lien **and that the HOA applied those payments to the superpriority component of the former homeowner's outstanding balance**." Id. at 1 [Emphasis added]. Thus, the difference is that in Golden Hill, there was undisputed evidence that the HOA applied the homeowner payments to the super-priority component of the HOA lien, whereas here, we essentially have no evidence as to how the HOA applied the payments it received. See also Deutsche Bank Nat'l Tr. Co. as Tr. for Registered Holders of Morgan Stanley ABS Capital I Inc. Tr. 2006-HE5 v. Vegas Prop. Servs., Inc., 439 P.3d 959 (Nev. 2019), where the Nevada Supreme Court distinguished Golden Hill in the exact same manner:

> Golden Hill relies on undisputed evidence that the HOA applied the homeowner's payments to the superpriority portion of the homeowner's outstanding balance. Here, Deutsche failed to demonstrate that McGahney's payments addressed the ongoing superpriority portion of the lien, or that the HOA applied her payments to that portion, based on the amount that still remained past-due following McGahney's completion of the payment plan. Thus, Golden Hill is distinguishable from this case and is not "clearly controlling," such that it would warrant our intervention.

Thus, according to the Nevada Supreme Court, Golden Hill does not apply unless there is undisputed evidence that the HOA applied homeowner payments to the super-priority portion of the HOA lien. Here, defendant has failed to supply any such evidence. Accordingly, without more, defendant cannot adequately support or rely on its argument that Nardizzi's payments extinguished the HOA's super-priority lien, and plaintiff's motion for summary judgment should be granted.

5. The legislative intent as evidenced by the commentary to the UCIOA shows that the bank, not the homeowner must satisfy the super priority portion of the lien.

"When a statute is ambiguous, legislative intent is the controlling factor, and reason and public policy may be considered in determine what the Legislature intended. Kaplan v. Chapter 7 Trustee 132 Nev. Adv. Op. 80, 384 P.3d 491, 493 (2016); Mendoza-Lobos v. State 125 Nev. 634,642, 218 P.3d 501, 506 (2009) Savage v. Pierson 123 Nev. 86, 89, 157 P.3d 697, 699 (2007).

The superpriority portion of an association lien is "a specially devised mechanism designed to "strike [ ] an equitable balance between the need to enforce collection of unpaid assessments and the

obvious necessity for protecting the priority of the security interests of lenders." SFR Investments Pool 1, LLC v. U.S. Bank N.A. 130 Nev. 742, 748, 334 P.3d 408, 412 (2014).

Extinguishing a deed of trust is a powerful tool. Without it, holders of first deeds of trust have no incentive to ever pay associations their borrowers' overdue assessments. The very goal was to bring the lender to the table, so "the first mortgage lender would promptly institute foreclosure proceedings and pay the prior six months of unpaid assessments to the association to satisfy the limited priority lien–thus permitting the mortgage lender to preserve its first lien position and deliver clear title in its foreclosure sale." See Report of the Joint Editorial Board for Uniform Real Property Acts, *The Six-Month "Limited Priority lien" for Association Fees Under the Uniform Common Interest Ownership Act* at p.4 (June 1, 2013). In other words, have the lender foreclose and get a paying owner in the property.

Lenders are disincentivized to protect a deed of trust if a homeowner's partial payment can satisfy the superpriority amount. The lenders sit back, wait for a foreclosure sale, then challenge the sale in hopes the association tried to work out a payment plan with the homeowner or the homeowner made some payments, thereby rendering the sale one of the remaining subpriority portion only. This is not how the statutes were intended to work. Therefore, giving first deed of trust holders credit for payments made by former owners serves to completely undermine the objective of compelling a first deed of trust holder to share in the burden of preserving a community while foreclosing on its deed of trust.

The Legislature and the UCIOA did not intend that lenders would sit idly by and my sheer luck find the presumptively extinguished deed of trust somehow survives the foreclosure sale. The only way for the statute to properly work and meet the drafter' and the Legislature's intent, is to make the lender the only person that can satisfy the superpriority amount.

To determine otherwise would be to create a circumstance where an association would need to stop the foreclosure process any time it began working on a payment plan with a homeowner, otherwise, it would lose its superpriority position, causing the potential for even further loss. Once

the foreclosure process begins, and the matter is turned over to collections, the association is liable for the costs incurred. Starting and stopping the process simply puts the homeowner and the association further in debt. Doing so while a first deed of trust holder takes no action to foreclose and does nothing to protect a property, defeats the purpose of the superpriority lien.

In SFR Investments Pool 1, LLC v. U.S. Bank N.A. 130 Nev. 742, 748, 334 P.3d 408, 412 (2014) the Court quoted from the official comments to UCIOA as follows:

> But the official comments to UCIOA § 3-116 forthrigthly acknowledge that the split-lien approach represents a "significant departure from existing practice." 1982 UCIOA § 3-116 cmt. 1; 1994 & 2008 UCIOA § 3-116 cmt. 2. **It is a specially devised mechanism designed to strike [ ] an equitable balance** between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interest of lenders." *Id.* The comments continue: "As a practical matter, secured lenders will most likely pay the 6 [in Nevada, nine, *see supra* note 1] months' assessments demanded by the association *rather than having the association foreclose on the unit*." *Id*. (emphasis added). **If the superpriority piece of the HOA lien just established a payment priority, the reference to a first security holder paying off the superpriority piece of the lien to stave off foreclosure would make no sense.**

(Emphasis added)

Likewise, if payments made by a unit owner can be applied to satisfy the HOA's superpriority lien, then "the reference to a first security holder paying off the superpriority piece of the lien" would make no sense.

The 2014 comments to Section 3-116 of the UCIOA comments further illuminate the intent of the drafters of the "specially devised mechanism" and the "equitable balance" that Section 3-116 creates. The 2014 comments state that the drafters of the UCIOA foresaw and anticipated that first deed of trust holders would pay off the super-priority lien rather than allowing a property be foreclosed upon. The comments also expressed concern for the inequity that exists when a lender takes no action to prevent an HOA foreclosure and instead drags its feet and relies on the rest of the property owners in the community to pay the costs of maintaining the community:

> The six-month limited priority for association liens constituted a significant departure from pre-existing practice, and was viewed as striking an equitable balance between the need to enforce collection of unpaid assessments and the need to protect the priority of the security interests of lenders in order to facilitate the availability of first mortgage credit to unit owners in common interest communities. **This equitable balance was premised**

> **on the assumption that, if an association took action to enforce its lien and the unit owner failed to cure its assessment default, the first mortgage lender would promptly institute foreclosure proceedings and pay the unpaid assessment (up to six months' worth) to the association to satisfy the association's limited priority lien**. This was expected to permit the mortgage lender to preserve its first lien and deliver clear title in its foreclosure sale - **a sale that was expected to be completed within six months** (in jurisdictions with non-judicial foreclosure) **or a reasonable period of time thereafter**, thus minimizing the period during which unpaid assessment would accrue for which the association would not have first priority. Likewise, it was expected that in the typical situation a unit would have a value sufficient to produce a sale price high enough for the foreclosing lender to recover both the unpaid mortgage balance and six months assessments.
>
> . . . .
>
> In many situations, however, mortgage lenders strategically delayed the institution or completion of foreclosure proceedings on units affected by common interest assessments. When a lender acquires a unit at a foreclosure sale by way of credit bid, it becomes legally obligated to pay assessments arising during the lenders' period of ownership. Some lenders have chosen to delay scheduling or completing a foreclosure sale, fearful that they may be unable to resell the unit quickly for an appropriate return in a depressed market. During this period of delay, neither the unit owner nor the mortgage lender is paying the common expense assessments – the unit owner is often unable or unwilling to do so, and the mortgagee is not legally obligated to do so prior to acquiring title. In the meantime, the association (and the remaining unit owners) bear the full financial consequences of this situation, because the association must either force the remaining owners to bear increased assessments to meet budgeted expenses or reduce expenditures for (or the level of) community maintenance, insurance and services.
>
> If other unit owners have to pay the burden of increased assessments to preserve community services or amenities, **the delaying lender receives a benefit in that the value of its collateral is preserved while the lender waits to foreclose**. Yet this preservation comes through the community's imposition of assessments that the lender does not have to pay or reimburse. **This benefit constitutes unjust enrichment of the mortgage lender**, particularly to the extent that the lender enjoys this benefit by virtue of conscious decision to delay completing a foreclosure sale.
>
> . . . .
>
> By allowing the association to extend its priority for six months per year throughout any period of delay by a foreclosing lender, subsection (c)(1) strikes a more appropriate and equitable sharing of the costs of preserving the value of the mortgagee's security.
>
> (emphasis added)

The same "unjust enrichment" occurs when a lender claims that payments made by a unit owner after the HOA commences foreclosure of its assessment lien must be applied to pay the superpriority assessments even though the lender "does not have to pay or reimburse" the unit owner for making those payments.

The comments to the UCIOA - from which NRS 116.3116 was derived - prove that the superpriority lien was created to require that lenders pay the super-priority lien and not rely on the property owners to do so. Instead, lenders sat on distressed properties and did nothing, allowing thousands of properties to end up in HOA foreclosures based on a gamble that housing prices would rebound.

In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., the Court also stated:

> U.S. Bank's final objection is that it makes little sense and is unfair to allow a relatively nominal lien—nine months of HOA dues—to extinguish a first deed of trust securing hundreds of thousands of dollars of debt. But as a junior lienholder, U.S. Bank could have paid off the SHHOA lien to avert loss of its security; it also could have established an escrow for SHHOA assessments to avoid having to use its own funds to pay delinquent dues. 1982 UCIOA § 3116 cmt. 1; 1994 & 2008 UCIOA § 3–116 cmt. 2.
> 334 P.3d at 414.

This quote recognizes that the lender must take action to avoid losing its security interest.

The court in SFR Investments Pool 1, LLC v. U.S. Bank N.A. 130 Nev. 742, 334 P.3d 408 (2014) acknowledged the drafters' intent that the superpriority piece of the HOA lien would be paid by lenders and not the unit owner.

The Court also stated at page 418:

> And from what little the record contains, nothing appears to have stopped U.S. Bank from determining the precise superpriority amount in advance of the sale or paying the entire amount and requesting a refund of the balance.

The Court again required lenders to take action before the HOA foreclosed its superpriority lien and not seek to obtain a windfall at a later date by claiming that some other person paid the superpriority amount on its behalf.

Additionally, the Nevada Supreme Court identified in Shadow Wood other actions that a lender could take to prevent an HOA foreclosure sale from extinguishing a first deed of trust: (1) attending the sale; (2) requesting arbitration to determine the amount owed; (3) enjoining the sale pending judicial determination of the amount owed; (4) seeking a temporary restraining order and preliminary injunction; and (5) filing a lis pendens.

Here, defendant used none of these alternatives despite being apprised of the sale. Defendant failed to even communicate with the foreclosure agent. Given the Nevada Supreme Court's iteration and reiteration of the principle that the first deed of trust holder has many options to prevent the foreclosure sale, and its citation to the UCIOA comments which anticipate lenders paying the super-priority amount, it is clear that the first deed of trust holder was responsible for paying the super-priority amount. Thus, defendant's argument that the homeowner paid the superpriority lien, which was raised only after defendant allowed the HOA foreclosure sale to take place without objection, directly conflicts with the statements made by the Nevada Supreme Court and the drafters of the UCIOA.

The UCIOA in its comments, and the Nevada Supreme Court in its decisions, are critical of lenders for allowing HOA dues to go unpaid and for doing nothing to prevent HOA foreclosures. The UCIOA comments indicate that the UCIOA would disapprove of a situation such as the instant matter, where, according to defendant's argument, a lender which did nothing to protect its own interest would benefit from payments made by a former homeowner. The UCIOA and the Nevada Supreme Court wanted lenders to take action to prevent foreclosure and protect their interests, and in the instant matter, defendant did virtually nothing to protect its interest.

To allow defendant to benefit from homeowner payments, while defendant did nothing itself, would fly in the face of the UCIOA's goal of an "equitable sharing of the costs of preserving the value of the mortgagee's security." The super-priority lien is designed to compel the lender holding a first deed of trust to make the payments and share in the costs incurred by the HOA to maintain the community where the Property is located.

6. The legislative amendments also evidence the legislative intent that the bank is to pay the super priority portion of the lien.

In Bielar v. Washoe Health System, Inc. 129 Nev. 459, 469, 306 P.3d 360, 367 (2013), the Supreme Court stated:

> "Where a legislature amends a former statute, or clarifies a doubtful meaning by subsequent legislation, such amendment or subsequent legislation is strong evidence of the legislative intent behind the first statute." 2B Norman J. Singer & J.D. Shambie

> Singer, Sutherland Statutory Construction § 49:10, at 129 (7th ed.2012); see also Pub. Emps.' Benefits Program v. Las Vegas Metro. Police Dep't, 124 Nev. 138, 157, 179 P.3d 542, 554–55 (2008) (stating that when the Legislature clarifies a statute "through subsequent legislation, we may consider the subsequent legislation persuasive evidence of what the Legislature originally intended")

In 2015, the Legislature amended NRS 116.3116, *et. seq*. which clarified that the holder of the first security interest is the party that must satisfy the super priority portion of the lien. The amendments to NRS 116.31162, regarding the language in the notice of default include:

> (3) State that:
>
> (I) **If the holder of the first security interest on the unit** does not satisfy the amount of the association's lien that is prior to that first security interest pursuant to subsection 3 of NRS 116.3116, the association may foreclose its lien by sale and that the sale may extinguish the first security interest as to the unit; and
>
> (II) If, not later than 5 days before the date of the sale, **the holder of the first security interest on the unit satisfies the amount of the association's lien that is prior to that first security interest pursuant to subsection 3 of NRS 116.3116** and, not later than 2 days before the date of the sale, a record of such satisfaction is recorded in the office of the recorder of the county in which the unit is located, the association may foreclose its lien by sale but the sale may not extinguish the first security interest as to the unit.

The amendment to the statutes clarify the legislative intent that the holder of the first security interest is the party that must satisfy the super priority portion of the lien.

7. The HOA and its foreclosure agent complied with every notice requirement in NRS 116.31162 to 116.31168, and by incorporation, NRS 107.090.

At page 20 of its opposition, defendant argues the sale was void because Red Rock "failed to provide the requisite notices to MERS...." Defendant claims MERS was the beneficiary of the deed of trust in question at the time Red Rock was noticing the sale, and thus MERS was an interested party entitled to notice of the HOA foreclosure. However, while page 2 of the deed of trust does in fact state that MERS is the beneficiary, it also states "MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns." Additionally, the first page of the deed of trust identifies IndyMac Bank as the Lender and contains addresses for IndyMac Bank

As discussed in the Facts section above, Red Rock mailed copies of the notice of default and notice of sale to Nardizzi; IndyMac Bank; and Wells Fargo Bank, N.A.

Defendant cites extensively to NRS 107.090 and states on page 20 of its opposition that "NRS 116.31168 incorporates NRS107.090, which requires that notices be sent to a deed of trust beneficiary". However, NRS 107.090 does not identify "the deed of trust beneficiary" as the person entitled to be served with either the notice of default or the notice of sale. NRS 107.090(3) instead required that a copy of the notice of default be mailed to "[e]ach person who has recorded a request for a copy of the notice" (NRS 107.090(3)(a)) and "[e]ach other **person with an interest** whose interest or claimed interest is subordinate to the deed of trust." (NRS 107.090(3)(b)) (emphasis added)

NRS 107.090(4) required that "a copy of the notice of time and place of sale" be mailed to "each person described in subsection 3."

NRS 107.090(1) states:

> As used in this section, "person with an interest" means **any person who has or claims any right, title or interest in, or lien or charge upon, the real property** described in the deed of trust, as evidenced by any document or instrument recorded in the office of the county recorder of the county in which any part of the real property is situated. (emphasis added)

In the present case, the "person with an interest" in the deed of trust recorded on March 15, 2005, was not MERS. The "person with an interest" was instead the Lender named in the deed of trust: IndyMac Bank.

In particular, although MERS was named as the beneficiary in the deed of trust, the deed of trust expressly stated that MERS was acting "solely as nominee for Lender and Lender's successors and assigns."

The recitals at page 4 of the deed of trust also stated:

> Borrower understands and agrees that **MERS holds only legal title to the interests granted by Borrower in this Security Instrument**. . . . (emphasis added)

In Edelstein v. Bank of New York Mellon, 128 Nev. 505, 286 P.3d 249, 259 (2012), this court stated:

> Although we conclude that MERS is the proper beneficiary pursuant to the deed of trust, **that designation does not make MERS the holder of the note**. Designating MERS as the beneficiary does, as Edelstein suggests, effectively "split" the note and the deed of trust at inception because, as the parties agreed, an entity separate from the original note holder (New American Funding) is listed as the beneficiary (MERS). *See generally* In re

> Agard, 444 B.R. 231, 247 (Bankr.E.D.N.Y.2011). And **a beneficiary is entitled to a distinctly different set of rights than that of a note holder**.

(emphasis added)

In Landmark National Bank v. Kesler, 216 P.3d 158 (Kan. 2009), the lender named in a first mortgage filed a petition to judicially foreclose its mortgage, but did not name MERS as a party even though MERS was identified as the beneficiary in a second mortgage recorded against the property. After the lender named in the first mortgage obtained a default judgment and the property was sold at a sheriff's sale, the unrecorded assignee of the second mortgage (i.e. Sovereign Bank) filed a motion to set aside the court's confirmation of the sale because "MERS was a K.S.A. 60-219(a) contingently necessary party and, because Landmark failed to name MERS as a defendant, Sovereign did not receive notice of the proceedings." Id. at 162.

MERS also joined Sovereign's motion. Id.

The Kansas Supreme Court examined language in the mortgage that matches the language used at pages 1 and 2 of the deed of trust and language that matches language used in paragraphs 6, 7 and 13 of the deed of trust in the present case.

In particular, the court noted that paragraph 12 of the mortgage stated that "any notice to Lender shall be given by certified mail to Lender's address stated herein or to such other address as Lender may designate by notice to Borrower as provided herein." Id. at 165.

In the present case, paragraph 15 of the deed of trust, on page 11, states in part:

> Any notice to Lender shall be given by delivering it or by mailing it by first class mail **to Lender's address stated herein** unless Lender has designated another address by notice to Borrower. (emphasis added)

The Kansas Supreme Court also discussed the role of MERS as a nominee:

> The relationship that MERS has to Sovereign is more akin to that of a straw man than to a party possessing all the rights given a buyer. . . . Although MERS asserts that, under some situations, the mortgage document purports to give it the same rights as the lender, the document consistently refers only to rights of the lender, including rights to receive notice of litigation, to collect payments, and to enforce the debt obligation. The document consistently limits MERS to acting "solely" as the nominee of the lender.
>
> Id. at 166.

In Culhane v. Aurora Loan Services of Nebraska, 708 F.3d 282, 287 (5th Cir. 2013), the court stated:

> **MERS's mortgagee status is narrowly circumscribed: it acts solely as "nominee" for the owner or servicer of the mortgage**, including the owner's or servicer's successors and assigns. There is one condition: the party for whom MERS serves as nominee must be a member of MERS. The upshot of this arrangement is that MERS holds the legal title to the mortgage as mortgagee of record, but **it does not have any beneficial interest in the loan.**

(emphasis added)

Because MERS does not hold "any beneficial interest" in a loan, MERS is not a "person with an interest" as defined in NRS 107.090(1).

In the present case, Red Rock timely mailed copies of both the notice of default and the notice of foreclosure sale to the entities and persons listed in the trustee's sale guarantee attached as Exhibit 10 to defendant's motion for summary judgment filed October 28, 2019. Although paragraph 8 in Schedule B identified MERS as the "Beneficiary" of the deed of trust, paragraph 3 in Schedule C did not include MERS in the list of persons "to whom notice is required by Section 107.090 of the Nevada Revised Statutes." To further this point, during her deposition, Ms. Trevino, the witness who appeared on behalf of Red Rock, answered a question regarding why Red Rock did not mail the notices to MERS:

Q. Do you know why Red Rock would not have mailed a copy of the NOS to MERS?

A. They were listed on the deed of trust with the contact information for Indy Bank, so Indy bank is where the notification would have gone to. That was the contact information provided by title on the ten-day for the deed of trust that listed MERS as a beneficiary.

Q. So just to be clear, the NOS was not -- a copy of the NOS was not mailed to MERS, but mailed to Indy Bank because Indy Bank was listed as the contact info for MERS?

A. It was listed on the deed of trust that listed MERS as a beneficiary.

Q. Indy Bank's information?

A. Yes, information for Indy Bank.

See Exhibit 9 to defendant's motion for summary judgment, page 68:25-15. So because the trustee's sale guarantee listed an address for IndyBank, and because the Ten Day Letter (see the last page of Exhibit 8 to plaintiff's opposition filed December 4, 2019) listed IndyMac Bank as requiring notice, and because MERS does not appear on any of those documents as an interested party, Red Rock did not mail the notices to MERS. Essentially, MERS is not an interested party; it is simply an agent for IndyBank, the true interested party.

As discussed above, the foreclosure agent timely mailed copies of the notice of default and the notice of foreclosure sale to IndyMac Bank and Wells Fargo at their addresses stated in the public record.

The "person with an interest" entitled to notice was the Lender, IndyMac Bank, and not MERS.

Although it also would have been appropriate for the foreclosure agent to mail the notices to the Lender's agent, MERS, defendant did not cite any authority that requires a separate notice to be served on a "nominee" for the "person with an interest" when notice has already been provided directly to the "person with an interest."

At page 23, defendant argues "MERS was prejudiced by not receiving the foreclosure notices." However, defendant does not explain how MERS was prejudiced. Defendant has not provided any proof that MERS had any sort of policy that it would either make a tender or otherwise stop an HOA from foreclosing. Defendant has not provided any proof that MERS would make a tender of the super-priority amount to an HOA, and undersigned counsel, in several hundred cases, has never seen a tender from or on behalf of MERS. Defendant also does not provide an affidavit or declaration from MERS stating that MERS was in any prejudiced by not receiving foreclosure notices. Defendant simply argues MERS was prejudiced without any support for that statement.

8. Defendant has not alleged fraud, oppression, or unfairness that caused or brought about a low purchase price, and thus defendant is not entitled to relief based on the sales price.

At page 23 of its opposition, defendant argues the HOA sale was tainted by "fraud, oppression, or unfairness," which, combined with an allegedly inadequate purchase price, is sufficient to justify granting defendant relief from the legal effects of the HOA foreclosure.

In Nationstar Mortgage v Saticoy Bay LLC Series 2227 Shadow Canyon , 133 Nev. Adv. Op. 91, 405 P.3d 641 (2017), the Supreme Court clarified that HOA foreclosure sales are not evaluated under the commercially reasonableness standard under Article 9 of the UCC. The court stated:

> Because we conclude that HOA real property foreclosure sales are not evaluated under Article 9's commercial reasonableness standard, Nationstar's argument that the HOA did not take extra-statutory efforts to garner the highest possible sales price has no bearing on our review of the district court's summary judgment. *See Wood,* 121 Nev. at 731, 121 P.3d at 1031 ("The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant."). And because HOA real property foreclosures are not subject to Article 9's commercial reasonableness standard, it follows that they are governed by this court's longstanding framework for evaluating any other real property foreclosure sale: whether the sale was affected by some element of fraud, unfairness, or oppression. *Shadow Wood*, 132 Nev., Adv. Op. 5, 366 P.3d at 1111-12 (reaffirming the applicability of this framework after examining case law from this court and other courts); *Long v. Towne,* 98 Nev. 11, 13, 639 P.2d 528, 530 (1982) (applying same framework); *Turner v. Dewco Servs., Inc.,* 87 Nev. 14, 18, 479 P.2d 462, 465 (1971) (same); *Brunzell v. Woodbury,* 85 Nev. 29, 31-32, 449 P.2d 158, 159 (1969) (same); *Golden,* 79 Nev. at 514-15, 387 P.2d at 994-95 (same)....

The law in Nevada is clear that price alone will not justify setting aside a foreclosure sale.

In Shadow Wood, there are three instances before reference to the Restatement in the case, in which the Court reiterates, without contradiction or criticism, the standard that a foreclosure sale will not be set aside absent fraud, oppression or unfairness which results in an inadequate sales price.

Shadow Wood cites to the case of Golden v. Tomiyasu, 79 Nev. 503, 387 P.2d 989 (1963). The Golden case and the Shadow Wood case both cite to the case of Oller v. Sonoma County Land Title Company, 137 Cal. App 2d 633, 290 P.2d 880 (1955). Both the Golden case and the Oller case cite to the case of Schroeder v. Young, 161 U.S. 334, 16 S. Ct. 512, 40.L .Ed 721 (1896) in which the U.S. Supreme Court cited examples of irregularities which may affect the sale. The court stated:

> 'While mere inadequacy of price has rarely been held sufficient in itself to justify setting aside a judicial sale of property, courts are not slow to seize upon other circumstances impeaching the fairness of the transaction as a cause for vacating it, especially if the inadequacy be so gross as to shock the conscience. If the sale has been attended by any irregularity, as if several lots have been sold in bulk where they should have been sold separately, or sold in such manner that their full value could not be realized; if bidders

> have been kept away; if any undue advantage has been taken to the prejudice of the owner of the property, or he has been lulled into a false security; or if the sale has been collusively or in any other manner conducted for the benefit of the purchaser, and the property has been sold at a greatly inadequate price,-the sale may be set aside, and the owner may be permitted to redeem.'

The requirements for relief from a foreclosure sale when the property has been purchased by a third party in the Restatement, as well as Shadow Wood and Golden is inadequacy of the price, and fraud, oppression and unfairness causing the inadequacy of price. At no time in the Shadow Wood opinion did the court use any language to question the validity of the standards or overturn the court's prior rulings.

Defendant's first allegation of fraud, oppression, or unfairness is that the HOA's governing documents contained a mortgage protection clause. However, the Nevada Supreme Court invalidated mortgage protection clauses in the HOA foreclosure context **more than five years ago**.

In SFR, the Nevada Supreme Court discussed the mortgage savings clause or mortgage protection clause, and held that it did not affect the foreclosure sale. The court stated:

> U.S. Bank last argues that, even if NRS 116.3116(2) allows nonjudicial foreclosure of a superpriority lien, the mortgage savings clause in the Southern Highlands CC & Rs subordinated SSHOA's superpriority lien to the first deed of trust. The mortgage savings clause states that "no lien created under this Article 9 [governing nonpayment of assessments], nor the enforcement of any provision of this Declaration shall defeat or render invalid the rights of the beneficiary under any Recorded first deed of trust encumbering a Unit, made in good faith and for value." It also states that "[t]he lien of the assessments, including interest and costs, shall be subordinate to the lien of any first Mortgage upon the Unit."
>
> **NRS 116.1104 defeats this argument. It states that Chapter 116's "provisions may not be varied by agreement, and rights conferred by it may not be waived ... [e]xcept as *expressly* provided in"** Chapter 116. (Emphasis added.) "Nothing in [NRS] 116.3116 expressly provides for a waiver of the HOA's right to a priority position for the HOA's super priority lien." *See 7912 Limbwood Court Trust,*: The mortgage savings clause thus does not affect NRS 116.3116(2)'s application in this case. *See Boulder Oaks Cmty. Ass'n v. B & J Andrews Enters., LLC,* 125 Nev. 397, 407, 215 P.3d 27, 34 (2009) (holding that a CC & Rs clause that created a statutorily prohibited voting class was void and unenforceable).

[Emphasis added].

Because of NRS 116.1104 and the Nevada Supreme Court's finding that the mortgage protection clause does not prevent extinguishment of a first deed of trust, the mortgage savings or mortgage

protection clause cannot be used to defeat the sale or to prevent extinguishment of defendant's deed of trust.

Defendant's second allegation of fraud, oppression, or unfairness is that the super-priority lien was paid off by Nardizzi's payments. However, as discussed above, defendant has failed to meet its burden to prove Nardizzi's payments were applied to the super-priority portion of the HOA's lien. Thus, Nardizzi's payments cannot constitute fraud, oppression, or unfairness.

Defendant's third allegation of fraud, oppression, or unfairness is that Red Rock did not mail the notice of default or notice of sale to MERS. However, as discussed above, MERS was simply a nominee on behalf of IndyBank, and NRS 107.090 does not require notices to be mailed to a nominee. Thus, MERS was not entitled to statutory notice and the lack of notice to MERS has no impact on the sale.

9. The HOA and its foreclosure agent did not represent to any person that the HOA foreclosure sale would not extinguish the subordinate deed of trust.

At pages 24 and 25 of its opposition, defendant also makes passing reference to the "HOA Trustee Letters" and argues that based on ZYZZX2 v. Dizon, No. 2:13-cv-1307, 2016 WL 1181666, at *5 (D. Nev. Mar. 25, 2016), the letters from Red Rock to IndyBank are proof of fraud, oppression, or unfairness.

Although the fourth paragraph in each letter stated that "[t]he Association's Lien for Delinquent Assessments is Junior only to the Senior Lender Mortgage Holder," neither letter stated that the HOA's superpriority lien was junior to the deed of trust. In addition, the very next sentence in each letter stated: "This Lien may affect your position."

Defendant has not proven that any person relied on or interpreted the language used in the letter as a statement that the HOA was not foreclosing its entire assessment lien, including the superpriority portion of the lien. In addition, because defendant did not prove that any person made this letter known to the persons who attended the HOA foreclosure auction, the letter could not "account for" or have "brought about" the high bid made by plaintiff.

Further, ZYZZX2 is distinguishable from the instant matter. The court in ZYZZX2 v. Dizon stated:

> In this case, the homeowner's association represented to both the general public as well as Wells Fargo that the association's foreclosure would not extinguish the first deed of trust. (Doc. #52, Exhs. 2, 4). **The association sent a letter to Wells Fargo and other interested parties stating that its foreclosure would not affect the senior lender/mortgage holder's lien. (Doc. #52, Exh. 2).** Wells Fargo, consequently, had no notice from the association that its interest was at risk and that it should pay off the HOA loan.

2016 WL 1181666 at *5.[Emphasis added].

No such letter exists in the present case. In the present case, both of the letters clearly stated: "This Lien may affect your position." Accordingly, because the letter in this case states the HOA lien may affect the deed of trust beneficiary's position; because defendant has presented no proof it or its predecessor-in-interest relied on the letter from Red Rock; and because defendant has presented no proof that the letter brought about or accounted for the purchase price or otherwise chilled bidding, the Red Rock letter cannot save defendant's first deed of trust from extinguishment.

Certainly, by December 3, 2013, when the HOA foreclosed in this matter, banks and other deed of trust beneficiaries were on notice that their deeds of trust were in danger of extinguishment from HOA foreclosures. Indeed, SFR Investments Pool 1, LLC v. U.S. Bank N.A. 130 Nev. 742, 334 P.3d 408 (2014), which held HOA foreclosures could extinguish a first deed of trust had been partially briefed by December 3, 2013; the opening and answering briefs had both been filed, so by December 2013, this issue was already being hotly contested. Defendant cannot legitimately argue it or its predecessor was instead relying on a four year old letter from Red Rock when the issue was already under serious consideration with the Nevada Supreme Court. Finally, even if defendant could prove defendant's predecessor received and relied on the Red Rock letter, the Nevada Supreme Court has explicitly found in the mortgage protection clause context that parties are presumed to know the law:

> [W]e have previously held that mortgage savings clauses protecting the first deed of trust were void and unenforceable under NRS 116.1104. Id. at 757-758, 334 P.3d at 418-19. Moreover, we must presume that any such bidders were aware of NRS 116.1104, such that they were not misled or chilled from bidding.4 See Smith v. State, 38 Nev. 477, 481, 151 P. 512, 513 (1915) ("Every one is presumed to know the law and this presumption is not even rebuttable.").

Nationstar Mortg., LLC v. BDJ Investments, LLC, No. 75480, 2019 WL 6208548, at *2 (Nev. Nov. 20, 2019). Likewise, in December 2013 when this foreclosure took place, defendant's predecessor-in-interest

was presumed to know that a properly conducted HOA foreclosure could extinguish a first deed of trust. Accordingly, defendant cannot rely on the Red Rock letter to protect its first deed of trust.

CONCLUSION

Based on the foregoing, plaintiff respectfully requests this court grant plaintiff's motion for summary judgment.

DATED this 11th day of December, 2019.

LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

By: / s / *Adam R. Trippiedi, Esq.*
Michael F. Bohn, Esq.
Adam R. Trippiedi, Esq.
2260 Corporate Circle, Suite 480
Henderson, Nevada 89074
Attorneys for Plaintiff/Counterdefendant
Saticoy Bay LLC Series 8149 Palace Monaco

CERTIFICATE OF SERVICE

Pursuant to NRCP 5, NEFCR 9 and EDCR 8.05, I hereby certify that I am an employee of Law Offices of Michael F. Bohn., Esq., Ltd, and on the 11th day of December, 2019, an electronic copy the above **SATICOY BAY LLC SERIES 8149 PALACE MONACO'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** was served via the Court's electronic service system upon the following counsel of record:

R. Samuel Ehlers, Esq.
Aaron D. Lancaster, Esq.
Wright, Finlay & Zak, LLP
7785 W. Sahara Ave., Ste. 200
Las Vegas, NV 89117
Attorneys for Defendant Wells Fargo Bank, National Association

Douglas M. Cohen, Esq.
Gregory P. Kerr, Esq.
Jordan Butler, Esq.
Wolf, Rifkin, Shapiro,
Schulman & Rabkin, LLP
3556 E. Russell Rd., Second Floor
Las Vegas, NV 89120
Attorneys for Defendant Monaco Landscape Maintenance Association, Inc.

/s/ Marc Sameroff/
An Employee of the LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD

RPLY
MICHAEL F. BOHN, ESQ.
Nevada Bar No.: 1641
mbohn@bohnlawfirm.com
ADAM R. TRIPPIEDI, ESQ.
Nevada Bar No.: 12294
atrippiedi@bohnlawfirm.com
LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.
2260 Corporate Circle, Suite 480
Henderson, NV 89074
(702) 642-3113/ (702) 642-9766 FAX
Attorneys for Plaintiff/Counterdefendant
Saticoy Bay LLC Series 8149 Palace Monaco

DISTRICT COURT

CLARK COUNTY, NEVADA

SATICOY BAY LLC SERIES 8149 PALACE MONACO, Plaintiff, vs. ROBERT NARDIZZI a/k/a ROBERT A. NARDIZZI; MONACO LANDSCAPE MAINTENANCE ASSOCIATION, INC.; WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE STRUCTURED ADJUSTABLE RATE MORTGAGE LOAN TRUST, MORTGAGE PASS THROUGH CERTIFICATES SERIES 2005-11, Defendants.	CASE NO.: A-18-770245-C DEPT. NO.: XXVIII **SATICOY BAY LLC SERIES 8149 PALACE MONACO'S REPLY IN SUPPORT OF COUNTER-MOTION FOR LEAVE TO AMEND COMPLAINT**
WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE STRUCTURED ADJUSTABLE RATE MORTGAGE LOAN TRUST, PASSTHROUGH CERTIFICATES SERIES 2005-11, Counterclaimant, vs. SATICOY BAY LLC SERIES 8149 PALACE MONACO; MONACO LANDSCAPE MAINTENANCE ASSOCIATION; and RED ROCK FINANCIAL SERVICES, LLC, Counterdefendants.	

Plaintiff/Counterdefendant, Saticoy Bay LLC Series 8149 Palace Monaco, by and through its attorneys, the Law Offices of Michael F. Bohn, Esq., Ltd., hereby submits its reply in support of its counter-motion for leave to amend complaint filed November 18, 2019, and in response to Monaco Landscape Maintenance Association's ("**the HOA**") opposition filed November 22, 2019. This reply is based upon the points and authorities contained herein.

LEGAL ARGUMENT

1. Plaintiff did not unduly delay in moving to amend its complaint.

Beginning at page 9 of its opposition, the HOA argues that because the homeowner payment information has been available to plaintiff since March 2019, plaintiff delayed in waiting until November 18, 2019, to move to amend its complaint. However, the HOA's argument ignores the status of the pleadings and their timing:

1. On February 2, 2018, plaintiff filed its complaint alleging the HOA failed to disclose a super-priority tender.
2. On October 1, 2018, defendant Wells Fargo Bank National Association, as Trustee for the Structured Adjustable Rate Mortgage Loan Trust, Pass-Through Certificates Series 2005-11 ("**Wells Fargo**") filed an answer and counterclaim. Wells Fargo's answer and counterclaim alleges the HOA's foreclosure did not extinguish Wells Fargo's deed of trust for various reasons, but does not mention homeowner payments.
3. On October 28, 2019, Wells Fargo filed its motion for summary judgment, alleging **for the first time** that payments by the former owner of the subject property, Robert Nardizzi, extinguished the HOA's super-priority lien.
4. On November 18, 2019, plaintiff moved to amend its complaint to add

Based on this history, it is logical that plaintiff would only add claims relating to the homeowner payments after Wells Fargo first argued that the homeowner payments affected the super-priority lien. Plaintiff would not assume Wells Fargo would make such allegations until Wells Fargo actually made the allegations, especially as it does not believe the homeowner payments actually affected the HOA's super-priority lien.

The HOA cites to the fact that on March 12, 2019, Wells Fargo disclosed the payment agreement and copies of payments made by Nardizzi. However, plaintiff did not want to assume Wells Fargo would make allegations regarding the homeowner payments, so plaintiff could not move to amend at that time. Plaintiff instead waited until Wells Fargo actually made such allegations, in its October 28, 2019, motion for summary judgment, and on November 18, 2019, within 21 days after receiving Wells Fargo's motion for summary judgment, moved to amend its complaint. The fact that Wells Fargo did not allege homeowner payments extinguished the super-priority lien until October 28, 2019, also supports the fact that plaintiff acted in good faith when it moved to amend on November 18, 2019, as it was unaware as to whether Wells Fargo would make such allegations until it filed its motion for summary judgment. Plaintiff is the party that would be prejudiced if it was unable to bring claims regarding homeowner payments, as Wells Fargo did not make any such allegations until the dispositive motion deadline.

The HOA also alleges that allowing plaintiff to amend its complaint would be "extremely prejudicial" to the HOA because it has not been defending against claims regarding the homeowner payments until now. However, the HOA has had the opportunity to conduct discovery on the issue of homeowner payments. As the HOA points out, the documents referencing homeowner payments were disclosed on March 12, 2019. Thus, the HOA could have conducted written discovery or depositions on these issues since at least March 12, 2019, and, accordingly, the HOA will not be prejudiced by plaintiff's proposed amendment.

2. The HOA had a duty to disclose a material fact such as payments which could possibly affect its super-priority lien.

The HOA's other primary argument is that it had no duty to disclose the homeowner payments to plaintiff or other bidders at the HOA foreclosure auction. However, the HOA and its trustee did not comply with all requirements of law because the HOA relied on NRS 116 in conducting its sale, and referenced NRS 116 in its notices, but (if Wells Fargo is correct) did not properly represent the status of the sale in only including a sub-priority.

The HOA and HOA Trustee cannot intentionally or negligently withhold information known only to the homeowner, the HOA and HOA Trustee that materially, adversely affects, the purchaser (plaintiff)

as defined under NRS 116, as to the value and nature of the bifurcated lien status of the Deed of Trust. Of matters not specifically known to the HOA and HOA Trustee at the time of the HOA Foreclosure Sale that cannot be adduced by a public records review as occurs in NRS 107 foreclosure sales, plaintiff would concede that the HOA would not be liable. However, in the instant case, the HOA and HOA Trustee are the actual parties with the information regarding the homeowner payments and therefore had an obligation to inform plaintiff. This fact alone constitutes sufficient proof of the HOA's, by and through its agent, the HOA Trustee, obligation and duty to disclose the homeowner payments. The HOA had a duty to disclose the homeowner payments to a "purchaser, as defined in NRS 116.079, at an HOA Foreclosure Sale pursuant to NRS 116.1113. At the time and place of the HOA Foreclosure Sale, the HOA, by and through its agent, the HOA Trustee, entered into a sale governed by a statute, NRS 116, by the function of the auction conducted by the HOA Trustee. Inherently, the material aspects of the factors affecting the lien priority of the secured debt that are only known solely to the HOA, HOA Trustee and homeowner, are material to the HOA Lien being foreclosed upon and must be disclosed to the HOA Foreclosure Sale bidders. To infer otherwise would destroy the statutory scheme of NRS 116 sales. A common argument among all parties to the HOA litigation has been the low prices adduced at the HOA Foreclosure Sales for the real property sold. Typically, the low sales prices have been driven by the mountain of litigation that has occurred over the last eight years seeking to define the rights and obligations of the various parties. To hold that the HOA does not have a duty to disclose information known only to the HOA and the HOA Trustee that materially affects the value of what a willing buyer would be willing to pay for the real property offered at auction that relates directly to the status and priority of the Deed of Trust. Essentially, the HOA is alleging that it will sell to the highest cash bidder the real property without any way for the bidder to know if it will acquire the real property free and clear of the Deed of Trust or subject thereto. This would effectively forever destroy the HOA foreclosure sale process under NRS 116.3116.

The HOA nad its trustee have a duty to disclose a potential extinguishment of a super-priority lien to a Purchaser at an HOA Foreclosure Sale pursuant to NRS 116.1113. At the time and place of the HOA Foreclosure Sale, the HOA, by and through its agent, enters into a sale contract by the function of the

auction conducted by the HOA. Inherently, the material aspects of the factors affecting the lien priority of the secured debt that are only known solely to the HOA, HOA Trustee and homeowner are material to the HOA lien being foreclosed upon and must be disclosed to the HOA foreclosure sale bidders under both NRS 116.1113 and NRS 113.130. To infer otherwise, would destroy the statutory scheme of NRS 116 sales. The disclosure to plaintiff of homeowner payments is a material fact that the HOA and HOA Trustee were obligated to disclose to the plaintiff. As the Supreme Court of Nevada stated in its recent unpublished decision in Noonan v. Bayview Loan Servicing, LLC, 2019 Nev. Unpub. LEXIS 428 p. 2-3, 438 P.3d 335, 2019 WL 1552690 (April 8, 2019, Nevada):

> Finally, the Noonans challenge the district court's summary judgment in favor of Hampton & Hampton Collections, LLC, on their negligent misrepresentation and deceptive trade practices claims. Summary judgment was inappropriate on the negligent misrepresentation claim because Hampton neither made an affirmative false statement nor omitted a material fact it was bound to disclose. See Halcrow, Inc. v. Eighth Judicial Dist. Court, 129 Nev 394, 400, 302 P.2d 1148, 1153 (2013) (providing the elements for a negligent misrepresentation claim); Nelson v. Heer, 123 Nev. 217, 225, 163 P.3d. 420, 426 (2007) ("The suppression or omission of material fact which a party is bound in good faith to disclose is equivalent to a false representation." (internal quotation marks omitted)). Compare NRS 116.31162(1)(b)(3)(II) (2017) (requiring an HOA to disclosure if tender of the superpriority portion of the lien has been made), with NRS 116.31162 (2013)1 (not requiring any such disclosure). The Noonans' deceptive trade practices claim fails under NRS 598.092(8) for the same reason.

NRS 116.1113 provides, "[e]very contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement." NRS 116.1113 provides that in "every contract or duty governed by [NRS 116]" the actions of the HOA and the HOA Trustee leading up to and including the HOA Foreclosure Sale provide that a duty of good faith regarding the HOA's performance in its enforcement of the provisions included in NRS Chapter 116 constitute the foreclosure sale and selling the property to a purchaser that will eventually be a member of the HOA. Plaintiff alleges that the HOA and the HOA Trustee's actions were not conducted in good faith. Plaintiff further alleges that the HOA and the HOA Trustee intentionally and/or negligently misrepresented the conditions present at the time it conducted the HOA Foreclosure Sale. The HOA, its trustee, and the homeowner were the only parties aware of the homeowner payments. They are therefore the only parties who could have informed bidders of the homeowner payments that may have affected the HOA's super-priority lien.

CONCLUSION

Based on the foregoing, plaintiff respectfully requests this court grant plaintiff's motion for summary judgment.

DATED this 11th day of December, 2019.

LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

By: / s / *Adam R. Trippiedi, Esq.*
Michael F. Bohn, Esq.
Adam R. Trippiedi, Esq.
2260 Corporate Circle, Suite 480
Henderson, Nevada 89074
Attorneys for Plaintiff/Counterdefendant
Saticoy Bay LLC Series 8149 Palace Monaco

CERTIFICATE OF SERVICE

Pursuant to NRCP 5, NEFCR 9 and EDCR 8.05, I hereby certify that I am an employee of Law Offices of Michael F. Bohn., Esq., Ltd, and on the 11th day of December, 2019, an electronic copy the above **SATICOY BAY LLC SERIES 8149 PALACE MONACO'S REPLY IN SUPPORT OF COUNTER-MOTION FOR LEAVE TO AMEND COMPLAINT** was served via the Court's electronic service system upon the following counsel of record:

R. Samuel Ehlers, Esq.
Aaron D. Lancaster, Esq.
Wright, Finlay & Zak, LLP
7785 W. Sahara Ave., Ste. 200
Las Vegas, NV 89117
Attorneys for Defendant Wells Fargo Bank, National Association

Douglas M. Cohen, Esq.
Gregory P. Kerr, Esq.
Jordan Butler, Esq.
Wolf, Rifkin, Shapiro,
Schulman & Rabkin, LLP
3556 E. Russell Rd., Second Floor
Las Vegas, NV 89120
Attorneys for Defendant Monaco Landscape Maintenance Association, Inc.

/s/ Marc Sameroff/
An Employee of the LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD

FFCO

WRIGHT, FINLAY & ZAK, LLP
Aaron D. Lancaster, Esq.
Nevada Bar No. 10115
7785 W. Sahara Ave., Suite 200
Las Vegas, NV 89117
(702) 475-7964 - Fax (702) 946-1345
alancaster@wrightlegal.net
Attorneys for Defendant Wells Fargo Bank, National Association, as Trustee for the Structured Adjustable Rate Mortgage Loan Trust, Pass-Through Certificates Series 2005-11

DISTRICT COURT
CLARK COUNTY, NEVADA

SATICOY BAY LLC SERIES 8149 PALACE MONACO,

Plaintiff,

vs.

ROBERT NARDIZZI a/k/a ROBERT A. NARDIZZI, an individual; MONACO LANDSCAPE MAINTENANCE ASSOCIATION, a Nevada domestic non-profit corporation; WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE STRUCTURED ADJUSTABLE RATE MORTGAGE LOAN TRUST, PASSTHROUGH CERTIFICATES SERIES 2005-11, a business entity location unknown; DOE individuals 1 through 10; and ROE business entities 11 through 30,

Defendants.

Case No.: A-18-770245-C
Dept. No.: XXVIII

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE STRUCTURED ADJUSTABLE RATE MORTGAGE LOAN TRUST, PASSTHROUGH CERTIFICATES SERIES 2005-11,

Counterclaimant,

vs.

SATICOY BAY LLC SERIES 8149 PALACE MONACO; MONACO LANDSCAPE MAINTENANCE ASSOCIATION; and RED

ROCK FINANCIAL SERVICES, LLC,
Counter-defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On October 28, 2019, Plaintiff/Counter-Defendant, Saticoy Bay LLC Series 8149 Palace Monaco ("Saticoy Bay") filed its Motion for Summary Judgment ("Saticoy MSJ"); Defendant/Counter-Claimant, Wells Fargo Bank, National Association, as Trustee for the Structured Adjustable Rate Mortgage Loan Trust, Pass-Through Certificates Series 2005-11 ("Wells Fargo") filed its Motion for Summary Judgment ("Wells Fargo MSJ"); and Defendant, Monaco Landscape Maintenance Association ("HOA") filed its Motion for Partial Summary Judgment ("HOA MSJ"). On November 18, 2019, Saticoy Bay filed its Counter-Motion for Leave to Amend Complaint ("Motion to Amend Complaint"). The matter being fully briefed, oral argument having been held on December 17, 2019 and the Court, having considered the competing motions and all briefs and supplements in support and opposition to the motions and being fully advised in the premises, finds as follows:

FINDINGS OF FACT

1. This action involves real property located at 8149 Palace Monaco Avenue, Las Vegas, NV, 89117, APN 163-09-817-050 (the "Property") in the Monaco homeowners association and governed by the Declaration of Covenants, Conditions, Restrictions and Easements for Monaco ("CC&Rs").

2. On or about February 3, 2003, Robert Nardizzi ("Nardizzi", "Borrower" or "Homeowner") purchased the Property.

3. On March 7, 2005, a Deed of Trust was executed by Nardizzi that identified IndyMac Bank, F.S. B., as the Lender, and Mortgage Electronic Registration Systems, Inc. ("MERS"), as the beneficiary, and secured a loan in the amount of $185,700.00 ("Deed of Trust").

4. On April 3, 2006, a second Deed of Trust was executed by Nardizzi that identified Wells Fargo Bank, N.A., as the beneficiary, and secured a loan in the amount of $100,000.00 ("Second Deed of Trust").

5. On May 20, 2009, a Lien for Delinquent Assessment ("Notice of Lien") was recorded against the Property on behalf of Monaco Landscape Maintenance Association, Inc. ("HOA") by Red Rock Financial Services ("HOA Trustee" or "Red Rock").

6. The delinquent assessments as of the execution of the Notice of Lien totaled $114.00.

7. The superpriority portion of the HOA's lien as of the execution of the Notice of Lien was $114.00.

8. HOA never recorded a subsequent Notice of Lien against the Property after the initial Notice of Lien to re-establish a new superpriority lien.

9. On July 7, 2009, a Notice of Default and Election to Sell Pursuant to the Lien for Delinquent Assessments was recorded against the Property ("Notice of Default").

10. Neither the HOA nor HOA Trustee mailed a copy of the Notice of Default to MERS, despite MERS being identified as the beneficiary of the Deed of Trust.

11. The HOA Trustee was provided with a trustee sale guarantee that identified MERS as the beneficiary and IndyMac Bank F.S. B. as the lender of the Deed of Trust. The trustee sale guarantee also identifies Wells Fargo Bank as the beneficiary of the second position deed of trust.

12. On September 17, 2009, HOA Trustee provided letters to Indymac Bank, F.S.B., ("Lender") and Wells Fargo Bank, N.A., that stated, "[t]he Association's Lien for Delinquent Assessments is Junior only to the Senior Lender/Mortgage Holder." ("HOA Trustee Letters".)

13. On October 22, 2010, the HOA Trustee advised the HOA that "[i]f the HOA chooses to move forward with the foreclosure and the property reverts back to the Association, the Association is still subject to the 1st mortgage (the HOA's lien wipes the 2nd mortgage and any junior liens except the 1st mortgage . . . ."

14. On April 8, 2013, a Notice of Sale was recorded against the Property ("Notice of Sale").

15. Neither the HOA nor the HOA Trustee mailed a copy of the Notice of Sale to MERS, despite MERS being identified as the beneficiary in the Deed of Trust.

16. Nardizzi entered into a Payment Agreement with the HOA, under which Nardizzi agreed to pay cert amounts owed, and which contained the following clause:

> The Association has agreed to establish a 24 month Payment Agreement ONLY with a waiver of late fees and interest. Failure to remit payments as Specified above may result in the immediate continuation of the Association's Foreclosure Sale at no further consideration or notification to you. The Association's Foreclosure Sale has been postponed until December 3, 2013. Failure to remit payments on time may result in the FULL balance being due and payable.

17. Nardizzi tendered the following payments to the HOA Trustee:

a. May 30, 2013, in the amount of $404.00, which the HOA Trustee allocated $114.00 to the January 1, 2009 semi-annual assessment and $15.00 to the July 1, 2009 semi-annual assessment;

b. June 21, 2013, in the amount of $169.00, which the HOA Trustee allocated $94.00 to the July 1, 2009 semi-annual assessment;

c. July 22, 2013, in the amount of $168.00, which the HOA Trustee allocated $114.00 to the January 1, 2010 semi-annual assessment and $54.00 to the July 1, 2010 semi-annual assessment; and

d. August 23, 2013, in the amount of $168.00, which the HOA Trustee allocated $60.00 to the July 1, 2010 semi-annual assessment and $108.00 to the January 1, 2011 semi-annual assessment.

18. Nardizzi's payments totaled $909.00, $559 of which was remitted to the HOA and credited toward unpaid assessments, and the remaining $350 was allocated by the HOA Trustee to collection costs.

19. The HOA Trustee allocated Nardizzi's payments to the oldest outstanding assessments of the HOA.

20. Nardizzi's payments satisfied the superpriority component ($114.00) of the HOA's lien prior to the HOA Sale date of December 3, 2013. Nardizzi only made a portion of his payments under the Payment Agreement through August 23, 2013 and failed to make the remaining payments resulting in the foreclosure sale going forward.

21. On December 27, 2013, a Foreclosure Deed Upon Sale was recorded ("Foreclosure Deed"). That document provides that a non-judicial foreclosure sale occurred on December 3, 2013 (hereinafter the "HOA Sale"), whereby HOA conveyed its interest in the Property, if any, to Saticoy Bay for the sum of $17,400.

22. On January 26, 2017, a Corporate Assignment of Deed of Trust was recorded evidencing the assignment of the beneficial interest of the Deed of Trust to Plaintiff ("Assignment").

CONCLUSIONS OF LAW

1. The primary purpose of a summary judgment procedure is to secure a "just, speedy, and inexpensive determination of any action." *Albatross Shipping Corp. v. Stewart*, 326 F.2d 208, 211 (5th Cir. 1964);[1] accord *McDonald v. D.P. Alexander & Las Vegas Boulevard, LLC*, 121 Nev. 812, 815, 123 P.3d 748, 750 (2005). Although summary judgment may not be used to deprive litigants of trials on the merits where material factual doubts exist, summary proceedings promote judicial economy and reduce litigation expenses associated with actions clearly lacking in merit. *Id.* "Summary judgment is appropriate if, when viewed in the light most favorable to the nonmoving party, the record reveals there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *DTJ Design, Inc. v. First Republic Bank*, 130 Nev. Adv. Op. 5, 318 P.3d 709, 710 (2014) (citing *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 713, 57 P.3d 82, 87 (2002)). The plain language of Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552 (1986) (adopted by *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005)). In such a situation, there can be

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[1] "The Nevada Supreme Court considers federal law interpreting the Federal Rules of Civil Procedure, 'because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.'" *Barbara Ann Hollier Trust v. Shack*, 356 P.3d 1085, 1089 (Nev. Aug. 6, 2015) (quoting *Executive Management, Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 782, 786 (2002)).

"no genuine issue as to any material fact" because a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Id.*

2. The Nevada Supreme Court clarified in *Saticoy Bay LLC Series 2141 Golden Hill v. JPMorgan Chase Bank, N.A.* ("*Golden Hill*") that the superpriority lien was comprised of the assessment for common expenses due as of the filing of the Notice of Lien, up to a maximum of 9 months, citing NRS 116.3116(2)(2012) ("describing the superpriority component of an HOA's lien as 'the assessments for common expenses . . . which would have become due in the absence of acceleration *during the 9 months immediately preceding institution of an action to enforce the lien*' (emphasis in *Golden Hill*)): *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan Chase Bank, N.A.*, 133 Nev. Adv. Op. 3, 388 P.3d 226, 231 (2017) ("recognizing under the pre-2015 version of NRS 116.3116 that serving a notice of delinquent assessments constitutes institution of an action to enforce the lien"); *cf. Property Plus Invs., LLC v. Mortgage Elec. Registration Sys., Inc.*, 133 Nev. Adv. Op. 62, 401 P.3d 728, 731-32 (2017) ("observing that an HOA must restart the foreclosure process in order to enforce a second superpriority lien").

3. At the time of the Notice of Lien was recorded, May 20, 2009, the superpriority lien was $114 for the Property.

4. Borrower made partial payments on May 30, 2013 of $404.00, which the HOA Trustee allocated $114.00 to the January 1, 2009 semi-annual assessment and $15.00 to the July 1, 2009 semi-annual assessment; June 21, 2013 of $169.00, which the HOA allocated $94.00 to the July 1, 2009 semi-annual assessment; July 22, 2013 of $168.00, which the HOA allocated $114.00 to the January 1, 2010 semi-annual assessment and $54.00 to the July 1, 2010 semi-annual assessment; and August 23, 2013 of $168.00, which the HOA allocated $60.00 to the July 1, 2010 semi-annual assessment and $108.00 to the January 1, 2011 semi-annual assessment, totaling $909, $559 of which was remitted to the HOA and credited toward unpaid assessments, and the remaining $350 was allocated by the HOA Trustee to collection costs.

5. Borrower's payments were applied by the HOA Trustee to the oldest outstanding assessments.

6. The Nevada Supreme Court in *Golden Hill* held that "[t]he record contains undisputed evidence that the former homeowner made payments sufficient to satisfy the superpriority component of the HOA's lien and that the HOA applied those payments to the superpriority component of the former homeowner's outstanding balance." The Court continued "[t]hus, the district court correctly determined that that at the time of the foreclosure sale, there was no superpriority component of the HOA's lien that could have extinguished respondent's deed of trust." *Id.* Here, the fact pattern mirrors that of *Golden Hill*.

7. In *Golden Hill* the court made clear: "[a]lthough appellant correctly points out that there were new unpaid monthly assessments at the time of the sale, these new unpaid monthly assessments could not have comprised a new superpriority lien **absent a new notice of delinquent assessments**." *Id.* at 1-2, citing *Property Plus Invs., LLC*, 401 P.3d at 731-32. (Emphasis Added).

8. In this matter, the HOA did not issue a new Notice of Lien after Borrower satisfied the superpriority portion of the assessment lien.

9. Borrower made payments after the Notice of Lien that were more than sufficient to cover the superpriority portion of the HOA's lien, and those payments were applied by the HOA Trustee to the oldest outstanding assessments.

10. The superpriority lien is deemed satisfied and extinguished prior to the HOA Sale. As a result, the HOA proceeded to sale on its sub-priority portion of the lien and the Deed of Trust was not extinguished by the HOA Sale.

11. The Nevada Supreme Court, when addressing the issue of "bona fide" purchaser, held that "[a]lthough appellant argues it was a bona fide purchaser, appellant has not explained how its putative BFP status could have revived the already-satisfied superpriority component of the HOA's lien." *Id.* at fn 1.

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JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED Wells Fargo's Motion for Summary Judgment is **GRANTED**.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Saticoy Bay's Motion for Summary Judgment is **DENIED**.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that judgment shall be entered in favor of Wells Fargo and against Saticoy Bay on Wells Fargo's counterclaim for Quiet Title/Declaratory Relief.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Wells Fargo's Deed of Trust was not extinguished by the HOA Sale conducted on December 3, 2013, and the interest conveyed to Saticoy Bay is subject to Wells Fargo's Deed of Trust.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Wells Fargo's Deed of Trust remains an enforceable lien on title to the Property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Wells Fargo (or any of its authorized agents, investors, affiliates, predecessors, successors, and assigns) has the right to pursue any and all remedies as defined in the Deed of Trust and/or Note, including the right to judicially or non-judicially foreclose or otherwise enforce the Deed of Trust against the Property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Wells Fargo's counterclaims for injunctive relief and unjust enrichment are dismissed as moot.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Monaco Landscape Maintenance Association's Motion for Partial Summary Judgment is **DENIED** due to disputed issues of material fact.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Wells Fargo (or any of its authorized agents, investors, affiliates, predecessors, successors, and assigns) may record these Findings and Conclusions.

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IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Saticoy Bay's Motion to Amend Complaint is **DENIED**.

IT IS SO ORDERED.

Dated this 3 day of June, 2020.

Ronald J. Israel

DISTRICT COURT JUDGE
RONALD J. ISRAEL

EL
A-18-770245-C

Respectfully submitted by:

WRIGHT, FINLAY & ZAK, LLP

/s/ Aaron D. Lancaster
Aaron D. Lancaster, Esq.
Nevada Bar No. 10115
7785 W. Sahara Ave., Suite 200
Las Vegas, Nevada 89117
Attorney for Defendant/Counter-Claimant, Wells Fargo Bank, National Association, as Trustee for the Structured Adjustable Rate Mortgage Loan Trust, Pass-Through Certificates Series 2005-11

Reviewed by:

LAW OFFICES OF MICHAEL F. BOHN, ESQ., LTD

Refused to Sign
Michael F Bohn, Esq.
Nevada Bar No. 1641
Adam R. Trippiedi, Esq.
Nevada Bar No. 12294
2260 Corporate Circle, Ste. 480
Henderson, NV 89074
Attorneys for Saticoy Bay LLC Series 8149 Palace Monaco

Reviewed by:

LIPSON NEILSON P.C.

Refused to Sign
J. William Ebert, Esq.
Nevada Bar No. 2697
Janeen V. Isaacson, Esq.
Nevada Bar No. 6429
9900 Covington Cross Drive, Ste. 120
Las Vegas, NV 89144
Attorneys for Monaco Landscape Maintenance Association

NEOJ

WRIGHT, FINLAY & ZAK, LLP
Robert A. Reither, Esq.
Nevada Bar No. 12076
Aaron D. Lancaster, Esq.
Nevada Bar No. 10115
7785 W. Sahara Ave., Suite 200
Las Vegas, NV 89117
(702) 475-7964; Fax: (702) 946-1345
alancaster@wrightlegal.net
Attorneys for Defendant Wells Fargo Bank, National Association, as Trustee for the Structured Adjustable Rate Mortgage Loan Trust, Pass-Through Certificates Series 2005-11

DISTRICT COURT

CLARK COUNTY, NEVADA

SATICOY BAY LLC SERIES 8149 PALACE MONACO, Plaintiff, vs. ROBERT NARDIZZI a/k/a ROBERT A. NARDIZZI, an individual; MONACO LANDSCAPE MAINTENANCE ASSOCIATION, a Nevada domestic non-profit corporation; WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE STRUCTURED ADJUSTABLE RATE MORTGAGE LOAN TRUST, PASS-THROUGH CERTIFICATES SERIES 2005-11, a business entity location unknown; DOE individuals 1 through 10; and ROE business entities 11 through 30, Defendants.	Case No.: A-18-770245-C Dept. No.: XXVIII **NOTICE OF ENTRY OF ORDER**
WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE STRUCTURED ADJUSTABLE RATE MORTGAGE LOAN TRUST, PASS-THROUGH CERTIFICATES SERIES 2005-11, Counterclaimant,	

vs.

SATICOY BAY LLC SERIES 8149 PALACE MONACO; MONACO LANDSCAPE MAINTENANCE ASSOCIATION; and RED ROCK FINANCIAL SERVICES, LLC,

Counterdefendants.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that a Findings of Fact, Conclusions of Law and Order was entered in the above-entitled Court on the 4th day of June, 2020. A copy of which is attached hereto.

DATED this 4th day of June, 2020.

WRIGHT, FINLAY & ZAK, LLP

/s/ Aaron D. Lancaster, Esq.
Aaron D. Lancaster, Esq.
Nevada Bar No. 10115
7785 W. Sahara Ave., Suite 200
Las Vegas, NV 89117
Attorneys for Defendant Wells Fargo Bank, National Association, as Trustee for the Structured Adjustable Rate Mortgage Loan Trust, Pass-Through Certificates Series 2005-11

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of WRIGHT, FINLAY & ZAK, LLP, and that on this 4th day of June, 2020, I did cause a true copy of **NOTICE OF ENTRY OF ORDER** to be e-filed and e-served through the Eighth Judicial District EFP system pursuant to NEFR 9 and/or by depositing a true copy of same in the United States Mail, at Las Vegas, Nevada, addressed as follows:

office@bohnlawfirm.com
mbohn@bohnlawfirm.com
dkoch@kochscow.com
sscow@kochscow.com
bwight@kochscow.com
bebert@lipsonneilson.com
snutt@lipsonneilson.com
rrittenhouse@lipsonneilson.com
aeshenbaugh@kochscow.com
sochoa@lipsonneilson.com
dscow@kochscow.com
JIsaacson@lipsonneilson.com

/s/ Lisa Cox
An Employee of WRIGHT, FINLAY & ZAK, LLP

FFCO

WRIGHT, FINLAY & ZAK, LLP
Aaron D. Lancaster, Esq.
Nevada Bar No. 10115
7785 W. Sahara Ave., Suite 200
Las Vegas, NV 89117
(702) 475-7964 - Fax (702) 946-1345
alancaster@wrightlegal.net
Attorneys for Defendant Wells Fargo Bank, National Association, as Trustee for the Structured Adjustable Rate Mortgage Loan Trust, Pass-Through Certificates Series 2005-11

DISTRICT COURT
CLARK COUNTY, NEVADA

SATICOY BAY LLC SERIES 8149 PALACE MONACO,

Plaintiff,

vs.

ROBERT NARDIZZI a/k/a ROBERT A. NARDIZZI, an individual; MONACO LANDSCAPE MAINTENANCE ASSOCIATION, a Nevada domestic non-profit corporation; WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE STRUCTURED ADJUSTABLE RATE MORTGAGE LOAN TRUST, PASSTHROUGH CERTIFICATES SERIES 2005-11, a business entity location unknown; DOE individuals 1 through 10; and ROE business entities 11 through 30,

Defendants.

WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE STRUCTURED ADJUSTABLE RATE MORTGAGE LOAN TRUST, PASSTHROUGH CERTIFICATES SERIES 2005-11,

Counterclaimant,

vs.

SATICOY BAY LLC SERIES 8149 PALACE MONACO; MONACO LANDSCAPE MAINTENANCE ASSOCIATION; and RED

Case No.: A-18-770245-C
Dept. No.: XXVIII

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

ROCK FINANCIAL SERVICES, LLC,
Counter-defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On October 28, 2019, Plaintiff/Counter-Defendant, Saticoy Bay LLC Series 8149 Palace Monaco ("Saticoy Bay") filed its Motion for Summary Judgment ("Saticoy MSJ"); Defendant/Counter-Claimant, Wells Fargo Bank, National Association, as Trustee for the Structured Adjustable Rate Mortgage Loan Trust, Pass-Through Certificates Series 2005-11 ("Wells Fargo") filed its Motion for Summary Judgment ("Wells Fargo MSJ"); and Defendant, Monaco Landscape Maintenance Association ("HOA") filed its Motion for Partial Summary Judgment ("HOA MSJ"). On November 18, 2019, Saticoy Bay filed its Counter-Motion for Leave to Amend Complaint ("Motion to Amend Complaint"). The matter being fully briefed, oral argument having been held on December 17, 2019 and the Court, having considered the competing motions and all briefs and supplements in support and opposition to the motions and being fully advised in the premises, finds as follows:

FINDINGS OF FACT

1. This action involves real property located at 8149 Palace Monaco Avenue, Las Vegas, NV, 89117, APN 163-09-817-050 (the "Property") in the Monaco homeowners association and governed by the Declaration of Covenants, Conditions, Restrictions and Easements for Monaco ("CC&Rs").

2. On or about February 3, 2003, Robert Nardizzi ("Nardizzi", "Borrower" or "Homeowner") purchased the Property.

3. On March 7, 2005, a Deed of Trust was executed by Nardizzi that identified IndyMac Bank, F.S. B., as the Lender, and Mortgage Electronic Registration Systems, Inc. ("MERS"), as the beneficiary, and secured a loan in the amount of $185,700.00 ("Deed of Trust").

4. On April 3, 2006, a second Deed of Trust was executed by Nardizzi that identified Wells Fargo Bank, N.A., as the beneficiary, and secured a loan in the amount of $100,000.00 ("Second Deed of Trust").

5. On May 20, 2009, a Lien for Delinquent Assessment ("Notice of Lien") was recorded against the Property on behalf of Monaco Landscape Maintenance Association, Inc. ("HOA") by Red Rock Financial Services ("HOA Trustee" or "Red Rock").

6. The delinquent assessments as of the execution of the Notice of Lien totaled $114.00.

7. The superpriority portion of the HOA's lien as of the execution of the Notice of Lien was $114.00.

8. HOA never recorded a subsequent Notice of Lien against the Property after the initial Notice of Lien to re-establish a new superpriority lien.

9. On July 7, 2009, a Notice of Default and Election to Sell Pursuant to the Lien for Delinquent Assessments was recorded against the Property ("Notice of Default").

10. Neither the HOA nor HOA Trustee mailed a copy of the Notice of Default to MERS, despite MERS being identified as the beneficiary of the Deed of Trust.

11. The HOA Trustee was provided with a trustee sale guarantee that identified MERS as the beneficiary and IndyMac Bank F.S. B. as the lender of the Deed of Trust. The trustee sale guarantee also identifies Wells Fargo Bank as the beneficiary of the second position deed of trust.

12. On September 17, 2009, HOA Trustee provided letters to Indymac Bank, F.S.B., ("Lender") and Wells Fargo Bank, N.A., that stated, "[t]he Association's Lien for Delinquent Assessments is Junior only to the Senior Lender/Mortgage Holder." ("HOA Trustee Letters".)

13. On October 22, 2010, the HOA Trustee advised the HOA that "[i]f the HOA chooses to move forward with the foreclosure and the property reverts back to the Association, the Association is still subject to the 1st mortgage (the HOA's lien wipes the 2nd mortgage and any junior liens except the 1st mortgage . . . ."

14. On April 8, 2013, a Notice of Sale was recorded against the Property ("Notice of Sale").

15. Neither the HOA nor the HOA Trustee mailed a copy of the Notice of Sale to MERS, despite MERS being identified as the beneficiary in the Deed of Trust.

16. Nardizzi entered into a Payment Agreement with the HOA, under which Nardizzi agreed to pay cert amounts owed, and which contained the following clause:

> The Association has agreed to establish a 24 month Payment Agreement ONLY with a waiver of late fees and interest. Failure to remit payments as Specified above may result in the immediate continuation of the Association's Foreclosure Sale at no further consideration or notification to you. The Association's Foreclosure Sale has been postponed until December 3, 2013. Failure to remit payments on time may result in the FULL balance being due and payable.

17. Nardizzi tendered the following payments to the HOA Trustee:

a. May 30, 2013, in the amount of $404.00, which the HOA Trustee allocated $114.00 to the January 1, 2009 semi-annual assessment and $15.00 to the July 1, 2009 semi-annual assessment;

b. June 21, 2013, in the amount of $169.00, which the HOA Trustee allocated $94.00 to the July 1, 2009 semi-annual assessment;

c. July 22, 2013, in the amount of $168.00, which the HOA Trustee allocated $114.00 to the January 1, 2010 semi-annual assessment and $54.00 to the July 1, 2010 semi-annual assessment; and

d. August 23, 2013, in the amount of $168.00, which the HOA Trustee allocated $60.00 to the July 1, 2010 semi-annual assessment and $108.00 to the January 1, 2011 semi-annual assessment.

18. Nardizzi's payments totaled $909.00, $559 of which was remitted to the HOA and credited toward unpaid assessments, and the remaining $350 was allocated by the HOA Trustee to collection costs.

19. The HOA Trustee allocated Nardizzi's payments to the oldest outstanding assessments of the HOA.

20. Nardizzi's payments satisfied the superpriority component ($114.00) of the HOA's lien prior to the HOA Sale date of December 3, 2013. Nardizzi only made a portion of his payments under the Payment Agreement through August 23, 2013 and failed to make the remaining payments resulting in the foreclosure sale going forward.

21. On December 27, 2013, a Foreclosure Deed Upon Sale was recorded ("Foreclosure Deed"). That document provides that a non-judicial foreclosure sale occurred on December 3, 2013 (hereinafter the "HOA Sale"), whereby HOA conveyed its interest in the Property, if any, to Saticoy Bay for the sum of $17,400.

22. On January 26, 2017, a Corporate Assignment of Deed of Trust was recorded evidencing the assignment of the beneficial interest of the Deed of Trust to Plaintiff ("Assignment").

CONCLUSIONS OF LAW

1. The primary purpose of a summary judgment procedure is to secure a "just, speedy, and inexpensive determination of any action." *Albatross Shipping Corp. v. Stewart*, 326 F.2d 208, 211 (5th Cir. 1964);[1] accord *McDonald v. D.P. Alexander & Las Vegas Boulevard, LLC*, 121 Nev. 812, 815, 123 P.3d 748, 750 (2005). Although summary judgment may not be used to deprive litigants of trials on the merits where material factual doubts exist, summary proceedings promote judicial economy and reduce litigation expenses associated with actions clearly lacking in merit. *Id.* "Summary judgment is appropriate if, when viewed in the light most favorable to the nonmoving party, the record reveals there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *DTJ Design, Inc. v. First Republic Bank*, 130 Nev. Adv. Op. 5, 318 P.3d 709, 710 (2014) (citing *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 713, 57 P.3d 82, 87 (2002)). The plain language of Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552 (1986) (adopted by *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005)). In such a situation, there can be

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[1] "The Nevada Supreme Court considers federal law interpreting the Federal Rules of Civil Procedure, 'because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.'" *Barbara Ann Hollier Trust v. Shack*, 356 P.3d 1085, 1089 (Nev. Aug. 6, 2015) (quoting *Executive Management, Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 782, 786 (2002)).

"no genuine issue as to any material fact" because a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Id.*

2. The Nevada Supreme Court clarified in *Saticoy Bay LLC Series 2141 Golden Hill v. JPMorgan Chase Bank, N.A.* ("*Golden Hill*") that the superpriority lien was comprised of the assessment for common expenses due as of the filing of the Notice of Lien, up to a maximum of 9 months, citing NRS 116.3116(2)(2012) ("describing the superpriority component of an HOA's lien as 'the assessments for common expenses . . . which would have become due in the absence of acceleration *during the 9 months immediately preceding institution of an action to enforce the lien*' (emphasis in *Golden Hill*)): *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan Chase Bank, N.A.*, 133 Nev. Adv. Op. 3, 388 P.3d 226, 231 (2017) ("recognizing under the pre-2015 version of NRS 116.3116 that serving a notice of delinquent assessments constitutes institution of an action to enforce the lien"); *cf. Property Plus Invs., LLC v. Mortgage Elec. Registration Sys., Inc.*, 133 Nev. Adv. Op. 62, 401 P.3d 728, 731-32 (2017) ("observing that an HOA must restart the foreclosure process in order to enforce a second superpriority lien").

3. At the time of the Notice of Lien was recorded, May 20, 2009, the superpriority lien was $114 for the Property.

4. Borrower made partial payments on May 30, 2013 of $404.00, which the HOA Trustee allocated $114.00 to the January 1, 2009 semi-annual assessment and $15.00 to the July 1, 2009 semi-annual assessment; June 21, 2013 of $169.00, which the HOA allocated $94.00 to the July 1, 2009 semi-annual assessment; July 22, 2013 of $168.00, which the HOA allocated $114.00 to the January 1, 2010 semi-annual assessment and $54.00 to the July 1, 2010 semi-annual assessment; and August 23, 2013 of $168.00, which the HOA allocated $60.00 to the July 1, 2010 semi-annual assessment and $108.00 to the January 1, 2011 semi-annual assessment, totaling $909, $559 of which was remitted to the HOA and credited toward unpaid assessments, and the remaining $350 was allocated by the HOA Trustee to collection costs.

5. Borrower's payments were applied by the HOA Trustee to the oldest outstanding assessments.

6. The Nevada Supreme Court in *Golden Hill* held that "[t]he record contains undisputed evidence that the former homeowner made payments sufficient to satisfy the superpriority component of the HOA's lien and that the HOA applied those payments to the superpriority component of the former homeowner's outstanding balance." The Court continued "[t]hus, the district court correctly determined that that at the time of the foreclosure sale, there was no superpriority component of the HOA's lien that could have extinguished respondent's deed of trust." *Id.* Here, the fact pattern mirrors that of *Golden Hill*.

7. In *Golden Hill* the court made clear: "[a]lthough appellant correctly points out that there were new unpaid monthly assessments at the time of the sale, these new unpaid monthly assessments could not have comprised a new superpriority lien **absent a new notice of delinquent assessments**." *Id.* at 1-2, citing *Property Plus Invs., LLC*, 401 P.3d at 731-32. (Emphasis Added).

8. In this matter, the HOA did not issue a new Notice of Lien after Borrower satisfied the superpriority portion of the assessment lien.

9. Borrower made payments after the Notice of Lien that were more than sufficient to cover the superpriority portion of the HOA's lien, and those payments were applied by the HOA Trustee to the oldest outstanding assessments.

10. The superpriority lien is deemed satisfied and extinguished prior to the HOA Sale. As a result, the HOA proceeded to sale on its sub-priority portion of the lien and the Deed of Trust was not extinguished by the HOA Sale.

11. The Nevada Supreme Court, when addressing the issue of "bona fide" purchaser, held that "[a]lthough appellant argues it was a bona fide purchaser, appellant has not explained how its putative BFP status could have revived the already-satisfied superpriority component of the HOA's lien." *Id.* at fn 1.

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JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED Wells Fargo's Motion for Summary Judgment is **GRANTED**.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Saticoy Bay's Motion for Summary Judgment is **DENIED**.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that judgment shall be entered in favor of Wells Fargo and against Saticoy Bay on Wells Fargo's counterclaim for Quiet Title/Declaratory Relief.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Wells Fargo's Deed of Trust was not extinguished by the HOA Sale conducted on December 3, 2013, and the interest conveyed to Saticoy Bay is subject to Wells Fargo's Deed of Trust.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Wells Fargo's Deed of Trust remains an enforceable lien on title to the Property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Wells Fargo (or any of its authorized agents, investors, affiliates, predecessors, successors, and assigns) has the right to pursue any and all remedies as defined in the Deed of Trust and/or Note, including the right to judicially or non-judicially foreclose or otherwise enforce the Deed of Trust against the Property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Wells Fargo's counterclaims for injunctive relief and unjust enrichment are dismissed as moot.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Monaco Landscape Maintenance Association's Motion for Partial Summary Judgment is **DENIED** due to disputed issues of material fact.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Wells Fargo (or any of its authorized agents, investors, affiliates, predecessors, successors, and assigns) may record these Findings and Conclusions.

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IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Saticoy Bay's Motion to Amend Complaint is **DENIED**.

IT IS SO ORDERED.

Dated this 3 day of June, 2020.

DISTRICT COURT JUDGE
RONALD J. ISRAEL
A-18-770245-C

Respectfully submitted by:

WRIGHT, FINLAY & ZAK, LLP

/s/ Aaron D. Lancaster
Aaron D. Lancaster, Esq.
Nevada Bar No. 10115
7785 W. Sahara Ave., Suite 200
Las Vegas, Nevada 89117
Attorney for Defendant/Counter-Claimant, Wells Fargo Bank, National Association, as Trustee for the Structured Adjustable Rate Mortgage Loan Trust, Pass-Through Certificates Series 2005-11

Reviewed by:

LAW OFFICES OF MICHAEL F. BOHN, ESQ., LTD

Refused to Sign
Michael F Bohn, Esq.
Nevada Bar No. 1641
Adam R. Trippiedi, Esq.
Nevada Bar No. 12294
2260 Corporate Circle, Ste. 480
Henderson, NV 89074
Attorneys for Saticoy Bay LLC Series 8149 Palace Monaco

Reviewed by:

LIPSON NEILSON P.C.

Refused to Sign
J. William Ebert, Esq.
Nevada Bar No. 2697
Janeen V. Isaacson, Esq.
Nevada Bar No. 6429
9900 Covington Cross Drive, Ste. 120
Las Vegas, NV 89144
Attorneys for Monaco Landscape Maintenance Association

NOAS
MICHAEL F. BOHN, ESQ.
Nevada Bar No.: 1641
mbohn@bohnlawfirm.com
ADAM R. TRIPPIEDI, ESQ.
Nevada Bar No.: 12294
atrippiedi@bohnlawfirm.com
LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.
2260 Corporate Circle, Suite 480
Henderson, NV 89074
(702) 642-3113/ (702) 642-9766 FAX

Attorneys for Plaintiff/Counterdefendant
Saticoy Bay LLC Series 8149 Palace Monaco

DISTRICT COURT

CLARK COUNTY, NEVADA

SATICOY BAY LLC SERIES 8149 PALACE MONACO, Plaintiff, vs. ROBERT NARDIZZI a/k/a ROBERT A. NARDIZZI; MONACO LANDSCAPE MAINTENANCE ASSOCIATION, INC.; WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE STRUCTURED ADJUSTABLE RATE MORTGAGE LOAN TRUST, MORTGAGE PASS THROUGH CERTIFICATES SERIES 2005-11, Defendants.	CASE NO.: A-18-770245-C DEPT. NO.: XXVIII

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that plaintiff, Saticoy Bay LLC Series 8149 Palace Monaco, by and through their attorney, Michael F. Bohn, Esq, hereby appeals to the Supreme Court of Nevada

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/ / /

from the Findings of Fact, Conclusions of Law and Order which was entered on June 4, 2020.

DATED this 6th day of July 2020.

LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

By: /s/ /Michael F. Bohn, Esq./
MICHAEL F. BOHN, ESQ.
2260 Corporate Circle, Suite 480
Henderson, NV 89074
Attorney for plaintiff

CERTIFICATE OF SERVICE

Pursuant to NRCP 5, NEFCR 9 and EDCR 8.05, I hereby certify that I am an employee of LAW OFFICES OF MICHAEL F. BOHN., ESQ., and on the 6th day of July, 2020, an electronic copy of the **NOTICE OF APPEAL** was served on opposing counsel via the Court's electronic service system to the following counsel of record:

R. Samuel Ehlers, Esq.
Aaron D. Lancaster, Esq.
Wright, Finlay & Zak, LLP
7785 W. Sahara Ave., Ste. 200
Las Vegas, NV 89117
Attorneys for Defendant Wells Fargo Bank, National Association

Douglas M. Cohen, Esq.
Gregory P. Kerr, Esq.
Jordan Butler, Esq.
Wolf, Rifkin, Shapiro,
Schulman & Rabkin, LLP
3556 E. Russell Rd., Second Floor
Las Vegas, NV 89120
Attorneys for Defendant Monaco Landscape Maintenance Association, Inc.

/s/ Marc Sameroff/
An Employee of the LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD

SAO

MICHAEL F. BOHN, ESQ.
Nevada Bar No.: 1641
mbohn@bohnlawfirm.com
LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.
2260 Corporate Circle, Suite 480
Henderson, NV 89074
(702) 642-3113/ (702) 642-9766 FAX
Attorneys for Plaintiff/Counterdefendant
Saticoy Bay LLC Series 8149 Palace Monaco

DISTRICT COURT
CLARK COUNTY, NEVADA

SATICOY BAY LLC SERIES 8149 PALACE MONACO, a Nevada limited liability company,

Plaintiff,

vs.

ROBERT NARDIZZI a/k/a ROBERT A. NARDIZZI; MONACO LANDSCAPE MAINTENANCE ASSOCIATION, INC.; WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE STRUCTURED ADJUSTABLE RATE MORTGAGE LOAN TRUST, MORTGAGE PASS THROUGH CERTIFICATES SERIES 2005-11,

Defendants

WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE STRUCTURED ADJUSTABLE RATE MORTGAGE LOAN TRUST, PASSTHROUGH CERTIFICATES SERIES 2005-11,

Counterclaimant,

vs.

SATICOY BAY LLC SERIES 8149 PALACE MONACO; MONACO LANDSCAPE MAINTENANCE ASSOCIATION; and RED ROCK FINANCIAL SERVICES, LLC,

Counterdefendants.

CASE NO.: A-18-770245-C
DEPT NO.: XXVIII

STIPULATION AND ORDER FOR NRCP 54(b) CERTIFICATION

Plaintiff Saticoy Bay LLC Series 8149 Palace Monaco by and through its attorneys of record, Law Offices of Michael F. Bohn, Esq., Ltd. and defendant, Wells Fargo Bank, National Association, as Trustee for the Structured Adjustable Rate Mortgage Loan Trust, Mortgage Pass-Through Certificates Series 2005-11 (hereinafter "Wells Fargo"), by and through its attorneys of record, the law firm of Wright, Finlay & Zak, LLP hereby stipulate and agree as follows:

WHEREAS the plaintiff Saticoy Bay LLC Series 8149 Palace Monaco filed this case on February 27, 2018 seeking quiet title after an HOA foreclosure; and

WHEREAS the plaintiffs complaint named Wells Fargo, the Monaco Landscape Maintenance Association, Inc., and Robert Nardizzi as defendants; and

WHEREAS Wells Fargo filed its answer and counterclaim on October 15, 2018; and

WHEREAS Wells Fargo named the Monaco Landscape Maintenance Association and Red Rock Financial Services in its counterclaim; and

WHEREAS the court entered its findings of fact, conclusions of law and judgment on June 4, 2020, wherein the court granted summary judgment in favor of Wells Fargo and against Saticoy Bay LLC; and

WHEREAS, the claims against the Monaco Landscape Maintenance Association and Red Rock Financial Services are still outstanding; and

WHEREAS, on July 6, 2020, Saticoy Bay LLC filed a notice of appeal; and

WHEREAS, the appeal is premature because of the outstanding claims against parties before the district court.

NOW WHEREFORE, based on the foregoing,

IT IS STIPULATED AND AGREED that there is no just reason for delay concerning Saticoy Bay LLC’s appeal of the judgment in favor of Wells Fargo.

IT IS FURTHER AGREED that NRCP 54(b) certification of the June 4, 2020 judgment is appropriate, and that the judgment is certified to be a final and appealable judgment pursuant to NRCP 54(b).

DATED this 29th day of September, 2020September, 2020.

WRIGHT, FINLAY & ZAK, LLP

By: /s/ Aaron D. Lancaster, Esq.
R. Samuel Ehlers, Esq.
Aaron D. Lancaster, Esq.
7785 W. Sahara Ave, Suite 200
Las Vegas, NV 89117
Attorney for Wells Fargo

LAW OFFICES OF MICHAEL F. BOHN, ESQ., LTD.

By: /s/ Michael F. Bohn, Esq.
MICHAEL F. BOHN, ESQ.
Nevada Bar No. 1641
2260 Corporate Circle, Suite 480
Henderson, NV 89074
Attorney for Saticoy Bay LLC Series 8149 Palace Monaco

ORDER

Based on the above stipulation of the parties, and for good cause appearing;

IT IS HEREBY ORDERED that this court makes an express determination that there is no just reason for delay of Saticoy Bay LLC's appeal.

IT IS FURTHER ORDERED that the findings of fact, conclusions of law and judgment filed on June 4, 2020 are final and appealable orders pursuant to NRCP 54(b).

Dated this 29th day of September, 2020

Dated this ____ day of September, 2020 September 29, 2020

DISTRICT COURT JUDGE

03B D42 E755 A6E0
Ronald J. Israel
District Court Judge

SC

Respectfully submitted by:

By: /s/ Michael F. Bohn, Esq.
MICHAEL F. BOHN, ESQ.
LAW OFFICES OF MICHAEL F. BOHN, ESQ., LTD.
Nevada Bar No. 1641
2260 Corporate Circle, Suite 480
Henderson, NV 89074
Attorney for Plaintiff

A-18-770745-C

From: Michael Bohn
Sent: Tuesday, September 29, 2020 11:51 AM
To: Marc Sameroff
Subject: FW: Saticoy v. Nardizzi A770245

Palace Monaco SAO 54b

MICKEY BOHN, ESQ.
Law Office of Michael F. Bohn, Esq.
2260 Corporate Circle
Suite 480
Henderson, NV 89074
(702) 642-3113
(702) 642-9766 FAX
mbohn@bohnlawfirm.com

From: Aaron D. Lancaster [mailto:alancaster@wrightlegal.net]
Sent: Tuesday, September 29, 2020 10:52 AM
To: Michael Bohn
Subject: RE: Saticoy v. Nardizzi A770245

Approved. Thanks,

Aaron D. Lancaster, Esq.
Attorney
Licensed in Nevada and Utah

WRIGHT FINLAY & ZAK LLP
ATTORNEYS AT LAW

2975 W. Executive Parkway Suite 233 / Mailbox 155 Lehi, Utah 84043 (801) 893-4901 – Direct (702) 946-7964 - Fax

From: Michael Bohn [mailto:mbohn@bohnlawfirm.com]
Sent: Tuesday, September 29, 2020 10:25 AM
To: Aaron D. Lancaster
Subject: RE: Saticoy v. Nardizzi A770245

Aaron

Please advise by email if I may submit this to the court

Thank you

MICKEY BOHN, ESQ.
Law Office of Michael F. Bohn, Esq.
2260 Corporate Circle
Suite 480
Henderson, NV 89074
(702) 642-3113
(702) 642-9766 FAX
mbohn@bohnlawfirm.com

From: Aaron D. Lancaster [mailto:alancaster@wrightlegal.net]
Sent: Tuesday, September 29, 2020 7:34 AM
To: Michael Bohn
Subject: RE: Saticoy v. Nardizzi A770245

I am agreeable to stipulating to a 54(b) certification. I am working with the HOA on a tolling agreement and dismissal without prejudice pending the appeal but don't know when that will be finalized. Please send over the stipulation for my review.

Thanks,

Aaron D. Lancaster, Esq.
Attorney
Licensed in Nevada and Utah

WRIGHT FINLAY & ZAK LLP
ATTORNEYS AT LAW

2975 W. Executive Parkway Suite 233 / Mailbox 155 Lehi, Utah 84043 (801) 893-4901 –

Direct (702) 946-
7964 - Fax

From: Michael Bohn [mailto:mbohn@bohnlawfirm.com]
Sent: Monday, September 28, 2020 5:37 PM
To: R. Samuel Ehlers; Aaron D. Lancaster
Subject: Saticoy v. Nardizzi A770245

Counsel

Can we stipulate to a 54(b) cert on this, or do you plan on dismissing your claims against the HOA and Red Rock anytime soon?

Please advise

MICKEY BOHN, ESQ.
Law Office of Michael F. Bohn, Esq.
2260 Corporate Circle
Suite 480
Henderson, NV 89074
(702) 642-3113
(702) 642-9766 FAX
mbohn@bohnlawfirm.com

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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Saticoy Bay LLC Series 8149 Palace Monaco, Plaintiff(s) vs. Robert Nardizzi, Defendant(s)	CASE NO: A-18-770245-C DEPT. NO. Department 28

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Stipulation and Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 9/29/2020

David Koch	dkoch@kochscow.com
Steven Scow	sscow@kochscow.com
Brody Wight	bwight@kochscow.com
E-Service BohnLawFirm	office@bohnlawfirm.com
Michael Bohn	mbohn@bohnlawfirm.com
J. William Ebert	bebert@lipsonneilson.com
Susana Nutt	snutt@lipsonneilson.com
Renee Rittenhouse	rrittenhouse@lipsonneilson.com
DEFAULT ACCOUNT	NVefile@wrightlegal.net
Lisa Cox	lcox@wrightlegal.net
Aaron Lancaster	alancaster@wrightlegal.net

Andrea Eshenbaugh - Legal Assistant	aeshenbaugh@kochscow.com
Sydney Ochoa	sochoa@lipsonneilson.com
Daniel Scow	dscow@kochscow.com
Janeen Isaacson	JIsaacson@lipsonneilson.com

NEO
MICHAEL F. BOHN, ESQ.
Nevada Bar No.: 1641
mbohn@bohnlawfirm.com
ADAM R. TRIPPIEDI, ESQ.
Nevada Bar No.:12294
atrippiedi@bohnlawfirm.com
LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.
2260 Corporate Circle, Suite 480
Henderson, Nevada 89074
(702) 642-3113/ (702) 642-9766 FAX

Attorney for plaintiff Saticoy Bay LLC
Series 8149 Palace Monaco

DISTRICT COURT

CLARK COUNTY NEVADA

SATICOY BAY LLC SERIES 8149 PALACE MONACO, a Nevada limited liability company, Plaintiff, vs. ROBERT NARDIZZI a/k/a ROBERT A. NARDIZZI; MONACO LANDSCAPE MAINTENANCE ASSOCIATION, INC.; WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE STRUCTURED ADJUSTABLE RATE MORTGAGE LOAN TRUST, MORTGAGE PASS THROUGH CERTIFICATES SERIES 2005-11, Defendants.	CASE NO.: A-18-770245-C DEPT. NO.: XXVIII **NOTICE OF ENTRY OF ORDER**
WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE STRUCTURED ADJUSTABLE RATE MORTGAGE LOAN TRUST, PASSTHROUGH CERTIFICATES SERIES 2005-11, Counterclaimant, vs. SATICOY BAY LLC SERIES 8149 PALACE MONACO; MONACO LANDSCAPE MAINTENANCE ASSOCIATION; and RED ROCK FINANCIAL SERVICES, LLC, Counterdefendants.	

TO: Parties above-named; and

TO: Their Attorney of Record

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that an **STIPULATION AND ORDER FOR NRCP 54(b) CERTIFICATION** has been entered on the 29th day ofSeptember, 2020, in the above captioned matter, a copy of which is attached hereto.

Dated this 29th day of September, 2020.

LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

By: /s/ /*Michael F. Bohn, Esq.*/
MICHAEL F. BOHN, ESQ.
2260 Corporate Circle, Suite 480
Henderson, NV 89074
Attorney for plaintiff

CERTIFICATE OF SERVICE

Pursuant to NRCP 5, NEFCR 9 and EDCR 8.05, I hereby certify that I am an employee of Law Offices of Michael F. Bohn., Esq., and on the29th day of September, 2020, an electronic copy of the **NOTICE OF ENTRY OF ORDER** was served on opposing counsel via the Court's electronic service system to the following counsel of record:

R. Samuel Ehlers, Esq.
Aaron D. Lancaster, Esq.
WRIGHT, FINLAY & ZAK, LLP
7785 W. Sahara Ave, Suite 200
Las Vegas, NV 89117
Attorney for Wells Fargo

J. William Ebert, Esq.
Janeen V. Isaacson, Esq.
LIPSON NEILSON P.C.
9900 Covington Cross Dr, Suite 120
Las Vegas, NV 89144
Attorney for Monaco Landscape Maintenance Association

By: /s/ /Marc Sameroff /
An Employee of the LAW OFFICES OF
MICHAEL F. BOHN, ESQ.

SAO
MICHAEL F. BOHN, ESQ.
Nevada Bar No.: 1641
mbohn@bohnlawfirm.com
LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.
2260 Corporate Circle, Suite 480
Henderson, NV 89074
(702) 642-3113/ (702) 642-9766 FAX
Attorneys for Plaintiff/Counterdefendant
Saticoy Bay LLC Series 8149 Palace Monaco

DISTRICT COURT
CLARK COUNTY, NEVADA

SATICOY BAY LLC SERIES 8149 PALACE MONACO, a Nevada limited liability company,

Plaintiff,

vs.

ROBERT NARDIZZI a/k/a ROBERT A. NARDIZZI; MONACO LANDSCAPE MAINTENANCE ASSOCIATION, INC.; WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE STRUCTURED ADJUSTABLE RATE MORTGAGE LOAN TRUST, MORTGAGE PASS THROUGH CERTIFICATES SERIES 2005-11,

Defendants

WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE STRUCTURED ADJUSTABLE RATE MORTGAGE LOAN TRUST, PASSTHROUGH CERTIFICATES SERIES 2005-11,

Counterclaimant,

vs.

SATICOY BAY LLC SERIES 8149 PALACE MONACO; MONACO LANDSCAPE MAINTENANCE ASSOCIATION; and RED ROCK FINANCIAL SERVICES, LLC,

Counterdefendants.

CASE NO.: A-18-770245-C
DEPT NO.: XXVIII

STIPULATION AND ORDER FOR NRCP 54(b) CERTIFICATION

Plaintiff Saticoy Bay LLC Series 8149 Palace Monaco by and through its attorneys of record, Law Offices of Michael F. Bohn, Esq., Ltd. and defendant, Wells Fargo Bank, National Association, as Trustee for the Structured Adjustable Rate Mortgage Loan Trust, Mortgage Pass-Through Certificates Series 2005-11 (hereinafter "Wells Fargo"), by and through its attorneys of record, the law firm of Wright, Finlay & Zak, LLP hereby stipulate and agree as follows:

WHEREAS the plaintiff Saticoy Bay LLC Series 8149 Palace Monaco filed this case on February 27, 2018 seeking quiet title after an HOA foreclosure; and

WHEREAS the plaintiffs complaint named Wells Fargo, the Monaco Landscape Maintenance Association, Inc., and Robert Nardizzi as defendants; and

WHEREAS Wells Fargo filed its answer and counterclaim on October 15, 2018; and

WHEREAS Wells Fargo named the Monaco Landscape Maintenance Association and Red Rock Financial Services in its counterclaim; and

WHEREAS the court entered its findings of fact, conclusions of law and judgment on June 4, 2020, wherein the court granted summary judgment in favor of Wells Fargo and against Saticoy Bay LLC; and

WHEREAS, the claims against the Monaco Landscape Maintenance Association and Red Rock Financial Services are still outstanding; and

WHEREAS, on July 6, 2020, Saticoy Bay LLC filed a notice of appeal; and

WHEREAS, the appeal is premature because of the outstanding claims against parties before the district court.

NOW WHEREFORE, based on the foregoing,

IT IS STIPULATED AND AGREED that there is no just reason for delay concerning Saticoy Bay LLC’s appeal of the judgment in favor of Wells Fargo.

IT IS FURTHER AGREED that NRCP 54(b) certification of the June 4, 2020 judgment is appropriate, and that the judgment is certified to be a final and appealable judgment pursuant to NRCP 54(b).

DATED this 29th day of September, 2020September, 2020.

WRIGHT, FINLAY & ZAK, LLP

By: /s/ Aaron D. Lancaster, Esq.
R. Samuel Ehlers, Esq.
Aaron D. Lancaster, Esq.
7785 W. Sahara Ave, Suite 200
Las Vegas, NV 89117
Attorney for Wells Fargo

LAW OFFICES OF MICHAEL F. BOHN, ESQ., LTD.

By: /s/ Michael F. Bohn, Esq.
MICHAEL F. BOHN, ESQ.
Nevada Bar No. 1641
2260 Corporate Circle, Suite 480
Henderson, NV 89074
Attorney for Saticoy Bay LLC Series 8149 Palace Monaco

ORDER

Based on the above stipulation of the parties, and for good cause appearing;

IT IS HEREBY ORDERED that this court makes an express determination that there is no just reason for delay of Saticoy Bay LLC's appeal.

IT IS FURTHER ORDERED that the findings of fact, conclusions of law and judgment filed on June 4, 2020 are final and appealable orders pursuant to NRCP 54(b).

Dated this 29th day of September, 2020

Dated this ____ day of September, 2020 September 29, 2020

DISTRICT COURT JUDGE

03B D42 E755 A6E0
Ronald J. Israel
District Court Judge

SC

Respectfully submitted by:

By: /s/ Michael F. Bohn, Esq.
MICHAEL F. BOHN, ESQ.
LAW OFFICES OF MICHAEL F. BOHN, ESQ., LTD.
Nevada Bar No. 1641
2260 Corporate Circle, Suite 480
Henderson, NV 89074
Attorney for Plaintiff

A-18-770745-C

From: Michael Bohn
Sent: Tuesday, September 29, 2020 11:51 AM
To: Marc Sameroff
Subject: FW: Saticoy v. Nardizzi A770245

Palace Monaco SAO 54b

MICKEY BOHN, ESQ.
Law Office of Michael F. Bohn, Esq.
2260 Corporate Circle
Suite 480
Henderson, NV 89074
(702) 642-3113
(702) 642-9766 FAX
mbohn@bohnlawfirm.com

From: Aaron D. Lancaster [mailto:alancaster@wrightlegal.net]
Sent: Tuesday, September 29, 2020 10:52 AM
To: Michael Bohn
Subject: RE: Saticoy v. Nardizzi A770245

Approved. Thanks,

Aaron D. Lancaster, Esq.
Attorney
Licensed in Nevada and Utah

WRIGHT FINLAY & ZAK LLP
ATTORNEYS AT LAW

2975 W. Executive Parkway Suite 233 / Mailbox 155 Lehi, Utah 84043 (801) 893-4901 – Direct (702) 946-7964 - Fax

From: Michael Bohn [mailto:mbohn@bohnlawfirm.com]
Sent: Tuesday, September 29, 2020 10:25 AM
To: Aaron D. Lancaster
Subject: RE: Saticoy v. Nardizzi A770245

Aaron

Please advise by email if I may submit this to the court

Thank you

MICKEY BOHN, ESQ.
Law Office of Michael F. Bohn, Esq.
2260 Corporate Circle
Suite 480
Henderson, NV 89074
(702) 642-3113
(702) 642-9766 FAX
mbohn@bohnlawfirm.com

From: Aaron D. Lancaster [mailto:alancaster@wrightlegal.net]
Sent: Tuesday, September 29, 2020 7:34 AM
To: Michael Bohn
Subject: RE: Saticoy v. Nardizzi A770245

I am agreeable to stipulating to a 54(b) certification. I am working with the HOA on a tolling agreement and dismissal without prejudice pending the appeal but don't know when that will be finalized. Please send over the stipulation for my review.

Thanks,

Aaron D. Lancaster, Esq.
Attorney
Licensed in Nevada and Utah

WRIGHT FINLAY & ZAK LLP
ATTORNEYS AT LAW

2975 W. Executive Parkway Suite 233 / Mailbox 155 Lehi, Utah 84043 (801) 893-4901 –

Direct (702) 946-
7964 - Fax

From: Michael Bohn [mailto:mbohn@bohnlawfirm.com]
Sent: Monday, September 28, 2020 5:37 PM
To: R. Samuel Ehlers; Aaron D. Lancaster
Subject: Saticoy v. Nardizzi A770245

Counsel

Can we stipulate to a 54(b) cert on this, or do you plan on dismissing your claims against the HOA and Red Rock anytime soon?

Please advise

MICKEY BOHN, ESQ.
Law Office of Michael F. Bohn, Esq.
2260 Corporate Circle
Suite 480
Henderson, NV 89074
(702) 642-3113
(702) 642-9766 FAX
mbohn@bohnlawfirm.com

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DISTRICT COURT
CLARK COUNTY, NEVADA

Saticoy Bay LLC Series 8149 Palace Monaco, Plaintiff(s) vs. Robert Nardizzi, Defendant(s)	CASE NO: A-18-770245-C DEPT. NO. Department 28

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Service Date: 9/29/2020

David Koch	dkoch@kochscow.com
Steven Scow	sscow@kochscow.com
Brody Wight	bwight@kochscow.com
E-Service BohnLawFirm	office@bohnlawfirm.com
Michael Bohn	mbohn@bohnlawfirm.com
J. William Ebert	bebert@lipsonneilson.com
Susana Nutt	snutt@lipsonneilson.com
Renee Rittenhouse	rrittenhouse@lipsonneilson.com
DEFAULT ACCOUNT	NVefile@wrightlegal.net
Lisa Cox	lcox@wrightlegal.net
Aaron Lancaster	alancaster@wrightlegal.net

Andrea Eshenbaugh - Legal Assistant	aeshenbaugh@kochscow.com
Sydney Ochoa	sochoa@lipsonneilson.com
Daniel Scow	dscow@kochscow.com
Janeen Isaacson	JIsaacson@lipsonneilson.com

Electronically Filed
8/25/2020 12:24 PM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

SATICOY BAY LLC SERIES 8149 PALACE MONACO, Plaintiff, vs. ROBERT NARDIZZI, Defendant.	CASE#: A-18-770245-C DEPT. XXVIII

BEFORE THE HONORABLE RONALD J. ISRAEL, DISTRICT COURT JUDGE

TUESDAY, DECEMBER 17, 2019

RECORDER'S TRANSCRIPT OF HEARING
ALL PENDING MOTIONS

APPEARANCES:

For the Plaintiff: NIKOLL NIKCI, ESQ.

For the Defendant,
Monaco Landscape
Maintenance Association, Inc.: JANEEN V. ISAACSON, ESQ.

Wells Fargo Bank, NA: ROCK K. JUNG, ESQ.

RECORDED BY: JUDY CHAPPELL, COURT RECORDER

Las Vegas, Nevada, Tuesday, December 17, 2019

[Case called at 9:27 a.m.]

THE CLERK: Case Number A770245, Saticoy Bay Series 8149 Palace Monaco versus Robert Nardizzi.

THE COURT: Okay. I think you guys -- go ahead and state your appearance for the record.

MR. NIKCI: Nik Nikci for the plaintiff, Your Honor.

MR. JUNG: Good morning, Your Honor, Rock Jung on behalf of Wells Fargo.

MS. ISACCSON: Good morning, Your Honor, Janeen Isaacson, for Monaco HOA.

THE COURT: You may have set the record on the number of pages provided on an HOA motion. I figure it's probably close to two or three thousand.

Okay. Wells Fargo's Motion for Summary Judgment. Let's start there.

MR. JUNG: Good morning.

THE COURT: Anything you have to add?

MR. JUNG: Your Honor, I mean, --

THE COURT: I've read this stuff.

MR. JUNG: You and I have done this for years now and I'm going to keep it brief.

THE COURT: Sadly.

MR. JUNG: I'll keep it brief, Your Honor. I feel the pleadings are pretty extensive, as you've noted. In a nutshell, Your Honor, --

THE COURT: Three grounds -- three grounds. One is that the homeowner paid the superpriority. The other one, insufficient sales price. And the third, I forgot. What was --

MR. JUNG: Your Honor, I'd just like to flesh that out a little. The third might be the strongest out of several strong arguments. So the third, specifically, Your Honor, is that the HOA is a limited association. Meaning, in this case, their CC&Rs, their terms govern and need to be adhered to, is an exception to having to follow Chapter 116 of NRS. And, Your Honor, specifically this is important and this case could turn on that, Your Honor, because Section 15.1 of the HOA CC&Rs contains a mortgagee protection savings clause. So based on the fact that the HOA itself is a limited association, based on the fact that the 2019 Nevada Supreme Court case, *Saticoy Bay*, states that with a limited association, the HOA's CC&Rs will govern. So that was Number 3, Your Honor, and that might be the most important one.

As you already noted --

THE COURT: It is to you. Okay.

MR. JUNG: As you already noted, Your Honor, there is also borrower tender which under the *Golden Hill* case would satisfy the superpriority amount. Not only was there a borrower tender, Your Honor, but it was almost eight times the amount of the superpriority amount. This -- the fact that there was a borrower tender has been corroborated by the HOA Trustee's own 30(b)(6) witness which we attached as exhibits to

our MSJ.

Your Honor, one other thing I'd like to point out is you had noted three. I'd also like to point out we noted a fourth reason why our MSJ should be granted as a matter of law, and that's because -- well, I'd like to separate it, Your Honor. You had mentioned the commercial reasonableness, the extremely low sales price, which we have to point out, coupled with the elements of unfairness, fraud, and oppression, deems that the sale must be set aside. And some of the elements of unfairness was, one, as you noted, there was a failure to properly mail the recorded HOA notices to MERS, who is the record beneficiary. And once again this failure to record, excuse me, this failure to mail this HOA notice to MERS was corroborated by the HOA Trustee's own witness at deposition.

However, Your Honor, I'd also like to add another element of unfairness would be the fact that the HOA Trustee's own correspondence stated that the HOA sale was junior to the Bank's first deed of trust lien sale. So, Your Honor, when you add the totality of the circumstances and the factors that we pointed out, it's abundantly clear that the Court should rule in favor of my client and that the superpriority lien was extinguished prior to the HOA sale either through the fact that we're dealing with a limited association, therefore, the HOA's own mortgage -- mortgagee savings protection clause applies. Or, Your Honor, if you'd like, because there was a borrower tender almost eight times the amount of the superpriority amount which also would have satisfied any superpriority lien that existed at the time of the sale.

Thank you, Your Honor.

THE COURT: Thank you.

Unless you want to go -- who wants to go next?

MS. ISAACSON: Your Honor, Janeen Isaacson for the Monaco HOA. I'm not going to talk about commercial reasonableness because I'm sure you hear that in your sleep and, you know, it'd be like Groundhog Day so I'm going to stick with the two --

THE COURT: I appreciate that. That's a good analogy. Go on.

MS. ISAACSON: So the two arguments I think that really stand out here that are a little bit different than you normally see are, and Mr. Jung has kind of touched on those, and the first is this idea of the limited association. And we agree that the *Pacific Sun* case did have the holding that he's suggesting, but what he's neglecting to mention is that the facts and circumstances with respect to the Monaco's CC&Rs are completely different than that limited case. And if you look at the language of that *Pacific Sun* case, they were incredibly limiting in that holding to those specific facts. In this particular set of CC&Rs, the HOA does have the power to enforce use restrictions. It's a very clear provision, we've cited it in our brief. And it gives the HOA the power to sue owners to enforce those provisions.

And secondly and most importantly, in that specific case, the CC&Rs specifically said that the collections process should work in a like manner, as NRS 116. Our CC&Rs say it must be done per NRS 116. And in the CC&Rs, it said, we're now following 116 unless we say

otherwise in the CC&Rs. And we said it. For those specific provisions in Section 8, we had to file -- or follow 116, which means a mortgage protection clause is null and void.

And then lastly with respect to this whole idea that borrower payments satisfy a superpriority lien for the Bank is -- it's a miscarriage of justice for every HOA and every homeowner in this state.

THE COURT: I got that. Why is it -- I do not understand, the borrower's the one who owes the money. They pay the money, and you're arguing that that doesn't satisfy the superpriority.

MS. ISAACSON: I am.

THE COURT: That's to protect them. Yes, the Bank is there now. But, so you're saying forget, it's the Bank that has to pay the superpriority? That makes no sense.

MS. ISAACSON: Well, if you look at the legislative intent of all of the -- everything that has happened in light of 116 and all the changes that have been made, the whole point in putting the superpriority lien in 116 was to entice the banks to participate. Because you had a situation where you had all these homeowners associations who are all created with the assumption and the notion that everyone's going to their part. Everyone's going to pay their dues, they're nonprofits and --

THE COURT: And the Bank is going to pay the superpriority?

MS. ISAACSON: Yes, that is what --

THE COURT: When?

MS. ISAACSON: -- the legislature intended. It was an enticement to get them to come to the table because they were sitting

back and letting all of this happen. And it was to get the banks to come.

THE COURT: I've got to say this is a novel argument. I mean, ten years I've been doing this and -- with all of this. All right, go on. Anything else?

MS. ISAACSON: And, you know, the bottom line is if we go with the notion that the homeowner's payments are going to satisfy the superpriority lien, that is going to quell an HOA from trying to work with them. Why would they? And you're going to have situations where poor homeowners, they get behind like they did in this crisis, are going to be in a situation where they're guaranteed to lose their homes because the HOA doesn't have an incentive to work with them. And that's not what was intended by the legislature. They were trying to help the homeowners, not hurt them. In our nonprofit association, --

THE COURT: Well, you're talking about the amendments in whenever that was, 20 -- or are you talking about the original. Because originally and I'm going back to 10 years before the crisis, this is not what took place. It was not what was expected. It was never expected by the legislature which is why they changed it as soon as this happened.

MS. ISAACSON: Well, and admittedly, the post 2015 is much more clear. It specifically referenced a bank making a tender. Pre 2015, it doesn't say it but I think the intention after 2009 from that crisis was what can we do to help these associations and these homeowners who are drowning? And that was it.

THE COURT: All right. Thank you.

You have the Saticoy.

MR. NIKCI: Yes, Your Honor. I'm going to agree with HOA's Counsel. The intent of the legislature was not for homeowners to pay it. And I think a simple example is that if the Bank pays the superpriority lien, their interest remains. If the Bank pays the superpriority lien and the foreclosure goes forward, the homeowner loses the property. If the superpriority is somehow miraculously paid but the HOA goes forward with the sale, the homeowner loses the property. I don't think you can reconcile this idea that the homeowner can pay the superpriority to preserve the interest of the Bank but still lose his property and then say it's the obligation of the homeowner to pay the superpriority lien.

In addition to that, the *Golden Hill* situation was different because in *Golden Hill*, there was no lien left. If I recall correctly, the entire lien had been paid off by the homeowner payments. In this situation, Counsel for the Bank has not demonstrated how the HOA payments were allotted. We have testimony from the Trustee which he says comprise eight times the superpriority lien, but that's from the Trustee. There's no testimony from the HOA itself, how those payments were allotted. Furthermore, even in, and you'll see this on our papers, but the payments, the entire amount that went to the Trustee did not go to the HOA. I don't believe that the Bank carried its burden here in showing that the superpriority lien was paid and certainly there's no obligation, we don't feel, for the homeowner to pay the superpriority lien of someone else.

THE COURT: All right. Thank you.

MS. ISAACSON: And if I --

THE COURT: What?

MS. ISAACSON: -- if you would indulge me for just one more --

THE COURT: Why?

MS. ISAACSON: -- minute?

THE COURT: No, we go --

MR. NIKCI: I have one other argument, Your Honor.

THE COURT: -- his motion, --

MS. ISAACSON: Okay.

THE COURT: -- your opposition, --

MS. ISAACSON: Sorry, Your Honor.

THE COURT: -- his opposition. He gets to reply.

MS. ISAACSON: Sorry.

THE COURT: What? Did you miss something? I --

MS. ISAACSON: It's in my papers, Your Honor. I just wanted to point out that the homeowner in this case and the HOA had a specific contract where the HOA preserved their rights to foreclose.

THE COURT: You said that.

MS. ISAACSON: Thanks.

MR. NIKCI: And, Your Honor, --

THE COURT: Okay.

MS. ISAACSON: Sitting down.

MR. NIKCI: -- we have a statute of limitations argument as well.

THE COURT: Yes.

MR. NIKCI: The counterclaim, the Bank's counterclaim did not

come until five years -- four years plus, nearly five years, after the foreclosure sale. And I don't want to belabor the Court, but that's in a --

THE COURT: And, again, I don't get it. They -- the foreclosure sale, assuming it's subject to the Bank's deed of trust, why is it they have to do anything? In 2018, you filed the quiet title and within, well, we're only in 2019, they filed, I guess, even when they answered, they filed their answer and their counterclaims. So you're saying whenever a foreclosure goes through, the Bank has to file to preserve their mortgage?

MR. NIKCI: Now whenever, but it's NRS 116. The Bank did not pay -- the Bank did not pay the superpriority lien. They had --

THE COURT: Well, okay, that's the other issue. But, all right. Anything else?

MR. NIKCI: I would just like to point out, again, I know you probably heard this is your nightmares, but it's not a quiet title. The Bank is not seeking quiet title, they're seeking to preserve their lien interest and different things.

THE COURT: I get that. And I had that in the federal or -- we have, and I think it's, no it was Mr. Hong, a federal case where they said, hey, the note's preserved. And anyway, all right. Thank you.

MR. NIKCI: Thank you, Your Honor.

THE COURT: I'm sure because I don't know how many hundreds of these. I'm granting the Bank's Motion for Summary Judgment.

First of all, the payment of the superpriority amount, I don't see

how it matters who makes the payment. It makes no sense for, and that ties in with the borrower, if the borrower makes payments, they automatically have to, should, must, go to the superpriority. That's the most important thing that the legislature did, according to the Supreme Court, have in mind is if you, you know, that should be number one, where the money goes to. The fines or the et cetera that they talk about in that case, and I can't remember, should be secondary. There's no doubt that the amounts, the money was paid and that's where it should have gone.

Second of all, as to -- as to the insufficiency, I'm not granting it based on that. As I've said in the past, given all of the disputed facts, the inadequacy of the price along coupled with, that's something that needs to be for a trial. But as far as the tender was done and it goes to the superpriority portion, the Bank's mortgage is in place. And therefore the purchaser takes it subject to the mortgage, which accounts -- which is why, and I've read all this, so I'm going to go into the countermotion to amend the complaint to include a new party and make a claim for the, I don't know how they titled it, but they're seeking damages for the fact that Saticoy didn't get the full title and the HOA now wants a counterclaim, et cetera, and amend the complaint. So as far as that, there's no basis.

The sale for, I want to say it was seventeen or eighteen thousand, was clearly an indicator that there were questions that would, should, or did, in this case, come up. When you're selling, even at that, you can argue distressed value, you can argue any of that. When somebody buys at a foreclosure sale a property where the mortgage was, what, $120,000, whatever it was, and this is less than ten percent,

Saticoy Bay had to know there were legitimate questions if in fact not clear basis that they were buying it subject to the note -- mortgage, sorry. Well I guess it would be -- could, it was both? Anyway.

And so the HOA's claim that they want to bring in the, you want to bring in --

MR. NIKCI: Your Honor, it's actually our motion.

THE COURT: Well, yeah, but didn't you have a --

MS. ISAACSON: Your Honor, we had brought a Motion for Summary Judgment on the claims for fraud and negligent concealment and unjust enrichment. Because in their --

THE COURT: On -- they wanted to bring in now the --

MS. ISAACSON: Yes.

THE COURT: -- your --

MR. NIKCI: Trustee.

THE COURT: Yeah, the Trustee of that. Okay.

MS. ISAACSON: And they came up with a new theory. So.

THE COURT: Yeah. Going after, yeah, the -- I saw this a long time ago, but, or thought, oh, now they're going to be doing that.

So they're -- I'm denying it. First of all, it's late, the Motion to Amend. Discovery is closed. And the time to bring substantiative motions has passed. And now they want to bring in a new party, reopen everything, et cetera, when their basis is they want to claim that they didn't know that this certainly was or could and did happen. And they -- everybody knew that years ago, especially in 2018 when the case was filed.

So I'm denying it based on that which actually takes care of your motion. I think it makes that moot. So I think I've dealt with everything for today, correct?

MS. ISAACSON: Your Honor, if I may?

THE COURT: Go ahead.

MS. ISAACSON: The Motion to Amend was denied, but technically we would still require a ruling on our Motion for Summary Judgment with respect to fraudulent, negligent concealment, and unjust enrichment.

THE COURT: Those aren't in there yet, are they?

MS. ISAACSON: They are.

THE COURT: That's what they wanted to amend to include.

MS. ISAACSON: They have -- their original complaint claimed fraud and negligent concealment in the fact that we didn't tell them about the Bank's tender. Turns out there was no Bank's tender. They declared unjust enrichment under the same ground and our position is regardless of how you look at it --

THE COURT: You gave them --

MS. ISAACSON: -- we had a contract.

THE COURT: -- you gave them a --

MS. ISAACSON: Non warranty deed.

THE COURT: Thank you.

MS. ISAACSON: And you said duress better than I could.

THE COURT: Yes. So I'm granting your motion because it was -- in the deed, it said it was you're getting a bag of air. I've said that

before. You get whatever you get and these were going on 20 -- well no, this one happened, what, 2012? 2013? Anyway. So all right.

MS. ISAACSON: Your Honor, if I may?

THE COURT: Yeah.

MS. ISAACSON: I apologize. Just for clarification, our Motion for Summary Judgment against Wells Fargo, this is a kind of an unusual one in where Wells Fargo brought like a whole plethora of claims where they normally kind of limit it to, you know, the basic three. With respect to your ruling, and I understand that the deed of trust is going to stay intact, and I think that works under declaratory relief. We had brought claims to dismiss tortious interference with contract, breach of contract, breach of covenant of good faith and fair dealing, wrongful defective foreclosure, negligence, negligence per se, and misrepresentation. The majority of those were brought because they're past the statute. Even when you take into account your prior ruling which tolled the time for the NRED mediation --

THE COURT: What are you asking?

MS. ISAACSON: I'm asking --

THE COURT: I decided their Motion for Summary Judgment on the one basis.

MS. ISAACSON: Okay. But ours, if you could decide ours, dismissing all claims but dec relief, then I think the case is done.

THE COURT: You want me to decide your claims against --

MS. ISAACSON: We brought --

THE COURT: -- Wells Fargo?

MS. ISAACSON: Yes, we brought our own Motion for Summary Judgment against Wells Fargo for -- it was a partial Motion for Summary Judgement with the exception of dec relief which you just decided.

THE COURT: All right.

MS. ISAACSON: It was for all the other causes of action and they were for statute of limitations and then we laid out the grounds for the rest. If you dismiss those claims, the case is, I believe, done. And if we -- under other decisions that have occurred, if the deed of trust is intact, there's no damages with respect to the Bank.

[Colloquy between the Judge and the Law Clerk]

MS. ISAACSON: So I believe you'd be rid of us.

THE COURT: Well as much as that's tempting, what's your opposition? I assumed you filed a --

MR. JUNG: Your Honor, at this point, the main opposition was that the period was tolled due to the NRED process. That was our main opposition, as I recall. At this point -- at this point, you know, we rest on the briefs, Your Honor. So whatever you decide based on the briefs, you know, we'll respect.

I just wanted to clarify as far as drafting the order goes, I'm drafting an order granting our MSJ based on the borrower's tender and --

THE COURT: Yes.

MR. JUNG: -- that's it, Your Honor?

THE COURT: Yeah.

MR. JUNG: Understood.

THE COURT: I -- all right, as much as I don't want to, I'm going to continue the countermotions and they'll be middle of January. So because, yeah, I want to -- I guess, I missed this third binder --

MS. ISAACSON: And I apologize --

THE COURT: -- out of the --

MS. ISAACSON: -- profusely for the paperwork.

THE COURT: Well the attachments, a multiplicity of attachments, was, as I said, more than I've ever seen on an HOA. So --

THE CLERK: So it's just the one motion.

THE COURT: -- everybody understands.

Oh, give me the -- a third binder.

THE CLERK: So it's the one motion for the HOA that's being continued?

MS. ISAACSON: Yes, that would be Monaco's Motion for --

THE CLERK: Okay.

MS. ISAACSON: -- Summary Judgment as to Wells Fargo's actions.

THE COURT: Make sure you give them back the ones we've already -- that I've ruled on.

THE CLERK: And that's going to be January 14th, 9 a.m.

THE COURT: You know what? I'm going to do it in Chambers.

THE CLERK: Oh, are you?

MS. ISAACSON: That's fine, Your Honor.

THE CLERK: Okay.

THE COURT: I'm going to do it in chambers.

THE CLERK: Chambers would be --

MS. ISAACSON: And for clarification, it was a partial Motion for Summary Judgment. We didn't --

THE COURT: Yes.

MS. ISAACSON: -- argue, the dec relief remained.

THE COURT: Yes. All right. Thank you.

THE CLERK: So Chambers would be January 16th.

MS. ISAACSON: Okay.

THE COURT: All right. Thank you.

THE CLERK: It's a different day for Chambers. Okay.

MS. ISAACSON: Your Honor, if --

THE COURT: The never-ending nightmare.

Yes.

MS. ISAACSON: If we may, can we table the orders on this portion until you rule on the rest because --

THE COURT: Yeah.

MS. ISAACSON: -- they're all intertwined.

THE COURT: Yeah. Nothing's going to happen and you're going to take it up anyway. Every one of these goes up. I get it. So.

All right. Thank you.

MR. JUNG: Your Honor, I'm sorry, just last question. So I am not submitting a proposed order granting --

THE COURT: No, wait --

MR. JUNG: -- our MSJ?

THE COURT: -- until after the 16th.

MR. JUNG: Understood, Your Honor.

THE COURT: There's no hurry.

MS. ISAACSON: And if my motion's granted, Your Honor, I have no intention of appealing. Thank you very much for your time today.

THE COURT: Yeah, if.

MR. JUNG: But for your record, Your Honor, the minutes will reflect the granting of the Bank's MSJ?

THE COURT: Yes, yes.

THE CLERK: Uh-huh.

MR. JUNG: Okay. Thank you, Your Honor.

THE COURT: All right. Thank you.

MS. ISAACSON: Thank you, sir. Thank you, everyone.

MR. JUNG: Thank you.

[Hearing concluded at 9:55 a.m.]

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

Judy Chappell

Judy Chappell
Court Recorder/Transcriber