

IN THE SUPREME COURT OF THE STATE OF NEVADA

BANK OF AMERICA, N.A., S/B/M TO
BAC HOME LOANS SERVICING, LP,
F/K/A COUNTRYWIDE HOME
LOANS SERVICING LP,

Appellant,

v.

VALENCIA MANAGEMENT LLC,
SERIES 9, A NEVADA LIMITED
LIABILITY COMPANY,

Respondent.

Electronically Filed
Mar 29 2021 06:40 p.m.
Elizabeth A. Brown

Supreme Court No. ~~82501~~ of Supreme Court

District Court Case No. A-15-723600-C

**DOCKETING STATEMENT
CIVIL APPEALS**

GENERAL INFORMATION

Appellant must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. Id. Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See KDI Sylvan Pools v. Workman*, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Eighth Department 29
County Clark Judge Hon. Rob Bare
District Ct. Case No. A-15-723600-C

2. Attorney filing this docketing statement:

Attorney Nicholas E. Belay, Ariel E. Stern, Melanie D. Morgan
Telephone (702) 634-5000

Firm: Akerman LLP

Address 1635 Village Center Circle, Suite 200, Las Vegas, Nevada 89134

Client(s) Bank of America, N.A. (BANA)

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement. N/A

3. Attorney(s) representing respondents(s):

Attorney Aimee Clark Newberry Telephone: (702) 608-4232

Firm Clark Newberry Law Firm

Address 810 S. Durango Drive #102, Las Vegas, Nevada 89145

Client(s) Valencia Management, LLC Series 9 (Valencia)

4. Nature of disposition below (check all that apply):

- | | |
|--|---|
| <input checked="" type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Dismissal: |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input type="checkbox"/> Summary judgment | <input type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input type="checkbox"/> Other (specify): _____ |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree: |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify): |

5. Does this appeal raise issues concerning any of the following? N/A

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

n/a

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (*e.g.*, bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

n/a

8. Nature of the action. Briefly describe the nature of the action and the result below:

This case concerns quiet title claims brought by Valencia arising out of an HOA foreclosure sale. Valencia sought a holding that it possesses title free and clear to real property located at 2176 Hearts Club Drive, Henderson, Nevada 89074 (**the property**) arising from an HOA foreclosure sale conducted by Sandstone Recreation Association, Inc. (**the HOA**) under NRS 116. The HOA had foreclosed on its lien and sold the property on February 18, 2014, to Valencia.

On September 8, 2011, Nevada Association Services, Inc. (**NAS**), as the agent for the HOA, recorded a notice of default and election to sell. At the time, BANA serviced the loan secured by the deed of trust. In response to the notice of default, BANA retained counsel to pay off any superpriority portion of the HOA's lien. BANA's attorneys sent a letter to NAS that offered to pay the superpriority portion of the HOA's lien and requested a payoff ledger. Based on the ledger provided, BANA's attorneys sent a check for nine months of delinquent assessments. NAS rejected that check and proceeded to foreclose.

After a bench trial, the court entered an order ruling in favor of Valencia, holding that the deed of trust was extinguished by the foreclosure sale. BANA filed a motion to alter or amend the judgment, which was denied. This appeal followed.

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

(1) Whether BANA made a sufficient tender of the superpriority portion because it submitted a payment equal to three quarterly assessments as indicated in the payoff ledger provided by the HOA's trustee NAS.

(2) Alternatively, whether the superpriority portion of the HOA's lien was discharged under the doctrine of excuse of tender because the evidence established that the HOA's trustee had a known policy of rejecting all tenders for anything less than the full lien amount (both the subpriority and superpriority portions).

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

None.

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☐ A substantial issue of first impression

☐ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain:

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

This case is not presumptively retained under either court. However, as it concerns the application of well-settled law, it should be referred to the Court of Appeals.

14. Trial. If this action proceeded to trial, how many days did the trial last? 2

Was it a bench or jury trial? Bench

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

No.

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from January 18, 2021

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

N/A

17. Date written notice of entry of judgment or order was served January 19, 2021

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59) N/A

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

☒ NRCP 59 Date of filing November 10, 2020 electronic

NOTE: **Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. 245 P.3d 1190 (2010).**

(b) Date of entry of written order resolving tolling motion January 18, 2021

(c) Date written notice of entry of order resolving tolling motion was served
Was service by: January 19, 2021

☐ Delivery

☒ Mail/Electronic/Fax

19. Date notice of appeal filed February 17, 2021

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other

NRAP 4(a)

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

☒ NRAP 3A(b)(1) ☐ NRS 38.205

☐ NRAP 3A(b)(2) ☐ NRS 233B.150

☐ NRAP 3A(b)(3) ☐ NRS 703.376

☐ Other (specify) _____

(b) Explain how each authority provides a basis for appeal from the judgment or order:

The judgment below is a final order following a bench trial.

22. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

BANA
Valencia
The HOA
NAS
Leny Stillwagon
Robert Stillwagon

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

Default judgment was entered against Leny Stillwagon and Robert Stillwagon. They did not appeal.

The HOA was formally dismissed from the action with prejudice.

Default was entered against NAS.

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

Valencia asserted claims for quiet title and unjust enrichment that were disposed of as to the Stillwagons, on July 25, 2017, and as to BANA, on October 13, 2020.

BANA asserted counterclaims for quiet title and declaratory relief against Valencia that were disposed of in the October 13, 2020, order. BANA asserted crossclaims for unjust enrichment, tortious interference with contract, breach of the duty of good faith, and wrongful foreclosure against the HOA that were disposed of on July 25, 2017. BANA's crossclaims against NAS have not been formally disposed of yet.

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☐ Yes

☒ No

25. If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

BANA's claims against NAS.

(b) Specify the parties remaining below:

NAS.

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☒ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☒ Yes

☐ No

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross- claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Bank of America, N.A.
Name of Appellant

Nicholas E. Belay, Esq.
Name of counsel of record

March 29, 2021
Date

/s/ Nicholas E. Belay
Signature of Counsel of Record

Clark County, Nevada
State and county where signed

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of March, 2021, I served a copy of this completed docketing statement upon all counsel of record:

- ☒ By electronically filing, the foregoing **Docketing Statement** with the Clerk of the Court for the Nevada Supreme Court by using the Court's electronic file and serve system. I certify that all parties of record to this appeal are either registered with the Court's electronic filing system or have consented to electronic service and that electronic service shall be made upon and in accordance with the Court's Master Service List; and/or
- ☐ By personally serving it upon him/her; and/or
- ☒ By mailing it by first class mail on March 30, 2021, with sufficient postage prepaid to the following address(es):

Aimee Clark Newberry, Esq.
Clark Newberry Law Firm
810 S. Durango Drive # 102
Las Vegas, NV 89145
Attorneys for Valencia Management, LLC Series 9

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

Dated this 29th day of March, 2021

/s/ Patricia Larsen
An Employee of AKERMAN LLP

0007300
10/13/15
Ad Villan
2:00pm
In-person
980-335 3561

QT

SUMM
CONNAGHAN|NEWBERRY LAW FIRM
Paul R. Connaghan, Esq. (SBN: 3229)
pconnaghan@cnlawlv.com
Tara D. Newberry, Esq. (SBN: 10696)
tnewberry@cnlawlv.com
7854 W. Sahara Ave.
Las Vegas, Nevada 89117
(702) 608-4232
Attorneys for Plaintiff

**DISTRICT COURT
CLARK COUNTY, NEVADA**

VALENCIA MANAGEMENT LLC, SERIES 9,)
a Nevada Limited Liability Company,)
Plaintiff,)

CASE NO.: A-15-723600-C
DEPT. NO.: XXXII

vs.

SUMMONS
(Bank of America, N.A.)

ROBERT STILLWAGON, an individual;)
LENY STILLWAGON, an individual; BAC)
HOME LOANS SERVICING, LP FKA)
COUNTRYWIDE HOME LOANS)
SERVICING LP; BANK OF AMERICA NA;)
DOES I through X; and ROE)
CORPORATIONS 1 through 10,)
Defendants.)

**NOTICE: YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU
WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN TWENTY (20) DAYS.
READ THE INFORMATION BELOW.**

TO THE DEFENDANT: A civil Complaint has been filed by the plaintiff against you for the relief
set forth in the Complaint.

BANK OF AMERICA, N.A.;
Brian T. Moynihan - CEO
100 North Tryon St
Charlotte, NC 28202

1. If you intend to defend this lawsuit, within 20 days after this Summons is served on you

CONNAGHAN NEWBERRY LAW FIRM
7854 W. Sahara Avenue
Las Vegas, Nevada 89117
Telephone (702) 608-4232

CONNAGHAN NEWBERRY LAW FIRM
7854 W. Sahara Avenue
Las Vegas, Nevada 89117
Telephone (702) 608-4232

1 exclusive of the day of service, you must do the following:

2 File with the Clerk of this Court, whose address is shown below, a formal written response to the
3 Complaint in accordance with the rules of the Court, with the appropriate filing fee.

4 Serve a copy of your response upon the attorney whose name and address is shown below.

5 2. Unless you respond, your default will be entered upon application of the Plaintiff and
6 failure to so respond will result in a judgment of default against you for the relief demanded in the
7 Complaint, which could result in the taking of money or property or other relief requested in the
8 Complaint.


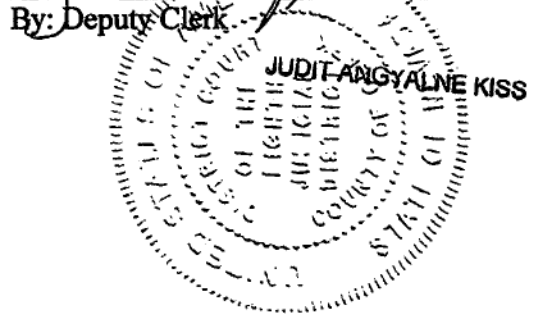
9 3. If you intend to seek the advice of an attorney in this matter, you should do so promptly
10 so that your response may be filed on time.

11 Issued at direction of:
12 **CONNAGHAN | NEWBERRY**

13 

14 **PAUL R. CONNAGHAN, ESQ.**
15 Nevada Bar No. 3229
16 7854 W. Sahara Avenue
17 Las Vegas, NV 89101
18 (702) 608-4232
19 pconnaghan@cnlawlv.com
20 Attorneys for Plaintiff

CLERK OF THE COURT

21 
22 By: Deputy Clerk
23 
24
25
26
27
28

DISTRICT COURT CIVIL COVER SHEET

A-15-723600-C

Clark County, Nevada

Case No. _____

(Assigned by Clerk's Office)

XXXII

I. Party Information (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone): Valencia Management LLC Series 9 C/o Connaghan Newberry Law Firm 7854 W. Sahara Avenue Las Vegas, NV 89117	Defendant(s) (name/address/phone): Robert Stillwagon, an individual
Attorney (name/address/phone): Connaghan Newberry Law Firm 7854 W. Sahara Avenue Las Vegas, NV 89117 (702) 608-4232	Attorney (name/address/phone):

II. Nature of Controversy (please select the one most applicable filing type below)**Civil Case Filing Types**

Real Property Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant Title to Property <input type="checkbox"/> Judicial Foreclosure <input checked="" type="checkbox"/> Other Title to Property Other Real Property <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	Negligence <input type="checkbox"/> Auto <input type="checkbox"/> Premises Liability <input type="checkbox"/> Other Negligence Malpractice <input type="checkbox"/> Medical/Dental <input type="checkbox"/> Legal <input type="checkbox"/> Accounting <input type="checkbox"/> Other Malpractice	Torts Other Torts <input type="checkbox"/> Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Employment Tort <input type="checkbox"/> Insurance Tort <input type="checkbox"/> Other Tort
Probate Probate (select case type and estate value) <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside <input type="checkbox"/> Trust/Conservatorship <input type="checkbox"/> Other Probate Estate Value <input type="checkbox"/> Over \$200,000 <input type="checkbox"/> Between \$100,000 and \$200,000 <input type="checkbox"/> Under \$100,000 or Unknown <input type="checkbox"/> Under \$2,500	Construction Defect & Contract Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect Contract Case <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input type="checkbox"/> Other Contract	Judicial Review/Appeal Judicial Review <input type="checkbox"/> Foreclosure Mediation Case <input type="checkbox"/> Petition to Seal Records <input type="checkbox"/> Mental Competency Nevada State Agency Appeal <input type="checkbox"/> Department of Motor Vehicle <input type="checkbox"/> Worker's Compensation <input type="checkbox"/> Other Nevada State Agency Appeal Other <input type="checkbox"/> Appeal from Lower Court <input type="checkbox"/> Other Judicial Review/Appeal
Civil Writ <input type="checkbox"/> Writ of Habeas Corpus <input type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrant <input type="checkbox"/> Writ of Prohibition <input type="checkbox"/> Other Civil Writ		Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Other Civil Matters

Business Court filings should be filed using the Business Court civil coversheet.

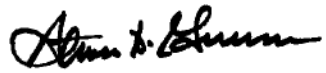
August 25, 2015

Date

/s/ Tara D. Newberry

Signature of initiating party or representative

See other side for family-related case filings.



CLERK OF THE COURT

1 **COMP**
2 **CONNAGHAN NEWBERRY LAW FIRM**
3 Paul R. Connaghan, Esq. (SBN: 3229)
4 pconnaghan@cnlawlv.com
5 Tara D. Newberry, Esq. (SBN: 10696)
6 tnewberry@cnlawlv.com
7 7854 W. Sahara Avenue
8 Las Vegas, Nevada 89117
9 (702) 608-4232
10 *Attorneys for Plaintiff*

11 **DISTRICT COURT**
12 **CLARK COUNTY, NEVADA**

13 **VALENCIA MANAGEMENT LLC,**
14 **SERIES 9, a Nevada Limited Liability**
15 **Company,**

16 **Plaintiff,**

17 **vs.**

18 **ROBERT STILLWAGON, an individual;**
19 **LENY STILLWAGON, an individual; BAC**
20 **HOME LOANS SERVICING, LP FKA**
21 **COUNTRYWIDE HOME LOANS**
22 **SERVICING LP; BANK OF AMERICA**
23 **NA; DOES I through X; and ROE**
24 **CORPORATIONS 1 through 10,**

25 **Defendants.**

CASE NO.: A-15-723600-C
DEPT. NO.: XXXII

COMPLAINT

Arbitration Exemptions:

1. **Action for Declaratory Relief**
2. **Action Concerning Title to Real Property**

26 Plaintiff, VALENCIA MANAGEMENT LLC, SERIES 9, a Nevada Limited Liability
27 Company ("Plaintiff" or "Valencia"), by and through its attorney of record, CONNAGHAN
28 NEWBERRY Law Firm, hereby complains and alleges against the above named Defendants,
Defendants DOES I through X, and ROE CORPORATIONS 1 through 10 (collectively,
"Defendants"), as follows:

GENERAL ALLEGATIONS

1. This lawsuit involves real property located at 2176 Hearts Club, Henderson, Nevada,
89074, and bearing Assessor's Parcel Number 178-18-716-015 (the "Property").
2. Valencia is, and at all times pertinent hereto was a Nevada limited liability company
doing business in Clark County, Nevada, and organized under the laws of the state of Nevada, and is

the current owner of the Property. (Exhibit 1:Trustee's Deed)

3. Upon information and belief, non-Defendant Neighbor's Financial Corporation was a lending institution operating in Nevada and originated an interest in the Property by way of a deed of trust recorded against the Property with the Clark County, Nevada Recorder's office on or about March 14, 2008 as Book and Instrument number 20080314-0002767 ("DOT"), as well as a second deed of trust, recorded March 14, 2008 as Book and Instrument number 20080314-0002768 ("2nd DOT").

4. The DOT and 2nd DOT, including all beneficial interest in each, were extinguished as a sold out subordinate liens on February 14, 2014, as a result of the HOA lien and foreclosure that is the subject of this Complaint.

5. Upon information and belief, BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING LP ("BAC") and/or BANK OF AMERICA NA, ("BOA") as successor by merger to BAC may claim an interest in the Property as a putative assignee of a beneficial interest in the DOT by way of an assignment recorded with the Clark County, Nevada Recorder on August 31, 2009 as Book and Instrument 20090831-0001060.

6. Upon information and belief, BOA may claim an interest in the Property as a putative assignee of a beneficial interest in the 2nd DOT by way of an assignment recorded with the Clark County, Nevada Recorder on August 14, 2012 as Book and Instrument 20120814-0003036.

7. Upon information and belief, Defendants BAC and BOA have each committed sufficient acts or consummated some transaction within Clark County, Nevada by which each purposefully availed itself of the privilege of conducting activities within this forum, thereby making exercise of jurisdiction by this Court over each said Defendant just and proper.

8. Upon information and belief, Defendants, ROBERT STILLWAGON and LENY STILLWAGO ("STILLWAGONS") are Nevada residents or have committed sufficient acts or consummated some transaction within Clark County, Nevada, by which each purposefully availed her/himself of the privilege of conducting activities within this forum, thereby making exercise of jurisdiction by this Court over each such Defendant just and proper.

9. The true names or capacities, whether individual, corporate, associate, or otherwise, of Defendants named herein as DOES I through X and ROE CORPORATIONS 1 through 10 are unknown to Plaintiff, who therefore sues said Defendants by such fictitious names; Plaintiff is

1 informed and believes and therein alleges, that each of those Defendants is responsible in some
2 manner for the events and happenings referred to, may claim an interest in the Property and
3 proximately caused damages to Plaintiff, and Plaintiff will ask leave of the Court to amend the
4 Complaint to insert the true names and capacities of those Defendants, inclusive, when the same
5 have been ascertained, and to join such Defendants in this action.

6 10. The Property is located in the SANDSTONE COMMUNITY RECREATION
7 AREA ("HOA"), which is governed by the Declaration of Covenants Conditions & Restrictions
8 recorded in the Office of the Clark County Recorder as well as any and all amendments and
9 modifications, all recorded prior to the DOT and any claimed interests of the Defendants.

10 11. Chapter 116 of the Nevada Revised Statutes, enacted in 1991, codifies the Uniform
11 Common-Interest Ownership Act and sets forth the statutory framework for common interest
12 communities such as HOAs. Nev. Rev. Stat. § 116.001; A.B. 221, Summary of Legislation, 66th
13 Leg. (Nev. 1991). Section 116.3116(1) provides for a lien in an HOA's favor "for any construction
14 penalty that is imposed against the unit's owner pursuant to NRS 116.310305, any assessment
15 levied against that unit or any fines imposed against the unit's owner from the time the
16 construction penalty, assessment or fine becomes due." Additionally, unless the HOA's declaration
17 provides otherwise, "any penalties, fees, charges, late charges, fines and interest charged pursuant
18 to [NRS § 116.3102(1)(j)-(n)] are enforceable as assessments under this section." NRS §
19 116.3116(1).

20 NRS § 116.3116(2) provides, in pertinent part:

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

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

24 ➤ The lien is also prior to all security interests described in paragraph (b) to the
25 extent of any charges incurred by the association on a unit pursuant to NRS
26 116.310312 and to the extent of the assessments for common expenses based on the
27 periodic budget adopted by the association pursuant to NRS 116.3115 which would
28 have become due in the absence of acceleration during the 9 months immediately
preceding institution of an action to enforce the lien . . .

NRS § 116.3116(2) therefore unambiguously provides that the HOA's limited, nine month "super-
priority" lien is senior to and has priority over a first deed of trust. Recording the HOA's

1 Declaration "constitutes record notice and perfection of the lien. No further recordation of any
2 claim of lien for assessment under this section is required." NRS 116.3116(4).

3 12. Upon information and belief, the Property was previously owned by
4 STILLWAGONS.

5 13. Upon information and belief, STILLWAGONS, as the record owner of the
6 Property, was required to make monthly payments and/or assessments to the HOA.

7 14. Upon information and belief, STILLWAGONS neglected, failed and/or refused to
8 pay the monthly payments and/or assessments to the HOA.

9 15. Upon information and belief, as a result of STILLWAGONS's neglect, failure
10 and/or refusal to pay the monthly payments and/or assessments to the HOA, NEVADA
11 ASSOCIATION SERVICES, INC. ("HOA TRUSTEE") acting as authorized agent for the HOA,
12 conducted a lien foreclosure and sale pursuant to and in compliance with NRS Chapter 116,
13 including without limitation, NRS 116.3116, *et seq.*, and in compliance with all requirements of law
14 and due process of law.

15 16. Upon information and belief, no individual or entity, including the Defendants
16 herein, paid the amount of delinquent assessments and reasonable collection costs set forth in the
17 HOA Lien prior to the HOA foreclosure sale.

18 17. On or about, February 14, 2014, Plaintiff acquired the Property at the foreclosure
19 sale held by HOA TRUSTEE, acting as authorized agent on behalf of the HOA, in compliance with
20 all requirements of law and pursuant to its rights under NRS Chapter 116, and NRS 116.3116, *et*
21 *seq.*

22 18. On the date the HOA Lien foreclosure sale was held, Plaintiff was among multiple
23 bidders to attend and bid at the sale, which upon information and belief was lawfully noticed and
24 held in compliance with NRS Chapter 116 and all applicable requirements of law.

25 19. Plaintiff acquired the Property by successfully bidding on the Property at a publicly
26 held foreclosure auction in accordance with NRS 116.3116, *et seq.*

27 20. In being the highest and successful bidder at the HOA lien foreclosure sale, Plaintiff
28 paid good and valuable consideration at the conclusion of the sale, and is a bona fide purchaser.

21. On or about February 18, 2014, the Trustee's Deed Upon Sale, stating Plaintiff as

owner of the Property, was recorded in the Official Records of the Clark County Recorder as Book and Instrument number 20140218-0002844 ("Trustee's Deed").

22. The Trustee's Deed complied and complies with NRS 116.31166, which specifically states:

1. The recitals in a deed made pursuant to NRS 116.31164 of:
 - (a) Default, the mailing of the notice of delinquent assessment, and the recording of the notice of default and election to sell;
 - (b) The elapsing of the 90 days; and
 - (c) The giving of notice of sale,are conclusive proof of the matters recited.
2. Such a deed containing those recitals is conclusive against the unit's former owner, his or her heirs and assigns, and all other persons. The receipt for the purchase money contained in such a deed is sufficient to discharge the purchaser from obligation to see to the proper application of the purchase money.
3. The sale of a unit pursuant to NRS 116.31162, 116.31163 and 116.31164 vests in the purchaser the title of the unit's owner without equity or right of redemption.
(Emphasis added.)

Plaintiff's Trustee's Deed ("Exhibit 1"), as conclusive proof that NRS Chapter 116 and all requirements of law have complied with and that title has vested in Plaintiff without equity or right of redemption, specifically states:

This conveyance is made pursuant to the powers conferred upon agent by Nevada Revised Statutes, the Sandstone Community Recreation Area governing documents (CC&R's) and that certain Notice of Delinquent Assessment Lien, described herein. Default occurred as set forth in a Notice of Default and Election to Sell, recorded on 9/8/2011 as instrument # 001384 Book 20110908 which was recorded in the office of the recorder of said county. Nevada Association Services, Inc. has complied with all requirements of law including, but not limited to the elapsing of 90 days, mailing of copies of Notice of Delinquent Assessment and Notice of Default and the posting and publication of the Notice of Sale. Said property was sold by said agent, on behalf of Sandstone Community Recreation Area at public auction on 2/14/2014, at the place indicated on the Notice of Sale. Grantee being the highest bidder at such sale became the purchaser of said property and paid therefore to said agent the amount bid \$13,000.00 in lawful money of the United States, or by satisfaction, pro tanto, of the obligations then secured by the Delinquent Assessment Lien.

23. Upon information and belief, despite all requirements of law having been complied with, as described in the Trustee's Deed, Defendants did nothing to protect their respective interests

1 in the Property, including without limitation, by paying the HOA the outstanding homeowner
2 assessments due.

3 24. NRS 116.3116(2) unambiguously provides that the HOA's limited, nine month
4 "super-priority" lien is senior to and has priority over the first deed of trust. The statutory scheme
5 also unambiguously provides for the HOA to resort to non-judicial foreclosure procedures to
6 enforce its lien. The statutory principles of priority, not the monetary value of the respective liens
7 controls. Plaintiff therefore is the record titleholder and all of the Defendants' interests in the
8 Property were extinguished by the HOA foreclosure sale.

9 **FIRST CAUSE OF ACTION**

10 **(Quiet Title Pursuant to NRS 30.010 and 116.3116, et seq.)**

11 25. Plaintiff repeats and realleges the allegations of the preceding paragraphs of the
12 complaint as though fully set forth herein and incorporate the same herein by reference.

13 26. Upon information and belief, none of the Defendants named herein assert an
14 interest, ownership or otherwise, in the Property which was recorded prior to the declaration
15 creating the HOA.

16 27. This Court has the power and authority to declare the Plaintiff's rights and interest
17 in the Property, and the resolution of Defendants' adverse claims, if any, to it.

18 28. Plaintiff acquired the Property via a NRS 116 foreclosure sale on or about May 17,
19 2013. Thereafter, Plaintiff properly recorded the Trustee's Deed on June 18, 2013, and is a bona
20 fide purchaser.

21 29. An NRS 116 foreclosure sale, like all foreclosure sales, extinguishes junior security
22 interests. Pursuant to NRS 116.3116, a Homeowners Association lien is superior in priority to all
23 mortgage encumbrances. Therefore, the subject NRS 116 foreclosure sale extinguished all
24 mortgage encumbrances and transferred title to Plaintiff.

25 30. That upon information and belief, one or more of the Defendants herein may claim
26 interests in the Property by way of security interests, including a first security interest. NRS
27 116.3116(2) further provides that a portion of the HOA Lien has priority over a first security
28 interest in the Property:

1 to the extent of any charges incurred by the association on a unit pursuant
2 to NRS 116.310312 and to the extent of the assessments for common
3 expenses based on the periodic budget adopted by the association pursuant
4 to NRS 116.3115 which would have become due in the absence of
5 acceleration during the 9 months immediately preceding institution of an
6 action to enforce the lien [.]
7 NRS 116.3116(2)

8 31. Upon information and belief, the HOA Lien included assessments for common
9 expenses based on the periodic budget adopted by the HOA pursuant to NRS 116.3115 which were
10 due in the absence of acceleration during the 9 months immediately preceding the HOA's
11 institution of the HOA Lien foreclosure action; giving the HOA Lien super-priority over the
12 interests of Defendants herein.

13 32. Upon information and belief, at no time prior to the HOA Lien foreclosure sale, did
14 the Defendants or their predecessors herein pay any portion of the super-priority HOA Lien, based
15 on 9 months of assessments for common expenses based on the periodic budget adopted by the
16 HOA which would have become due.

17 33. Upon information and belief, Defendants were duly notified of the HOA
18 foreclosure sale by HOA TRUSTEE, and failed to act to protect their interests.

19 34. Upon information and belief, Defendants knew or should have known the
20 foreclosure of the HOA Lien, including the super-priority portion of the same, would extinguish
21 their respective interests in the Property.

22 35. Upon information and belief, the HOA, through its agent HOA TRUSTEE,
23 conducted the lien foreclosure action and sale in accordance with NRS 116.3116 through
24 116.31168, inclusive and all statutory requirements therein were satisfied.

25 36. Upon information and belief, after the foreclosure sale concluded, the deed
26 transferring title to the Plaintiff made all the necessary recitals, including that all requirements of
27 law were complied with regarding the mailing of copies of notices and the posting and publication
28 of the copies of the Notice of Sale in accordance with NRS 116.31166 and the elapsing of 90 days.

37. That at the conclusion of the HOA Lien foreclosure sale referenced herein, and as a
result of the Trustee's Deed transferring title to Plaintiff prepared at the conclusion thereof, the
interests of Defendants were extinguished.

1 38. That NRS 116.31166(3) states when a HOA enforces its lien by foreclosure sale
2 under Chapter 116 of the Nevada Revised Statutes, the deed prepared at the conclusion of the
3 foreclosure sale vests title in the Plaintiff without equity or right of redemption of the prior
4 owner(s).

5 39. Defendants have sat on their rights and effectively have abandoned their security
6 interests, if any ever legitimately existed.

7 40. Plaintiff is entitled to a determination from this Court, pursuant to NRS 40.010, that
8 Plaintiff is the rightful owner of the Property and that the Defendants have no right, title or interest
9 in the Property.

10 41. Plaintiff seeks an order from the Court quieting title to the Property in favor of
11 Plaintiff and extinguishing any interests Defendants may have therein.

12 **SECOND CAUSE OF ACTION**

13 **(Declaratory Relief)**

14 42. Plaintiff repeats and realleges the allegations of the preceding paragraphs of the
15 complaint as though fully set forth herein and incorporate the same herein by reference.

16 43. That this Court has jurisdiction and the power to adjudicate the rights, status, and
17 other legal relationships of the parties in this matter based on and pursuant to the provisions of the
18 Uniformed Declaratory Judgments Acts as set forth in NRS 30.010 et seq.

19 44. That the interests of Plaintiff and Defendants are adverse regarding the justiciable
20 controversy outlined above, as each has asserted competing interests regarding the ownership
21 rights and beneficial interests, if any, in the Property, as well as the attendant rights and duties
22 arising therefrom.

23 45. That the legal issues between the parties are ripe for judicial determination because,
24 inter alia, it presents an existing controversy as to the rights and obligations of the parties vis-a-vis
25 the ownership interests and priority interests of the Plaintiff and Defendants recorded against the
26 Property, as well as the attendant rights and duties arising therefrom.

27 46. Accordingly, Plaintiff is entitled to a declaratory judgment from this Court finding
28 that:

(1) Defendants have no legal interests in the Property;

1 (2) Plaintiff is the owner of the Property;

2 (3) Plaintiff's Trustee's Deed is valid and enforceable; and

3 (4) Plaintiff's rights to the Property and interest in the Property are superior to any
4 adverse interests claimed by Defendants, whose alleged rights and interests have
5 been extinguished.

6 47. That Plaintiff respectfully prays that upon the trial of this cause, this Court to enter
7 a declaratory judgment, declaring the respective rights and obligations of the parties in relation the
8 HOA Lien foreclosure sale and the attendant rights and duties arising therefrom relating to the
9 Property and ownership thereof.

10 **THIRD CAUSE OF ACTION**

11 **(Unjust Enrichment)**

12 48. Plaintiff repeats and realleges the allegations of the preceding paragraphs of the
13 complaint as though fully set forth herein and incorporate the same herein by reference.

14 49. That since Plaintiff has taken title to the Property, Plaintiff has made improvements
15 to the Property, paid monthly HOA assessments and fees, kept property taxes current, and obtained
16 a hazard insurance policy.

17 50. The Defendants have retained or seek to retain for themselves, goods, property,
18 money or other things as hereinabove alleged which have value and rightfully belong to the
19 Plaintiff, without right or claim on the part of Defendants, and therefore against principals of
20 equity and good conscience.

21 51. That as a direct and proximate result of the actions of the Defendants as
22 hereinabove alleged, the Defendants have been or seek to be unjustly enriched, and Plaintiff has
23 been damaged in an amount which is currently unknown, but which will be proved at the trial of
24 this cause, and is in any event in excess of \$10,000.

25 52. Plaintiff has been required to retain an attorney to prosecute this matter and is
26 entitled to an award of reasonable attorney's fees and costs incurred herein.

27 **FOURTH CAUSE OF ACTION**

28 **(Injunctive Relief)**

53. Plaintiff repeats and realleges the allegations of the preceding paragraphs of the

1 complaint as though fully set forth herein and incorporate the same herein by reference.

2 54. The Property involved in this action is real property and is therefore unique and
3 money damages are inadequate to fully compensate Plaintiff.

4 55. Upon information and belief, Defendants may still claim ownership interests in the
5 Property despite the HOA Lien foreclosure action which extinguished any interests Defendants
6 may have had in the Property.

7 56. Any attempt by Defendants, to maintain possession or attempt to exercise any
8 dominion or control over the Property, based on the aforementioned prior ownership interests,
9 would be wrongful and invalid based on the extinguishment of said interests by the HOA Lien
10 foreclosure action.

11 57. Upon information and belief, Defendants are attempting to gain or maintain
12 possession as well as exercise dominion or control over the Property.

13 58. Upon information and belief, Defendants, may still claim interests in the Property
14 despite the HOA Lien foreclosure action which extinguished any right, title and interest of the
15 Defendants, including the first deed of trust recorded against the Property.

16 59. Any attempt by Defendants to take title to the Property by way of foreclosure
17 action, or otherwise, based on the aforementioned deed of trust, would be wrongful and invalid
18 based on the extinguishment of said interests by the HOA Lien foreclosure action.

19 60. Upon information and belief, BAC and BOA may seek to begin or are currently in
20 the process of conducting, a foreclosure action against the Property, contrary to Nevada law on the
21 extinguished deed of trust.

22 61. Plaintiff will suffer irreparable harm unless the court issues an order restraining or
23 otherwise enjoining the actions of Defendants from beginning, continuing or conducting any
24 action that would adversely affect Plaintiff's ownership interest in or rights to the Property.

25 62. The threatened injury to Plaintiff, specifically the loss of ownership or loss of the
26 right to possession or enjoyment of the Property outweighs whatever damage the proposed
27 restraining order and injunction may cause Defendants.

28 63. Plaintiff properly acquired the by successfully bidding on the Property at a publicly
held foreclosure action in accordance with NRS 116.3116, et seq. and the Trustee's Deed

1 reflecting such information was recorded in the Official Records of the Clark County Recorder.

2 64. The issuance of a temporary restraining order and injunction will not be adverse to
3 the public interest.

4 65. There is a substantial likelihood that the Plaintiff will prevail on the merits of the
5 underlying claim or this case presents serious issues on the merits which should be the subject of
6 further litigation.

7 66. On the basis of the facts described herein, Plaintiff has a reasonable probability of
8 success on the merits of its claims and has no other adequate remedies of law.

9 67. As such, Plaintiff is entitled to a preliminary and permanent injunction directing
10 Defendants to immediately cease and desist in any foreclosure activity and any activity adverse to
11 Plaintiff's interests until the Court determines the parties' rights in the Property.

12 **FIFTH CAUSE OF ACTION**

13 **(Award of Attorney's fees and costs)**

14 68. Plaintiff repeats and realleges each and every allegation contained in the preceding
15 paragraphs as if fully set forth herein.

16 69. Pursuant to NRS 18.010(a) the court may make an allowance of attorney's fees to a
17 prevailing party when the prevailing party has not recovered more than \$20,000. "The court shall
18 liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all
19 appropriate situations." NRS 18.010(b).

20 70. Plaintiff seeks a determination of rights to real property and should the recovery at
21 trial be less than \$20,000, Plaintiff is entitled to an award of reasonable attorney's fees incurred
22 herein.

23 71. Pursuant to NRS 18.020, costs must be allowed to the prevailing party against any
24 adverse party against whom judgment is rendered in an action for the recovery of real property or a
25 possessory right thereto. Plaintiff is entitled to an award of costs, as this action seeks the recovery
26 of real property or a possessory right thereto.

27 **PRAYER FOR RELIEF**

28 **WHEREFORE**, Plaintiff prays for judgment against Defendants, as follows:

1. For an order declaring the Plaintiff is the rightful owner of the Property having full

1 title thereto and quieting title to the Property into the name of Plaintiff.

2 2. For a declaration and determination that Plaintiff is the rightful holder of title to the
3 Property and that Defendants, and each of them, be declared to have no right, title or interest in the
4 Property;

5 3. For a preliminary and permanent injunction against Defendants enjoining any and all
6 foreclosure or other activity by them contrary to the Plaintiff's rightful ownership of the Property;

7 4. For damages sustained by Plaintiff in an amount in excess of \$10,000.00.

8 5. For reasonable attorney's fees and costs of suit; and,

9 6. For such other and further relief as the Court may deem proper.

10 DATED this 25th day of August 2015.

11 CONNAGHAN NEWBERRY

12 /s/ Tara D. Newberry

13 TARA D. NEWBERRY, ESQ.

14 Nevada Bar No. 10696

15 7854 W. Sahara Avenue

16 Las Vegas, Nevada 89117

17 Attorneys for Plaintiff

VERIFICATION

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, BRANDY WHITE ELK, am an authorized agent of Plaintiff, that I have read the foregoing "COMPLAINT Arbitration Exemptions: 1. Action for Declaratory Relief and 2. Action Concerning Real Property" and am competent to testify that the contents are true of my own knowledge except for those matters stated therein on information and belief; and, as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Dated this 27th day of June 2015.

By: *Brandy White Elk*
BRANDY WHITE ELK
As: Authorized Agent

SUBSCRIBED and SWORN to before me
this 27 day of June 2015.

Tina Walsh
Notary Public



CONNAGHAN NEWBERRY LAW FIRM
7854 W. Sahara Avenue
Las Vegas, Nevada 89117
Telephone (702) 608-4232

1 **IAFD**
2 **CONNAGHAN/NEWBERRY LAW FIRM**
3 Paul R. Connaghan, Esq., (SBN: 3229)
4 pconnaghan@cnlawlv.com
5 Tara D. Newberry, Esq. (SBN: 10696)
6 tnewberry@cnlawlv.com
7 7854 W. Sahara Ave.
8 Las Vegas, Nevada 89117
9 Tel: (702) 608-4232
10 *Attorneys for Plaintiff*

11
12 **DISTRICT COURT**
13 **CLARK COUNTY, NEVADA**

14 VALENCIA MANAGEMENT LLC,
15 SERIES 9, a Nevada Limited Liability
16 Company,

17 Plaintiff,

18 vs.

19 ROBERT STILLWAGON, an individual;
20 LENY STILLWAGON, an individual; BAC
21 HOME LOANS SERVICING, LP FKA
22 COUNTRYWIDE HOME LOANS
23 SERVICING LP; BANK OF AMERICA
24 NA; DOES I through X; and ROE
25 CORPORATIONS 1 through 10,

26 Defendants.

) CASE NO.:
) DEPT. NO.:

27 **INITIAL APPEARANCE FEE**
28 **DISCLOSURE**

29 Pursuant to NRS Chapter 19, as amended by Senate Bill 106, filing fees are submitted for
30 parties appearing in the above entitled action as indicated below:

31 /////

32 /////

33 /////

34 /////

35 /////

CONNAGHAN NEWBERRY LAW FIRM
7854 W. Sahara Avenue
Las Vegas, Nevada 89117
Telephone (702) 608-4232

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1st Plaintiff: VALENCIA MANAGEMENT LLC, SERIES 9 \$270.00

Total **\$270.00**

DATED this 25th day of August 2015.

CONNAGHAN NEWBERRY LAW FIRM

/s/ Tara D. Newberry

TARA D. NEWBERRY, ESQ.

Nevada Bar No. 10696

7854 W. Sahara Avenue

Las Vegas, Nevada 89117

Attorneys for Plaintiff

EXHIBIT 1

EXHIBIT 1

Inst #: 201402180002844
Fees: \$18.00 N/C Fee: \$0.00
RPTT: \$652.80 Ex: #
02/18/2014 03:19:56 PM
Receipt #: 1935715
Requestor:
TITLE SOLUTIONS, INC.
Recorded By: MSH Pgs: 3
DEBBIE CONWAY
CLARK COUNTY RECORDER

Please mail tax statement and
when recorded mail to:
Valencia Management, LLC Series 9
8550 W. Desert Inn Road, #102-112
Las Vegas, NV 89117

FORECLOSURE DEED

APN # 178-18-716-015
North American Title #45010-11-34076

RECEIVED
TIME-DATE 3/3/14
CHECK #

NAS # N67782

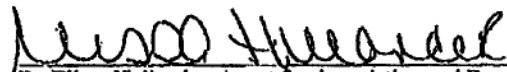
The undersigned declares:

Nevada Association Services, Inc., herein called agent (for the Sandstone Community Recreation Area), was the duly appointed agent under that certain Notice of Delinquent Assessment Lien, recorded May 9, 2011 as instrument number 0000507 book 20110509, in Clark County. The previous owner as reflected on said lien is STILLWAGON, ROBERT & LENY. Nevada Association Services, Inc. as agent for Sandstone Community Recreation Area does hereby grant and convey, but without warranty expressed or implied to: Valencia Management, LLC Series 9 (herein called grantee), pursuant to NRS 116.31162, 116.31163 and 116.31164, all its right, title and interest in and to that certain property legally described as: STRAWBERRY FIELDS PLAT BOOK 56 PAGE 90 LOT 15 BLOCK 1 SEC 18 TWP 22 RND 62 Clark County

AGENT STATES THAT:

This conveyance is made pursuant to the powers conferred upon agent by Nevada Revised Statutes, the Sandstone Community Recreation Area governing documents (CC&R's) and that certain Notice of Delinquent Assessment Lien, described herein. Default occurred as set forth in a Notice of Default and Election to Sell, recorded on 9/8/2011 as instrument # 0001384 Book 20110908 which was recorded in the office of the recorder of said county. Nevada Association Services, Inc. has complied with all requirements of law including, but not limited to, the elapsing of 90 days, mailing of copies of Notice of Delinquent Assessment and Notice of Default and the posting and publication of the Notice of Sale. Said property was sold by said agent, on behalf of Sandstone Community Recreation Area at public auction on 2/14/2014, at the place indicated on the Notice of Sale. Grantee being the highest bidder at such sale, became the purchaser of said property and paid therefore to said agent the amount bid \$13,000.00 in lawful money of the United States, or by satisfaction, pro tanto, of the obligations then secured by the Delinquent Assessment Lien.

Dated: February 14, 2014



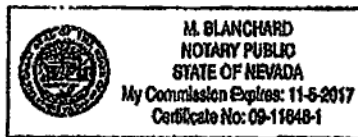
By Elissa Hollander, Agent for Association and Employee of Nevada Association Services

STATE OF NEVADA
COUNTY OF CLARK }

On February 14, 2014, before me, Brenda L. Sherwood, personally appeared Elissa Hollander personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged that he/she executed the same in his/her authorized capacity, and that by signing his/her signature on the instrument, the person, or the entity upon behalf of which the person acted, executed the instrument.
WITNESS my hand and seal.

(Seal)

(Signature)



M. Blanchard

STATE OF NEVADA
DECLARATION OF VALUE

1. Assessor Parcel Number(s)

a. 178-18-716-015
b. _____
c. _____
d. _____

2. Type of Property:

a. ☐ Vacant Land b. ☒ Single Fam. Res.
c. ☐ Condo/Townhouse d. ☐ 2-4 Plex
e. ☐ Apt. Bldg f. ☐ Comm'l/Ind'l
g. ☐ Agricultural h. ☐ Mobile Home
i. ☐ Other

FOR RECORDERS OPTIONAL USE ONLY
Book _____ Page: _____
Date of Recording: _____
Notes: _____

3.a. Total Value/Sales Price of Property

\$ 13,000.00

b. Deed in Lieu of Foreclosure Only (value of property) _____

c. Transfer Tax Value:

\$ 127,789.00

d. Real Property Transfer Tax Due

\$ 652.80

4. If Exemption Claimed:

a. Transfer Tax Exemption per NRS 375.090, Section _____

b. Explain Reason for Exemption: _____

5. Partial Interest: Percentage being transferred: 100 %

The undersigned declares and acknowledges, under penalty of perjury, pursuant to NRS 375.060 and NRS 375.110, that the information provided is correct to the best of their information and belief, and can be supported by documentation if called upon to substantiate the information provided herein. Furthermore, the parties agree that disallowance of any claimed exemption, or other determination of additional tax due, may result in a penalty of 10% of the tax due plus interest at 1% per month. Pursuant to NRS 375.030, the Buyer and Seller shall be jointly and severally liable for any additional amount owed.

Signature _____

Capacity: NAS Employee/Agent for HOA

Signature _____

Capacity: _____

SELLER (GRANTOR) INFORMATION
(REQUIRED)

Print Name: Nevada Association Services

Address: 6224 W. Desert Inn Road

City: Las Vegas

State: NV

Zip: 89146

BUYER (GRANTEE) INFORMATION
(REQUIRED)

Print Name: Valencia Management LLC Series

Address: 8550 W. Desert Inn Rd, #102-112

City: Las Vegas

State: NV

Zip: 89117

COMPANY/PERSON REQUESTING RECORDING (Required if not seller or buyer)

Print Name: Take Solutions Inc Escrow # _____

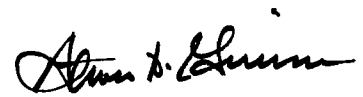
Address: 2552 WALNUT AVE # 220

City: JUSTIN

State: CA

Zip: 92782

AS A PUBLIC RECORD THIS FORM MAY BE RECORDED/MICROFILMED



CLERK OF THE COURT

ANS
DARREN T. BRENNER, ESQ.
Nevada Bar No. 8386
JESSE A. RANSOM, ESQ.
Nevada Bar No. 13565
Akerman LLP
1160 Town Center Drive, Suite 330
Las Vegas, Nevada 89144
Telephone: (702) 634-5000
Facsimile: (702) 380-8572
Email: darren.brenner@akerman.com
Email: jesse.ransom@akerman.com

*Attorneys for Defendant Bank of America, N.A.,
s/b/m to BAC Home Loans Servicing, LP
f/k/a Countrywide Home Loans Servicing LP*

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

VALENCIA MANAGEMENT LLC, SERIES 9,
a Nevada Limited Liability Company,

Plaintiff,

vs.

ROBERT STILLWAGON, an individual; LENY
STILLWAGON, an individual; BAC HOME
LOANS SERVICING, LP FKA
COUNTRYWIDE HOME LOANS SERVICING
LP; BANK OF AMERICA NA; DOES 1 through
X; and ROE CORPORATIONS 1 through 10,

Defendants.

Case No.: A-15-723600-C
Dept. No.: XXXII

**BANK OF AMERICA, N.A., S/B/M TO
BAC HOME LOANS SERVICING, LP
F/K/A COUNTRYWIDE HOME LOANS
SERVICING'S FIRST AMENDED
ANSWER TO PLAINTIFF'S
COMPLAINT, COUNTERCLAIM
AGAINST PLAINTIFF, AND
CROSSCLAIMS AGAINST SANDSTONE
RECREATION ASSOCIATION, INC.
AND NEVADA ASSOCIATION
SERVICES, INC.**

BANK OF AMERICA, N.A., S/B/M TO BAC
HOME LOANS SERVICING, LP FKA
COUNTRYWIDE HOME LOANS
SERVICING, LP,

Cross-claimant,

v.

SANDSTONE RECREATION ASSOCIATION,
INC.; and NEVADA ASSOCIATION
SERVICES, INC.,

Cross-defendants.

1 Defendant Bank of America, N.A., s/b/m to BAC Home Loans Servicing, LP f/k/a
2 Countrywide Home Loans Servicing LP amends its answer to Plaintiff Valencia Management LLC,
3 Series 9's (Plaintiff) Complaint as follows:

4 **GENERAL ALLEGATIONS**

5 1. Defendant admits that the subject property is commonly known as 2176 Hearts Club,
6 Henderson, Nevada, 89074 ("the property") and that the APN is 178-18-716-015.

7 2. Defendant admits that according to a Foreclosure Deed recorded February 18, 2104,
8 Plaintiff purchased Sandstone Community Recreation Area's interest in the property but states that
9 Defendant maintains its interest in the property. Defendant lacks sufficient information to admit or
10 deny the remaining allegations and therefore denies the same. As to the referenced document,
11 Exhibit 1: Trustee's Deed, the document speaks for itself.

12 3. Defendant admits that a Deed of Trust was recorded against the property as
13 Instrument Number 20080314-0002767 and that a Deed of Trust was recorded against the property
14 as Instrument Number 20080314-0002768. Defendant lacks sufficient information to admit or deny
15 the remaining allegations in Paragraph 3 and therefore denies the same.

16 4. Defendant denies the allegations in Paragraph 4.

17 5. Defendant admits that it currently claims an interest in the property pursuant to an
18 Assignment of Deed of Trust that was recorded with the Clark County, Nevada Recorder on August
19 31, 2009 as Book and Instrument number 20090831-0001060.

20 6. Defendant admits it claims an interest in the property by way of an assignment
21 recorded with the Clark County, Nevada Recorder on August 14, 2012 as Book and Instrument
22 number 20120814-0003036.

23 7. Paragraph 7 is a legal conclusion to which no response is required. To the extent a
24 response is required, Defendant states Plaintiff's allegation that it has "committed sufficient acts or
25 consummated some transaction within Clark County, Nevada by which [it] purposely availed itself
26 of the privilege of conducting activities within this forum" is too vague to frame a response and
27 therefore denies the allegations of Paragraph 7.
28

1 8. Defendant lacks sufficient information to admit or deny allegations pertaining to
2 Defendants Robert Stillwagon and Leny Stillwagon in this case and therefore denies the allegations.

3 9. The allegations of Paragraph 9 relate to alleged fictitious parties, and Defendant is
4 without sufficient information to admit or deny allegations related to unknown fictitious parties, and
5 therefore denies the same.

6 10. Defendant is without sufficient information to admit or deny the allegations in
7 Paragraph 10 and therefore denies the allegations.

8 11. Paragraph 11 is a legal conclusion to which no response is required. To the extent a
9 response is required, Defendant admits that Plaintiff accurately quotes a portions of NRS 116.3116,
10 but denies that Paragraph is a full or complete statement of the law. Defendant asserts that it
11 maintains an interest in the property at issue.

12 12. Defendant admits that, according to the recorded documents, the Stillwagons were the
13 former record title holders of the property.

14 13. Defendant is without sufficient information to admit or deny the allegations of
15 Paragraph 13 regarding the Stillwagons' obligations to the HOA, and therefore denies the same.

16 14. Defendant lacks sufficient information to admit or deny allegations pertaining to co-
17 defendants in this case and therefore denies the allegations.

18 15. Defendant denies that the referenced sale was in compliance with all requirements of
19 law and due process. Defendant is without sufficient information to admit or deny the remaining
20 allegations of Paragraph 15 at this time and therefore denies the same.

21 16. Defendant denies the allegations in Paragraph 16 and specifically states that, upon
22 information and belief, it paid the super-priority amount prior to the HOA's foreclosure sale.

23 17. Defendant denies that the sale was conducted in compliance with all requirements of
24 law. Defendant states that it maintains its interest in the property. Defendant is without sufficient
25 information to admit or deny the remaining allegations in Paragraph 17 and therefore denies the
26 same.

1 18. Defendant denies that the sale was conducted in compliance with all requirements of
2 law. Defendant states that it maintains its interest in the property. Defendant is without sufficient
3 information to admit or deny the remaining allegations in Paragraph 18 and therefore denies the
4 same.

5 19. Defendant denies that the sale was conducted in compliance with all requirements of
6 law. Defendant states that it maintains its interest in the property. Defendant is without sufficient
7 information to admit or deny the remaining allegations in Paragraph 19 and therefore denies the
8 same.

9 20. Defendant denies that Plaintiff is a bona fide purchaser. Defendant states that it
10 maintains its interest in the property. Defendant is without sufficient information to admit or deny
11 the remaining allegations in Paragraph 20 and therefore denies the same.

12 21. Defendant denies that a “Trustee’s Deed Upon Sale” was recorded as Book and
13 Instrument number 20140218-0002844 but states that a Foreclosure Deed was recorded. Defendant
14 states that the recorded document speaks for itself, denies that the document states Plaintiff is the
15 “owner,” and denies that Defendant’s interest in the property has been extinguished.

16 22. Defendant denies that the Foreclosure Deed referenced by Plaintiff is “conclusive
17 proof that NRS Chapter 116 and all requirements of law have [sic] complied with” and states that
18 Plaintiff has taken title subject to Defendant’s interest in the property. Defendant further states that
19 the statute and referenced document speak for themselves, denies any interpretation inconsistent
20 with the documents and law, and states that Plaintiff’s assertions of law are not full and complete.

21 23. Defendant denies the allegations in Paragraph 23.

22 24. Defendant denies that Plaintiff’s interpretation of the law is complete or correct and
23 specifically denies that Defendant’s interest has been extinguished.

24 **FIRST CAUSE OF ACTION**

25 **(Quiet Title Pursuant to NRS 30.010 and 116.3116, et seq.)**

26 25. Defendant adopts and incorporates by reference its responses to the preceding
27 paragraphs of Plaintiff’s Complaint as if fully set out herein
28

1 26. Defendant lacks sufficient information to admit or deny the allegations in Paragraph
2 26 and therefore denies the allegations.

3 27. Defendant admits that the Court has the power and authority to resolve the claims
4 brought by Plaintiff in this case and the claims brought by Defendant against Plaintiff.

5 28. Defendant denies that Plaintiff is a bonafide purchaser or that Defendant's interest in
6 the property has been extinguished. Defendant lacks sufficient information to admit or deny the
7 remaining allegations in Paragraph 28 and therefore denies the allegations.

8 29. Defendant denies that its interest in the property has been extinguished or that
9 Plaintiff's interpretation of the law is complete and correct.

10 30. Defendant admits it claims an interest in the property and denies that Plaintiff's own
11 legal conclusions regarding NRS 116.3116(2) are complete and correct.

12 31. Defendant denies that its interest in the property has been extinguished. Defendant
13 lacks sufficient information to admit or deny the remaining allegations in Paragraph 31 and therefore
14 denies the allegations.

15 32. Defendant denies the allegations of Paragraph 32.

16 33. Defendant denies the allegations of Paragraph 33.

17 34. Defendant denies the allegations of Paragraph 34 and specifically denies that its
18 interest has been extinguished.

19 35. Defendant denies the allegations of Paragraph 35.

20 36. Defendant states that the Foreclosure Deed speaks for itself and is without sufficient
21 information to admit or deny the allegations at this time and therefore denies the same.

22 37. Defendant denies the allegations of Paragraph 37.

23 38. Defendant states that Plaintiff took title subject to Defendant's deed of trust and
24 further states that the statute speaks for itself. Defendant denies any interpretation of the statute by
25 Plaintiff which is inconsistent with the law.

26 39. Defendant denies the allegations of Paragraph 39.

27 40. Defendant denies that its interest has been extinguished and denies that Plaintiff is
28 entitled to the requested relief.

(Declaratory Relief Against All Defendants)

FOURTH CAUSE OF ACTION**(Injunctive Relief)**

53. Defendant adopts and incorporates by reference its responses to the preceding paragraphs of Plaintiff's Complaint as if fully set out herein.

54. Paragraph 54 states Plaintiff's own legal conclusions regarding real property to which no response is required but Defendant specifically denies that Plaintiff is entitled to any compensation from Defendant regarding this property and denies that Defendant's interest in the property has been extinguished.

55. Defendant admits that it claims an interest in the property and denies that the HOA lien foreclosure action extinguished its interest in the property.

56. Paragraph 56 states Plaintiff's own legal conclusions and does not assert averments against Defendants to which a response is required. To the extent a response is required, Defendant specifically denies that the foreclosure extinguished its interest.

57. Defendant denies that it is attempting to possess the property or exercise dominion or control over the property at this time but denies that any efforts to do so would be wrongful.

58. Defendant admits that it maintains an interest in the property and denies that the HOA lien foreclosure sale extinguished its interest in the property or extinguished the deed of trust.

59. Defendant denies that its interest in the property has been extinguished and denies that any foreclosure or other such action would be wrongful.

60. Defendant denies that is conducting or is about to conduct a foreclosure against the property but denies that any such action would be wrongful.

61. Defendant denies the allegations of Paragraph 61.

62. Defendant denies the allegations of Paragraph 62.

63. Defendant denies that its interest in the property has been extinguished, denies that the foreclosure sale was conducted in compliance with NRS 116, and states that it lacks sufficient information to admit or deny the remaining allegations, and therefore denies same.

64. Defendant denies the allegations of Paragraph 64.

65. Defendant denies the allegations of Paragraph 65.

1 66. Defendant denies the allegations of Paragraph 66.

2 67. Defendant denies the allegations of Paragraph 67.

3 **FIFTH CAUSE OF ACTION**

4 **(Award of Attorney's fees and costs)**

5 68. Defendant adopts and incorporates by reference its responses to the preceding
6 paragraphs of Plaintiff's Complaint as if fully set out herein.

7 69. Paragraph 69 is a legal conclusion to which no response is required. To the extent
8 further response is required, Defendant denies that Plaintiff is entitled to any attorney's fees or costs.

9 70. Defendant denies that Plaintiff is entitled to any attorney's fees or costs.

10 71. Paragraph 71 is a legal conclusion to which no response is required. To the extent
11 further response is required, Defendant denies that Plaintiff is entitled to any attorney's fees or costs.

12 **PRAYER FOR RELIEF**

13 Defendant denies that Plaintiff is entitled to the relief requested in its prayer for relief,
14 including any attorney's fees and costs.

15 **AFFIRMATIVE DEFENSES**

16 Defendant asserts the following affirmative defenses. Discovery and investigation of this
17 case is not yet complete, and Defendant reserves the right to amend this Answer by adding, deleting,
18 or amending defenses as may be appropriate. Any allegations not specifically admitted are denied.
19 In further answer to the Complaint, and by way of additional defenses, Defendant avers as follows:
20

21 **FIRST AFFIRMATIVE DEFENSE**

22 **(Failure to State a Claim)**

23 Plaintiff has failed to state facts sufficient to constitute any cause of action against
24 Defendant.

25 **SECOND AFFIRMATIVE DEFENSE**

26 **(Void for Vagueness)**

27 To the extent that Plaintiff's interpretation of NRS 116.3116 is accurate, the statute, and
28 Chapter 116, are void for vagueness as applied to this matter.

1 **THIRD AFFIRMATIVE DEFENSE**
2 **(Due Process Violations)**

3 A senior deed of trust beneficiary cannot be deprived of its property interest in violation of
4 the Procedural Due Process Clause of the 14 Amendment of the United States Constitution and
5 Article 1, Sec. 8, of the Nevada Constitution.

6 **FOURTH AFFIRMATIVE DEFENSE**
7 **(Assumption of Risk)**

8 Plaintiff, at all material times, calculated, knew and understood the risks inherent in the
9 situations, actions, omissions and transactions upon which it now bases its various claims for relief,
10 and with such knowledge, Plaintiff undertook and thereby assumed such risks and is consequently
11 barred from all recovery by such assumption of risk.

12 **FIFTH AFFIRMATIVE DEFENSE**
13 **(Tender, Estoppel, Laches, or Waiver)**

14 The super-priority lien was satisfied prior to the homeowner's association foreclosure under
15 the doctrines of tender, estoppel, laches, or waiver.

16 **SIXTH AFFIRMATIVE DEFENSE**
17 **(Commercial Reasonableness and Violation of Good Faith – NRS 116.1113)**

18 The homeowner's association foreclosure sale was not commercially reasonable, and the
19 circumstances of sale of the property violated the homeowner's association's obligation of good
20 faith under NRS 116.1113 and duty to act in a commercially reasonable manner.

21 **SEVENTH AFFIRMATIVE DEFENSE**
22 **(Failure to Mitigate Damages)**

23 Plaintiff's claims are barred in whole or in part because of its failure to take reasonable steps
24 to mitigate its damages, if any.

25 **EIGHTH AFFIRMATIVE DEFENSE**
26 **(Third Party Fault)**

27 The damages complained of, if there were any, were proximately contributed to or caused by
28 the carelessness, negligence, fault or defects resulting from acts/omissions of other persons unknown
to Defendant at this time, and were not caused in any way by Defendant or by persons for whom
Defendant is legally responsible.

NINTH AFFIRMATIVE DEFENSE
(Reduction of Damages Based on Third Party Fault)

Defendant is entitled to have any award against it reduced or eliminated to the extent that the negligence, carelessness, or defect resulted from the acts/omissions or comparative fault of other persons that contributed to Plaintiff's damages, if any.

TENTH AFFIRMATIVE DEFENSE
(No Standing)

Plaintiff lacks standing to bring some or all of its claims and causes of action.

ELEVENTH AFFIRMATIVE DEFENSE
(Unclean Hands)

Defendant avers the affirmative defense of unclean hands.

TWELFTH AFFIRMATIVE DEFENSE
(Failure to Provide Notice)

Defendant was not provided proper notice of the "super-priority" assessment amounts and the homeowner's association foreclosure sale, and any such notice provided to Defendant failed to comply with the statutory and common law requirements of Nevada and with state and federal constitutional law.

THIRTEENTH AFFIRMATIVE DEFENSE
(Plaintiff is Not Entitled to Relief)

Defendant denies that the Plaintiff is entitled to any relief for which it prays.

FOURTEENTH AFFIRMATIVE DEFENSE
(Failure to Do Equity)

Defendant avers the affirmative defense of failure to do equity.

FIFTEENTH AFFIRMATIVE DEFENSE
(Plaintiff is not a Bona Fide Purchaser for Value)

Plaintiff purchased the property with record notice of the interest of the senior deed of trust recorded against the property.

SIXTEENTH AFFIRMATIVE DEFENSE
(Void Foreclosure Sale)

The HOA foreclosure sale is void for failure to comply with the provisions of NRS Chapter 116, and other provisions of law.

1 **SEVENTEENTH AFFIRMATIVE DEFENSE**
2 **(Property Clause)**

3 The HOA sale is void or otherwise fails to extinguish the applicable deed of trust pursuant to
4 the Property Clause of the United States Constitution.

5 **EIGHTEENTH AFFIRMATIVE DEFENSE**
6 **(Supremacy Clause)**

7 The HOA sale is void or otherwise fails to extinguish the applicable deed of trust pursuant to
8 the Supremacy Clause of the United States Constitution.

9 **NINETEENTH AFFIRMATIVE DEFENSE**
10 **(Due Process — Facially Unconstitutional Provisions)**

11 Chapter 116 of the Nevada Revised Statutes is facially unconstitutional because its “opt-in”
12 notice provisions do not mandate that reasonable and affirmative steps be taken to give actual notice
13 to a record lien holder before depriving that lien holder of its property rights, in violation of the Due
14 Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution and of
15 the Nevada Constitution.

16 **TWENTIETH AFFIRMATIVE DEFENSE**
17 **(Additional Affirmative Defenses)**

18 Pursuant to NRCP 11, Defendant reserves the right to assert additional affirmative defenses
19 in the event discovery and/or investigation disclose the existence of other affirmative defenses.

20 **TWENTY-FIRST AFFIRMATIVE DEFENSE**
21 **(SFR Investments Cannot be Applied Retroactively)**

22 The Deed of Trust cannot be extinguished by the HOA foreclosure sale because the
23 Nevada Supreme Court’s decision in *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408
(Nev. 2014) cannot be applied retroactively.

24 **PRAYER FOR RELIEF**

25 WHEREFORE, Defendant prays for the following:

- 26 1. That Plaintiff’s complaint be dismissed in its entirety with prejudice and that Plaintiff
27 take nothing by way of its complaint;
- 28 2. For attorney’s fees and costs of defending this action; and

1 3. For such other and further relief as this Court deems just and proper.

2 **COUNTERCLAIMS AND CROSS-CLAIMS**

3 Bank of America hereby files these counterclaims against Plaintiff and crossclaims against
4 Sandstone Recreation Association, Inc. (**HOA**) and Nevada Association Services, Inc. (**NAS**).

5 **PARTIES**

6 1. Bank of America is a national association doing business in Clark County, Nevada.

7 2. Upon information and belief, Plaintiff is a Nevada limited liability company that does
8 business in Clark County, Nevada.

9 3. Upon information and belief, the HOA is a Nevada non-profit corporation conducting
10 business in Clark County, Nevada.

11 4. Upon information and belief, NAS is a Nevada corporation conducting business in
12 Clark County, Nevada.

13 **JURISDICTION AND VENUE**

14 5. This Court has jurisdiction over Plaintiff, HOA, and NAS because the allegations set
15 forth in Bank of America's counterclaims and crossclaims relate to Plaintiff's purported interest in,
16 and the HOA and NAS's purported foreclosure of, real property located and situated in Clark
17 County, Nevada.

18 6. Venue is proper in this judicial district because the Property that is the subject of this
19 action is situated in this district.

20 **GENERAL ALLEGATIONS**

21 7. Under Nevada law, homeowners' associations have the right to charge property
22 owners residing within the community assessments to cover the homeowners' association's expenses
23 for maintaining or improving the community, among other things.

24 8. When these assessments are not paid, the homeowners' association may both impose
25 and foreclose on a lien.

26 9. A homeowners' association may impose a lien for "any penalties, fees, charges, late
27 charges, fines and interest charged" under NRS 116.3102(1)(j)-(n). NRS 116.3116(1).
28

11. According to the Nevada Supreme Court's recent decision in *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408 (Nev. 2014), if a homeowner's association properly forecloses on its super-priority lien, it can extinguish a first deed of trust. However, the HOA's foreclosure in this case did not extinguish Bank of America's deed of trust because the foreclosure did not comply with Nevada law and was commercially unreasonable as a matter of law. Furthermore, to deprive Bank of America of its deed of trust under the circumstances of this case would deprive Bank of America of its due process rights.

12. As recorded on March 14, 2008, Robert and Leny Stillwagon (**Borrowers**) entered into a Deed of Trust with Neighbor's Financial Corporation in the amount of \$210,201 for the property at 2176 Hearts Club Drive, Henderson, NV 89074. The Borrowers also entered into a second deed of trust with Neighbor's Financial regarding the property in the amount of \$6,405.

The HOA Lien and Foreclosure

{38708543;1}

1 recorded a Notice of Delinquent Assessment Lien. The Lien stated the amount due to the HOA was
2 \$930, which included assessments, interest, and collection costs. The Lien neither identifies the
3 super-priority amount claimed by the HOA, nor describes the “deficiency in payment” required by
4 NRS 116.31162(1)(b)(1).

5 15. On June September 8, 2011, the HOA, through its new agent NAS, recorded a Notice
6 of Default and Election to Sell Under Homeowners Association Lien. The Notice stated the amount
7 due to the HOA was \$2,459.20, which included assessments, dues, interest, and fees. The Notice of
8 Default neither identifies the super-priority amount claimed by the HOA, nor describes the
9 “deficiency in payment” required by NRS 116.31162(1)(b)(1).

10 16. In response to the Notice of Default, on October 5, 2011, Bank of America, through
11 its outside counsel at Miles, Bauer, Bergstrom, & Winters, LLP (**Miles Bauer**), contacted NAS to
12 obtain a payoff ledger detailing the super-priority amount claimed by the HOA.

13 17. On December 1, 2011, after NAS refused to provide a superpriority payoff, Miles
14 Bauer, on Bank of America’s behalf delivered a check for \$495.00 to NAS. This amount included
15 the last nine months’ worth of delinquent assessments as indicated by the HOA’s payoff statement
16 provided by NAS to Miles Bauer for a different property, which was the maximum amount the HOA
17 could claim had super-priority over the Deed of Trust.

18 18. The HOA, through NAS, rejected Bank of America’s tender. Neither the HOA nor
19 NAS provided any reason for rejecting Bank of America’s tender.

20 19. On October 10, 2012, the HOA, through NAS, recorded a Notice of Foreclosure Sale.
21 The Notice set a November 9, 2012 foreclosure sale and stated the amount due to the HOA was
22 \$4,069.97. The Notice of Foreclosure Sale neither identifies the super-priority amount claimed by
23 the HOA, nor describes the “deficiency in payment” required by NRS 116.31162(1)(b)(1).

24 20. Subsequently, on December 2, 2013, NAS recorded a Notice of Foreclosure Sale
25 which set a foreclosure date of January 3, 2014 and which alleged \$5,738.28 was owed.

26 21. The HOA only identified the amount of the alleged lien that was for late fees, interest,
27 fines/violations, or collection fees/costs in the Notice of Delinquent Assessment Lien.
28

28. NAS's foreclosure sale was invalid and did not extinguish Bank of America's first Deed of Trust because Bank of America's tender extinguished any super-priority lien held by the HOA.

(Quiet Title Against Plaintiff)

31. The HOA, through NAS, foreclosed on the HOA's lien on February 14, 2014.

1 32. Upon information and belief, Plaintiff claims an interest in the Property adverse to
2 Bank of America, in that Plaintiff claims that the HOA's foreclosure sale extinguished Bank of
3 America's interest in the Property.

4 33. The HOA's foreclosure sale did not extinguish Bank of America's senior Deed of
5 Trust because the recorded notices, even if they were in fact provided, failed to describe the lien in
6 sufficient detail as required by Nevada law and the United States Constitution, including, without
7 limitation: whether the deficiency included a "super-priority" component, the amount of the super-
8 priority component, how the super-priority component was calculated, when payment on the super-
9 priority component was required, where payment was to be made, or the consequences for failure to
10 pay the super-priority component.

11 34. The HOA's foreclosure sale did not extinguish Bank of America's senior Deed of
12 Trust because the statute authorizing the foreclosure sale, NRS 116, *et seq.*, is facially
13 unconstitutional because it does not mandate that deed of trust beneficiaries receive actual notice of
14 an HOA's foreclosure sale, as required by the Due Process Clause of the United States Constitution.

15 35. The HOA's foreclosure sale did not extinguish Bank of America's senior Deed of
16 Trust because Bank of America paid the super-priority amount to the HOA, and the HOA
17 wrongfully refused to accept that amount.

18 36. The foreclosure sale did not extinguish the senior Deed of Trust because the sale was
19 commercially unreasonable or otherwise failed to comply with the good faith requirement of NRS
20 116.1113 in several respects, including, without limitation: the lack of sufficient notice, the HOA's
21 failure to accept tender, the sale of the property for a fraction of the actual market value of the
22 property, a foreclosure that was not calculated to promote an equitable sales price for the property or
23 to attract proper prospective purchasers, and a foreclosure sale that was designed and/or intended to
24 result in a maximum profit for the HOA and NAS without regard to the rights and interests of those
25 who have an interest in the loan and made the purchase of the property possible in the first place.

26 37. Based on the adverse claims being asserted by the parties, a judicial determination is
27 necessary to ascertain the rights, obligations, and duties of the various parties.
28

39. Bank of America was required to retain an attorney to prosecute this action, and is therefore entitled to collect its reasonable attorneys' fees and costs.

(Declaratory Judgment Against Plaintiff)

43. This foreclosure sale is invalid, and thus did not extinguish Bank of America's deed of trust, because NRS 116, *et seq.* is facially unconstitutional, as it does not mandate that deed of trust beneficiaries receive actual notice of an HOA's foreclosure sale, as required by the Due Process Clause of the United States Constitution.

45. The foreclosure sale did not extinguish the senior Deed of Trust because the sale was commercially unreasonable or otherwise failed to comply with the good faith requirement of NRS 116.1113 in several respects, including, without limitation: the lack of sufficient notice, NAS's rejection of Bank of America's tender, the sale of the property for a fraction of the actual market value of the property, a foreclosure that was not calculated to promote an equitable sales price for the

1 property or to attract proper prospective purchasers, and a foreclosure sale that was designed and/or
2 intended to result in a maximum profit for the HOA and NAS without regard to the rights and
3 interests of those who have an interest in the loan and made the purchase of the property possible in
4 the first place.

5 46. Based on the adverse claims being asserted by the parties, a judicial determination is
6 necessary to ascertain the rights, obligations, and duties of the various parties.

7 47. Bank of America is entitled to a declaration that the HOA sale did not extinguish the
8 senior Deed of Trust, which is superior to any interest acquired by Plaintiff through the HOA
9 foreclosure sale.

10 48. Bank of America was required to retain an attorney to prosecute this action, and is
11 therefore entitled to collect its reasonable attorneys' fees and costs.

12 **THIRD CAUSE OF ACTION**
13 **(Unjust Enrichment Against the HOA)**

14 49. Bank of America repeats and re-alleges the preceding paragraphs as though set forth
15 fully herein and incorporates the same by reference.

16 50. Under NRS 116.3116(2), a homeowner's association's lien is split into two pieces:
17 one which has super-priority, and another which is subordinate to the first deed of trust.

18 51. The portion of the lien with super-priority consists of only the last nine months of
19 assessments for common expenses incurred prior to the institution of an action to enforce the lien.
20 The remainder of a homeowner's association's lien is subordinate to a first deed of trust.

21 52. Prior to the foreclosure sale, Bank of America, through Miles Bauer, paid the super-
22 priority amount of the HOA's lien to the HOA to protect its interest in the Property.

23 53. The HOA, through its agent NAS, rejected Miles Bauer's payment.

24 54. After rejecting Bank of America's super-priority payment, the HOA and NAS
25 foreclosed on the Property, selling the Property for a grossly inadequate and commercially
26 unreasonable purchase price.

27 55. By foreclosing on the Property rather than accepting Bank of America's tender of the
28 super-priority amount, the HOA was unjustly enriched in an amount at least equal to the difference

1 between the true super-priority portion of its lien and the amount the HOA actually recovered from
2 the foreclosure proceeds.

3 56. Bank of America is entitled to a reasonable amount of the benefits obtained by the
4 HOA based on a theory of unjust enrichment.

5 57. Bank of America was required to retain an attorney to prosecute this action, and is
6 therefore entitled to collect its reasonable attorneys' fees and costs.

7 **FOURTH CAUSE OF ACTION**
8 **(Unjust Enrichment Against NAS, the HOA Trustee)**

9 58. Bank of America repeats and re-alleges the preceding paragraphs as though fully set
10 forth herein and incorporates the same by reference.

11 59. By rejecting Bank of America's payment of the super-priority amount yet still
12 proceeding with foreclosure, NAS provided itself with the opportunity to perform many additional
13 services relating to the foreclosure on behalf of the HOA.

14 60. Consequently, NAS has been unjustly enriched by refusing in bad faith to accept
15 Bank of America's payment of the super-priority amount. NAS has been unjustly enriched in an
16 amount at least equal to NAS's charges for services rendered after Bank of America's payment;
17 services that would have been unnecessary if NAS had accepted Bank of America's payment.

18 61. Bank of America is entitled to a reasonable amount of the benefits obtained by NAS
19 based on a theory of unjust enrichment.

20 62. Bank of America was required to retain an attorney to prosecute this action, and is
21 therefore entitled to collect its reasonable attorneys' fees and costs.

22 **FIFTH CAUSE OF ACTION**
23 **(Tortious Interference with Contractual Relations Against the HOA and NAS)**

24 63. Bank of America repeats and re-alleges the preceding paragraphs as though fully set
25 forth herein and incorporates the same by reference.

26 64. On March 4, 2008, Borrowers executed a Deed of Trust of trust in favor of
27 Neighbor's Financial Corporation. This Deed of Trust was assigned to Bank of America, via an
28 Assignment of Deed of Trust, recorded on August 31, 2009.

1 65. On September 8, 2011, NAS, as agent for the HOA, recorded a Notice of Default,
2 stating the Borrowers owed \$2,459.20 in assessments, dues, interest, and fees.

3 66. To protect the first Deed of Trust, on December 1, 2011, Bank of America, through
4 outside counsel at Miles Bauer, delivered a check in an amount equal to the super-priority portion of
5 the HOA's lien to the HOA through the HOA's agent, NAS.

6 67. NAS, on behalf of the HOA, rejected Bank of America's tender, did not provide a
7 reason for rejecting Bank of America's tender, and subsequently foreclosed on the Property. The
8 HOA sold its interest in the Property for \$13,000.00, approximately 7% of the Property's fair market
9 value.

10 68. The HOA and NAS's decision to foreclose on the Property after rejecting Bank of
11 America's super-priority tender—which should have prevented foreclosure—was designed to
12 disrupt the contractual relationship between Bank of America and Borrowers by extinguishing the
13 first Deed of Trust.

14 69. The HOA and NAS's foreclosure allowed the HOA to recover the full value of its
15 delinquent assessment lien rather than just the amount of the lien with super-priority over Bank of
16 America's first Deed of Trust.

17 70. While the HOA and NAS's rejection of Bank of America's super-priority tender and
18 subsequent foreclosure sale allowed the HOA to recover the full value of its lien, it has put the first
19 priority position of Bank of America's Deed of Trust with an original amount of \$210,201.00 in
20 dispute.

21 71. Bank of America is entitled to an order establishing that its Deed of Trust is the senior
22 lien encumbering the Property or, in the alternative, monetary damages equal to the value secured by
23 its first Deed of Trust that was purportedly extinguished as a direct result of the HOA and NAS's
24 intentional acts.

25 72. Bank of America was required to retain an attorney to prosecute this action, and is
26 therefore entitled to collect its reasonable attorneys' fees and costs.

27 **SIXTH CAUSE OF ACTION**

28 **(Breach of the Duty of Good Faith Against the HOA and NAS)**

73. Bank of America repeats and re-alleges the preceding paragraphs as though fully set forth herein and incorporates the same by reference.

74. NRS 116.1113 provides that every duty governed by NRS 116, the Common-Interest Ownership Uniform Act, must be performed in good faith.

75. Prior to the foreclosure of the Property, and in an attempt to prevent foreclosure, Bank of America paid the full super-priority amount to NAS on or about December 1, 2011. NAS, acting on behalf of the HOA, rejected Miles Bauer's tender.

76. Rather than accept the super-priority payment that satisfied the HOA's super-priority lien, the HOA and NAS determined in bad faith to foreclose on the Property in a commercially unreasonable manner.

77. This bad-faith foreclosure allowed the HOA to recover the full value of its lien for delinquent assessments, rather than the portion of the lien with priority over Bank of America's first Deed of Trust. As a result, the first priority position of Bank of America's Deed of Trust with an original amount of \$210,201.00 in dispute.

78. Bank of America is entitled to an order establishing that its Deed of Trust is the senior lien encumbering the Property or, in the alternative, monetary damages equal to the value secured by its first Deed of Trust that was purportedly extinguished as a direct result of the HOA and NAS's bad-faith foreclosure.

79. Bank of America was required to retain an attorney to prosecute this action, and is therefore entitled to collect its reasonable attorneys' fees and costs.

SEVENTH CAUSE OF ACTION

(Wrongful Foreclosure Against the HOA and NAS)

80. Bank of America repeats and re-alleges the preceding paragraphs as though fully set forth herein and incorporates the same by reference.

81. Prior to the HOA's foreclosure sale, Bank of America paid the super-priority amount of the HOA's lien to NAS. NAS, acting on behalf of the HOA, rejected Bank of America's tender.

1 82. Bank of America's tender extinguished the super-priority portion of the HOA's lien.
2 Consequently, the HOA and NAS's foreclosure of the super-priority portion of its lien was wrongful,
3 as the Borrowers were not in default for that portion of the lien after Bank of America tendered the
4 super-priority amount.

5 83. The HOA and NAS's foreclosure sale was wrongful because the HOA and NAS sold
6 the HOA's interest in the Property for a grossly inadequate and commercially unreasonable price.

7 84. The HOA and NAS's wrongful foreclosure has put the first priority position of Bank
8 of America's first Deed of Trust with an original amount of \$210,201.00 in dispute.

9 85. Bank of America is entitled to an order establishing that its Deed of Trust is the senior
10 lien encumbering the Property or, in the alternative, monetary damages equal to the value secured by
11 its first Deed of Trust that was purportedly extinguished as a direct result of the HOA and NAS's
12 wrongful foreclosure.

13 86. Bank of America was required to retain an attorney to prosecute this action, and is
14 therefore entitled to collect its reasonable attorneys' fees and costs.

15 **PRAYER FOR RELIEF**

16 WHEREFORE, Defendant Bank of America prays for the following:

17 1. An order establishing Bank of America's Deed of Trust is the senior lien
18 encumbering the property;

19 2. An order establishing that the super-priority portion of the HOA's lien is eliminated
20 as a result of Bank of America's payment of the full super-priority amount;

21 3. Judgment in Bank of America's favor against the HOA for the damages it caused
22 Bank of America in excess of \$10,000;

23 4. Judgment in Bank of America's favor against NAS for the damages it caused Bank of
24 America in excess of \$10,000;

25 5. Reasonable attorneys' fees as special damages and the costs of the suit; and

26 ///

27 ///

28 ///

1 6. For such other and further relief the Court deems proper.

2
3 DATED January 9, 2016.

4 /s/ Jesse A. Ransom

5 DARREN T. BRENNER, ESQ.

6 Nevada Bar No. 8386

7 JESSE A. RANSOM, ESQ.

8 Nevada Bar No. 13565

9 Akerman LLP

10 1160 Town Center Drive, Suite 330

11 Las Vegas, Nevada 89144

12 *Attorneys for Defendant Bank of America, N.A.,*

13 *s/b/m to BAC Home Loans Servicing, LP*

14 *f/k/a Countrywide Home Loans Servicing LP*

AKERMAN LLP

1160 TOWN CENTER DRIVE, SUITE 330
LAS VEGAS, NEVADA 89144
TEL.: (702) 634-5000 – FAX: (702) 380-8572

CERTIFICATE OF SERVICE

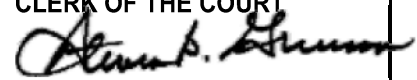
I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on this 21st day of September, 2017 I caused to be served a true and correct copy of foregoing **BANK OF AMERICA, N.A., S/B/M TO BAC HOME LOANS SERVICING, LP F/K/A COUNTRYWIDE HOME LOANS SERVICING'S FIRST AMENDED ANSWER TO PLAINTIFF'S COMPLAINT, COUNTERCLAIM AGAINST PLAINTIFF, AND CROSSCLAIMS AGAINST SANDSTONE RECREATION ASSOCIATION, INC. AND NEVADA ASSOCIATION SERVICES, INC.** in the following manner:

(ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by the Court's facilities to those parties listed on the Court's Master Service List.

Connaghan/Newberry Law Firm		
	Contact	Email
	Kathleen Seckinger	kseckinger@cnlawlv.com
	Nura S. Khoury	nkhoury@cnlawlv.com
	Paul R. Connaghan, Esq.	pconnaghan@cnlawlv.com
	Richard Hopkins	hopkinslegalcounsel@gmail.com
	Tara D. Newberry, Esq.	tnewberry@cnlawlv.com

/s/ Michael Hannon

AN EMPLOYEE OF AKERMAN LLP



NOE
CLARK NEWBERRY LAW FIRM
Tara Clark Newberry, Esq. (SBN: 10696)
tnewberry@cnlawlv.com
7854 W. Sahara Ave.
Las Vegas, Nevada 89117
(702) 608-4232
Attorney for Valencia 9

**DISTRICT COURT
CLARK COUNTY, NEVADA**

VALENCIA MANAGEMENT LLC,)
SERIES 9, a Nevada Limited Liability)
Company,)

Plaintiff,)

vs.)

ROBERT STILLWAGON, an individual;)
LENY STILLWAGON, an individual; BAC)
HOME LOANS SERVICING, LP FKA)
COUNTRYWIDE HOME LOANS)
SERVICING LP; BANK OF AMERICA)
NA; DOES I through X; and ROE)
CORPORATIONS 1 through 10,)

Defendants.)

BANK OF AMERICA, N.A., S/B/M TO)
BAC HOME LOANS SERVICING, LP)
F/K/A COUNTRYWIDE HOME LOANS)
SERVICING LP)

Counter-Claimant,)

vs.)

VALENCIA MANAGEMENT LLC,)
SERIES 9, a Nevada Limited Liability)
Company,)

Counter-Defendant,)

BANK OF AMERICA, N.A., S/B/M TO)

CASE NO.: A-15-723600-C
DEPT. NO.: XXXII

**NOTICE OF ENTRY OF DEFAULT
JUDGMENT**

CLARK NEWBERRY LAW FIRM
7854 W. Sahara Avenue
Las Vegas, Nevada 89117
Telephone (702) 608-4232

1 BAC HOME LOANS SERVICING, LP)
2 F/K/A COUNTRYWIDE HOME LOANS)
3 SERVICING LP)
4 Cross-Claimant,)
5 v.)
6 SANDSTONE RECREATION)
7 ASSOCIATION, INC.; NEVADA)
8 ASSOCIATION SERVICES, INC.,)
9 Cross-Defendants.)
_____)

10 **NOTICE OF ENTRY OF DEFAULT JUDGMENT**

11 Please take notice that the attached DEFAULT JUDGMENT OF ROBERT STILLWAGON
12 AND LENY STILLWAGON was entered on July 25, 2017.

13 DATED this 25th day of July 2017.

14 CLARK NEWBERRY LAW FIRM

15
16
17 /s/ Tara Clark Newberry
18 TARA CLARK NEWBERRY, ESQ.
19 Nevada Bar No. 10696
20 7854 W. Sahara Avenue
21 Las Vegas, NV 89117
22 *Attorney for Valencia 9*
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of July 2017, I served, via the Court's electronic filing system, a true and correct copy of the foregoing **NOTICE OF ENTRY OF DEFAULT JUDGMENT**, to the following:

Akerman LLP

Contact

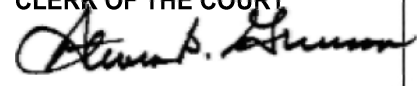
Akerman Las Vegas Office
Brienne Siriwan
Darren T. Brenner, Esq.
Jesse Ransom

Email

akermanlas@akerman.com
brienne.siriwan@akerman.com
darren.brenner@akerman.com
jesse.ransom@akerman.com

/s/ Kathleen Seckinger

Kathleen Seckinger, an Employee of
CLARK NEWBERRY LAW FIRM



DFLT
CLARK NEWBERRY LAW FIRM
Tara Clark Newberry, Esq. (SBN: 10696)
tnewberry@cnlawlv.com
7854 W. Sahara Ave.
Las Vegas, Nevada 89117
(702) 608-4232
Attorney for Valencia 9

**DISTRICT COURT
CLARK COUNTY, NEVADA**

VALENCIA MANAGEMENT LLC,
SERIES 9, a Nevada Limited Liability
Company,

Plaintiff,

vs.

ROBERT STILLWAGON, an individual;
LENY STILLWAGON, an individual; BAC
HOME LOANS SERVICING, LP FKA
COUNTRYWIDE HOME LOANS
SERVICING LP; BANK OF AMERICA
NA; DOES I through X; and ROE
CORPORATIONS 1 through 10,

Defendants.

BANK OF AMERICA, N.A., S/B/M TO
BAC HOME LOANS SERVICING, LP
F/K/A COUNTRYWIDE HOME LOANS
SERVICING LP

Counter-Claimant,

vs.

VALENCIA MANAGEMENT LLC,
SERIES 9, a Nevada Limited Liability
Company,

Counter-Defendant,

BANK OF AMERICA, N.A., S/B/M TO

CASE NO.: A-15-723600-C
DEPT. NO.: XXXII

DEFAULT JUDGMENT
(Robert Stillwagon and
Leny Stillwagon)

CLARK NEWBERRY LAW FIRM
7854 W. Sahara Ave.
Las Vegas, Nevada 89117
Telephone (702) 608-4232

JUN 14 2017

1 BAC HOME LOANS SERVICING, LP)
 2 F/K/A COUNTRYWIDE HOME LOANS)
 3 SERVICING LP)

4 Cross-Claimant,)

5 v.)

6 SANDSTONE RECREATION)
 7 ASSOCIATION, INC.; NEVADA)
 8 ASSOCIATION SERVICES, INC.,)

9 Cross-Defendants.)

10 **DEFAULT JUDGMENT (Robert Stillwagon and Leny Stillwagon)**

11 An Application having been duly made by Plaintiff for judgment against the Defendants,
 12 ROBERT STILLWAGON and LENY STILLWAGON (the "STILLWAGONS"), and the default of
 13 said Defendants having been entered for failure to answer or otherwise defend as to the Complaint of
 14 the Plaintiff, and it appearing that said Defendants are not in the military service of the United States
 15 nor infants or incompetent persons, and good cause appearing therefore, the Court orders that Default
 16 Judgment be entered as follows:

17 **IT IS ORDERED** that VALENCIA MANAGEMENT LLC, SERIES 9 ("VALENCIA #9") is
 18 the rightful owner of the Property commonly known as 2176 Hearts Club Drive, Henderson, Nevada 89074,
 19 whose Legal Description is as follows:

20 LOT FIFTEEN (15) IN BLOCK ONE (1) OF STRAWBERRY FIELDS, AS SHOWN
 21 BY THE MAP THEREOF ON FILE IN BOOK 56 OF PLATS, PAGE 90, IN THE
 22 OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA.

23 More Frequently Described as: Clark County Assessor's Parcel Number 178-18-716-015,
 24 having full title thereto and quieting title to the Property into the name of VALENCIA #9.

25 /////

26 /////

27 /////

28 /////

1 **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that Plaintiff is the rightful
2 holder of title to the Property and that Defendants, the STILLWAGONS, have no right, title or interest in the
3 Property, thereby confirming that VALENCIA #9 has clear and marketable title.

4 DATED this 5 day of July 2017.

6
7 IT IS SO ORDERED

8
9 

10 DISTRICT COURT JUDGE

11 ROB BARE
12 JUDGE, DISTRICT COURT, DEPARTMENT 32

13 Respectfully Submitted

14 CLARK NEWBERRY LAW FIRM

15 
16 TARA CLARK NEWBERRY, ESQ.

17 Nevada Bar No. 10696

18 7854 W. Sahara Ave.

19 Las Vegas, Nevada 89117

20 Attorneys for Valencia #9
21
22
23
24
25
26
27
28

ODM

ARIEL E. STERN, ESQ.
Nevada Bar No. 8276
NICHOLAS E. BELAY, ESQ.
Nevada Bar No. 15175
Akerman LLP
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89134
Telephone: (702) 634-5000
Facsimile: (702) 380-8572
Email: ariel.stern@akerman.com
Email: nicholas.belay@akerman.com

*Attorneys for Defendant Bank of America, N.A.,
S/B/M to BAC Home Loans Servicing, LP
fka Countrywide Home Loans Servicing, LP*

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

VALENCIA MANAGEMENT LLC, SERIES 9, a
Nevada Limited Liability Company,

Plaintiff,

vs.

ROBERT STILLWAGON, an individual; LENY
STILLWAGON, an individual; BAC HOME
LOANS SERVICING, LP FKA
COUNTRYWIDE HOME LOANS SERVICING
LP; BANK OF AMERICA NA; DOES 1 through
X; and ROE CORPORATIONS 1 through 10,

Defendants.

Case No.: A-15-723600-C

Dept. No: XXXII

**ORDER DENYING BANK OF
AMERICA, N.A.'S MOTION TO ALTER
OR AMEND FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

This matter came before Department XXII of the Eighth Judicial District Court, in and for Clark County, Nevada, on December 15, 2020, to hear argument regarding Bank of America, N.A.'s Motion to Alter or Amend Findings of Fact and Conclusions of Law ("Motion to Amend"), with JUDGE ROB BARE presiding.

TARA CLARK NEWBERRY, ESQ., of the CLARK NEWBERRY LAW FIRM appeared on behalf of VALENCIA MANAGEMENT, LLC, SERIES 9; NICHOLAS BELAY, ESQ., of the AKERMAN LLP law firm, appeared on behalf of BANK OF AMERICA, N.A.

///

///

FINDINGS OF FACT

PROCEDURAL HISTORY

1. Based on the briefs, evidence, and arguments presented to this Court on summary judgment, in April, May, and June of 2017, it determined that genuine issues of material fact made trial necessary.

2. BANA moved for reconsideration of this Court’s summary judgment decision, on June 27, 2019, based on *Bank of America, N.A., v. SFR Investments Pool 1, LLC*, 134 Nev.Adv. Op. 72, 427 P.3d 113 (2018) (“*Diamond Spur*”). That motion was denied on August 3, 2019.

3. This Court held a 2-day bench trial on December 4, 2019 and December 5, 2019.

4. On February 27, 2020, the Nevada Supreme Court issued *7510 Perla Del Mar Ave. Trust v. Bank of America, N.A.*, 458 P.3d 348 (Nev. 2020) (“*Perla Trust*”).

5. After preparation and review of the trial transcript, the parties exchanged drafts of the Findings of Fact, Conclusions of Law and Judgment (“FFCL”) – which was ultimately presented to this Court for signing.

6. The FFCL, and Notice of Entry of the FFCL, took place on October 13, 2020.

7. BANA filed a Motion to Alter or Amend Findings of Fact and Conclusions of Law on November 10, 2020.

OVERVIEW OF THE EVIDENCE PRESENTED AT TRIAL

8. Prior to the hearing on the Motion to Amend, this Court took the opportunity to review the trial transcript carefully.

9. As the finder of fact, this Court believed that Miles Bauer prepared the tender letter and check. (See Trial Transcript, Day 2, at 107.)

10. But, the evidence presented at trial did not support a finding that the tender letter and check were delivered to the HOA, the HOA management company, or the HOA Trustee. Arguments made by BANA, and further review of the trial transcript and evidence in this case, did not change the conclusion this Court reached immediately after trial.

11. This Court found “that in this situation the bank in its affirmative defense efforts has a letter and after that they have a mystery. And that’s why the plaintiffs win” (See Trial Transcript, Day 2, at 109-110.)

THE UN-REDACTED DOCUMENTS PRESENTED IN BANK OF AMERICA’S MOTION TO AMEND ARE NOT “NEWLY DISCOVERED EVIDENCE”

12. In its Motion to Amend, BANA claimed it “discovered” additional evidence of delivery of tender.

13. Redaction of the contents of the document admitted as an exhibit at trial concealed what BANA now contends is “newly discovered” evidence.

14. Miles Bauer provided the un-redacted document to BANA’s counsel many years ago; and this fact was established through evidence presented, and the admission of the Akerman law firm.

15. The content of the exhibit does not constitute “newly discovered evidence material for the party making the motion that the party could not, with reasonable diligence, have discovered and produced at the trial.” NRCP 59(a)(1)(D); *see also* NRCP 59(a)(2).

16. BANA could have produced the purportedly determinative evidence during discovery and at trial.

17. BANA claims that it discovered the “inadvertent” redaction after trial. (*See* Motion to Amend, at 8.)

18. When the attorneys at Akerman prepared the documents for the affidavit signed by Mr. Kendis and Mr. Miles, they had access to the un-redacted version of the delivery/acknowledgement sheet. (*See* Trial Transcript, Day 1, at 111; 208-209.)

19. The attorneys for BANA selected and prepared the documents for the Adam Kendis affidavit and the Douglas Miles affidavit – which they used in disclosure, discovery and dispositive motion work – and which this Court considered at trial. (*See* Trial Transcript, Day 1, at 111; 208-209.)

20. The Akerman attorneys also prepared their exhibits for use at trial.

21. During discovery, BANA could have corrected the “inadvertent” error – instead, counsel only disclosed the Strawberry Fields tender.

22. At some point in this litigation, BANA’s counsel reviewed the Legal Wings delivery sheet and should have recognized or “discovered” the purported \$495 entry on that document.

23. But it appears that BANA did not review the underlying, non-redacted evidence until after trial; the altered redaction is not “new” evidence.

///

EVIDENCE AT TRIAL DID NOT ESTABLISH AN “ORDINARY COURSE OF BUSINESS” OR THAT STANDARD PROCEDURES HAD BEEN FOLLOWED

24. In its Motion to Amend, BANA relies on the rebuttable presumption of NRS 47.250 as to Miles Bauer’s ordinary course of business.

25. BANA’s representative, Shawn Look, testified about the way BANA’s tender attempts were supposed to take place. (*See* Trial Transcript, Day 1, at 88-89.)

26. Yet, Mr. Miles and the BANA witness failed to show that funds were delivered to NAS or the HOA, or returned to BANA after the putative rejection.

27. This Court maintains that too many questions arose whether Miles Bauer followed the standard procedures it claimed were in place, and that “a lack of material pieces of evidence – that should have been available to the Bank” – were missing. (*See* FFCL, at 16).

BANK OF AMERICA DID NOT PRESENT EVIDENCE TO SUPPORT EXCUSING A VALID TENDER ATTEMPT UNDER THE FUTILITY DOCTRINE

28. A review of the documents and testimony presented at trial in this case do not show that BANA presented sufficient evidence to support its argument related to the doctrine of futility as set forth in *7510 Perla Del Mar Ave. Trust v. Bank of America, N.A.*, 136 Nev.Adv.Op. 6, 458 P.3d 348 (2020) (“*Perla Trust*”).

29. The testimony of Susan Moses proved inconclusive as to whether – *at the time* of the Sandstone notice and purported tender - NAS¹ had the blanket policy to reject tender offers.

30. Susan Moses could not identify when NAS started “rejecting” Miles Bauer’s offers with conditions. (*See* Trial Transcript, Day 1, at 26-27 (emphasis added).)

31. In this case, BANA did not elicit evidence of the NAS practices or policies in place in December of 2011.

///

///

¹ NAS had “evolving” practices and policies. *Perla Trust*, 458 P.3d at 349.

32. Thus, from the evidence presented it was not apparent when NAS adopted a policy or procedure to reject tender offers – or whether such a policy existed in December of 2011.²

33. The evidence BANA presented at trial, and the references in its Motion to Amend, was not the same or as extensive as the evidence presented by the bank in *Perla Trust*.

34. As in *Poshbaby LLC v. Elsinore III, LLC*, 73700 (July 1, 2020) (unpublished deposition), BANA presented no evidence that it “chose not to make a superpriority tender because it was aware that the HOA’s agent might have rejected that payment.”

THE TESTIMONY OF DOUG MILES WAS NOT CREDIBLE

35. Additionally, this Court found the testimony of Mr. Miles to be unreliable. (*See* Trial Transcript, Day 2, at 103-104.)

36. The fact that he was paid to be a fact witness “weighed against his credibility . . . [and] the full force and effect of his testimony” – it suggested bias and was not credible. *Id.*

37. Similarly, Mr. Miles was impeached in other portions of his testimony.

38. Therefore, nothing in the Motion to Amend changes this Court’s decision about Mr. Miles credibility and testimony.

CONCLUSIONS OF LAW

STANDARDS FOR ALTERING OR AMENDING A JUDGMENT

1. The purpose and function of Rule 59(e) is limited.

2. A “decision to grant or deny a motion [to alter or amend] rests within the sound discretion of the trial court . . .” *Southern Pac Transp. Co. v. Fitzgerald*, 94 Nev. 241, 244, 577 P.2d 1234, 1236 (1978).

3. Reconsideration of prior orders “is extraordinary in nature and . . . motions invoking [the] rule should be granted sparingly.” *Lal v. California*, 610 F.3d 518, 524 (9th Cir. 2010) (citing *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993)); *Gonzalez-Pina v. Rodriguez*, 407 F.3d 425 (1st Cir. 2005).

///

² Nor is it clear what the basis for rejecting tender offers might have been; i.e., whether they were conditional or simply not of a sufficient amount.

1 4. The grounds for altering or amending a judgment are to: (i) correct manifest errors or law or
2 fact, (ii) if previously unavailable or newly discovered evidence arises, (iii) to prevent manifest injustice,
3 or (iv) if a change in controlling law has occurred. *AA Primo Builders, LLC v. Washington*, 126 Nev.
4 578, 582, 245 P.3d 1190, 1193 (2010).

5 **BANK OF AMERICA DID NOT MEET ITS BURDEN TO PROVE THE AFFIRMATIVE DEFENSE OF**
6 **TENDER AT TRIAL**

7 5. BANA had the burden to present evidence to support its affirmative defense of tender – by a
8 preponderance of the evidence. *Resources Group, LLC v. Nev. Ass’n Servs., Inc.*, 135 Nev. 48, 52, 437
9 P.3d 154, 158 (2019) (“payment of a debt is an affirmative defense, which the party asserting has the
10 burden of proving”); *Schwartz v. Schwartz*, 95 Nev. 202, 206 n.2, 591 P.2d 1137, 1140 n.2 (1979).

11 6. This Court made the determination that BANA did not carry its burden to present a
12 preponderance of evidence on the issue of delivery of a tender, and that critical testimony was not
13 credible or was the result of bias – and it stands by that decision. (*See* FFCL, generally.)

14 7. There were no irregularities in the trial, no misconduct of Valencia #9, no accident or surprise,
15 and no error in law that was preserved by BANA at a trial. *See* NRCP Rule 59(a)(1-7).

16 8. This case was decided upon the evidence presented at trial – and it is bound by the evidence
17 presented at trial.

18 9. Based on the evidence presented to it, this Court did not err in reaching the conclusion that no
19 delivery of a tender for the super-priority portion of the Sandstone HOA lien took place.

20 10. This Court properly determined that the evidence presented by BANA did not establish that
21 Miles Bauer delivered its offer of tender.

22 11. This Court based its decision on the evidence presented, the evidence lacking, and the testimony
23 of Mr. Miles (versus that of Ms. Moses).³

24 12. Contrary to BANA’s arguments in its Motion to Amend, the evidence presented was not
25 conclusive, and it showed BANA did not have adequate proof of delivery.

26 _____

27
28 ³ BANA “got up to about 40 percent on the burden that they have to show tender, but they didn’t make a preponderance . .
.” (*See* Trial Transcript, Day 2, at 95-96.)

1 **THE EVIDENCE BANK OF AMERICA PRESENTS IN ITS MOTION WAS NOT “NEWLY**
2 **DISCOVERED”**

3 13. BANA claims the “inadvertent disclosure was a mistake that could not have been avoided in the
4 exercise of due diligence.” (*See* Motion to Amend, at 8.)

5 14. This Court does not agree – the “redaction error” could have been avoided, and is not “newly
6 discovered evidence” as contemplated by Rule 59. *Watlis*, 26 F.3d at 892 n.6.

7 15. BANA’s counsel could have attempted to rectify its failure to timely disclose the document in
8 question through disclosure, during discovery, or at trial.⁴

9 16. BANA’s claimed redaction “error” does not provide an adequate excuse allowing the belated
10 disclosure and use of the document in question.

11 17. In sum, BANA and counsel did not make a timely effort to clarify the issue – which is a
12 requirement of Rule 59: “evidence . . . the party could not, with reasonable diligence, have discovered
13 and produced at the trial.” (Emphasis added.)

14 **BANK OF AMERICA HAS NOT SHOWN THIS COURT’S DECISION PRESENTS A “MANIFEST**
15 **INJUSTICE”**

16 18. BANA also argues that this Court must find in favor of the survival of the first deed of trust to
17 “prevent manifest injustice.” (*See* Motion to Amend, at 9.)

18 19. It claims that the evidence it purportedly had, but failed to provide, would not have materially
19 changed the parties’ strategy or course of trial. *Id.*

20 20. Since BANA had access to the putative evidence on the issue of tender delivery, BANA should
21 have presented that evidence in discovery, in its pre-trial disclosures, and then at trial for consideration
22 by the finder of fact.

23 **SANCTIONS UNDER NEVADA RULE OF CIVIL PROCEDURE 37 SHOULD APPLY IN THIS**
24 **INSTANCE**

25 21. As noted above, the unredacted information does not constitute “newly discovered evidence.”
26 (*See* Findings of Fact, *supra.*)

27 ⁴ As explained in the Conclusions of Law below, counsel would have had to convince this Court that it should not be subject
28 to the sanctions of NRCP 37. The facts do not show that this Court should excuse BANA from the preclusion of evidence
that it failed to produce in disclosure or discovery.

22. “Evidence is not newly discovered if it was in the party’s possession at the time of summary judgment [or trial] or could have been discovered with reasonable diligence. *Watlis v. J.R. Simplot Co.*, 26 F.3d 885, 892 n.6 (9th Cir. 1994).

23. Therefore, pursuant to NRCP 37, this Court must bar the use of the un-redacted Legal Wings delivery sheet. Specifically, NRCP 37 (c)(1) precludes the use of evidence not disclosed or provided in discovery.⁵

24. Sanctions for discovery violations under NRCP 37 contemplate preclusion of evidence – even evidence that might be case determinative. “Rule 37(c)(1) gives teeth to these requirements by forbidding the use at trial of any information required to be disclosed by Rule 26(a) that is not properly disclosed . . . even when a litigant’s entire cause of action or defense has been precluded . . .” *Yeti by Molly, Ltd. V. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001) (applying the federal counterpart of NRCP 37) (internal quotations omitted).

25. A party is required to disclose, without awaiting a discovery request, information that the party may use to support its defenses, including a copy of all documents it may use to support its claims or defenses. NRCP 26(a)(1)(A).

26. In addition to the obligation for initial disclosure, Rule 26(e) “imposes a broad requirement on parties to update their earlier disclosures and discovery responses.” *See, e.g., Klonoski v. Mahlab*, 156 F.3d 255, 268 (1st Cir. 1998).

27. Excluding evidence as a sanction is “automatic and mandatory” unless BANA can show the violation was either justified or harmless. *See* NRCP 37(c)(1); *Hoffman v. Construction Protective Services, Inc.*, 541 F.3d 1175, 1179 (9th Cir. 2008) (applying the federal counterpart of NRCP 37).

28. The exception to “ameliorate the harshness of Rule 37(c)(1),” and allow the introduction of non-disclosed evidence, may arise if a party’s “failure to disclose the required information is substantially justified . . .” or harmless. *Self-Insurance Institute of America, Inc. v. Software and Information Industry Ass’n*, 208 F.Supp.2d 1058, 1066 (C.D.Cal.2000).

⁵ “A party’s production of documents that is not in compliance with Rule 34(b)(2)(E)(i) may also be treated as a failure to produce documents.” NRCP 37(a)(4).

1 29. The burden of showing substantial justification or harmlessness rests squarely on the offending
2 party. *Goodman v. Staples the Office Superstore, LLC*, 644 F.3d 817, 827 (9th Cir. 2011); *see also See*
3 *Yeti by Molly*, 259 F.3d at 1107.

4 30. BANA has not satisfied this Court that BANA and its counsel were justified in not discovering
5 the information in the redacted portion of the document in question. BANA's counsel had full access
6 to the unredacted version of the Legal Wings delivery sheet for several years.

7 31. This Court concludes that allowing BANA to use the now un-redacted document would be an
8 unfair surprise. *Cambridge Electronics Corp. v. MGA Electronics, Inc.*, 227 F.R.D. 313, 325 (C.D.Cal.
9 2004); *see also Orjias v. Stevenson*, 31 F.3d 995, 1005 (10th Cir. 1994) (inaccurate interrogatory
10 response warranted exclusion of testimony).

11 32. A showing of prejudice or unfair surprise due to an opponent's failure to disclose information
12 pursuant to NRCP 26(e)(1) justifies barring its use. *See Pfingston v. Ronan Engineering Co.*, 284 F.3d
13 999, 1005 (9th Cir. 2002).

14 33. "Disruption to the schedule of the court and other parties . . . is not harmless." *Wong v. Regents*
15 *of Univ. of California*, 410 F.3d 1052, 1062 (9th Cir. 2005).

16 34. The sanctions in Rule 37 were intended to provide a "strong inducement for disclosure of
17 material that the disclosing party would expect to use as evidence . . ." Fed.R.Civ.P. 37(c), Advisory
18 Committee Notes to 1993 Amendments.

19 35. BANA failed to provide the relevant information as required by the disclosure and discovery
20 rules, therefore it is not allowed to use that information or witness to supply evidence on a motion, at a
21 hearing, or at a trial [or post-trial]. The failure was not substantially justified nor was it harmless.

22 **THE DOCTRINE OF FUTILITY DOES NOT APPLY IN THIS CASE**

23 36. This Court has considered the holding in *7510 Perla Del Mar Ave. Trust v. Bank of America,*
24 *N.A.*, 458 P.3d 348 (Nev. 2020); and concludes the evidence presented by BANA at trial is insufficient
25 to support its theory of "futility."

26 37. Contrary to BANA's claim, this case was not "virtually identical" to *Perla Trust* – in terms of
27 facts or evidence. The evidence presented and arguments made in *Perla Trust* and in the trial of this
28 case were different.

1 38. Timing as to when the foreclosure notices were sent, and knowledge of Miles Bauer and the
2 Bank were critical components in the *Perla Trust* case. 458 P.3d at 351.

3 39. Here, this Court cannot apply the futility doctrine due to the lack of substantial evidence that
4 would support a finding that NAS would have summarily rejected a tender attempt as to the Hearts Club
5 property.

6 40. “[S]ubstantial . . . clearly implies that such evidence must be of ponderable legal significance . .
7 . It must be reasonable . . . credible, and of solid value . . .” *Villafuerte v. Inter-Con Security Systems,*
8 *Inc.*, 117 Cal.Rptr.2d 916, 96 Cal.App.4th Supp. 45, 50 (2002) (quoting *Kuhn v. Department of General*
9 *Services*, 29 Cal.Rptr.2d 191 (1994); and *Howard v. Owens Corning*, 85 Cal.Rptr.2d 386 (1999)
10 (internal quotation marks omitted)).

11 41. No evidence of the kind presented in *Perla Trust* exists in this case.

12 42. This Court finds the footnote referencing the futility doctrine in *Poshbaby LLC v. Elsinore III,*
13 *LLC*, 73700 (July 1, 2020) (unpublished disposition), persuasive. Specifically, as in *Poshbaby*, BANA
14 presented no evidence that it “chose not to make a superpriority tender because it was aware that the
15 HOA’s agent might have rejected that payment.”

16 CONCLUSION

17 1. BANA failed to present sufficient evidence concerning the delivery and receipt of the letter and
18 check from Miles Bauer to NAS or Sandstone.

19 2. BANA’s Motion to Amend does not change the fact that “[t]oo many questions arose whether
20 Miles Bauer followed the standard procedures that it claimed were in place” and that “a lack of material
21 pieces of evidence – that should have been available to the Bank – were missing.” (*See* FFCL, at 16
22 (emphasis added).)

23 3. The Miles Bauer business records and testimony did not definitely establish a consistent course
24 of business – much less delivery of a tender.

25 4. BANA had possession of the unredacted documents since at least February of 2015, when Mr.
26 Kendis signed his affidavit.

27 5. The testimony of Mr. Miles and Ms. Moses failed to show knowledge and reliance to prove that
28 in December of 2011 a valid tender would have been futile.

6. BANA also did not present sufficient evidence at trial to support a futility argument – thus, this Court lacked the basis to find a valid tender would have been futile.

7. Because BANA failed to establish delivery of a tender offer, and it did not cogently present sufficient evidence at trial that a tender attempt would have been futile, the HOA lien foreclosure sale extinguished all junior liens, including the first deed of trust.

8. This Court will not alter or amend its findings of fact and conclusions of law.

ORDER

Bank of America, N.A.’s Motion to Alter or Amend Findings of Fact and Conclusions of Law is **DENIED**

Dated this 18th day of January, 2021



AA8 744 14A6 16E3
David M Jones
District Court Judge

Respectfully Submitted by:

AKERMAN LLP

/s/ Nicholas E. Belay

ARIEL E. STERN, ESQ.
Nevada Bar No. 8276
NICHOLAS E. BELAY, ESQ.
Nevada Bar No. 15175
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89134

*Attorneys for Defendant Bank of America, N.A.,
S/B/M to BAC Home Loans Servicing, LP
fka Countrywide Home Loans Servicing, LP*

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Valencia Management LLC
Series 9, Plaintiff(s)

CASE NO: A-15-723600-C

7 vs.

DEPT. NO. Department 29

8
9 Robert Stillwagon, Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Findings of Fact, Conclusions of Law and Judgment was served via the
14 court's electronic eFile system to all recipients registered for e-Service on the above entitled
case as listed below:

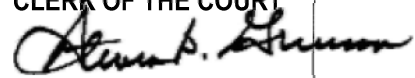
15 Service Date: 1/18/2021

16 "Tara D. Newberry, Esq." .	tnewberry@cnlawlv.com
17 Akerman Las Vegas Office .	akermanlas@akerman.com
18 Brienne Siriwan .	brienne.siriwan@akerman.com
19 Kathleen Seckinger .	kseckinger@cnlawlv.com
20 Nura S. Khoury .	nkhoury@cnlawlv.com
21 Richard Hopkins .	hopkinslegalcounsel@gmail.com
22 Susana Nutt	snutt@lipsonneilson.com
23 Brenda Correa	bcorrea@lipsonneilson.com
24 Renee Rittenhouse	rrittenhouse@lipsonneilson.com
25 Amber Williams	awilliams@lipsonneilson.com

26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Ariel Stern	ariel.stern@akerman.com
Melanie Morgan	melanie.morgan@akerman.com
Elizabeth Streible	elizabeth.streible@akerman.com
Aimee Clark Newberry	aclarknewberry@cnlawlv.com
Nicholas Belay	nicholas.belay@akerman.com



SAO

LIPSON NEILSON P.C.
J. WILLIAM EBERT, ESQ.
Nevada Bar No. 2697
AMBER M. WILLIAMS, ESQ.
Nevada Bar No. 12301
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
(702) 382-1500 - Telephone
(702) 382-1512 - Facsimile
bebert@lipsonneilson.com
awilliams@lipsonneilson.com

*Attorneys for Defendant
Sandstone Recreation Association, Inc.*

DISTRICT COURT

CLARK COUNTY, NEVADA

VALENCIA MANAGEMENT, LLC, SERIES 9,
a Nevada Limited Liability Company,

Plaintiff,

vs.

ROBERT STILLWAGON, an individual; LENY
STILLWAGON, an individual; BAC HOME
LOANS SERVICING, LP FKA
COUNTRYWIDE HOME LOANS
SERVICING, LP; BANK OF AMERICA NA;
DOES 1 through X; and ROE
CORPORATIONS 1 through 10,

Defendants.

BANK OF AMERICA, N.A., S/B/M TO BAC
HOME LOANS SERVICING, LP FKA
COUNTRYWIDE HOME LOANS
SERVICING, LP,

Cross-Claimants,

vs.

SANDSTONE RECREATION ASSOCIATION,
INC.; and NEVADA ASSOCIATION
SERVICES, INC.,

Cross-Defendants.

CASE NO.: A-15-723600-C

DEPT. NO.: XXXII

**STIPULATION AND ORDER TO
DISMISS CROSS-CLAIMS AGAINST
SANDSTONE RECREATION
ASSOCIATION, INC. WITH
PREJUDICE**

Lipson Neilson P.C.
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
(702) 382-1500 FAX: (702) 382-1512

JUL 30 2018

Lipson Neilson P.C.
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
(702) 382-1500 FAX: (702) 382-1512

Valencia Management LLC, Series 9 v. Robert Stillwagon, et al.
Case No. A-15-723600

Cross-Claimant BANK OF AMERICA, N.A., S/B/M TO BAC HOME LOANS
SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP ("BANA") and
Cross-Defendant SANDSTONE RECREATION ASSOCIATION, INC. ("HOA"), by and
through their counsel of record hereby stipulate as follows:

1. That BANA's cross-claims against the HOA are dismissed with prejudice.
2. That BANA and the HOA shall bear their own attorneys' fees and costs
associated with this action.

DATED July 27, 2018.

LIPSON NEILSON P.C.

J. WILLIAM EBERT, ESQ.
NV BAR No. 2697
AMBER M. WILLIAMS, ESQ.
NV BAR No. 12301
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144

*Attorneys for Cross-Defendant
Sandstone Recreation Association*

DATED July 27, 2018.

AKERMAN LLP

DARREN T. BRENNER, ESQ.
NEVADA BAR No. 8386
REBEKKAH BODOFF, ESQ.
NEVADA BAR No. 12703
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89134

*Attorneys for Cross-Claimant
Bank of America, N.A. S/B/M to BAC Home
Loans Servicing, LP F/K/A Countrywide
Home Loans Servicing, LP*

ORDER

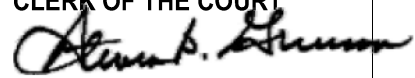
IT IS HEREBY ORDERED that Cross-Claimant BANK OF AMERICA, N.A., S/B/M
TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS
SERVICING, LP's Cross-Claims against Cross-Defendant SANDSTONE RECREATION
ASSOCIATION, INC. are dismissed with prejudice, each party to the above stipulation to
bear its own attorneys' fees and costs.

DATED: August 2, 2018

DISTRICT COURT JUDGE
ROB BARE
JUDGE, DISTRICT COURT, DEPARTMENT 32

Lipson Neilson P.C.
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
(702) 382-1500 FAX: (702) 382-1512

Electronically Filed
8/16/2018 1:48 PM
Steven D. Grierson
CLERK OF THE COURT



LIPSON NEILSON P.C.
J. WILLIAM EBERT, ESQ.
Nevada Bar No. 2697
AMBER M. WILLIAMS, ESQ.
Nevada Bar No. 12301
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
(702) 382-1500 - Telephone
(702) 382-1512 - Facsimile
bebert@lipsonneilson.com
awilliams@lipsonneilson.com

*Attorneys for Defendant
Sandstone Recreation Association, Inc.*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

VALENCIA MANAGEMENT, LLC, SERIES 9,
a Nevada Limited Liability Company,

Plaintiff,

vs.

ROBERT STILLWAGON, an individual; LENY
STILLWAGON, an individual; BAC HOME
LOANS SERVICING, LP FKA
COUNTRYWIDE HOME LOANS
SERVICING, LP; BANK OF AMERICA NA;
DOES 1 through X; and ROE
CORPORATIONS 1 through 10,

Defendants.

BANK OF AMERICA, N.A., S/B/M TO BAC
HOME LOANS SERVICING, LP FKA
COUNTRYWIDE HOME LOANS
SERVICING, LP,

Cross-Claimants,

vs.

SANDSTONE RECREATION ASSOCIATION,
INC.; and NEVADA ASSOCIATION
SERVICES, INC.,

Cross-Defendants.

CASE NO.: A-15-723600-C

DEPT. NO.: XXXII

**NOTICE OF ENTRY OF
STIPULATION AND ORDER TO
DISMISS CROSS-CLAIMS AGAINST
SANDSTONE RECREATION
ASSOCIATION, INC. WITH
PREJUDICE**

**NOTICE OF ENTRY OF STIPULATION AND ORDER TO DISMISS CROSS-CLAIMS
AGAINST SANDSTONE RECREATION ASSOCIATION, INC. WITH PREJUDICE**

TO: ALL PARTIES; and

TO: THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on the 6th day of August, 2018, a Stipulation and Order to Dismiss Cross-Claims Against Sandstone Recreation Association, Inc. with Prejudice, was entered in the above-captioned matter.

A copy of said Order is attached hereto and made part hereof.

DATED this 16th day of August, 2018.

LIPSON NEILSON P.C.

/s/ Amber M. Williams

By: _____
J. WILLIAM EBERT, ESQ. (NV BAR NO. 2697)
AMBER M. WILLIAMS, ESQ. (NV BAR NO. 12301)
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144

*Attorneys for Cross-Defendant
Sandstone Recreation Association*

CERTIFICATE OF SERVICE

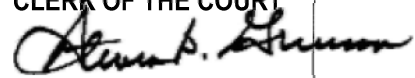
Pursuant to NRCP 5(b) and Administrative Order 14-2, I hereby certify that on the 16th day of August, 2018, I electronically transmitted the foregoing **NOTICE OF ENTRY OF STIPULATION AND ORDER TO DISMISS CROSS-CLAIMS AGAINST SANDSTONE RECREATION ASSOCIATION, INC. WITH PREJUDICE** to the Clerk's Office using the Odyssey eFileNV & Serve System for filing and transmittal to the following Odyssey eFileNV & Serve registrants:

Darren T. Brenner, Esq.
Rebekkah A. Bodoff, Esq.
AKERMAN LLP
1635 Village Center Circle, Suite 200
Las Vegas, NV 89134
darren.brenner@akerman.com
rebekkah.bodoff@akerman.com
Attorneys for Bank of America, N.A.

Tara Clark Newberry, Esq.
CLARK NEWBERRY LAW FIRM
810 S. Durango Drive, Suite 102
Las Vegas, NV 89119
tnewberry@cnlaw.com
Attorneys for Valencia Management, LLC

/s/ Brenda Correa

Employee of
LIPSON NEILSON P.C.



SAO

LIPSON NEILSON P.C.
J. WILLIAM EBERT, ESQ.
Nevada Bar No. 2697
AMBER M. WILLIAMS, ESQ.
Nevada Bar No. 12301
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
(702) 382-1500 - Telephone
(702) 382-1512 - Facsimile
bebert@lipsonneilson.com
awilliams@lipsonneilson.com

*Attorneys for Defendant
Sandstone Recreation Association, Inc.*

DISTRICT COURT

CLARK COUNTY, NEVADA

VALENCIA MANAGEMENT, LLC, SERIES 9,
a Nevada Limited Liability Company,

Plaintiff,

vs.

ROBERT STILLWAGON, an individual; LENY
STILLWAGON, an individual; BAC HOME
LOANS SERVICING, LP FKA
COUNTRYWIDE HOME LOANS
SERVICING, LP; BANK OF AMERICA NA;
DOES 1 through X; and ROE
CORPORATIONS 1 through 10,

Defendants.

BANK OF AMERICA, N.A., S/B/M TO BAC
HOME LOANS SERVICING, LP FKA
COUNTRYWIDE HOME LOANS
SERVICING, LP,

Cross-Claimants,

vs.

SANDSTONE RECREATION ASSOCIATION,
INC.; and NEVADA ASSOCIATION
SERVICES, INC.,

Cross-Defendants.

CASE NO.: A-15-723600-C

DEPT. NO.: XXXII

**STIPULATION AND ORDER TO
DISMISS CROSS-CLAIMS AGAINST
SANDSTONE RECREATION
ASSOCIATION, INC. WITH
PREJUDICE**

Lipson Neilson P.C.
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
(702) 382-1500 FAX: (702) 382-1512

JUL 30 2018

Lipson Neilson P.C.
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
(702) 382-1500 FAX: (702) 382-1512

Valencia Management LLC, Series 9 v. Robert Stillwagon, et al.
Case No. A-15-723600

Cross-Claimant BANK OF AMERICA, N.A., S/B/M TO BAC HOME LOANS
SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP ("BANA") and
Cross-Defendant SANDSTONE RECREATION ASSOCIATION, INC. ("HOA"), by and
through their counsel of record hereby stipulate as follows:

1. That BANA's cross-claims against the HOA are dismissed with prejudice.
2. That BANA and the HOA shall bear their own attorneys' fees and costs
associated with this action.

DATED July 27, 2018.

LIPSON NEILSON P.C.

J. WILLIAM EBERT, ESQ.
NV BAR No. 2697
AMBER M. WILLIAMS, ESQ.
NV BAR No. 12301
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144

*Attorneys for Cross-Defendant
Sandstone Recreation Association*

DATED July 27, 2018.

AKERMAN LLP

DARREN T. BRENNER, ESQ.
NEVADA BAR No. 8386
REBEKKAH BODOFF, ESQ.
NEVADA BAR No. 12703
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89134

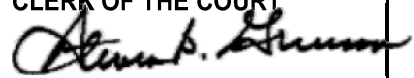
*Attorneys for Cross-Claimant
Bank of America, N.A. S/B/M to BAC Home
Loans Servicing, LP F/K/A Countrywide
Home Loans Servicing, LP*

ORDER

IT IS HEREBY ORDERED that Cross-Claimant BANK OF AMERICA, N.A., S/B/M
TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS
SERVICING, LP's Cross-Claims against Cross-Defendant SANDSTONE RECREATION
ASSOCIATION, INC. are dismissed with prejudice, each party to the above stipulation to
bear its own attorneys' fees and costs.

DATED: August 2, 2018

DISTRICT COURT JUDGE
ROB BARE
JUDGE, DISTRICT COURT, DEPARTMENT 32



FFCL
CLARK NEWBERRY LAW FIRM
Tara Clark Newberry, Esq. (SBN: 10696)
tnewberry@cnlawlv.com
810 S. Durango Drive, Suite 102
Las Vegas, Nevada 89145
(702) 608-4232
Attorney for Valencia #9

**DISTRICT COURT
CLARK COUNTY, NEVADA**

VALENCIA MANAGEMENT LLC,
SERIES 9, a Nevada Limited Liability
Company,

Plaintiff,

vs.

ROBERT STILLWAGON, an individual;
LENY STILLWAGON, an individual; BAC
HOME LOANS SERVICING, LP FKA
COUNTRYWIDE HOME LOANS
SERVICING LP; BANK OF AMERICA
NA; DOES I through X; and ROE
CORPORATIONS 1 through 10,

Defendants.

BANK OF AMERICA, N.A., S/B/M TO
BAC HOME LOANS SERVICING, LP
F/K/A COUNTRYWIDE HOME LOANS
SERVICING LP

Counter-Claimant,

vs.

VALENCIA MANAGEMENT LLC,
SERIES 9, a Nevada Limited Liability
Company,

Counter-Defendant,

BANK OF AMERICA, N.A., S/B/M TO

CASE NO.: A-15-723600-C
DEPT. NO.: XXXII

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

BAC HOME LOANS SERVICING, LP)
F/K/A COUNTRYWIDE HOME LOANS)
SERVICING LP)
Cross-Claimant,)
v.)
SANDSTONE RECREATION)
ASSOCIATION, INC.; NEVADA)
ASSOCIATION SERVICES, INC.,)
Cross-Defendants.)
_____)

This matter came before Department XXII of the Eighth Judicial District Court, in and for Clark County, Nevada, on December 4 and December 5, 2019, for a bench trial to resolve issues of title to real estate in a matter based on a HOA lien foreclosure, with JUDGE ROB BARE presiding.

VALENCIA MANAGEMENT LLC SERIES 9 appeared by and through its attorney, TARA CLARK NEWBERRY, ESQ.; of the CLARK NEWBERRY LAW FIRM; and Defendant, BANK OF AMERICA, N.A., appeared by and through its attorney REX GARNER, ESQ. of the AKERMAN LLP law firm.

Stipulated Facts of the Case

1. On or about March 4, 2008, Robert and Leny Stillwagon (the “Borrowers” or “Homeowners”) entered into a deed of trust with Neighbor’s Financial Corporation (the “Deed of Trust”) for the property located at 2176 Hearts Club Drive, Henderson, Nevada 89074 (the “Property”).

2. The Deed of Trust was recorded on March 14, 2008 with the Clark County Recorder as Instrument No. 20080314-0002767.

3. The Deed of Trust was assigned to BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing LP and the assignment as recorded with the Clark County Recorder on August

1 31, 2009 as Instrument No. 20090831-0001060. Bank of America, N.A. (the “Bank” or “BANA”) is
2 the successor by merger to BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing
3 LP.
4

5 4. The Property is located in a common interest community called Sandstone Recreations
6 Association, Inc. (“Sandstone”), which is governed by Declarations of Community Covenants and
7 Restrictions (aka “CC&Rs” or “Declarations”) recorded with the Clark County Recorder on March 30,
8 1993, in Book Number 930330, as Instrument No. 00841.

9 5. The Homeowners became delinquent on their assessments to Sandstone. On May 9,
10 2011, through Taylor Association Management, Inc., Sandstone recorded a Notice of Delinquent
11 Assessment Lien against the Property with the Clark County Recorder as Instrument No. 20110509-
12 0000507.
13

14 6. On September 8, 2011, Nevada Association Services, Inc. (“NAS”), as agent for
15 Sandstone, recorded a Notice of Default and Election to Sell Under Homeowners Association Lien
16 against the Property, Instrument No. 20110908-0001384.
17

18 7. On or about October 5, 2011, Bank of America, through counsel at Miles, Bauer,
19 Bergstrom & Winters, LLP (“Miles Bauer”), contacted NAS seeking a payoff ledger in relation to the
20 Sandstone’s lien.

21 8. On October 10, 2012, NAS, as agent for Sandstone, recorded a Notice of Foreclosure
22 Sale against the Property, Instrument No. 20121010-0001041. The notice stated the total amount due
23 was \$4,069.97 and set a sale for November 9, 2012.
24

25 9. On December 2, 2013, NAS, as agent for Sandstone, recorded a second Notice of
26 Foreclosure Sale against the Property as Instrument No. 20131202-0002018. The notice stated the
27 total amount due was \$5,738.28 and set a sale for January 3, 2014.
28

10. NAS auctioned the Property on behalf of Sandstone, and recorded a Foreclosure Deed on February 18, 2014, Instrument No. 20140218-0002844. The Foreclosure Deed stated NAS sold Sandstone's interest in the Property to Plaintiff for \$13,000.00 at the foreclosure sale held February 14, 2014.

11. BANA retained an appraiser, Matthew Lubawy, to render an opinion concerning value.

12. Mr. Lubawy's opinion of market value (as defined by the FDIC Interagency Appraisal and Evaluation Guidelines (December 2, 2010) Appendix D) of the Property is that it was worth \$185,000.00 at the time of the HOA sale.

Admitted Evidence

The following exhibits were admitted by stipulation on the first day of trial:

1	Covenants, Conditions, and Restrictions of Sandstone Community Recreation Area, Instrument No. 199303300000841 BANA000663-BANA000705
2	Grant, Bargain and Sale Deed, Instrument No. 200803140002766 BANA000081-BANA000085
3	Deed of Trust, Instrument No. 20080314-0002767 BANA000065-BANA000080
4	Assignment of Deed of Trust from MERS to BAC Home Loans Servicing LP f/k/a Countrywide Home Loans Servicing, LP, Instrument No. 2009083100001060 BANA000041
5	Notice of Delinquent Assessment Lien, Instrument No. 201105090000507 BANA000020-BANA000021
6	Notice of Substitution of Agent, Instrument No. 2011090800001383 BANA000018
7	Notice of Default and Election to Sell Under Homeowners Association Lien, Instrument No. 2011090800001384 BANA000016-BANA000017
8	Notice of Foreclosure Sale, Instrument No. 201210100001041 BANA000006-BANA000007
9	Notice of Foreclosure Sale, Instrument No. 201312020002018 BANA000001-BANA000002
10	Foreclosure Deed, Instrument No. 201402180002844

	BANA000181-BANA000183
11	Release of Delinquent Assessment Lien, Instrument No. 20140325000029 BANA000180
12	Notice of Pendency of Action, Instrument No. 201508260001157 BANA000169-BANA000171
13	Documents produced by NAS in response to subpoena BANA000247-BANA000604
27	Plaintiff's Rebuttal Expert Disclosure Pursuant to NRCP 16.1
28	BANA's Response to Plaintiff's Interrogatories, Requests for Production, and Requests for Admission
35	Notice of Federal Tax Lien, recorded on December 3, 2010, as Book and Instrument #20102030-0003492
36	ADR Property Services, Landscaping Invoices and Documents, PL00050, PL00061
37	NAS Auction Receipt PL00062
38-65	Miscellaneous Valencia #9 Expense Receipts and Notices PL00063-000629
66	Treasurer's Property Account Inquiry – Summary Screen PL000632-000633

The following exhibits were admitted into evidence during the course of trial:

14	Corrected Miles Bauer Tender Affidavits BANA000605-BANA000624
18	Sandstone Recreation Association, Inc.'s Disclosures (Property File) SRA000001-SRA000494

Witnesses Called to Testify

1. **Susan Moses**, Corporate Witness for Nevada Association Services, Inc. ("Ms. Moses")
Trial Transcript Day One: Pages 18-67
2. **Brandy White Elk**, Corporate Witness for Valencia #9 ("Ms. White Elk") Trial
Transcript Day One: Pages 67-85
3. **Angela Shawn Look**, Corporate Witness for Bank of America, N.A. ("Ms. Look") Trial
Transcript Day One: Pages 85-97
4. **Douglas Miles** ("Mr. Miles") Trial Transcript Day One: Pages 97-236

5. **Mireille Marois**, Corporate Witness for Taylor Management Association, Inc. (“Ms. Marois”) Trial Transcript Day Two: Pages 5-46

FINDINGS OF FACT

Background

1. The subject of this lawsuit is residential real property with the address of 2176 Hearts Club Drive, Henderson, Nevada 89074 (the “Property”). Robert and Leny Stillwagon (the “Borrowers” or “Homeowners”) previously owned the property. **Stipulated Facts ¶1; Trial Ex. 2.**

2. The Property is part of the Sandstone Recreation Association, Inc. (“Sandstone”) common-interest community. As such, NRS Chapter 116 and the Declaration of Covenants, Conditions and Restrictions (“CC&Rs”), govern the Property. **Stipulated Facts ¶4; Trial Ex. 1.** Those CC&Rs include the requirement that homeowners or members of the association pay periodic assessments to benefit the common-interest community. Sandstone operates with a budget adopted pursuant to NRS 116.3115. *Id.*

3. The Property also is part of the Strawberry Fields Homeowners Association (“Strawberry Fields”) and Legacy Village Property Owners Association (“Legacy Village”) common-interest communities. **Testimony of Ms. Moses at p. 39; Testimony of Ms. Marois at p. 6.**

4. The CC&Rs for each of the associations required the Homeowners to pay the particular HOA periodic assessments. *Id.*

5. Neighbor’s Financial Corporation lent the Borrowers funds to purchase the Property, and took a First Deed of Trust. **Stipulated Facts ¶1; Trial Ex. 3.** That Deed of Trust was recorded March 14, 2008 with the Clark County Recorder as Instrument No. 20080314-0002767. **Stipulated Facts ¶2; Trial Ex. 3.**

6. The Deed of Trust was assigned to BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing LP, and the assignment was recorded with the Clark County Recorder on

1 August 31, 2009 as Instrument No. 20090831-0001060. Bank of America, N.A. (the “Bank” or
2 “BANA”) is the successor by merger to BAC Home Loans Servicing, LP fka Countrywide Home
3 Loans Servicing LP. **Stipulated Facts ¶3; Trial Ex. 4.**

4
5 7. The Borrowers failed to pay the monthly assessments to Sandstone. **Stipulated Facts**
6 **¶6; Trial Ex. 13, at BANA332, Testimony of Ms. Moses, at p. 20.** The Borrowers also failed to pay
7 the monthly assessments to the Strawberry Fields and Legacy Village. **Trial Ex. 13, at BANA325**
8 **and 382, Testimony of Ms. Moses, at pp. 37-39.**

9
10 8. Taylor Association Management, Inc. (the “Property Manager” or “Taylor
11 Management”) manages the association property for Sandstone. **Testimony of Ms. Marois, at p. 6.**

12
13 9. On May 9, 2011, the HOA, through Taylor Management recorded a Notice of
14 Delinquent Assessment Lien against the Property with the Clark County Recorder as Instrument No.
15 20110509-0000507. **Stipulated Facts ¶6; Trial Ex. 5; Testimony of Ms. Moses, at p. 20.**

16
17 10. Sandstone retained Nevada Association Services, Inc. (the “HOA Trustee” or “NAS”),
18 as its authorized agent for collection of, and if necessary foreclosure on, delinquent assessments.
19 **Testimony of Ms. Moses, at p. 20.**

20
21 11. The outstanding assessments, late charges and costs of collection and interest remain
22 unpaid. **Trial Ex. 13, at BANA556-558; Testimony of Ms. Moses, at pp. 26-28.** On September 8,
23 2011, NAS, as agent for the HOA, recorded a Notice of Default and Election to Sell Under
24 Homeowners Association Lien against the Property, Instrument No. 201109080001384. **Stipulated**
25 **Facts ¶7; Trial Ex. 7; Testimony of Ms. Moses, at p. 24.**

26
27 12. NAS mailed the NOD to the holders of recorded security interests encumbering the
28 Property. **Testimony of Ms. Moses, at pp. 51, 53, 56; Trial Ex. 13. BANA000475-485.**

The Miles Bauer Tender Attempt¹

13. After receiving the NOD, BANA hired Miles, Bauer, Bergstrom & Winters, LLP (“Miles Bauer”). **Testimony of Ms. Look, at pp. 88-89; Testimony of Mr. Miles, at p. 100-101.** Miles Bauer contacted NAS on or about October 5, 2011, seeking a payoff ledger in relation to the HOA’s lien. **Stipulated Facts ¶8; Testimony of Mr. Miles, at p. 170; Trial Ex. 14.**

14. Mr. Miles testified about the standard procedures used when BANA engaged Miles Bauer to attempt to protect a first deed of trust in an HOA lien foreclosure. **Testimony of Mr. Miles, at p. 99.** Mr. Miles said they followed their standard practice in this instance. **Testimony of Mr. Miles, at pp. 218-219.** This Court considered the testimony of Ms. Look concerning BANA following its ordinary course of business, as well. **Testimony of Ms. Look, at pp. 88-89.**

15. BANA argued that one must presume Miles Bauer followed its standard operating procedures. Any such presumption, if one exists, was overcome by stronger evidence that standard procedures were not followed. **See, e.g., Testimony of Mr. Miles, at pp. 177-183; 197-199; 201-202; 209-213.** This Court finds that BANA has not established by a preponderance of the evidence that Miles Bauer actually sent the second Miles Bauer letter and check in question to NAS.

16. A letter dated December 1, 2011, along with a copy of the check, provide the only evidence of a tender. **Trial Ex. 14, BANA000614-618.** Ostensibly, that letter on its face is an indication that Miles Bauer attempted to make a tender. The relevant question at hand is whether the letter and check were delivered.

17. In relevant part the letter to Nevada Association Services states: “Dear sir or madam, NAS is unwilling to provide our office with a payoff ledger.” The letter goes on to indicate the basis upon which Miles Bauer calculated the super-priority amount to be \$495. In the next to the last

¹ The parties disputed the applicable standard of proof in Nevada for establishing whether a tender occurred. *See* Conclusions of Law, ¶¶12-13.

1 paragraph the letter says, “Thus enclosed you will find a cashier’s check made out to Nevada
2 Association Services in the sum of \$495.” On the next page, one finds a copy of a \$495 check dated
3 November 28, 2011. *Id.*

4
5 18. The Court finds that the letter dated December 1, 2011, is authentic – it existed and the
6 check was attached to it at some point, but what happened with the letter thereafter is unclear. Mr.
7 Miles testified that there was no acknowledgment of receipt of the tender by NAS. **Testimony of Mr.**
8 **Miles, at p. 207.** The evidence offered to this Court by the Bank failed to show that Miles Bauer
9 delivered the letter and check to NAS.

10
11 19. Mr. Miles testified about the operations in the Henderson, Nevada office of Miles
12 Bauer; and in particular about deliveries of tender checks through the runner-service, Legal Wings.
13 Mr. Miles testified regarding the use of a box at the Henderson office for Legal Wings deliveries, and
14 the standard course of practice regarding the deliveries. *See, e.g., Testimony of Mr. Miles, at pp.*
15 **153-159; 177-180; 207-209.** He testified that the Henderson Legal Wings box was used for all 7,000
16 cases or so cases handled by Miles Bauer. **Testimony of Mr. Miles, at p. 201.**

17
18 20. From his testimony, however, this Court concludes that Mr. Miles did not really know
19 what was going on with Legal Wings deliveries at the Henderson office. *See, e.g., Testimony of Mr.*
20 **Miles, at pp. 153-156.** While Mr. Miles might have been generally aware of the standard operating
21 procedure in that office, this Court does not accept that Mr. Miles knew what was really happening on
22 a day-to-day basis.

23
24 21. Mr. Miles was in the Henderson office only twice a month. **Testimony of Mr. Miles,**
25 **at p. 153.** As a managing partner of the firm, in the office only twice a month, this Court believes Mr.
26 Miles would not have specific knowledge as to what was happening with the Legal Wings deliveries.
27 In fact, Mr. Miles was asked specifically if he had anything to do with the Legal Wings deliveries.
28

1 **Testimony of Mr. Miles, at pp. 155-157.** He seemed to take offense to that suggestion, implying that
2 deliveries were a runner's job, and not the job of the managing partner. *Id.*

3 1. Mr. Miles based his conclusions that the letter and check were delivered on a record
4 keeping system used by the Miles Bauer law firm ("ProLaw"). **Trial Ex. 14; Testimony of Mr.**
5 **Miles at pp. 106-107, 159, 162, 166, 197-199, 210, 232-234.** Mr. Miles testified that ProLaw is a
6 summary of events and potential activities – with reminders and automated entries. **Testimony of**
7 **Mr. Miles, at pp. 160-162, 197-199.** One would need to verify the entries by looking at the
8 underlying documents referenced in the system. *Id.*

9
10 22. Mr. Miles indicated that the ProLaw system was exceptionally accurate. **Testimony of**
11 **Mr. Miles, at p. 234-235.** This Court finds, however, that the evidence presented in trial established
12 that the ProLaw system is not exceptionally accurate; in fact, at times is not so accurate at all. *See,*
13 *e.g., Testimony of Mr. Miles, at pp. 162-201.* In some instances in this case, the ProLaw entries
14 contradicted the testimony of Mr. Miles. **Testimony of Mr. Miles, at pp. 169-171.**

15
16 23. Mr. Miles explained that the ProLaw system generates an automatic checkmark next to
17 an activity as a computer-generated reminder – and the checkmark does not indicate a human event of
18 activity. **Testimony of Mr. Miles, at pp. 145-146; 160-161.** The ProLaw printout shows the
19 reminder for December 2, 2011, to send a check to the HOA. **Trial Ex. 14, BANA000618.**

20
21 24. In contrast, in ProLaw an icon of a little pile of paper next to an activity means a human
22 being actually did something. **Testimony of Mr. Miles, at pp. 160-161.** The ProLaw printout shows
23 that on December 2, 2011, an email was sent from Rock Jung regarding payoff funds. **Trial Ex. 14,**
24 **BANA000618.**

25
26 25. Mr. Miles testified that one could verify the ProLaw entries by confirming the ProLaw
27 activity with a corresponding document in the file. **Testimony of Mr. Miles, at pp. 162, 167, 197,**
28

1 **199.** In this case, BANA could not produce the email from Rock Jung regarding payoff funds in the
2 case. That piece of evidence is missing, and it constitutes a material piece of evidence in this case.

3 26. Similarly, a ProLaw entry purportedly showed a December 15, 2011, email from Rock
4 Jung to the bank on the subject of the HOA's rejection of tender. **Trial Ex. 14, BANA000618.**
5 BANA was unable to produce a copy of that email. Again, another material piece of evidence was
6 missing. The ProLaw printout, in conjunction with Mr. Miles' testimony that one could confirm the
7 ProLaw entries by checking the contents of the emails, weighs against the tender occurring.
8

9 27. Additionally, as a finder of fact, the Court notes that Mr. Miles was provided with a
10 payment of \$4,000 as a fact witness. **Testimony of Mr. Miles, at pp. 226-227.** That payment for a
11 few hours in court weighs against his credibility. It suggests that Mr. Miles was paid for his
12 appearance and testimony. The Court takes no position on the ultimate propriety or ethics of the Bank
13 paying a fee, or regarding Mr. Miles accepting such payment. This Court, however, finds it weighs
14 against the full force and effect of his testimony and indicates bias.
15

16 28. The Court also observed through the evidence an anomaly in the procedures at the
17 Miles Bauer office. Three HOAs – Sandstone, Strawberry Fields, and Legacy Village – initiated
18 foreclosure proceedings against the Hearts Club property, and all three HOAs retained NAS for that
19 purpose. *E.g., Testimony of Moses, at pp. 38-39.* The evidence showed an acknowledgement form
20 of \$180 for the Strawberry Fields HOA lien tender. **Testimony of Mr. Miles, at pp. 201-207; Trial**
21 **Ex. 14, BANA000210.** Another acknowledgement form for a little over \$800 was offered in evidence
22 for the Legacy Village delinquency. **Testimony of Mr. Miles, at pp. 185-187; Testimony of Ms.**
23 **Moses, at pp. 39-45; Trial Ex. 14, BANA000201.** But, no evidence was produced for alleged
24 payment to Sandstone of \$495.
25

26 29. Additional evidence weighed against the claims made by the Miles Bauer law firm and
27 their involvement – specifically, the Adam Kendis affidavit. **Trial Ex. 14, BANA000184-234.**
28

Paragraph 8 of the affidavit says, “Based upon Miles Bauer’s business records, Nevada Association Services, Inc. returned the \$495 check to Miles Bauer.” **Trial Ex. 14, BANA000205.** The rest of paragraph 8 says: “A copy of the confirmation of receipt from Miles Bauer’s business records showing the check as not accepted is attached as Exhibit 3.” *Id.* No Exhibit 3 was attached to that affidavit. A supplement to the Kendis affidavit (BANA000214 – designated as 214A) shows that the confirmation receipt still was not attached. *Id.* Instead, the confirmation receipt for the Strawberry Fields \$180 was attached, not the confirmation receipt for \$495. *Id.*

30. The next sentence in paragraph 8 of Mr. Kendis’ sworn affidavit states: “A copy of the voided check from Miles Bauer’s business records is attached as Exhibit 4.” The check attached as Exhibit 4 is not the \$495 Sandstone check – it is \$180 check for Strawberry Fields. **Trial Ex. 14, BANA000216.** The Kendis affidavit is inaccurate in a material sense because he produced the wrong check. This Court finds the evidence weighs against the conclusion that Miles Bauer actually sent the check for the Sandstone delinquency, and the evidence weighs against the conclusion the Sandstone check was returned – in part because the Bank failed to produce the voided check.

31. The Court found the testimony of Ms. Moses credible. Ms. Moses testified that there was no indication in the Sandstone file that the Bank sent a check to NAS. **Testimony of Ms. Moses, at p. 46.** No receipt having to do with sending the Sandstone check appears in the NAS records or in the evidence produced by the Bank.

32. Thus, the testimony given, the various entries and items mentioned in ProLaw, and the contradictory affidavits, all lead this Court to believe that it is more likely than not that the letter was not sent. Again, as the finder of fact, this Court determines that those material pieces of evidence on the ultimate issue in the case – whether the Bank tendered the \$495 – indicate that check was not sent to NAS.

The Foreclosure Sale

33. On October 10, 2012, NAS, as agent for the HOA, recorded a Notice of Foreclosure Sale against the Property, Instrument No. 20121010-0001041. The notice stated the total amount due was \$4069.97 and set a sale for November 9, 2012. **Stipulated Facts ¶9; Trial Ex. 8.**

34. On December 2, 2013, NAS, as agent for Sandstone, recorded a second Notice of Foreclosure Sale against the Property as Instrument No. 20131202-0002018. The notice stated the total amount due was \$5,738.28 and set a sale for January 3, 2014. **Stipulated Facts ¶10; Trial Ex. 9.**

35. The NAS file and witness testimony show that it sent the Sandstone NOD and the NOS to BANA regarding the Hearts Club foreclosure. **Trial Ex. 13, pp. 477-498; Testimony of Moses, at pp. 51-56.** The evidence shows, that in July of 2013, the Sandstone NOS was served, posted and published, and mailed to those persons entitled to notice. *Id.*

36. NAS auctioned the Property on behalf of Sandstone and recorded a Foreclosure Deed on February 18, 2014, Instrument No. 20140218-0002844, which stated NAS sold the HOA's interest in the Property to Plaintiff at the February 14, 2014, foreclosure sale. **Stipulated Facts ¶11; Trial Ex. 10.** Twenty-one potential bidders attended the sale. **Testimony of Moses, at p. 50; Trial Ex. 37.**

37. Valencia #9 paid \$13,000.00 for the Property, which was the highest bid at the public action. **Stipulated Facts ¶11; Trial Ex. 10.** Valencia #9 took title via a Trustee's Deed Upon Sale ("Trustee's Deed"). The recitals in the Trustee's Deed state that:

Nevada Association Services, Inc., has complied with all requirements of law including, but not limited to, the elapsing of 90 days, mailing of copies of Notices of Delinquent Assessment and Notice of default and the posting and publication of the Notice of Sale.

Trial Ex. 10.

38. The evidence presented at trial indicates that the sale was proper as to time, location, and manner. **Testimony of Moses, at pp. 20-21, 50-56.**

39. The Bank’s expert, Mr. Lubawy, gave an opinion of market value (as defined by the FDIC Interagency Appraisal and Evaluation Guidelines (December 2, 2010) Appendix D). He determined that at the time of the HOA sale the Property was worth \$185,000.00. **Stipulated Facts ¶¶12-13.**

CONCLUSIONS OF LAW

1. After hearing the evidence presented at trial, considering the applicable law, weighing the credibility of the witnesses, and balancing the equities in this case as required by *Shadow Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc.*, 366 P.3d 1105 (Nev. 2016)(“*Shadow Wood*”), this Court determines that BANA failed to present sufficient evidence to preclude Valencia #9’s clear title. Valencia #9 is entitled to judgment in its favor – the Sandstone HOA lien foreclosure sale extinguished the First Deed of Trust.

2. NRS Chapter 116 sets forth requirements for a valid HOA lien foreclosure. An HOA must follow specific steps and include detailed information in the notices. *See* NRS 116.31162-116.31168. “NRS 116.3116(2) gives an HOA a true super-priority lien, proper foreclosure of which will extinguish a first deed of trust.” *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. Adv. Op. 75, 334 P.3d 408, 419 (2014) (“*SFR*”). “The sale of a unit pursuant to NRS 116.31162, “116.31163 and 116.31164 vests in the purchaser the title of the unit’s owner without equity or right of redemption.” *Id.* BANA had the burden to prove each of its claims, and each of its affirmative defenses against the counterclaims of Valencia #9. *Schwartz v. Schwartz*, 95 Nev. 202, 206, 591 P.2d 1137 (1979). BANA also had the burden to rebut all statutory and common-law presumptions given to foreclosure sales.

3. There is a common-law presumption that a foreclosure sale was conducted validly. *E.g., Moeller v. Lien*, 25 Cal. App. 4th 822, 30 Cal. Rptr. 2d 777 (1994). A duly recorded Trustee’s Deed is presumed valid. *See Breliaant v. Preferred Equities Corp.*, 112 Nev. 663, 669, 918 P.2d 314,

319 (1996). In other words, the “conclusive recitals” state the homeowners’ association’s agent, complied with the statutory default, notice and timing requirements. “A presumption not only fixes the burden of going forward with evidence, but it also shifts the burden of proof . . . “ *Yeager v. Harrah’s Club, Inc.*, 111 Nev. 830, 834, 897 P.2d 1093, 1095 (1995). “[P]resumptions impose on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.” *Id.* (citing NRS 47.180).

4. At trial, the Bank did not meet its burden to prove its claims and affirmative defenses. In this case, all requirements of the HOA lien foreclosure statute were met. All parties entitled to notice of the HOA lien foreclosure sale were properly notified by the HOA Trustee.

5. The super-priority portion of the Sandstone assessment lien extinguished BANA’s First Deed of Trust. *SFR*, 334 P.3d at 412. Therefore, as a matter of law, Valencia #9 acquired the Property free and clear of all encumbrances; and BANA’s Deed of Trust and all junior liens were extinguished.

Tender as an Affirmative Defense

6. BANA asserts that Miles Bauer made a valid tender of the super-priority lien amount on its behalf prior to the HOA lien foreclosure sale. This Court disagrees for several reasons.

7. As noted above, BANA had the burden to prove a valid tender occurred. “The rules which govern tenders are strict and are strictly applied.” *Nguyen v. Calhoun*, 105 Cal. App. 4th 428, 439 (2003). There is an “invariable tendency of courts to limit the doctrine of release by tender . . . Such relief is most drastic, and, to obtain the same in an equitable action, the right thereto must clearly appear.” *Hilmes v. Moon*, 11 P.2d 253, 238-239 (Wash. 1932).

8. This Court has considered the holding in *U.S. Bank, National Association, v. Resources Group, LLC*, 135 Nev. Adv. Op. 26, 444 P.3d 442 (Nev. 2019); and determines that the standard to establish a tender is by a preponderance of the evidence.

1 9. But even under the preponderance of the evidence standard, BANA did not meet the
2 evidentiary requirements to establish the affirmative defense of tender. Too many questions arose
3 whether Miles Bauer followed the standard procedures that it claimed were in place. And, a lack of
4 material pieces of evidence – that should have been available to the Bank – were missing.

5
6 **Commercial Reasonableness of the Sale**

7 10. BANA bore the burden to establish that the HOA sale should be set aside on the basis
8 of commercial reasonableness.

9 11. The Court disagrees with the Bank’s conclusion that the sale was commercially
10 unreasonable, even in light of the \$13,000 paid by the plaintiffs compared to Mr. Lubawy’s valuation
11 of \$185,000 for the property.

12 12. The law in the area of commercial reasonableness has been well defined in Nevada over
13 the last few years. The Nevada Supreme Court’s guidance has been specific. As dictated by the
14 holding of *Shadow Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc.*, 366
15 P.3d 1105 (Nev. 2016), this Court must apply a two-part test when considering the commercial
16 reasonableness of the sale. This Court cannot void a foreclosure sale based on price alone.

17 13. Simply demonstrating that an association sold a property at its foreclosure sale for a low
18 or “inadequate” price is not enough to set aside the sale. In addition to a disparity of price and value,
19 long established precedent in Nevada holds that “inadequacy of price, however gross, is not in itself a
20 sufficient ground for setting aside a trustee’s sale legally made; there must be in addition proof of some
21 element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price.”
22 *Nationstar Mortgage, LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 405 P.3d 641, 645, 648
23 (Nev. 2017) (emphasis added); *Golden v. Tomiyasu*, 79 Nev. 503, 387 P.2d 989 (1963) (quoting *Oller*
24 *v. Sonoma Cty., Land Title Co.*, 290 P.2d 880, 882 (Cal.Ct.App. 1955); *see also Long v. Towne*, 98
25 Nev. 11, 13 639 P.2d 528, 530 (1982); *Brunzell v. Woodbury*, 85 Nev. 29, 449 P.2d 158 (1969).

14. A court must determine whether the sale was affected by alleged irregularities in the sales process that constitute fraud, unfairness or oppression, or whether there is evidence of some other irregularity. In this case, BANA provided no evidence of fraud, oppression or unfairness, or any irregularity in the foreclosure sale, to establish that the sale was commercially unreasonable or conducted in bad faith. In other words, the price paid at the HOA foreclosure did not come about as the result of fraud, oppression or unfairness. *Tomiyasu* 79 Nev. at 515-516, 387 P.2d at 995 (emphasis in *original*) (quoting *Odell v. Cox*, 90 P. 194 (Cal. 1907)).

15. BANA did not present, and this Court does not find, any evidence of irregularity, fraud, unfairness or oppression. This Court has found nothing to indicate irregularities, fraud, oppression or unfairness occurred in this case. Thus, this Court cannot conclude that the sale was commercially unreasonable.

16. Because Valencia #9 retains the Property free and clear of the Bank's encumbrance, Valencia #9's claim for unjust enrichment against BANA is deemed moot.

JUDGMENT

Accordingly, based upon the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is rendered in favor of VALENCIA MANAGEMENT LLC SERIES 9 on its claims for quiet title and declaratory relief;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that VALENCIA MANAGEMENT LLC SERIES 9 purchased the subject property, to wit: 2176 Hearts Club Drive, Henderson, Nevada 89074, by way of homeowners' association foreclosure sale, which was appropriately conducted without any irregularities, and thus, it takes title to the Property free and clear of the first security interest;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the claim of VALENCIA

MANAGEMENT LLC SERIES 9 for unjust enrichment against BANA is deemed moot;

THIS JUDGMENT IS MADE FINAL as to ALL PARTIES. This Court determines that there is no just reason for delay and enters final judgment pursuant to NRCP 54(b).²

DATED: 13th of October, 2020.



DISTRICT COURT JUDGE ROB BARE

HL

Submitted by:

Approved as to form and content:

Dated this 12th day of October, 2020.

Dated this 12th day of October, 2020.

CLARK NEWBERRY LAW FIRM

AKERMAN LLP

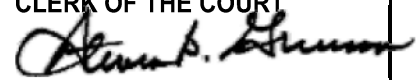
/s/ Tara Clark Newberry
TARA CLARK NEWBERRY, ESQ.
Nevada Bar No. 10696
810 S. Durango Drive, Suite 102
Las Vegas, Nevada 89145

Attorneys for Valencia #9

/s/ Nicholas E. Belay
NICHOLAS E. BELAY, ESQ.
Nevada Bar No. 15175
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89134

Attorneys for Bank of America, N.A.

² The former Homeowners did not file an answer or meaningfully participate in this litigation, and a default judgment was entered against them earlier in this case.



NOE
CLARK NEWBERRY LAW FIRM
Tara Clark Newberry, Esq. (SBN: 10696)
tnewberry@cnlawlv.com
810 S. Durango Drive, Suite 102
Las Vegas, Nevada 89145
(702) 608-4232
Attorney for Valencia #9

**DISTRICT COURT
CLARK COUNTY, NEVADA**

VALENCIA MANAGEMENT LLC,
SERIES 9, a Nevada Limited Liability
Company,

Plaintiff,

vs.

ROBERT STILLWAGON, an individual;
LENY STILLWAGON, an individual; BAC
HOME LOANS SERVICING, LP FKA
COUNTRYWIDE HOME LOANS
SERVICING LP; BANK OF AMERICA
NA; DOES I through X; and ROE
CORPORATIONS 1 through 10,

Defendants.

BANK OF AMERICA, N.A., S/B/M TO
BAC HOME LOANS SERVICING, LP
F/K/A COUNTRYWIDE HOME LOANS
SERVICING LP

Counter-Claimant,

vs.

VALENCIA MANAGEMENT LLC,
SERIES 9, a Nevada Limited Liability
Company,

Counter-Defendant,

BANK OF AMERICA, N.A., S/B/M TO

CASE NO.: A-15-723600-C
DEPT. NO.: XXXII

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

CLARK NEWBERRY LAW FIRM
810 S. Durango Drive, Suite 102
Las Vegas, Nevada 89145
Telephone (702) 608-4232

1 BAC HOME LOANS SERVICING, LP)
2 F/K/A COUNTRYWIDE HOME LOANS)
3 SERVICING LP)

4 Cross-Claimant,)

5 v.)

6 SANDSTONE RECREATION)
7 ASSOCIATION, INC.; NEVADA)
8 ASSOCIATION SERVICES, INC.,)

9 Cross-Defendants.)
10 _____)

11 **NOTICE OF ENTRY OF FINDINGS OF FACT,**
12 **CONCLUSIONS OF LAW AND JUDGMENT**

13 Please take notice that the attached **FINDINGS OF FACT, CONCLUSIONS OF LAW AND**
14 **JUDGMENT** was entered on October 13, 2020.

15 DATED this 13th day of October 2020.

16
17 /s/ Tara Clark Newberry
18 TARA CLARK NEWBERRY, ESQ.
19 Nevada Bar No. 10696
20 810 S. Durango Drive, Suite 102
21 Las Vegas, NV 89145
22 *Attorney for Valencia #9*
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of October 2020, I served, via the Court's electronic filing system, a true and correct copy of the foregoing **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT**, to the following:

Akerman LLP

Contact

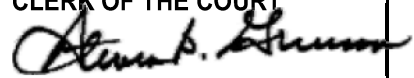
Akerman Las Vegas Office
Brienne Siriwan
Nicholas E. Belay, Esq.
Melanie D. Morgan, Esq.

Email

akermanlas@akerman.com
brienne.siriwan@akerman.com
nicholas.belay@akerman.com
melanie.morgan@akerman.com

/s/ Kathleen Seckinger

Kathleen Seckinger, an Employee of
Clark Newberry Law Firm



FFCL
CLARK NEWBERRY LAW FIRM
Tara Clark Newberry, Esq. (SBN: 10696)
tnewberry@cnlawlv.com
810 S. Durango Drive, Suite 102
Las Vegas, Nevada 89145
(702) 608-4232
Attorney for Valencia #9

**DISTRICT COURT
CLARK COUNTY, NEVADA**

VALENCIA MANAGEMENT LLC,)
SERIES 9, a Nevada Limited Liability)
Company,)
)
Plaintiff,)

CASE NO.: A-15-723600-C
DEPT. NO.: XXXII

vs.)

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
JUDGMENT

ROBERT STILLWAGON, an individual;)
LENY STILLWAGON, an individual; BAC)
HOME LOANS SERVICING, LP FKA)
COUNTRYWIDE HOME LOANS)
SERVICING LP; BANK OF AMERICA)
NA; DOES I through X; and ROE)
CORPORATIONS 1 through 10,)
)
Defendants.)

BANK OF AMERICA, N.A., S/B/M TO)
BAC HOME LOANS SERVICING, LP)
F/K/A COUNTRYWIDE HOME LOANS)
SERVICING LP)

Counter-Claimant,)

vs.)

VALENCIA MANAGEMENT LLC,)
SERIES 9, a Nevada Limited Liability)
Company,)

Counter-Defendant,)

BANK OF AMERICA, N.A., S/B/M TO)

CLARK NEWBERRY LAW FIRM
810 S. Durango Drive, Suite 102
Las Vegas, Nevada 89145
Telephone (702) 608-4232

BAC HOME LOANS SERVICING, LP)
F/K/A COUNTRYWIDE HOME LOANS)
SERVICING LP)
Cross-Claimant,)
v.)
SANDSTONE RECREATION)
ASSOCIATION, INC.; NEVADA)
ASSOCIATION SERVICES, INC.,)
Cross-Defendants.)
_____)

This matter came before Department XXII of the Eighth Judicial District Court, in and for Clark County, Nevada, on December 4 and December 5, 2019, for a bench trial to resolve issues of title to real estate in a matter based on a HOA lien foreclosure, with JUDGE ROB BARE presiding.

VALENCIA MANAGEMENT LLC SERIES 9 appeared by and through its attorney, TARA CLARK NEWBERRY, ESQ.; of the CLARK NEWBERRY LAW FIRM; and Defendant, BANK OF AMERICA, N.A., appeared by and through its attorney REX GARNER, ESQ. of the AKERMAN LLP law firm.

Stipulated Facts of the Case

1. On or about March 4, 2008, Robert and Leny Stillwagon (the “Borrowers” or “Homeowners”) entered into a deed of trust with Neighbor’s Financial Corporation (the “Deed of Trust”) for the property located at 2176 Hearts Club Drive, Henderson, Nevada 89074 (the “Property”).

2. The Deed of Trust was recorded on March 14, 2008 with the Clark County Recorder as Instrument No. 20080314-0002767.

3. The Deed of Trust was assigned to BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing LP and the assignment as recorded with the Clark County Recorder on August

1 31, 2009 as Instrument No. 20090831-0001060. Bank of America, N.A. (the “Bank” or “BANA”) is
2 the successor by merger to BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing
3 LP.

4
5 4. The Property is located in a common interest community called Sandstone Recreations
6 Association, Inc. (“Sandstone”), which is governed by Declarations of Community Covenants and
7 Restrictions (aka “CC&Rs” or “Declarations”) recorded with the Clark County Recorder on March 30,
8 1993, in Book Number 930330, as Instrument No. 00841.

9
10 5. The Homeowners became delinquent on their assessments to Sandstone. On May 9,
11 2011, through Taylor Association Management, Inc., Sandstone recorded a Notice of Delinquent
12 Assessment Lien against the Property with the Clark County Recorder as Instrument No. 20110509-
13 0000507.

14 6. On September 8, 2011, Nevada Association Services, Inc. (“NAS”), as agent for
15 Sandstone, recorded a Notice of Default and Election to Sell Under Homeowners Association Lien
16 against the Property, Instrument No. 20110908-0001384.

17
18 7. On or about October 5, 2011, Bank of America, through counsel at Miles, Bauer,
19 Bergstrom & Winters, LLP (“Miles Bauer”), contacted NAS seeking a payoff ledger in relation to the
20 Sandstone’s lien.

21 8. On October 10, 2012, NAS, as agent for Sandstone, recorded a Notice of Foreclosure
22 Sale against the Property, Instrument No. 20121010-0001041. The notice stated the total amount due
23 was \$4,069.97 and set a sale for November 9, 2012.

24
25 9. On December 2, 2013, NAS, as agent for Sandstone, recorded a second Notice of
26 Foreclosure Sale against the Property as Instrument No. 20131202-0002018. The notice stated the
27 total amount due was \$5,738.28 and set a sale for January 3, 2014.

10. NAS auctioned the Property on behalf of Sandstone, and recorded a Foreclosure Deed on February 18, 2014, Instrument No. 20140218-0002844. The Foreclosure Deed stated NAS sold Sandstone's interest in the Property to Plaintiff for \$13,000.00 at the foreclosure sale held February 14, 2014.

11. BANA retained an appraiser, Matthew Lubawy, to render an opinion concerning value.

12. Mr. Lubawy's opinion of market value (as defined by the FDIC Interagency Appraisal and Evaluation Guidelines (December 2, 2010) Appendix D) of the Property is that it was worth \$185,000.00 at the time of the HOA sale.

Admitted Evidence

The following exhibits were admitted by stipulation on the first day of trial:

1	Covenants, Conditions, and Restrictions of Sandstone Community Recreation Area, Instrument No. 199303300000841 BANA000663-BANA000705
2	Grant, Bargain and Sale Deed, Instrument No. 200803140002766 BANA000081-BANA000085
3	Deed of Trust, Instrument No. 20080314-0002767 BANA000065-BANA000080
4	Assignment of Deed of Trust from MERS to BAC Home Loans Servicing LP f/k/a Countrywide Home Loans Servicing, LP, Instrument No. 2009083100001060 BANA000041
5	Notice of Delinquent Assessment Lien, Instrument No. 201105090000507 BANA000020-BANA000021
6	Notice of Substitution of Agent, Instrument No. 2011090800001383 BANA000018
7	Notice of Default and Election to Sell Under Homeowners Association Lien, Instrument No. 2011090800001384 BANA000016-BANA000017
8	Notice of Foreclosure Sale, Instrument No. 201210100001041 BANA000006-BANA000007
9	Notice of Foreclosure Sale, Instrument No. 201312020002018 BANA000001-BANA000002
10	Foreclosure Deed, Instrument No. 201402180002844

	BANA000181-BANA000183
11	Release of Delinquent Assessment Lien, Instrument No. 20140325000029 BANA000180
12	Notice of Pendency of Action, Instrument No. 201508260001157 BANA000169-BANA000171
13	Documents produced by NAS in response to subpoena BANA000247-BANA000604
27	Plaintiff's Rebuttal Expert Disclosure Pursuant to NRCP 16.1
28	BANA's Response to Plaintiff's Interrogatories, Requests for Production, and Requests for Admission
35	Notice of Federal Tax Lien, recorded on December 3, 2010, as Book and Instrument #20102030-0003492
36	ADR Property Services, Landscaping Invoices and Documents, PL00050, PL00061
37	NAS Auction Receipt PL00062
38-65	Miscellaneous Valencia #9 Expense Receipts and Notices PL00063-000629
66	Treasurer's Property Account Inquiry – Summary Screen PL000632-000633

The following exhibits were admitted into evidence during the course of trial:

14	Corrected Miles Bauer Tender Affidavits BANA000605-BANA000624
18	Sandstone Recreation Association, Inc.'s Disclosures (Property File) SRA000001-SRA000494

Witnesses Called to Testify

1. **Susan Moses**, Corporate Witness for Nevada Association Services, Inc. ("Ms. Moses")
Trial Transcript Day One: Pages 18-67
2. **Brandy White Elk**, Corporate Witness for Valencia #9 ("Ms. White Elk") Trial
Transcript Day One: Pages 67-85
3. **Angela Shawn Look**, Corporate Witness for Bank of America, N.A. ("Ms. Look") Trial
Transcript Day One: Pages 85-97
4. **Douglas Miles** ("Mr. Miles") Trial Transcript Day One: Pages 97-236

5. **Mireille Marois**, Corporate Witness for Taylor Management Association, Inc. (“Ms. Marois”) Trial Transcript Day Two: Pages 5-46

FINDINGS OF FACT

Background

1. The subject of this lawsuit is residential real property with the address of 2176 Hearts Club Drive, Henderson, Nevada 89074 (the “Property”). Robert and Leny Stillwagon (the “Borrowers” or “Homeowners”) previously owned the property. **Stipulated Facts ¶1; Trial Ex. 2.**

2. The Property is part of the Sandstone Recreation Association, Inc. (“Sandstone”) common-interest community. As such, NRS Chapter 116 and the Declaration of Covenants, Conditions and Restrictions (“CC&Rs”), govern the Property. **Stipulated Facts ¶4; Trial Ex. 1.** Those CC&Rs include the requirement that homeowners or members of the association pay periodic assessments to benefit the common-interest community. Sandstone operates with a budget adopted pursuant to NRS 116.3115. *Id.*

3. The Property also is part of the Strawberry Fields Homeowners Association (“Strawberry Fields”) and Legacy Village Property Owners Association (“Legacy Village”) common-interest communities. **Testimony of Ms. Moses at p. 39; Testimony of Ms. Marois at p. 6.**

4. The CC&Rs for each of the associations required the Homeowners to pay the particular HOA periodic assessments. *Id.*

5. Neighbor’s Financial Corporation lent the Borrowers funds to purchase the Property, and took a First Deed of Trust. **Stipulated Facts ¶1; Trial Ex. 3.** That Deed of Trust was recorded March 14, 2008 with the Clark County Recorder as Instrument No. 20080314-0002767. **Stipulated Facts ¶2; Trial Ex. 3.**

6. The Deed of Trust was assigned to BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing LP, and the assignment was recorded with the Clark County Recorder on

1 August 31, 2009 as Instrument No. 20090831-0001060. Bank of America, N.A. (the “Bank” or
2 “BANA”) is the successor by merger to BAC Home Loans Servicing, LP fka Countrywide Home
3 Loans Servicing LP. **Stipulated Facts ¶3; Trial Ex. 4.**

4
5 7. The Borrowers failed to pay the monthly assessments to Sandstone. **Stipulated Facts**
6 **¶6; Trial Ex. 13, at BANA332, Testimony of Ms. Moses, at p. 20.** The Borrowers also failed to pay
7 the monthly assessments to the Strawberry Fields and Legacy Village. **Trial Ex. 13, at BANA325**
8 **and 382, Testimony of Ms. Moses, at pp. 37-39.**

9
10 8. Taylor Association Management, Inc. (the “Property Manager” or “Taylor
11 Management”) manages the association property for Sandstone. **Testimony of Ms. Marois, at p. 6.**

12
13 9. On May 9, 2011, the HOA, through Taylor Management recorded a Notice of
14 Delinquent Assessment Lien against the Property with the Clark County Recorder as Instrument No.
15 20110509-0000507. **Stipulated Facts ¶6; Trial Ex. 5; Testimony of Ms. Moses, at p. 20.**

16
17 10. Sandstone retained Nevada Association Services, Inc. (the “HOA Trustee” or “NAS”),
18 as its authorized agent for collection of, and if necessary foreclosure on, delinquent assessments.
19 **Testimony of Ms. Moses, at p. 20.**

20
21 11. The outstanding assessments, late charges and costs of collection and interest remain
22 unpaid. **Trial Ex. 13, at BANA556-558; Testimony of Ms. Moses, at pp. 26-28.** On September 8,
23 2011, NAS, as agent for the HOA, recorded a Notice of Default and Election to Sell Under
24 Homeowners Association Lien against the Property, Instrument No. 201109080001384. **Stipulated**
25 **Facts ¶7; Trial Ex. 7; Testimony of Ms. Moses, at p. 24.**

26
27 12. NAS mailed the NOD to the holders of recorded security interests encumbering the
28 Property. **Testimony of Ms. Moses, at pp. 51, 53, 56; Trial Ex. 13. BANA000475-485.**

The Miles Bauer Tender Attempt¹

13. After receiving the NOD, BANA hired Miles, Bauer, Bergstrom & Winters, LLP (“Miles Bauer”). **Testimony of Ms. Look, at pp. 88-89; Testimony of Mr. Miles, at p. 100-101.** Miles Bauer contacted NAS on or about October 5, 2011, seeking a payoff ledger in relation to the HOA’s lien. **Stipulated Facts ¶8; Testimony of Mr. Miles, at p. 170; Trial Ex. 14.**

14. Mr. Miles testified about the standard procedures used when BANA engaged Miles Bauer to attempt to protect a first deed of trust in an HOA lien foreclosure. **Testimony of Mr. Miles, at p. 99.** Mr. Miles said they followed their standard practice in this instance. **Testimony of Mr. Miles, at pp. 218-219.** This Court considered the testimony of Ms. Look concerning BANA following its ordinary course of business, as well. **Testimony of Ms. Look, at pp. 88-89.**

15. BANA argued that one must presume Miles Bauer followed its standard operating procedures. Any such presumption, if one exists, was overcome by stronger evidence that standard procedures were not followed. **See, e.g., Testimony of Mr. Miles, at pp. 177-183; 197-199; 201-202; 209-213.** This Court finds that BANA has not established by a preponderance of the evidence that Miles Bauer actually sent the second Miles Bauer letter and check in question to NAS.

16. A letter dated December 1, 2011, along with a copy of the check, provide the only evidence of a tender. **Trial Ex. 14, BANA000614-618.** Ostensibly, that letter on its face is an indication that Miles Bauer attempted to make a tender. The relevant question at hand is whether the letter and check were delivered.

17. In relevant part the letter to Nevada Association Services states: “Dear sir or madam, NAS is unwilling to provide our office with a payoff ledger.” The letter goes on to indicate the basis upon which Miles Bauer calculated the super-priority amount to be \$495. In the next to the last

¹ The parties disputed the applicable standard of proof in Nevada for establishing whether a tender occurred. *See* Conclusions of Law, ¶¶12-13.

1 paragraph the letter says, “Thus enclosed you will find a cashier’s check made out to Nevada
2 Association Services in the sum of \$495.” On the next page, one finds a copy of a \$495 check dated
3 November 28, 2011. *Id.*

4
5 18. The Court finds that the letter dated December 1, 2011, is authentic – it existed and the
6 check was attached to it at some point, but what happened with the letter thereafter is unclear. Mr.
7 Miles testified that there was no acknowledgment of receipt of the tender by NAS. **Testimony of Mr.**
8 **Miles, at p. 207.** The evidence offered to this Court by the Bank failed to show that Miles Bauer
9 delivered the letter and check to NAS.

10
11 19. Mr. Miles testified about the operations in the Henderson, Nevada office of Miles
12 Bauer; and in particular about deliveries of tender checks through the runner-service, Legal Wings.
13 Mr. Miles testified regarding the use of a box at the Henderson office for Legal Wings deliveries, and
14 the standard course of practice regarding the deliveries. *See, e.g., Testimony of Mr. Miles, at pp.*
15 **153-159; 177-180; 207-209.** He testified that the Henderson Legal Wings box was used for all 7,000
16 cases or so cases handled by Miles Bauer. **Testimony of Mr. Miles, at p. 201.**

17
18 20. From his testimony, however, this Court concludes that Mr. Miles did not really know
19 what was going on with Legal Wings deliveries at the Henderson office. *See, e.g., Testimony of Mr.*
20 **Miles, at pp. 153-156.** While Mr. Miles might have been generally aware of the standard operating
21 procedure in that office, this Court does not accept that Mr. Miles knew what was really happening on
22 a day-to-day basis.

23
24 21. Mr. Miles was in the Henderson office only twice a month. **Testimony of Mr. Miles,**
25 **at p. 153.** As a managing partner of the firm, in the office only twice a month, this Court believes Mr.
26 Miles would not have specific knowledge as to what was happening with the Legal Wings deliveries.
27 In fact, Mr. Miles was asked specifically if he had anything to do with the Legal Wings deliveries.
28

1 **Testimony of Mr. Miles, at pp. 155-157.** He seemed to take offense to that suggestion, implying that
2 deliveries were a runner's job, and not the job of the managing partner. *Id.*

3 1. Mr. Miles based his conclusions that the letter and check were delivered on a record
4 keeping system used by the Miles Bauer law firm ("ProLaw"). **Trial Ex. 14; Testimony of Mr.**
5 **Miles at pp. 106-107, 159, 162, 166, 197-199, 210, 232-234.** Mr. Miles testified that ProLaw is a
6 summary of events and potential activities – with reminders and automated entries. **Testimony of**
7 **Mr. Miles, at pp. 160-162, 197-199.** One would need to verify the entries by looking at the
8 underlying documents referenced in the system. *Id.*

9
10 22. Mr. Miles indicated that the ProLaw system was exceptionally accurate. **Testimony of**
11 **Mr. Miles, at p. 234-235.** This Court finds, however, that the evidence presented in trial established
12 that the ProLaw system is not exceptionally accurate; in fact, at times is not so accurate at all. *See,*
13 *e.g., Testimony of Mr. Miles, at pp. 162-201.* In some instances in this case, the ProLaw entries
14 contradicted the testimony of Mr. Miles. **Testimony of Mr. Miles, at pp. 169-171.**

15
16 23. Mr. Miles explained that the ProLaw system generates an automatic checkmark next to
17 an activity as a computer-generated reminder – and the checkmark does not indicate a human event of
18 activity. **Testimony of Mr. Miles, at pp. 145-146; 160-161.** The ProLaw printout shows the
19 reminder for December 2, 2011, to send a check to the HOA. **Trial Ex. 14, BANA000618.**

20
21 24. In contrast, in ProLaw an icon of a little pile of paper next to an activity means a human
22 being actually did something. **Testimony of Mr. Miles, at pp. 160-161.** The ProLaw printout shows
23 that on December 2, 2011, an email was sent from Rock Jung regarding payoff funds. **Trial Ex. 14,**
24 **BANA000618.**

25
26 25. Mr. Miles testified that one could verify the ProLaw entries by confirming the ProLaw
27 activity with a corresponding document in the file. **Testimony of Mr. Miles, at pp. 162, 167, 197,**
28

1 **199.** In this case, BANA could not produce the email from Rock Jung regarding payoff funds in the
2 case. That piece of evidence is missing, and it constitutes a material piece of evidence in this case.

3 26. Similarly, a ProLaw entry purportedly showed a December 15, 2011, email from Rock
4 Jung to the bank on the subject of the HOA's rejection of tender. **Trial Ex. 14, BANA000618.**
5 BANA was unable to produce a copy of that email. Again, another material piece of evidence was
6 missing. The ProLaw printout, in conjunction with Mr. Miles' testimony that one could confirm the
7 ProLaw entries by checking the contents of the emails, weighs against the tender occurring.
8

9 27. Additionally, as a finder of fact, the Court notes that Mr. Miles was provided with a
10 payment of \$4,000 as a fact witness. **Testimony of Mr. Miles, at pp. 226-227.** That payment for a
11 few hours in court weighs against his credibility. It suggests that Mr. Miles was paid for his
12 appearance and testimony. The Court takes no position on the ultimate propriety or ethics of the Bank
13 paying a fee, or regarding Mr. Miles accepting such payment. This Court, however, finds it weighs
14 against the full force and effect of his testimony and indicates bias.
15

16 28. The Court also observed through the evidence an anomaly in the procedures at the
17 Miles Bauer office. Three HOAs – Sandstone, Strawberry Fields, and Legacy Village – initiated
18 foreclosure proceedings against the Hearts Club property, and all three HOAs retained NAS for that
19 purpose. **E.g., Testimony of Moses, at pp. 38-39.** The evidence showed an acknowledgement form
20 of \$180 for the Strawberry Fields HOA lien tender. **Testimony of Mr. Miles, at pp. 201-207; Trial**
21 **Ex. 14, BANA000210.** Another acknowledgement form for a little over \$800 was offered in evidence
22 for the Legacy Village delinquency. **Testimony of Mr. Miles, at pp. 185-187; Testimony of Ms.**
23 **Moses, at pp. 39-45; Trial Ex. 14, BANA000201.** But, no evidence was produced for alleged
24 payment to Sandstone of \$495.
25

26 29. Additional evidence weighed against the claims made by the Miles Bauer law firm and
27 their involvement – specifically, the Adam Kendis affidavit. **Trial Ex. 14, BANA000184-234.**
28

Paragraph 8 of the affidavit says, “Based upon Miles Bauer’s business records, Nevada Association Services, Inc. returned the \$495 check to Miles Bauer.” **Trial Ex. 14, BANA000205.** The rest of paragraph 8 says: “A copy of the confirmation of receipt from Miles Bauer’s business records showing the check as not accepted is attached as Exhibit 3.” *Id.* No Exhibit 3 was attached to that affidavit. A supplement to the Kendis affidavit (BANA000214 – designated as 214A) shows that the confirmation receipt still was not attached. *Id.* Instead, the confirmation receipt for the Strawberry Fields \$180 was attached, not the confirmation receipt for \$495. *Id.*

30. The next sentence in paragraph 8 of Mr. Kendis’ sworn affidavit states: “A copy of the voided check from Miles Bauer’s business records is attached as Exhibit 4.” The check attached as Exhibit 4 is not the \$495 Sandstone check – it is \$180 check for Strawberry Fields. **Trial Ex. 14, BANA000216.** The Kendis affidavit is inaccurate in a material sense because he produced the wrong check. This Court finds the evidence weighs against the conclusion that Miles Bauer actually sent the check for the Sandstone delinquency, and the evidence weighs against the conclusion the Sandstone check was returned – in part because the Bank failed to produce the voided check.

31. The Court found the testimony of Ms. Moses credible. Ms. Moses testified that there was no indication in the Sandstone file that the Bank sent a check to NAS. **Testimony of Ms. Moses, at p. 46.** No receipt having to do with sending the Sandstone check appears in the NAS records or in the evidence produced by the Bank.

32. Thus, the testimony given, the various entries and items mentioned in ProLaw, and the contradictory affidavits, all lead this Court to believe that it is more likely than not that the letter was not sent. Again, as the finder of fact, this Court determines that those material pieces of evidence on the ultimate issue in the case – whether the Bank tendered the \$495 – indicate that check was not sent to NAS.

The Foreclosure Sale

33. On October 10, 2012, NAS, as agent for the HOA, recorded a Notice of Foreclosure Sale against the Property, Instrument No. 20121010-0001041. The notice stated the total amount due was \$4069.97 and set a sale for November 9, 2012. **Stipulated Facts ¶9; Trial Ex. 8.**

34. On December 2, 2013, NAS, as agent for Sandstone, recorded a second Notice of Foreclosure Sale against the Property as Instrument No. 20131202-0002018. The notice stated the total amount due was \$5,738.28 and set a sale for January 3, 2014. **Stipulated Facts ¶10; Trial Ex. 9.**

35. The NAS file and witness testimony show that it sent the Sandstone NOD and the NOS to BANA regarding the Hearts Club foreclosure. **Trial Ex. 13, pp. 477-498; Testimony of Moses, at pp. 51-56.** The evidence shows, that in July of 2013, the Sandstone NOS was served, posted and published, and mailed to those persons entitled to notice. *Id.*

36. NAS auctioned the Property on behalf of Sandstone and recorded a Foreclosure Deed on February 18, 2014, Instrument No. 20140218-0002844, which stated NAS sold the HOA's interest in the Property to Plaintiff at the February 14, 2014, foreclosure sale. **Stipulated Facts ¶11; Trial Ex. 10.** Twenty-one potential bidders attended the sale. **Testimony of Moses, at p. 50; Trial Ex. 37.**

37. Valencia #9 paid \$13,000.00 for the Property, which was the highest bid at the public action. **Stipulated Facts ¶11; Trial Ex. 10.** Valencia #9 took title via a Trustee's Deed Upon Sale ("Trustee's Deed"). The recitals in the Trustee's Deed state that:

Nevada Association Services, Inc., has complied with all requirements of law including, but not limited to, the elapsing of 90 days, mailing of copies of Notices of Delinquent Assessment and Notice of default and the posting and publication of the Notice of Sale.

Trial Ex. 10.

38. The evidence presented at trial indicates that the sale was proper as to time, location, and manner. **Testimony of Moses, at pp. 20-21, 50-56.**

39. The Bank’s expert, Mr. Lubawy, gave an opinion of market value (as defined by the FDIC Interagency Appraisal and Evaluation Guidelines (December 2, 2010) Appendix D). He determined that at the time of the HOA sale the Property was worth \$185,000.00. **Stipulated Facts ¶¶12-13.**

CONCLUSIONS OF LAW

1. After hearing the evidence presented at trial, considering the applicable law, weighing the credibility of the witnesses, and balancing the equities in this case as required by *Shadow Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc.*, 366 P.3d 1105 (Nev. 2016)(“*Shadow Wood*”), this Court determines that BANA failed to present sufficient evidence to preclude Valencia #9’s clear title. Valencia #9 is entitled to judgment in its favor – the Sandstone HOA lien foreclosure sale extinguished the First Deed of Trust.

2. NRS Chapter 116 sets forth requirements for a valid HOA lien foreclosure. An HOA must follow specific steps and include detailed information in the notices. *See* NRS 116.31162-116.31168. “NRS 116.3116(2) gives an HOA a true super-priority lien, proper foreclosure of which will extinguish a first deed of trust.” *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. Adv. Op. 75, 334 P.3d 408, 419 (2014) (“*SFR*”). “The sale of a unit pursuant to NRS 116.31162, “116.31163 and 116.31164 vests in the purchaser the title of the unit’s owner without equity or right of redemption.” *Id.* BANA had the burden to prove each of its claims, and each of its affirmative defenses against the counterclaims of Valencia #9. *Schwartz v. Schwartz*, 95 Nev. 202, 206, 591 P.2d 1137 (1979). BANA also had the burden to rebut all statutory and common-law presumptions given to foreclosure sales.

3. There is a common-law presumption that a foreclosure sale was conducted validly. *E.g., Moeller v. Lien*, 25 Cal. App. 4th 822, 30 Cal. Rptr. 2d 777 (1994). A duly recorded Trustee’s Deed is presumed valid. *See Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 669, 918 P.2d 314,

319 (1996). In other words, the “conclusive recitals” state the homeowners’ association’s agent, complied with the statutory default, notice and timing requirements. “A presumption not only fixes the burden of going forward with evidence, but it also shifts the burden of proof . . . “ *Yeager v. Harrah’s Club, Inc.*, 111 Nev. 830, 834, 897 P.2d 1093, 1095 (1995). “[P]resumptions impose on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.” *Id.* (citing NRS 47.180).

4. At trial, the Bank did not meet its burden to prove its claims and affirmative defenses. In this case, all requirements of the HOA lien foreclosure statute were met. All parties entitled to notice of the HOA lien foreclosure sale were properly notified by the HOA Trustee.

5. The super-priority portion of the Sandstone assessment lien extinguished BANA’s First Deed of Trust. *SFR*, 334 P.3d at 412. Therefore, as a matter of law, Valencia #9 acquired the Property free and clear of all encumbrances; and BANA’s Deed of Trust and all junior liens were extinguished.

Tender as an Affirmative Defense

6. BANA asserts that Miles Bauer made a valid tender of the super-priority lien amount on its behalf prior to the HOA lien foreclosure sale. This Court disagrees for several reasons.

7. As noted above, BANA had the burden to prove a valid tender occurred. “The rules which govern tenders are strict and are strictly applied.” *Nguyen v. Calhoun*, 105 Cal. App. 4th 428, 439 (2003). There is an “invariable tendency of courts to limit the doctrine of release by tender . . . Such relief is most drastic, and, to obtain the same in an equitable action, the right thereto must clearly appear.” *Hilmes v. Moon*, 11 P.2d 253, 238-239 (Wash. 1932).

8. This Court has considered the holding in *U.S. Bank, National Association, v. Resources Group, LLC*, 135 Nev. Adv. Op. 26, 444 P.3d 442 (Nev. 2019); and determines that the standard to establish a tender is by a preponderance of the evidence.

1 9. But even under the preponderance of the evidence standard, BANA did not meet the
2 evidentiary requirements to establish the affirmative defense of tender. Too many questions arose
3 whether Miles Bauer followed the standard procedures that it claimed were in place. And, a lack of
4 material pieces of evidence – that should have been available to the Bank – were missing.

5
6 **Commercial Reasonableness of the Sale**

7 10. BANA bore the burden to establish that the HOA sale should be set aside on the basis
8 of commercial reasonableness.

9 11. The Court disagrees with the Bank’s conclusion that the sale was commercially
10 unreasonable, even in light of the \$13,000 paid by the plaintiffs compared to Mr. Lubawy’s valuation
11 of \$185,000 for the property.

12 12. The law in the area of commercial reasonableness has been well defined in Nevada over
13 the last few years. The Nevada Supreme Court’s guidance has been specific. As dictated by the
14 holding of *Shadow Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc.*, 366
15 P.3d 1105 (Nev. 2016), this Court must apply a two-part test when considering the commercial
16 reasonableness of the sale. This Court cannot void a foreclosure sale based on price alone.

17 13. Simply demonstrating that an association sold a property at its foreclosure sale for a low
18 or “inadequate” price is not enough to set aside the sale. In addition to a disparity of price and value,
19 long established precedent in Nevada holds that “inadequacy of price, however gross, is not in itself a
20 sufficient ground for setting aside a trustee’s sale legally made; there must be in addition proof of some
21 element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price.”
22 *Nationstar Mortgage, LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 405 P.3d 641, 645, 648
23 (Nev. 2017) (emphasis added); *Golden v. Tomiyasu*, 79 Nev. 503, 387 P.2d 989 (1963) (quoting *Oller*
24 *v. Sonoma Cty., Land Title Co.*, 290 P.2d 880, 882 (Cal.Ct.App. 1955); *see also Long v. Towne*, 98
25 Nev. 11, 13 639 P.2d 528, 530 (1982); *Brunzell v. Woodbury*, 85 Nev. 29, 449 P.2d 158 (1969).

14. A court must determine whether the sale was affected by alleged irregularities in the sales process that constitute fraud, unfairness or oppression, or whether there is evidence of some other irregularity. In this case, BANA provided no evidence of fraud, oppression or unfairness, or any irregularity in the foreclosure sale, to establish that the sale was commercially unreasonable or conducted in bad faith. In other words, the price paid at the HOA foreclosure did not come about as the result of fraud, oppression or unfairness. *Tomiyasu* 79 Nev. at 515-516, 387 P.2d at 995 (emphasis in *original*) (quoting *Odell v. Cox*, 90 P. 194 (Cal. 1907)).

15. BANA did not present, and this Court does not find, any evidence of irregularity, fraud, unfairness or oppression. This Court has found nothing to indicate irregularities, fraud, oppression or unfairness occurred in this case. Thus, this Court cannot conclude that the sale was commercially unreasonable.

16. Because Valencia #9 retains the Property free and clear of the Bank's encumbrance, Valencia #9's claim for unjust enrichment against BANA is deemed moot.

JUDGMENT

Accordingly, based upon the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is rendered in favor of VALENCIA MANAGEMENT LLC SERIES 9 on its claims for quiet title and declaratory relief;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that VALENCIA MANAGEMENT LLC SERIES 9 purchased the subject property, to wit: 2176 Hearts Club Drive, Henderson, Nevada 89074, by way of homeowners' association foreclosure sale, which was appropriately conducted without any irregularities, and thus, it takes title to the Property free and clear of the first security interest;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the claim of VALENCIA

MANAGEMENT LLC SERIES 9 for unjust enrichment against BANA is deemed moot;

THIS JUDGMENT IS MADE FINAL as to ALL PARTIES. This Court determines that there is no just reason for delay and enters final judgment pursuant to NRCP 54(b).²

DATED: 13th of October, 2020.



DISTRICT COURT JUDGE ROB BARE

HL

Submitted by:

Approved as to form and content:

Dated this 12th day of October, 2020.

Dated this 12th day of October, 2020.

CLARK NEWBERRY LAW FIRM

AKERMAN LLP

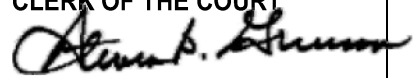
/s/ Tara Clark Newberry
TARA CLARK NEWBERRY, ESQ.
Nevada Bar No. 10696
810 S. Durango Drive, Suite 102
Las Vegas, Nevada 89145

Attorneys for Valencia #9

/s/ Nicholas E. Belay
NICHOLAS E. BELAY, ESQ.
Nevada Bar No. 15175
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89134

Attorneys for Bank of America, N.A.

² The former Homeowners did not file an answer or meaningfully participate in this litigation, and a default judgment was entered against them earlier in this case.



NEOJ

ARIEL E. STERN, ESQ.

Nevada Bar No. 8276

NICHOLAS E. BELAY, ESQ.

Nevada Bar No. 15175

AKERMAN LLP

1635 Village Center Circle, Suite 200

Las Vegas, Nevada 89134

Telephone: (702) 634-5000

Facsimile: (702) 380-8572

Email: ariel.stern@akerman.com

Email: nicholas.belay@akerman.com

Attorneys for Defendant Bank of America, N.A.,

S/B/M to BAC Home Loans Servicing, LP

fka Countrywide Home Loans Servicing, LP

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

VALENCIA MANAGEMENT LLC, SERIES 9, a
Nevada Limited Liability Company,

Plaintiff,

vs.

ROBERT STILLWAGON, an individual; LENY
STILLWAGON, an individual; BAC HOME
LOANS SERVICING, LP FKA
COUNTRYWIDE HOME LOANS SERVICING
LP; BANK OF AMERICA NA; DOES 1 through
X; and ROE CORPORATIONS 1 through 10,

Defendants.

Case No.: A-15-723600-C

Dept. No.: XXIX

**NOTICE OF ENTRY OF ORDER
DENYING BANK OF AMERICA, N.A.'S
MOTION TO ALTER OR AMEND
FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that an **ORDER DENYING BANK OF AMERICA, N.A.'S
MOTION TO ALTER OR AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW** has
been entered by this Court on the 18th day of January, 2021, in the above-captioned matter. A copy of
said Order is attached hereto as **Exhibit A**.

Dated this 19th day of January, 2021.

AKERMAN LLP

/s/ Nicholas E. Belay

ARIEL E. STERN, ESQ., NV Bar No. 8276

NICHOLAS E. BELAY, ESQ., NV Bar No. 15175

1635 Village Center Circle, Suite 200

Las Vegas, Nevada 89134

*Attorneys for Bank of America, N.A., S/B/M to BAC Home
Loans Servicing, LP fka Countrywide Home Loans
Servicing, LP*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of AKERMAN LLP, and that on this 19th day of January, 2021, and pursuant to NRCP 5.1, I caused to be served a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER DENYING BANK OF AMERICA, N.A.'S MOTION TO ALTER OR AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW**, in the following manner:

(ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by the Court's facilities to those parties listed on the Court's Master Service List as follows:

CLARK NEWBERRY LAW FIRM

Aimee L Clark Newberry	aclarknewberry@cnlawlv.com
Tara D. Newberry, Esq.	tnewberry@cnlawlv.com
Kathleen Seckinger	kseckinger@cnlawlv.com
Nura S. Khoury	nkhoury@cnlawlv.com
Richard Hopkins	hopkinslegalcounsel@gmail.com

LIPSON NEILSON

Brenda Correa	bcorrea@lipsonneilson.com
Susana Nutt	snutt@lipsonneilson.com
Renee Rittenhouse	rrittenhouse@lipsonneilson.com
Amber Williams	awilliams@lipsonneilson.com

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

/s/ Carla Llarena
An employee of AKERMAN LLP

EXHIBIT A

EXHIBIT A

ODM

ARIEL E. STERN, ESQ.
Nevada Bar No. 8276
NICHOLAS E. BELAY, ESQ.
Nevada Bar No. 15175
Akerman LLP
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89134
Telephone: (702) 634-5000
Facsimile: (702) 380-8572
Email: ariel.stern@akerman.com
Email: nicholas.belay@akerman.com

*Attorneys for Defendant Bank of America, N.A.,
S/B/M to BAC Home Loans Servicing, LP
fka Countrywide Home Loans Servicing, LP*

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

VALENCIA MANAGEMENT LLC, SERIES 9, a
Nevada Limited Liability Company,

Plaintiff,

vs.

ROBERT STILLWAGON, an individual; LENY
STILLWAGON, an individual; BAC HOME
LOANS SERVICING, LP FKA
COUNTRYWIDE HOME LOANS SERVICING
LP; BANK OF AMERICA NA; DOES 1 through
X; and ROE CORPORATIONS 1 through 10,

Defendants.

Case No.: A-15-723600-C

Dept. No: XXXII

**ORDER DENYING BANK OF
AMERICA, N.A.'S MOTION TO ALTER
OR AMEND FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

This matter came before Department XXII of the Eighth Judicial District Court, in and for Clark County, Nevada, on December 15, 2020, to hear argument regarding Bank of America, N.A.'s Motion to Alter or Amend Findings of Fact and Conclusions of Law ("Motion to Amend"), with JUDGE ROB BARE presiding.

TARA CLARK NEWBERRY, ESQ., of the CLARK NEWBERRY LAW FIRM appeared on behalf of VALENCIA MANAGEMENT, LLC, SERIES 9; NICHOLAS BELAY, ESQ., of the AKERMAN LLP law firm, appeared on behalf of BANK OF AMERICA, N.A.

///

///

FINDINGS OF FACT

PROCEDURAL HISTORY

1. Based on the briefs, evidence, and arguments presented to this Court on summary judgment, in April, May, and June of 2017, it determined that genuine issues of material fact made trial necessary.

2. BANA moved for reconsideration of this Court's summary judgment decision, on June 27, 2019, based on *Bank of America, N.A., v. SFR Investments Pool 1, LLC*, 134 Nev. Adv. Op. 72, 427 P.3d 113 (2018) ("*Diamond Spur*"). That motion was denied on August 3, 2019.

3. This Court held a 2-day bench trial on December 4, 2019 and December 5, 2019.

4. On February 27, 2020, the Nevada Supreme Court issued *7510 Perla Del Mar Ave. Trust v. Bank of America, N.A.*, 458 P.3d 348 (Nev. 2020) ("*Perla Trust*").

5. After preparation and review of the trial transcript, the parties exchanged drafts of the Findings of Fact, Conclusions of Law and Judgment ("FFCL") – which was ultimately presented to this Court for signing.

6. The FFCL, and Notice of Entry of the FFCL, took place on October 13, 2020.

7. BANA filed a Motion to Alter or Amend Findings of Fact and Conclusions of Law on November 10, 2020.

OVERVIEW OF THE EVIDENCE PRESENTED AT TRIAL

8. Prior to the hearing on the Motion to Amend, this Court took the opportunity to review the trial transcript carefully.

9. As the finder of fact, this Court believed that Miles Bauer prepared the tender letter and check. (*See Trial Transcript, Day 2, at 107.*)

10. But, the evidence presented at trial did not support a finding that the tender letter and check were delivered to the HOA, the HOA management company, or the HOA Trustee. Arguments made by BANA, and further review of the trial transcript and evidence in this case, did not change the conclusion this Court reached immediately after trial.

11. This Court found "that in this situation the bank in its affirmative defense efforts has a letter and after that they have a mystery. And that's why the plaintiffs win" (*See Trial Transcript, Day 2, at 109-110.*)

THE UN-REDACTED DOCUMENTS PRESENTED IN BANK OF AMERICA’S MOTION TO AMEND ARE NOT “NEWLY DISCOVERED EVIDENCE”

12. In its Motion to Amend, BANA claimed it “discovered” additional evidence of delivery of tender.

13. Redaction of the contents of the document admitted as an exhibit at trial concealed what BANA now contends is “newly discovered” evidence.

14. Miles Bauer provided the un-redacted document to BANA’s counsel many years ago; and this fact was established through evidence presented, and the admission of the Akerman law firm.

15. The content of the exhibit does not constitute “newly discovered evidence material for the party making the motion that the party could not, with reasonable diligence, have discovered and produced at the trial.” NRCP 59(a)(1)(D); *see also* NRCP 59(a)(2).

16. BANA could have produced the purportedly determinative evidence during discovery and at trial.

17. BANA claims that it discovered the “inadvertent” redaction after trial. (*See* Motion to Amend, at 8.)

18. When the attorneys at Akerman prepared the documents for the affidavit signed by Mr. Kendis and Mr. Miles, they had access to the un-redacted version of the delivery/acknowledgement sheet. (*See* Trial Transcript, Day 1, at 111; 208-209.)

19. The attorneys for BANA selected and prepared the documents for the Adam Kendis affidavit and the Douglas Miles affidavit – which they used in disclosure, discovery and dispositive motion work – and which this Court considered at trial. (*See* Trial Transcript, Day 1, at 111; 208-209.)

20. The Akerman attorneys also prepared their exhibits for use at trial.

21. During discovery, BANA could have corrected the “inadvertent” error – instead, counsel only disclosed the Strawberry Fields tender.

22. At some point in this litigation, BANA’s counsel reviewed the Legal Wings delivery sheet and should have recognized or “discovered” the purported \$495 entry on that document.

23. But it appears that BANA did not review the underlying, non-redacted evidence until after trial; the altered redaction is not “new” evidence.

///

EVIDENCE AT TRIAL DID NOT ESTABLISH AN “ORDINARY COURSE OF BUSINESS” OR THAT STANDARD PROCEDURES HAD BEEN FOLLOWED

24. In its Motion to Amend, BANA relies on the rebuttable presumption of NRS 47.250 as to Miles Bauer’s ordinary course of business.

25. BANA’s representative, Shawn Look, testified about the way BANA’s tender attempts were supposed to take place. (*See* Trial Transcript, Day 1, at 88-89.)

26. Yet, Mr. Miles and the BANA witness failed to show that funds were delivered to NAS or the HOA, or returned to BANA after the putative rejection.

27. This Court maintains that too many questions arose whether Miles Bauer followed the standard procedures it claimed were in place, and that “a lack of material pieces of evidence – that should have been available to the Bank” – were missing. (*See* FFCL, at 16).

BANK OF AMERICA DID NOT PRESENT EVIDENCE TO SUPPORT EXCUSING A VALID TENDER ATTEMPT UNDER THE FUTILITY DOCTRINE

28. A review of the documents and testimony presented at trial in this case do not show that BANA presented sufficient evidence to support its argument related to the doctrine of futility as set forth in *7510 Perla Del Mar Ave. Trust v. Bank of America, N.A.*, 136 Nev.Adv.Op. 6, 458 P.3d 348 (2020) (“*Perla Trust*”).

29. The testimony of Susan Moses proved inconclusive as to whether – *at the time* of the Sandstone notice and purported tender - NAS¹ had the blanket policy to reject tender offers.

30. Susan Moses could not identify when NAS started “rejecting” Miles Bauer’s offers with conditions. (*See* Trial Transcript, Day 1, at 26-27 (emphasis added).)

31. In this case, BANA did not elicit evidence of the NAS practices or policies in place in December of 2011.

///

///

¹ NAS had “evolving” practices and policies. *Perla Trust*, 458 P.3d at 349.

32. Thus, from the evidence presented it was not apparent when NAS adopted a policy or procedure to reject tender offers – or whether such a policy existed in December of 2011.²

33. The evidence BANA presented at trial, and the references in its Motion to Amend, was not the same or as extensive as the evidence presented by the bank in *Perla Trust*.

34. As in *Poshbaby LLC v. Elsinore III, LLC*, 73700 (July 1, 2020) (unpublished deposition), BANA presented no evidence that it “chose not to make a superpriority tender because it was aware that the HOA’s agent might have rejected that payment.”

THE TESTIMONY OF DOUG MILES WAS NOT CREDIBLE

35. Additionally, this Court found the testimony of Mr. Miles to be unreliable. (*See* Trial Transcript, Day 2, at 103-104.)

36. The fact that he was paid to be a fact witness “weighed against his credibility . . . [and] the full force and effect of his testimony” – it suggested bias and was not credible. *Id.*

37. Similarly, Mr. Miles was impeached in other portions of his testimony.

38. Therefore, nothing in the Motion to Amend changes this Court’s decision about Mr. Miles credibility and testimony.

CONCLUSIONS OF LAW

STANDARDS FOR ALTERING OR AMENDING A JUDGMENT

1. The purpose and function of Rule 59(e) is limited.

2. A “decision to grant or deny a motion [to alter or amend] rests within the sound discretion of the trial court . . .” *Southern Pac Transp. Co. v. Fitzgerald*, 94 Nev. 241, 244, 577 P.2d 1234, 1236 (1978).

3. Reconsideration of prior orders “is extraordinary in nature and . . . motions invoking [the] rule should be granted sparingly.” *Lal v. California*, 610 F.3d 518, 524 (9th Cir. 2010) (citing *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993)); *Gonzalez-Pina v. Rodriguez*, 407 F.3d 425 (1st Cir. 2005).

///

² Nor is it clear what the basis for rejecting tender offers might have been; i.e., whether they were conditional or simply not of a sufficient amount.

1 4. The grounds for altering or amending a judgment are to: (i) correct manifest errors or law or
2 fact, (ii) if previously unavailable or newly discovered evidence arises, (iii) to prevent manifest injustice,
3 or (iv) if a change in controlling law has occurred. *AA Primo Builders, LLC v. Washington*, 126 Nev.
4 578, 582, 245 P.3d 1190, 1193 (2010).

5 **BANK OF AMERICA DID NOT MEET ITS BURDEN TO PROVE THE AFFIRMATIVE DEFENSE OF**
6 **TENDER AT TRIAL**

7 5. BANA had the burden to present evidence to support its affirmative defense of tender – by a
8 preponderance of the evidence. *Resources Group, LLC v. Nev. Ass’n Servs., Inc.*, 135 Nev. 48, 52, 437
9 P.3d 154, 158 (2019) (“payment of a debt is an affirmative defense, which the party asserting has the
10 burden of proving”); *Schwartz v. Schwartz*, 95 Nev. 202, 206 n.2, 591 P.2d 1137, 1140 n.2 (1979).

11 6. This Court made the determination that BANA did not carry its burden to present a
12 preponderance of evidence on the issue of delivery of a tender, and that critical testimony was not
13 credible or was the result of bias – and it stands by that decision. (*See* FFCL, generally.)

14 7. There were no irregularities in the trial, no misconduct of Valencia #9, no accident or surprise,
15 and no error in law that was preserved by BANA at a trial. *See* NRCP Rule 59(a)(1-7).

16 8. This case was decided upon the evidence presented at trial – and it is bound by the evidence
17 presented at trial.

18 9. Based on the evidence presented to it, this Court did not err in reaching the conclusion that no
19 delivery of a tender for the super-priority portion of the Sandstone HOA lien took place.

20 10. This Court properly determined that the evidence presented by BANA did not establish that
21 Miles Bauer delivered its offer of tender.

22 11. This Court based its decision on the evidence presented, the evidence lacking, and the testimony
23 of Mr. Miles (versus that of Ms. Moses).³

24 12. Contrary to BANA’s arguments in its Motion to Amend, the evidence presented was not
25 conclusive, and it showed BANA did not have adequate proof of delivery.

26 _____

27
28 ³ BANA “got up to about 40 percent on the burden that they have to show tender, but they didn’t make a preponderance . .
.” (*See* Trial Transcript, Day 2, at 95-96.)

1 **THE EVIDENCE BANK OF AMERICA PRESENTS IN ITS MOTION WAS NOT “NEWLY**
2 **DISCOVERED”**

3 13. BANA claims the “inadvertent disclosure was a mistake that could not have been avoided in the
4 exercise of due diligence.” (*See* Motion to Amend, at 8.)

5 14. This Court does not agree – the “redaction error” could have been avoided, and is not “newly
6 discovered evidence” as contemplated by Rule 59. *Watlis*, 26 F.3d at 892 n.6.

7 15. BANA’s counsel could have attempted to rectify its failure to timely disclose the document in
8 question through disclosure, during discovery, or at trial.⁴

9 16. BANA’s claimed redaction “error” does not provide an adequate excuse allowing the belated
10 disclosure and use of the document in question.

11 17. In sum, BANA and counsel did not make a timely effort to clarify the issue – which is a
12 requirement of Rule 59: “evidence . . . the party could not, with reasonable diligence, have discovered
13 and produced at the trial.” (Emphasis added.)

14 **BANK OF AMERICA HAS NOT SHOWN THIS COURT’S DECISION PRESENTS A “MANIFEST**
15 **INJUSTICE”**

16 18. BANA also argues that this Court must find in favor of the survival of the first deed of trust to
17 “prevent manifest injustice.” (*See* Motion to Amend, at 9.)

18 19. It claims that the evidence it purportedly had, but failed to provide, would not have materially
19 changed the parties’ strategy or course of trial. *Id.*

20 20. Since BANA had access to the putative evidence on the issue of tender delivery, BANA should
21 have presented that evidence in discovery, in its pre-trial disclosures, and then at trial for consideration
22 by the finder of fact.

23 **SANCTIONS UNDER NEVADA RULE OF CIVIL PROCEDURE 37 SHOULD APPLY IN THIS**
24 **INSTANCE**

25 21. As noted above, the unredacted information does not constitute “newly discovered evidence.”
26 (*See* Findings of Fact, *supra.*)

27 ⁴ As explained in the Conclusions of Law below, counsel would have had to convince this Court that it should not be subject
28 to the sanctions of NRCP 37. The facts do not show that this Court should excuse BANA from the preclusion of evidence
that it failed to produce in disclosure or discovery.

22. “Evidence is not newly discovered if it was in the party’s possession at the time of summary judgment [or trial] or could have been discovered with reasonable diligence. *Watlis v. J.R. Simplot Co.*, 26 F.3d 885, 892 n.6 (9th Cir. 1994).

23. Therefore, pursuant to NRCP 37, this Court must bar the use of the un-redacted Legal Wings delivery sheet. Specifically, NRCP 37 (c)(1) precludes the use of evidence not disclosed or provided in discovery.⁵

24. Sanctions for discovery violations under NRCP 37 contemplate preclusion of evidence – even evidence that might be case determinative. “Rule 37(c)(1) gives teeth to these requirements by forbidding the use at trial of any information required to be disclosed by Rule 26(a) that is not properly disclosed . . . even when a litigant’s entire cause of action or defense has been precluded . . .” *Yeti by Molly, Ltd. V. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001) (applying the federal counterpart of NRCP 37) (internal quotations omitted).

25. A party is required to disclose, without awaiting a discovery request, information that the party may use to support its defenses, including a copy of all documents it may use to support its claims or defenses. NRCP 26(a)(1)(A).

26. In addition to the obligation for initial disclosure, Rule 26(e) “imposes a broad requirement on parties to update their earlier disclosures and discovery responses.” *See, e.g., Klonoski v. Mahlab*, 156 F.3d 255, 268 (1st Cir. 1998).

27. Excluding evidence as a sanction is “automatic and mandatory” unless BANA can show the violation was either justified or harmless. *See* NRCP 37(c)(1); *Hoffman v. Construction Protective Services, Inc.*, 541 F.3d 1175, 1179 (9th Cir. 2008) (applying the federal counterpart of NRCP 37).

28. The exception to “ameliorate the harshness of Rule 37(c)(1),” and allow the introduction of non-disclosed evidence, may arise if a party’s “failure to disclose the required information is substantially justified . . .” or harmless. *Self-Insurance Institute of America, Inc. v. Software and Information Industry Ass’n*, 208 F.Supp.2d 1058, 1066 (C.D.Cal.2000).

⁵ “A party’s production of documents that is not in compliance with Rule 34(b)(2)(E)(i) may also be treated as a failure to produce documents.” NRCP 37(a)(4).

29. The burden of showing substantial justification or harmlessness rests squarely on the offending party. *Goodman v. Staples the Office Superstore, LLC*, 644 F.3d 817, 827 (9th Cir. 2011); *see also See Yeti by Molly*, 259 F.3d at 1107.

30. BANA has not satisfied this Court that BANA and its counsel were justified in not discovering the information in the redacted portion of the document in question. BANA's counsel had full access to the unredacted version of the Legal Wings delivery sheet for several years.

31. This Court concludes that allowing BANA to use the now un-redacted document would be an unfair surprise. *Cambridge Electronics Corp. v. MGA Electronics, Inc.*, 227 F.R.D. 313, 325 (C.D.Cal. 2004); *see also Orjias v. Stevenson*, 31 F.3d 995, 1005 (10th Cir. 1994) (inaccurate interrogatory response warranted exclusion of testimony).

32. A showing of prejudice or unfair surprise due to an opponent's failure to disclose information pursuant to NRCP 26(e)(1) justifies barring its use. *See Pfingston v. Ronan Engineering Co.*, 284 F.3d 999, 1005 (9th Cir. 2002).

33. "Disruption to the schedule of the court and other parties . . . is not harmless." *Wong v. Regents of Univ. of California*, 410 F.3d 1052, 1062 (9th Cir. 2005).

34. The sanctions in Rule 37 were intended to provide a "strong inducement for disclosure of material that the disclosing party would expect to use as evidence . . ." Fed.R.Civ.P. 37(c), Advisory Committee Notes to 1993 Amendments.

35. BANA failed to provide the relevant information as required by the disclosure and discovery rules, therefore it is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial [or post-trial]. The failure was not substantially justified nor was it harmless.

THE DOCTRINE OF FUTILITY DOES NOT APPLY IN THIS CASE

36. This Court has considered the holding in *7510 Perla Del Mar Ave. Trust v. Bank of America, N.A.*, 458 P.3d 348 (Nev. 2020); and concludes the evidence presented by BANA at trial is insufficient to support its theory of "futility."

37. Contrary to BANA's claim, this case was not "virtually identical" to *Perla Trust* – in terms of facts or evidence. The evidence presented and arguments made in *Perla Trust* and in the trial of this case were different.

1 38. Timing as to when the foreclosure notices were sent, and knowledge of Miles Bauer and the
2 Bank were critical components in the *Perla Trust* case. 458 P.3d at 351.

3 39. Here, this Court cannot apply the futility doctrine due to the lack of substantial evidence that
4 would support a finding that NAS would have summarily rejected a tender attempt as to the Hearts Club
5 property.

6 40. “[S]ubstantial . . . clearly implies that such evidence must be of ponderable legal significance . .
7 . It must be reasonable . . . credible, and of solid value . . .” *Villafuerte v. Inter-Con Security Systems,*
8 *Inc.*, 117 Cal.Rptr.2d 916, 96 Cal.App.4th Supp. 45, 50 (2002) (quoting *Kuhn v. Department of General*
9 *Services*, 29 Cal.Rptr.2d 191 (1994); and *Howard v. Owens Corning*, 85 Cal.Rptr.2d 386 (1999)
10 (internal quotation marks omitted)).

11 41. No evidence of the kind presented in *Perla Trust* exists in this case.

12 42. This Court finds the footnote referencing the futility doctrine in *Poshbaby LLC v. Elsinore III,*
13 *LLC*, 73700 (July 1, 2020) (unpublished disposition), persuasive. Specifically, as in *Poshbaby*, BANA
14 presented no evidence that it “chose not to make a superpriority tender because it was aware that the
15 HOA’s agent might have rejected that payment.”

16 CONCLUSION

17 1. BANA failed to present sufficient evidence concerning the delivery and receipt of the letter and
18 check from Miles Bauer to NAS or Sandstone.

19 2. BANA’s Motion to Amend does not change the fact that “[t]oo many questions arose whether
20 Miles Bauer followed the standard procedures that it claimed were in place” and that “a lack of material
21 pieces of evidence – that should have been available to the Bank – were missing.” (*See* FFCL, at 16
22 (emphasis added).)

23 3. The Miles Bauer business records and testimony did not definitely establish a consistent course
24 of business – much less delivery of a tender.

25 4. BANA had possession of the unredacted documents since at least February of 2015, when Mr.
26 Kendis signed his affidavit.

27 5. The testimony of Mr. Miles and Ms. Moses failed to show knowledge and reliance to prove that
28 in December of 2011 a valid tender would have been futile.

6. BANA also did not present sufficient evidence at trial to support a futility argument – thus, this Court lacked the basis to find a valid tender would have been futile.

7. Because BANA failed to establish delivery of a tender offer, and it did not cogently present sufficient evidence at trial that a tender attempt would have been futile, the HOA lien foreclosure sale extinguished all junior liens, including the first deed of trust.

8. This Court will not alter or amend its findings of fact and conclusions of law.

ORDER

Bank of America, N.A.’s Motion to Alter or Amend Findings of Fact and Conclusions of Law is **DENIED**

Dated this 18th day of January, 2021



AA8 744 14A6 16E3
David M Jones
District Court Judge

Respectfully Submitted by:

AKERMAN LLP

/s/ Nicholas E. Belay

ARIEL E. STERN, ESQ.
Nevada Bar No. 8276
NICHOLAS E. BELAY, ESQ.
Nevada Bar No. 15175
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89134

*Attorneys for Defendant Bank of America, N.A.,
S/B/M to BAC Home Loans Servicing, LP
fka Countrywide Home Loans Servicing, LP*

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Valencia Management LLC
Series 9, Plaintiff(s)

CASE NO: A-15-723600-C

7 vs.

DEPT. NO. Department 29

8
9 Robert Stillwagon, Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Findings of Fact, Conclusions of Law and Judgment was served via the
14 court's electronic eFile system to all recipients registered for e-Service on the above entitled
case as listed below:

15 Service Date: 1/18/2021

16 "Tara D. Newberry, Esq." .	tnewberry@cnlawlv.com
17 Akerman Las Vegas Office .	akermanlas@akerman.com
18 Brienne Siriwan .	brienne.siriwan@akerman.com
19 Kathleen Seckinger .	kseckinger@cnlawlv.com
20 Nura S. Khoury .	nkhoury@cnlawlv.com
21 Richard Hopkins .	hopkinslegalcounsel@gmail.com
22 Susana Nutt	snutt@lipsonneilson.com
23 Brenda Correa	bcorrea@lipsonneilson.com
24 Renee Rittenhouse	rrittenhouse@lipsonneilson.com
25 Amber Williams	awilliams@lipsonneilson.com

26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Ariel Stern	ariel.stern@akerman.com
Melanie Morgan	melanie.morgan@akerman.com
Elizabeth Streible	elizabeth.streible@akerman.com
Aimee Clark Newberry	aclarknewberry@cnlawlv.com
Nicholas Belay	nicholas.belay@akerman.com