IN THE SUPREME COURT OF THE STATE OF NEVADA

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LAS VEGAS DEVELOPMENT GROUP, LLC, A NEVADA LIMITED LIABILITY COMPANY, Appellant, vs. THE BANK OF NEW YORK MELLON, F/K/A THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF CWABS, INC., ASSET-BACKED CERTIFICATES, SERIES 2006-7, Respondent.	Supreme Court No. 81961 Consolidated with No. 82266

APPEAL

From the Eighth Judicial District Court,
The Honorable Mark R. Denton, District Court Judge
District Court Case No. A-17-756215-C

APPELLANT'S REPLY BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Las Vegas Development Group, LLC (*"LVDG"*) is a private limited liability company with no publicly held corporation owning 10% or more of its stock. Appellant is represented by Roger P. Croteau and Timothy E. Rhoda of Roger P. Croteau & Associates, Ltd.

INTRODUCTION

The instant action relates to real property commonly known as 1524 Highfield Court, North Las Vegas, Nevada (*the "Property"*). (JA 002). The Property was the subject of a homeowners association lien foreclosure sale conducted pursuant to NRS Chapter 116 on March 2, 2011 (*"HOA Foreclosure Sale"*). (JA 004). At the time of the HOA Foreclosure Sale, Bank of New York Mellon, f/k/a the Bank of New York, as Trustee for the Certificateholders of CWABS, Inc., Asset-backed Certificates, Series 2006-7 (*"BONY" or the "Bank"*), owned a deed of trust (*"First Deed of Trust"*) recorded against the Property. (JA 001).

The Bank's Answering Brief seems to argue that its First Deed of Trust was protected from extinguishment by virtue of a purported tender. However, the Bank completely ignores the numerous statutory presumptions that exist in favor of the purchaser and owner of real property that is the subject of a foreclosure sale in Nevada. Subsequent to the HOA Foreclosure Sale, the Bank took no action to contest the force and effect of the HOA Foreclosure Sale upon the First Deed of Trust for a period of well over six years. As a result, the various statutory presumptions that exist in favor of purchasers at foreclosure sales in Nevada

became unrebuttable and the Bank's subordinate First Deed of Trust was extinguished as a matter of law – not protected as the Bank argues.

ARGUMENT

1. THE BANK'S PURPORTED TENDER DID NOT PRESERVE THE FIRST DEED OF TRUST UNDER THE CIRCUMSTANCES AT HAND

As discussed at length in LVDG's Opening Brief, it is incumbent upon a lien holder to *adjudicate* in a court of law the force and effect of a foreclosure sale upon a subordinate deed of trust if the lien holder asserts that the lien was for some reason not extinguished. In order to accomplish this, the lien holder must file an action within a specific period of time. What this period of time may be is the subject of the certified question pending before this Court as Appeal No. 81129 (*"Thunder Properties"*). However, in this particular case, the exact time period is not important. This is so because the Bank did nothing for over six years after the HOA Foreclosure Sale. As a result, any conceivable statute of limitations expired.

The Nevada Court of Appeals has very recently confirmed that a deed of trust is not automatically protected from extinguishment as a matter of law by virtue of a tender in the matter of *Wilmington Trust v. Saticoy Bay LLC Series*

4509 Melrose Abbey, 2021 Nev. App. Unpub. LEXIS 626, 2021 WL 4988173 (*"Melrose Abbey"*). Like the instant matter, *Melrose Abbey* involved real property that was the subject of a homeowners association lien foreclosure sale. *Id*. at *1. Subsequent to the foreclosure sale, Wilmington, which was the beneficiary of the first deed of trust recorded against the property, filed an action seeking to quiet title against the purchaser of the property in federal district court, but the court dismissed the action, concluding that it was time-barred pursuant to the 4-year statute of limitations of NRS 11.220. *Id*.

Notwithstanding the dismissal of its lawsuit, Wilmington later recorded a notice of breach and election to sell under its deed of trust. The property owner, Saticoy Bay, commenced an action seeking to quiet title against Wilmington, which essentially sought the same relief in its answer. *Id*. at *2. The district court ultimately ruled in Saticoy Bay's favor. *Id*. In particular, the district court found that the HOA complied with the statutory requirements for foreclosure. *Id*. Moreover, based on the dismissal of Wilmington's federal court action, the district court concluded that claim preclusion barred Wilmington's defense against Saticoy Bay's quiet title claim, which included the fact that payments to the HOA satisfied the HOA's superpriority lien such that Saticoy Bay took title to the property subject to the deed of trust. *Id*. On appeal, the Nevada Court of Appeals affirmed

the district court's determination that claim preclusion applied to its defense of payment by the prior owner and that the deed of trust was extinguished. *Id*. at *6.

While the circumstances of *Melrose Abbey* are somewhat different that the instant matter in that it involved claim preclusion, *Melrose Abbey* clearly proves that a deed of trust is not automatically protected from extinguishment by virtue of a purported tender. If this were the case, Wilmington would not have been precluded from foreclosing upon its deed of trust and its deed of trust would not have been deemed to be extinguished by the district court. As in *Melrose Abbey*, the First Deed of Trust at issue in this case was extinguished as a result of the Bank's failure to timely file an action to contest the force and effect of the HOA Foreclosure Sale.

2. THE BANK'S AFFIRMATIVE DEFENSE OF TENDER IN THIS CASE WAS NOTHING MORE THAN A TIME-BARRED CLAIM MASQUERADING AS A DEFENSE

As discussed in LVDG's Opening Brief and in the pending *Thunder Properties* certified question, it was incumbent upon the Bank to timely file an action to rebut the various statutory presumptions that exist in favor the purchaser at the HOA Foreclosure Sale in the event that the Bank asserted that its subordinate First Deed of Trust was unaffected by the HOA Foreclosure Sale.

After the appropriate time period has passed (as it most certainly did in this particular case), the statutory presumptions become unrebuttable. This dictates that the affected subordinate security interests were and are extinguished. This is exactly what the Court of Appeals determined in *Melrose Abbey*.

To the extent that the Bank argued in this case that its deed of trust was not affected by the HOA Foreclosure Sale, this claim was required to be litigated within the time period that this Court eventually sets in *Thunder Properties*. Said time period will almost certainly be less than six years. Attempting to raise its affirmative claim as a defense against LVDG's action cannot be effective.

In *City of Saint Paul, Alaska v. Evans* the Ninth Circuit Court of Appeals held "No matter what gloss the City puts on its defenses, they are simply time-barred claims masquerading as defenses and are likewise subject to the statute of limitations bar." 334 F.3d 1029, 1035-36 (9th Cir. 2003). In that case, the City of St. Paul filed a lawsuit challenging the validity of a settlement agreement but that lawsuit was dismissed by an Alaskan district court on statute of limitations grounds. *Id*. at 1030-31. In response to the lawsuit, the defendant filed counterclaims to reaffirm the settlement. *Id*. The district court permitted the City to raise the identical allegations as defenses to the counterclaim. *Id.* On appeal, the Ninth Circuit reversed, holding that the defenses were nothing more than time-

barred claims masquerading as defenses. *Id*. at 1035-36. Such is also the case here.

3. A STATUTE OF LIMITATIONS APPLIES

The question of what, if any, statute of limitations applies to a lien holders claim seeking a declaratory judgment that its lien was not extinguished will be decided by this Court in *Thunder Properties*. Indeed, the certified question presented by the Ninth Circuit and accepted by this Court asks, in part:

> When a lienholder whose lien arises from a mortgage for the purchase of a property brings a claim seeking a declaratory judgment that the lien was not extinguished by a subsequent foreclosure sale of the property, is that claim exempt from statute of limitations under *City of Fernley v. Nevada Department of Taxation*, 366 P.3d 699 (Nev. 2016)?

The applicability of *City of Fernley* has been discussed in both LVDG's Opening Brief and in *Thunder Properties*.

In *City of Fernley*, because the City had delayed seeking relief for almost 11 years after it possessed notice that it would be adversely affected by the statute at issue, the City was allowed to proceed only with its prospective claims for injunctive and declaratory relief from the statute. *City of Fernley*, 366 P.3d 699, 707, 2016 Nev. LEXIS 4, *17, 132 Nev. Adv. Rep. 4. The Bank in this case claims that it sought only prospective relief, but this is false. Judge Richard Boulware of

the United States District Court for the District Nevada held as such in the matter of *Bank of N.Y. Mellon v. Ruddell*, when he found as follows:

> BNY incorrectly asserts that no statute of limitations applies to seek declaratory relief. "A claim for declaratory relief is subject to a statute of limitations generally applicable to civil claims." *Zuill v. Shanahan*, 80 F.3d 1366, 1369-70 (9th Cir. 1996). While Nevada law recognizes that "[t]he statute of limitations applies differently depending on the type of relief sought" and that "claimants retain the right to prevent future violations of their constitutional rights [through prospective relief]," *City of Fernley v. State, Dep't of Tax*, 366 P.3d 699, 706 (Nev. 2016), the relief BNY seeks is retrospective in nature. BNY argues that it seeks prospective relief as to the ongoing validity of its deed of trust. But to find in favor of BNY on this claim, the Court would first need to award retrospective relief by finding that the foreclosure sale did not extinguish the senior deed of trust or that the foreclosure sale was void, meaning a deed of trust existed on which the judicial foreclosure claim could proceed.

Bank of N.Y. Mellon v. Ruddell, 380 F. Supp. 3d 1096, 1100-01 (D. Nev. 2019). The same reasoning holds true herein.

Although the Bank cites another decision of Judge Boulware, *Bank of N.Y. Mellon v. Willow Creek Cmty. Ass'n*, No. 2:16-cv-00717-RFB-BNW, 2019 WL 4677009, seemingly to support its claim that "*City of Fernley* applies regardless of whether the impetus for the declaratory relief arose in the past or is expected in the future" (see Ans. Brief, p. 17), it is unclear how the Bank arrives at this interpretation. In fact, in *Willow Creek*, Judge Boulware stated as follows:

> While Nevada law recognizes that "[t]he statute of limitations applies differently depending on the type of relief sought" and that "claimants retain the right to prevent future violations of their constitutional rights [through prospective relief]," *Fernley*, 366 P.3d at 706, **the relief BNY seeks is retrospective in nature**. BNY argues that the relief it seeks is prospective: whether BNY can proceed to judicially foreclose on the senior deed of trust. But as the Court has previously explained, to so find, the Court would first need to award retrospective relief by finding that the foreclosure sale did not extinguish the deed of trust or that the foreclosure sale was void, meaning a deed of trust existed on which the judicial foreclosure claim could proceed. *Carrington*, 381 F.Supp.3d at 1294.

Bank of N.Y. Mellon v. Willow Creek Cmty. Ass'n, No. 2:16-cv-00717- RFB-BNW, 2019 U.S. Dist. LEXIS 165641, at *9 (D. Nev. Sep. 25, 2019) (Emphasis added). Contrary to the Bank's insinuation, Judge Boulware did not find in any manner that the bank's claims in *Willow Creek* were prospective in nature.

In this case, as Judge Boulware has repeatedly pointed out in similar matters, the Bank sought retrospective relief related to the HOA Foreclosure Sale that took place more than six years before the filing of LVDG's Complaint. Specifically, the Bank sought a ruling from the district court finding that its First Deed of Trust was wholly unaffected by the foreclosure sale that had been completed more than half a decade earlier. Such a finding was and is a prerequisite to any further relief determining that the Bank is entitled to enforce the First Deed of Trust in any manner whatsoever.

4. THE BANK'S "THEORIES" ARE NOT SUBJECT TO DIFFERENT STATUTES OF LIMITATION

The Bank asserts that its different "theories" may be entitled to different statutes of limitation. However, this is not the case. "Theories" are not the subject of statutes of limitations, claims are. The Bank's untimely Counterclaim herein was comprised of a single cause of action for Quiet Title/Declaratory Relief. Regardless of the "theories" at play, this single claim must be governed by a single period of limitation. The length of this statute of limitation will be determined by this Court in *Thunder Properties*.

The statute of limitations serves to prohibit suits "after a period of time that follows the accrual of the cause of action." *FDIC v. Rhodes*, 130 Nev. 893, 899, 336 P.3d 961, 965 (2014). In this case, the continued validity of the Bank's First Deed of Trust came into question at the time of the HOA Foreclosure Sale that took place on March 2, 2011, or, at the latest on March 3, 2011, when the HOA Foreclosure Deed was recorded. From that date, the Bank had a limited time period of time in which to file an action to contest the force and effect of the HOA Foreclosure Sale and to rebut the statutory presumptions related thereto. The Bank failed to take any action at all for well over six years and every conceivable period of limitations lapsed.

The Bank complains that a presumption of extinguishment "would force those that paid the superpriority component to sue for a declaratory order." See Ans. Brief, p. 22. The Bank has hit the nail on the head with this statement, which is absolutely correct. As discussed in LVDG's Opening Brief, the various statutory presumptions that exist in favor of buyers at foreclosure sales must be rebutted by the Bank. The failure to timely rebut these presumptions "by **pleading and proving** an improper procedure and the resulting prejudice" leaves the presumptions unrebutted. *Fontenot v. Wells Fargo Bank*, 198 Cal. App. 4th 256, 272, 129 Cal. Rptr. 3d 467 (2011). After the passage of the applicable period of limitations, the presumptions become unrebuttable.

The Bank goes on to assert that "there is no reason to impose a judicial-action requirement." See Ans. Brief, p. 22-23. This is false for the reasons mentioned in LVDG's Opening Brief. See Opening Brief, p. 19. Specifically, in the case of a tender, the Bank's efforts may have been insufficient. For example, Appellant's counsel is aware of occasions on which Miles Bauer sent its correspondence to an incorrect address for the HOA's agent and the correspondence was thus not received though no fault of the HOA or its agent. Similarly, the Bank's agent, whether due to miscalculation or some other reason, may have sent a check in an insufficient amount that did not serve to satisfy the

superpriority portion of the HOA lien. In either event, the Bank's tender may be ineffective. For this reason, the Bank must be required to timely adjudicate the validity of its tender in order to rebut the statutory presumptions that exist in favor of the buyer of the property at a foreclosure sale. Notably, the Bank makes absolutely no effort to discuss the aforementioned circumstances in its brief.

5. NEVADA'S COURTS HAVE ROUTINELY APPLIED A STATUTE OF LIMITATIONS TO CLAIMS SUCH AS THOSE BROUGHT BY THE BANK

The Bank argues that a declaratory suit can only be untimely if coercive relief is untimely. As noted in LVDG's Opening Brief, the Bank ignores the fact that the Courts of Nevada have, to best of its knowledge, unanimously applied statutes of limitation to claims such as the Bank's herein. See Opening Brief, p. 23-25. Indeed, as noted in the Opening Brief, Appellant's counsel is unaware of a single court in Nevada that has held that a claim such as the Bank's claim for Quiet Title/Declaratory Relief is not governed by a statute of limitation. Nor does the Bank point to a single such instance in its brief.

The Bank argues that "[f]oreclosure is timely" and that the First Deed of Trust "remains valid and enforceable until ten years after the note becomes fully due." See Ans. Brief, p. 25. This assertion misses the point of this case. The crux

of this case is that the First Deed of Trust has been extinguished and that it is now unenforceable. The Bank's claims are an overstatement to say the least. The Bank's comments regarding a suit on the note are similarly misplaced.

The Bank asserts that "[e]ven a suit on the note would be timely." See Ans. Brief, p. 25. While this may be true, the Bank ignores the fact that LVDG is not the borrower under the note. LVDG has no privity with the Bank with regard to the Property or the loan that was once secured by it. The loan secured by the First Deed of Trust became unsecured when the First Deed of Trust was extinguished. While the Bank may be able to sue the borrower on the note, it certainly may not maintain any claim against LVDG. Nor would such a suit have any relevance to or impact upon the already extinguished First Deed of Trust.

6. NEVADA LAW SUPPORTS A POLICY OF MAKING FORECLOSURE SALES FINAL SUBJECT TO ONLY BRIEF PERIODS OF TIME IN WHICH THEY MAY BE CONTESTED

The Bank asserts that "LVDG appears to assert that Chapter 116 sales be subjected to thirty- to ninety-day window to contest the sale, similar to NRS 107.080's provisions." See Ans. Brief, p. 26. While this is far from a ridiculous assertion, it is not what LVDG contends. On the contrary, LVDG simply asserts exactly what its Opening Brief states – that the laws of Nevada support a policy of

making foreclosure sales final subject to only brief period of time in which they may be contested.

It cannot be disputed that NRS 107.080 provides for very limited periods of time in which an interested party may contest a foreclosure sale. As the Bank points out, the statute very specifically provides that if a party fails to timely contest the foreclosure sale, NRS 107.080(7) provides that the rights of a bona fide purchaser may not be affected. **This is the case even if an interested party possesses an otherwise valid claim.** If the claim is not timely adjudicated, the rights of the applicable purchaser at the foreclosure sale may not be affected. The same should hold true in this matter.

7. THE APPLICATION OF A STATUTE OF LIMITATIONS TO THE FEDERAL FORECLOSURE BAR INDICATES THAT SOME PERIOD OF LIMITATIONS APPLIES TO THE MATTER AT HAND

The so-called Federal Foreclosure Bar of 12 U.S.C. §4617(b)(12) is not applicable to the facts of this action. However, as discussed in LVDG's Opening Brief, it cannot be disputed that this Court applied a statute of limitation to a Quiet Title/Declaratory Relief claim based upon the Federal Foreclosure Bar in *JPMorgan Chase Bank, Nat'l Ass'n v. SFR Invs. Pool 1, Ltd. Liab. Co.*, 475 P.3d 52, 54 (Nev. 2020). Because this Court applied a statute of limitation under such a

"theory," it is clear that some statute of limitations must be applied to this matter as well. Exactly what that statute of limitations is will be determined by this Court in *Thunder Properties*.

8. THE BANK CANNOT SUE SIMPLY BECAUSE LVDG CAN SUE

The Bank incorrectly argues that "LVDG can sue, so BoNYM can sue." Once again, this demonstrates a fundamental lack of understanding law.

The differences between LVDG, which actually holds title to the property, and the Bank, which held nothing more than a lien interest at any point in time, have been discussed at length in LVDG's Opening Brief. See Opening Brief, p. 27-30. The Bank fails to recognize the fact that the parties are in completely different positions and that they have completely different rights.

9. THE BANK OBVIOUSLY MAY NOT FORECLOSE IF ITS FIRST DEED OF TRUST WAS EXTINGUISHED

The Bank's next argument again indicates a lack of understanding of the gist of this case. LVDG contends that the Bank's First Deed of Trust was extinguished notwithstanding the Bank's purported tender of the superpriority portion of the HOA Lien due to the fact that it failed to timely file any action to rebut the various presumptions which indicate that the First Deed of Trust WAS extinguished. The Bank failed to rebut these presumptions within the appropriate

time period. Unfortunately, the district court incorrectly failed to apply the appropriate statute of limitations and thus came to an erroneous result.

It goes without saying that the Bank must have a deed of trust to foreclose upon in order to foreclose. Because the First Deed of Trust was extinguished by virtue of the Bank's dilatory failure to protect its rights, the Bank no longer possesses any interest in the Property and lacks any authority to foreclose.

10. THE HOA FORECLOSURE SALE PLACED THE CONTINUED VALIDITY OF THE FIRST DEED OF TRUST IN QUESTION

The Bank cites the matter of *Berberich v. Bank of America*, 136 Nev. 93, 460 P.3d 440 (2020), for the proposition that a statute of limitations does not commence running until someone "presses an adverse claim" or "eject[s]" the title owner from the property. See Ans. Brief, p. 31. Yet again, the Bank fails to comprehend the difference between the parties to this case.

As discussed in LVDG's Opening Brief, *Berberich* dealt with the statute of limitations applicable to the *owner* of real property, not a lien holder. In *JPMorgan Chase*, this Court specifically acknowledged that *Berberich* was not relevant to the determination of what statute of limitations applied to claims based upon the Federal Foreclosure Bar for this very reason ("In this regard, *Berberich v. Bank of America, N.A.*, 136 Nev. 93, 460 P.3d 440 (2020), provides no guidance.

In that case, we addressed the statute of limitations that applied to an action brought by the party who purchased the subject property at an HOA foreclosure sale to quiet title to the property.") *JPMorgan Chase Bank, Nat'l Ass'n v. SFR Invs. Pool 1, Ltd. Liab. Co.*, 475 P.3d 52, 59 (Nev. 2020). *Berberich* is no more applicable here.

The HOA Foreclosure Sale, which the Bank or its predecessor received actual notice of, placed the Bank on notice that its rights may have been affected by virtue of the provisions of NRS Chapter 116, which provides a homeowners association with a superpriority lien which can and does extinguish a first deed of trust. Thus, the Bank or its predecessor was on notice that its rights might be affected by the HOA Foreclosure Sale. *See Smith v. Slate*, 38 Nev. 477, 481, 151 P. 512, 513 (1915) ("Everyone is presumed to know the law and this presumption is not even rebuttable."). It naturally follows that the time period the Bank possessed in which to file an action to rebut the presumptions that exist under Nevada law commenced running at that point.

As discussed in LVDG's Opening Brief, the Bank possessed actual knowledge of the facts surrounding the HOA Foreclosure Sale and what it may or may not have done to protect its interests. See Opening Brief, p. 17-18. This is opposed to LVDG, which never possessed any such information. On the contrary,

LVDG was simply a bona fide purchaser that purchased the Property subsequent to the HOA Foreclosure Sale. LVDG possessed no reason to know of any efforts that the Bank may or may not have taken in an effort to protect its security interest. It was incumbent upon the Bank to file an action to prove that its interest was protected if it contested the force and effect of the HOA Foreclosure Sale upon its subordinate deed of trust.

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CONCLUSION

For the reasons set forth herein, the district court erred. This Court should thus reverse the district court's order and remand with clear instructions to the district court directing that judgment quieting title to the Property should be entered in favor of LVDG. Additionally, the Order Awarding Costs and Attorneys' Fees to the Bank must be vacated.

DATED this 29th day of November, 2021.

ROGER P. CROTEAU & ASSOCIATES, LTD.

/s/ *Timothy E. Rhoda*

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X6 with 14 point, double spaced Times New Roman font.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 3964 words. Counsel has relied upon the word count application of the word processing program in this regard.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the

accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure

DATED this 29th day of November, 2021.

ROGER P. CROTEAU & ASSOCIATES, LTD.

/s/ *Timothy E. Rhoda*

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee or agent of ROGER P. CROTEAU & ASSOCIATES, LTD. and that on the 29th day of November, 2021, I caused a true and correct copy of the foregoing document to be served on all parties as follows:

__X__ VIA ELECTRONIC SERVICE: through the Nevada Supreme Court's eflex e-file and serve system.

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

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

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

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