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5316 Clover Blossom Ct Trust

SUPREME COURT

STATE OF NEVADA

5316 CLOVER BLOSSOM CT TRUST, Appellant, vs. U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN TRUST 2006-OA1, MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1; and CLEAR RECON CORPS, Respondents.	CASE NO.: 82426

APPELLANT'S APPENDIX VOLUME 2

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

5316 CLOVER BLOSSOM CT TRUST;

Plaintiff,

v.

U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN TRUST 2006-OA1, MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1; and CLEAR RECON CORPS,

Defendants.

U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN TRUST 2006-OA1, MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1;

Counterclaimant,

v.

Case No.: A-14-704412-C

Dept. No.: XXIV

U.S. BANK, N.A., AS TRUSTEE'S ANSWER TO 5316 CLOVER BLOSSOM TRUST'S AMENDED COMPLAINT, COUNTERCLAIMS, AND CROSS-CLAIMS

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5316 CLOVER BLOSSOM CT TRUST;

Counter-defendant.

U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN TRUST 2006-OA1, MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1;

Cross-claimant,

v.

COUNTRY GARDENS OWNERS ASSOCIATION,

Cross-defendants.

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U.S. Bank, N.A., solely as Successor Trustee to Bank of America, N.A., successor by merger to LaSalle Bank, N.A., as Trustee to the holders of the Zuni Mortgage Loan Trust 2006-OA1, Mortgage Loan Pass-Through Certificates Series 2006-OA1 (**U.S. Bank**), by and through its attorneys at the law firm AKERMAN LLP, hereby answers Plaintiff 5316 Clover Blossom CT Trust's (**Plaintiff**) Amended Complaint as follows:

ANSWER TO AMENDED COMPLAINT

1. U.S. Bank admits only that a Trustee's Deed Upon Sale recorded on January 24, 2013 purports to convey the Property to Plaintiff. U.S. Bank specifically denies that its interest in the Property has been extinguished. U.S. Bank further denies that Plaintiff has ever been the legal or equitable owner of the Property.

2. U.S. Bank admits only that a Trustee's Deed Upon Sale recorded on January 24, 2013 purports to convey the Property to Plaintiff. U.S. Bank specifically denies that its interest in the Property has been extinguished. U.S. Bank further denies that Plaintiff has ever been the legal or equitable owner of the Property.

3. U.S. Bank admits only that a Trustee's Deed Upon Sale recorded on January 24, 2013 purports to convey the Property to Plaintiff. U.S. Bank specifically denies that its interest in the

Property has been extinguished. U.S. Bank further denies that Plaintiff has ever been the legal or equitable owner of the Property.

4. The allegations of Paragraph 4 relate to a recorded document that speaks for itself. To the extent a response is required, U.S. Bank admits the allegations of Paragraph 4.

5. The allegations of Paragraph 5 relate to a recorded document that speaks for itself. To the extent a response is required, U.S. Bank admits the allegations of Paragraph 5.

6. U.S. Bank denies the allegations of Paragraph 6.

7. U.S. Bank denies the allegations of Paragraph 7.

8. U.S. Bank denies the allegations of Paragraph 8.

9. The allegations of Paragraph 9 relate to a recorded document that speaks for itself. To the extent a response is required, U.S. Bank admits the allegations of Paragraph 9.

10. U.S. Bank denies that Plaintiff is entitled to the relief requested in Paragraph 10.

11. U.S. Bank denies that Plaintiff is entitled to the relief requested in Paragraph 11.

SECOND CLAIM FOR RELIEF

12. U.S. Bank adopts and incorporates by reference all the preceding paragraphs as though set forth fully herein. To the extent a response is required, U.S. Bank denies the allegations of Paragraph 12.

13. U.S. Bank denies that Plaintiff is entitled to the relief requested in Paragraph 13.

14. U.S. Bank denies that Plaintiff is entitled to the relief requested in Paragraph 14.

THIRD CLAIM FOR RELIEF

15. U.S. Bank adopts and incorporates by reference all the preceding paragraphs as though set forth fully herein. To the extent a response is required, U.S. Bank denies the allegations of Paragraph 15.

16. U.S. Bank denies that Plaintiff is entitled to the relief requested in Paragraph 16.

17. U.S. Bank denies that Plaintiff is entitled to the relief requested in Paragraph 17.

PRAYER FOR RELIEF

1. U.S. Bank denies that Plaintiff is entitled to the relief requested in Paragraph 1 of the Prayer.

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2. U.S. Bank denies that Plaintiff is entitled to the relief requested in Paragraph 2 of the Prayer.

3. U.S. Bank denies that Plaintiff is entitled to the relief requested in Paragraph 3 of the Prayer.

4. U.S. Bank denies that Plaintiff is entitled to the relief requested in Paragraph 4 of the Prayer.

5. U.S. Bank denies that Plaintiff is entitled to the relief requested in Paragraph 5 of the Prayer.

AFFIRMATIVE DEFENSES

U.S. Bank asserts the following additional defenses. Discovery and investigation of this case is not yet complete, and U.S. Bank reserves the right to amend this Answer by adding, deleting, or amending defenses as may be appropriate. In further answer to the Amended Complaint, and by way of additional defenses, U.S. Bank avers as follows:

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim)

Plaintiff has failed to state facts sufficient to constitute any cause of action against U.S. Bank.

SECOND AFFIRMATIVE DEFENSE

(Void for Vagueness)

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

THIRD AFFIRMATIVE DEFENSE

(Due Process Violations)

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

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FOURTH AFFIRMATIVE DEFENSE

(Tender, Estoppel, Laches, and Waiver)

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

FIFTH AFFIRMATIVE DEFENSE

(Commercial Reasonableness and Violation of Good Faith)

The homeowners association's foreclosure sale was not commercially reasonable, and the circumstances of the sale of the property violated the homeowners association's obligation of good faith and duty to act in a commercially reasonable manner.

SIXTH AFFIRMATIVE DEFENSE

(Failure to Mitigate Damages)

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

SEVENTH AFFIRMATIVE DEFENSE

(No Standing)

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

EIGHTH AFFIRMATIVE DEFENSE

(Unclean Hands)

U.S. Bank avers the affirmative defense of unclean hands.

NINTH AFFIRMATIVE DEFENSE

(Plaintiff is Not Entitled to Relief)

U.S. Bank denies that Plaintiff is entitled to any relief for which it prays.

TENTH AFFIRMATIVE DEFENSE

(Failure to Do Equity)

U.S. Bank avers the affirmative defense of failure to do equity.

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ELEVENTH AFFIRMATIVE DEFENSE

(Failure to Provide Notice)

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

TWELFTH 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.

THIRTEENTH AFFIRMATIVE DEFENSE

(Federal Law)

The homeowners association's sale is void or otherwise fails to extinguish the applicable deed of trust because it violates provisions of the United States' Constitution and/or applicable federal law.

FOURTEENTH AFFIRMATIVE DEFENSE

(*SFR Investments* Cannot be Applied Retroactively)

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

FIFTEENTH AFFIRMATIVE DEFENSE

(No Super-Priority Sale)

The Deed of Trust was not extinguished by the HOA foreclosure sale because the HOA foreclosed on the sub-priority portion of its lien.

SIXTEENTH AFFIRMATIVE DEFENSE

(Additional Affirmative Defenses)

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

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COUNTERCLAIMS AND CROSS-CLAIMS

GENERAL ALLEGATIONS

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

2. When these assessments are not paid, the homeowners association may both impose and foreclose on a lien.

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

4. NRS 116.3116 makes a homeowners association's lien for assessments junior to a first deed of trust beneficiary's secured interest in the property, with one limited exception: a homeowners association's lien is senior to a first deed of trust beneficiary's secured interest "to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would 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)(c).

5. According to the Nevada Supreme Court's decision in *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. Adv. Op. 75, 334 P.3d 408 (2014), if a homeowners association properly forecloses on its super-priority lien, it can extinguish a first deed of trust. However, Country Gardens Owners Association's (**HOA**) foreclosure in this case did not extinguish U.S. Bank's senior deed of trust because the foreclosure did not comply with Nevada law and was commercially unreasonable as a matter of law. To deprive U.S. Bank of its deed of trust under the circumstances of this case would deprive U.S. Bank of its due process rights.

The Deed of Trust and Assignment

6. On or about June 24, 2004, Dennis Johnson and Geraldine Johnson (**Borrowers**) purchased real property located at 5316 Clover Blossom Court, North Las Vegas, Nevada 89031 (**Property**) via a loan in the amount of $147,456.00, which was secured by a deed of trust executed in favor of Countrywide Home Loans, Inc. (**Countrywide**) and recorded on June 30, 2004 (**Deed of**

Trust). A true and correct copy of the Deed of Trust is attached as **Exhibit A**.

7. This Deed of Trust was subsequently assigned to U.S. Bank via an Assignment of Deed of Trust on June 15, 2011. This Assignment was recorded on June 20, 2011. A true and correct copy of the Assignment is attached as **Exhibit B**.

8. The Borrowers defaulted under the terms of the note and Deed of Trust.

9. The Deed of Trust provides that, if the Borrowers default in paying the indebtedness the Deed of Trust secures, or fail to perform any agreement in the note or Deed of Trust, U.S. Bank may, upon notice to the Borrowers, declare the amounts owed under the note immediately due and payable.

10. Following the Borrowers' default, U.S. Bank provided Borrowers with notice of its intent to accelerate the amounts owed under the note.

11. The unpaid principal balance due on the loan secured by the Deed of Trust, as of August 15, 2017, exceeds $147,145.84. This amount has increased and will continue to increase pursuant to the terms of the note and Deed of Trust.

12. Although U.S. Bank has demanded that Borrowers pay the amounts due under the loan, they have failed and refused to do so, and continue to fail and refuse to do so.

The HOA Lien and Foreclosure

13. Upon information and belief, Borrowers failed to pay the HOA all amounts due to it. On February 22, 2012, the HOA, through its agent Alessi & Koenig, LLC (**HOA Trustee**), recorded a Notice of Delinquent Assessment (Lien). This Notice stated the amount due to the HOA was $1,095.50, which included assessments, dues, interest, and fees. A true and correct copy of the Lien is attached as **Exhibit C**. The Lien neither identifies the super-priority amount claimed by the HOA, nor describes the "deficiency in payment" required by NRS 116.31162(1)(b)(1).

14. On the same day, the HOA, through the HOA Trustee, recorded another Notice of Delinquent Assessment (Lien). This Notice stated the amount due to the HOA was $1,150.50, which included assessments, dues, interest, and fees. A true and correct copy of this Lien is attached as **Exhibit D**. The Lien neither identifies the super-priority amount claimed by the HOA, nor describes the "deficiency in payment" required by NRS 116.31162(1)(b)(1).

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15. On April 20, 2012, the HOA, through the HOA Trustee, recorded a Notice of Default and Election to Sell Under Homeowners Association Lien. This Notice referenced the Notice of Delinquent Assessment (Lien) attached as **Exhibit C**, and stated the amount due to the HOA was $3,396.00, which included assessments, dues, interest, and fees. A true and correct copy of the Notice of Default is attached as **Exhibit E**. The Notice of Default neither identifies the super-priority amount claimed by the HOA, nor described the "deficiency in payment" required by NRS 116.31162(1)(b)(1).

16. On October 31, 2012, the HOA, through the HOA Trustee, recorded a Notice of Trustee's Sale. This Notice stated the amount due to the HOA was $4,039.00, which included assessments, dues, interest, and fees, and set the sale for November 28, 2012. A true and correct copy of the Notice of Sale is attached as **Exhibit F**. The Notice of Sale neither identifies the super-priority amount claimed by the HOA, nor described the "deficiency in payment" required by NRS 116.31162(1)(b)(1).

17. In response to the Notice of Trustee's Sale, Bank of America, who serviced the loan secured by the Deed of Trust, through counsel at Miles, Bauer, Bergstrom & Winters, LLP (**Miles Bauer**), contacted the HOA Trustee and requested a payoff ledger detailing the specific super-priority amount of the HOA's lien on the Property. A true and correct copy of this Letter is attached as **Exhibit G-1**.

18. The HOA Trustee provided Miles Bauer with a ledger showing the HOA's monthly assessments were $55.00, meaning nine months of delinquent assessments would equal $495.00. A true and correct copy of this Ledger is attached as **Exhibit G-2**.

19. Bank of America nonetheless tendered to the HOA Trustee a check in the amount of $1,494.50 – which included $999.50 in "reasonable collection costs" in addition to the $495.00 statutory super-priority amount – to satisfy the HOA's super-priority lien. A true and correct copy of this Letter is attached as **Exhibit G-3**.

20. The HOA Trustee unjustifiably rejected this tender.

21. The HOA non-judicially foreclosed on its sub-priority lien secured by the Property on January 16, 2013, selling an encumbered interest in the Property to Plaintiff for $8,200.00. A true and correct copy of the Trustee's Deed Upon Sale is attached as **Exhibit H**.

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22. In none of the recorded documents nor in any notice did the HOA specify that U.S. Bank's interest in the Property would be extinguished by the HOA foreclosure.

23. The HOA Trustee's sale of the HOA's interest in the Property for less than 6% of the value of the unpaid principal balance of the note secured by the senior Deed of Trust, and, on information and belief, for a similarly diminutive percentage of the Property's fair market value, is commercially unreasonable and not in good faith as required by NRS 116.1113 to the extent the HOA foreclosed on the super-priority portion of its lien.

24. On information and belief, the HOA and HOA Trustee were not attempting to foreclose on the super-priority portion of the HOA's lien. To the extent the HOA Trustee's foreclosure sale is construed as a super-priority foreclosure, that sale is unfair and oppressive because the HOA and HOA Trustee did not intend the sale as a super-priority foreclosure, and thus did not conduct the sale in such a way to attract proper prospective purchasers, thus leading, in part, to the grossly inadequate sales price.

25. The HOA Trustee's foreclosure sale was commercially unreasonable because the notices it provided did not describe the "deficiency in payment," as required by NRS 116.31162(1)(b)(1).

26. The HOA Trustee's foreclosure sale was commercially unreasonable because the HOA's covenants, conditions, and restrictions, which were recorded, specifically stated that the HOA's foreclosure sales could not extinguish senior deeds of trust. To the extent the HOA Trustee's foreclosure sale is construed as a super-priority foreclosure, that sale is unfair and oppressive because the HOA publicly recorded documents stating that such a sale could not extinguish a senior deed of trust, which led to the sale not attracting proper prospective purchasers, leading, in part, to the grossly inadequate sales price.

27. This foreclosure sale was commercially unreasonable because the manner in which the HOA Trustee conducted the sale, including the notices it provided and other circumstances surrounding the sale, was not calculated to attract proper perspective purchasers, and thus could not promote an equitable sales price of the Property.

28. The HOA Trustee's foreclosure sale was commercially unreasonable because, in

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calculating the super-priority amount allegedly owed and rejecting tender as insufficient, the HOA included amounts in its supposed super-priority lien – including fines, interest, late fees, and costs of collection – that were not allowed to be included in its super-priority lien under NRS 116.311(c).

29. The HOA Trustee's foreclosure sale was invalid and did not extinguish U.S. Bank's senior Deed of Trust because Bank of America's tender of the super-priority-plus amount extinguished any super-priority lien held by the HOA.

30. The HOA Trustee's foreclosure sale was commercially unreasonable because, even if Bank of America's tender did not accurately calculate the entire super-priority amount of HOA's lien, such mistake was caused by the HOA Trustee's refusal to identify or accurately define the amount of the HOA's super-priority lien.

FIRST CAUSE OF ACTION

(Declaratory Relief / Quiet Title Against Plaintiff)

31. U.S. Bank repeats and re-alleges the preceding paragraphs as though fully set forth herein and incorporates the same by reference.

32. Under NRS 30.010 *et seq.* and NRS 40.010, this Court has the power and authority to declare U.S. Bank's rights and interests in the Property and to resolve Plaintiff's adverse claim in the Property.

33. The HOA, through the HOA Trustee, foreclosed on the HOA's lien on January 16, 2013.

34. Upon information and belief, Plaintiff claims an interest in the Property adverse to U.S. Bank, in that Plaintiff claims that the HOA's foreclosure sale extinguished U.S. Bank's interest in the Property. A judicial determination is necessary to ascertain the rights, obligations, and duties of the various parties.

35. U.S. Bank is entitled to a declaration that the HOA's foreclosure sale did not extinguish U.S. Bank's interest.

36. The HOA's foreclosure sale did not extinguish U.S. Bank's senior Deed of Trust because the recorded notices, even if they were in fact provided, failed to describe the lien in sufficient detail as required by Nevada law, including, without limitation: whether the deficiency included a

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"super-priority" component, the amount of the super-priority component, how the super-priority component was calculated, when payment on the super-priority component was required, where payment was to be made, or the consequences for failure to pay the super-priority component.

37. The foreclosure sale did not extinguish U.S. Bank's senior Deed of Trust because Bank of America tendered the super-priority-plus amount to the HOA Trustee, and the HOA Trustee unjustifiably rejected that tender.

38. 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, the HOA's failure to accept the tender, the sale of the Property for a fraction of the loan balance or actual market value of the Property, a foreclosure that was not calculated to promote an equitable sales price for the Property or to attract proper prospective purchasers, and a foreclosure sale that was designed and/or intended to result in a maximum profit for the HOA and HOA Trustee without regard to the rights and interests of those who have an interest in the loan and made the purchase of the Property possible in the first place.

39. The foreclosure sale did not extinguish the senior Deed of Trust because NRS 116 is facially unconstitutional under the Due Process Clause for the reasons set forth in *Bourne Valley v. Wells Fargo Bank, N.A.*, 832 F.3d 1154 (9th Cir. Aug. 12, 2016).

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

41. U.S. Bank is entitled to a declaration that the HOA sale did not extinguish the senior Deed of Trust, which is superior to any interest acquired by Plaintiff through the HOA foreclosure sale.

42. U.S. Bank was required to retain an attorney to prosecute this action, and is therefore entitled to collect its reasonable attorney's fees and costs.

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SECOND CAUSE OF ACTION

(Injunctive Relief Against Plaintiff)

43. U.S. Bank repeats and re-alleges the preceding paragraphs as though fully set forth herein and incorporates the same by reference.

44. U.S. Bank disputes Plaintiff's claim that it owns the Property free and clear of the senior Deed of Trust.

45. Any sale or transfer of the Property by Plaintiff, prior to a judicial determination concerning the respective rights and interests of the parties to this case, may be rendered invalid if the senior Deed of Trust still encumbers the Property in first position and was not extinguished by the HOA sale.

46. U.S. Bank has a substantial likelihood of success on the merits of its claims, for which compensatory damages would not compensate for the irreparable harm of the loss of title to a bona fide purchaser or loss of the first-position priority status secured by the Property.

47. U.S. Bank has no adequate remedy at law due to the uniqueness of the Property and the risk of loss of the senior Deed of Trust.

48. U.S. Bank is entitled to a preliminary injunction prohibiting Plaintiff, or its successors, assigns, or agents, from conducting any sale, transfer, or encumbrance of the Property that is claimed to be superior to the senior Deed of Trust or not subject to the senior Deed of Trust.

49. U.S. Bank is entitled to a preliminary injunction requiring Plaintiff to pay all taxes, insurance, and homeowners association dues during the pendency of this action.

THIRD CAUSE OF ACTION

(Unjust Enrichment Against the HOA)

50. U.S. Bank repeats and re-alleges the preceding paragraphs as though set forth fully herein and incorporates the same by reference.

51. Under NRS 116.3116(2), a homeowners association's lien is split into two portions: one which has super-priority, and another which is subordinate to a senior deed of trust.

52. The portion of the lien with super-priority consists of only the last nine months of assessments for common expenses incurred prior to the institution of an action to enforce the lien. The

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remainder of a homeowners association's lien is subordinate to a senior deed of trust.

53. Bank of America, through Miles Bauer, tendered an amount much greater than the super-priority amount to the HOA Trustee on December 6, 2012. This amount constituted the last nine months of HOA assessments—the full amount the HOA could claim had super-priority over the Deed of Trust – in addition to the HOA's reasonable collection costs.

54. The HOA, through the HOA Trustee, unjustifiably rejected this super-priority-plus tender.

55. Rather than accepting this payment, the HOA and HOA Trustee purported to foreclose on the extinguished super-priority portion of the HOA's lien. This allowed the HOA Trustee to sell the HOA's interest in the Property at the foreclosure sale for $8,200.00.

56. By purporting to foreclose on the super-priority portion of its lien after rejecting Bank of America's super-priority-plus tender, the HOA was unjustly enriched in an amount at least equal to the full value of the proceeds it received from the foreclosure sale.

57. Even if the HOA's super-priority foreclosure is held to be proper, on information and belief, it has still retained a portion of the foreclosure-sale proceeds that should have been distributed to U.S. Bank, as the Deed of Trust at all times had priority over the vast majority of the HOA's lien.

58. U.S. Bank is entitled to a reasonable amount of the benefits obtained by the HOA based on a theory of unjust enrichment.

59. U.S. Bank submitted this claim against the HOA to mediation before the Department of Business and Industry – Real Estate Division (**NRED**), but it has not yet been mediated.

60. U.S. Bank was required to retain an attorney to prosecute this action, and is therefore entitled to collect its reasonable attorney's fees and costs.

FOURTH CAUSE OF ACTION

(Tortious Interference with Contractual Relations Against the HOA)

61. U.S. Bank repeats and re-alleges the preceding paragraphs as though fully set forth herein and incorporates the same by reference.

62. On June 24, 2004, Borrowers executed a Deed of Trust in favor of Countrywide Home Loans, Inc. This Deed of Trust was subsequently assigned to U.S. Bank via an Assignment of Deed

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of Trust on June 15, 2011.

63. On April 20, 2012, the HOA, through the HOA Trustee, recorded a Notice of Default and Election to Sell Under Homeowners Association Lien.

64. After the HOA Trustee recorded the Notice of Default, Bank of America tendered $1,494.50 to the HOA Trustee to satisfy the super-priority portion of the HOA's lien. This amount included the last nine months of delinquent assessments – the maximum amount the HOA could claim had super-priority over U.S. Bank's senior Deed of Trust – in addition to a significant amount of the HOA's collection costs.

65. Rather than accepting this tender, the HOA, through the HOA Trustee, foreclosed on the Property. The HOA Trustee sold the Property for $8,200.00, less than 6% of the outstanding balance of the loan secured by U.S. Bank's senior Deed of Trust.

66. The HOA Trustee's decision on behalf of the HOA to foreclose on the Property rather than accept Bank of America's super-priority-plus tender – which prevented foreclosure of the HOA's super-priority lien – was designed to disrupt the contractual relationship between U.S. Bank and Borrowers by extinguishing the senior Deed of Trust.

67. The HOA Trustee's rejection of tender and subsequent foreclosure sale has put in dispute the first-priority position of U.S. Bank's Deed of Trust, which secures a loan with an unpaid principal balance of $147,145.84.

68. U.S. Bank 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 Deed of Trust that was purportedly extinguished as a direct result of the HOA Trustee's intentional acts.

69. U.S. Bank submitted this claim against the HOA to mediation before NRED, but it has not yet been mediated.

70. U.S. Bank was required to retain an attorney to prosecute this action, and is therefore entitled to collect its reasonable attorney's fees and costs.

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FIFTH CAUSE OF ACTION

(Breach of the Duty of Good Faith Against the HOA)

71. U.S. Bank repeats and re-alleges the preceding paragraphs as though fully set forth herein and incorporates the same by reference.

72. NRS 116.1113 provides that every duty governed by NRS 116, Nevada's version of the Uniform Common Interest Ownership Act, must be performed in good faith.

73. Before the foreclosure of the Property, U.S. Bank tendered an amount much greater than the super-priority amount to the HOA Trustee. The HOA Trustee, acting on behalf of the HOA, refused to accept payment.

74. Rather than accept a payment which would satisfy the HOA's super-priority lien, the HOA Trustee determined in bad faith to foreclose on the Property pursuant to NRS 116.

75. As a result of this bad-faith foreclosure, the first-priority position of U.S. Bank's Deed of Trust, which secures a loan with an unpaid balance of $147,145.84, is in dispute.

76. U.S. Bank 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 Deed of Trust that was purportedly extinguished as a direct result of the HOA and HOA Trustee's bad-faith foreclosure.

77. U.S. Bank submitted this claim against the HOA to mediation before NRED, but it has not yet been mediated.

78. U.S. Bank was required to retain an attorney to prosecute this action, and is therefore entitled to collect its reasonable attorney's fees and costs.

SIXTH CAUSE OF ACTION

(Wrongful Foreclosure Against the HOA)

79. U.S. Bank repeats and re-alleges the preceding paragraphs as though fully set forth herein and incorporates the same by reference.

80. Prior to the HOA's foreclosure sale, Bank of America tendered an amount much greater than the full super-priority amount of the HOA's lien to the HOA Trustee. The HOA Trustee, acting on behalf of the HOA, rejected this tender.

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81. Bank of America's tender extinguished the super-priority portion of the HOA's lien. Consequently, the HOA's foreclosure of the super-priority portion of its lien was wrongful, as the Borrowers were not in default for that portion of the lien.

82. The HOA and HOA Trustee's wrongful foreclosure has put in dispute the first-priority position of U.S. Bank's Deed of Trust, which secures a loan with an unpaid principal balance of $147,145.84.

83. U.S. Bank 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 Deed of Trust that was purportedly extinguished as a direct result of the HOA and HOA Trustee's wrongful foreclosure.

84. U.S. Bank submitted this claim against the HOA and HOA Trustee to mediation before NRED, but it has not yet been mediated.

85. U.S. Bank was required to retain an attorney to prosecute this action, and is therefore entitled to collect its reasonable attorney's fees and costs.

PRAYER FOR RELIEF

WHEREFORE, U.S. Bank prays for the following:

1. A declaration establishing U.S. Bank's Deed of Trust is the senior lien encumbering the property;

2. A declaration establishing U.S. Bank's Deed of Trust is senior and superior to any right, title, interest, lien, equity, or estate of Plaintiff;

3. A declaration establishing that the super-priority portion of the HOA's lien is eliminated as a result of the HOA Trustee's refusal to accept Bank of America's tender of an amount much greater than the statutory super-priority amount;

4. A preliminary injunction prohibiting Plaintiff, its successors, assigns, or agents, from conducting any sale, transfer, or encumbrance of the Property that is claimed to be superior to the senior Deed of Trust, or not subject to the senior Deed of Trust;

5. A preliminary injunction requiring Plaintiff to pay all taxes, insurance, and homeowner's association dues during the pendency of this action;

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6. Judgment in U.S. Bank's favor against the HOA for the damages it caused U.S. Bank in an amount in excess of $10,000.00;

7. Reasonable attorney's fees as special damages and the costs of the suit; and

8. For such other and further relief the Court deems proper.

DATED: September __, 2017

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Attorneys for U.S. Bank, N.A., solely as Successor Trustee to Bank of America, N.A., successor by merger to LaSalle Bank, N.A., as Trustee to the Holders of the Zuni Mortgage Loan Trust 2006-OA1, Mortgage Loan Pass-Through Certificates Series 2006-OA1

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ___ day of September, 2017, and pursuant to NRCP 5(b), I deposited for mailing in the U.S. Mail a true and correct copy of the foregoing **U.S. BANK, N.A., AS TRUSTEE'S ANSWER TO 5316 CLOVER BLOSSOM TRUST'S AMENDED COMPLAINT, COUNTERCLAIMS, AND CROSS-CLAIMS**, postage prepaid and addressed to:

Michael F. Bohn, Esq.
LAW OFFICES OF MICHAEL F. BOHN, ESQ., LTD.
376 East Warm Springs Road, Suite 140
Las Vegas, NV 89119

Attorney for Plaintiff

/s/
An employee of AKERMAN LLP

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

5316 CLOVER BLOSSOM CT TRUST;

Plaintiff,

v.

U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN TRUST 2006-OA1, MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1; and CLEAR RECON CORPS,

Defendants.

U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN TRUST 2006-OA1, MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1;

Counterclaimant,

Case No.: A-14-704412-C

Dept. No.: XXIV

U.S. BANK, N.A., AS TRUSTEE'S ANSWER TO 5316 CLOVER BLOSSOM TRUST'S AMENDED COMPLAINT, COUNTERCLAIMS, AND CROSS-CLAIMS

v.

5316 CLOVER BLOSSOM CT TRUST;

Counter-defendant.

U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN TRUST 2006-OA1, MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1;

Cross-claimant,

v.

COUNTRY GARDEN OWNERS' ASSOCIATION,

Cross-defendants.

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U.S. Bank, N.A., solely as Successor Trustee to Bank of America, N.A., successor by merger to LaSalle Bank, N.A., as Trustee to the holders of the Zuni Mortgage Loan Trust 2006-OA1, Mortgage Loan Pass-Through Certificates Series 2006-OA1 (**U.S. Bank**), by and through its attorneys at the law firm AKERMAN LLP, hereby answers Plaintiff 5316 Clover Blossom CT Trust's (**Plaintiff**) Amended Complaint as follows:

ANSWER TO AMENDED COMPLAINT

1. U.S. Bank admits only that a Trustee's Deed Upon Sale recorded on January 24, 2013 purports to convey the Property to Plaintiff. U.S. Bank specifically denies that its interest in the Property has been extinguished. U.S. Bank further denies that Plaintiff has ever been the legal or equitable owner of the Property.

2. U.S. Bank admits only that a Trustee's Deed Upon Sale recorded on January 24, 2013 purports to convey the Property to Plaintiff. U.S. Bank specifically denies that its interest in the Property has been extinguished. U.S. Bank further denies that Plaintiff has ever been the legal or equitable owner of the Property.

3. U.S. Bank admits only that a Trustee's Deed Upon Sale recorded on January 24, 2013 purports to convey the Property to Plaintiff. U.S. Bank specifically denies that its interest in the

Property has been extinguished. U.S. Bank further denies that Plaintiff has ever been the legal or equitable owner of the Property.

4. The allegations of Paragraph 4 relate to a recorded document that speaks for itself. To the extent a response is required, U.S. Bank admits the allegations of Paragraph 4.

5. The allegations of Paragraph 5 relate to a recorded document that speaks for itself. To the extent a response is required, U.S. Bank admits the allegations of Paragraph 5.

6. U.S. Bank denies the allegations of Paragraph 6.

7. U.S. Bank denies the allegations of Paragraph 7.

8. U.S. Bank denies the allegations of Paragraph 8.

9. The allegations of Paragraph 9 relate to a recorded document that speaks for itself. To the extent a response is required, U.S. Bank admits the allegations of Paragraph 9.

10. U.S. Bank denies that Plaintiff is entitled to the relief requested in Paragraph 10.

11. U.S. Bank denies that Plaintiff is entitled to the relief requested in Paragraph 11.

SECOND CLAIM FOR RELIEF

12. U.S. Bank adopts and incorporates by reference all the preceding paragraphs as though set forth fully herein. To the extent a response is required, U.S. Bank denies the allegations of Paragraph 12.

13. U.S. Bank denies that Plaintiff is entitled to the relief requested in Paragraph 13.

14. U.S. Bank denies that Plaintiff is entitled to the relief requested in Paragraph 14.

THIRD CLAIM FOR RELIEF

15. U.S. Bank adopts and incorporates by reference all the preceding paragraphs as though set forth fully herein. To the extent a response is required, U.S. Bank denies the allegations of Paragraph 15.

16. U.S. Bank denies that Plaintiff is entitled to the relief requested in Paragraph 16.

17. U.S. Bank denies that Plaintiff is entitled to the relief requested in Paragraph 17.

PRAYER FOR RELIEF

1. U.S. Bank denies that Plaintiff is entitled to the relief requested in Paragraph 1 of the Prayer.

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2. U.S. Bank denies that Plaintiff is entitled to the relief requested in Paragraph 2 of the Prayer.

3. U.S. Bank denies that Plaintiff is entitled to the relief requested in Paragraph 3 of the Prayer.

4. U.S. Bank denies that Plaintiff is entitled to the relief requested in Paragraph 4 of the Prayer.

5. U.S. Bank denies that Plaintiff is entitled to the relief requested in Paragraph 5 of the Prayer.

AFFIRMATIVE DEFENSES

U.S. Bank asserts the following additional defenses. Discovery and investigation of this case is not yet complete, and U.S. Bank reserves the right to amend this Answer by adding, deleting, or amending defenses as may be appropriate. In further answer to the Amended Complaint, and by way of additional defenses, U.S. Bank avers as follows:

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim)

Plaintiff has failed to state facts sufficient to constitute any cause of action against U.S. Bank.

SECOND AFFIRMATIVE DEFENSE

(Void for Vagueness)

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

THIRD AFFIRMATIVE DEFENSE

(Due Process Violations)

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

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FOURTH AFFIRMATIVE DEFENSE

(Tender, Estoppel, Laches, and Waiver)

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

FIFTH AFFIRMATIVE DEFENSE

(Commercial Reasonableness and Violation of Good Faith)

The homeowners association's foreclosure sale was not commercially reasonable, and the circumstances of the sale of the property violated the homeowners association's obligation of good faith and duty to act in a commercially reasonable manner.

SIXTH AFFIRMATIVE DEFENSE

(Failure to Mitigate Damages)

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

SEVENTH AFFIRMATIVE DEFENSE

(No Standing)

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

EIGHTH AFFIRMATIVE DEFENSE

(Unclean Hands)

U.S. Bank avers the affirmative defense of unclean hands.

NINTH AFFIRMATIVE DEFENSE

(Plaintiff is Not Entitled to Relief)

U.S. Bank denies that Plaintiff is entitled to any relief for which it prays.

TENTH AFFIRMATIVE DEFENSE

(Failure to Do Equity)

U.S. Bank avers the affirmative defense of failure to do equity.

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ELEVENTH AFFIRMATIVE DEFENSE

(Failure to Provide Notice)

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

TWELFTH 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.

THIRTEENTH AFFIRMATIVE DEFENSE

(Federal Law)

The homeowners association's sale is void or otherwise fails to extinguish the applicable deed of trust because it violates provisions of the United States' Constitution and/or applicable federal law.

FOURTEENTH AFFIRMATIVE DEFENSE

(*SFR Investments* Cannot be Applied Retroactively)

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

FIFTEENTH AFFIRMATIVE DEFENSE

(No Super-Priority Sale)

The Deed of Trust was not extinguished by the HOA foreclosure sale because the HOA foreclosed on the sub-priority portion of its lien.

SIXTEENTH AFFIRMATIVE DEFENSE

(Additional Affirmative Defenses)

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

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COUNTERCLAIMS AND CROSS-CLAIMS

GENERAL ALLEGATIONS

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

2. When these assessments are not paid, the homeowners association may both impose and foreclose on a lien.

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

4. NRS 116.3116 makes a homeowners association's lien for assessments junior to a first deed of trust beneficiary's secured interest in the property, with one limited exception: a homeowners association's lien is senior to a first deed of trust beneficiary's secured interest "to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would 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)(c).

5. According to the Nevada Supreme Court's decision in *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. Adv. Op. 75, 334 P.3d 408 (2014), if a homeowners association properly forecloses on its super-priority lien, it can extinguish a first deed of trust. However, Country Garden Owners' Association's (**HOA**) foreclosure in this case did not extinguish U.S. Bank's senior deed of trust because the foreclosure did not comply with Nevada law and was commercially unreasonable as a matter of law. To deprive U.S. Bank of its deed of trust under the circumstances of this case would deprive U.S. Bank of its due process rights.

The Deed of Trust and Assignment

6. On or about June 24, 2004, Dennis Johnson and Geraldine Johnson (**Borrowers**) purchased real property located at 5316 Clover Blossom Court, North Las Vegas, Nevada 89031 (**Property**) via a loan in the amount of $147,456.00, which was secured by a deed of trust executed in favor of Countrywide Home Loans, Inc. (**Countrywide**) and recorded on June 30, 2004 (**Deed of**

Trust). A true and correct copy of the Deed of Trust is attached as **Exhibit A**.

7. This Deed of Trust was subsequently assigned to U.S. Bank via an Assignment of Deed of Trust on June 15, 2011. This Assignment was recorded on June 20, 2011. A true and correct copy of the Assignment is attached as **Exhibit B**.

8. The Borrowers defaulted under the terms of the note and Deed of Trust.

9. The Deed of Trust provides that, if the Borrowers default in paying the indebtedness the Deed of Trust secures, or fail to perform any agreement in the note or Deed of Trust, U.S. Bank may, upon notice to the Borrowers, declare the amounts owed under the note immediately due and payable.

10. Following the Borrowers' default, U.S. Bank provided Borrowers with notice of its intent to accelerate the amounts owed under the note.

11. The unpaid principal balance due on the loan secured by the Deed of Trust, as of August 15, 2017, exceeds $147,145.84. This amount has increased and will continue to increase pursuant to the terms of the note and Deed of Trust.

12. Although U.S. Bank has demanded that Borrowers pay the amounts due under the loan, they have failed and refused to do so, and continue to fail and refuse to do so.

The HOA Lien and Foreclosure

13. Upon information and belief, Borrowers failed to pay the HOA all amounts due to it. On February 22, 2012, the HOA, through its agent Alessi & Koenig, LLC (**HOA Trustee**), recorded a Notice of Delinquent Assessment (Lien). This Notice stated the amount due to the HOA was $1,095.50, which included assessments, dues, interest, and fees. A true and correct copy of the Lien is attached as **Exhibit C**. The Lien neither identifies the super-priority amount claimed by the HOA, nor describes the "deficiency in payment" required by NRS 116.31162(1)(b)(1).

14. On the same day, the HOA, through the HOA Trustee, recorded another Notice of Delinquent Assessment (Lien). This Notice stated the amount due to the HOA was $1,150.50, which included assessments, dues, interest, and fees. A true and correct copy of this Lien is attached as **Exhibit D**. The Lien neither identifies the super-priority amount claimed by the HOA, nor describes the "deficiency in payment" required by NRS 116.31162(1)(b)(1).

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15. On April 20, 2012, the HOA, through the HOA Trustee, recorded a Notice of Default and Election to Sell Under Homeowners Association Lien. This Notice referenced the Notice of Delinquent Assessment (Lien) attached as **Exhibit C**, and stated the amount due to the HOA was $3,396.00, which included assessments, dues, interest, and fees. A true and correct copy of the Notice of Default is attached as **Exhibit E**. The Notice of Default neither identifies the super-priority amount claimed by the HOA, nor described the "deficiency in payment" required by NRS 116.31162(1)(b)(1).

16. On October 31, 2012, the HOA, through the HOA Trustee, recorded a Notice of Trustee's Sale. This Notice stated the amount due to the HOA was $4,039.00, which included assessments, dues, interest, and fees, and set the sale for November 28, 2012. A true and correct copy of the Notice of Sale is attached as **Exhibit F**. The Notice of Sale neither identifies the super-priority amount claimed by the HOA, nor described the "deficiency in payment" required by NRS 116.31162(1)(b)(1).

17. In response to the Notice of Trustee's Sale, Bank of America, who serviced the loan secured by the Deed of Trust, through counsel at Miles, Bauer, Bergstrom & Winters, LLP (**Miles Bauer**), contacted the HOA Trustee and requested a payoff ledger detailing the specific super-priority amount of the HOA's lien on the Property. A true and correct copy of this Letter is attached as **Exhibit G-1**.

18. The HOA Trustee provided Miles Bauer with a ledger showing the HOA's monthly assessments were $55.00, meaning nine months of delinquent assessments would equal $495.00. A true and correct copy of this Ledger is attached as **Exhibit G-2**.

19. Bank of America nonetheless tendered to the HOA Trustee a check in the amount of $1,494.50 – which included $999.50 in "reasonable collection costs" in addition to the $495.00 statutory super-priority amount – to satisfy the HOA's super-priority lien. A true and correct copy of this Letter is attached as **Exhibit G-3**.

20. The HOA Trustee unjustifiably rejected this tender.

21. The HOA non-judicially foreclosed on its sub-priority lien secured by the Property on January 16, 2013, selling an encumbered interest in the Property to Plaintiff for $8,200.00. A true and correct copy of the Trustee's Deed Upon Sale is attached as **Exhibit H**.

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22. In none of the recorded documents nor in any notice did the HOA specify that U.S. Bank's interest in the Property would be extinguished by the HOA foreclosure.

23. The HOA Trustee's sale of the HOA's interest in the Property for less than 6% of the value of the unpaid principal balance of the note secured by the senior Deed of Trust, and, on information and belief, for a similarly diminutive percentage of the Property's fair market value, is commercially unreasonable and not in good faith as required by NRS 116.1113 to the extent the HOA foreclosed on the super-priority portion of its lien.

24. On information and belief, the HOA and HOA Trustee were not attempting to foreclose on the super-priority portion of the HOA's lien. To the extent the HOA Trustee's foreclosure sale is construed as a super-priority foreclosure, that sale is unfair and oppressive because the HOA and HOA Trustee did not intend the sale as a super-priority foreclosure, and thus did not conduct the sale in such a way to attract proper prospective purchasers, thus leading, in part, to the grossly inadequate sales price.

25. The HOA Trustee's foreclosure sale was commercially unreasonable because the notices it provided did not describe the "deficiency in payment," as required by NRS 116.31162(1)(b)(1).

26. The HOA Trustee's foreclosure sale was commercially unreasonable because the HOA's covenants, conditions, and restrictions, which were recorded, specifically stated that the HOA's foreclosure sales could not extinguish senior deeds of trust. To the extent the HOA Trustee's foreclosure sale is construed as a super-priority foreclosure, that sale is unfair and oppressive because the HOA publicly recorded documents stating that such a sale could not extinguish a senior deed of trust, which led to the sale not attracting proper prospective purchasers, leading, in part, to the grossly inadequate sales price.

27. This foreclosure sale was commercially unreasonable because the manner in which the HOA Trustee conducted the sale, including the notices it provided and other circumstances surrounding the sale, was not calculated to attract proper perspective purchasers, and thus could not promote an equitable sales price of the Property.

28. The HOA Trustee's foreclosure sale was commercially unreasonable because, in

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calculating the super-priority amount allegedly owed and rejecting tender as insufficient, the HOA included amounts in its supposed super-priority lien – including fines, interest, late fees, and costs of collection – that were not allowed to be included in its super-priority lien under NRS 116.311(c).

29. The HOA Trustee's foreclosure sale was invalid and did not extinguish U.S. Bank's senior Deed of Trust because Bank of America's tender of the super-priority-plus amount extinguished any super-priority lien held by the HOA.

30. The HOA Trustee's foreclosure sale was commercially unreasonable because, even if Bank of America's tender did not accurately calculate the entire super-priority amount of HOA's lien, such mistake was caused by the HOA Trustee's refusal to identify or accurately define the amount of the HOA's super-priority lien.

FIRST CAUSE OF ACTION

(Declaratory Relief / Quiet Title Against Plaintiff)

31. U.S. Bank repeats and re-alleges the preceding paragraphs as though fully set forth herein and incorporates the same by reference.

32. Under NRS 30.010 *et seq.* and NRS 40.010, this Court has the power and authority to declare U.S. Bank's rights and interests in the Property and to resolve Plaintiff's adverse claim in the Property.

33. The HOA, through the HOA Trustee, foreclosed on the HOA's lien on January 16, 2013.

34. Upon information and belief, Plaintiff claims an interest in the Property adverse to U.S. Bank, in that Plaintiff claims that the HOA's foreclosure sale extinguished U.S. Bank's interest in the Property. A judicial determination is necessary to ascertain the rights, obligations, and duties of the various parties.

35. U.S. Bank is entitled to a declaration that the HOA's foreclosure sale did not extinguish U.S. Bank's interest.

36. The HOA's foreclosure sale did not extinguish U.S. Bank's senior Deed of Trust because the recorded notices, even if they were in fact provided, failed to describe the lien in sufficient detail as required by Nevada law, including, without limitation: whether the deficiency included a

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"super-priority" component, the amount of the super-priority component, how the super-priority component was calculated, when payment on the super-priority component was required, where payment was to be made, or the consequences for failure to pay the super-priority component.

37. The foreclosure sale did not extinguish U.S. Bank's senior Deed of Trust because Bank of America tendered the super-priority-plus amount to the HOA Trustee, and the HOA Trustee unjustifiably rejected that tender.

38. 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, the HOA's failure to accept the tender, the sale of the Property for a fraction of the loan balance or actual market value of the Property, a foreclosure that was not calculated to promote an equitable sales price for the Property or to attract proper prospective purchasers, and a foreclosure sale that was designed and/or intended to result in a maximum profit for the HOA and HOA Trustee without regard to the rights and interests of those who have an interest in the loan and made the purchase of the Property possible in the first place.

39. The foreclosure sale did not extinguish the senior Deed of Trust because NRS 116 is facially unconstitutional under the Due Process Clause for the reasons set forth in *Bourne Valley v. Wells Fargo Bank, N.A.*, 832 F.3d 1154 (9th Cir. Aug. 12, 2016).

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

41. U.S. Bank is entitled to a declaration that the HOA sale did not extinguish the senior Deed of Trust, which is superior to any interest acquired by Plaintiff through the HOA foreclosure sale.

42. U.S. Bank was required to retain an attorney to prosecute this action, and is therefore entitled to collect its reasonable attorney's fees and costs.

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SECOND CAUSE OF ACTION

(Injunctive Relief Against Plaintiff)

43. U.S. Bank repeats and re-alleges the preceding paragraphs as though fully set forth herein and incorporates the same by reference.

44. U.S. Bank disputes Plaintiff's claim that it owns the Property free and clear of the senior Deed of Trust.

45. Any sale or transfer of the Property by Plaintiff, prior to a judicial determination concerning the respective rights and interests of the parties to this case, may be rendered invalid if the senior Deed of Trust still encumbers the Property in first position and was not extinguished by the HOA sale.

46. U.S. Bank has a substantial likelihood of success on the merits of its claims, for which compensatory damages would not compensate for the irreparable harm of the loss of title to a bona fide purchaser or loss of the first-position priority status secured by the Property.

47. U.S. Bank has no adequate remedy at law due to the uniqueness of the Property and the risk of loss of the senior Deed of Trust.

48. U.S. Bank is entitled to a preliminary injunction prohibiting Plaintiff, or its successors, assigns, or agents, from conducting any sale, transfer, or encumbrance of the Property that is claimed to be superior to the senior Deed of Trust or not subject to the senior Deed of Trust.

49. U.S. Bank is entitled to a preliminary injunction requiring Plaintiff to pay all taxes, insurance, and homeowners association dues during the pendency of this action.

THIRD CAUSE OF ACTION

(Unjust Enrichment Against the HOA)

50. U.S. Bank repeats and re-alleges the preceding paragraphs as though set forth fully herein and incorporates the same by reference.

51. Under NRS 116.3116(2), a homeowners association's lien is split into two portions: one which has super-priority, and another which is subordinate to a senior deed of trust.

52. The portion of the lien with super-priority consists of only the last nine months of assessments for common expenses incurred prior to the institution of an action to enforce the lien. The

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remainder of a homeowners association's lien is subordinate to a senior deed of trust.

53. Bank of America, through Miles Bauer, tendered an amount much greater than the super-priority amount to the HOA Trustee on December 6, 2012. This amount constituted the last nine months of HOA assessments—the full amount the HOA could claim had super-priority over the Deed of Trust – in addition to the HOA's reasonable collection costs.

54. The HOA, through the HOA Trustee, unjustifiably rejected this super-priority-plus tender.

55. Rather than accepting this payment, the HOA and HOA Trustee purported to foreclose on the extinguished super-priority portion of the HOA's lien. This allowed the HOA Trustee to sell the HOA's interest in the Property at the foreclosure sale for $8,200.00.

56. By purporting to foreclose on the super-priority portion of its lien after rejecting Bank of America's super-priority-plus tender, the HOA was unjustly enriched in an amount at least equal to the full value of the proceeds it received from the foreclosure sale.

57. Even if the HOA's super-priority foreclosure is held to be proper, on information and belief, it has still retained a portion of the foreclosure-sale proceeds that should have been distributed to U.S. Bank, as the Deed of Trust at all times had priority over the vast majority of the HOA's lien.

58. U.S. Bank is entitled to a reasonable amount of the benefits obtained by the HOA based on a theory of unjust enrichment.

59. U.S. Bank submitted this claim against the HOA to mediation before the Department of Business and Industry – Real Estate Division (**NRED**), but it has not yet been mediated.

60. U.S. Bank was required to retain an attorney to prosecute this action, and is therefore entitled to collect its reasonable attorney's fees and costs.

FOURTH CAUSE OF ACTION

(Tortious Interference with Contractual Relations Against the HOA)

61. U.S. Bank repeats and re-alleges the preceding paragraphs as though fully set forth herein and incorporates the same by reference.

62. On June 24, 2004, Borrowers executed a Deed of Trust in favor of Countrywide Home Loans, Inc. This Deed of Trust was subsequently assigned to U.S. Bank via an Assignment of Deed

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of Trust on June 15, 2011.

63. On April 20, 2012, the HOA, through the HOA Trustee, recorded a Notice of Default and Election to Sell Under Homeowners Association Lien.

64. After the HOA Trustee recorded the Notice of Default, Bank of America tendered $1,494.50 to the HOA Trustee to satisfy the super-priority portion of the HOA's lien. This amount included the last nine months of delinquent assessments – the maximum amount the HOA could claim had super-priority over U.S. Bank's senior Deed of Trust – in addition to a significant amount of the HOA's collection costs.

65. Rather than accepting this tender, the HOA, through the HOA Trustee, foreclosed on the Property. The HOA Trustee sold the Property for $8,200.00, less than 6% of the outstanding balance of the loan secured by U.S. Bank's senior Deed of Trust.

66. The HOA Trustee's decision on behalf of the HOA to foreclose on the Property rather than accept Bank of America's super-priority-plus tender – which prevented foreclosure of the HOA's super-priority lien – was designed to disrupt the contractual relationship between U.S. Bank and Borrowers by extinguishing the senior Deed of Trust.

67. The HOA Trustee's rejection of tender and subsequent foreclosure sale has put in dispute the first-priority position of U.S. Bank's Deed of Trust, which secures a loan with an unpaid principal balance of $147,145.84.

68. U.S. Bank 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 Deed of Trust that was purportedly extinguished as a direct result of the HOA Trustee's intentional acts.

69. U.S. Bank submitted this claim against the HOA to mediation before NRED, but it has not yet been mediated.

70. U.S. Bank was required to retain an attorney to prosecute this action, and is therefore entitled to collect its reasonable attorney's fees and costs.

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FIFTH CAUSE OF ACTION

(Breach of the Duty of Good Faith Against the HOA)

71. U.S. Bank repeats and re-alleges the preceding paragraphs as though fully set forth herein and incorporates the same by reference.

72. NRS 116.1113 provides that every duty governed by NRS 116, Nevada's version of the Uniform Common Interest Ownership Act, must be performed in good faith.

73. Before the foreclosure of the Property, U.S. Bank tendered an amount much greater than the super-priority amount to the HOA Trustee. The HOA Trustee, acting on behalf of the HOA, refused to accept payment.

74. Rather than accept a payment which would satisfy the HOA's super-priority lien, the HOA Trustee determined in bad faith to foreclose on the Property pursuant to NRS 116.

75. As a result of this bad-faith foreclosure, the first-priority position of U.S. Bank's Deed of Trust, which secures a loan with an unpaid balance of $147,145.84, is in dispute.

76. U.S. Bank 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 Deed of Trust that was purportedly extinguished as a direct result of the HOA and HOA Trustee's bad-faith foreclosure.

77. U.S. Bank submitted this claim against the HOA to mediation before NRED, but it has not yet been mediated.

78. U.S. Bank was required to retain an attorney to prosecute this action, and is therefore entitled to collect its reasonable attorney's fees and costs.

SIXTH CAUSE OF ACTION

(Wrongful Foreclosure Against the HOA)

79. U.S. Bank repeats and re-alleges the preceding paragraphs as though fully set forth herein and incorporates the same by reference.

80. Prior to the HOA's foreclosure sale, Bank of America tendered an amount much greater than the full super-priority amount of the HOA's lien to the HOA Trustee. The HOA Trustee, acting on behalf of the HOA, rejected this tender.

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81. Bank of America's tender extinguished the super-priority portion of the HOA's lien. Consequently, the HOA's foreclosure of the super-priority portion of its lien was wrongful, as the Borrowers were not in default for that portion of the lien.

82. The HOA and HOA Trustee's wrongful foreclosure has put in dispute the first-priority position of U.S. Bank's Deed of Trust, which secures a loan with an unpaid principal balance of $147,145.84.

83. U.S. Bank 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 Deed of Trust that was purportedly extinguished as a direct result of the HOA and HOA Trustee's wrongful foreclosure.

84. U.S. Bank submitted this claim against the HOA and HOA Trustee to mediation before NRED, but it has not yet been mediated.

85. U.S. Bank was required to retain an attorney to prosecute this action, and is therefore entitled to collect its reasonable attorney's fees and costs.

PRAYER FOR RELIEF

WHEREFORE, U.S. Bank prays for the following:

1. A declaration establishing U.S. Bank's Deed of Trust is the senior lien encumbering the property;

2. A declaration establishing U.S. Bank's Deed of Trust is senior and superior to any right, title, interest, lien, equity, or estate of Plaintiff;

3. A declaration establishing that the super-priority portion of the HOA's lien is eliminated as a result of the HOA Trustee's refusal to accept Bank of America's tender of an amount much greater than the statutory super-priority amount;

4. A preliminary injunction prohibiting Plaintiff, its successors, assigns, or agents, from conducting any sale, transfer, or encumbrance of the Property that is claimed to be superior to the senior Deed of Trust, or not subject to the senior Deed of Trust;

5. A preliminary injunction requiring Plaintiff to pay all taxes, insurance, and homeowner's association dues during the pendency of this action;

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6. Judgment in U.S. Bank's favor against the HOA for the damages it caused U.S. Bank in an amount in excess of $10,000.00;

7. Reasonable attorney's fees as special damages and the costs of the suit; and

8. For such other and further relief the Court deems proper.

DATED: October 10, 2017

AKERMAN LLP

/s/ Karen Whelan

DARREN T. BRENNER, ESQ.
Nevada Bar No. 8386
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Attorneys for U.S. Bank, N.A., solely as Successor Trustee to Bank of America, N.A., successor by merger to LaSalle Bank, N.A., as Trustee to the Holders of the Zuni Mortgage Loan Trust 2006-OA1, Mortgage Loan Pass-Through Certificates Series 2006-OA1

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of AKERMAN LLP, and that on this 10th day of October, 2017, I caused to be served a true and correct copy of the foregoing **U.S. BANK, N.A., AS TRUSTEE'S ANSWER TO 5316 CLOVER BLOSSOM TRUST'S AMENDED COMPLAINT, COUNTERCLAIMS, AND CROSS-CLAIMS**, 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:

WRIGHT FINLAY & ZAK, LLP
Brandon Lopipero blopipero@wrightlegal.net
Dana J. Nitz dnitz@wrightlegal.net

LAW OFFICES OF MICHAEL F. BOHN, ESQ., LTD.
Eserve Contact office@bohnlawfirm.com
Michael F Bohn Esq mbohn@bohnlawfirm.com

/s/ Carla Llarena
An employee of AKERMAN LLP

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EXHIBIT A

EXHIBIT A

20040630-0002408
Fee: $45.00
06/30/2004 11:16:47 T20040047643
Req: LAWYERS TITLE OF NEVADA
Frances Deane
Clark County Recorder Pgs: 32

Assessor's Parcel Number:
12431220092
After Recording Return To: + MAIL TAX STATEMENTS TO:
COUNTRYWIDE HOME LOANS, INC.

MS SV-79 DOCUMENT PROCESSING
P.O.Box 10423
Van Nuys, CA 91410-0423
Prepared By:
KARLA R. WILSON
~~Recording Requested By:~~
J. BOLICH

32

COUNTRYWIDE HOME LOANS, INC.

7350 W. CHEYENNE AVENUE
LAS VEGAS
NV 89129

04050200-CV

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[Escrow/Closing #] [Doc ID #]

DEED OF TRUST

MIN 1000157-0003681336-4

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) "Security Instrument" means this document, which is dated JUNE 24, 2004, together with all Riders to this document.

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DOC ID #: 0006348226006004

(B) "Borrower" is
DENNIS L JOHNSON, AND GERALDINE J JOHNSON, HUSBAND AND WIFE AS JOINT TENANTS

Borrower is the trustor under this Security Instrument.
(C) "Lender" is
COUNTRYWIDE HOME LOANS, INC.

Lender is a
CORPORATION

organized and existing under the laws of NEW YORK . Lender's address is
4500 Park Granada
Calabasas, CA 91302-1613
(D) "Trustee" is
CTC REAL ESTATE SERVICES

400 COUNTRYWIDE WAY MSN SV-88
SIMI VALLEY, NV 93065
(E) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. **MERS is the beneficiary under this Security Instrument.** MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.
(F) "Note" means the promissory note signed by Borrower and dated JUNE 24, 2004 .
The Note states that Borrower owes Lender
ONE HUNDRED FORTY SEVEN THOUSAND FOUR HUNDRED FIFTY SIX and 00/100
Dollars (U.S. $ 147,456.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than JULY 01, 2034 .
(G) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."
(H) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.
(I) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

[X] Adjustable Rate Rider	[ ] Condominium Rider	[ ] Second Home Rider
[ ] Balloon Rider	[X] Planned Unit Development Rider	[X] 1-4 Family Rider
[ ] VA Rider	[ ] Biweekly Payment Rider	[ ] Other(s) [specify]

(J) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

Initials:

(K) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(L) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(M) "Escrow Items" means those items that are described in Section 3.

(N) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(O) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(P) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(Q) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. Section 2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(R) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS. This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower

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irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in the COUNTY of

[Type of Recording Jurisdiction]

CLARK :

[Name of Recording Jurisdiction]

SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF.

which currently has the address of

5316 CLOVER BLOSSOM COURT, NORTH LAS VEGAS

[Street/City]

Nevada 89031-0480 ("Property Address"):

[Zip Code]

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property." Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

Initials:

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges. Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. Application of Payments or Proceeds. Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. Funds for Escrow Items. Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums

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any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

4. Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or

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defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be

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paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. Occupancy. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. Preservation, Maintenance and Protection of the Property; Inspections. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. Borrower's Loan Application. Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is

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reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

10. Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive

from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

(b) Any such agreements will not affect the rights Borrower has - if any - with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

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Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

12. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

13. Joint and Several Liability; Co-signers; Successors and Assigns Bound. Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

14. Loan Charges. Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

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15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

16. Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

17. Borrower's Copy. Borrower shall be given one copy of the Note and of this Security Instrument.

18. Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees,

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property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. Sale of Note; Change of Loan Servicer; Notice of Grievance. The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

21. Hazardous Substances. As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Initials: _____

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option, and without further demand, may invoke the power of sale, including the right to accelerate full payment of the Note, and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If Lender invokes the power of sale, Lender shall execute or cause Trustee to execute written notice of the occurrence of an event of default and of Lender's election to cause the Property to be sold, and shall cause such notice to be recorded in each county in which any part of the Property is located. Lender shall mail copies of the notice as prescribed by Applicable Law to Borrower and to the persons prescribed by Applicable Law. Trustee shall give public notice of sale to the persons and in the manner prescribed by Applicable Law. After the time required by Applicable Law, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Trustee may postpone sale of all or any parcel of the Property by public announcement at the time and place of any previously scheduled sale. Lender or its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable Trustee's and attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

23. Reconveyance. Upon payment of all sums secured by this Security Instrument, Lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and all notes evidencing debt secured by this Security Instrument to Trustee. Trustee shall reconvey the Property without warranty to the person or persons legally entitled to it. Such person or persons shall pay any recordation costs. Lender may charge such person or persons a fee for reconveying the Property, but only if the fee is paid to a third party (such as the Trustee) for services rendered and the charging of the fee is permitted under Applicable Law.

24. Substitute Trustee. Lender at its option, may from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder. Without conveyance of the Property, the successor trustee shall succeed to all the title, power and duties conferred upon Trustee herein and by Applicable Law.

25. Assumption Fee. If there is an assumption of this loan, Lender may charge an assumption fee of US.$ 300.00

Initials: _____

DOC ID #: 0006348226006004

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Witnesses:

_____

_____

_____ (Seal)
DENNIS L. JOHNSON -Borrower

_____ (Seal)
GERALDINE J. JOHNSON -Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

DOC ID #: 0006348226006004

STATE OF NEVADA
COUNTY OF Clark

This instrument was acknowledged before me on 6-28-04 by

Dennis L. Johnson + Geraldine J. Johnson

C. Vennettilli

Mail Tax Statements To:
TAX DEPARTMENT SV3-24

450 American Street
Simi Valley CA, 93065

EXHIBIT "A"

All that certain real property situated in the County of Clark, State of Nevada, described as follows:

Parcel I
Lot Ninety two (92) of the Plat of Arbor Gate as shown by map thereof on file in Book 91 of plats, page 71, in the Office of the County Recorder of Clark County, Nevada.

Parcel II
A non-exclusive easement for ingress and egress and enjoyment in and to the Association property as set forth in the Declaration of Covenants, Conditions and Restrictcions for Country Garden (Arbor Gate) a common interest community recorded February 25, 2000 in Book 20000225 as Document No. 00963, of Official Records of Clark County, Nevada , as the same may from time to time be amended and/or supplemented, which easement is appurtenant to Parcel One.

Assessor's Parcel Number: 124-31-220-092

ADJUSTABLE RATE RIDER
(MTA Index - Payment Caps)

After Recording Return To:
COUNTRYWIDE HOME LOANS, INC.
MS SV-79 DOCUMENT PROCESSING
P.O.Box 10423
Van Nuys, CA 91410-0423

PARCEL ID #:
12431220092

Prepared By:
KARLA R. WILSON

04050200
[Escrow/Closing #]

0006348226006004
[Doc ID #]

CONV
● ARM PayOption Rider
10729-US (07/02) 01(d)

Initials:

23991

0634822600000001D729

DOC ID #: 00063482260060304

THIS ADJUSTABLE RATE RIDER is made this TWENTY-FOURTH day of JUNE, 2004, and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Security Deed (the "Security Instrument") of the same date given by the undersigned ("Borrower") to secure Borrower's Adjustable Rate Note (the "Note") to COUNTRYWIDE HOME LOANS, INC.

("Lender") of the same date and covering the property described in the Security Instrument and located at:
5316 CLOVER BLOSSOM COURT
NORTH LAS VEGAS, NV 89031-0480
[Property Address]

THE NOTE CONTAINS PROVISIONS THAT WILL CHANGE THE INTEREST RATE AND THE MONTHLY PAYMENT. THERE MAY BE A LIMIT ON THE AMOUNT THAT THE MONTHLY PAYMENT CAN INCREASE OR DECREASE. THE PRINCIPAL AMOUNT TO REPAY COULD BE GREATER THAN THE AMOUNT ORIGINALLY BORROWED, BUT NOT MORE THAN THE LIMIT STATED IN THE NOTE.

ADDITIONAL COVENANTS. In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows:

A. INTEREST RATE AND MONTHLY PAYMENT CHANGES

The Note provides for changes in the interest rate and the monthly payments, as follows:

2. INTEREST

(A) Interest Rate

Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of 1.625 %. The interest rate I will pay may change.

The interest rate required by this Section 2 is the rate I will pay both before and after any default described in Section 7(B) of the Note.

(B) Interest Rate Change Dates

The interest rate I will pay may change on the first day of AUGUST, 2004, and on that day every month thereafter. Each date on which my interest rate could change is called an "Interest Rate Change Date." The new rate of interest will become effective on each Interest Rate Change Date.

(C) Index

Beginning with the first Change Date, my adjustable interest rate will be based on an Index. The "Index" is the "Twelve-Month Average" of the annual yields on actively traded United States Treasury Securities adjusted to a constant maturity of one year as published by the Federal Reserve Board in the Federal Reserve Statistical Release entitled "Selected Interest Rates (H.15)" (the "Monthly Yields"). The Twelve Month Average is determined by adding together the Monthly Yields for the most recently available twelve months and dividing by 12. The most recent Index figure available as of the date 15 days before each Change Date is called the "Current Index".

If the Index is no longer available, the Note Holder will choose a new index that is based upon comparable information. The Note Holder will give me notice of this choice.

(D) Calculation of Interest Rate Changes

Before each Interest Rate Change Date, the Note Holder will calculate my new interest rate by adding THREE & 25/1000 percentage point(s) (3.025 %) to the Current Index. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). This rounded amount will be my new interest rate until the next Interest Rate Change Date. My interest rate will never be greater than 10.325 %.

DOC ID #: 0006348226006004

3. PAYMENTS

(A) Time and Place of Payments

I will pay principal and interest by making a payment every month.

I will make my monthly payments on the FIRST day of each month beginning on August, 2004 . I will make these payments every month until I have paid all the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied to interest before Principal. If, on JULY 01, 2034 , I still owe amounts under the Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at
P.O. Box 10219, Van Nuys, CA 91410-0219

or at a different place if required by the Note Holder.

(B) Amount of My Initial Monthly Payments

Each of my initial monthly payments will be in the amount of U.S. $ 517.79 . This amount may change.

(C) Payment Change Dates

My monthly payment may change as required by Section 3(D) below beginning on the first day of AUGUST, 2005 , and on that day every 12th month thereafter. Each of these dates is called a "Payment Change Date." My monthly payment also will change at any time Section 3(F) or 3(G) below requires me to pay a different monthly payment.

I will pay the amount of my new monthly payment each month beginning on each Payment Change Date or as provided in Section 3(F) or 3(G) below.

(D) Calculation of Monthly Payment Changes

At least 30 days before each Payment Change Date, the Note Holder will calculate the amount of the monthly payment that would be sufficient to repay the unpaid principal that I am expected to owe at the Payment Change Date in full on the maturity date in substantially equal installments at the interest rate effective during the month preceding the Payment Change Date. The result of this calculation is called the "Full Payment". The Note Holder will then calculate the amount of my monthly payment due the month preceding the Payment Change Date multiplied by the number 1.075. The result of this calculation is called the "Limited Payment." Unless Section 3(F) or 3(G) below requires me to pay a different amount, my new

required monthly payment will be lesser of the Limited Payment and the Full Payment. I also have the option each month to pay more than the Limited Payment up to and including the Full Payment for my monthly payment.

(E) Additions to My Unpaid Principal

My monthly payment could be less than the amount of the interest portion of the monthly payment that would be sufficient to repay the unpaid principal I owe at the monthly payment date in full on the Maturity Date in substantially equal payments. If so, each month that my monthly payment is less than the interest portion, the Note Holder will subtract the amount of my monthly payment from the amount of the interest portion and will add the difference to my unpaid principal. The Note Holder also will add interest on the amount of this difference to my unpaid principal each month. The interest rate on the interest added to Principal will be the rate required by Section 2 above.

(F) Limit on My Unpaid Principal; Increased Monthly Payment

My unpaid principal can never exceed a maximum amount equal to ONE HUNDRED FIFTEEN percent (115 %) of the Principal amount I originally borrowed. My unpaid principal could exceed that maximum amount due to the Limited Payments and interest rate increases. In that event, on the date that my paying my monthly payment would cause me to exceed that limit, I will instead pay a new monthly payment. The new monthly payment will be in an amount that would be sufficient to repay my then unpaid principal in full on the Maturity Date in substantially equal installments at the current interest rate.

(G) Required Full Payment

On the fifth Payment Change Date and on each succeeding fifth Payment Change Date thereafter, I will begin paying the Full Payment as my monthly payment until my monthly payment changes again. I also will begin paying the Full Payment as my monthly payment on the final Payment Change Date.

4. NOTICE OF CHANGES

The Note Holder will deliver or mail to me a notice of any changes in the amount of my monthly payment before the effective date of any change. The notice will include information required by law to be given me and also the title and telephone number of a person who will answer any question I may have regarding the notice.

B. TRANSFER OF THE PROPERTY OR A BENEFICIAL INTEREST IN BORROWER

Uniform Covenant 18 of the Security Instrument is amended to read as follows:

Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law. Lender also shall not exercise this option if: (a) Borrower causes to be submitted to Lender information required by Lender to evaluate the intended transferee as if a new loan were being made to the transferee; and (b) Lender reasonably determines that Lender's security will not be impaired by the loan assumption and that the risk of a breach of any covenant or agreement in this Security Instrument is acceptable to Lender.

To the extent permitted by Applicable Law, Lender may charge a reasonable fee as a condition to Lender's consent to the loan assumption. Lender also may require the transferee to sign an assumption agreement that is acceptable to Lender and that obligates the transferee to keep all the promises and agreements made in the Note and in this Security Instrument. Borrower will continue to be obligated under the Note and this Security Instrument unless Lender releases Borrower in writing.

If Lender exercises the option to require immediate payment in full, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

DOC ID #: 0C06348226006004

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Adjustable Rate Rider.

Dennis L Johnson (Seal)
DENNIS L. JOHNSON
Borrower

Geraldine J. Johnson (Seal)
GERALDINE J. JOHNSON
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

After Recording Return To:
COUNTRYWIDE HOME LOANS, INC.
MS SV-79 DOCUMENT PROCESSING
P.O.Box 10423
Van Nuys, CA 91410-0423

[Space Above This Line For Recording Data]

1-4 FAMILY RIDER
(Assignment of Rents)

PARCEL ID #:
12431220092
Prepared By:
KARLA R. WILSON

04050200
[Escrow/Closing #]

0006348226006004
[Doc ID #]

MULTISTATE 1-4 FAMILY RIDER -Fannie Mae/Freddie Mac Uniform Instrument
Page 1 of 4
Initials:
-57R (0008).01 CHL (09/01)(d) VMP MORTGAGE FORMS - (800)521-7291 Form 3170 1/01
CONV/VA

23991

0634822600000001057R

DOC ID #: 0006348226006004

THIS 1-4 FAMILY RIDER is made this TWENTY-FOURTH day of JUNE, 2004 , and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Security Deed (the "Security Instrument") of the same date given by the undersigned (the "Borrower") to secure Borrower's Note to

COUNTRYWIDE HOME LOANS, INC.

(the "Lender") of the same date and covering the Property described in the Security Instrument and located at:

5316 CLOVER BLOSSOM COURT, NORTH LAS VEGAS, NV 89031-0480

[Property Address]

1-4 FAMILY COVENANTS. In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows:

A. ADDITIONAL PROPERTY SUBJECT TO THE SECURITY INSTRUMENT. In addition to the Property described in the Security Instrument, the following items now or hereafter attached to the Property to the extent they are fixtures are added to the Property description, and shall also constitute the Property covered by the Security Instrument: building materials, appliances and goods of every nature whatsoever now or hereafter located in, on, or used, or intended to be used in connection with the Property, including, but not limited to, those for the purposes of supplying or distributing heating, cooling, electricity, gas, water, air and light, fire prevention and extinguishing apparatus, security and access control apparatus, plumbing, bath tubs, water heaters, water closets, sinks, ranges, stoves, refrigerators, dishwashers, disposals, washers, dryers, awnings, storm windows, storm doors, screens, blinds, shades, curtains and curtain rods, attached mirrors, cabinets, panelling and attached floor coverings, all of which, including replacements and additions thereto, shall be deemed to be and remain a part of the Property covered by the Security Instrument. All of the foregoing together with the Property described in the Security Instrument (or the leasehold estate if the Security Instrument is on a leasehold) are referred to in this 1-4 Family Rider and the Security Instrument as the "Property."

B. USE OF PROPERTY; COMPLIANCE WITH LAW. Borrower shall not seek, agree to or make a change in the use of the Property or its zoning classification, unless Lender has agreed in writing to the change. Borrower shall comply with all laws, ordinances, regulations and requirements of any governmental body applicable to the Property.

C. SUBORDINATE LIENS. Except as permitted by federal law, Borrower shall not allow any lien inferior to the Security Instrument to be perfected against the Property without Lender's prior written permission.

D. RENT LOSS INSURANCE. Borrower shall maintain insurance against rent loss in addition to the other hazards for which insurance is required by Section 5.

E. "BORROWER'S RIGHT TO REINSTATE" DELETED. Section 19 is deleted.

F. BORROWER'S OCCUPANCY. Unless Lender and Borrower otherwise agree in writing, Section 6 concerning Borrower's occupancy of the Property is deleted.

Initials:

G. ASSIGNMENT OF LEASES. Upon Lender's request after default, Borrower shall assign to Lender all leases of the Property and all security deposits made in connection with leases of the Property. Upon the assignment, Lender shall have the right to modify, extend or terminate the existing leases and to execute new leases, in Lender's sole discretion. As used in this paragraph G, the word "lease" shall mean "sublease" if the Security Instrument is on a leasehold.

H. ASSIGNMENT OF RENTS; APPOINTMENT OF RECEIVER; LENDER IN POSSESSION. Borrower absolutely and unconditionally assigns and transfers to Lender all the rents and revenues ("Rents") of the Property, regardless of to whom the Rents of the Property are payable. Borrower authorizes Lender or Lender's agents to collect the Rents, and agrees that each tenant of the Property shall pay the Rents to Lender or Lender's agents. However, Borrower shall receive the Rents until: (i) Lender has given Borrower notice of default pursuant to Section 22 of the Security Instrument, and (ii) Lender has given notice to the tenant(s) that the Rents are to be paid to Lender or Lender's agent. This assignment of Rents constitutes an absolute assignment and not an assignment for additional security only.

If Lender gives notice of default to Borrower: (i) all Rents received by Borrower shall be held by Borrower as trustee for the benefit of Lender only, to be applied to the sums secured by the Security Instrument; (ii) Lender shall be entitled to collect and receive all of the Rents of the Property; (iii) Borrower agrees that each tenant of the Property shall pay all Rents due and unpaid to Lender or Lender's agents upon Lender's written demand to the tenant; (iv) unless applicable law provides otherwise, all Rents collected by Lender or Lender's agents shall be applied first to the costs of taking control of and managing the Property and collecting the Rents, including, but not limited to, attorneys' fees, receiver's fees, premiums on receiver's bonds, repair and maintenance costs, insurance premiums, taxes, assessments and other charges on the Property, and then to the sums secured by the Security Instrument; (v) Lender, Lender's agents or any judicially appointed receiver shall be liable to account for only those Rents actually received; and (vi) Lender shall be entitled to have a receiver appointed to take possession of and manage the Property and collect the Rents and profits derived from the Property without any showing as to the inadequacy of the Property as security.

If the Rents of the Property are not sufficient to cover the costs of taking control of and managing the Property and of collecting the Rents any funds expended by Lender for such purposes shall become indebtedness of Borrower to Lender secured by the Security Instrument pursuant to Section 9.

Borrower represents and warrants that Borrower has not executed any prior assignment of the Rents and has not performed, and will not perform, any act that would prevent Lender from exercising its rights under this paragraph.

Lender, or Lender's agents or a judicially appointed receiver, shall not be required to enter upon, take control of or maintain the Property before or after giving notice of default to Borrower. However, Lender, or Lender's agents or a judicially appointed receiver, may do so at any time when a default occurs. Any application of Rents shall not cure or waive any default or invalidate any other right or remedy of Lender. This assignment of Rents of the Property shall terminate when all the sums secured by the Security Instrument are paid in full.

I. CROSS-DEFAULT PROVISION. Borrower's default or breach under any note or agreement in which Lender has an interest shall be a breach under the Security Instrument and Lender may invoke any of the remedies permitted by the Security Instrument.

Initials: _____

DOC ID #: 0306348226006004

BY SIGNING BELOW, Borrower accepts and agrees to the terms and provisions contained in this 1-4 Family Rider.

Dennis L. Johnson (Seal)
DENNIS L. JOHNSON - Borrower

Geraldine J. Johnson (Seal)
GERALDINE J. JOHNSON - Borrower

(Seal)
- Borrower

(Seal)
- Borrower

After Recording Return To:
COUNTRYWIDE HOME LOANS, INC.
MS SV-79 DOCUMENT PROCESSING
P.O.Box 10423
Van Nuys, CA 91410-0423

[Space Above This Line For Recording Data]

PLANNED UNIT DEVELOPMENT RIDER

PARCEL ID #:
12431220092
Prepared By:
KARLA R. WILSON

04050200 (Escrow/Closing #)

0006348226006004 (Doc ID #)

MULTISTATE PUD RIDER - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT
Page 1 of 4
Initials:

7R (0008).01 CHL (08/01)(d) VMP MORTGAGE FORMS - (800)521-7291 Form 3150 8/01
CONV/VA

23991

0063482260000001007R

DOC ID #: 0006348226006004

THIS PLANNED UNIT DEVELOPMENT RIDER is made this TWENTY-FOURTH day of JUNE, 2004, and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Security Deed (the "Security Instrument") of the same date, given by the undersigned (the "Borrower") to secure Borrower's Note to

COUNTRYWIDE HOME LOANS, INC.

(the "Lender") of the same date and covering the Property described in the Security Instrument and located at:

5316 CLOVER BLOSSON COURT, NORTH LAS VEGAS, NV 89031-0480

[Property Address]

The Property includes, but is not limited to, a parcel of land improved with a dwelling, together with other such parcels and certain common areas and facilities, as described in

THE COVENANTS, CONDITIONS, AND RESTRICTIONS FILED OF RECORD THAT AFFECT THE PROPERTY

(the "Declaration"). The Property is a part of a planned unit development known as

ARBOR GATE

[Name of Planned Unit Development]

(the "PUD"). The Property also includes Borrower's interest in the homeowners association or equivalent entity owning or managing the common areas and facilities of the PUD (the "Owners Association") and the uses, benefits and proceeds of Borrower's interest.

PUD COVENANTS. In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows:

A. PUD Obligations. Borrower shall perform all of Borrower's obligations under the PUD's Constituent Documents. The "Constituent Documents" are the (i) Declaration; (ii) articles of incorporation, trust instrument or any equivalent document which creates the Owners Association; and (iii) any by-laws or other rules or regulations of the Owners Association. Borrower shall promptly pay, when due, all dues and assessments imposed pursuant to the Constituent Documents.

B. Property Insurance. So long as the Owners Association maintains, with a generally accepted insurance carrier, a "master" or "blanket" policy insuring the Property which is satisfactory to Lender and which provides insurance coverage in the amounts (including deductible levels), for the periods, and against loss by fire, hazards included within the term "extended coverage," and any other hazards, including, but not limited to, earthquakes and floods, for which Lender requires insurance, then: (i) Lender waives the provision in Section 3 for the Periodic Payment to Lender of the yearly premium installments for property insurance on the Property; and (ii) Borrower's obligation under Section 5 to maintain property insurance coverage on the Property is deemed satisfied to the extent that the required coverage is provided by the Owners Association policy.

Initials:

What Lender requires as a condition of this waiver can change during the term of the loan.

Borrower shall give Lender prompt notice of any lapse in required property insurance coverage provided by the master or blanket policy.

In the event of a distribution of property insurance proceeds in lieu of restoration or repair following a loss to the Property, or to common areas and facilities of the PUD, any proceeds payable to Borrower are hereby assigned and shall be paid to Lender. Lender shall apply the proceeds to the sums secured by the Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

C. Public Liability Insurance. Borrower shall take such actions as may be reasonable to insure that the Owners Association maintains a public liability insurance policy acceptable in form, amount, and extent of coverage to Lender.

D. Condemnation. The proceeds of any award or claim for damages, direct or consequential, payable to Borrower in connection with any condemnation or other taking of all or any part of the Property or the common areas and facilities of the PUD, or for any conveyance in lieu of condemnation, are hereby assigned and shall be paid to Lender. Such proceeds shall be applied by Lender to the sums secured by the Security Instrument as provided in Section 11.

E. Lender's Prior Consent. Borrower shall not, except after notice to Lender and with Lender's prior written consent, either partition or subdivide the Property or consent to: (i) the abandonment or termination of the PUD, except for abandonment or termination required by law in the case of substantial destruction by fire or other casualty or in the case of a taking by condemnation or eminent domain; (ii) any amendment to any provision of the "Constituent Documents" if the provision is for the express benefit of Lender; (iii) termination of professional management and assumption of self-management of the Owners Association; or (iv) any action which would have the effect of rendering the public liability insurance coverage maintained by the Owners Association unacceptable to Lender.

F. Remedies. If Borrower does not pay PUD dues and assessments when due, then Lender may pay them. Any amounts disbursed by Lender under this paragraph F shall become additional debt of Borrower secured by the Security Instrument. Unless Borrower and Lender agree to other terms of payment, these amounts shall bear interest from the date of disbursement at the Note rate and shall be payable, with interest, upon notice from Lender to Borrower requesting payment.

Initials: _____

DOC ID #: 0006348226006004

BY SIGNING BELOW, Borrower accepts and agrees to the terms and provisions contained in this PUD Rider.

Dennis L. Johnson (Seal)
DENNIS L. JOHNSON - Borrower

Geraldine J. Johnson (Seal)
GERALDINE J. JOHNSON - Borrower

(Seal)
- Borrower

(Seal)
- Borrower

EXHIBIT B

EXHIBIT B

Inst #: 201106200002747
Fees: $15.00
N/C Fee: $25.00
06/20/2011 03:24:45 PM
Receipt #: 817961
Requestor:
CORELOGIC
Recorded By: CYV Pgs: 2
DEBBIE CONWAY
CLARK COUNTY RECORDER

Recording Requested By:
Bank of America
Prepared By: **Diana DeAvila**
888-603-9011
When recorded mail to:
CoreLogic
450 E. Boundary St.
Attn: Release Dept.
Chapin, SC 29036

DocID# **6686348226090044**
Tax ID: **12431220092**
Property Address:
5316 Clover Blossom Ct
North Las Vegas, NV 89031-0480
NV0-ADT 14157743 6/14/2011

This space for Recorder's use

MIN #: 1000157-0003681336-4 MERS Phone #: 888-679-6377

ASSIGNMENT OF DEED OF TRUST

For Value Received, the undersigned holder of a Deed of Trust (herein "Assignor") whose address is **3300 S.W. 34TH AVENUE, SUITE 101 OCALA, FL 34474** does hereby grant, sell, assign, transfer and convey unto **U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN TRUST 2006-OA1, MORTGAGE LOAN PASS-THROUGH CERTIFICATES, SERIES 2006-OA1** whose address is **9062 OLD ANNAPOLISRD, COLUMBIA, MD 21045** all beneficial interest under that certain Deed of Trust described below together with the note(s) and obligations therein described and the money due and to become due thereon with interest and all rights accrued or to accrue under said Deed of Trust.

Original Lender: **COUNTRYWIDE HOME LOANS, INC.**
Made By: **DENNIS L JOHNSON, AND GERALDINE J JOHNSON, HUSBAND AND WIFE AS JOINT TENANTS**
Trustee: **CTC REAL ESTATE SERVICES**
Date of Deed of Trust: **6/24/2004** Original Loan Amount: **$147,456.00**

Recorded in **Clark County, NV** on: **6/30/2004**, book **N/A**, page **N/A** and instrument number **20040630-0002408**

I the undersigned hereby affirm that this document submitted for recording does not contain the social security number of any person or persons.

IN WITNESS WHEREOF, the undersigned has caused this Assignment of Deed of Trust to be executed on 6-15-2011

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

By: _____
Martha Munoz, Assistant Secretary

State of **California**
County of **Ventura**

On June 15, 2011 before me, **Carol Marie Littleford**, Notary Public, personally appeared **Martha Munoz**, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity (ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Notary Public: **Carol Marie Littleford**
My Commission Expires: **1/2/2014**

(Seal)

CAROL MARIE LITTLEFORD
Commission # 1875468
Notary Public - California
Los Angeles County
My Comm. Expires Jan 2, 2014

Attached to: Assignment of Deed of Trust

Borrowers: Dennis L Johnson
Geraldine J Johnson

EXHIBIT C

EXHIBIT C

Inst #: 201202220001651
Fees: $17.00
N/C Fee: $0.00
02/22/2012 09:17:26 AM
Receipt #: 1073371
Requestor:
ALESSI & KOENIG LLC (JUNES
Recorded By: MSH Pgs: 1
DEBBIE CONWAY
CLARK COUNTY RECORDER

When recorded return to:

ALESSI & KOENIG, LLC
9500 W. Flamingo Rd., Suite 205
Las Vegas, Nevada 89147
Phone: (702) 222-4033

A.P.N. 124-31-220-092 Trustee Sale # **29628-5316**

NOTICE OF DELINQUENT ASSESSMENT (LIEN)

In accordance with Nevada Revised Statutes and the Association's Declaration of Covenants, Conditions and Restrictions (CC&Rs) of the official records of **Clark** County, Nevada, **Country Gardens Owners' Assocation** has a lien on the following legally described property.

The property against which the lien is imposed is commonly referred to as **5316 CLOVER BLOSSOM CT, North Las Vegas, NV 89031** and more particularly legally described as: **LOT 92** Book **91** Page **71** in the County of **Clark**.

The owner(s) of record as reflected on the public record as of today's date is (are): **DENNIS L & GERALDINE J JOHNSON**

The mailing address(es) is: **5225 ELM GROVE DR, LAS VEGAS, NV 89130**

The total amount due through today's date is: **$1,095.50**. Of this total amount **$1,020.50** represent Collection and/or Attorney fees, assessments, interest, late fees and service charges. **$75.00** represent collection costs. Note: Additional monies shall accrue under this claim at the rate of the claimant's regular monthly or special assessments, plus permissible late charges, costs of collection and interest, accruing subsequent to the date of this notice.

Date: **January 11, 2012**

By: _____
Ryan Kerbow, Esq. of Alessi & Koenig, LLC on behalf of **Country Gardens Owners' Assocation**

State of Nevada
County of Clark
SUBSCRIBED and SWORN before me ~~**January 11, 2012**~~ Feb. 17, 2012

(Seal)

LANI MAE U. DIAZ
Notary Public State of Nevada
No. 10-2800-1
My appt. exp. Aug. 24, 2014

(Signature) _____
NOTARY PUBLIC

EXHIBIT D

EXHIBIT D

Inst #: 201202220001527
Fees: $17.00
N/C Fee: $0.00
02/22/2012 09:17:26 AM
Receipt #: 1073345
Requestor:
ALESSI & KOENIG LLC (JUNES
Recorded By: MSH Pgs: 1
DEBBIE CONWAY
CLARK COUNTY RECORDER

When recorded return to:

ALESSI & KOENIG, LLC
9500 W. Flamingo Rd., Suite 205
Las Vegas, Nevada 89147
Phone: (702) 222-4033

A.P.N. 124-31-220-092 Trustee Sale # **30488-5316**

NOTICE OF DELINQUENT ASSESSMENT (LIEN)

In accordance with Nevada Revised Statutes and the Association's Declaration of Covenants, Conditions and Restrictions (CC&Rs) of the official records of **Clark** County, Nevada, **Country Gardens Owners' Assocation** has a lien on the following legally described property.

The property against which the lien is imposed is commonly referred to as **5316 CLOVER BLOSSOM CT, North Las Vegas, NV 89031** and more particularly legally described as: **PLAT BOOK 91 PAGE 71 LOT 92** Book **91** Page **71** in the County of **Clark**.

The owner(s) of record as reflected on the public record as of today's date is (are): **DENNIS L & GERALDINE J JOHNSON**

The mailing address(es) is: **5225 ELM GROVE DR, LAS VEGAS, NV 89130**

The total amount due through today's date is: **$1,150.50**. Of this total amount **$1,075.50** represent Collection and/or Attorney fees, assessments, interest, late fees and service charges. **$75.00** represent collection costs. Note: Additional monies shall accrue under this claim at the rate of the claimant's regular monthly or special assessments, plus permissible late charges, costs of collection and interest, accruing subsequent to the date of this notice.

Date: **February 6, 2012**

By:_____
Ryan Kerbow, Esq. of Alessi & Koenig, LLC on behalf of **Country Gardens Owners' Assocation**

State of Nevada
County of Clark
SUBSCRIBED and SWORN before me **February 17, 2012**

(Seal)

LANI MAE U. DIAZ
Notary Public State of Nevada
No. 10-2800-1
My appt. exp. Aug. 24, 2014

(Signature)_____
NOTARY PUBLIC

EXHIBIT E

EXHIBIT E

Inst #: 201204200000428
Fees: $17.00
N/C Fee: $0.00
04/20/2012 08:27:12 AM
Receipt #: 1136956
Requestor:
ALESSI & KOENIG LLC (JUNES
Recorded By: SAO Pgs: 1
DEBBIE CONWAY
CLARK COUNTY RECORDER

When recorded mail to:

THE ALESSI & KOENIG, LLC
9500 West Flamingo Rd., Ste 205
Las Vegas, Nevada 89147
Phone: 702-222-4033

A.P.N. **124-31-220-092** Trustee Sale No. **30488-5316**

NOTICE OF DEFAULT AND ELECTION TO SELL UNDER HOMEOWNERS ASSOCIATION LIEN

WARNING! IF YOU FAIL TO PAY THE AMOUNT SPECIFIED IN THIS NOTICE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE! You may have the right to bring your account in good standing by paying all of your past due payments plus permitted costs and expenses within the time permitted by law for reinstatement of your account. The sale may not be set until ninety days from the date this notice of default recorded, which appears on this notice. The amount due is **$3,396.00** as of **March 27, 2012** and will increase until your account becomes current. To arrange for payment to stop the foreclosure, contact: **Country Gardens Owners' Assocation**, c/o Alessi & Koenig, 9500 W. Flamingo Rd, Ste 205, Las Vegas, NV 89147, (702)222-4033.

THIS NOTICE pursuant to that certain Notice of Delinquent Assessment Lien, recorded on **February 22, 2012** as document number **0001651**, of Official Records in the County of **Clark**, State of Nevada. Owner(s): **DENNIS L & GERALDINE J JOHNSON,** of **PLAT BOOK 91 PAGE 71 LOT 92**, as per map recorded in Book **91**, Pages **71**, as shown on the Plan and Subdivision map recorded in the Maps of the County of **Clark,** State of Nevada. PROPERTY ADDRESS: **5316 CLOVER BLOSSOM CT, North Las Vegas, NV 89031**. If you have any questions, you should contact an attorney. Notwithstanding the fact that your property is in foreclosure, you may offer your property for sale, provided the sale is concluded prior to the conclusion of the foreclosure. REMEMBER YOU MAY LOSE LEGAL RIGHTS IF YOU DO NOT TAKE PROMPT ACTION. NOTICE IS HEREBY GIVEN THAT Alessi & Koenig, LLC is appointed trustee agent under the above referenced lien, dated **February 22, 2012**, on behalf of **Country Gardens Owners' Assocation** to secure assessment obligations in favor of said Association, pursuant to the terms contained in the Declaration of Covenants, Conditions, and Restrictions (CC&Rs). A default in the obligation for which said CC&Rs has occurred in that the payment(s) have not been made of homeowners assessments due from **January 10, 2011** and all subsequent assessments, late charges, interest, collection and/or attorney fees and costs.
Dated: **March 27, 2012**

Ryan Kerbow, Esq. of Alessi & Koenig, LLC on behalf of **Country Gardens Owners' Assocation**

EXHIBIT F

EXHIBIT F

Inst #: 201210310000738
Fees: $17.00
N/C Fee: $0.00
10/31/2012 08:04:08 AM
Receipt #: 1364103
Requestor:
ALESSI & KOENIG LLC
Recorded By: MAT Pgs: 1
DEBBIE CONWAY
CLARK COUNTY RECORDER

When recorded mail to:
Alessi & Koenig, LLC
9500 West Flamingo Rd., Suite 205
Las Vegas, NV 89147
Phone: 702-222-4033

APN: **124-31-220-092** TSN **30488-5316**

NOTICE OF TRUSTEE'S SALE

WARNING! A SALE OF YOUR PROPERTY IS IMMINENT! UNLESS YOU PAY THE AMOUNT SPECIFIED IN THIS NOTICE BEFORE THE SALE DATE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE. YOU MUST ACT BEFORE THE SALE DATE. IF YOU HAVE ANY QUESTIONS, PLEASE CALL Alessi & Koenig at 702-222-4033. IF YOU NEED ASSISTANCE, PLEASE CALL THE FORECLOSURE SECTION OF THE OMBUDSMAN'S OFFICE, NEVADA REAL ESTATE DIVISION, AT 1-877-829-9907 IMMEDIATELY.

NOTICE IS HEREBY GIVEN THAT:

On **November 28, 2012**, Alessi & Koenig as duly appointed Trustee pursuant to a certain lien, recorded on **February 22, 2012**, as instrument number **0001651**, of the official records of **Clark** County, Nevada, WILL SELL THE BELOW MENTIONED PROPERTY TO THE HIGHEST BIDDER FOR LAWFUL MONEY OF THE UNITED STATES, OR A CASHIERS CHECK at: 2:00 p.m., at 9500 W. Flamingo Rd., Suite #205, Las Vegas, Nevada 89147 (Alessi & Koenig, LLC Office Building, 2nd Floor)

The street address and other common designation, if any, of the real property described above is purported to be: **5316 CLOVER BLOSSOM CT, North Las Vegas, NV 89031.** The owner of the real property is purported to be: **DENNIS L & GERALDINE J JOHNSON**

The undersigned Trustee disclaims any liability for any incorrectness of the street address and other common designations, if any, shown herein. Said sale will be made, without covenant or warranty, expressed or implied, regarding title, possession or encumbrances, to pay the remaining principal sum of a note, homeowner's assessment or other obligation secured by this lien, with interest and other sum as provided therein: plus advances, if any, under the terms thereof and interest on such advances, plus fees, charges, expenses, of the Trustee and trust created by said lien. The total amount of the unpaid balance of the obligation secured by the property to be sold and reasonable estimated costs, expenses and advances at the time of the initial publication of the Notice of Sale is **$4,039.00.** Payment must be in made in the form of certified funds.

Date: **October 15, 2012**

By: Ryan Kerbow, Esq. of Alessi & Koenig LLC on behalf of Country Gardens Owners' Assocation

EXHIBIT G

EXHIBIT G

MILES, BERGSTROM & WINTERS, LLP AFFIDAVIT

State of California }
}ss.
Orange County }

Affiant being first duly sworn, deposes and says:

1. I am a managing partner with the law firm of Miles, Bergstrom & Winters, LLP, formerly known as Miles, Bauer, Bergstrom & Winters, LLP (**Miles Bauer**) in Costa Mesa, California. I am authorized to submit this affidavit on behalf of Miles Bauer.

2. I am over 18 years of age, of sound mind, and capable of making this affidavit.

3. The information in this affidavit is taken from Miles Bauer's business records. I have personal knowledge of Miles Bauer's procedures for creating these records. They are: (a) made at or near the time of the occurrence of the matters recorded by persons with personal knowledge of the information in the business record, or from information transmitted by persons with personal knowledge; (b) kept in the course of Miles Bauer's regularly conducted business activities; and (c) it is the regular practice of Miles Bauer to make such records. I have personal knowledge of Miles Bauer's procedures for creating and maintaining these business records. I personally confirmed that the information in this affidavit is accurate by reading the affidavit and attachments, and checking that the information in this affidavit matches Miles Bauer's records available to me.

4. Bank of America, N.A. (**BANA**) retained Miles Bauer to tender payments to homeowners associations (**HOA**) to satisfy super-priority liens in connection with the following loan:

Loan Number: [redacted]2260

Borrower(s): Dennis L. and Geraldine J. Johnson

Property Address: 5316 Clover Blossom Court, North Las Vegas, Nevada 89031

5. Miles Bauer maintains records for the loan in connection with tender payments to HOA. As part of my job responsibilities for Miles Bauer, I am familiar with the type of records maintained by Miles Bauer in connection with the loan.

6. Based on Miles Bauer's business records, attached as **Exhibit 1** is a copy of a November 21, 2012 letter from Paterno C. Jurani, Esq., an attorney with Miles Bauer, to Country Gardens Owners' Association, care of The Alessi & Koenig, LLC.

7. Based on Miles Bauer's business records, attached as **Exhibit 2** is a copy of a Statement of Account from Alessi & Koenig, LLC dated November 27, 2012 and received by Miles Bauer in response to the November 21, 2012 letter identified above.

8. Based on Miles Bauer's business records, attached as **Exhibit 3** is a copy of a December 6, 2012 letter from Rock K. Jung, an attorney with Miles Bauer, to Alessi & Koenig, LLC enclosing a check for $1,494.50.

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9. Based on Miles Bauer's business records, Alessi & Koenig, LLC returned the $1,494.50 check to Miles Bauer. A copy of a screenshot containing the relevant case management note confirming the check was returned is attached as **Exhibit 4**.

FURTHER DECLARANT SAYETH NOT.

Date: 7/14/15

Declarant Douglas E. Miles

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California

County of Orange

Subscribed and sworn to (or affirmed) before me on this 14th day of July, 2015,

by Douglas E. Miles, proved to me on the basis of satisfactory evidence to be
(Name of Signer)

the person who appeared before me.

Signature _____ (Seal)
(Signature of Notary Public)

ARLENE D. MARTIN
Commission # 2078306
Notary Public - California
Los Angeles County
My Comm. Expires Sep 5, 2018

EXHIBIT 1

DOUGLAS E. MILES
Also Admitted in California & Illinois
JEREMY T. BERGSTROM
Also Admitted in Arizona
GINA M. CORENA
ROCK K. JUNG
KRISTA J. NIELSON
JORY C. GARABEDIAN
THOMAS M. MORLAN
Admitted in California
STEVEN E. STERN
Admitted in Arizona & Illinois
ANDREW H. PASTWICK
Also Admitted in Arizona & California
PATERNO C. JURANI

MILES, BAUER, BERGSTROM & WINTERS, LLP
ATTORNEYS AT LAW SINCE 1985

2200 Paseo Verde Pkwy., Suite 250
Henderson, NV 89052
Phone: (702) 369-5960
Fax: (702) 942-0411

CALIFORNIA OFFICE
1231 E. Dyer Road, Suite 100
Santa Ana, CA 92705
Phone (714) 481-9100
Fax (714) 481-9141

RICHARD J. BAUER, JR.
FRED TIMOTHY WINTERS
KEENAN E. McCLENAHAN
MARK T. DOMEYER
Also Admitted in the District of Columbia & Virginia
TAMI S. CROSBY
L. BRYANT JAQUEZ
VY T. PHAM
HADI R. SEYED-ALI
BRIAN H. TRAN
CORI B. JONES
CATHERINE K. MASON
CHRISTINE A. CHUNG
HANH T. NGUYEN
S. SHELLY RAISZADEH
SHANNON C. WILLIAMS
LAWRENCE R. BOIVIN
RICK J. NEHORAOFF
BRIAN M. LUNA

November 21, 2012

Country Gardens Owners' Association
c/o The Alessi & Koenig, LLC
9500 West Flamingo Rd., Ste. 205
Las Vegas, NV 89147

Re: *Property Address: 5316 Clover Blossom Court, North Las Vegas, NV 89031*
MBBW File No.: 12-H2280

Dear Sir or Madam:

This letter is written in response to your Notice of Sale with regard to the HOA assessments purportedly owed on the above described real property. This firm represents the interests of MERS as nominee for Bank of America, N.A., as successor by merger to BAC Home Loans Servicing, LP (hereinafter "BANA") with regard to these issues. BANA is the beneficiary/servicer of the first and second deed of trust loans secured by the property.

As you know, NRS 116.3116 governs liens against units for assessments. Pursuant to NRS 116.3116:

> The association has a lien on a unit for:
> ...
> *any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section*

While the HOA may claim a lien under NRS 116.3102 Subsection (1), Paragraphs (j) through (n) of this Statute clearly provide that such a lien is JUNIOR to first deeds of trust to the extent the lien is for fees and charges imposed for collection and/or attorney fees, collection costs, late fees, service charges and interest. See Subsection 2(b) of NRS 116.3116, which states in pertinent part:

> 2. A lien under this section is prior to all other liens and encumbrances on a unit except:
>
> (b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent…
>
> The lien is also prior to all security interests described in paragraph (b) to the extent of the assessments for common expenses…which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien.

Subsection 2b of NRS 116.3116 clearly provides that an HOA lien "is prior to all other liens and encumbrances on a unit except: a first security interest on the unit…" But such a lien is prior to a first security interest to the extent of the assessments for common expenses which would have become due during the 9 months before institution of an action to enforce the lien.

Based on Section 2(b), a portion of your HOA lien is arguably senior to BANA's first deed of trust, specifically the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessment. For purposes of calculating the nine-month period, the trigger date is the date the HOA sought to enforce its lien. It is unclear, based upon the information known to date, what amount the nine months' of common assessments pre-dating the NOD actually are. That amount, whatever it is, is the amount BANA should be required to rightfully pay to fully discharge its obligations to the HOA per NRS 116.3102 and my client hereby offers to pay that sum upon presentation of adequate proof of the same by the HOA.

Please let me know what the status of the Foreclosure sale that is scheduled for November 28, 2012. My client does not want these issues to become further exacerbated by a wrongful HOA sale and it is my client's goal and intent to have these issues resolved as soon as possible. Please refrain from taking further action to enforce this HOA lien until my client and the HOA have had an opportunity to speak to attempt to fully resolve all issues.

Thank you for your time and assistance with this matter. I may be reached by phone directly at (702) 942-0413. Please fax the breakdown of the HOA arrears to my attention at (702) 942-0411. I will be in touch as soon as I've reviewed the same with BANA.

Sincerely,

MILES, BAUER, BERGSTROM & WINTERS, LLP

Paterno C. Jurani, Esq.

EXHIBIT 2

DAVID ALESSI*
THOMAS BAYARD *
ROBERT KOENIG**
RYAN KERBOW***

* Admitted to the California Bar

** Admitted to the California, Nevada and Colorado Bars

*** Admitted to the Nevada and California Bar

ALESSI KOENIG

A Multi-Jurisdictional Law Firm

9500 W. Flamingo Road, Suite 205
Las Vegas, Nevada 89147
Telephone: 702-222-4033
Facsimile: 702-222-4043
www.alessikoenig.com

ADDITIONAL OFFICES IN

AGOURA HILLS, CA
PHONE: 818-735-9600

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

$1,494.50

FACSIMILE COVER LETTER

To:	A Bhame	**Re:**	5316 CLOVER BLOSSOM CT/HO #30488
From:		**Date:**	Tuesday, November 27, 2012
Fax No.:		**Pages:**	2, including cover
		HO #:	30488

Dear A Bhame:

This cover will serve as an amended demand on behalf of Country Gardens Owners' Assocation for the above referenced escrow; property located at 5316 CLOVER BLOSSOM CT, North Las Vegas, NV. The total amount due through December 15, 2012 is $4,186.00. The breakdown of fees, interest and costs is as follows:

Pre NOD		$90.00
Release of Lien		$30.00
Demand Fee		$150.00
Attorney Fees	(1.5)	$360.00
Pre-Notice of Trustee Sale		$90.00
Notice of Delinquent Assessment Lien - Nevada		$275.00
Notice of Default		$345.00
Notice of Trustee Sale		$275.00
Foreclosure Fee		$150.00
Total		$1,765.00

Please be advised that Alessi & Koenig, LLC is a debt collector that is attempting to collect a debt and any information obtained will be used for that purpose.

DAVID ALESSI*
THOMAS BAYARD *
ROBERT KOENIG**
RYAN KERBOW***
* Admitted to the California Bar
** Admitted to the California, Nevada and Colorado Bars
*** Admitted to the Nevada and California Bar

ALESSI & KOENIG
A Multi-Jurisdictional Law Firm
9500 W. Flamingo Road, Suite 205
Las Vegas, Nevada 89147
Telephone: 702-222-4033
Facsimile: 702-222-4043
www.alessikoenig.com

ADDITIONAL OFFICES IN
AGOURA HILLS, CA
PHONE: 818- 735-9600
RENO NV
PHONE: 775-626-2323
&
DIAMOND BAR CA
PHONE: 909-861-8300

FACSIMILE COVER LETTER

1. Attorney and/or Trustees fees:	C $1,765.00
2. Notary, Recording, Copies, Mailings, and PACER	C $350.00
3. Assessments Through December 15, 2012	$1,189.00
4. Late Fees Through December 15, 2012	o $22.00
5. Fines Through November 27, 2012	$0.00
6. Interest Through December 15, 2012	$0.00
7. RPIR-GI Report	C $85.00
8. Title Research (10-Day Mailings per NRS 116.31163)	C $275.00
9. Management Company Advanced Audit Fee	C $200.00
10. Management Account Setup Fee	$0.00
11. Publishing and Posting of Trustee Sale	C $175.00
13. Conduct Foreclosure Sale	—$125.00
14. Capital Contribution	$0.00
15. Progress Payments:	$0.00
Sub-Total:	$4,186.00
Less Payments Received:	$0.00
Total Amount Due:	$4,186.00

Please have a check in the amount of $4,186.00 made payable to the Alessi & Koenig, LLC and mailed to the above listed NEVADA address. Upon receipt of payment a release of lien will be drafted and recorded. Please contact our office with any questions.

Please be advised that Alessi & Koenig, LLC is a debt collector that is attempting to collect a debt and any information obtained will be used for that purpose.

RUN DATE: 08/06/2012

COUNTRY GARDEN
ACCOUNT HISTORY REPORT
FOR THE PERIOD 01/01/2012 TO 08/31/2012
SINGLE OWNER

000029-01 PERFECT STORM, C/O DENNIS&JOANNE JOHNSON 5316 CLOVER BLOSSOM CT
STOP PAYMENT

TRX DATE	DESCRIPTION	CHARGES	CREDITS	BALANCE
12/31/2011	BEGINNING BALANCE			490.50
01/01/2012	MONTHLY ASSESSMENTS	55.00		545.50
01/31/2012	LATE FEE	5.50		551.00
02/01/2012	MONTHLY ASSESSMENTS	55.00		606.00
03/01/2012	MONTHLY ASSESSMENTS	55.00		661.00
03/02/2012	LATE FEE	5.50		666.50
03/31/2012	LATE FEE	5.50		672.00
04/01/2012	MONTHLY ASSESSMENTS	55.00		727.00
05/01/2012	MONTHLY ASSESSMENTS	55.00		782.00
05/01/2012	LATE FEE	5.50		787.50
05/31/2012	LATE FEE	5.50		793.00
06/01/2012	MONTHLY ASSESSMENTS	55.00		848.00
07/01/2012	MONTHLY ASSESSMENTS	55.00		903.00
07/01/2012	LATE FEE	5.50		908.50
07/31/2012	LATE FEE	5.50		914.00
08/01/2012	MONTHLY ASSESSMENTS	55.00		969.00

1 OWNERS - REPORT BALANCE AS OF: 08/31/2012 969.00

assessment $9 \times 55 = (495)$
Late fee $= 9 \times 5.50 = (49.50)$
Collection $2,850 \div 3 = (950)$

EXHIBIT 3

DOUGLAS E. MILES
Also Admitted in California & Illinois
JEREMY T. BERGSTROM
Also Admitted in Arizona
GINA M. CORENA
ROCK K. JUNG
KRISTA J. NIELSON
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THOMAS M. MORLAN
Admitted in California
STEVEN E. STERN
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HADI R. SEYED-ALI
BRIAN H. TRAN
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CORI B. JONES
CATHERINE K. MASON
CHRISTINE A. CHUNG
HANH T. NGUYEN
THOMAS B. SONG
S. SHELLY RAISZADEH
SHANNON C. WILLIAMS
ABTIN SHAKOURI
LAWRENCE R. BOIVIN
RICK J. NEHORAOFF
BRIAN M. LUNA

December 6, 2012

ALESSI & KOENIG, LLC
9500 W. FLAMINGO ROAD, SUITE 100
LAS VEGAS, NV 89147

Re: *Property Address:* 5316 Clover Blossom Court
Account ID: 30488
LOAN #: [redacted]2260
MBBW File No. 12-H2280

Dear Sir/Madame:

As you may recall, this firm represents the interests of Bank of America, N.A., as successor by merger to BAC Home Loans Servicing, LP (hereinafter "BANA") with regard to the issues set forth herein. We have received correspondence from your firm regarding our inquiry into the "Super Priority Demand Payoff" for the above referenced property. The Statement of Account provided by you in regards to the above-referenced address shows a full payoff amount of $4,186.00. BANA is the beneficiary/servicer of the first deed of trust loan secured by the property and wishes to satisfy its obligations to the HOA. Please bear in mind that:

NRS 116.3116 governs liens against units for assessments. Pursuant to NRS 116.3116:

> The association has a lien on a unit for:
>
> ...
>
> *any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section*

While the HOA may claim a lien under NRS 116.3102 Subsection (1), Paragraphs (j) through (n) of this Statute clearly provide that such a lien is JUNIOR to first deeds of trust to the extent the lien is for fees and charges imposed for collection and/or attorney fees, collection costs, late fees, service charges and interest. See Subsection 2(b) of NRS 116.3116, which states in pertinent part:

2. A lien under this section is prior to all other liens and encumbrances on a unit except:
(b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent...

The lien is also prior to all security interests described in paragraph (b) to the extent of the assessments for common expenses...which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien.

Based on Section 2(b), a portion of your HOA lien is arguably prior to BANA's first deed of trust, specifically the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessment. As stated above, the payoff amount stated by you includes many fees that are junior to our client's first deed of trust pursuant to the aforementioned NRS 116.3102 Subsection (1), Paragraphs (j) through (n). Nevertheless, due to the Nevada Real Estate Division's Advisory Opinion of December 2010, which was recently ratified in the Nevada Supreme Court's *non-published* opinion on May 23, 2012, our client wishes to also make a good-faith tender of your collection costs as part of the super-priority amount. Bear in mind that NRS 116.310313(1) only allows "[a]n association [to] charge a unit's owner reasonable fees to cover the costs of collecting any past due obligation." Here, reasonable collection costs in relation to my client's position as the first deed of trust lienholder, as opposed to a unit owner, is thought to be $999.50.

Thus, our client has authorized us to make payment to you in the amount of $1,494.50, which takes into account both the maximum 9 months worth of common assessments as well as reasonable collection costs to satisfy its obligations to the HOA as a holder of the first deed of trust against the property. Thus, enclosed you will find a cashier's check made out to Alessi & Koenig, LLC in the sum of $1,494.50. This is a non-negotiable amount and any endorsement of said cashier's check on your part, whether express or implied, will be strictly construed as an unconditional acceptance on your part of the facts stated herein and express agreement that BANA's financial obligations towards the HOA in regards to the real property located at 5316 Clover Blossom Court have now been "paid in full".

Thank you for your prompt attention to this matter. If you have any questions or concerns, I may be reached by phone directly at (702) 942-0412.

Sincerely,

MILES, BAUER, BERGSTROM & WINTERS, LLP

Rock K. Jung, Esq.

Miles, Bauer, Bergstrom & Winters, LLP Trust Acct 12-H2280 Initials: NEG

Payee: Alessi & Koenig, LLC Check #: 17657 Date: 12/4/2012 Amount: 1,494.50

Inv. Date	Reference #	Description	Inv. Amount	Case #	Matter Description	Cost Amount
12/4/2012	30488	To Cure HOA Deficiency	1,494.50			

Miles, Bauer, Bergstrom & Winters, LLP
Trust Account
1231 E. Dyer Road, #100
Santa Ana, CA 92705
Phone: (714) 481-9100

Bank of America
1100 N. Green Valley Parkway
Henderson, NV 89074
16-66/1220
1020

12-H2280

Loan # [redacted]2260

17657

Date: 12/4/2012

Amount $**** 1,494.50

Check Void After 90 Days

Pay $*****One Thousand, Four Hundred Ninety-Four & 50/100 Dollars
to the order of

Alessi & Koenig, LLC

[redacted]

Security Features Included. Details on back.

AA000333

EXHIBIT 4

Matters

File Edit View Help

Matter ID: 12-H2280

Client Sort: BANK OF AMERICA, N.A. (CWF)

Desc: Johnson, Diane L. & Geraldine J.
Country Gardens OA / A&K

General | Notes | Billing | Contacts | Matters | Events | Inquiry | Settlement | Civil | Contract Info | Custom | Deed Info | New Invoice

Date | (all)

11/20/2012 RCVD REFERRAL; OPENED 11/20/12
11/20/2012 EMT Clnt re: New Referral
11/20/2012 EMF RKJ re: Confirmation of NV HOA Referral / Johnson
11/20/2012 LTR - HOA HO
11/21/2012 11/21 EMT CLIENT WITH INITIAL LETTERS ATTACHED. FU
11/21/2012 Envelopes Sent on 21 NOV 2012.pdf
11/21/2012 2280 - Signed Letters.pdf
11/28/2012 EMF RKJ re: initial letters to borrowers & HOA
11/28/2012 11/28 EMT CLIENT HOA UPDATE WITH PO ATTACHED. FU
11/28/2012 EMF RKJ re: status update w/po & figures
11/28/2012 EMF Clnt re: were submitted
12/7/2012 12/7 CHECK SENT TO HOA. FU 12/21 SEE IF CHECK WAS
12/7/2012 EMF RKJ re: Payoff Funds re: 12-H2280 / 5216 Clover Blossom Ct / Will
12/21/2012 EMF RKJ re: Status of Payoff Funds (Rejected) 12-H2280 5216 Clover B
12/21/2012 12/21 CHECK RETURNED. FU 1/21 MONITOR EX PARTE
12/28/2012 EMF Clnt re: hearing to Matt Compton
12/28/2012 EMF CLNT re: closing file/holding to NV bulk team; please invoice
12/28/2012 EMT CLNT re: sent invoice
1/23/2013 PROPERTY SOLD TO 3RD PARTY AT HOA SALE. FU 2/13
2/13/2013 PROPERTY SOLD TO 3RD PARTY. NEW DEED RECORDED.
2/25/2013 EMF RKJ re: closing file prop sold at HOA sale
3/4/2013 EMT MBT w/excel spreadsheet & 02/26/13 invoices attached. NV Bulk Lis
4/5/2013 EMT MBT re: status of outstanding invoice payments
4/12/2013 EMT Matt Compton re: outstanding past due invoices, attached A/P aging
4/22/2013 EMT Matt Compton re: followup on monies & past due bills

EventNo: 4478541

Docket | Reminders | Options | Contacts | Matters

Date: 11/20/2012
To:
Type: ATY
Place:
Done: 11/21/2012
Loc:

Notes: RCVD REFERRAL; OPENED 11/20/12

Initials	Professional

Rules

EXHIBIT H

EXHIBIT H

(21)

Inst #: 201301240002549
Fees: $17.00 N/C Fee: $0.00
RPTT: $43.35 Ex: #
01/24/2013 02:33:00 PM
Receipt #: 1470974
Requestor:
ALESSI & KOENIG LLC
Recorded By: ANI Pgs: 2
DEBBIE CONWAY
CLARK COUNTY RECORDER

When recorded mail to and
Mail Tax Statements to:
5316 Clover Blossom Ct Trust
PO Box 36208
LAS VEGAS, NV 89133

A.P.N. No.**124-31-220-092** TS No. **30488-5316**

TRUSTEE'S DEED UPON SALE

The Grantee (Buyer) herein was: **5316 Clover Blossom Ct Trust**
The Foreclosing Beneficiary herein was: **Country Gardens Owners' Assocation**
The amount of unpaid debt together with costs: $5,021.00
The amount paid by the Grantee (Buyer) at the Trustee's Sale: **$8,200.00**
The Documentary Transfer Tax: $43.35
Property address: **5316 CLOVER BLOSSOM CT, North Las Vegas, NV 89031**
Said property is in [ ] unincorporated area: City of **North Las Vegas**
Trustor (Former Owner that was foreclosed on): **DENNIS L & GERALDINE J JOHNSON**

Alessi & Koenig, LLC (herein called Trustee), as the duly appointed Trustee under that certain Notice of Delinquent Assessment Lien, recorded **February 22, 2012** as instrument number **0001651**, in **Clark** County, does hereby grant, without warranty expressed or implied to: **5316 Clover Blossom Ct Trust** (Grantee), all its right, title and interest in the property legally described as: **LOT 92**, as per map recorded in Book **91**, Pages **71** as shown in the Office of the County Recorder of **Clark** County Nevada.

TRUSTEE STATES THAT:
This conveyance is made pursuant to the powers conferred upon Trustee by NRS 116 et seq., and that certain Notice of Delinquent Assessment Lien, described herein. Default occurred as set forth in a Notice of Default and Election to Sell which was recorded in the office of the recorder of said county. All requirements of law regarding the mailing of copies of notices and the posting and publication of the copies of the Notice of Sale have been complied with. Said property was sold by said Trustee at public auction on **January 16, 2013** at the place indicated on the Notice of Trustee's Sale.

Ryan Kerbow, Esq.
Signature of AUTHORIZED AGENT for Alessi & Koenig, LLC

State of Nevada)
County of **Clark**)

SUBSCRIBED and SWORN to before me 1/24/13

WITNESS my hand and official seal.
(Seal) (Signature)

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
LANI MAE U. DIAZ
Appt. No. 10-2800-1
My Appt. Expires Aug. 24, 2014

STATE OF NEVADA
DECLARATION OF VALUE

1. Assessor Parcel Number(s)
   a. 124-31-220-092
   b. _____
   c. _____
   d. _____
2. Type of Property:
   a. ☐ Vacant Land b. ☑ Single Fam. Res.
   c. ☐ Condo/Twnhse d. ☐ 2-4 Plex
   e. ☐ Apt. Bldg f. ☐ Comm'l/Ind'l
   g. ☐ Agricultural h. ☐ Mobile Home
   ☐ Other

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

3.a. Total Value/Sales Price of Property $ 8,200.00
b. Deed in Lieu of Foreclosure Only (value of property) ( )
c. Transfer Tax Value: $ 8,200.00
d. Real Property Transfer Tax Due $ 43.35

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: Grantor

Signature _____ Capacity: _____

SELLER (GRANTOR) INFORMATION (REQUIRED)	**BUYER (GRANTEE) INFORMATION (REQUIRED)**
Print Name: Alessi & Koenig, LLC	Print Name: 5316 Clover Blossom Ct Trust
Address: 9500 W Flamingo Rd. Suite 205	Address: PO Box 36208
City: Las Vegas	City: Las Vegas
State: NV Zip: 89147	State: NV Zip: 89133

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

Print Name: Alessi & Koenig, LLC	Escrow # N/A Foreclosure
Address: 9500 W Flamingo Rd. Suite 205	
City: Las Vegas	State: NV Zip: 89147

AS A PUBLIC RECORD THIS FORM MAY BE RECORDED/MICROFILMED

MTD

MICHAEL F. BOHN, ESQ.
Nevada Bar No.: 1641
mbohn@bohnlawfirm.com
ADAM R. TRIPPIEDI, ESQ.
Nevada Bar No. 12294
atrippiedi@bohnlawfirm.com
LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.
376 E. Warm Springs Rd., Ste. 140
Las Vegas, Nevada 89119
(702) 642-3113/ (702) 642-9766 FAX
Attorney for plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

5316 CLOVER BLOSSOM CT TRUST Plaintiff, vs. U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN TRUST 2006-OA1, MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1; and CLEAR RECON CORPS Defendants.	CASE NO.: A-14-704412-C DEPT NO.: XXIV **MOTION TO DISMISS COUNTERCLAIM**
U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN TRUST 2006-OA1, MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1; Counterclaimant, vs. 5316 CLOVER BLOSSOM CT TRUST, Counterdefendant.	

U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN TRUST 2006-OA1, MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1;

Cross-claimant,

vs.

COUNTRY GARDEN OWNERS' ASSOCIATION,

Cross-defendant.

Plaintiff, 5316 Clover Blossom Ct Trust, by and through its attorney, Michael F. Bohn, Esq. hereby moves to dismiss the counterclaim filed by Defendant U.S. Bank, National Association, Successor Trustee to Bank of America, N.A., Successor by Merger to Lasalle Bank, N.A., as Trustee to the Holders of the Zuni Mortgage Loan Trust 2006-OA1, Mortgage Loan Pass-through Certificates Series 2006-OA1("defendant" or "defendant bank") on October 10, 2017. This motion is based upon the points and authorities contained herein

DATED this 23rd day of October, 2017.

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

By: /s/ *Adam R. Trippiedi, Esq.*
Michael F. Bohn, Esq.
Adam R. Trippiedi, Esq.
376 East Warm Springs Road, Ste. 140
Las Vegas NV 89119
Attorney for plaintiff

/ / /

/ / /

/ / /

NOTICE OF MOTION

TO: Defendants above named; and

TO: Their respective counsel of record

YOU AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the above and foregoing Motion on for hearing before the above entitled Court, Department XXIV on the 30 day of November, 2017 at 9:00 a.m. or as soon thereafter as counsel can be heard.

DATED this 23rd day of October, 2017.

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

By: /s/ *Adam R. Trippiedi, Esq.*
Michael F. Bohn, Esq.
Adam R. Trippiedi, Esq.
376 East Warm Springs Road, Ste. 140
Las Vegas NV 89119
Attorney for plaintiff

FACTS

Defendant's counterclaim alleges the following facts:

1. The subject of the case is the residential property located at 5316 Clover Blossom Court, North Las Vegas, Nevada (hereinafter referred to as "the Property"). Paragraph 6.

2. Dennis Johnson and Geraldine Johnson are the former owners of the property. Paragraph 6.

3. A deed of trust was recorded against the property on June 30, 2004. Paragraph 6.

4. Defendant is the current beneficiary of a deed of trust as evidenced by the assignment recorded June 20, 2011. Paragraph 7.

4. On February 22, 2012, a Notice of Delinquent Assessment Lien was recorded against the property. Paragraph 13.

6. On April 20, 2012, a Notice of Default and Election to Sell under homeowners association lien was recorded against the property. Paragraph 15.

7. On October 31, 2012, a Notice of Foreclosure Sale was recorded against the property.

Paragraph 16.

8. On January 16, 2013, plaintiff obtained title to the property by purchasing the property for $8,200.00 at the HOA foreclosure sale as shown by the foreclosure deed recorded January 24, 2013. The amount paid was $8,200.00 Paragraph 21.

Each of the arguments contained within the counterclaims have been determined to be invalid arguments by the Nevada Supreme Court. Plaintiff now moves to dismiss the defendant's claims.

POINTS AND AUTHORITIES

1. There is a Statutory Conclusive Presumption that the HOA's Foreclosure Sale was Properly Conducted.

The detailed and comprehensive statutory requirements for a foreclosure sale are indicative of a public policy which favors a final and conclusive foreclosure sale as to the purchaser. See 6 Angels, Inc. v. Stuart-Wright Mortgage, Inc., 85 Cal. App. 4th 1279, 102 Cal. Rptr. 2d 711 (2011); McNeill Family Trust v. Centura Bank, 60 P.3d 1277 (Wyo. 2033); In re Suchy, 786 F.2d 900 (9th Cir. 1985); and Miller & Starr, California Real Property 3d §10:210. In the case of SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408 (2014), the Court described the non-judicial foreclosure provisions of NRS Chapter 116 as "elaborate," and therefore indicative of the public policy favoring the finality of a foreclosure sale.

Additionally, there is a common law presumption that a foreclosure sale was conducted validly. Fontenot v. Wells Fargo Bank, 198 Cal. App. 4th 256, 129 Cal. Rptr. 3d 467 (2011); Moeller v. Lien, 25 Cal. App. 4th 822, 30 Cal. Rptr. 2d 777 (1994); Burson v. Capps, 440 Md. 328, 102 A.3d 353 (2014); Timm v. Dewsnup, 86 P.3d 699 (Utah 2003); Deposit Insurance Bridge Bank, N.A.; Dallas v. McQueen, 804 S.W. 2d 264 (Tex. App. 1991); Myles v. Cox, 217 So.2d 31 (Miss. 1968); American Bank and Trust Co v. Price, 688 So.2d 536 (La. App. 1996); Meeker v. Eufaula Bank & Trust, 208 Ga. App. 702, 431 S.E. 2d 475 (Ga. App 1993).

These presumptions are present under Nevada law. There are a number of statutory disputable presumptions which enforce the presumption of validity of the sale:

NRS 47.250(16) provides the disputable presumption that "the law has been obeyed."

NRS 47.250 (17) provides that "a trustee or other person, whose duty it was to convey real property to a particular person, has actually conveyed to that person, when such presumption is necessary to perfect the title of such person or a successor in interest."

NRS 47.250 (18)provides:

> In situations not governed by the Uniform Commercial Code:
> (a) That an obligation delivered up to the debtor has been paid.
> (b) That private transactions have been fair and regular.
> (c) That the ordinary course of business has been followed.
> (d) That there was good and sufficient consideration for a written contract.

Under Nevada law, the recitals in a foreclosure deed are sufficient and conclusive proof that the HOA recorded, mailed, posted, and published all required notices. The controlling statute, NRS 116.31166(1) provides that the recitals in a foreclosure deed are "conclusive proof of the matters recited," and NRS 116.31166(2) provides that the foreclosure deed is "conclusive against the unit's former owner, his or her heirs and assigns, **and all other persons**." (emphasis added)

In Shadow Wood Homeowners Association v. New York Community Bancorp, Inc., 132 Nev. Adv. Op. 5, 366 P.3d 1105 (2016), the Nevada Supreme Court recognized that "such recitals are "conclusive, *in the absence of grounds for equitable relief.*" 366 P.3d at 1112. (quoting from Holland v. Pendleton Mortg. Co., 61 Cal. App. 2d 570, 143 P.2d 493, 496 (Cal. Ct. App.1943). Therefore, until and unless the defendant sets forth grounds for equitable relief, the recitals in the deed are conclusive as to the defendant bank.

It is respectfully submitted that this court should find that the foreclosure deed received by the plaintiff at the time it obtained title to the Property is conclusive and sufficient proof that the notices were sent in compliance with the law, and that title is vested in plaintiff and not subject to attack from the defendant bank.

2. Equity should not afford relief to the defendant which failed to act to protect its interest prior to the foreclosure sale

The defendant is estopped by both the unclean hands and the failure to mitigate damages doctrines because it failed to timely or properly act to protect its interests.

In SFR, the court said not once, but twice, that the bank had simple remedies at its disposal to

preserve its interest in the property. The Court stated at page 414:

> U.S. Bank's final objection is that it makes little sense and is unfair to allow a relatively nominal lien—nine months of HOA dues—to extinguish a first deed of trust securing hundreds of thousands of dollars of debt. But as a junior lienholder, U.S. Bank could have paid off the SHHOA lien to avert loss of its security; it also could have established an escrow for SHHOA assessments to avoid having to use its own funds to pay delinquent dues. 1982 UCIOA § 3116 cmt. 1; 1994 & 2008 UCIOA § 3–116 cmt. 2. The inequity U.S. Bank decries is thus of its own making and not a reason to give NRS 116.3116(2) a singular reading at odds with its text and the interpretation given it by the authors and editors of the UCIOA. (emphasis added)

The Court also stated at page 418:

> U.S. Bank further complains about the content of the notice it received. It argues that due process requires specific notice indicating the amount of the superpriority piece of the lien and explaining how the beneficiary of the first deed of trust can prevent the superpriority foreclosure sale. But it appears from the record that specific lien amounts were stated in the notices, ranging from $1,149.24 when the notice of delinquency was recorded to $4,542.06 when the notice of sale was sent. The notices went to the homeowner and other junior lienholders, not just U.S. Bank, so it was appropriate to state the total amount of the lien. As U.S. Bank argues elsewhere, dues will typically comprise most, perhaps even all, of the HOA lien. *See supra* note 3. **And from what little the record contains, nothing appears to have stopped U.S. Bank from determining the precise superpriority amount in advance of the sale or paying the entire amount and requesting a refund of the balance.** *Cf. In re Medaglia,* 52 F.3d 451, 455 (2d Cir.1995) ("[I]t is well established that due process is not offended by requiring a person with actual, timely knowledge of an event that may affect a right to exercise due diligence and take necessary steps to preserve that right."). (Emphasis added)

In Shadow Wood, the Nevada Supreme Court identified other ways a bank could protect itself:

> Against these inconsistencies, however, must be weighed NYCB's (in)actions. The NOS was recorded on January 27, 2012, and the sale did not occur until February 22, 2012. NYCB knew the sale had been scheduled and that it disputed the lien amount, yet it did not attend the sale, request arbitration to determine the amount owed, or seek to enjoin the sale pending judicial determination of the amount owed. The NOS included a warning as required by NRS 116.311635(3)(b):
> . . . .
> 366 P.3d at 1114

The court in Shadow Wood also cited a number of cases which cite the rule that equitable relief is not available when innocent third parties are affected. The court also noted in footnote 7:

> Consideration of harm to potentially innocent third parties is especially pertinent here where NYCB did not use the legal remedies available to it to prevent the property from being sold to a third party, such as by seeking a temporary restraining order and preliminary injunction and filing a lis pendens on the property. *See* NRS 14.010; NRS 40.060. *Cf. Barkley's Appeal. Bentley's Estate,* 2 Monag. 274, 277 (Pa.1888) (**"In the case before us, we can see no way of giving the petitioner the equitable relief she asks without doing great injustice to other innocent parties who would not have been in a position to be injured by such a decree as she asks if she had applied for**

relief at an earlier day."). (emphasis added)

Defendant had remedies available to protect its interests before the foreclosure and failed to avail itself of these remedies. However, according to the facts as pled in the counterclaim, defendant chose not to pay the super-priority lien or to take any action whatsoever. Because defendant chose not to use the legal remedies available to it to prevent the property from being sold, defendant cannot now seek equitable relief setting aside the foreclosure sale.

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

Under both the Restatement and Nevada law, the defendant bank has no remedies against the plaintiff in regards to the foreclosure sale because any damages which the bank **may** have sustained as a result of an **alleged** wrongful foreclosure can be compensated with money damages. This is an adequate remedy at law, there is and there is no equity jurisdiction when a party has an adequate remedy at law.

Shadow Wood has limited application because Shadow Wood dealt with title divestment of the former owner. This case, however, deals with the extinguishment of the defendant's security interest in the property. Because the plaintiff is a bona fide purchaser, the sale cannot be set aside.

In Shadow Wood, the Supreme Court referred to the Restatement (Third) of Prop.: Mortgages § 8.3. Comment (b) recognizes that where the property has been purchased by a bona fide purchaser, "the real estate is unavailable" and that "price inadequacy" may be raised in a suit against the foreclosing mortgagee for damages. Comment b states:

> On the other hand, where foreclosure is by power of sale, judicial confirmation of the sale is usually not required and the issue of price inadequacy will therefore arise only if the party attacking the sale files an independent judicial action. Typically this will be an action to set aside the sal; it may be brought by the mortgagor, junior lienholders, or the holders of other junior interests who are prejudiced by the sale. **If the real estate is unavailable because title has been acquired by a bona fide purchaser,** the issues of price inadequacy may be raised by the mortgagor or a junior interest holder in a suit against the foreclosing mortgagee for damages for wrongful foreclosure**. This latter remedy, however, is not available based on gross price inadequacy alone.** In addition, the mortgagee must be responsible for a defect in the foreclosure process of the type described in Comment *c* of this section. (emphasis added)

A copy of this section from the Restatement is attached as Exhibit 1.

This authority from the Restatement is consistent with Nevada law and the common law rule

that there is no equity jurisdiction when a party has an available adequate remedy at law.

The United States Supreme Court has recognized that equitable relief is not available when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 381 (1992).

Back in 1868, the court in Sherman v. Clark 4 Nev. 138 (1868) the Nevada Supreme Court stated:

> The writ is exclusively an equitable remedy. But equity is chary of its powers; it employs them only when the impotent or tardy process of the law does not afford that complete and perfect remedy or protection which the individual may be justly entitled to. **When therefore it is shown that there is a complete and adequate remedy at law, equity will afford no assistance.** "When a party has a remedy at law," says Mr. Hilliard, "he cannot come into equity, unless from circumstances not within his control he could not avail himself of his legal remedy." (Hill. Inj. sec. 23.) That full compensation can be had at law is the great rule for withholding the strong arm of the chancellor," says Mr. Justice Thompson, in Pusey v. Wright, (31 Penn. 396.) See also Thompson v. Matthews (2 Edw. Ch. R. 213; 9 Paige, 323.) **Before refusing its aid upon this ground, however, it must appear that the legal remedy is complete and adequate to afford the complainant full redress; but when that fact does appear, equity at once relinquishes all control over the case, and leaves the party to pursue his legal remedy.** (Emphasis added)

Likewise, in the case of Conley v. Chedic 6 Nev. 222 (1870) the Nevada Supreme Court held:

> Equity will not take jurisdiction or interpose its powers when there is a full, complete and adequate remedy in the ordinary course of law; that is, when the wrong complained of may be fully compensated in damages, which can easily be ascertained, and it is not shown that a judgment at law cannot be satisfied by execution. (See Sherman v. Clark, 4 Nev. 138.)

In Turley v. Thomas 31 Nev. 181, 101 P. 568 (1909) the Nevada Supreme Court stated:

> Again, in a decision rendered last year, Hills v. McMunn, 232 Ill. 488, 83 N. E. 963, it is stated: "It is also contended that the case made by the bill and proofs shows no grounds for the interposition of a court of equity, and that if appellant has any remedy the law will afford adequate relief.

In State v. Second Judicial District Court 49 Nev. 145, 241 P.317, 43 A.L.R. 1331 (1925), the Nevada Supreme Court stated:

> As to the contention that pursuant to paragraph 6 the court was authorized to make the appointment under its general equity jurisdiction, we need only say that where it does not appear, as in this case, that the plaintiff has no adequate remedy at law, a court of equity acquires no jurisdiction.

In Washoe County v. City of Reno 77 Nev. 152, 360 P.2d 602 (1961), the Nevada Supreme

Court held that the fact that the judgment may not be collectable is not an issue to be considered. The court stated:

> During oral argument, counsel for respondents suggested that an action at law would not be adequate because it could not be enforced by a writ of execution against a county fund. Whether this be true or not, it is hardly to be supposed that an execution would be necessary in the event a judgment at law were obtained against the county in this type of case any more than a contempt proceeding would be required in the event a peremptory writ of mandamus were issued. **In answer to this suggestion however it is necessary to say only that our concern is with the existence of a remedy and not whether it will be unproductive in this particular case**, Hughes v. Newcastle Mutual Insurance Co., 13 U.C.Q.B. (Ont.) 153, or inconvenient, Gulf Research & Development Co. v. Harrison, 9 Cir., 185 F.2d 457, or ineffectual, United States ex rel. Crawford v. Addison, 22 How. 174, 63 U.S. 174, 16 L.Ed. 304.
>
> In Stewart v. Manget, 132 Fla. 498, 181 So. 370, in affirming an order dismissing a bill in equity on the ground that the plaintiff had an adequate remedy at law, the Florida Supreme Court cited with approval the following language from Tampa & G. C. R. Co. v. Mulhern, 73 Fla. 146, 74 So. 297, 299:
>
> > 'The inadequacy of a remedy at law to produce money is not the test of the applicability of the rule. **All remedies, whether at law or in equity, frequently fail to do that; and to make that the test of equity jurisdiction would be substituting the result of a proceeding for the proceeding which is invoked to produce the result. The true test is, could a judgment be obtained in a proceeding at law, and not, would the judgment procure pecuniary compensation.'**
>
> (Emphasis added)

Any defects in the sale gives the party damaged thereby a claim for money damages against the foreclosure agent. Defendant's claim should be against the foreclosure agent, not the bona fide purchaser plaintiff . The Supreme Court in Shadow Wood repeatedly stated that the title of a bona fide purchaser will not be disturbed. This is consistent with the rule that equity won't interfere when there is an adequate remedy at law.

Also noted in comment b to the Restatement, any claim the defendant bank has is not against the plaintiff but against the foreclosure agent. This is consistent with the case law.

Similarly, in the case of Moeller v. Lien, 25 Cal. App. 4th 822, 30 Cal. Rptr. 2d 777 (1994), the respondent allowed a trustee's sale to go forward even though it had available cash deposits to pay off the loan. Id. at 828. The trial court set aside the sale because "[t]he value of the property was four

times the amount of the debt/sales price." Id. at 829. The Court of Appeals reversed the trial court's order and stated:

> Thus **as a general rule, a trustor has no right to set aside a trustee's deed as against a bona fide purchaser for value by attacking the validity of the sale.** (Homestead Savings v. Damiento, supra, 230 Cal. App. 3d at p. 436.) The conclusive presumption precludes an attack by the trustor on a trustee's sale to a bona fide purchaser **even though there may have been a failure to comply with some required procedure which deprived the trustor of his right of reinstatement or redemption**. (4 Miller & Starr, supra, § 9:141, p. 463; cf. Homestead v. Damiento, supra, 230 Cal. App. 3d at p. 436.) The conclusive presumption precludes an attack by the trustor on the trustee's sale to a bona fide purchaser even where the trustee wrongfully rejected a proper tender of reinstatement by the trustor**. Where the trustor is precluded from suing to set aside the foreclosure sale, the trustor may recover damages from the trustee**. (Munger v. Moore (1970) 11 Cal. App. 3d 1, 9, 11 [89 Cal. Rptr. 323].)
>
> Id. at 831-832. (emphasis added)

This holding is consistent with Nevada case law. The Nevada Supreme Court has repeatedly held that equity jurisdiction does not exist when there exists an adequate remedy at law which may be compensated by a judgment for money damages. Any defects in the sale, and there are none in this case, which may have damaged any party with an interest in the party may be compensated by money damages in a claim against the foreclosure agent. This court should not exercise its equity jurisdiction to disrupt the plaintiff's title.

4. Plaintiff is a bona fide purchaser.

The burden of proof is on the bank, seeking to invoke the equity jurisdiction of the court and have the sale set aside, to prove that the purchaser is NOT a bona fide purchaser. See Shadow Wood:

> The question remains whether NYCB demonstrated sufficient grounds to justify the district court in setting aside Shadow Wood's foreclosure sale on NYCB's motion for summary judgment.

Similarly, in First Fidelity Thrift & Loan Ass'n v. Alliance Bank, 60 Cal. App. 4th 1433, 71 Cal. Rptr. 2d 295 (1998), the court recognized that where a party is seeking equitable relief, the burden is on the party seeking equitable relief to allege and prove that the person holding legal title is not a bona fide purchaser:

> **That Alliance had knowledge of First Fidelity's equitable claim for reinstatement of its reconveyed deed of trust was an element of First Fidelity's case**. "The general rule places the burden of proof upon a person claiming bona fide purchaser status to

> present evidence that he or she acquired interest in the property without notice of the prior interest. (Bell v. Pleasant (1904) 145 Cal. 410, 413-414, 78 P. 957; Alcorn v. Buschke (1901) 133 Cal. 655, 657-658, 66 P. 15; Hodges v. Lochhead (1963) 217 Cal. App.2d 199, 203, 31 Cal. Rptr. 879; 2 Miller & Starr, Current Law of Cal. Real Estate [1977] § 11:28, p. 51.) ... [¶] If the prior party claims an equitable rather than a legal title, however, the burden of proof is upon the person asserting that title. (Bell v. Pleasant, *supra*, 145 Cal. 410, 414-415, 78 P. 957; Garber v. Gianella (1893) 98 Cal. 527, 529-530, 33 P. 458; 2 Miller & Starr, Current Law of Cal. Real Estate, *supra*, § 11:28, pp. 52-53.)" (Gates Rubber Co. v. Ulman (1989) 214 Cal. App. 3d 356, 366, fn. 6, 262 Cal. Rptr. 630.) (2b) **Showing that Alliance was not an innocent purchaser for value was hence an element of First Fidelity's claim**. (Firato v. Tuttle, *supra*, 48 Cal.2d 136, 138, 308 P.2d 333.) (emphasis added)

60 Cal. App. 4th at 1442, 71 Cal. Rptr. at 301.

The counterclaim fails to specify any defects in the foreclosure sale of which the purchaser was on notice of prior to the sale. The counterclaim should therefore be dismissed.

Defendant has the burden to prove a defect with the sale, and that the purchaser knew of the defect at or before the time of the sale. Defendant has failed in both counts. The counterclaim fails to specify any defects in the foreclosure sale of which the purchaser was on notice of prior to the sale. The counterclaim should therefore be dismissed.

The concept of bona fide purchaser has more application in voluntary sales in which title is transferred by deed. In these cases, a purchaser takes subject to any matters which are recorded against the property. However, in foreclosure cases, the bona fide purchaser doctrine rarely comes into play because all interests on the property which are junior to the lien being foreclosed upon are extinguished. This is even more so with an HOA foreclosure because it is senior to all other liens other than prior existing debts and taxes are extinguished by the foreclosure. In these situations, the purchaser would be precluded from bona fide purchaser status in HOA foreclosure cases only if there was some irregularity in the sale AND the purchaser knew of the irregularity.

Shadow Wood cited 1 Grant S. Nelson, Dale A. Whitman, Ann M. Burkhart & R. Wilson Freyermuth, *Real Estate Finance Law* §7:21 (6th ed. 2014). Section 7.21 of this treatise is entitled "defective power of sale foreclosure-"void-voidable"distinction. The treatise explains there are three types of defects which may affect the validity of foreclosure sales: void, voidable, or inconsequential.

Void sales arise when there is a substantial defect with the sale, such as when the mortgage was obtained by fraud or forgery, or the mortgage holder had no right to foreclose.

The treatise then explains:

> Most defects render the foreclosure voidable and not void. When a voidable error occurs, bare legal title passes to the sale purchaser, subject to the redemption rights of those injured by the defective foreclosure. Typically, a voidable error is "an irregularity in the execution of a foreclosure sale" and must be "substantial or result in a probably unfairness."
> . . . .
> If the defect only renders the sale voidable, the redemption rights can be cut off if a bona fide purchase for value acquires the land. When this occurs, an action for damages against the foreclosing mortgagee or trustee may be the only remaining remedy.
> ...
> The treatise then goes on to explain who is a bona fide purchaser in a foreclosure contest: If the defective sale is only voidable, who is a bona fide purchaser? A mortgagee purchaser should rarely, if every, qualify as a bona fide purchaser, because the mortgagee or its attorney normally manages the power of sale foreclosure and should be responsible for defects. The result should be the same when a deed of trust is foreclosed. Although the trustee, rather than the lender, normally is in charge of the proceedings, the court probably will treat the trustee as the lender's agent for purposes of determining BFP status. **If the sale purchaser paid value and is unrelated to the mortgagee, he should take free of voidable defects if : (a) he has no actual knowledge of he defects; (b) he is not on reasonable notice from recorded instruments; and (c) the defects are such that a person attending the sale and exercising reasonable care would be unaware of the defects....**
> (emphasis added, footnotes omitted)

A copy of this section of the treatise is attached as Exhibit 2.

A purchaser would be precluded from bona fide purchaser status in HOA foreclosure cases only if there was some irregularity in the sale AND the purchaser knew of the irregularity. Thus, plaintiff is a bona fide purchaser and should take title to the subject property free and clear.

5. There is no requirement that the foreclosure notice specify the super priority lien amount

Paragraphs 22 through 25 and 36 of the counterclaim allege that the HOA did not provide proper notice of the correct superpriority amount or other information. The adequacy of the notice was also addressed in the SFR case. The court stated:

> U.S. Bank further complains about the content of the notice it received. It argues that due process requires specific notice indicating the amount of the superpriority piece of the lien and explaining how the beneficiary of the first deed of trust can prevent the superpriority foreclosure sale. But it appears from the record that specific lien amounts were stated in the notices, ranging from $1,149.24 when the notice of delinquency was recorded to $4,542.06 when the notice of sale was sent. The notices went to the

> homeowner and other junior lienholders, not just U.S. Bank, so it was appropriate to state the total amount of the lien. As U.S. Bank argues elsewhere, dues will typically comprise most, perhaps even all, of the HOA lien. *See supra* note 3. And from what little the record contains, nothing appears to have stopped U.S. Bank from determining the precise superpriority amount in advance of the sale or paying the entire amount and requesting a refund of the balance. *Cf. In re Medaglia,* 52 F.3d 451, 455 (2d Cir.1995) ("[I]t is well established that due process is not offended by requiring a person with actual, timely knowledge of an event that may affect a right to exercise due diligence and take necessary steps to preserve that right."). On this record, at the pleadings stage, we credit the allegations of the complaint that SFR provided all statutorily required notices as true and sufficient to withstand a motion to dismiss. *See 7912 Limbwood Court Trust,* 979 F.Supp.2d at 1152–53.

Accordingly, it was not improper for the notices to state the total amount of the lien, and the information which defendant claims was not in the notice was not required, because the notices were being mailed to the homeowner and other junior lien holders. As a result, the defendant has no claim based on the failure of the lien to state the super priority amount or the other complaints regarding the notices.

6. There is no requirement for a sale to be commercially reasonable.

Defendant's counterclaim alleges in paragraph 27 that the foreclosure sale was "commercially unreasonable" because the manner in which the sale was conducted "could not promote an equitable sales price of the Property." Shadow Wood is often cited for its so called "20% rule" from the Restatement. However, as demonstrated above, Shadow Wood has no application in this case because plaintiff is a bona fide purchaser and there are no irregularities alleged regarding the sale. **IF** there were any irregularities, equity would not interfere because the party harmed would have a claim against the foreclosing agent.

The argument regarding the low price was also considered by the Nevada Supreme Court in the case of SFR Investments Pool 1, LLC v. U.S. Bank N.A. 130 Nev. Adv. Op 75, 334 P.3d 408 (2014). The price argument fails because of the simple and inexpensive remedy available to the trust deed holder in discharging the relatively small or nominal lien.

The Court stated at page 414:

> U.S. Bank's final objection is that it makes little sense and is unfair to allow a relatively nominal lien—nine months of HOA dues—to extinguish a first deed of trust securing hundreds of thousands of dollars of debt. But as a junior lienholder, U.S. Bank could have paid off the SHHOA lien to avert loss of its security; it also could

> have established an escrow for SHHOA assessments to avoid having to use its own funds to pay delinquent dues. 1982 UCIOA § 3116 cmt. 1; 1994 & 2008 UCIOA § 3–116 cmt. 2. **The inequity U.S. Bank decries is thus of its own making and not a reason to give NRS 116.3116(2) a singular reading at odds with its text and the interpretation given it by the authors and editors of the UCIOA**. (emphasis added)

The Court also stated at page 418:

> U.S. Bank further complains about the content of the notice it received. It argues that due process requires specific notice indicating the amount of the superpriority piece of the lien and explaining how the beneficiary of the first deed of trust can prevent the superpriority foreclosure sale. But it appears from the record that specific lien amounts were stated in the notices, ranging from $1,149.24 when the notice of delinquency was recorded to $4,542.06 when the notice of sale was sent. The notices went to the homeowner and other junior lienholders, not just U.S. Bank, so it was appropriate to state the total amount of the lien. As U.S. Bank argues elsewhere, dues will typically comprise most, perhaps even all, of the HOA lien. *See supra* note 3. **And from what little the record contains, nothing appears to have stopped U.S. Bank from determining the precise superpriority amount in advance of the sale or paying the entire amount and requesting a refund of the balance.** *Cf. In re Medaglia,* 52 F.3d 451, 455 (2d Cir.1995) ("[I]t is well established that due process is not offended by requiring a person with actual, timely knowledge of an event that may affect a right to exercise due diligence and take necessary steps to preserve that right."). (Emphasis added)

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

> While mere inadequacy of price has rarely been held sufficient in itself to justify setting aside a judicial sale of property, courts are not slow to seize upon other circumstances impeaching the fairness of the transaction as a cause for vacating it, especially if the inadequacy be so gross as to shock the conscience. If the sale has been attended by any irregularity, as if several lots have been sold in bulk where they should have been sold separately, or sold in such manner that their full value could not be realized; if bidders have been kept away; if any undue advantage has been taken to the prejudice of the owner of the property, or he has been lulled into a false security; or if the sale has been collusively or in any other manner conducted for the benefit of the purchaser, and the property has been sold at a greatly inadequate price,-the sale may be set aside, and the owner may be permitted to redeem.
> 161 U.S. at 337-338.

The requirements for relief from a foreclosure sale when the property has been purchased by a third party in the Restatement, as well as Shadow Wood and Golden, is inadequacy of the price, and fraud, oppression and unfairness causing the inadequacy of price. At no time in the Shadow Wood

opinion did the court use any language to question the validity of the standards or overturn the court's prior rulings.

The "shock the conscious" standard was also specifically rejected by the court in Golden v. Tomiyasu,79 Nev. 503, 387 P.2d 989 (1963). The court stated:

> ' The court then referred to the inadequacy of the consideration and said: 'However, even assuming that the price was inadequate, that fact standing alone would not justify setting aside the trustee's sale. 'In California, it is a settled rule that inadequacy of price, however gross, is not in itself a sufficient ground for setting aside a trustee's sale legally made; there must be in addition proof of some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price.'' Several earlier California cases are cited. The allegation of value was $25,000 and the testimony as to value was conflicting. The sale price was $5,025. **(In approving the rule thus stated, we necessarily reject the dictum in Dazet v. Landry, supra, implying that the rule requiring more than mere inadequacy of price will not be applied if 'the inadequacy be so great as to shock the conscience.')**
>
> 79 Nev. 515, 387 P.2d 995.

The law in Nevada is clear that price alone will not justify setting aside a foreclosure sale, especially when the sold out lienholder knew of the sale and failed to take steps to protect its interests.

7. The majority opinion in Bourne Valley Court Trust v. Wells Fargo Bank, N.A. is not a binding interpretation of Nevada's HOA foreclosure statute.

The counterclaim alleges that under the decision in Bourne Valley Court Trust v. Wells Fargo Bank, N.A., 832 F.3d 1154 (9th Cir. 2016), and claims that foreclosure statutes are unconstitutional. The decision in Bourne Valley, however, is not a binding interpretation of the statute, and the Nevada Supreme Court has expressly rejected the due process argument adopted by the majority opinion in that case.

In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408 (2014), the Nevada Supreme Court expressly rejected the lender's argument that the statutory scheme granting to the HOA its superpriority lien rights violated due process:

> The contours of U.S. Bank's due process argument are protean. **To the extent U.S. Bank argues that a statutory scheme that gives an HOA a superpriority lien that can be foreclosed nonjudicially, thereby extinguishing an earlier filed deed of trust, offends due process, the argument is a nonstarter**. As discussed in 7912 Limbwood Court Trust, 979 F. Supp. 2d at 1152'.
>
> > Chapter 116 was enacted in 1991, and thus [the lender] was on notice that by operation of the statute, the [earlier recorded] CC & Rs might entitle the HOA to a super priority lien at some future date which would take priority over a [later recorded] first deed of trust.... Consequently**, the conclusion that foreclosure on an HOA super priority lien**

> **extinguishes all junior liens, including a first deed of trust recorded prior to a notice of delinquent assessments, does not violate [the lender's] due process rights.**
>
> *Accord* Nationstar Mtg., 2014 WL 3661398, at *3 (rejecting a due process challenge to nonjudicial foreclosure of a superpriority lien). (emphasis added)

334 P.3d at 418.

In Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage, 133 Nev., Adv. Op. 5 (Jan. 26, 2017), the Nevada Supreme Court found that due process is not an issue in an HOA foreclosure sale because no "state actor" participates in the foreclosure process. At pages *6 and *7 of its opinion, the court relied on the decisions by the United States Supreme Court in Lugar v. Edmondson Oil Co., Inc., 475 U.S. 922 (1982), and Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978), which hold that due process is not an issue unless a "state actor" participates in the challenged procedure.

At page 7 of the opinion, the Nevada Supreme Court also recognized that based on this federal precedent, "the Legislature's mere enactment of NRS 116.3116 does not implicate due process absent some additional showing that the state compelled the HOA to foreclose on its lien, or that the state was involved with the sale." In footnote 5 at the bottom of page *7, the court acknowledged the finding in Bourne Valley "that the Legislature's enactment of NRS 116.3116 *et seq.* does constitute state action," and stated: "However, for the aforementioned reasons, we decline to follow its holding."

The interpretation of Nevada law by the majority opinion in Bourne Valley is not a binding interpretation of the statute because only the Nevada Supreme Court can authoritatively construe NRS Chapter 116.

In Blanton v. N. Las Vegas Mun. Ct., 103, Nev. 623, 633, 748 P.2d 494, 500 (1987), *aff'd*, Blanton v. City of N. Las Vegas, 489 U.S. 538 (1989), the Nevada Supreme Court stated:

> We note initially that the decisions of the federal district court and panels of the federal circuit court of appeal are not binding upon this court. United States ex rel. Lawrence v. Woods, 432 F.2d 1072, 1075-76 (7th Cir. 1970), *cert. denied*, 402 U.S. 983, 91 S.Ct. 1658, 29 L.Ed. 2d 140 (1971). Even *en banc* decision of a federal circuit court would not bind Nevada to restructure the court system of this state. Our state constitution binds the courts of the State of Nevada to the United States Constitution as interpreted by the United States Supreme Court. art. I, §2. See Bargas v. Warden,

87 Nev. 30, 482 P.2d 317, *cert. denied*, 403 U.S. 935, 91 S. Ct. 2267, 29 L.Ed.2d 715 (1971).

In California Teachers Association v. State Board of Education, 271 F.3d 1141 (9th Cir. 2001), the court identified the following limits on a federal court's power to interpret state law:

> We recognize that it is **solely within the province of the state courts to authoritatively construe state legislation**. *See* United States v. Thirty–Seven (37) Photographs, 402 U.S. 363, 369, 91 S. Ct. 1400, 28 L. Ed. 2d 822 (1971). Nor are we authorized to rewrite the law so it will pass constitutional muster. Virginia v. American Booksellers Ass'n, Inc., 484 U.S. 383, 397, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988). A federal court's duty, when faced with a constitutional challenge such as this one, is to employ traditional tools of statutory construction to determine the statute's "allowable meaning." Grayned v. City of Rockford, 408 U.S. 104, 110, 92 S. Ct. 2294, 33 L.Ed.2d 222 (1972); Stoianoff v. Montana, 695 F.2d 1214, 1218 (9th Cir.1983). In doing so, **we look to the words of the statute itself as well as state court interpretations of the same or similar statutes**. Grayned, 408 U.S. at 109–10, 92 S. Ct. 2294. Moreover, before invalidating a state statute on its face, a federal court **must determine whether the statute is "readily susceptible" to a narrowing construction by the state courts.** American Booksellers, 484 U.S. at 397, 108 S. Ct. 636; Nunez v. City of San Diego, 114 F.3d 935, 942 (9th Cir.1997). (emphasis added)

271 F.3d at 1146-1147.

In Arizonans for Official English v. Arizona, 520 U.S. 43, 48 (1997), the Supreme Court stated:

> Federal courts lack competence to rule definitively on the meaning of state legislation, see, e.g., Reetz v. Bozanich, 397 U.S. 82, 86-87 (1970), nor may they adjudicate challenges to state measures absent a showing of actual impact on the challenger, see, e.g., Golden v. Zwickler, 394 U.S. 103, 110 (1969).

In Bromley v. Crisp, 561 F.2d 1351, 1354 (10th Cir. 1977), cert. denied, 435 U.S. 908 (1978), the court stated that "the Oklahoma Courts may express their differing views on the retroactivity problem **or similar federal questions** until we are all guided by a binding decision of the Supreme Court." (emphasis added)

In Arizonans for Official English v. Arizona, 520 U.S. 43, 77 (1997), the Supreme Court stated that "[a] more cautious approach was in order" and that "[t]hrough certification of novel or unsettled questions of state law for authoritative answers by a State's highest court, a federal court may save 'time, energy, and resources and hel[p] build a cooperative judicial federalism.'"

At the time that the deed of trust was recorded, NRS 116.3116(5) stated:

Recording of the declaration constitutes record notice and perfection of the lien.

No recordation of any claim of lien for assessment under this section is required.

As recognized by the Nevada Supreme Court in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 334 P.3d at 418, and in Saticoy Bay LLC Series 350 Durango v. Wells Fargo 133 Nev. Adv. Op. 5, 388 P.3d 970 (2017), both the CC&Rs and the statute enacted in 1991 provided defendant with notice that its deed of trust was subordinate to the HOA's superpriority lien rights.

This court is not bound by the incorrect interpretation of the statute by the majority opinion in Bourne Valley. This court is instead bound by the constitutional interpretation of the statute adopted by the Nevada Supreme Court.

8. Defendant's attempt to tender its calculation of the super-priority amount does not affect the title of plaintiff because there is no notice.

Within the counterclaim, defendant alleges the foreclosure sale did not extinguish the deed of trust because defendant tendered the super-priority amount. The defendant does not allege any act undertaken to record any document in the public record to put third persons on notice of any pre-foreclosure dispute. The facts alleged in the counterclaimdo not constitute a proper tender under either the Restatement (Third) of Prop.: Mortgages §6.4 or persuasive California case law.

The rules stated in the Restatement, (Third) of Mortgages, §6.4 regarding payment and discharge are:

> **§ 6.4 Redemption from Mortgage by Performance or Tender**
>
> (a) Except as provided in Subsection (d), a performance in full of the obligation secured by a mortgage, or a performance that is accepted by the mortgagee in lieu of performance in full, by one who is primarily responsible for performance of the obligation, redeems the real estate from the mortgage, terminates the accrual of interest on the obligation, and extinguishes the mortgage. Performance may be made prior to the time the obligation is due (except as restricted by agreement of the parties subject to §§ 6.1 and 6.2), or may be made at or after the time the obligation is due but prior to foreclosure.
>
> (b) Upon receipt of performance as provided in Subsection (a), the mortgagee has a duty to provide to the person performing, within a reasonable time, an appropriate document in recordable form showing that the mortgage is discharged. If the mortgagee fails to do so upon reasonable request, the person performing may obtain judicial relief ordering the mortgage discharged and, unless the mortgagee acted in good faith in rejecting the request, awarding against the mortgagee any damages resulting from the delay.

(c) An unconditional tender of performance in full by one who is primarily responsible for the obligation, even if rejected by the mortgagee, if kept good, has the effect of performance under Subsections (a) and (b) above.

(d) Performance under Subsection (a) does not extinguish a mortgage or require the issuance of a document under Subsection (b) if the person performing and mortgagee agree that the mortgage is to remain in existence.

(e) **A performance in full of the obligation secured by a mortgage, or a performance that is accepted by the mortgagee in lieu of payment in full, by one who holds an interest in the real estate subordinate to the mortgage but is not primarily responsible for performance, does not extinguish the mortgage, but redeems the interest of the person performing from the mortgage and entitles the person performing to subrogation to the mortgage under the principles of §7.6. Such performance may not be made until the obligation secured by the mortgage is due, but may be made at or after the time the obligation is due but prior to foreclosure**.

(f) **Upon receipt of performance as provided in Subsection (e), the mortgagee has a duty to provide to the person performing, within a reasonable time, an appropriate assignment of the mortgage in recordable form. If the mortgagee fails to do so upon reasonable request, the person performing may obtain judicial relief ordering the mortgage assigned and, unless the mortgagee acted in good faith in rejecting the request, awarding against the mortgagee any damages resulting from the delay.**

(g) An unconditional tender of performance in full by a person described in Subsection (e), even if rejected by the mortgagee, if kept good has the effect of performance under Subsections (e) and (f) above.
(emphasis added)

Comment d to this section states in part:

Tender of payment rejected by mortgagee. Under Subsection (c), a mortgage is extinguished by mere *tender* of full payment **by the person primarily responsible for payment**, even if the mortgagee rejects it. the tender must be kept good in the sense that the person making the tender must continue at all times to be ready, willing, and able to make the payment. If the payor brings an action to have the mortgage cancelled, the money must be paid into the court to keep the tender good.

The tender must be unconditional. However, the payor's demand that the mortgagee return the mortgagor's promissory note, mark it "paid," or execute a discharge of the mortgage is not a condition of the sort that will invalidate the tender. See Illustration 5.

The next section of comment (d) to this section explains the significance of recording notice of the tender:

. . . .

The rule extinguishing the mortgage when a tender is rejected has only limited modern significance. The reason is that mortgages are virtually always recorded, and the payor

> derives little benefit, merely from the theoretical extinction of the mortgage if it is in fact still present, and apparently undischarged in the public records.

A tender or purported tender needs to be recorded to put third persons, such as bidders at foreclosure sale on notice of any issue with the payment of the super priority portion of the lien. This is especially true when the bank pays the super priority portion of a lien knowing that the property is going forward to a foreclosure sale.

Nevada statutes are consistent with the rules set forth in the Restatement to require the recording of a notice of satisfaction of a lien that has been performed by a party to put third persons on notice of the satisfaction.

9. Nevada statutes require that notice of satisfaction must be recorded

NRS 116.1108 provides**:**

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

There are no provisions contained in Chapters 106, 111 or 116 which provides that notice of payment of the super priority portion of the lien would NOT be subject to the recording laws of this state.

Under Nevada law, interests in property must be recorded. An unrecorded interest in property is void against a subsequent purchaser if the subsequent purchaser's interest is first duly recorded. Tae-Si Kim v. Kearney, 838 F. Supp. 2d 1077, 1087-1088 (D. Nev. 2012).

The recording statutes, found under Chapter 111 of the NRS were adopted when Nevada became a state in 1861, and are largely the same as they were when they were adopted. The recording statutes were adopted from the California recording statutes, which in turn were modeled on the recording statutes from the colonial states, which in turn adopted those recording laws from England.

The recording laws are an integral part of real property law which is unchanged from the common law, and are not subject to any different interpretation simply because the property in question is subject to CC&Rs or because a bank is going to lose its security interest in that property.

The recording statutes under Chapter 111 of the NRS set forth the legal requirements for recording assignments, transfers or other conveyances of an interest in real property. All "conveyances" must be recorded, or else they will have zero effect on a subsequent purchaser.

NRS 111.315 provides:

> **Recording of conveyances and instruments: Notice to third persons**. Every conveyance of real property, and every instrument of writing setting forth an agreement to convey any real property, or whereby any real property may be affected, proved, acknowledged and certified in the manner prescribed in this chapter, to operate as notice to third persons, shall be recorded in the office of the recorder of the county in which the real property is situated or to the extent permitted by NR 105.010 to 105.080, inclusive, in the Office of the Secretary of State, but shall be valid and binding between the parties thereto without such record.

NRS 111.325 provides:

> **Unrecorded conveyances void as against subsequent bona fide purchase for value when conveyance recorded.** Every conveyance of real property within this State hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser, in good faith and for valuable consideration, of the same real property, or any portion thereof, where his or her own conveyance shall be first duly recorded.

(Emphasis added)

The question becomes whether the payment and acceptance, or even if a rejected tender of the super priority portion of the lien constitutes a "conveyance" under NRS Chapter 111. It does.

NRS 111.010(1) defines "conveyance" very broadly to include anything affecting title the the property. It states:

> **Definitions. As used in this chapter:**
> 1. "Conveyance" shall be construed to embrace every instrument in writing, except a last will and testament, whatever may be its form, and by whatever name it may be known in law, by which any estate or interest in lands is created, alienated, **assigned** or **surrendered.** (emphasis added)

Payment can be construed as either "assignment" of the lien or a surrender of the lien, and therefore a "conveyance" that is required to be recorded. In the case where it is paid or "tendered" by a subordinate lien holder on the property, it constitutes an "assignment" and must be recorded.

The holder of a junior mortgage or encumbrance who pays or advances money to pay the debt secured by the prior mortgage or encumbrance is generally entitled to be subrogated to the rights of the senior encumbrancer. See Restatement, (Third) of Mortgages,, §7.6; American Sterling Bank v.

Johnny Management LV, INC., 126 Nev. 423, 245 P.3d 535 (2010); Houston v. Bank of America 119 Nev. 485, 78 P.3d 71 (2003). This rule is particularly important where a foreclosure of a senior lien will erase the security interest of a junior lien. Thus, at the threat of foreclosure, a junior lienor is entitled, even without express contractual authority, to reinstate the loan by making a payment sufficient to cure the default or to pay of the senior lien and become subrogated to the rights of the senior lienholder as against the owner of the property. See Restatement, 3rd of Mortgages, §7.6; American Sterling Bank v. Johnny Management LV, INC., 126 Nev. 423, 245 P.3d 535 (2010).

The Restatement, (Third) of Mortgages, §6.4 , comment a, explains the distinction between payment or tender between someone primarily liable for the debt, and payment or tender by a party seeking to protect its interest in the property. It states in part:

> Equitable redemption is ultimately accomplished by performance in full of the obligation secured by the mortgage. **However, redemption has two quite distinct results, depending on whether the performance is made by a person who is primarily responsible for payment of the mortgage obligation, or by someone else who holds an interest in the land subordinate to the mortgage**. In the first of these situations, the mortgage is simply extinguished, as provided in Subsection (a) of this section. **In the second, the mortgage is not extinguished, but by virtue of Subsection (e) is assigned by operation of law to the payor under the doctrine of subrogation;** see §7.6. Subrogation does not occur in the first situation, since one who is primarily responsible for payment of a debt cannot have subrogation by performing that duty; see §7.6, Comment b.
>
> (emphasis added)

Subrogation is broadly defined as one person standing in place of another with reference to a lawful claim, demand or right, so that he who is substituted succeeds to the rights of the other in relation to a debt or claim, and its rights, remedies or securities. See Arguello v. Sunset Station, Inc., 127 Nev. Adv. Op. 29, 252 P.3d 206 (2011); Subrogation is a device adopted by equity which applies in a great variety of cases and is broad enough to include every instance in which one party pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter. Laffranchini v. Clark 39 Nev. 48, 153 P. 250 (1915). "Equitable" or "legal" subrogation is given a liberal application.Laffranchini v. Clark 39 Nev. 48, 153 P. 250 (1915).

Comment (g) to §6.4 of the Restatement further explains the significance when payment is made by a subordinate lienholder. The comment provides in part:

> The second distinction, mentioned above, is that redemption by a person who is not primarily responsible for payment of the debt **does not extinguish the mortgage, but rather assigns both the mortgage and the debt to the payor by operation of law under the doctrine of subrogation**; See §7.6. In cases of this sort, the payoff has paid, not out of duty, but to protect a real estate interest from foreclosure. Thus, the payoff is entitled to reimbursement from whomever is primarily responsible for payment, and can enforce the mortgage against that person to aid in collection of the reimbursement. Subrogation in this context helps prevent the unjust enrichment of the party who is primarily responsible at the expense of the payor. See §7.6, Illustrations 1 and 2. Since the mortgage is not extinguished, and since the payor has actually paid or tendered the balance owing to protect his or her interest, the accrual of interest on the balance ceases in favor of the mortgagee but continues unabated in favor of the payor. (emphasis added)

The tender of assessments by the defendant subrogates the defendant to the super priority portion lien of the HOA. And because it is an assignment of an interest in real property it must be recorded to be effective as to subsequent purchasers. The recording of the assignment of the lien is required because when the purchaser bids on the property he is relying on the information contained in the public records when determining whether or not to bid on the property and how much to pay for the property. In order words, the purchaser needs to know what he or she is buying.

The defendant is the party that stands to lose its security in the property, and has the responsibility to protect its security and mitigate its damages. The defendant 's counterclaim fails to allege any recording or other publically information available to put plaintiff on notice of this alleged assignment. The counterclaim should therefore be dismissed.

10. If tender discharges a lien, it must be recorded to be effective.

If defendant's tender is not viewed as the basis for equitable subrogation, but instead is viewed as extinguishing the superpriority lien, the payment must still be recorded, because an extinguishment or surrender of the debt owed by the lien is a "conveyance"under Nevada's recording statutes.

The purported satisfaction of the superpriority portion of the association's lien is a surrender or release of the HOA's senior position. Blacks Law Dictionary defines surrender and release as:

> **Surrender**, n. (15c) 1. The act of yielding to another's power or control. 2. The giving up of a right or claim.

Because the satisfaction of a lien is a form of conveyance, surrender or discharge, NRS 111.315 requires that the defendant's satisfaction be recorded in order to be effective as to plaintiff.

Likewise, NRS 111.325, makes it abundantly clear that an unrecorded satisfaction of lien on the part of the defendant is void against a subsequent purchaser, such as plaintiff.

Additionally, to the extent that the purported tender is claimed to have worked to discharge or extinguish the HOA's lien, such a discharge or release must also be recorded in the office of the county recorder. Separate and apart from "conveyances," all discharges of liens must be recorded.

> **NRS 106.260 Discharge and assignment: Marginal entries; discharge or release must be recorded when mortgage or lien recorded by microfilm.**
>
> 1. Any mortgage or lien, that has been or may hereafter be recorded, may be discharged or assigned by an entry on the margin of the record thereof, signed by the mortgagee or the mortgagee's personal representative or assignee, acknowledging the satisfaction of or value received for the mortgage or lien and the debt secured thereby, in the presence of the recorder or the recorder's deputy, who shall subscribe the same as a witness, and such entry shall have the same effect as a deed of release or assignment duly acknowledged and recorded. Such marginal discharge or assignment shall in each case be properly indexed by the recorder.
>
> 2. In the event that the mortgage or lien has been recorded by a microfilm or other photographic process, a marginal release may not be used and **a duly acknowledged discharge or release of such mortgage or lien must be recorded.** (emphasis added)

It is established that the super-priority lien under NRS116.3116(2) is a true priority lien and is superior to a first deed of trust. The Nevada Supreme Court relied, in part, on the holding in 7912 Limbwood Court Trust v. Wells Fargo Bank, N.A., 979 F. Supp. 2d 1142, 1149 (D. Nev. 2013). Limbwood recognizes that in order to avoid the extinguishment of the first deed of trust, the first deed of trust holder needs to pay the HOA to obtain the priority position.

NRS 111.325 mandates that any claimed interest on the part of the defendant is void as a matter of law. The purpose of recording documents is to provide notice to all persons of the recording party's interest in the property. An unrecorded or other instrument required to be recorded is not valid and effective against a bona fide purchaser.

Whether tender is regarded as an assignment, subrogation, subordination, or extinguishment, an instrument must be recorded with the Clark County Recorder's office in order to be effective as to subsequent purchasers, such as plaintiff. The counterclaim does not allege that the defendant recorded this property interest or that there was any other publically available notice of the purported tender or payment. The purported payment or tender of the super-priority interest is void as a

property interest as a matter of law against the foreclosure deed to plaintiff because evidence of the payment was not recorded in accordance with Nevada's recording laws. As a result of the failure to record any evidence of this property interest prior to the date that the foreclosure sale occurred, the property interest created by the defendant is void as against the foreclosure deed issued in this case.

This analysis is consistent with the recent amendment to the statute by the Nevada Legislature which requires recording of evidence of tender and announcement of the payment at the auction, prior to bidding.

11. Any change in priority must be recorded.

Further, because the purported payment or tender would have the effect of changing the priority of the HOA's lien, versus the deed of trust, it is required to be recorded as well.

> **NRS 106.220 Filing and recording of instruments subordinating or waiving priority of mortgages or deeds of trust; constructive notice; effect of unrecorded instruments.**
>
> 1. Any instrument by which any mortgage or deed of trust of, lien upon or interest in real property is subordinated or waived as to priority, must, in case it concerns only one or more mortgages or deeds of trust of, liens upon or interests in real property, together with, or in the alternative, one or more mortgages of, liens upon or interests in personal property or crops, the instruments or documents evidencing or creating which have been recorded prior to March 27, 1935, be recorded in the office of the recorder of the county in which the property is located, and from the time any of the same are so filed for record operates as constructive notice of the contents thereof to all persons. The instrument is not enforceable under this chapter or chapter 107 of NRS unless and until it is recorded.
>
> 2. Each such filing or recording must be properly indexed by the recorder.
>
> (Emphasis added)

Thus, in order to be effective, a satisfaction of lien must be recorded.

A foreclosure agent has a duty to act impartially and in good faith. By analogy, NRS 107.028(5), involving the duties of a trustee under a deed of trust provides in part:

> The trustee does not have a fiduciary obligation to the grantor or any other person having an interest in the property which is subject to the deed of trust. **The trustee shall act impartially and in good faith with respect to the deed of trust and shall act in accordance with the laws of this State.** A rebuttable presumption that a trustee has acted impartially and in good faith exists if the trustee acts in compliance with the provisions of NRS 107.080. (emphasis added)

Subsection (f) to §6.4 of the Restatement also provides that the party accepting the payment must provide a document in recordable form proving the payment. Comment c to this section states:

> *c. Duty to provide document of discharge.* When payment or tender by the person primarily responsible for the debt has extinguished the mortgage, the payor derives little comfort unless a document can be recorded to clear the public records of the mortgage lien. Hence it is the mortgagee's duty to provide such a document....

There are dual responsibilities here. The party receiving the tender or payment has the obligation to provide a recordable document, and the party seeking to protect its interest in the real property, the defendant herein, has its obligation to mitigate its damages by recording proof of tender of payment to put third persons on notice. Neither is alleged in the counterclaim and thus the counterclaim should be dismissed.

12. Notice to third parties is of utmost significance.

The court in Shadow Wood defined a bona fide purchaser as follows:

> A subsequent purchaser is bona fide under common-law principles if it takes the property "for a valuable consideration and without notice of the prior equity, and without notice of facts which upon diligent inquiry would be indicated and from which notice would be imputed to him, if he failed to make such inquiry." *Bailey v. Butner,* 64 Nev. 1, 19, 176 P.2d 226, 234 (1947)

In summarizing the evidence regarding the lack of notice to the putative bona fide purchaser, the court in Shadow Wood stated:

> . . . .And NYCB points to **no other evidence indicating that Gogo Way had notice before it purchased the property, either actual, constructive, or inquiry, as to NYCB's attempts to pay the lien and prevent the sale**, or that Gogo Way knew or should have known that Shadow Wood claimed more in its lien than it actually was owed, especially where the record prevents us from determining whether that is true. *Lennartz v. Quilty,* 191 Ill. 174, 60 N.E. 913, 914 (Ill.1901) (finding a purchaser for value protected under the common law who took the property without record or other notice of an infirmity with the discharge of a previous lien on the property). **Because the evidence does not show Gogo Way had any notice of the pre-sale dispute between NYCB and Shadow Wood**, the potential harm to Gogo Way must be taken into account and further defeats NYCB's entitlement to judgment as a matter of law.

Notice to potential third party bidders who could otherwise claim status of a bona fide purchaser is critical to this court's evaluation of this case. Defendant had knowledge that the property was in foreclosure and third persons could likely bid on the property. For the nominal cost of recording a notice at $17.00, defendant could have recorded a one page notice and put the world on

notice. In evaluating the equities between the various parties, the court should keep in mind that the deed of trust beneficiary had a simple and inexpensive method to notify the world of its payment or tender and a means of protecting an interest in the deed of trust.

13. The facts as alleged in the counterclaim do not constitute a proper tender.

Tender is defined in section (c) of Restatement, (Third) of Mortgages, §6.4 :

> (c) An unconditional tender of performance in full by one who is primarily responsible for the obligation, even if rejected by the mortgagee, if kept good, has the effect of performance under Subsections (a) and (b) above.

Comment d to this section further explains:

> *d. Tender of payment rejected by mortgagee.* Under Subsection (c), a mortgage is extinguished by mere *tender* of full payment by the person primarily responsible for payment, even if the mortgagee rejects it. **The tender must be kept good in the sense that the person making the tender must continue at all times t obe ready, willing, and able to make the payment. If the payor brings an action to have the mortgage canceled, the money must be paid into the court to keep the tender good**.
>
> The tender must be unconditional. However, the payor's demand that the mortgagee return the mortgagor's promissory note, mark it "paid," or execute a discharge of the mortgage is not a condition of the sort that will invalidate the tender. See Illustration 5.
>
> The rule extinguishing the mortgage when a tender is rejected has only limited modern significance. The reason is that mortgages are virtually always recorded, and the payor derives little benefit, merely from the theoretical extinction of the mortgage if it is in fact still present, and apparently undischarged in the public records. ....
>
> Nonetheless, the tender of full payment *per se* relieves the real estate of the mortgage lien. Tender is significant in at least two ways. First, the tender stops the accrual of interest, late fees, and any other charges that might otherwise result from the passage of additional time. **Second, under Subsection (b) the mortgagee who wrongfully refuses a tender may be held liable for damages flowing from any unreasonable delay that results in clearing the mortgage from the real estate's title**. See Illustrations 5 and 6.

The last section from this comment shows that the remedy of defendant is money damages against the party that wrongfully refused the tender if it was valid,. This is an adequate remedy at law and precludes the court from invoking equity to affect the title of the bona fide purchaser.

Illustration 5 to §6.4 of the Restatement is an example of a proper tender:

> 5. Mortgagor is indebted to Mortgagee for the principal sum of $100,000, secured by a mortgage on Blackacre. Mortgagor sends a check to Mortgagee for $100,000, purporting to pay the debt, but Mortgagee refuses to accept the check or execute a discharge of the mortgage. Mortgagor then deposits $100,000 in an escrow

> account established for the purpose of paying the debt, and informs Mortgagee that the funds are available upon Mortgagee's request and execution of a document discharging the mortgage. Mortgagor's tender is effective, continuing, and conditional. The mortgage is extinguished, and no further interest will accrue on the debt.

The counterclaim does not allege an unconditional check or other form of acceptable payment was sent to the foreclosure agent. The counterclaim should therefore be dismissed.

14. Plaintiff is a bona fide purchaser.

Quoting again from the Shadow Wood case, the Supreme Court stated:

> As to notice, NYCB submits that "the simple fact that the HOA trustee is attempting to sell the property, and divest the title owner of its interest, is enough to impart constructive notice onto the purchaser that there may be an adverse claim to title." Essentially, then, NYCB would have this court hold that a purchaser at a foreclosure sale can never be bona fide because there is always the possibility that the former owner will challenge the sale post hoc. The law does not support this contention.

The counterclaim fails to allege notice of the tender was recorded prior to the HOA foreclosure sale. The counterclaim also fails to allege plaintiff knew or should have known of the tender as the result of any recorded notice or other notice method undertaken on behalf of defendant's interests. Plaintiff is a bona fide purchaser as a matter of law, and the law must protect its title.

15. The mortgagee protection clause is not grounds to set a sale aside.

In paragraph 26 of the counterclaim, defendant references the mortgagee protection clause within the CC&Rs and argues that the presence of that clause made the foreclosure sale commercially unreasonable. However, this argument has already been rejected by the Nevada Supreme Court.

In SFR Investments Pool 1, LLC v. U.S. Bank N.A. 130 Nev. Adv. Op 75, 334 P.3d 408 (2014), a case analogous to the instant matter in many respects, the property at issue was subject to CC&Rs recorded in 2000. In 2007 it was further encumbered by a note and deed of trust to U.S. Bank, the appellee. By 2010, the former owners of the property became delinquent on their community association dues. Nonjudicial foreclosure proceedings were then initiated. Id. at 409.

The appellee in SFR argued that the mortgagee protection clause within the CC&Rs recorded on the property at issue rendered the community association's superpriority lien subordinate, contrary to NRS 116. The mortgagee protection clause stated that "no lien created under this Article 9

[governing nonpayment of assessments], nor the enforcement of any provision of this Declaration shall defeat or render invalid the rights of the beneficiary under any Recorded first deed of trust encumbering a Unit, made in good faith and for value." Id. at 418.

However, the Supreme Court of Nevada held that the mortgagee protection clause did not affect the foreclosure sale. The court stated:

> NRS 116.1104 defeats this argument. It states that Chapter 116's "provisions may not be varied by agreement, and rights conferred by it may not be waived ... [e]xcept as expressly provided in" Chapter 116. (Emphasis added.) "Nothing in [NRS] 116.3116 expressly provides for a waiver of the HOA's right to a priority position for the HOA's super priority lien." See 7912 Limbwood Court Trust, 979 F.Supp.2d at 1153: The mortgage savings clause thus does not affect NRS 116.3116(2)'s application in this case.
>
> Id. at 419.

As a result, defendant cannot rely on the mortgagee protection clause to protect its interest.

16. The Trust Deed has been Extinguished.

In SFR, the Nevada Supreme Court stated:

> NRS 116.3116 gives a homeowners' association (HOA) a superpriority lien on an individual homeowner's property for up to nine months of unpaid HOA dues. With limited exceptions, this lien is "prior to all other liens and encumbrances" on the homeowner's property, even a first deed of trust recorded before the dues became delinquent. NRS 116.3116(2). We must decide whether this is a true priority lien such that its foreclosure extinguishes a first deed of trust on the property and, if so, whether it can be foreclosed nonjudicially. We answer both questions in the affirmative and therefore reverse.
>
> 334 P.3d at 409.

At the conclusion of its opinion, the Nevada Supreme Court stated:

> NRS 116.3116(2) gives an HOA a true superpriority lien, proper foreclosure of which will extinguish a first deed of trust. Because Chapter 116 permits nonjudicial foreclosure of HOA liens, and because SFR's complaint alleges that proper notices were sent and received, we reverse the district court's order of dismissal. In view of this holding, we vacate the order denying preliminary injunctive relief and remand for further proceedings consistent with this opinion.
>
> 334 P.3d at 419.

Because the facts in the present case are substantially the same as the facts in SFR, this Court should reach the same conclusion that the nonjudicial foreclosure arising from the HOA's super priority lien extinguished the deed of trust held by defendant on the date of sale.

CONCLUSION

The authorities are clear that equity should not interfere with the title of a bona fide purchaser. The authorities are also clear that equitable relief should not be granted when there is an adequate remedy at law. If there were any defects with the foreclosure sale in the present case, defendant has a claim for money damages against the HOA and its foreclosure agent. These are adequate remedies at law. Plaintiff, as a bona fide purchaser, is protected from defendant's equitable claims.

Because defendant's attempted tender was improper under Nevada Revised Statutes and case law, equitable relief should not be granted in regards to plaintiff's title to the Property free and clear of the extinguished deed of trust.

By reason of the foregoing, plaintiff respectfully requests that the court enter an order dismissing defendant's counterclaim.

DATED this 23rd day of October, 2017

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5, NEFCR 9 and EDCR 8.05, I hereby certify that I am an employee of Law Offices of Michael F. Bohn., Esq., and on the 23rd day of October, 2017, an electronic copy of the **MOTION TO DISMISS COUNTERCLAIM** was served on opposing counsel via the Court's electronic service system to the following counsel of record:

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EXHIBIT 1

EXHIBIT 1

trap for the unwary, and often to be Draconian in its consequences. See, e.g., Security Pacific National Bank v. Wozab, 800 P.2d 557 (Cal. 1990); Conley, The Sanction for Violation of California's One–Action Rule, 79 Cal. L. Rev. 1601 (1991); Hetland & Hanson, The "Mixed Collateral" Amendments to California's Commercial Code—Covert Repeal of California Real Property Foreclosure and Antideficiency Provisions or Exercise in Futility?, 75 Cal. L. Rev. 185 (1987); Hirsh, Arnold, Rabin & Sigman, The U.C.C. Mixed Collateral Statute—Has Paradise Really Been Lost?, 36 U.C.L.A. L. Rev. 1, 6, 10 (1988); Munoz & Rabin, The Sequel to Bank of America v. Daily: Security Pac. Nat'l Bank v. Wozab, 12 Real Prop. L. Rep. 204 (1989).

For a consideration of the characteristics of judicial and power of sale foreclosure, see 1 G. Nelson & D. Whitman, Real Estate Finance Law §§ 7.11–7.14, 7.19–7.30 (3d ed. 1993).

Limitations on mortgagee's remedies, Comment b. Some states permit the mortgagee to sue on the mortgage obligation and simultaneously to bring a judicial foreclosure action or power of sale proceeding. See, e.g., Hartford National Bank & Trust Co. v. Kotkin, 441 A.2d 593 (Conn.1981); Eastern Illinois Trust & Sav. Bank v. Vickery, 517 N.E.2d 604 (Ill. App. Ct. 1987); First Indiana Federal Sav. Bank v. Hartle, 567 N.E.2d 834 (Ind. Ct.App.1991); Kepler v. Slade, 896 P.2d 482 (N.M.1995); Elmwood Federal Savings Bank v. Parker, 666 A.2d 721 n.6 (Pa. Super. Ct. 1995); In re Gayle, 189 B.R. 914 (Bankr. S.D.Tex.1995). This section prohibits such a course of action. This reflects a policy of judicial economy and against harassment of the mortgagor by forcing him or her to defend two proceedings at once. This approach is supported by legislation in over a dozen states. See Alaska Stat. § 09.45.200; Ariz. Rev. Stat. § 33–722; Fla. Stat. Ann. § 702.06; Idaho Code § 45–1505(4); Iowa Code Ann. § 654.4; Mich. Comp. Laws Ann. §§ 600.3105(1), (2), .3204(2); Minn. Stat. Ann. § 580.02; Neb. Rev. Stat. §§ 25–2140,–2143; N.Y. Real Prop. Acts. & Proc. L. §§ 1301, 1401(2); N.D. Cent. Code § 32–19–05; Or. Rev. Stat. §§ 86.735(4), 88.040; S.D. Comp. Laws Ann. §§ 21–47–6,–48–4; Wash. Rev. Code Ann. § 61.12.120; Wyo. Stat. § 34–4–103.

For authority that an election of remedies statute similar to the language of this section does not prohibit a mortgagee from foreclosing on a guarantor's real estate after having obtained a judgment against the principal debtor, see Ed Herman & Sons v. Russell, 535 N.W.2d 803 (Minn. 1995).

§ 8.3 Adequacy of Foreclosure Sale Price

(a) A foreclosure sale price obtained pursuant to a foreclosure proceeding that is otherwise regularly conducted in compliance with applicable law does not render the foreclosure defective unless the price is grossly inadequate.

(b) Subsection (a) applies to both power of sale and judicial foreclosure proceedings.

Cross-References:

Section 7.1, Effect of Mortgage Priority on Foreclosure; § 8.4, Foreclosure: Action for a Deficiency; § 8.5, The Merger Doctrine Inapplicable to Mortgages.

Comment:

a. Introduction. Many commentators have observed that the foreclosure process commonly fails to produce the fair market value for foreclosed real estate. The United States Supreme Court recently emphasized this widely perceived dichotomy between "foreclosure sale value" and fair market value:

> An appraiser's reconstruction of "fair market value" could show what similar property would be worth if it did not have to be sold within the time and manner strictures of state-prescribed foreclosure. But property that *must* be sold with these strictures is simply *worth* less. No one would pay as much to own such property as he would pay to own real estate that could be sold at leisure and pursuant to normal marketing techniques. And it is no more realistic to ignore that characteristic of the property (the fact that state foreclosure law permits the mortgagee to sell it at a forced sale) than it is to ignore other price-affecting characteristics (such as the fact that state zoning law permits the owner of the neighboring lot to open a gas station).

BFP v. Resolution Trust Corp., 511 U.S. 531, 539, 114 S.Ct. 1757, 1762, 128 L.Ed.2d 556 (1994).

There are several reasons for low bids at foreclosure sales. First, because the mortgage lender can "credit bid" up to the amount of the mortgage obligation without putting up new cash, it has a distinct bidding advantage over a potential third party bidder. Second, while foreclosure legislation usually requires published notice to potential third party purchasers, this notice, especially in urban areas, is frequently published in the classified columns of legal newspapers with limited circulation. Moreover, because the publication is usually highly technical, unsophisticated potential bidders have little idea as to the nature of the real estate being sold. Third, many potential third party purchasers are reluctant to buy land at a foreclosure sale because of the difficulty in ascertaining whether the sale will produce a good and marketable title and the absence of any warranty of title or of physical quality from the foreclosing mortgagee. Finally, when a mortgagee forecloses on improved real estate, potential bidders may find it difficult to inspect the premises prior to sale. Even though it may be in the self-interest of the mortgagor to allow such persons to inspect the premises, mortgagors who are about to lose their real estate through a foreclosure sale understandably are frequently reluctant to cooperate.

Given the nature of the foreclosure sale process, courts have consistently been unwilling to impose a "fair market value" standard on the price it produces. Courts are rightly concerned that an increased willingness to invalidate foreclosure sales because of price inadequacy will make foreclosure titles more uncertain. When a foreclosure sale is set aside, the court may upset third party expectations. A third party may have acquired title to the foreclosed real estate by purchase at the sale or by conveyance from the mortgagee-purchaser. Thus, a general reluctance to set aside the sale is understandable and sensible. This reluctance may be especially justifiable when price inadequacy is the only objection to the sale. Consequently, the end result of additional judicial activism on this issue might well be further exacerbation of the foreclosure price problem. This section largely reflects this judicial concern.

However, close judicial scrutiny of the sale price is more justifiable when the price is being employed to calculate the amount of a deficiency judgment context. This is especially the case where the mortgagee purchases at the sale and, in addition, seeks a deficiency judgment. The potential for unjust enrichment of the mortgagee in this situation may well demand closer judicial scrutiny of the sale price. Moreover, the interests of third parties are not prejudiced by judicial intervention in an action for a deficiency judgment. Because a deficiency proceeding is merely an *in personam* action against the mortgagor for money, the title of the foreclosure purchaser is not placed at risk. Consequently, a more intensive examination of the foreclosure price in the deficiency context is appropriate. This view is reflected in § 8.4 of this Restatement.

Ultimately, however, price inadequacy must be addressed in the context of a fundamental legislative reform of the entire foreclosure process so that it yields a price more closely approximating "fair market value." In order to ameliorate the price-suppressing tendency of the "forced sale" system, such legislation could incorporate many of the sale and advertising techniques found in the normal real estate marketplace. These could include, for example, the use of real estate brokers and commonly used print and pictorial media advertising. While such a major restructuring of the foreclosure process is desirable, it is more appropriate subject for legislative action than for the Restatement process.

b. Application of the standard. Section 8.4 deals with the question of adequacy of the foreclosure price in the deficiency judgment context. This section, on the other hand, applies to actions to nullify the foreclosure sale itself based on price inadequacy. This issue may arise in any of several different procedural contexts, depending on whether the mortgage is being foreclosed judicially or by power of

sale. Where the foreclosure is by judicial action, the issue of price typically will arise when the mortgagee makes a motion to confirm the sale.

On the other hand, where foreclosure is by power of sale, judicial confirmation of the sale is usually not required and the issue of price inadequacy will therefore arise only if the party attacking the sale files an independent judicial action. Typically this will be an action to set aside the sale; it may be brought by the mortgagor, junior lienholders, or the holders of other junior interests who were prejudiced by the sale. If the real estate is unavailable because title has been acquired by a bona fide purchaser, the issue of price inadequacy may be raised by the mortgagor or a junior interest holder in a suit against the foreclosing mortgagee for damages for wrongful foreclosure. This latter remedy, however, is not available based on gross price inadequacy alone. In addition, the mortgagee must be responsible for a defect in the foreclosure process of the type described in Comment *c* of this section.

This section articulates the traditional and widely held view that a foreclosure proceeding that otherwise complies with state law may not be invalidated because of the sale price unless that price is grossly inadequate. The standard by which "gross inadequacy" is measured is the fair market value of the real estate. For this purpose the latter means, not the fair "forced sale" value of the real estate, but the price which would result from negotiation and mutual agreement, after ample time to find a purchaser, between a vendor who is willing, but not compelled to sell, and a purchaser who is willing to buy, but not compelled to take a particular piece of real estate. Where the foreclosure is subject to senior liens, the amount of those liens must be subtracted from the unencumbered fair market value of the real estate in determining the fair market value of the title being transferred by the foreclosure sale.

"Gross inadequacy" cannot be precisely defined in terms of a specific percentage of fair market value. Generally, however, a court is warranted in invalidating a sale where the price is less than 20 percent of fair market value and, absent other foreclosure defects, is usually not warranted in invalidating a sale that yields in excess of that amount. See Illustrations 1–5. While the trial court's judgment in matters of price adequacy is entitled to considerable deference, in extreme cases a price may be so low (typically well under 20% of fair market value) that it would be an abuse of discretion for the court to refuse to invalidate it.

Foreclosures subject to senior liens can sometimes pose special problems in assessing price adequacy. For example, where one or

more senior liens are also in default and their amount substantial or controverted, a court may properly recognize the added uncertainties facing the foreclosure purchaser and refuse to invalidate a sale even though it produces a price that is less than 20 percent of the fair market value of the mortgagor's equity. This problem may be particularly acute where a senior mortgage has a substantial prepayment fee or if it is uncertain whether the senior mortgage is prepayable at all. See Illustration 6.

Moreover, courts can properly take into account the fact that the value shown on a recent appraisal is not necessarily the same as the property's fair market value on the foreclosure sale date, and that "gross inadequacy" cannot be precisely defined in terms of a specific percentage of appraised value. This is particularly the case in rapidly rising or falling market conditions. Appraisals are time-bound, and in such situations are often prone to error to the extent that they rely on comparable sales data, for such data are by definition historical in nature and cannot possibly reflect current market conditions with complete precision. For this reason, a court may be justified in approving a foreclosure price that is less than 20 percent of appraised value if the court determines that market prices are falling rapidly and that the appraisal does not take adequate account of recent declines in value as of the date of the foreclosure. See Illustration 7. Similarly, a court may be warranted in refusing to confirm a sale that produces more than 20 percent of appraised value if the court finds that market prices are rising rapidly and that the appraisal reflects an amount lower than the current fair market value as of the date of foreclosure. See Illustration 8.

Illustrations:

1. Mortgagee forecloses a mortgage on Blackacre by judicial action. The mortgage is the only lien on Blackacre. Blackacre is sold at the foreclosure sale for $19,000. The fair market value of Blackacre at the time of the sale is $100,000. The foreclosure proceeding is regularly conducted in compliance with state law. A court is warranted in finding that the sale price is grossly inadequate and in refusing to confirm the sale.

2. The facts are the same as Illustration 1, except the foreclosure proceeding is by power of sale and Mortgagor files a judicial action to set aside the sale based on inadequacy of the sale price. A court is warranted in finding that the sale price is grossly inadequate and in setting aside the sale, provided that the property has not subsequently been sold to a bona fide purchaser.

3. The facts are the same as Illustration 2, except that the Mortgagee is responsible for conduct that chills bidding at the

sale. Blackacre is purchased at the foreclosure sale by a bona fide purchaser. Mortgagor files a suit against the Mortgagee to recover damages for wrongful foreclosure. A court is warranted in finding that the sale price is grossly inadequate and in awarding damages to Mortgagor.

4. Mortgagee forecloses a mortgage on Blackacre by judicial action. The foreclosure is subject to a senior lien in the amount of $50,000. Blackacre is sold at the foreclosure sale for $19,000. The fair market value of Blackacre free and clear of liens at the time of the sale is $150,000. The foreclosure proceeding is regularly conducted in compliance with state law. A court is warranted in finding that the sale price is grossly inadequate and in refusing to confirm the sale.

5. The facts are the same as Illustration 1, except that Blackacre has a fair market value of $60,000 at the time of the foreclosure sale. The court is not warranted in refusing to confirm the sale.

6. Mortgagee forecloses a mortgage on Blackacre by power of sale. The foreclosure is subject to a large (in relation to market value) senior lien that is in default, carries an above market interest rate, and provides for a substantial prepayment charge. At the time of the foreclosure sale, the current balance on the senior lien is $500,000. Blackacre is sold at the foreclosure sale for $10,000. The fair market value of Blackacre free and clear of liens at the time of the sale is $600,000. The foreclosure proceeding is regularly conducted in compliance with state law. Mortgagor files suit to set aside the sale. A court is warranted in refusing to set the sale aside.

7. Mortgagee forecloses a mortgage on Blackacre, a vacant lot, by judicial action. The mortgage is the only lien on Blackacre. Blackacre is sold at the foreclosure sale for $10,000. The appraised value of Blackacre, based on an appraisal performed shortly before the sale, is $100,000. The foreclosure proceeding is regularly conducted in compliance with state law. The real estate market in the vicinity of Blackacre has been declining rapidly, and this is especially the case with respect to raw land. If the court finds that, notwithstanding the appraisal, the actual fair market value of Blackacre at the date of sale was $50,000 or less, the court is warranted in confirming the sale.

8. Mortgagee forecloses a mortgage on Blackacre, a residential duplex, by judicial action. The mortgage is the only lien on Blackacre. Blackacre is sold at the foreclosure sale for $35,000. The appraised value of Blackacre, based on an appraisal per-

formed shortly before the sale, is $100,000. The foreclosure proceeding is regularly conducted in compliance with state law. The real estate market in the vicinity of Blackacre has been rising rapidly, and this is especially the case with respect to residential rental real estate. If the court finds that, notwithstanding the appraisal, the actual fair market value of Blackacre at the date of sale was $175,000 or more, the court is warranted in refusing to confirm the sale.

c. Price inadequacy coupled with other defects. Even where the foreclosure price for less than fair market value cannot be characterized as "grossly inadequate," if the foreclosure proceeding is defective under local law in some other respect, a court is warranted in invalidating the sale and may even be required to do so. Such defects may include, for example, chilled bidding, an improper time or place of sale, fraudulent conduct by the mortgagee, a defective notice of sale, or selling too much or too little of the mortgaged real estate. For example, even a slight irregularity in the foreclosure process coupled with a sale price that is substantially below fair market value may justify or even compel the invalidation of the sale. See Illustrations 9 and 10. On the other hand, even a sale for slightly below fair market value may be enough to require invalidation of the sale where there is a major defect in the foreclosure process. See Illustration 11.

Illustrations:

9. Mortgagee forecloses a mortgage on Blackacre by judicial action. The mortgage is the only lien on Blackacre. Blackacre is sold at the foreclosure sale for $15,000. The fair market value of Blackacre at the time of the sale is $50,000. The foreclosure proceeding is regularly conducted in compliance with state law except that at the foreclosure sale the sheriff fails to read the foreclosure notice aloud as required by the applicable statute. A court is warranted in refusing to confirm the sale.

10. The facts are the same as Illustration 9, except that the foreclosure is by power of sale. The foreclosure proceeding is regularly conducted in compliance with state law except that notice of the sale is published only 16 times rather than 20 times as required by the applicable statute. Mortgagor files suit to set aside the sale. A court is warranted in setting the sale aside.

11. Mortgagee forecloses a deed of trust on Blackacre by power of sale. Blackacre is sold at the foreclosure sale for $85,000. The fair market value of Blackacre as of the time of the sale is $100,000. Although the foreclosure proceeding is otherwise regu-

larly conducted in compliance with state law, the trustee at the sale fails to recognize a higher bid from a junior lienor who is present at the sale. Mortgagor files suit to set aside the sale. The sale should be set aside.

REPORTERS' NOTE

Introduction, Comment a. Numerous commentators point out that foreclosure sales normally do not generally produce fair market value for the foreclosed real estate. See, e.g., Goldstein, Reforming the Residential Foreclosure Process, 21 Real Est. L.J. 286 (1993); Johnson, Critiquing the Foreclosure Process: An Economic Approach Based on the Paradigmatic Norms of Bankruptcy, 79 Va. L. Rev. 959 (1993) (observing that there is a "disparity in values between the perceived fair market value of the foreclosed premises prior to foreclosure and amount actually realized upon foreclosure"); Ehrlich, Avoidance of Foreclosure Sales as Fraudulent Conveyances: Accommodating State and Federal Objectives, 71 Va. L. Rev. 933 (1985) ("contemporary foreclosure procedures are poorly designed to maximize sales price"); Washburn, The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales, 53 S. Cal. L. Rev. 843 (1980); G. Nelson & D. Whitman, Real Estate Finance Law § 8.8 (3d ed. 1994). In an empirical study of judicial foreclosure prices and resales in one New York county, Professor Wechsler has gone so far to conclude that

> foreclosure by sale frequently operated as a meaningless charade, producing the functional equivalent of strict foreclosure, a process abandoned long ago. Mortgagees acquired properties at foreclosure sales and resold them at a significant profit in a large number of cases.... In short, ... foreclosure by sale is not producing its intended results, and in many cases is yielding unjust and inequitable results.

Wechsler, Through the Looking Glass: Foreclosure by Sale as *De Facto* Strict Foreclosure—An Empirical Study of Mortgage Foreclosure and Subsequent Resale, 70 Cornell L. Rev. 850, 896 (1985). See Resolution Trust Corp. v. Carr, 13 F.3d 425 (1st Cir. 1993) ("It is common knowledge in the real world that the potential price to be realized from the sale of real estate, particularly in a recessionary period, usually is considerably lower when sold 'under the hammer' than the price obtainable when it is sold by an owner not under distress and who is able to sell at his convenience and to wait until a purchaser reaches his price.").

For a consideration of why foreclosure sales do not normally bring fair market value, see Nelson, Deficiency Judgments After Real Estate Foreclosures in Missouri: Some Modest Proposals, 47 Mo. L. Rev. 151, 152 (1982); Johnson, Critiquing the Foreclosure Process: An Economic Approach Based on the Paradigmatic Norms of Bankruptcy, 79 Va. L. Rev. 959, 966–72 (1993); Washburn, The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales, 53 So. Cal. L. Rev. 843, 848–851 (1980); Carteret Savings & Loan Ass'n v. Davis, 521 A.2d 831, 835 (N.J.1987) ("[I]t is likely that the

low turnout of third parties who actually buy property at foreclosure sales reflects a general conclusion that the risks of acquiring an imperfect title are often too high").

Until recently, claims of foreclosure price inadequacy commonly arose in the context of mortgagor bankruptcy proceedings. Debtors in possession and bankruptcy trustees frequently challenged pre-bankruptcy foreclosure sales as constructively fraudulent transfers under § 548 of the Bankruptcy Code. See 11 U.S.C. § 548. Under the latter section, a trustee or a debtor in possession may avoid a transfer by a debtor if it can be established that (1) the debtor had an interest in property; (2) the transfer took place within a year of the bankruptcy petition filing; (3) the debtor was insolvent at the time of the transfer or the transfer caused insolvency; and (4) the debtor received "less than a reasonably equivalent value" for the transfer. 11 U.S.C. § 548(a)(2)(A). In Durrett v. Washington National Ins. Co., 621 F.2d 201 (5th Cir.1980), a controversial decision by the United States Court of Appeals for the Fifth Circuit, the court used the predecessor to § 548(a) to find, for the first time, that a foreclosure proceeding that otherwise complied with state law could be set aside if the sale price did not represent "reasonably equivalent value." In dictum the court suggested that a foreclosure price of less than 70 percent of fair market value failed to meet the "fair equivalency" test. Several other federal courts adopted *Durrett*. See, e.g., In re Hulm, 738 F.2d 323 (8th Cir.1984); First Federal Savings & Loan Ass'n of Warner Robbins v. Standard Building Associates, Ltd., 87 B.R. 221 (N.D.Ga.1988); 1 G. Nelson & D. Whitman, Real Estate Finance Law § 8.17 & notes 10–17 (3d ed. 1993).

Other courts, while rejecting a "bright line" 70 percent test, endorsed *Durrett* as a general principle, but adopted the view that "in defining reasonably equivalent value, the court should neither grant a conclusive presumption in favor of a purchaser at a regularly conducted, noncollusive foreclosure sale, nor limit its inquiry to a simple comparison of the sale price to the fair market value. Reasonable equivalence should depend on all the facts of each case." Matter of Bundles, 856 F.2d 815, 824 (7th Cir. 1988). *Durrett* was the subject of significant scholarly commentary. See, e.g., Baird & Jackson, Fraudulent Conveyance Law and Its Proper Domain, 38 Vand. L. Rev. 829 (1985); Henning, An Analysis of *Durrett* and Its Impact on Real and Personal Property Foreclosures: Some Proposed Modifications, 63 N.C. L. Rev. 257 (1984); Zinman, Noncollusive Regularly Conducted Foreclosure Sales: Involuntary Nonfraudulent Transfers, 9 Cardozo L. Rev. 581 (1987). The Ninth Circuit, however, rejected *Durrett* and its variations and held, in a case where the foreclosure price was allegedly less than 60 percent of the real estate's fair market value, "that the price received at a noncollusive, regularly conducted foreclosure establishes irrebuttably reasonably equivalent value" under § 548. In re BFP, 974 F.2d 1144 (9th Cir.1992). See also Matter of Winshall Settlor's Trust, 758 F.2d 1136 (6th Cir.1985).

The United States Supreme Court, in a 5–4 decision, affirmed the Ninth Circuit and rejected *Durrett* and its progeny:

[W]e decline to read the phrase "reasonably equivalent value" ...

> to mean, in its application to foreclosure sales, either "fair market value" or "fair foreclosure price" (whether calculated as a percentage of fair market value or otherwise). We deem, as the law has always deemed, that a fair and proper price, or a "reasonably equivalent value," for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with.

BFP v. Resolution Trust Corp., 511 U.S. 531, 545, 114 S.Ct. 1757, 1765, 128 L.Ed.2d 556 (1994). As a result, § 548 of the Bankruptcy Code now provides no basis for invalidating state foreclosure sales based on inadequacy of the price.

The *Durrett* principle has been rejected in another important context, the Uniform Fraudulent Transfer Act (UFTA), promulgated by the National Conference of Commissioners on Uniform State Laws in 1984. Because of a fear that bankruptcy judges and state courts would interpret state fraudulent conveyance law as incorporating *Durrett* principles, the UFTA provides that "a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale ... under a mortgage, deed of trust or security agreement." U.F.T.A. § 3(b). The UFTA has been adopted by at least 30 states. See 7A Uniform Laws Ann. 170 (1993 Supp.).

For suggestions for statutory reform of the foreclosure process, see Goldstein, Reforming the Residential Foreclosure Process, 21 Real Est. L. J. 286 (1993); Johnson, Critiquing the Foreclosure Process: An Economic Approach Based on the Paradigmatic Norms of Bankruptcy, 79 Va. L. Rev. 959 (1993); Nelson, Deficiency Judgments After Real Estate Foreclosures in Missouri: Some Modest Proposals, 47 Mo. L. Rev. 151 (1982).

The United States Supreme Court has yet to resolve whether an inadequate foreclosure sale price may under some circumstances be the basis for a preference attack under § 547 of the Bankruptcy Code. At least four cases hold that, assuming the mortgagor was insolvent at the time of foreclosure, a mortgagee foreclosure purchase for the amount of the mortgage obligation or less within 90 days of a mortgagor bankruptcy petition is a voidable preference to the extent that real estate was worth more than the mortgage obligation at the time of the foreclosure sale. See In re Park North Partners, Ltd., 80 B.R. 551 (N.D.Ga.1987); In re Winters, 119 B.R. 283 (Bankr.M.D.Fla.1990); In re Wheeler, 34 B.R. 818 (Bankr.N.D.Ala. 1983); Matter of Fountain, 32 B.R. 965 (Bankr.W.D.Mo.1983). Cf. In re Quinn, 69 B.R. 776 (Bankr.W.D.Tenn. 1986) (foreclosure sale not a preference because mortgagor was not insolvent at time of the foreclosure sale). On the other hand, the United States Court of Appeals for the Ninth Circuit and at least one other court have rejected this use of § 547. See In re Ehring, 900 F.2d 184 (9th Cir. 1990); First Federal Savings & Loan Assoc. of Warner Robbins v. Standard Building Associates, Ltd., 87 B.R. 221 (D.Ga.1988). See generally 1 G. Nelson & D. Whitman, Real Estate Finance Law 785–788 (3d ed. 1993). For criticism of the use of the preference approach in this context, see Kennedy, Involuntary Fraudulent Transfer, 9 Cardozo L. Rev. 531, 563–564 (1987).

Application of the standard, Comment b. An action to set aside a power of sale foreclosure may be brought not only by the mortgagor or other holder of the equity of redemption, but also by junior lienors. See generally 1 G. Nelson & D. Whitman, Real Estate Finance Law 537–540 (3d ed. 1993). This is also true with respect to actions for damages for wrongful foreclosure. Id. at 540–544.

All jurisdictions take the position that mere inadequacy of the foreclosure sale price, not accompanied by other defects in the foreclosure process, will not automatically invalidate a sale. See, e.g., Security Savings & Loan Ass'n v. Fenton, 806 P.2d 362 (Ariz.Ct.App.1990); Gordon v. South Central Farm Credit, ACA, 446 S.E.2d 514 (Ga.Ct.App.1994); Boatmen's Bank of Jefferson County v. Community Interiors, Inc., 721 S.W.2d 72 (Mo.Ct.App.1986); Greater Southwest Office Park, Ltd. v. Texas Commerce Bank, N.A., 786 S.W.2d 386 (Tex. Ct. App. 1990); Kurtz v. Ripley County State Bank, 785 F.Supp. 116 (E.D.Mo.1992).

In general, courts articulate two main standards for invalidating a foreclosure sale based on price. First, many courts require that, in the absence of some other defect or irregularity in the foreclosure process, the price be "grossly inadequate" before a sale may be invalidated. See, e.g., Estate of Yates, 32 Cal.Rptr.2d 53 (Cal. Ct. App. 1994); Moody v. Glendale Federal Bank, 643 So.2d 1149 (Fla.Dist.Ct.App.1994); Gordon v. South Central Farm Credit, ACA, 446 S.E.2d 514 (Ga.Ct.App.1994); Union National Bank v. Johnson, 617 N.Y.S.2d 993 (N.Y.App.Div.1994); United Oklahoma Bank v. Moss, 793 P.2d 1359 (Okla. 1990); Vend–A–Matic, Inc. v. Frankford Trust Co., 442 A.2d 1158 (Pa. Super. Ct. 1982). Second, other courts require a disparity between the sale price and fair market value so gross as to "shock the conscience of the court or raise a presumption of fraud or unfairness." See, e.g., Allied Steel Corp. v. Cooper, 607 So.2d 113 (Miss.1992); Armstrong v. Csurilla, 817 P.2d 1221 (N.M.1991); Crown Life Insurance Co. v. Candlewood, Ltd., 818 P.2d 411 (N.M.1991); Trustco Bank New York v. Collins, 623 N.Y.S.2d 642 (N.Y.App.Div.1995); Key Bank of Western New York, N.A. v. Kessler Graphics Corp., 608 N.Y.S.2d 21 (N.Y.App.Div.1993); Bascom Construction, Inc. v. City Bank & Trust, 629 A.2d 797 (N.H.1993); Crossland Mortgage Corp. v. Frankel, 596 N.Y.S.2d 130 (N.Y.App.Div.1993); Verex Assurance, Inc. v. AABREC, Inc., 436 N.W.2d 876 (Wis.Ct.App.1989). A few courts seem to conflate the foregoing standards by holding that a sale will be set aside only where the price is so "grossly inadequate as to shock the conscience." United Oklahoma Bank v. Moss, 793 P.2d 1359 (Okla.1990).

At least one jurisdiction takes the position that "[i]f the fair market value of the property is over twice the sales price, the price is considered to be grossly inadequate, shocking 'the conscience of the court' and justifying the setting aside of the sale." Burge v. Fidelity Bond & Mortgage Co., 648 A.2d 414, 419 (Del.1994). At the other extreme, one state supreme court, in dealing with a price that was "shockingly inadequate" abandoned the "conscience shocking" standard as "impractical" and instead held that "[i]f a foreclosure sale is legally held, conducted and consummated, there must be some evidence of irregularity, misconduct, fraud, or unfairness

on the part of the trustee or mortgagee that caused or contributed to an inadequate price, for a court of equity to set aside the sale." Holt v. Citizens Central Bank, 688 S.W.2d 414, 416 (Tenn.1984). See also Security Savings & Loan Ass'n v. Fenton, 806 P.2d 362 (Ariz.Ct.App.1990).

It is unlikely that the "grossly inadequate" and "shock the conscience" standards differ materially. However, this section adopts the former standard on the theory that in form, if not in substance, it may afford a court somewhat greater flexibility in close cases to invalidate a foreclosure sale than does its "shock the conscience" counterpart.

Illustrations 1–4 establish that only rarely will a court be justified in invalidating a foreclosure sale based on substantial price disparity alone. Courts routinely uphold foreclosure sale prices of 50 percent or more of fair market value. See, e.g., Danbury Savings & Loan Ass'n v. Hovi, 569 A.2d 1143 (Conn. App. Ct. 1990); Moody v. Glendale Federal Bank, 643 So.2d 1149 (Fla.Dist.Ct.App.1994); Guerra v. Mutual Federal Savings & Loan Ass'n, 194 So.2d 15 (Fla.Ct.App. 1967); Union National Bank v. Johnson, 617 N.Y.S.2d 993 (N.Y.App.Div. 1994); Long Island Savings Bank v. Valiquette, 584 N.Y.S.2d 127 (N.Y.App.Div.1992); Glenville & 110 Corp. v. Tortora, 524 N.Y.S.2d 747 (N.Y.App.Div.1988); Zisser v. Noah Industrial Marine & Ship Repair, Inc., 514 N.Y.S.2d 786 (N.Y.App.Div. 1987); S & T Bank v. Dalessio, 632 A.2d 566 (Pa. Super. Ct. 1993); Cedrone v. Warwick Federal Savings & Loan Ass'n, 459 A.2d 944 (R.I.1983); Federal Deposit Ins. Corp. v. Villemaire, 849 F.Supp. 116 (D.Mass. 1994); Kurtz v. Ripley County State Bank, 785 F.Supp. 116 (E.D.Mo. 1992). But see Murphy v. Financial Development Corp., 495 A.2d 1245 (N.H.1985) (sale price of 59% of fair market value indicated failure of due diligence on part of foreclosing mortgagee in exercising power of sale).

Moreover, courts usually uphold sales even when they produce significantly less than 50 percent. See, e.g., Hurlock Food Processors Investment Associates v. Mercantile–Safe Deposit & Trust Co., 633 A.2d 438 (Md.Ct. App.1993) (35% of fair market value (FMV)); Frank Buttermark Plumbing & Heating Corp. v. Sagarese, 500 N.Y.S.2d 551 (N.Y.App.Div.1986) (30% of FMV); Shipp Corp., Inc. v. Charpilloz, 414 So.2d 1122 (Fla.Dist. Ct.App.1982) (33% of FMV); Moeller v. Lien, 30 Cal.Rptr.2d 777 (Cal.Ct. App.1994) (25% of FMV). See generally Dingus, Mortgages—Redemption After Foreclosure Sale in Missouri, 25 Mo. L. Rev. 261, 262–63 (1960).

On the other hand, there are cases holding that a trial court is warranted in invalidating a foreclosure sale that produces a price of 20 percent of fair market value or less. See United Oklahoma Bank v. Moss, 793 P.2d 1359 (Okla.1990) (approximately 20% of FMV); Crown Life Insurance Co. v. Candlewood, Ltd., 818 P.2d 411 (N.M.1991) (15% of FMV); Rife v. Woolfolk, 289 S.E.2d 220 (W.Va.1982) (14% of FMV); Ballentyne v. Smith, 205 U.S. 285, 27 S.Ct. 527, 51 L.Ed. 803 (1907) (14% of FMV); Polish National Alliance v. White Eagle Hall Co., Inc., 470 N.Y.S.2d 642 (N.Y.App. Div.1983) ("foreclosure sales at prices below 10% of value have consistently been held unconscionably low"). According to the New Mexico Supreme Court, when the price falls into the 10–40 percent range, it should not be confirmed "absent good reasons why it should be." Armstrong v. Csurilla,

817 P.2d 1221, 1234 (N.M.1991). A Mississippi decision takes the position that a sale for less than 40 percent of fair market value "shocks the conscience." Allied Steel Corp. v. Cooper, 607 So.2d 113, 120 (Miss.1992). One commentator maintains that there "is general agreement at the extremes as to what constitutes gross inadequacy. Sale prices less than 10 percent of value are generally held grossly inadequate, whereas those above 40 percent are held not grossly inadequate." Washburn, The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales, 53 So. Cal. L. Rev. 843, 866 (1980).

On rare occasions, a trial court may abuse its discretion in confirming a grossly inadequate price. See First National Bank of York v. Critel, 555 N.W.2d 773 (Neb.1996) (reversing trial court's confirmation of a foreclosure sale that yielded 14% of appraised value).

Illustration 6 takes the position that a court may properly take into account that senior liens under some circumstances may make bidding at a junior foreclosure sale an especially precarious enterprise, and may thus be warranted in upholding the sale of the mortgagor's equity for an amount that would otherwise be deemed grossly inadequate. Support for this approach is found in Allied Steel Corp. v. Cooper, 607 So.2d 113, 120 (Miss.1992). See also Deibler v. Atlantic Properties Group, Inc., 652 A.2d 553, 558 (Del.1995); Briehler v. Poseidon Venture, Inc., 502 A.2d 821, 822 (R.I.1986).

The "grossly inadequate" standard applied by this section is measured by reference to the fair market value of the mortgaged real estate at the time of the foreclosure sale. The definition of fair market value is derived from BFP v. Resolution Trust Corp., 511 U.S. 531, 537–538, 114 S.Ct. 1757, 1761, 128 L.Ed.2d 556 (1994), which itself relies on Black's Law Dictionary 971 (6th ed. 1990):

> The market value of ... a piece of property is the price which it might be expected to bring if offered for sale in a fair market; not the price which might be obtained on a sale at public auction or a sale forced by the necessities of the owner, but such a price as would be fixed by negotiation and mutual agreement, after ample time to find a purchaser, as between a vendor who is willing (but not compelled) to sell and a purchaser who desires to buy but is not compelled to take the particular ... piece of property.

The formulation of "fair market value" used in this section also finds support in the definition used by the Internal Revenue Service. Under this approach, "fair market value" is defined as:

> the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts. The fair market value of a particular item of property ... is not to be determined by a forced sale price. Nor is the fair market value ... to be determined by the sale price of the item in a market other than that which such item is most commonly sold to the public.

Treas. Reg. § 20.2031–1(b).

Price inadequacy coupled with other defects, Comment c. Even if the price is not so low as to be deemed "grossly inadequate," the foreclosure sale may nevertheless be invalidated if it is otherwise defective under state

law. See, e.g., Rosenberg v. Smidt, 727 P.2d 778 (Alaska 1986) (sale for 28% of fair market value set aside where trustee failed to use due diligence to determine last known address of mortgagor); Bank of Seoul & Trust Co. v. Marcione, 244 Cal.Rptr. 1 (Cal.Ct.App.1988) (sale set aside where foreclosure price was for one third of fair market value and trustee refused to recognize a higher bid from a junior lienholder who was present at the sale); Estate of Yates, 32 Cal.Rptr.2d 53 (Cal. Ct. App. 1994) (sale for 12% of fair market value set aside where trustee failed to mail notice of default to executor); Whitman v. Transtate Title Co., 211 Cal.Rptr. 582 (Cal.Ct.App.1985) (sale for 20% of FMV set aside where trustee refused request for one-day postponement of sale); Federal National Mortgage Ass'n v. Brooks, 405 S.E.2d 604 (S.C.Ct.App.1991) (sale for 3% of FMV set aside where improper information supplied to bidders); Kouros v. Sewell, 169 S.E.2d 816 (Ga.1969) (sale for 3% of FMV set aside where mortgagee gave mortgagor incorrect sale date). Conversely, more than nominal price inadequacy must exist notwithstanding other defects in the sale process in order to establish the requisite prejudice to sustain an attack on the sale. See Cragin Federal Bank For Savings v. American National Bank & Trust Co. of Chicago, 633 N.E.2d 1011 (Ill. App. Ct. 1994).

Illustration 11 is based in part on Bank of Seoul & Trust Co. v. Marcione, 244 Cal.Rptr. 1 (Cal.Ct.App. 1988).

It is not uncommon for the *mortgagee,* rather than the mortgagor or a junior lienor, to attempt to set aside a sale based on an inadequate price. Note that in this setting, the real estate not only will be sold for less than fair market value, but usually, though not always, for a price that will not qualify as "grossly inadequate." Moreover, the foreclosure proceeding itself is normally not defective under state law. Rather, the mortgagee intends to enter a higher bid at the sale, but because of mistake or negligence on its part, actually makes a lower bid and a third party becomes the successful purchaser. Courts are deeply divided on this issue. Some take the position that mistake or negligence on the mortgagee's part should be treated as the functional equivalent of a defect under state law. As a result, these courts reason, the inadequate price plus the mistake or negligence are sufficient to justify setting aside the sale. See Burge v. Fidelity Bond & Mortgage Co., 648 A.2d 414 (Del. 1994) (sale for 71% to 80% of FMV set aside based on mistaken bid by mortgagee); Alberts v. Federal Home Loan Mortgage Corp., 673 So.2d 158 (Fla.Dist.Ct.App.1996) (affirming trial court that set aside a foreclosure sale after mortgagee's agent, through a mistake in communications, entered a bid of $18,995, instead of $118,995 and property was sold to third party for a grossly inadequate $19,000); RSR Investments, Inc. v. Barnett Bank of Pinellas County, 647 So.2d 874 (Fla.Dist.Ct.App.1994) (sale for 6% of FMV set aside because mortgagee inadvertently failed to appear at the sale); Crown Life Insurance Co. v. Candlewood, Ltd., 818 P.2d 411 (N.M.1991) (sale for 15% to 23% of FMV set aside based on mistaken bid by mortgagee). Other courts, however, have less sympathy for the mortgagee in this setting. See Wells Fargo Credit Corp. v. Martin, 605 So.2d 531 (Fla.Dist.Ct.App.1992) (trial court refusal to set aside sale affirmed even though mortgagee's agent, through a

misunderstanding, entered bid of $15,500 instead of $115,000 and property was sold to another for the grossly inadequate amount of $20,000); Mellon Financial Services Corp. #7 v. Cook, 585 So.2d 1213 (La.Ct.App.1991) (sale upheld even though attorney for mortgagee, who was deaf in his right ear, failed to bid higher against a third party because he "contributed to the problem by not positioning himself in a more favorable position, considering his hearing disability."); Crossland Mortgage Corp. v. Frankel, 596 N.Y.S.2d 130 (N.Y.App.Div.1993) (sale to mortgagor's father for 28% to 34% of FMV upheld even though erroneous bidding instructions to mortgagee's agent caused him to cease bidding prematurely). According to the *Crossland* court, "[mortgagee's] mistake was unfortunate, [but] it did not provide a basis to invalidate the sale which was consummated in complete accord with lawful procedure ... since the mistake was unilateral on [mortgagee's] part." Id. at 131.

On balance, the latter approach to mortgagee mistake seems preferable. In general, third party bidding should be encouraged, and this section reflects that policy by making it extremely difficult to invalidate foreclosure sales based on price inadequacy alone. Where the foreclosure process itself complies with state law and the other parties to the process have not engaged in fraud or similar unlawful conduct, courts should be especially hesitant to upset third party expectations. This is especially the case where, as here, mortgagees can easily protect themselves by employing simple common-sense precautions.

§ 8.4 Foreclosure: Action for a Deficiency

(a) If the foreclosure sale price is less than the unpaid balance of the mortgage obligation, an action may be brought to recover a deficiency judgment against any person who is personally liable on the mortgage obligation in accordance with the provisions of this section.

(b) Subject to Subsections (c) and (d) of this section, the deficiency judgment is for the amount by which the mortgage obligation exceeds the foreclosure sale price.

(c) Any person against whom such a recovery is sought may request in the proceeding in which the action for a deficiency is pending a determination of the fair market value of the real estate as of the date of the foreclosure sale.

(d) If it is determined that the fair market value is greater than the foreclosure sale price, the persons against whom recovery of the deficiency is sought are entitled to an offset against the deficiency in the amount by which the fair market value, less the amount of any liens on the real estate that were not extinguished by the foreclosure, exceeds the sale price.

EXHIBIT 2

EXHIBIT 2

Pooling and Servicing Agreement (PSA).[62] Surprisingly, many courts have held that borrowers do not have standing to make this type of claim, because they were not parties to or intended third party beneficiaries of the assignment or the PSA.[63] Recognizing that allowing a foreclosure by a person that does not own the note and mortgage may subject the borrower to multiple actions, other courts have held that the borrower does have standing to make this type of claim.[64] However, the borrower may have standing only if the alleged defect caused the assignment to be void, rather than merely voidable.[65] If the defect makes the assignment voidable, the assignor, rather than the borrower, has the right to decide whether to extinguish the assignment.

§ 7:21 Defective power of sale foreclosure—"Void-voidable" distinction

The next section examines a variety of defects that provide grounds for setting aside a power of sale foreclosure, but we should first consider those defects from a broader perspective. Generally, defects in the exercise of a power of sale can be categorized in at least three ways—void, voidable, or inconsequential.

Some defects are so substantial that they render the sale *void*. In this situation, neither legal nor equitable title transfers to the sale purchaser or subsequent grantees, except perhaps by adverse

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[62]E.g., Schwend v. U.S. Bank, N.A., 2013 WL 686592 (E.D. Mo. 2013); Kilpatrick v. U.S. Bank, NA, 2013 WL 4525571 (S.D. Cal. 2013); In re Washington, 468 B.R. 846, 76 U.C.C. Rep. Serv. 2d 289 (Bankr. W.D. Mo. 2011), aff'd, 2012 WL 4483798 (W.D. Mo. 2012).

[63]E.g., Wells Fargo Bank, N.A. v. Strong, 149 Conn. App. 384, 2014 WL 1364994 (Conn. Ct. App. 2014); Schwend v. U.S. Bank, N.A., 2013 WL 686592 (E.D. Mo. 2013); Palffy v. BSI Financial Services, Inc., 2013 WL 4718931 (E.D. Mich. 2013); Kilpatrick v. U.S. Bank, NA, 2013 WL 4525571 (S.D. Cal. 2013); In re Washington, 468 B.R. 846, 76 U.C.C. Rep. Serv. 2d 289 (Bankr. W.D. Mo. 2011), aff'd, 2012 WL 4483798 (W.D. Mo. 2012).

[64]Murphy v. Aurora Loan Services, LLC, 699 F.3d 1027 (8th Cir. 2012), as corrected, (Nov. 28, 2012) and cert. denied, 133 S. Ct. 2358, 185 L. Ed. 2d 1068 (2013); Ball v. Bank of New York, 2012 WL 6645695 (W.D. Mo. 2012) (not reported in F. Supp. 2d); In re Bailey, 468 B.R. 464 (Bankr. D. Mass. 2012).

[65]Reinagel v. Deutsche Bank Nat. Trust Co., 722 F.3d 700 (5th Cir. 2013), opinion amended and superseded on reh'g, 735 F.3d 220 (5th Cir. 2013) (strangely, the court held that the borrower could not assert a claim based on the PSA but that it could assert defects in the assignment that rendered it void); Glaski v. Bank of America, National Association, 218 Cal. App. 4th 1079, 160 Cal. Rptr. 3d 449 (5th Dist. 2013); Wells Fargo Bank, N.A. v. Erobobo, 39 Misc. 3d 1220(A), 972 N.Y.S.2d 147 (Sup 2013).

possession.[1] The most common defect that renders a sale void is that the mortgagee had no right to foreclose,[2] such as when the mortgage is forged, the loan is not in default, or the loan is void for illegality.[3] Traditionally, courts characterized the sale as being void if the person foreclosing did not own the note,[4] but courts

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[Section 7:21]

[1]Deep v. Rose, 234 Va. 631, 364 S.E.2d 228 (1988) (when defect renders sale void, "no title, legal or equitable, passes to the purchaser"); Henke v. First Southern Properties, Inc., 586 S.W.2d 617 (Tex. Civ. App. Waco 1979), writ refused n.r.e., (June 18, 1980); Dingus, Mortgages—Redemption After Foreclosure Sale in Missouri, 25 Mo. L. Rev. 261, 277 (1960); Tiffany, Real Property § 1552 (3d ed. 1939). But cf. Phillips v. Latham, 523 S.W.2d 19 (Tex. Civ. App. Dallas 1975), writ refused n.r.e., (July 16, 1975).

[2]Rosenberg v. Smidt, 727 P.2d 778 (Alaska 1986) ("only substantial defects such as a lack of substantive basis to foreclose in the first place will make a sale void"); Bevilacqua v. Rodriguez, 460 Mass. 762, 955 N.E.2d 884 (2011) (mortgage assignee foreclosed before mortgage assigned to it); Graham v. Oliver, 659 S.W.2d 601, 603 (Mo. Ct. App. S.D. 1983); Staffordshire Investments, Inc. v. Cal-Western Reconveyance Corp., 209 Or. App. 528, 149 P.3d 150 (2006) (sale held contrary to terms of valid forbearance agreement deemed void). But see Bottomly v. Kabachnick, 13 Mass. App. Ct. 480, 434 N.E.2d 667 (1982) (sale void though default existed because notice did not identify mortgage holder).

[3]See, e.g., La Jolla Group II v. Bruce, 211 Cal. App. 4th 461, 149 Cal. Rptr. 3d 716 (5th Dist. 2012) (forged deed of trust); Lona v. Citibank, N.A., 202 Cal. App. 4th 89, 134 Cal. Rptr. 3d 622 (6th Dist. 2011) (unconscionable loan void for illegality); Garcia v. World Sav., FSB, 183 Cal. App. 4th 1031, 107 Cal. Rptr. 3d 683 (2d Dist. 2010) (sale void because default cured before sale); Lee v. HSBC Bank USA, 121 Haw. 287, 218 P.3d 775 (2009) (sale void because default cured before sale); Taylor v. Just, 138 Idaho 137, 59 P.3d 308 (2002) (sale void because default cured before sale); Bradford v. Thompson, 470 S.W.2d 633, 89 A.L.R.3d 941 (Tex. 1971); Diversified, Inc. v. Walker, 702 S.W.2d 717 (Tex. App. Houston 1st Dist. 1985), writ refused n.r.e., (Oct. 1, 1986) (sale void because mortgagor tendered late installments pursuant to mortgagee's agreement to accept late installments and cancel sale). "The power of sale is ordinarily conditioned upon a failure to pay the debt at a time named, and consequently a sale before that time would, it seems, ordinarily be invalid for any purpose, even in favor of an innocent purchaser from the purchaser at the sale." Tiffany, Real Property § 1552 (3d ed. 1939); see also Wellman v. Travelers Ins. Co., 689 P.2d 1151 (Colo. App. 1984), judgment rev'd on other grounds, 721 P.2d 685 (Colo. 1986) (sale void because debt previously satisfied). But see Brown v. Federal Home Loan Mortg. Co., 2013 Ark. App. 574, 2013 WL 5556267 (2013) (foreclosure statute eliminated borrowers' ability to have sale set aside on basis that loan was not in default).

[4]See Williams v. Kimes, 996 S.W.2d 43 (Mo. 1999), as modified on denial of reh'g, (June 29, 1999) ("There are numerous circumstances that may render a foreclosure sale void: (1) where the foreclosing party does not hold title to the secured note; (2) where there has been no default by the mortgagor at or before the first publication of notice for the sale; (3) where the secured note has been paid; and (4) where the deed of trust authorizes sale upon the request of its holder and no such request has been given."); Cobe v. Lovan, 193 Mo. 235, 92 S.W. 93 (1906); Graham v. Oliver, 659 S.W.2d 601 (Mo. Ct. App. S.D. 1983).

in a few recent cases surprisingly and incorrectly have held that the sale can be valid.[5] The sale also is void if a trustee under a deed of trust forecloses without authorization.[6] The mortgagee's failure to follow certain fundamental procedural requirements may render a sale void. For example, courts have held that a sale was void when the notice of sale omitted part of the mortgaged real estate[7] or the mortgagee or trustee did not give statutorily-required notice[8] or did not record all mortgage assignments before beginning the sale as statutorily required.[9] A sale also is void

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[5]Debrunner v. Deutsche Bank Nat. Trust Co., 204 Cal. App. 4th 433, 138 Cal. Rptr. 3d 830 (6th Dist. 2012), review denied, (June 13, 2012); You v. JP Morgan Chase Bank, 293 Ga. 67, 743 S.E.2d 428 (2013). See Whitman and Milner, Foreclosing on Nothing: The Curious Problem of the Deed of Trust Foreclosure Without Entitlement to Enforce the Note, 66 Ark. L. Rev. 21 (2013).

[6]In re Cedano, 470 B.R. 522 (B.A.P. 9th Cir. 2012); Lustenberger v. Hutchinson, 343 Mo. 51, 119 S.W.2d 921 (1938); Graham v. Oliver, 659 S.W.2d 601 (Mo. Ct. App. S.D. 1983); Albice v. Premier Mortg. Services of Washington, Inc., 174 Wash. 2d 560, 276 P.3d 1277 (2012). Cf. Trotter v. Bank of New York Mellon, 152 Idaho 842, 275 P.3d 857, 862 (2012).

[7]Graham v. Oliver, 659 S.W.2d 601 (Mo. Ct. App. S.D. 1983); cf. Myrad Properties, Inc. v. LaSalle Bank Nat. Ass'n, 252 S.W.3d 605 (Tex. App. Austin 2008), judgment rev'd, 300 S.W.3d 746 (Tex. 2009) (notice described only one of two parcels to be foreclosed; however, sale not void because notice included sufficient information for prospective bidders to determine that both parcels were being sold).

[8]See Little v. Cfs Service Corp., 188 Cal. App. 3d 1354, 233 Cal. Rptr. 923 (2d Dist. 1987); Reese v. Provident Funding Associates, LLP, 317 Ga. App. 353, 730 S.E.2d 551 (2012), cert. granted, judgment vacated on other grounds, (May 20, 2013) (notice named servicer as lender); Williams v. Kimes, 996 S.W.2d 43 (Mo. 1999), as modified on denial of reh'g, (June 29, 1999) (failure to provide notice to remaindermen rendered sale void); Roylston v. Bank of America, N.A., 290 Ga. App. 556, 660 S.E.2d 412 (2008); Terry L. Bell Generations Trust v. Flathead Bank of Bigfork, 2013 MT 152, 370 Mont. 342, 302 P.3d 390 (2013) (failure to give statutorily required notice); NW Property Wholesalers, LLC v. Spitz, 252 Or. App. 29, 287 P.3d 1106 (2012), review denied, 353 Or. 203, 296 P.3d 1275 (2013) (failure to serve notice of sale); Shearer v. Allied Live Oak Bank, 758 S.W.2d 940 (Tex. App. Corpus Christi 1988), writ denied, (June 14, 1989); see also In re Gatlin, 357 B.R. 519 (Bankr. W.D. Ark. 2006) (incorrect street address); In re AMRCO, Inc., 496 B.R. 442, 58 Bankr. Ct. Dec. (CRR) 76 (Bankr. W.D. Tex. 2013); In re Nelson, 134 B.R. 838 (Bankr. N.D. Tex. 1991) (sale void because notice by certified mail on 21st day before sale did not give owner full 21 days notice); Deep v. Rose, 234 Va. 631, 364 S.E.2d 228 (1988) (sale void because held on last day of advertisement in violation of statute). Cf. Amos v. Aspen Alps 123, LLC, 2012 CO 46, 280 P.3d 1256 (Colo. 2012) (sale valid despite failure to give statutorily-required notice because trustor had actual notice).

[9]In re Rinehart, 2012 WL 3018291 (Bankr. D. Idaho 2012); U.S. Bank Nat. Ass'n v. Ibanez, 458 Mass. 637, 941 N.E.2d 40, 86 A.L.R.6th 755 (2011); Ruiz v. 1st Fidelity Loan Servicing, LLC, 829 N.W.2d 53 (Minn. 2013); see Barnett v. BAC Home Loan Servicing, L.P., 772 F. Supp. 2d 1328 (D. Or. 2011). Contra Kim v. JPMorgan Chase Bank, N.A., 493 Mich. 98, 825 N.W.2d 329 (2012) (failure to record mortgage assignment as required by statute renders sale voidable, not void).

when someone other than the named trustee conducts the sale,[10] including a successor who has not been validly appointed,[11] or, conversely, if the original trustee conducts the sale after a successor-trustee has been appointed.[12]

Most defects render the foreclosure *voidable* and not void. When a voidable error occurs, bare legal title passes to the sale purchaser, subject to the redemption rights of those injured by the defective foreclosure. Typically, a voidable error is "an irregularity in the execution of a foreclosure sale" and must be "substantial or result in a probable unfairness."[13] In many jurisdictions, the trustee's purchase at a sale she is conducting under a deed of trust makes the sale voidable.[14] Courts also have held that a sale is voidable when the mortgagee published the notice of sale for slightly fewer times than the statutorily prescribed number[15] or when the sale is conducted at the east door, rather than west front door, of the county courthouse.[16] If the defect only renders the sale voidable, the redemption rights

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[10]See Citizens Bank of Edina v. West Quincy Auto Auction, Inc., 742 S.W.2d 161 (Mo. 1987) (sale void because conducted by trustee's son and law partner without trustee being present and without a provision authorizing delegation of trustee's function). But cf. Jones v. First American Title Ins. Co., 107 Cal. App. 4th 381, 131 Cal. Rptr. 2d 859 (2d Dist. 2003), as modified on denial of reh'g, (Apr. 23, 2003) (reformation permitted to show recorded substitution of trustee). See also In re AMRCO, Inc., 496 B.R. 442, 58 Bankr. Ct. Dec. (CRR) 76 (Bankr. W.D. Tex. 2013) (failure to include substitute trustee's address on notice of foreclosure rendered sale invalid).

[11]Lane v. Wells Fargo Bank, N.A., 2012 WL 1687105 (D. Nev. 2012) (unpublished); In re Kitts, 274 B.R. 491 (Bankr. E.D. Tenn. 2002); Winters v. Winters, 820 S.W.2d 694 (Mo. Ct. App. S.D. 1991). See Jordan v. Plaza Home Mortg., Inc., 2011 WL 4809274 (D. Nev. 2011) (unpublished) (successor trustee executed notice of default before becoming properly substituted trustee; foreclosure not properly initiated). Compare Reynolds v. Woodall, 2012 UT App 206, 285 P.3d 7 (Utah Ct. App. 2012) (although successor trustee not validly appointed until after sale, borrower must show injury to invalidate sale).

[12]Dimock v. Emerald Properties LLC, 81 Cal. App. 4th 868, 97 Cal. Rptr. 2d 255 (4th Dist. 2000).

[13]Conlin v. Mortgage Electronic Registration Systems, Inc., 714 F.3d 355 (6th Cir. 2013); Lessl v. CitiMortgage, Inc., 515 Fed. Appx. 467 (6th Cir. 2013) (unpublished); England v. Mortgage Electronic Registration Systems, 2013 WL 1812194 (E.D. Mich. 2013); Kim v. JPMorgan Chase Bank, N.A., 493 Mich. 98, 825 N.W.2d 329 (2012); Gilroy v. Ryberg, 266 Neb. 617, 667 N.W.2d 544 (2003) ("We * * * hold that to establish a defect that renders the trustee's sale voidable, the party seeking to set aside the sale must show not only the defect, but also that the defect caused the party prejudice.").

[14]See, e.g., Whitlow v. Mountain Trust Bank, 215 Va. 149, 207 S.E.2d 837 (1974); Dingus, supra note 1, at 276–282.

[15]See, e.g., Jackson Investment Corp. v. Pittsfield Products, Inc., 162 Mich. App. 750, 413 N.W.2d 99 (1987); Kennon v. Camp, 353 S.W.2d 693 (Mo. 1962).

[16]See Wakefield v. Dinger, 234

intervening purchaser with notice of the defect, because they could not reacquire the property in good faith.[21]

§ 7:22 Defective power of sale foreclosure—Specific problems

In this section, we focus on commonly raised grounds for setting aside a power of sale foreclosure. As we will note, some irregularities are considered so prejudicial that the presence of one of them alone may be sufficient to invalidate a foreclosure. Other deficiencies, however, may only be significant if they are found in conjunction with other defects. In any event, the chances for reversal of a sale are always strengthened by the cumulative impact of several irregularities in one foreclosure proceeding.

The following discussion analyzes challenges based on (1) inadequacy of the sale price, (2) the time of sale, (3) the place of sale, (4) sale by parcels or in bulk, (5) chilled bidding, (6) purchase by the mortgagee, and (7) the conduct of the trustee of a deed of trust. It then examines statutes that states have enacted in an attempt to enhance the stability of titles acquired at foreclosure sales.

Inadequacy of the Sale Price

All jurisdictions adhere to the recognized rule that mere inadequacy of the foreclosure sale price will not invalidate a sale, absent fraud, unfairness, or other irregularity.[1] Courts generally articulate two main standards for invalidating a foreclosure sale

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[21]See McDaniel v. Sprick, 297 Mo. 424, 249 S.W. 611 (1923); see also 3 Pomeroy, Equity Jurisprudence 55–57 (5th ed. 1941) (support by analogy to recording act cases).

[Section 7:22]

[1]F.D.I.C. v. Myers, 955 F.2d 348 (5th Cir. 1992); Perales v. Wells Fargo Bank, N.A., 2013 WL 3456998 (W.D. Tex. 2013); Kurtz v. Ripley County State Bank, 785 F. Supp. 116 (E.D. Mo. 1992), judgment aff'd, 972 F.2d 354 (8th Cir. 1992); Security Sav. and Loan Ass'n v. Fenton, 167 Ariz. 268, 806 P.2d 362 (Ct. App. Div. 2 1990); 6 Angels, Inc. v. Stuart-Wright Mortgage, Inc., 85 Cal. App. 4th 1279, 102 Cal. Rptr. 2d 711 (2d Dist. 2001); Handy v. Rogers, 143 Colo. 1, 351 P.2d 819 (1960); Kouros v. Sewell, 225 Ga. 487, 169 S.E.2d 816 (1969); Phillips v. Atlantic Bank & Trust Co., 168 Ga. App. 590, 309 S.E.2d 813 (1983); Gilbert v. Lusk, 123 Ind. App. 167, 106 N.E.2d 404 (1952); Lippold v. White, 181 Md. 562, 31 A.2d 170 (1943); Boatmen's Bank of Jefferson County v. Community Interiors, Inc., 721 S.W.2d 72 (Mo. Ct. App. E.D. 1986); Robert R. Wisdom Oil Co., Inc. v. Gatewood, 682 S.W.2d 882 (Mo. Ct. App. S.D. 1984); Mueller v. Simmons, 634 S.W.2d 533 (Mo. Ct. App. E.D. 1982); Greater Southwest Office Park, Ltd. v. Texas Commerce Bank Nat. Ass'n, 786 S.W.2d 386 (Tex. App. Houston 1st Dist. 1990), writ denied, (Nov. 21, 1990); Ogden v. Gibralter Sav. Ass'n, 620 S.W.2d 926 (Tex. Civ. App. Corpus Christi 1981), judgment rev'd on other grounds, 640 S.W.2d 232 (Tex. 1982); Pyper v. Bond, 2011 UT 45, 258 P.3d 575 (Utah 2011); Tiffany, Real Property § 1550 (3rd ed. 1939).

If the defective sale is only voidable, who is a bona fide purchaser? A mortgagee-purchaser should rarely, if ever, qualify as a bona fide purchaser, because the mortgagee or its attorney normally manages the power of sale foreclosure and should be responsible for defects. The result should be the same when a deed of trust is foreclosed. Although the trustee, rather than the lender, normally is in charge of the proceedings, a court probably will treat the trustee as the lender's agent for purposes of determining BFP status. If the sale purchaser paid value and is unrelated to the mortgagee, he should take free of voidable defects if: (a) he has no actual knowledge of the defects; (b) he is not on reasonable notice from recorded instruments; and (c) the defects are such that a person attending the sale and exercising reasonable care would be unaware of the defects.[20] When a subsequent grantee has acquired the property, BFP status should easier to achieve. If the grantee did not attend the sale, she is a bona fide purchaser unless she had actual notice of the defect or was on reasonable notice from the recorded documents. If the sale purchaser or some later purchaser is a BFP but conveys the property to a person who does not qualify, such as the original mortgagee, what should the result be? Most jurisdictions would probably refuse to confer BFP status on the mortgagee and on an

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ute nor the deed of trust required that information to be in the notice. See Goffney v. Family Savings & Loan Ass'n, 98 Cal. Rptr. 2d 497 (App. 2d Dist. 2000), as modified on denial of reh'g, (June 30, 2000). For a complete catalogue of "insubstantial" defects, see Graham v. Oliver, 659 S.W.2d 601, 604 (Mo. Ct. App. S.D. 1983); see also Burrill v. First Nat. Bank of Shawnee Mission, N.A., 668 S.W.2d 116 (Mo. Ct. App. W.D. 1984).

[20]In re Edry, 201 B.R. 604 (Bankr. D. Mass. 1996) (foreclosure purchaser not a BFP, because he was an "experienced purchaser" who knew that display ads usually used to advertise foreclosure sale); Rosenberg v. Smidt, 727 P.2d 778 (Alaska 1986) (foreclosure sale purchasers were deemed to be on inquiry notice of trustee's failure to use "due diligence" to determine last known address of the mortgagor where trustee's deed failed to contain a factual recitation of the trustee's actions in complying with statutory notice requirements); Federal Home Loan Mortg. Corp. v. Appel, 143 Idaho 42, 137 P.3d 429 (2006) (quoting text with approval); Mirjafari v. Cohn, 183 Md. App. 701, 963 A.2d 247 (2009), judgment aff'd, 412 Md. 475, 988 A.2d 997 (2010) (BFP status determined at time of sale); Pizza v. Walter, 345 Md. 664, 694 A.2d 93 (1997) (purchaser who is attorney for mortgagee is not a BFP); Swindell v. Overton, 310 N.C. 707, 314 S.E.2d 512 (1984) (quoting text with approval); Albice v. Premier Mortg. Services of Washington, Inc., 174 Wash. 2d 560, 276 P.3d 1277 (2012) (experienced real estate purchaser knew sufficient facts to put him on inquiry notice); cf. Melendrez v. D & I Investment, Inc., 127 Cal. App. 4th 1238, 26 Cal. Rptr. 3d 413 (6th Dist. 2005) ("the two elements of being a BFP are that the buyer (1) purchase the property in good faith *for value*, and (2) have no knowledge or notice of the asserted rights of another"—the fact that third party buyer was an experienced foreclosure purchaser is not alone enough to destroy BFP status).

can be cut off if a bona fide purchaser for value acquires the land.[17] When this occurs, an action for damages against the foreclosing mortgagee or trustee may be the only remaining remedy.

Finally, some defects are so *inconsequential* that they render the sale neither void nor voidable. These defects commonly involve minor discrepancies in the notice of sale. For example, when the first of four published notices of sale omitted the place of sale, the court held that the sale was valid because the mortgagee substantially complied with the deed of trust requirements and the omission did not affect the parties in a "material way."[18] Similarly, a court held that a sale was valid though the mortgagee sent the notice of sale by regular mail, rather than by the statutorily required certified or registered mail, because the mortgagor had actual notice of the sale for more than the statutorily specified period.[19]

Mo. App. 407, 135 S.W.2d 17 (1939).

[17]See, e.g., Rosenberg v. Smidt, 727 P.2d 778 (Alaska 1986) (when "a defect in a foreclosure sale makes it merely voidable, * * * sale to a BFP cuts off the trustor's ability to set aside the sale"); Ragland v. U.S. Bank Nat. Assn., 209 Cal. App. 4th 182, 147 Cal. Rptr. 3d 41 (4th Dist. 2012); Mirjafari v. Cohn, 183 Md. App. 701, 963 A.2d 247 (2009), judgment aff'd, 412 Md. 475, 988 A.2d 997 (2010); Gilroy v. Ryberg, 266 Neb. 617, 667 N.W.2d 544 (2003) ("An injured party can have the sale set aside only so long as 'the legal title has not moved to a bona fide purchaser.' "); Note, 5 Alaska L. Rev. 799 (1988); Jackson v. Klein, 320 S.W.2d 553 (Mo. 1959); Steward v. Good, 51 Wash. App. 509, 754 P.2d 150 (Div. 1 1988); Dingus, supra note 1, at 277, 280.

[18]In re Hoffman, 280 B.R. 234 (Bankr. W.D. Mo. 2002) (defect inconsequential because "only abnormality with the Debtor's address was that the street name was misspelled *Lester* instead of *Lister*"); Richards v. Phillips, 925 So. 2d 216 (Ala. Civ. App. 2005) (foreclosure notice "furnished the means of eliminating any confusion that might have resulted from the reference to Shelby county in its preamble;" therefore, that inaccurate statement "was not a sufficient basis upon which to set aside a foreclosure deed"); Fairfield Plantation Action Committee, Inc. v. Plantation Equity Group, Inc., 215 Ga. App. 746, 452 S.E.2d 147 (1994) (sale not set aside though first two publications included "two substitutions of 'southeast' for 'southwest' in describing an outparcel, and the omission of one line of text referring to a land lot identified immediately below but the errors" because they "were corrected in the third and fourth publications"); Tarleton v. Griffin Federal Sav. Bank, 202 Ga. App. 454, 415 S.E.2d 4 (1992) (foreclosure advertisement not legally defective for referring to security deed as being recorded at page three, rather than page two, of county records; potential purchaser would not have been misled because page three was part of the same recorded document); Concepts, Inc. v. First Sec. Realty Services, Inc., 743 P.2d 1158 (Utah 1987) (sale not invalid though 1983 notice of sale stated that sale would take place in 1982); Bailey v. Pioneer Federal Sav. & Loan Ass'n, 210 Va. 558, 172 S.E.2d 730 (1970).

[19]Macon-Atlanta State Bank v. Gall, 666 S.W.2d 934 (Mo. Ct. App. W.D. 1984). A notice of default that misstated the number of defaulted monthly payments did not render the sale invalid, because neither the stat-

intervening purchaser with notice of the defect, because they could not reacquire the property in good faith.[21]

§ 7:22 Defective power of sale foreclosure—Specific problems

In this section, we focus on commonly raised grounds for setting aside a power of sale foreclosure. As we will note, some irregularities are considered so prejudicial that the presence of one of them alone may be sufficient to invalidate a foreclosure. Other deficiencies, however, may only be significant if they are found in conjunction with other defects. In any event, the chances for reversal of a sale are always strengthened by the cumulative impact of several irregularities in one foreclosure proceeding.

The following discussion analyzes challenges based on (1) inadequacy of the sale price, (2) the time of sale, (3) the place of sale, (4) sale by parcels or in bulk, (5) chilled bidding, (6) purchase by the mortgagee, and (7) the conduct of the trustee of a deed of trust. It then examines statutes that states have enacted in an attempt to enhance the stability of titles acquired at foreclosure sales.

Inadequacy of the Sale Price

All jurisdictions adhere to the recognized rule that mere inadequacy of the foreclosure sale price will not invalidate a sale, absent fraud, unfairness, or other irregularity.[1] Courts generally articulate two main standards for invalidating a foreclosure sale

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[21]See McDaniel v. Sprick, 297 Mo. 424, 249 S.W. 611 (1923); see also 3 Pomeroy, Equity Jurisprudence 55–57 (5th ed. 1941) (support by analogy to recording act cases).

[Section 7:22]

[1]F.D.I.C. v. Myers, 955 F.2d 348 (5th Cir. 1992); Perales v. Wells Fargo Bank, N.A., 2013 WL 3456998 (W.D. Tex. 2013); Kurtz v. Ripley County State Bank, 785 F. Supp. 116 (E.D. Mo. 1992), judgment aff'd, 972 F.2d 354 (8th Cir. 1992); Security Sav. and Loan Ass'n v. Fenton, 167 Ariz. 268, 806 P.2d 362 (Ct. App. Div. 2 1990); 6 Angels, Inc. v. Stuart-Wright Mortgage, Inc., 85 Cal. App. 4th 1279, 102 Cal. Rptr. 2d 711 (2d Dist. 2001); Handy v. Rogers, 143 Colo. 1, 351 P.2d 819 (1960); Kouros v. Sewell, 225 Ga. 487, 169 S.E.2d 816 (1969); Phillips v. Atlantic Bank & Trust Co., 168 Ga. App. 590, 309 S.E.2d 813 (1983); Gilbert v. Lusk, 123 Ind. App. 167, 106 N.E.2d 404 (1952); Lippold v. White, 181 Md. 562, 31 A.2d 170 (1943); Boatmen's Bank of Jefferson County v. Community Interiors, Inc., 721 S.W.2d 72 (Mo. Ct. App. E.D. 1986); Robert R. Wisdom Oil Co., Inc. v. Gatewood, 682 S.W.2d 882 (Mo. Ct. App. S.D. 1984); Mueller v. Simmons, 634 S.W.2d 533 (Mo. Ct. App. E.D. 1982); Greater Southwest Office Park, Ltd. v. Texas Commerce Bank Nat. Ass'n, 786 S.W.2d 386 (Tex. App. Houston 1st Dist. 1990), writ denied, (Nov. 21, 1990); Ogden v. Gibralter Sav. Ass'n, 620 S.W.2d 926 (Tex. Civ. App. Corpus Christi 1981), judgment rev'd on other grounds, 640 S.W.2d 232 (Tex. 1982); Pyper v. Bond, 2011 UT 45, 258 P.3d 575 (Utah 2011); Tiffany, Real Property § 1550 (3rd ed. 1939).

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Attorneys for U.S. Bank, N.A., solely as Successor Trustee to Bank of America, N.A., successor by merger to LaSalle Bank, N.A., as Trustee to the Holders of the Zuni Mortgage Loan Trust 2006-OA1, Mortgage Loan Pass-Through Certificates Series 2006-OA1

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

5316 CLOVER BLOSSOM CT TRUST; Plaintiff, v. U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN TRUST 2006-OA1, MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1; and CLEAR RECON CORPS, Defendants.	Case No.: A-14-704412-C Dept. No.: XXIV **U.S. BANK, N.A., AS TRUSTEE'S OPPOSITION TO 5316 CLOVER BLOSSOM CT TRUST'S MOTION TO DISMISS COUNTERCLAIM**

U.S. Bank, N.A., solely as Successor Trustee to Bank of America, N.A., successor by merger to LaSalle Bank, N.A., as Trustee to the holders of the Zuni Mortgage Loan Trust 2006-OA1, Mortgage Loan Pass-Through Certificates Series 2006-OA1 (**U.S. Bank**), by and through its attorneys at the law firm AKERMAN LLP, hereby files its Opposition to the Motion to Dismiss filed by 5316 Clover Blossom CT Trust (**Plaintiff**). This Opposition is based upon the Memorandum of Points and Authorities attached hereto, all exhibits attached hereto, and such oral argument as may be entertained by the Court at the time and place of the hearing of this matter.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Nevada Court of Appeals just vacated the Order granting summary judgment in Plaintiff's favor and remanded this case for further fact-finding regarding Bank of America's super-priority-plus tender, Plaintiff's bona fide purchaser status, and the commercial reasonableness of the HOA's foreclosure sale. Undeterred, Plaintiff now moves to dismiss U.S Bank's quiet title and declaratory relief counterclaims, in which U.S. Bank alleges that its Deed of Trust survived the HOA's foreclosure because Bank of America's super-priority-plus tender extinguished the HOA's super-priority lien, the HOA's foreclosure was commercially unreasonable if construed as a super-priority foreclosure, and Plaintiff is not a bona fide purchaser. The Nevada Court of Appeals' Remand Order and the Nevada Supreme Court precedent on which it relies shows Plaintiff's motion to dismiss is meritless. It should be denied.[1]

II. STATEMENT OF RELEVANT FACTS

A. The Johnsons borrow $147,456.00 to purchase a home.

On June 24, 2004, Dennis Johnson and Geraldine Johnson (collectively, **Borrowers**) executed a promissory note (**Note**) in the amount of $147,456.00 to finance the purchase of real property located at 5316 Clover Blossom Court, North Las Vegas, Nevada 89031 (**Property**). The Note was secured by a senior deed of trust encumbering the Property executed in favor of Countrywide Home Loans, Inc. (**Deed of Trust**). U.S. Bank, N.A. as Trustee's Answer to 5316 Clover Blossom CT Trust's Amended Complaint, Counterclaims, and Cross-claims (hereinafter "U.S. Bank's Am. Pldg."), **Ex. A**. This Deed of Trust was assigned to U.S. Bank via an Assignment of Deed of Trust, which was recorded on June 20, 2011. U.S Bank's Am. Pldg., **Ex. B**.

B. The HOA Trustee rejects Bank of America's super-priority-plus payment and forecloses.

The Property is governed by Country Garden Owners Association's (**HOA**) Declaration of Covenants, Conditions, and Restrictions (**CC&Rs**), which require the Property's owner to pay certain

[1] While U.S. Bank recognizes the Nevada Supreme Court held that NRS 116 does not implicate the Due Process Clause in *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage*, 133 Nev. Adv. Op. 5 (Nev. Jan. 26, 2017), to preserve the issue, U.S. Bank contends that statute does violate the Due Process Clause for the reasons stated in the Ninth Circuit's decision in *Bourne Valley v. Wells Fargo Bank, N.A.*, 832 F.3d 1154 (9th Cir. Aug. 12, 2016).

assessments to the HOA. **Exhibit A**. Borrowers defaulted on their obligations to the HOA. As a result, Alessi & Koenig, LLC (**HOA Trustee**), acting on behalf of the HOA, recorded two Notices of Delinquent Assessment Liens on February 22, 2012, at 9:17 AM, both ostensibly encumbering the Property. One Notice stated the Borrowers owed $1,095.50 to the HOA and that the Lien was instituted "[i]n accordance with Nevada Revised Statutes and the Association's" CC&Rs. U.S Bank's Am. Pldg., **Ex. C**. The other Notice, which also stated that it was instituted "[i]n accordance with Nevada Revised Statutes and the Association's" CC&Rs, stated the Borrowers owed $1,150.50 to the HOA. U.S. Bank's Am. Pldg., **Ex. D**.

On April 20, 2012, the HOA Trustee recorded a Notice of Default and Election to Sell Under Homeowners Association Lien, particularly the Lien attached to U.S. Bank's Amended Pleading as Exhibit C (the **Lien**), which stated the total amount due to the HOA was $3,396.00. U.S. Bank's Am. Pldg., **Ex. E**. The HOA Trustee then recorded a Notice of Trustee's Sale on October 31, 2012, which stated the total amount due to the HOA was $4,039.00, and set the sale for November 28, 2012. U.S. Bank's Am. Pldg., **Ex. F**.

In response to the Notice of Sale, Bank of America, N.A. (**Bank of America**), who serviced the loan secured by the Deed of Trust at the time, retained Miles, Bauer, Bergstrom & Winters LLP (**Miles Bauer**) to determine the super-priority amount of the HOA's lien and pay that amount to protect the Deed of Trust. U.S Bank's Am. Pldg., **Ex. G**, at ¶ 4. On November 21, 2012, Miles Bauer sent a letter to the HOA Trustee requesting information regarding the super-priority amount and "offer[ing] to pay that sum upon adequate proof of the same by the HOA." U.S Bank's Am. Pldg., **Ex. G-1**. The HOA Trustee refused to provide the super-priority amount, instead demanding that Bank of America pay off the HOA's entire lien even though the majority of the lien was junior to the Deed of Trust. U.S Bank's Am. Pldg., **Ex. G-2**. However, the payoff ledger the HOA Trustee provided showed the HOA's monthly assessments were $55.00 each, meaning the statutory super-priority amount of the HOA's lien was $495.00. *Id.*

Bank of America nonetheless sent the HOA Trustee a check in the amount of $1,494.50 – which included $999.50 in "reasonable collection costs" in addition to the $495.00 statutory super-priority amount. U.S Bank's Am. Pldg., **Ex. G-3**. The letter enclosing the check made clear that the

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payment was meant to extinguish only the super-priority portion of the HOA's lien, stating specifically that the check was to "satisfy [Bank of America]'s obligations as a holder of the first deed of trust against the property." *Id.* The HOA Trustee unjustifiably rejected this super-priority-plus payment. *Id.*, at ¶ 9.

Instead of accepting this payment, the HOA Trustee foreclosed on the HOA's sub-priority lien on January 26, 2013, selling an encumbered interest in the Property to Plaintiff for $8,200.00. U.S Bank's Am. Pldg., **Ex. H**. The Lien foreclosed stated that it was instituted "[i]n accordance with Nevada Revised Statutes and the Association's" CC&Rs. U.S Bank's Am. Pldg., **Ex. C**. Those CC&Rs stated that no "enforcement of any lien provision [in the CC&Rs] shall defeat or render invalid" a senior deed of trust. *See* **Ex. A**, at § 9.1.

C. <u>Procedural History</u>

Plaintiff filed its Complaint on July 25, 2014, seeking to quiet title to the Property. Plaintiff moved for summary judgment on May 18, 2015, arguing that the recitals contained in the HOA's Trustee's Deed Upon Sale were sufficient standing alone to show that it obtained title to the Property free and clear at the HOA's foreclosure sale. In its opposition, U.S. Bank argued that Bank of America's super-priority-plus payment extinguished the HOA's super-priority lien before the sale, meaning Plaintiff took title subject to the Deed of Trust, and that Plaintiff was not a bona fide purchaser. On September 10, 2015, this Court granted Plaintiff's motion for summary judgment and quieted title in Plaintiff's favor.

U.S. Bank appealed, and the Nevada Court of Appeals vacated the judgment in Plaintiff's favor and remanded the case to this Court. *See U.S. Bank, N.A., as Trustee v. 5316 Clover Blossom CT Trust*, Case No. 68915 (Nev. Ct. App. June 30, 2017). The Court of Appeals explained that the recitals in the Trustee's Deed Upon Sale were not conclusive, and that this Court should resolve the legal and factual issues surrounding the super-priority-plus tender, commercial reasonableness of the HOA's foreclosure sale, and Plaintiff's bona fide purchaser status before determining the effect of the HOA's foreclosure sale. *See id.*, at 2.

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III. LEGAL STANDARDS

In a motion to dismiss under NEV. R. CIV. P. 12(b)(5), "[t]he standard of review is rigorous as [the court] 'must construe the pleading liberally and draw every fair intendment in favor of the [non-moving party].'" *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 844, 858 P.2d 1258, 1260 (1993) (quoting *Squires v. Sierra Nev. Educational Found.*, 107 Nev. 902, 903, 823 P.2d 256, 257 (1991)). Further, "[a]ll factual allegations of the complaint must be accepted as true." *Breliant*, 109 Nev. at 844. Claims against a party "will not be dismissed for failure to state a claim 'unless it appears beyond a doubt that the [claimant] could prove no set of facts which, if accepted by the trier of fact, would entitle him [or her] to relief.'" *Id.* (quoting *Edgar v. Wagner*, 101 Nev. 226, 228, 699 P.2d 110, 112 (1985)). Finally, "[t]he test for determining whether the allegations of a complaint are sufficient to assert a claim for relief is whether the allegations give fair notice of the nature and basis of a legally sufficient claim and the relief requested." *Id.*

IV. ARGUMENT

This Court should deny Plaintiff's motion to dismiss for seven reasons. **First**, the Nevada Court of Appeals just remanded this case for additional fact-finding regarding the arguments U.S. Bank raised in its counterclaims. **Second**, U.S. Bank's counterclaims satisfy Nevada's liberal notice-pleading standard, as U.S. Bank clearly alleged that its Deed of Trust survived the HOA's foreclosure sale, entitling it to a declaration that the Deed of Trust still encumbers the Property. **Third**, Plaintiff's argument that the foreclosure-deed recitals alone show that it has free and clear title has been rejected by the Nevada Court of Appeals in this case specifically, and by the Nevada Supreme Court in *Shadow Wood*. **Fourth**, Bank of America's super-priority-plus tender extinguished the HOA's super-priority lien before the HOA's foreclosure sale. **Fifth**, the HOA elected to foreclose on only the sub-priority portion of its lien, which could not extinguish the Deed of Trust. **Sixth**, if the sale is construed as a super-priority foreclosure, it is void because it was commercially unreasonable for the HOA to foreclose on its super-priority lien after rejecting Bank of America's payment for an amount much greater than the super-priority amount. **Seventh**, Plaintiff's bona fide purchaser status is irrelevant because no super-priority lien was foreclosed, and even if it were relevant, Plaintiff is not a bona fide purchaser because it did not satisfy his inquiry duty.

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A. The Nevada Court of Appeals just remanded with instructions to resolve the factual issues in this case.

Plaintiff's motion to dismiss seemingly ignores the Nevada Court of Appeals' remand of this case for further fact-finding regarding Bank of America's super-priority-plus tender, the commercial reasonableness of the HOA's foreclosure sale, and Plaintiff's bona fide purchaser status. *See U.S. Bank*, Case No. 68915, at 2. That Remand Order alone shows that Plaintiff's claim that U.S. Bank's tender, commercial reasonableness, and bona fide purchaser arguments "have been determined to be invalid arguments by the Nevada Supreme Court" is utterly meritless. *See id.*; *see* Pltf's MTD, at 4. Plaintiff's motion is a waste of this Court's time, and should be denied.

B. U.S. Bank's counterclaims are sufficiently pled.

A quiet title action "may be brought by any person against another who claims an estate or interest in real property, adverse to the person bringing the action, for the purpose of determining such adverse claim." NRS 40.010. U.S. Bank's counterclaims properly allege that Plaintiff has an interest in the Property adverse to U.S. Bank's interest, and that U.S. Bank is entitled to a declaration that its interest is senior to Plaintiff's adverse interest. *See* U.S. Bank's Am. Pldg., at ¶ 34. Further, the counterclaims set forth that U.S. Bank's Deed of Trust was not extinguished by the HOA's foreclosure sale because Bank of America satisfied the super-priority portion of the HOA's lien before the sale, the sale was commercially unreasonable, and that Plaintiff is not a bona fide purchaser. *Id.*, at ¶¶ 21-30. Notably, these are the same arguments the Nevada Court of Appeals just held required additional factual development in its Order remanding this case. *See U.S. Bank*, Case No. 68915, at 2. These allegations sufficiently set forth quiet title and declaratory relief claims under Nevada's liberal notice-pleading standard. *See Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984) (explaining that courts are to "liberally construe pleadings to place into issue matters which are fairly noticed to the adverse party"); *Branda v. Sanford*, 97 Nev. 643, 648, 637 P.2d 1223, 1227 (1981).

C. The foreclosure deed recitals are irrelevant to U.S. Bank's tender, commercial reasonableness, and bona fide purchaser arguments.

Plaintiff's meritless motion simply recycles arguments that Nevada's appellate courts have rejected in this case and many others. Plaintiff relies on the minimal recitals in the Trustee's Deed Upon Sale that, pursuant to NRS 116.31164 and 1116.31166, are allegedly "conclusive proof" that

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"that title is vested in Plaintiff and not subject to attack from" U.S. Bank. Pltf's MTD, at 4-5. As discussed above, this argument is untenable considering the Nevada Court of Appeals just remanded this case for further "attack[s]" on Plaintiff's purported title. *See U.S. Bank*, Case No. 68915, at 2. And the Nevada Supreme Court soundly rejected Plaintiff's argument that foreclosure-deed recitals are the end-all-be-all in these HOA-lien cases in *Shadow Wood*.

The *Shadow Wood* Court held the "conclusive" recitals found in association foreclosure deeds do not bar mortgagees or homeowners from challenging the validity of an association's foreclosure sale. *Shadow Wood Homeowners Ass'n v. New York Cmty. Bancorp, Inc.*, 132 Nev. Adv. Op. 5, 366 P.3d 1105, 1112 (2016). The Court noted that the deed recitals outlined in NRS 116.3116 only concern "default, notice, and publication of the" notice of sale, and thus do not provide any presumption regarding other aspects of the foreclosure, such as the commercial reasonableness of the sale or the effect of a pre-foreclosure payment from a mortgagee or homeowner. *Id.*, at 1110. The Court further held that the recitals are not conclusive to even the matters recited, such as whether the homeowner was in default. *Id.* ("[W]hile it is possible to read a conclusive recital statute like NRS 116.31166 as conclusively establishing a default justifying a foreclosure when, in fact, no default occurred, such a reading would be breathtakingly broad and is probably legislatively unintended."). The Court thus rejected the HOA-sale purchaser's argument that the deed recitals alone defeated the action to set aside the subject foreclosure sale. *Id.*, at 1111.

U.S. Bank's counterclaims assert that the Deed of Trust survived the HOA's foreclosure sale because of Bank of America's super-priority-plus tender, the HOA's decision to foreclose on only the sub-priority portion of its lien, and the commercial unreasonableness of the HOA's sale if it is construed as a super-priority sale. U.S. Bank's Am. Pldg., at ¶¶ 21-30. The recitals found in the Trustee's Deed Upon Sale are irrelevant to these arguments. *See Shadow Wood*, 366 P.3d at 1112. Accordingly, Plaintiff's motion to dismiss, which relies on the deed recitals to "conclusively" show the foreclosure sale was valid, should be denied.

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D. U.S. Bank pled and attached evidence of Bank of America's super-priority-plus tender that extinguished the HOA's super-priority lien.

This Court should deny Plaintiff's motion to dismiss because U.S. Bank alleged that Bank of America tendered an amount much greater than the super-priority amount to the HOA Trustee before the HOA's foreclosure sale, and in fact attached evidence of this super-priority-plus tender to its counterclaims. U.S. Bank's Am. Pldg., **Exs. G-1** & **G-3**. Further, Bank of America was not required to record its tender for the tender to be effective against Plaintiff.

1. Bank of America's super-priority-plus tender extinguished the HOA's super-priority lien.

Tender is complete when "the money is offered to a creditor who is entitled to receive it." *Cladianos v. Friedhoff*, 69 Nev. 41, 45, 240 P.2d 208, 210 (1952); *see also Ebert v. W. States Refining Co.*, 75 Nev. 217, 222, 337 P.2d 1075, 1077 (1959). After the money owed is offered to the creditor, "nothing further remains to be done, and the transaction is completed and ended." *Id.* Other jurisdictions agree that tender is defined as "an offer of payment that is coupled either with no conditions or only with conditions upon which the tendering party has a right to insist." *Fresk v. Kramer*, 99 P.3d 282, 286-87 (Or. 2004); *see also* 74 Am. Jur. 2d *Tender* § 22 (2014). The tender doctrine is designed "**to enable the debtor to** … relieve his property of encumbrance by **offering his creditor** all that he has any right to claim," which "does not mean that the debtor must offer an amount beyond reasonable dispute, but it means **the amount due, — actually due**." *Dohrman v. Tomlinson*, 399 P.2d 255, 258 (Id. 1965) (emphasis added).

The Nevada Supreme Court has confirmed that an association's super-priority lien is limited to nine months of delinquent assessments. *Horizons at Seven Hills Homeowners Ass'n v. Ikon Holdings, LLC*, 132 Nev. Adv. Op. 35, 373 P.3d 66, 73 (2016) ("[W]e conclude the superpriority lien … is limited to an amount equal to the common expense assessments due during the nine months before foreclosure."). And the Supreme Court clearly stated that a mortgagee's pre-foreclosure payment of the super-priority amount prevents the deed of trust from being extinguished. *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. Adv. Op. 75, 334 P.3d 408, 414 (2014) ("[A]s junior lienholder, [the holder of the first deed of trust] could have paid off the [HOA] lien to avert loss of its security[.]"); *id.*, at 413 ("As a practical matter, secured lenders will most likely **pay the [9]**

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months' assessments demanded by the association **rather than having the association foreclose on the unit**.") (emphasis added). Coupling the Nevada Supreme Court's holdings in *SFR Investments* and *Ikon Holdings* shows that a mortgagee's tender of nine months' delinquent assessments to an association extinguishes the association's super-priority lien.

Bank of America took that exact action in this case. To satisfy the super-priority portion of the HOA's lien, Bank of America, through counsel at Miles Bauer, sent a letter to the HOA Trustee requesting information regarding the super-priority amount and "offer[ing] to pay that sum upon adequate proof of the same by the HOA." U.S Bank's Am. Pldg., **Ex. G-1**. The HOA Trustee refused to provide the super-priority amount, instead demanding that Bank of America pay off the HOA's entire lien, even though the majority of the lien was junior to the Deed of Trust. U.S Bank's Am. Pldg., **Ex. G-2**. However, the payoff ledger the HOA Trustee provided showed the HOA's monthly assessments were $55.00 each, meaning the statutory super-priority amount of the HOA's lien was $495.00. *Id.*

Bank of America nonetheless sent the HOA Trustee a check in the amount of $1,494.50 – which included $999.50 in "reasonable collection costs" in addition to the $495.00 statutory super-priority amount. U.S Bank's Am. Pldg., **Ex. G-3**. The letter enclosing the check made clear that the payment was meant to extinguish only the super-priority portion of the HOA's lien and nothing else, stating specifically that the check was to "satisfy [Bank of America]'s obligations as a holder of the first deed of trust against the property." *Id.*

While the HOA Trustee unjustifiably rejected Bank of America's super-priority-plus payment, that tender of the amount "actually due" (and more) nonetheless extinguished the HOA's super-priority lien. *See Dohrman*, 399 P.2d at 258 (explaining that an effective tender "does not mean that the debtor must offer an amount beyond reasonable dispute, but it means the amount due, — actually due."). Because the super-priority lien was extinguished before the HOA's foreclosure sale, Plaintiff's interest in the Property, if any, is subject to the Deed of Trust. *See SFR Investments*, 334 P.3d at 413 ("As a practical matter, secured lenders will most likely pay the [9] months' assessments demanded by the association rather than having the association foreclose on the unit.").

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2. Bank of America did not have to record the tender.

Plaintiff contends that Bank of America's super-priority-plus tender was not effective as to Plaintiff because it was not recorded. Pltf's MTD, at 18-27. Plaintiff first claims the super-priority-plus tender was actually an equitable subrogation, not a tender, which means the super-priority lien was not extinguished, but instead assigned to U.S. Bank through operation of equity. *Id.*, at 21-22. And because this "equitable assignment" was effectively a conveyance of land, Plaintiff contends the assignment must be recorded to be effective against bona fide purchasers. *Id.* Plaintiff then argues that even if the tender was not an equitable subrogation that assigned the super-priority lien to U.S. Bank, it was nonetheless a "surrender," "discharge," or "release" that must be recorded to be effective against subsequent bona fide purchasers. Pltf's MTD, at 23-24.

As a threshold matter, these arguments are completely irrelevant unless Plaintiff is a bona fide purchaser, as the recording statutes only protect bona fide purchasers. *See* NRS 111.325; *Berge v. Fredericks*, 95 Nev. 183, 185, 591 P.2d 246, 248 (1979) ("The protection of the recording act is afforded only to" bona fide purchasers.). Plaintiff is not a bona fide purchaser, and Plaintiff certainly cannot prove it is a bona fide purchaser on a motion to dismiss, as will be explained more fully in Section G below. But even if Plaintiff were a bona fide purchaser, Bank of America's tender is still effective against Plaintiff because it was not required to be recorded.

a. Bank of America's tender was not an "equitable subrogation."

Equitable subrogation is an equitable remedy designed to protect a creditor's lien priority. *Houston v. Bank of America*, 119 Nev. 485, 487, 78 P.3d 71, 74 (2003). This would be U.S. Bank's remedy to assert – a remedy U.S. Bank did not assert because it is irrelevant to this case. However, Plaintiff believes U.S. Bank should have asserted it because Plaintiff believes U.S. Bank satisfies the elements of this unasserted remedy. Pltf's MTD, at 21-22. Specifically, Plaintiff's straw man argument is as follows: (1) under NRS 111.325, unrecorded conveyances are void as against subsequent bona fide purchasers; (2) under NRS 111.010, a "conveyance" includes assignments, and (3) an equitable subrogation equitably "assigns" the senior lien, meaning it is a conveyance that must be recorded to be effective against subsequent bona fide purchasers. *Id.*, at 21-23. According to Plaintiff, U.S. Bank's super-priority-plus tender amounted to an "equitable subrogation," and because

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subrogation is sometimes termed an "equitable assignment," this is an "assignment" that amounts to a "conveyance" that must be recorded to be effective against subsequent bona fide purchasers under NRS 111.325. *Id.* Even assuming that Plaintiff has standing to assert an equitable subrogation claim for U.S. Bank (it does not), and it is a bona fide purchaser (it is not), U.S. Bank's tender did not amount to an equitable subrogation.

Equitable subrogation does not apply to statutorily-created liens, like the HOA's lien here. *In re Fontainebleau Las Vegas Holdings, LLC*, 128 Nev. Adv. Op. 53, 289 P.3d 1199, 1208 (2012). In *Fontainebleau*, the Nevada Supreme Court held that equitable subrogation could not be used by mortgagees against mechanics' lienholders. *Id.*, at 1212. Like an association's super-priority lien, the mechanics' liens at issue in *Fontainebleau* were part of a "specific statutory scheme whereby [the] lien is afforded priority over a subsequent lien, mortgage, or encumbrance" to further a certain policy of the Legislature: in the mechanics' lien context, "payment for work and materials provided for construction or improvements on land," and in the association super-priority lien context, to ensure that associations receive nine months' delinquent assessments. *See id.* Because mechanics' liens are part of a "specific statutory scheme," the Nevada Supreme Court held they have "no place in equity jurisprudence," as "equitable principles will not justify a court's disregard of statutory requirements." *Id.* Accordingly, the *Fontainebleau* Court held that equitable subrogation cannot be applied against statutorily-created mechanics' liens.

Fontainebleau applies here – equitable subrogation cannot be applied against statutorily-created super-priority liens. The plain language of NRS 116.3116(1) is clear – only an association can have a super-priority lien. *See* NRS 116.3116(1) ("[t]he **association** has a lien on a unit . . . .") (emphasis added). If equitable subrogation could apply to these super-priority liens, any tendering party – whether that be a bank, unit owner, or another secured party – would end up holding an association's super-priority lien after its super-priority tender, as that lien would be "equitably assigned" to the tendering party after the tender. *American Sterling Bank v. Johnny Mgmt. LV, Inc.*, 126 Nev. 423, 429, 245 P.3d 535, 539 (2010) (explaining that subrogation revives the discharged lien and assigns the interest to the party that pays the lien). This result would violate the plain language of

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NRS 116.3116, which states that only a homeowners association can hold a lien for unpaid assessments.

Just as equitable subrogation cannot apply to statutory mechanics' liens, it cannot apply to statutory association liens under *Fontainebleau*. Consequently, Bank of America's super-priority-plus tender did not "equitably assign" the HOA's super-priority lien to Bank of America or U.S. Bank, and thus did not have to be recorded to be effective against subsequent bona fide purchasers.

b. Bank of America was not required to record the super-priority-plus tender.

Plaintiff next contends that even if Bank of America's tender did not amount to an equitable subrogation, it was still a "surrender," "discharge," or "release" that must be recorded to be effective against subsequent bona fide purchasers. Pltf's MTD, at 23-24. Plaintiff explains that an "extinguishment" of a lien is included in the definition of a "conveyance" under NRS 111.010, as conveyance includes instruments through which an interest in land is "surrendered." *Id.*, at 24. Plaintiff fails to recognize that no "instrument" extinguished the HOA's super-priority lien here, rendering NRS 111 inapplicable.

Nevada's federal courts have rejected this "recorded tender" argument on this very basis. *U.S. Bank, N.A. v. SFR Investments Pool 1, LLC*, 2016 WL 4473427, at *11 (D. Nev. Aug. 24, 2016). In *U.S. Bank*, the court held that Bank of America's super-priority tender extinguished the subject super-priority lien, and "reject[ed] the arguments that the fact of the tender is unenforceable under NRS 111.010, 106.220, and 106.260 because it was not recorded." *Id.* The court explained that Bank of America's tender did not result in a conveyance from the association to Bank of America of the super-priority lien, but rather extinguished the super-priority lien by operation of Nevada law. *Id.* The court thus held that NRS 111.010 does not apply because that "statute says nothing about extinguishment of or subordination of interests occurring by operation of law, and there is no evidence [the HOA] ever gave [Bank of America] any written instrument surrendering any interest in the Property." *Id.*

Like the HOA-sale purchaser in *U.S. Bank*, Plaintiff here cites to wholly inapplicable statutes to argue that Bank of America's tender must be recorded to be effective against subsequent bona fide purchasers. *See id.*; *see* Pltf's MTD, at 18-27. Plaintiff's argument fails, just as the HOA-sale purchaser's argument failed in *U.S. Bank*. There is no "instrument in writing" that conveyed the

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HOA's interest to Bank of America or U.S. Bank here. Rather, under operation of Nevada law, Bank of America's super-priority-plus tender – a check and a letter, not an "instrument" – extinguished the HOA's super-priority lien. *See Cladianos*, 69 Nev. 41 at 45 (holding that tender is complete when "the money is offered to a creditor who is entitled to receive it"); *SFR Investments*, 334 P.3d at 413 ("As a practical matter, secured lenders will most likely pay the [9] months' assessments demanded by the association rather than having the association foreclose on the unit."). Because no "instrument" extinguished the HOA's super-priority lien, NRS 111 does not apply here.

Plaintiff next cites NRS 106.260 for the proposition that "all discharges of liens must be recorded," emphasizing in bold the clause "a duly acknowledged discharge or release of such mortgage or lien must be recorded." Pltf's MTD, at 26. But the clause directly preceding the clause Plaintiff emphasized reads "[i]n the event that the mortgage or lien has been recorded by a microfilm or other photographic process, a marginal release may not be used," followed by the section Plaintiff quotes: "and a duly acknowledged discharge or release of such mortgage or lien must be recorded." *See* NRS 106.260. Obviously, Bank of America's tender was not "a microfilm or other photographic process," it was two pieces of paper, a letter and a check. *See* U.S. Bank's Am. Pldg., **Ex. G-3**. Antiquated statutes discussing microfilm are irrelevant to the efficacy of Bank of America's tender, even if such a tender could be considered "an instrument" that causes a change in priority.

Next, Plaintiff argues that any instrument which "would have the effect of changing the priority of the HOA's" must be recorded to be effective under NRS 106.220. Pltf's MTD, at 21. However, NRS 106.220 states that such instruments are not enforceable **only** "under this chapter or Chapter 107 of NRS unless and until it is recorded." NRS 106.220. The statute makes no mention of NRS 116, the statute governing association foreclosure sales. *See id.* Plaintiff also fails to mention that NRS 106 only requires the lienholder to record a release of its lien upon that lien's extinguishment. NRS 106.290 ("the **mortgagee shall cause** a discharge of the mortgage to be recorded pursuant to NRS 106.260 or 106.270," and imposing statutory penalties for a **mortgagee that fails to record** the release of a mortgage **it held** that has been extinguished) (emphasis added).[2] NRS 106.220 is thus irrelevant

[2] This highlights an important point. The extinguished super-priority lien was the HOA's lien to release. Bank of America did not have authority to release a lien that was not its own. To the extent a release of the super-priority lien should have been recorded, it was incumbent on the HOA or HOA Trustee to do so. While there is no specific provision in NRS 116

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to the enforceability of a tender under NRS 116, even if such a tender could be considered "an instrument" that causes a change in priority.

Nonetheless, Plaintiff contends Bank of America or U.S. Bank could have simply recorded a one-page notice for $17.00 stating that the super-priority lien was extinguished. Pltf's MTD, at 26. This fails to account for the costs of defending a potential slander of title claim brought by the HOA, who rejected Bank of America's tender. The HOA knew, or should have known, that its super-priority lien was extinguished before the foreclosure sale, and it chose not to record a lien release. The HOA and HOA Trustee may be liable to Plaintiff for their failure to record a release, but that failure should not result in the extinguishment of the Deed of Trust after Bank of America took the exact action required to protect the Deed of Trust – tendering the super-priority amount, and more, of the HOA's lien.

Ultimately, whether Bank of America's tender was required to be recorded is irrelevant, as Plaintiff is not entitled to protection from the recording statutes because it is not a bona fide purchaser. Nor do the recording statutes require that mortgagees record their super-priority tenders for those tenders to be effective against subsequent bona fide purchasers, as a tender is not a conveyance of land. Under any of these scenarios, Bank of America's super-priority-plus tender discharged the HOA's super-priority lien before the sale, and thus protected U.S. Bank's Deed of Trust from extinguishment. Accordingly, Plaintiff's motion to dismiss should be denied.

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regarding who must record a release of a lien upon payment, NRS 117, which sets forth the statutory scheme governing another form of common-interest communities, condominiums, provides that the condominium association must record a satisfaction of lien once a lien for delinquent assessments is satisfied. NRS 117.070(1) ("Upon payment of the assessment and charges … the management body shall cause to be recorded a further notice stating the satisfaction and the release of the lien thereof."). This comes as no surprise, as it is ubiquitous throughout Nevada statutory lien law that the lien claimant is responsible for recording a lien release upon payment, not the party who paid off the lien. *See, e.g.*, NRS 106.290 ("the mortgagee shall cause a discharge of the mortgage to be recorded pursuant to NRS 106.260 or 106.270," and imposing statutory penalties for a mortgagee that fails to record the release of a mortgage that has been extinguished); NRS 108.668 (requiring hospital lien claimant to release lien upon payment or face statutory penalties); NRS 108.2437 (after a mechanics' lien is discharged, "the lien claimant shall cause to be recorded a discharge or release of the notice of lien[.]"); NRS 108.2433 (a statutory lien may be discharged if it is "signed by the lien claimant or the lien claimant's personal representative or assignee in the presence of the recorder or the recorder's deputy, acknowledging the satisfaction of or value received for the notice of lien and the debt secured thereby").

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E. The HOA foreclosed on only its sub-priority lien.

Plaintiff's motion should be denied because U.S. Bank alleged that the HOA foreclosed on only the sub-priority portion of its lien. Under NRS 116.3116, an association's lien is split "into two pieces, a superpriority piece and a sub-priority piece." *SFR Investments*, 334 P.3d at 410. "The superpriority piece" is "prior to a first deed of trust." *Id.* "The subpriority piece, consisting of all other HOA fees or assessments, is subordinate to a first deed of trust." *Id.*

The Nevada Supreme Court has made clear that an association can choose to foreclose on either the sub-priority or super-priority portion of its lien. *See Shadow Wood*, 366 P.3d at 1116 ("And **if** the association forecloses on its superpriority lien portion, the sale also would extinguish other subordinate interests in the property.") (emphasis added); *Stone Hollow Ave. Trust v. Bank of America, N.A.*, 382 P.3d 911 (Table), 2016 WL 4543202 (Nev. 2016) (vacated on other grounds) (*Stone Hollow II*). An association's foreclosure of its sub-priority lien does not extinguish a senior deed of trust. *See Stone Hollow*, 382 P.3d at 911 ("[T]he superpriority portion of [the association's] lien had been discharged, leaving only the subpriority portion to be foreclosed. Because [the] deed of trust was superior to that portion of [the association's] lien, the deed of trust was not extinguished by virtue of the sale[.]"); *Nationstar Mortgage, LLC v. SFR Investments Pool 1, LLC*, 184 F.Supp. 3d 853, 859 (D. Nev. 2016) ("[A] subsequent HOA sale based only on the subpriority amounts transfers title subject to the first mortgage."); *Laurent v. JP Morgan Chase, N.A.*, 2016 WL 1270992, at *7 (D. Nev. March 31, 2016) ("Because Palisades foreclosed on only its sub-priority lien, Chase has met its burden of showing that it has superior title to Laurent. As such, I grant Chase's motion for summary judgment.").[3]

Here, U.S. Bank alleged that the HOA elected to foreclose on only its sub-priority lien, which is sufficient, standing alone, to defeat Plaintiff's motion to dismiss. *See* U.S. Bank's Am. Pldg., at ¶

[3] *See also Augusta Investment Management, LLC v. The Bank of New York Mellon*, A-14-711294-C, Summary Judgment Order, at 6 (Nev. Dist. Ct. November 9, 2016) (Kishner, J.) ("The actions of Red Rock and the HOA indicate that, under the totality of the circumstances, the parties intended to conduct a sale of the HOA's subpriority lien rights."); *A Oro, LLC v. Green Tree Servicing, LLC*, A-14-705977-C, Summary Judgment Order, at 6 (Nev. Dist. Ct. June 8, 2017) (Leavitt, J.) (granting lender's summary judgment motion, explaining that the "Defendants have produced undisputed evidence and testimony to confirm that the HOA Lien Sale was a subpriority assessment lien sale."). Copies of these Orders are attached as **Exhibits B** & **C**.

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21; *see also Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 844 858 P.2d 1258, 1260 (1993) (explaining that "[a]ll factual allegations of the complaint must be accepted as true" when reviewing a motion to dismiss). Supporting that allegation is the HOA's foreclosure notices. The HOA's Notice of Delinquent Assessment Lien stated that it was instituted "[i]n accordance with Nevada Revised Statutes and the Association's" CC&Rs. U.S Bank's Am. Pldg., **Ex. C**. Those CC&Rs stated that no "enforcement of any lien provision [in the CC&Rs] shall defeat or render invalid" a senior deed of trust. *See* **Ex. A**, at § 9.1.

To be clear, U.S. Bank is not alleging that the HOA "waived" its super-priority lien rights, a straw man that Plaintiff erects and then destroys to avoid U.S. Bank's actual argument. *See* Pltf's MTD, at 28-29. That actual argument is that the HOA chose to foreclose on its sub-priority lien, which it had every right to do under Nevada law. *See, e.g.*, *Shadow Wood*, 366 P.3d at 1116; *Stone Hollow*, 382 P.3d at 911; *Nationstar Mortgage*, 184 F.Supp. 3d at 859; *Laurent v. JP Morgan Chase, N.A.*, 2016 WL 1270992 at *7. The Nevada Supreme Court's holding in *SFR Investments* that an association's foreclosure of its super-priority lien could extinguish a senior deed of trust does not mean every association's foreclosure has such an effect – only proper super-priority foreclosures do. While U.S. Bank expects that discovery will yield additional evidence supporting its intended sub-priority sale argument, U.S. Bank's allegation that the HOA foreclosed on only its sub-priority lien is all that is required to defeat Plaintiff's motion to dismiss.

F. <u>The HOA's sale is invalid because it was commercially unreasonable.</u>

Plaintiff next argues that U.S. Bank's counterclaims should be dismissed because U.S. Bank "failed to allege any instance of fraud, oppression or unfairness," which is required for the HOA's sale to be commercially unreasonable. Pltf's MTD, at 13-15. Plaintiff again ignores the explicit allegations in U.S. Bank's counterclaims, which state that the HOA's sale was commercially unreasonable because of the grossly inadequate price **in addition to** the HOA Trustee's unjustified rejection of Bank of America's super-priority-plus tender and the way it conducted the sale. U.S. Bank's Am. Pldg., at ¶¶ 22-30. Through these allegations, U.S. Bank has sufficiently pled that the sale is void as commercially unreasonable if it is construed as a super-priority foreclosure. *See Shadow Wood*, 366 P.3d at 1112 (explaining that an HOA foreclosure sale must be set aside if the price is grossly

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inadequate and there is evidence of unfairness with respect to the sale). Accordingly, Plaintiff's motion should be denied.

G. Plaintiff's interest in the Property, if any, is subject to U.S. Bank's Deed of Trust.

Plaintiff spends much of its motion arguing that its title to the Property is unassailable because it is a bona fide purchaser, and therefore U.S Bank's counterclaims, which challenge Plaintiff's purported title, must be dismissed. *See generally*, Pltf's MTD. However, Plaintiff's bona fide purchaser status is irrelevant, as that equitable doctrine cannot protect it from the legal effect of Bank of America's super-priority-plus tender or the HOA's decision to foreclose on only its sub-priority lien. More importantly, even if bona fide purchaser status could protect a foreclosure-sale purchaser from a super-priority tender, U.S. Bank specifically pled that Plaintiff is not a bona fide purchaser, and it is Plaintiff's burden to prove it is a bona fide purchaser, which it cannot do in a motion to dismiss.

1. The bona fide purchaser doctrine cannot protect Plaintiff from Bank of America's super-priority-plus tender.

The Nevada Supreme Court recently held that the bona fide purchaser doctrine is irrelevant in cases where, like here, the senior mortgagee tendered the super-priority amount before the foreclosure sale. *Stone Hollow Ave. Trust v. Bank of America, N.A*, 382 P.3d 911 (Table), 2016 WL 4543202 (Nev. Aug. 11, 2016) (*Stone Hollow II*). While *Stone Hollow II* was vacated on separate grounds by the *en banc* Nevada Supreme Court, the Court has not retreated from its holding that a valid super-priority tender extinguishes an association's super-priority lien, and that whether the HOA-sale purchaser is a bona fide purchaser is irrelevant in super-priority tender cases.

In *Stone Hollow*, the plaintiff purchased a property at an association's foreclosure sale and then filed suit against the mortgagee to quiet title. The trial court entered summary judgment in favor of Bank of America, and the HOA-sale purchaser appealed. *Stone Hollow Ave. Trust v. Bank of America, N.A*, 2016 WL 1109167, at *1 (Nev. Mar. 18, 2016) (*Stone Hollow I*). On appeal, the Supreme Court initially reversed the trial court, finding that the trial court failed to consider the HOA-sale purchaser's bona fide purchaser status. *Id*. Bank of America moved for rehearing, arguing that its super-priority tender discharged the super-priority lien, rendering inapplicable equitable doctrines like bona fide

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purchaser. The three-judge panel agreed—reversing its prior ruling and affirming the trial court's grant of summary judgment in Bank of America's favor. *Stone Hollow II*, 2016 WL 4543202 at *1. The *Stone Hollow II* Court held that the association's rejection of the full super-priority tender was "unjustified" and "[w]hen rejection of a tender is unjustified, the tender is effective to discharge the lien." *Id.* Whether the HOA-sale purchaser was irrelevant. *Id.*

Following *Stone Hollow II*, the HOA-sale purchaser filed a petition for reconsideration *en banc*. Without disturbing the three-judge panel's holdings regarding the legal effect of a valid tender or the irrelevance of the bona fide purchaser doctrine, the Supreme Court vacated its order and again decided to reverse the trial court, this time solely on the grounds that there was a sufficient factual dispute over the legal adequacy of the mortgagee's tender to preclude summary judgment. *See Stone Hollow Avenue Trust v. Bank of America, N.A.*, No. 64955, 2016 (Nev. Dec. 21, 2016) (*Stone Hollow III*).[4] Notably, in the dissent, Justice Pickering wrote that the Court's previous order should not be reconsidered based on tender because the HOA-sale purchaser had not made an argument regarding the adequacy of tender, but rather had solely raised the issue of whether it was a bona fide purchaser. Justice Pickering made clear that "appellant's putative bona fide purchaser status is irrelevant under [the] prevailing view" that "a tender of the lien amount invalidates a foreclosure sale to the extent that the sale purports to extinguish the tenderer's interest in the property." *Id.* (citing to 1 Grant S. Nelson, Dale A. Whitman, Ann M. Burkhart & R. Wilson Freyermuth, *Real Estate Finance Law* § 7:21 (6th ed. 2014)). The *Stone Hollow* Trilogy makes clear the bona fide purchaser doctrine does not protect Plaintiff from the legal effect of Bank of America's tender or the HOA's decision to foreclose on only its sub-priority lien.

2. Bona fide purchaser is an affirmative defense that Plaintiff cannot prove.

Whether a party is a bona fide purchaser is an affirmative defense for which the asserting party bears the burden of proof. NRS 111.325. Plaintiff thus has the burden of proof in establishing that it is a bona fide purchaser. *Berge v. Fredericks*, 95 Nev. 183, 185, 591 P.2d 246, 248 (1979) (explaining that the putative bona fide purchaser "was required to show that legal title had been transferred to her

[4] A copy of this Order is attached as **Exhibit D**.

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before she had notice of the prior conveyance to appellant"). Plaintiff has not and cannot offer proof that it was a bona fide purchaser at the motion to dismiss stage.

A subsequent purchaser is bona fide under common-law principles if it takes property "for a valuable consideration and without notice of the prior equity, and **without notice of facts which upon diligent inquiry would be indicated and from which notice would be imputed to him, if he failed to make such inquiry**." *Shadow Wood*, 366 P.3d at 1115 (citing *Bailey v. Butner*, 64 Nev. 1, 19, 176 P.2d 226, 234 (1947) (emphasis added)). Under Nevada law, "[c]onstructive notice is that which is imparted to a person upon strictly legal inference of matters which he necessarily ought to know, or which, by the exercise of ordinary diligence, he might know." *Id.* (quoting *Allison Steel Mfg. Co. v. Bentonite, Inc.*, 86 Nev. 494, 497, 471 P.2d 666, 668 (1970)).

A party cannot qualify as a bona fide purchaser if it was under a duty of inquiry that it fails to discharge before purchasing the property at issue. *Berge*, 95 Nev. at 189. The *Berge* Court explained that this duty arises:

> when the circumstances are such that a **purchaser is in possession of facts which would lead a reasonable man in his position to make an investigation** that would advise him of the existence of prior unrecorded rights. He is said **to have constructive notice of their existence** whether he does or does not make the investigation. The authorities are unanimous in holding **that he has notice of whatever the search would disclose**.

Id. (emphasis added). The Nevada Supreme Court has clarified that "[a] recital in an instrument of record charges subsequent purchasers with notice of all material facts which an inquiry suggested by that recital would have disclosed." *Allison Steel*, 86 Nev. at 498. "When **anything** appears in" an instrument of record "sufficient to put a prudent man on inquiry which if prosecuted with ordinary diligence would lead to actual knowledge of **some right or title in conflict with the title he is about to purchase**, it is his duty to make inquiry, and **if he does not do so he is chargeable with actual knowledge of what the inquiry would have disclosed**." *Id.* (emphasis added).

Here, the recorded Deed of Trust contains the following provision: "If Borrower does not pay [HOA] dues and assessments when due, **then Lender may pay them**." U.S. Bank's Am. Pldg., **Ex. A** (emphasis added). This provision, clearly stating that the Deed of Trust beneficiary could take the exact action Bank of America took in this case – tendering payment for the super-priority portion of

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the HOA's lien – put Plaintiff on inquiry notice of Bank of America's super-priority-plus tender. *See Allison Steel*, 86 Nev. at 498. Consequently, Plaintiff is charged with "actual knowledge" of that tender unless it discharged its duty of inquiry. *See id.* Plaintiff's duty of inquiry required the level of investigation that a "reasonable man in his position [would make] that would advise him of the existence of prior unrecorded rights." *See Berge*, 95 Nev. at 189.

Allison Steel is directly on point. In that case, an individual purchased a property at a tax lien foreclosure (the **First Purchaser**), but failed to record the certificate of sale from that tax lien foreclosure until two years later. *Id.*, at 496. After the tax sale, but before the certificate of sale was recorded, another entity purchased the same property at the foreclosure sale of a judgment lien (the **Second Purchaser**). *Id.* At the time of the second purchase, the tax lien that was foreclosed in the first purchase was still recorded in the land records, as it had not been released. *Id.* The Second Purchaser contended it was a bona fide purchaser because simply reviewing the land records before the judgment-lien foreclosure would not reveal the unrecorded certificate of sale, and thus would make it appear as if the tax lien had not been foreclosed. *Id.*

The Nevada Supreme Court disagreed, holding that the **recorded** tax liens provided inquiry notice of the **unrecorded** certificate of sale to the Second Purchaser. *Id.*, at 498. While the certificate of sale was not recorded, the Nevada Supreme Court explained that the Second Purchaser had constructive notice of the recorded tax lien that was foreclosed, and thus could have simply made "an inquiry to the IRS [which] would have revealed the sale to" the First Purchaser, which was memorialized in the unrecorded certificate of sale. *Id.* Because the Second Purchaser had inquiry notice of the unrecorded certificate of sale through the recorded tax lien, the Nevada Supreme Court held he was not a bona fide purchaser, and thus was not protected from the unrecorded certificate of sale. *Id.*

Just as the recorded tax lien put the Second Purchaser on inquiry notice of the unrecorded certificate of sale in *Allison Steel*, here the recorded Deed of Trust's provision stating that the beneficiary could pay off the HOA's super-priority liens put Plaintiff on inquiry notice of Bank of America's super-priority-plus tender. Plaintiff is thus presumed to have knowledge of the tender, a

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presumption it can rebut "by showing that [it] made due investigation without discovering the prior right or title [it] was bound to investigate." *See Berge*, 95 Nev. at 189.

Plaintiff cannot offer evidence that it made such an investigation on a motion to dismiss. More generally, Plaintiff cannot offer any evidence to meet its burden to prove its bona fide purchaser affirmative defense to U.S. Bank's counterclaims. Plaintiff's motion – which rests almost entirely on its unwarranted assumption that it is a bona fide purchaser – should be denied.

V. CONCLUSION

For the foregoing reasons, Plaintiff's Motion to Dismiss Counterclaims should be denied.

DATED: November 9, 2017

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/s/Karen A. Whelan

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of November, 2017, and pursuant to NRCP 5(b), I served via the Clark County electronic filing system a true and correct copy of the foregoing **U.S. BANK, N.A., AS TRUSTEE'S OPPOSITION TO 5316 CLOVER BLOSSOM CT TRUST'S MOTION TO DISMISS COUNTERCLAIM**, postage prepaid and addressed to:

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EXHIBIT A

20000225
.00963

APN: 124-31-220-001-104

DECLARATION OF COVENANTS, CONDITIONS, AND RESTRICTIONS
FOR
COUNTRY GARDEN
(ARBOR GATE)
A COMMON INTEREST COMMUNITY

WHEN RECORDED, MAIL TO:

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DECLARATION OF COVENANTS, CONDITIONS, AND RESTRICTIONS FOR COUNTRY GARDEN, A COMMON INTEREST COMMUNITY

This Declaration of Covenants, Conditions, and Restrictions, hereinafter referred to as "Declaration," is made this 17th day of February, 2000, by W.L. Homes LLC, a Delaware limited liability company, dba Watt Homes-Nevada Division, the "Declarant," with reference to the following:

RECITALS:

A. Declarant is the owner of that certain real property located in the County of Clark, State of Nevada, which is described as:

> Property known as ARBOR GATE, a Common Interest Community, as more fully appears on the Plat filed on October 20, 1999, in Book 91 of Plats, Page 71, Official Records, Clark County, Nevada, Recorder.

hereinafter called the "Property."

B. Declarant has or intends to improve the Property by constructing thereon a Common Interest Residential Community consisting of up to a maximum of 104 Units, which will be known and marketed as Country Garden under the provisions of the Nevada Common Interest Ownership Act.

C. The first Phase of the Project will consist of one-story and two-story single family residences, and all Common Elements within Phase 1. The architectural style is wood frame and stucco.

D. The development of the Property is the first Phase of a planned twelve (12) Phase Project described as follows:

Phase 1 Lots 97 through 104, inclusive, together with Association Property consisting of

Private Drives & Public Utility Easements, Common Elements & Public Utility Easements, Landscaping & Visibility Restriction Easements, and Utility Easements within Phase 1.

Phase 2 — Lots 89 through 96, inclusive, together with Association Property consisting of Private Drives & Public Utility Easements, Common Elements & Public Utility Easements, Landscaping & Visibility Restriction Easements, and Utility Easements within Phase 2.

Phase 3 — Lots 81 through 88, inclusive, together with Association Property consisting of Private Drives & Public Utility Easements, Common Elements & Public Utility Easements, Landscaping & Visibility Restriction Easements, and Utility Easements within Phase 3.

Phase 4 — Lots 16 through 25, inclusive, together with Association Property consisting of Private Drives & Public Utility Easements, Common Elements & Public Utility Easements, Landscaping & Visibility Restriction Easements, and Utility Easements within Phase 4.

Phase 5 — Lots 73 through 80, inclusive, together with Association Property consisting of Private Drives & Public Utility Easements, Common Elements & Public Utility Easements, Landscaping & Visibility Restriction Easements, and Utility Easements within Phase 5.

Phase 6 — Lots 26 through 35, inclusive, together with Association Property consisting of Private Drives & Public Utility Easements, Common Elements & Public Utility Easements, Landscaping & Visibility Restriction Easements, and Utility Easements within Phase 6.

Phase 7 — Lots 65 through 72, inclusive, together with Association Property consisting of Private Drives & Public Utility Easements, Common Elements & Public Utility Easements, Landscaping & Visibility Restriction Easements, and Utility Easements within Phase 7.

Phase 8 — Lots 36 through 45, inclusive, together with Association Property consisting of Private Drives & Public Utility Easements, Common Elements & Public Utility Easements, Landscaping & Visibility Restriction Easements, and Utility Easements within Phase 8.

Phase 9 — Lots 55 through 64, inclusive, together with Association Property consisting of Private Drives & Public Utility Easements, Common Elements & Public Utility Easements, Landscaping & Visibility Restriction Easements, and Utility Easements within Phase 9.

Phase 10 Lots 46 through 54, inclusive, together with Association Property consisting of Private Drives & Public Utility Easements, Common Elements & Public Utility Easements, Landscaping & Visibility Restriction Easements, and Utility Easements within Phase 10.

Phase 11 Lots 9 through 15, inclusive, together with Association Property consisting of Private Drives & Public Utility Easements, Common Elements & Public Utility Easements, Landscaping & Visibility Restriction Easements, and Utility Easements within Phase 11.

Phase 12 Lots 1 through 8, inclusive, together with Association Property consisting of Private Drives & Public Utility Easements, Common Elements & Public Utility Easements, Landscaping & Visibility Restriction Easements, and Utility Easements within Phase 12.

E. Each Phase shall have appurtenant to it a membership in COUNTRY GARDEN OWNERS' ASSOCIATION, a Nevada non-profit corporation ("Association"), which will be the management body of the overall Project.

F. The Association will receive title to the Association Property on the conveyance of the first Lot in Phase 1 and in subsequent Phases on conveyance of the first Lot in each Phase.

G. Declarant contemplates subjecting all Phases in the Property to this Declaration. There is no guarantee that any or all of the subsequent Phases will be completed or that the number of Lots, Recreational Areas, and open spaces will be developed as described above.

H. Before selling or conveying any interest in the Property, Declarant desires to subject the Property, in accordance with a common plan, to certain covenants, conditions, and restrictions for the benefit of Declarant and all present and future owners of the Property.

NOW, THEREFORE, Declarant hereby declares that all of the Property described as Phase 1 in Recital D, and subsequent Phases when annexed, shall be held, used, sold, and conveyed subject to the following easements, covenants, conditions, restrictions, and equitable

servitudes which are for the purpose of protecting the economic value of the Residences, and livability of Owners within the Project, and which will run with each Phase of the Property in the Project, and shall inure to the benefit of each Owner thereof, and bind all persons, their heirs, successors, and assigns who hold any right, title, or interest in the Project or any part thereof.

ARTICLE I

DEFINITIONS

Section 1.1 Arbitration means the requirement under NRS Chapter 38.300-360 that certain claims regarding the Declaration and the Association be submitted to Arbitration or mediation.

Section 1.2 Architectural Committee shall mean and refer to the Committee established in accordance with Article VII of the Declaration to exercise architectural control in the Project.

Section 1.3 Articles shall mean and refer to the Articles of Incorporation of the Association and any amendments to said Articles.

Section 1.4 Association shall mean and refer to COUNTRY GARDEN OWNERS' ASSOCIATION, a Nevada non-profit corporation, its successors and assigns.

Section 1.5 Association Expenses sometimes Common Expenses shall mean and include the actual and estimated expenses of operating the Association and any reasonable reserves for such purposes.

Section 1.6 Association Property shall mean all of the Property, real and personal, owned by the Association, including all the Common Elements (i.e., open spaces and Recreational Areas), Private Drives and Association Easements.

Section 1.7 Board, Board of Directors, or Executive Board, shall mean and refer to the governing body of the Association.

Section 1.8 Boundaries, when interpreting conveyances or plans, shall mean the then existing physical boundaries of a Lot whether in its original state or reconstructed in substantial accordance with the original plans. The Boundaries, as above defined, shall be conclusively presumed to be its boundaries rather than the boundaries expressed in the deed or plan, regardless of settling or lateral movement of buildings, fences, or other Improvements (hereafter defined), and regardless of minor variances between boundaries shown on the plat or deed, and those of the Improvements.

Section 1.9 Boundary Wall sometimes Party Wall shall mean and refer to the freestanding or party walls constructed on the Property line between contiguous Lots.

Section 1.10 Bylaws shall mean and refer to the Bylaws of the Association and any amendments to said Bylaws.

Section 1.11 Common Elements shall mean and refer to the Association Property identified by such terms as Private Drive & Public Utility Easements, Common Elements & Public Utility Easements, Visibility Restriction Easements, Landscape Easements, or Utility Easements, as the case may be, as shown on Sheets 2 and 3 of the Plat.

Section 1.12 Declarant shall mean and refer to W.L. Homes LLC, a Delaware limited liability company, dba Watt Homes-Nevada Division, its successors and assigns.

Section 1.13 Declarant's Rights shall mean and refer to the rights granted to the Declarant by law and pursuant to this Declaration, including without limitation, the Declarant's

right to:

(a) add Phases to the Property;

(b) create Lots and Common Elements within the Phases;

(c) complete the improvements as indicated on the Plat;

(d) maintain on the Property sales offices, models, management offices, and signs;

(e) use of easements through the Common Elements for the purpose of making improvements in the Project;

(f) appoint or remove officers of the Association and any members of the Executive Board during the Declarant's Control Period as described in Section 3.2; and

(g) statutory rights and those rights described in Section 3.3 and as otherwise reserved in the Declaration.

Section 1.14 Declaration shall mean and refer to this enabling Declaration of Covenants, Conditions, and Restrictions.

Section 1.15 Eligible Insurer or Guarantor shall mean and refer to an insurer or governmental guarantor who has requested notice from the Association of those matters of which such insurer or guarantor is entitled to notice by reason of this Declaration or the Bylaws.

Section 1.16 Eligible Security Holder shall mean a holder of the First Security Interest on a Lot who has requested notice from the Association of matters of which the holder is entitled to notice of by reason of this Declaration or the Bylaws.

Section 1.17 Governing Documents is a collective term that means and refers to this Declaration, the Articles, the Bylaws, and the Association's Rules and Regulations.

Section 1.18 Improvements includes, without limitation, the construction, installation,

alteration, or remodeling (including exterior painting) of buildings, walls, decks, fences, swimming pools, landscaping, landscape structures, skylights, solar heating equipment, spas, antennas, utility lines, or structures of any kind.

Section 1.19 Lot sometimes Unit shall mean and refer to any portion of the Property designated as a Lot or Unit on any recorded subdivision map or parcel map for the Property intended for improvement with a Residence.

Section 1.20 Manager shall mean the person or entity designated by the Board to manage the affairs of the Project and to perform various other duties assigned to it by the Board by the provisions of this Declaration and the Bylaws.

Section 1.21 Member shall mean and refer to an Owner as defined in Section 1.24 of Article I herein.

Section 1.22 Mortgage sometimes Security Interest shall mean and refer to a deed of trust as well as a mortgage.

Section 1.23 Mortgagee shall mean and refer to the holder of a Security Interest, whether a beneficiary or holder under a deed of trust or mortgage given for value, which encumbers any Lot.

Section 1.24 Owner sometimes Lot Owner shall mean and refer to a record owner, whether one or more persons or entities, of fee simple title to any Lot which is part of the Property including installment contract buyers, but excluding those having such interest merely as security for the performance of an obligation.

Section 1.25 Parking shall mean and refer to off Lot parking, the use of which shall be

as regulated by the Association.

Section 1.26 Perimeter Wall means the masonry wall along the perimeter of the Project. The maintenance and repair of the exteriors of the Perimeter Walls will be done by the Association. The interior of the Perimeter Wall will be maintained proportionately by each Owner whose Lot backs up to the interior of the Perimeter Wall. The exteriors of walls in the interior of the Project which front on Common Elements shall be maintained by the Association, the interiors of such walls (and any other interior wall) shall be maintained proportionately by each Owner whose Lot backs up to such interior wall.

Section 1.27 Phased Annexation sometimes Annexable Areas, shall mean and refer to the Phases described in Recital D, which the Declarant may annex in accordance with Article 12.2.

Section 1.28 Plat shall mean and refer to the Plat of ARBOR GATE, a Common Interest Community, as shown by the map thereof filed on October 20, 1999, in Book 91, Page 71 of Plats, Official Records, Clark County, Nevada, Recorder, any amendments thereto, and when annexed any Plats for subsequent Phases.

Section 1.29 Private Streets shall mean the Private Drives & Public Utility Easements as shown on Sheets 2 and 3 of the Plat.

Section 1.30 Project shall mean and refer to the entire Planned Community as shown by the Plat, including the Annexable Areas when annexed.

Section 1.31 Property shall mean and refer to the entire real property described in Recital A, including all structures and improvements erected or to be erected thereon, and such

additions as may hereafter be brought within the jurisdiction of the Association.

Section 1.32 Recreational Area shall mean the recreational areas and open spaces shown as Common Elements & Public Utility Easements on Sheets 2 and 3 of the Plat.

Section 1.33 Residence shall mean and refer to any dwelling constructed on a Lot in accordance with the law and this Declaration.

Section 1.34 Security Interest shall mean and refer to the holder of a Security Interest on a Lot which by definition includes mortgages, deeds of trust, and installment contracts of sale.

ARTICLE II

ASSOCIATION PROPERTY

Section 2.1 Title To Association Property. Declarant hereby covenants for itself, its successors and assigns, that it will at the time of conveyance of the first Lot to an Owner in Phase I convey title to the Association Property to the Association free and clear of all encumbrances and liens, except utility easements, covenants, conditions, and reservations then of record, including those set forth in this Declaration. Similar conveyances shall be made to the Association at the time of the conveyance to an Owner of the first Lot in each subsequent Phase.

Section 2.2 Association Property. The Association shall have the following rights regarding the Association Property:

(a) The right of the Association to dedicate or transfer all or substantially all or any part of the Association Property to any public agency, authority, or utility for such purposes, subject to compliance with NRS §116.3112.

(b) A non-exclusive easement over and upon the Lots for the purpose of work on the Association Property. Any damage to any Lot caused by the gross negligence or willful

misconduct of the Association or any of its agents during any entry onto any Lot shall be repaired by and at the expense of the Association.

(c) The right of the Association, in accordance with NRS §116.3112, the Articles, and the Bylaws, to borrow money for the purpose of repairing and replacing the Association Property, and with the consent of the majority of the Association Members including a majority of votes of Members other than the Declarant, to hypothecate any or all real or personal property owned by the Association.

Section 2.3 Easements.

(a) Owner Easements. Every Owner of a Lot shall have a right and easement of ingress, egress, and enjoyment in and to the Association Property which shall be appurtenant to and shall pass with the title to every such Lot, subject to the following provisions:

(i) The right of the Association to establish uniform Rules and Regulations pertaining to the use of the Association Property.

(ii) The right of the Association to suspend the voting rights of an Owner for any period during which any Lot assessment or installment remains unpaid for thirty (30) days past its Due Date (hereinafter called a "Delinquent Assessment"); also for a period not to exceed thirty (30) days for any infraction of its published Rules and Regulations after reasonable written notice and an opportunity for a hearing before the Board as set forth in the Bylaws.

(b) Encroachment Easement. In the event: (i) any improvement on a Lot encroaches upon an adjoining Lot or Association Property, or (ii) the Association Property encroaches upon a Lot as a result of the initial construction, or as the result of repair, shifting, settlement, or movement of any portion thereof, an easement for the encroachment and for the maintenance of

same, shall exist so long as the encroachment exists. Further, each Lot Owner and the Association are hereby granted an easement over all adjoining Lots and Association Property for the purpose of accommodating any minor encroachment not exceeding one foot, due to engineering errors, errors in original construction, settlement or shifting of the walls and fences, and architectural or other appendants.

(c) Utility Easement. Each Lot is subject to all easements appearing on the Plat, other easements of record, and easements for the use and benefit of sewer/water and other utilities created by this Declaration and which serve Lots and the Association Property. Easements may include, but are not limited to, those for cable television, sewers, water, gas, electrical, irrigation systems, landscaping, and drainage. No Owner shall interfere in any way with the initiation, installation or access to or for maintenance, replacement, or repair of said utilities, irrigation systems, landscaping, or in any manner obstruct or change the direction or flow of drainage channels in such easements.

Section 2.4 Other Easements. Easements are reserved throughout the Property, including, but not limited to utility easements for utility services and right-of-way easements over the Private Drives for ingress and egress, drainage, landscape, and sight easements as described on the Plat.

Section 2.5 Special Declarant's Easements. Subject to a concomitant obligation to restore, Declarant and its agents shall have:

(a) a non-exclusive easement over the Association Property for the purpose of making repairs to the Association Property and to Lots if access thereto is not reasonably available; and

(b) the right to the non-exclusive use of the Association Property during the Declarant's

Control Period for the purpose of developing of the Project. The use of the Association Property by Declarant and its agents shall not unreasonably interfere with the use thereof by any Owner.

Section 2.6 Water Drainage Easement. Lots situated on higher elevations shall have surface water drainage easements over adjacent Lots with lower elevations for the drainage of rainfall or other surface waters. Except with the prior approval of the Owner of the lower Lot, and the Architectural Committee, the grade along or close to any side line of the Lot situated on the higher elevation shall not be altered nor shall any structure or improvement be placed along or close to any Lot line of the higher elevation Lot so as to unduly concentrate the flow of surface waters or locate such flow in a manner that will be hazardous to life or cause material damage to the property of the Owner of the Lot situated on the lower elevation. Except with the prior approval of the Owner of the higher Lot and the Association, no structure or improvement shall be erected, made, or maintained on the Lot situated on the lower elevation that will alter or change the drainage pattern of such lower Lot in a manner hazardous or detrimental to the Lot situated on higher elevation.

Section 2.7 Delegation of Use. Any Owner entitled to the right and easement of use and enjoyment of Association Property may delegate his/her right and easement to his/her tenant's or contract purchasers who reside in the Owner's Lot, subject to the Rules and Regulations prescribed by the Board. An Owner who has so delegated his/her right and easement shall not be entitled to use and enjoyment of the Association Property for so long as such delegation remains in effect.

Section 2.8 Waiver of Use. No Owner may exempt himself from personal liability for assessments duly levied by the Association, or effect the release of his Lot from the liens and

charges thereof, by waiving the use and enjoyment of the Association Property or by abandoning his/her Lot.

ARTICLE III

MEMBERSHIP AND VOTING RIGHTS IN ASSOCIATION

Section 3.1 Membership. Every Owner of a Lot including the Declarant shall be a Member of the Association. Membership shall be appurtenant to and may not be separated from ownership of any Lot. Each Owner is obligated to comply with the Declaration, Articles, Bylaws, and Rules and Regulations of the Association. Membership in the Association shall not be transferred, pledged, or alienated in any way, except upon the sale of the Lot to which it is appurtenant, and then only to the purchaser of such Lot. Any attempt to make a prohibited transfer is void. If the Owner of a Lot should fail or refuse to transfer the membership registered in his/her name to the purchaser of his/her Lot, the Association shall have the right to record the transfer upon its books and thereupon the old membership outstanding in the name of the seller shall be null and void.

Section 3.2 Voting. There shall be one membership for each Lot owned within the Project. This membership shall be automatically transferred upon the conveyance of that Lot. Voting shall be one (1) vote per Lot, and the vote to which each membership is entitled is the vote assigned to its Lot in the Declaration for the Project. If a Lot is owned by more than one (1) person, those persons shall agree among themselves how a vote for that Lot's membership is to be cast. Individual co-owners may not cast fractional votes. A vote by a co-owner for the entire Lot's membership interest shall be deemed to be valid unless another co-owner of the same Lot objects at the time the vote is cast, in which case such membership's vote shall not be counted.

The Members shall be of one (1) class consisting of Lot Owners who own Lots as defined in this Declaration. These Lot Owners shall elect all members of the Executive Board, following the period of Declarant's Control defined below.

Notwithstanding the foregoing, the Declarant of the Project shall have additional rights and qualifications as provided in the Uniform Common Interest Ownership Act (Nevada Revised Statutes Chapter 116) and the Declaration, including the right to appoint members of the Executive Board as follows: During the Declarant's Control Period, the Declarant, or persons designated by him or her, subject to certain limitations contained in this Declaration, may appoint and remove the officers and members of the Executive Board. The Declarant's Control Period terminates no later than the earlier of (a) sixty (60) days after conveyance to Lot Owners other than a Declarant of seventy-five percent (75%) of the Lots that may be created; (b) seven (7) years after all Declarants have ceased to offer Lots for sale in the ordinary course of business; or (c) seven (7) years after any right to add new Lots was last exercised.

Not later than sixty (60) days after conveyance to Lot Owners other than a Declarant of twenty-five percent (25%) of the Lots that may be created, at least one (1) member, and not less than twenty-five percent (25%) of the members of the Executive Board shall be elected by Lot Owners other than the Declarant. Not later than sixty (60) days after conveyance to Lot Owners other than a Declarant of fifty percent (50%) of the Lots that may be created, not less than thirty-three and one-third percent (33 1/3%) of the members of the Executive Board must be elected by Lot Owners other than the Declarant.

The Declarant may voluntarily surrender the right to appoint and remove officers and Directors of the Executive Board before termination of the Declarant's Control Period, but in that

event, the Declarant may require, for the duration of the Declarant's Control Period, that specified actions of the Association or Executive Board, as described in a recorded instrument executed by the Declarant, be approved by the Declarant before they become effective.

Except as otherwise provided above, not later than the termination of the Declarant's Control Period, the Lot Owners shall elect an Executive Board of not less than three (3) members, at least a majority of whom shall be Lot Owners. The Executive Board shall elect the officers. The Executive Board members and officers shall take office upon election.

Section 3.3 Declarant's General Rights and Reservations. Nothing in this Declaration shall limit, and no Owner or the Association shall do anything to interfere with, the right of the Declarant to subdivide or re-subdivide any portion of the Property, or to complete Improvements to and on the Property owned solely or partially by the Declarant, or to alter the foregoing or its construction plans and designs, or to construct such additional Improvements as the Declarant deems advisable in the course of development of the Property. The rights of the Declarant hereunder shall include, but shall not be limited to, the right to install and maintain such structures, displays, signs, billboards, flags, and sales offices as may be reasonably necessary to conduct its business of completing the work and disposing of the Lots by sale, resale, lease, or otherwise. Each Owner by accepting a deed to a Lot hereby acknowledges that the activities of the Declarant may temporarily or permanently impair the view of such Owner and may constitute an inconvenience or nuisance to the Owners, and hereby consents to such impairment inconvenience or nuisance. This Declaration shall not limit the right of the Declarant at any time prior to acquisition of title to a Lot in the Project by a purchaser from the Declarant to establish on that Lot additional licenses, easements, reservations and rights-of-way to itself, to utility

companies, or to there as may from time to time be reasonably necessary to the proper development and disposal of the Property. The Declarant may use any Lots owned by the Declarant in the Project as model home complexes, real estate sales offices, or leasing offices. The Declarant need not seek or obtain Architectural Committee approval of any Improvement constructed or placed on any portion of the Property by the Declarant. The rights of the Declarant hereunder and elsewhere in these Restrictions may be assigned by the Declarant to any successor in interest to any portion of the Declarant's interest in any portion of the Property by a written assignment. Notwithstanding any other provision of this Declaration, the prior written approval of the Declarant, as developer of the Property, will be required before any amendment to this Article shall be effective. Each Owner hereby grants, upon acceptance of his/her deed to the Lot, an irrevocable, special power of attorney to the Declarant to execute and record all documents and maps necessary to allow the Declarant to exercise its rights under this Article. The Declarant and its prospective purchasers of Lots shall be entitled to the nonexclusive use of the Association Property and any recreational facilities thereon, without further cost for access, ingress, egress, use, or enjoyment in order to show the Property to its prospective purchasers and dispose of the Property as provided herein. The Declarant, its successors, and tenants shall also be entitled to the nonexclusive use of any portions of the Property which comprise Private Streets and walkways for the purpose of ingress, egress, and accommodating vehicular and pedestrian traffic to and from the Property. The use of the Association Property by the Declarant shall not unreasonably interfere with the use thereof by other Owners. The Association shall provide the Declarant with all notices and other documents to which a beneficiary is entitled pursuant to this Declaration, provided that the Declarant shall be provided such notices and other documents without making

written request therefor. The rights and reservations of the Declarant set forth in this Article shall terminate upon the expiration of the Declarant's Control Period as set forth in Section 3.2 hereof.

ARTICLE IV

COVENANT FOR MAINTENANCE ASSESSMENTS TO ASSOCIATION

Section 4.1 Creation of Lien and Personal Obligation of Assessment. The Declarant, for each Lot owned within Phase 1, and each additional Phase when annexed, hereby covenants and each Owner of any Lot by acceptance of a deed therefore, whether or not it shall be so expressed in such deed, is deemed to covenant and further agrees to pay to the Association without deduction or setoff:

(a) annual assessments, which shall include an adequate reserve fund for insurance, periodic maintenance, repair, and replacement of the Association Property;

(b) special assessments for capital improvements;

(c) special Lot assessments.

The full annual and special assessments, together with interest, costs, and when applicable, reasonable attorney's fees, shall be a charge on the Lot and shall be a continuing lien upon the Lot against which such assessments are made. Each assessment, together with interest, costs and reasonable attorney's fees, shall also be the personal obligation of the person who was the Owner of such Lot at the time the assessment became due. The personal obligation for delinquent assessments shall not pass to an Owner's successors in title unless expressly assumed in writing by such successor.

(d) The Board of Directors shall prepare on an annual basis a budget for the daily

operation of the Association, including reserve studies, and cause the budget to be approved by the Board and presented to the Members for approval, all as set forth in Section 10.18 of the Bylaws.

Section 4.2 Purpose of Assessments. The assessments levied by the Association shall be used exclusively to promote the recreation, health, safety, welfare, and common good of all the Residents in the Project and for the improvement and maintenance of the Association Property.

Section 4.3 Maximum Annual Assessment. Until January of the year immediately following the conveyance of the first Lot in the first Phase to an Owner, the maximum annual assessments paid to the Association shall be $453.00 per Lot, payable in monthly installments of $37.75 per month.

(a) From and after January 1st of the year immediately following the conveyance of the first Lot to an Owner, the maximum annual assessment of the Association may, without a vote of the membership, be increased by the Board each year thereafter not more than fifteen percent (15%) above the maximum assessment for the previous year.

(b) From and after January of the year immediately following the conveyance of the first Lot in the first Phase to an Owner, the maximum annual assessment may be increased above fifteen percent (15%) only by the vote or written assent of fifty-one percent (51%) of the total Voting Power (as defined in the Bylaws) of the Association.

(c) The Board of Directors may fix the annual assessment at any amount not in excess of the fifteen percent (15%) maximum.

Section 4.4 Special Assessments. In addition to the annual assessments authorized above, the Association may levy, in any assessment year, a special assessment applicable to that

year--the Board may permit payment in installments beyond the assessment year--only for the purpose of defraying, in whole or part, any construction, reconstruction, repair, or replacement of a capital improvement upon the Association Property, including fixtures and personal property related thereto, provided that any such assessment shall have the vote or written assent of:

(a) a majority of the total Voting Power of the Association; and

(b) a majority of the total Voting Power of the Members other than the Declarant.

Section 4.5 Single Lot Assessment. The Association may also levy a special assessment against any Member and Member's Lot to reimburse the Association for costs incurred in bringing a Member and Member's Lot into compliance with the provisions of the Declaration, any amendments thereto, the Articles, the Bylaws, and the Association's Rules and Regulations, which special assessment may be levied upon the vote of the Board after notice and the opportunity to be heard.

Section 4.6 Membership Approval. Any action authorized under Section 4.3 or 4.4 above which requires Owner approval shall be taken at a meeting called for that purpose, written notice of which must state the time, place, and the items to be considered at the meeting shall be given to all Members by first class mail, or personal service, not less than twenty-one (21) days nor more than sixty (60) days before the meeting. A quorum for such meeting shall be a majority of the Voting Power of the membership of the Association. If the required quorum is not present, another meeting may be called subject to the same notice requirement, and the required quorum at the subsequent meeting shall be twenty-five (25%) percent of the Voting Power of the membership of the Association; provided, however, if

(a) the meeting so adjourned is an annual meeting, and

(b) the adjourned annual meeting is actually attended, in person or by proxy, by less than thirty-three and one-third (33 1/3%) percent of the Voting Power of the membership of the Association, then the only matters which may be voted upon thereat, are matters the general nature of which notice was duly given. If the proposed action is favored by a majority of the votes cast at such meeting, but such vote is less than the requisite fifty-one percent (51%), Members who were not present in person or by proxy may give their assent in writing provided the same is obtained by the Board or its Manager not later than thirty (30) days from the date of such meeting.

Section 4.7 Assessment Criteria. Both annual and special assessments must be fixed at a uniform rate for all Lots. Surplus funds remaining after payment of provisions for Common Expenses shall be retained by the Association as a capital and replacement reserve.

Any assessment not paid within thirty (30) days after the due date shall be delinquent and shall bear interest at the rate of eighteen percent (18%) per annum from the due date until paid. A late charge of ten percent (10%) of the delinquent assessment shall be due for any payment made later than thirty (30) days after its due date.

Section 4.8 Date of Commencement of Annual Assessments; Due Dates. The annual assessments provided for herein shall commence as to all Lots in each Phase, on the earlier of the first day of the month following the conveyance of the first Lot in each Phase to an Owner or on the first day of the month following the conveyance of the Association Property to the Association.

During the Declarant's Control Period, the Declarant may pay on annexed and unsold Lots one-half (½) of the regular monthly assessment, but not less than an amount sufficient to cover

the Common Expenses applicable to each Lot for the Common Elements and Association Property.

The first annual assessment shall be adjusted according to the number of months remaining in the calendar year. The Board shall fix the amount of the annual assessment against each Lot at least thirty (30) days in advance of each annual assessment period. Written notice of the annual assessment shall be sent to every Owner subject thereto. The regular assessments as to Lots brought under this Declaration by annexation shall commence with respect to all Lots within said Annexed Area on the first day of the month following the conveyance of the first Lot in that Phase to an Owner.

Section 4.9 Effect of Non-payment of Assessments/Remedies of the Association. Any assessment made in accordance with this Declaration shall be a debt of the Owner of a Lot from the time the assessment is due.

(a) At any time after any assessment levied by the Association against any Lot has become delinquent, the Board may record in the Office of the Clark County Recorder a "Notice of Delinquent Assessment and Claim of Lien" as to such Lot. A suggested form of lien is set forth as follows:

NOTICE OF DELINQUENT ASSESSMENT
AND CLAIM OF LIEN
COUNTRY GARDEN OWNERS' ASSOCIATION

TO: _____
(Owner)

_____
(Address)

_____
North Las Vegas, Nevada

The COUNTRY GARDEN OWNERS' ASSOCIATION ("Association") claims a lien in the sum of $_____ for maintenance,* assessments with interest at eighteen percent (18%) per annum on the property owned by you, commonly known as _____, North Las Vegas, Nevada, as shown by the certain Subdivision Map entitled ARBOR GATE, a Common Interest Community, in Book 91, of Plats, Page 71, Clark County, Nevada, Recorder, for failure to pay the maintenance* assessments due for the months of _____, and all subsequent installments, interest, accruing costs, and attorneys' fees from date hereof until paid.
(*Revise if it is a different type of assessment, i.e., capital or special Lot assessment.)

Failure to pay said assessments, all accrued interest, costs, and fees within fifteen (15) days from date hereof may result in commencement of foreclosure of this lien upon your Lot, and/or filing of legal action to collect same.

Payment should be made to COUNTRY GARDEN OWNERS' ASSOCIATION,

_____
(Address)

COUNTRY GARDEN
OWNERS' ASSOCIATION

By:_____

Its _____

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

On this _____ day of_____, 200_, personally appeared before me, a Notary Public in and for said County and State, _____of COUNTRY GARDEN OWNERS' ASSOCIATION who acknowledged to me that he/she executed the foregoing instrument freely and voluntarily and for the purposes and uses therein mentioned.

_____
NOTARY PUBLIC

Such notice shall be signed by an officer or director of the Association, its Manager or attorney. A copy of said notice may be recorded and shall be served personally upon the Owner, or be sent by first class mail, postage prepaid, certified or registered, return receipt request, to the then

current address of the Owner in the Association's files.

(b) Immediately upon the mailing of any notice of delinquency pursuant to this Section, the amounts delinquent and all subsequent installments, whether delinquent or not, together with costs (including attorneys' fees) and interest accruing thereon, shall be and become immediately due. The notice shall also secure all other payments and/or assessments, together with interest, costs, fines and attorneys' fees with respect to said Lot following such recording. The lien on the Lot is for a period of three (3) years from when the full amount of the assessment becomes due by Section 4.1 of this Section.

(c) In the event the delinquent assessments and all other assessments which have become due and payable with respect to the Lot, together with all costs (including attorney's fees) and accrued interest on such amounts, are fully paid or otherwise satisfied prior to the completion of the foreclosure sale, the Board shall record a signed satisfaction and release of said lien.

(d) Each assessment lien may be foreclosed as and in the same manner as the foreclosure of a mortgage upon real property under the laws of the State of Nevada, or may be enforced by sale pursuant to NRS §§ 116.31162 and 116.31164, as from time to time amended, or any successor statute and to that end, a power of sale is hereby conferred upon the Association. The Association, acting on behalf of the Lot Owners, shall have the power to bid for the Lot at a foreclosure sale, and to acquire and hold, lease, mortgage, or convey the same. Suits to recover a money judgment for unpaid assessments, rent, and attorneys' fees are permitted without foreclosing or waiving the lien securing the same.

Section 4.10 Notice to Lien Holders. A copy of the notice of default and election to sell, as well as the notice of sale, shall be mailed certified mail or registered mail, return receipt

requested, to persons who have recorded requests for notice per NRS §107.090 and holders of recorded liens. Notice shall be mailed to the name and address appearing on the request for notice and on recorded liens.

Section 4.11 Lien/Security Interest. The Association liens under this Section are prior to all other liens and encumbrances on a Lot except:

(a) Liens and encumbrances recorded before the recording of the Declaration;

(b) Liens for real estate taxes and other governmental assessments or charges against the Lot;

(c) Other than as provided in Section 4.13, a First Security Interest on the Lot recorded before the date on which the assessment sought to be enforced became delinquent;

(d) Mechanics and materialmen's liens; and

(e) Association liens with earlier priority.

Section 4.12 Super Priority. The lien is also prior to all Security Interests described in Sub-section 4.11(c) to the extent of the assessments for Common Expenses and Association Property based on the periodic budget adopted by the Association pursuant to NRS §116.3115 would have become due in the absence of acceleration during the six (6) months immediately preceding institution of an action to enforce the lien.

Recording of the Declaration, constitutes record notice and perfection of the lien. No further recording of any claim of lien for assessment under this Section is required, except a notice of delinquent assessment must be served upon the Owner before commencement of foreclosure. A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within three (3) years after the full amount of the assessments becomes due.

Section 4.13 Subordination of the Lien to First Security Interest. Except as provided in Section 4.12, the lien of the assessments provided for herein shall be subordinate to the lien upon any Lot of a First Security Interest recorded prior to the date the assessment sought to be enforced becomes delinquent. Sale or transfer of any Lot shall not affect the assessment lien. However, the sale or transfer of any Lot pursuant to judicial or non-judicial foreclosure of a First Security Interest or any conveyance in lieu thereof shall, except pursuant to Section 4.12, extinguish the lien of such assessments as to payments which became due prior to such sale or transfer. No sale or transfer shall relieve such Lot from lien rights for any assessments thereafter becoming due.

Where the holder of a recorded First Security Interest or other purchaser of a Lot obtains title to the same as a result of foreclosure or conveyance in lieu, such acquirer of title, his successors and assigns, shall not, except pursuant to Section 4.13, be liable for the share of the Common Expenses or Assessments by the Association chargeable to such Lot which became due prior to the acquisition of title to such Lot by such acquirer. Such unpaid share of Common Expenses or Assessments shall be deemed to be Common Expenses collectible from all of the Lots including such acquirer, his successors and assigns.

Section 4.14 Estoppel Certificate. The Association shall within ten (10) days after written request by a Lot Owner or holder of a Security Interest on a Lot, provide a certificate in recordable form signed by an officer of the Association setting forth the amount of the unpaid assessment on the Lot and whether or not it is delinquent. A properly executed certificate of the Association as to the status of any assessment on a Lot is binding upon the Association, the Board and every Lot Owner as of the date of its issuance.

Section 4.15 Personal Liability of Owner. No Owner may exempt himself from the personal liability for assessments levied by the Association, nor release the Lot owned by him from the liens and charges hereof by waiver of the use or enjoyment of any of the Association Property or by abandonment of his Lot.

Section 4.16 Working Capital Fund. Upon acquisition of record title to a Lot from Declarant, each Owner in each Phase shall contribute to the working capital fund of the Association an amount equal to one-sixth (1/6) the amount of the then annual assessment for that Lot as determined by the Board. The working capital shall not be considered prepayment of the annual assessment. This amount shall be deposited by the buyer into the purchase and sale escrow and disbursed therefrom to the Association.

ARTICLE V

DUTIES AND POWERS OF THE ASSOCIATION

Section 5.1 Duties and Powers of the Association. In addition to the duties and powers enumerated in its Articles and Bylaws, or elsewhere provided for herein, and without limiting the generality thereof, the Association, through the Executive Board, shall:

(a) Own, maintain, and otherwise manage all of the Association Property and all facilities, improvements, and landscaping thereon.

(b) Pay any real and personal property taxes and other charges assessed against the Association Property.

(c) Notwithstanding Section 2.2(b) hereof, grant easements where necessary for access and for utilities and sewer facilities over, upon, and under the Association Property to serve the Property and the Lots.

(d) Maintain liability insurance and such other policy or policies of insurance as provided in Sub-Section (l)(iii) below.

(e) Have the authority to employ a Manager or other persons and to contract with independent contractors or managing agents to perform all or any part of the duties and responsibilities of the Association, provided that any such contract with a person or firm appointed shall not exceed one (1) year in term unless approved by the vote of a majority of the Members of the Association.

(f) Enforce applicable provisions of the Declaration, Articles and Bylaws of the Association.

(g) Establish and enforce uniform Rules and Regulations regarding the Association Property, including the levy of reasonable fines and penalties for violation thereof.

(h) Have the right upon notice to Owner, to enter upon any privately owned Lot (but not the interior of any dwelling) where necessary in connection with construction, maintenance, or repair of a Lot per Sections 4.5 and 6.1 or Association Property and to enforce Owners' obligations under the Declaration, Articles, Bylaws, and Rules and Regulations.

(in) Establish and maintain an adequate reserve fund from annual assessments at least equal to two (2) months' normal monthly assessments from the Owners, for the periodic maintenance, repair, and replacement of improvements to the Association Property.

(j) Cause all officers or employees having fiscal responsibilities to be bonded, as the Board of Directors may deem appropriate; and purchase Directors' and Officers' Liability Insurance as it deems necessary.

(k) Review annually all insurance policies and bonds maintained by the Association.

(l) Acting for itself and for all Owners, obtain and maintain at all times insurance of the type of policy and amount as set forth hereinafter for the benefit of the Owners and the Association as its interest may appear. Payments of premiums for such insurance shall be considered a purpose for which assessments may be levied by the Association pursuant to Article IV hereof:

(i) A fire insurance policy with extended coverage and inflation guard endorsements for the full insurable replacement value (excluding land and foundations) of all structures and improvements located on the Association Property. Such policy or policies shall provide for a maximum deductible of the lesser of $1,000.00 adjusted for inflation or one percent (1%) of the individual building replacement cost.

(ii) OWNERS AND THE DECLARANT SHALL MAINTAIN AT THEIR OWN EXPENSE HAZARD (FIRE) AND LIABILITY INSURANCE ON THEIR RESPECTIVE LOTS AND CONTENTS.

(iii) The Association shall obtain a policy or policies insuring the Association, its officers and Board of Directors, Owners and employees against any liability to the public, the Owners, contract purchasers in possession, their invitees or tenants, incident to ownership or use of the Association Property. Limits of liability under such policy shall not be less than $1,000,000.00 for personal injury and $300,000.00 for property damage for each occurrence. Such policy or policies shall be issued on a comprehensive liability basis to provide cross-liability endorsements wherein the rights of the named insured under the policy shall not be prejudiced as respects the right of action of any such insurance against any other named insured. Said policy or policies shall include a severability of interest endorsement which will preclude the insurer from

denying the claim of an Owner because of negligent acts of the Association or other Owners.

(iv) The Association may obtain Fidelity bond or policy insuring the Association against dishonest acts by its officers, directors, trustees, and employees who are responsible for handling funds of the Association. Such coverage shall be not less than One Hundred percent (100%)--subject to a maximum deductible of $1,000.00, adjusted for inflation--of the estimated annual operating expenses.

(v) All insurance policies required under this Article shall be written by a company licensed to do business in Nevada and holding a rating of Class VI or better by Best's Insurance Reports or equivalent report.

(vi) Exclusive authority to adjust losses under policies obtained by the Association pursuant to this Article shall be vested in the Association or its authorized representatives.

(vii) In no event shall the insurance coverage obtained and maintained by the Association hereunder be brought into contribution with insurance purchased by individual Owners or their mortgagees.

(m) Exercise the powers described in NRS §116.3102 where not in conflict with this Declaration.

(n) Have and exercise any rights or privileges given to it expressly by this Declaration, or reasonably implied from the provisions of the Declaration, or given or implied by law, or which may be necessary or desirable to fulfill its duties, obligations, rights, or privileges.

ARTICLE VI

MAINTENANCE AND REPAIR OBLIGATIONS

Section 6.1 Maintenance Obligations of Owners. It shall be the duty of each Owner, at the Owner's expense, subject to Architectural Committee approval, when applicable, to maintain, repair, replace, and restore the Residence, grounds, and Improvements on the Owner's Lot. If any Owner shall permit any Residence, grounds, or Improvement, the maintenance of which is the responsibility of such Owner, to fall into disrepair or to become unsafe, unsightly or unattractive, or to otherwise violate this Declaration, the Board shall have the right to seek any remedies at law or in equity which it may have to correct the situation. In addition, the Board shall have the right, but not the duty, after notice and hearing as provided in the Bylaws, to enter upon such Owner's Lot to make such repairs or to perform such maintenance and to charge the cost thereof to the Owner. Said cost shall be a Single Lot Assessment enforceable as set forth in this Declaration.

Section 6.2 Damage to Association Property by Owner. The cost of any maintenance, repairs, or replacements by the Association on the Association Property arising out of or caused by the willful or negligent act of an Owner, his/her tenants, or their families, guests, or invitees shall, after notice and hearing, be levied by the Board as a Special Assessment against such Owner.

To the extent permitted by Nevada law, each Member shall be liable to the Association for any damage to the Association Property not fully reimbursed to the Association by insurance (including without limitation any deductible amounts under any insurance policies against which the Association files a claim for such damage) if the damage is sustained because of the

negligence, willful misconduct or unauthorized or improper installation or maintenance of any Improvements by the Member, his/her guests, tenants or invitees, or any other persons deriving their right and easement of use and enjoyment of the Association Property from the Member, or his/her or their respective family, guests, both minor and adult. However, the Association, acting through the Board, reserves the right to determine whether any claim shall be made upon the insurance maintained by the Association, and the Association further reserves the right, after notice and hearing as provided in the Bylaws, to levy a special assessment (Single Lot Assessment) equal to the increase, if any, in insurance premiums directly attributable to the damage caused by the Member or the person for whom the member may be liable as described above. In the case of joint ownership of a Lot, the liability of the Owners shall be joint and severable, except to the extent the Association shall have previously contracted in writing with the joint Owners to the contrary. After notice and hearing as provided in the Bylaws, the cost of correcting the damage to the extent not reimbursed to the Association by insurance shall be a special assessment (Single Lot Assessment) against such Member's Lot, and may be enforced as provided herein.

Section 6.3 Damage and Destruction Affecting Dwelling Lots - Duty to Rebuild. If all or any portion of any Improvement or of a Lot is damaged or destroyed by fire or other casualty, it shall be the duty of the Owner of such Lot to diligently rebuild, repair, or reconstruct the same in a manner which will restore it substantially to its appearance and condition immediately prior to the casualty as approved by the Architectural Committee. The Owner shall cause reconstruction to commence within three (3) months after the damage occurs and to be completed within nine (9) months after damage occurs, unless prevented by causes beyond his/her reasonable

control. A transferee of title to the Lot which is damaged shall commence and complete reconstruction in the respective periods which would have remained for the performance of such obligations if the Owner of the Lot at the time of the damage still held title to the Lot.

ARTICLE VII

ARCHITECTURAL COMMITTEE

Section 7.1 Architectural Committee Approval of Improvements.

(a) Approval Generally. Before commencing construction or installation of any Improvement within the Project other than the initial construction of Units by the Declarant, the Owner planning such Improvement must submit to the Association's Architectural Committee a written request for approval. The Owner's request shall include color schemes, exterior finish, structural plans, specifications, and plot plans satisfying the requirements of this Article and Section. Unless the Architectural Committee's approval of the proposal is first obtained, no work on the Improvement shall be undertaken. The Architectural Committee shall base its decision to approve, disapprove, or conditionally approve the proposed Improvement on the criteria described in this Article and Section.

(b) Modification to Approved Plans Must Also be Approved. Once a work of Improvement has been duly approved by the Architectural Committee, no material modifications shall be made in the approved plans and specifications therefore and no subsequent alteration, relocation, addition or modification shall be made to the work of Improvement, as approved, without a separate written submission to, and review and approval by, the Architectural Committee. If the proposed modification will have, or is likely to have, a material affect on other aspects or components of the work, the Architectural Committee, in its discretion, may order the

Owner, or Owner's contractors and agents, to cease working not only on the modified component of the Improvement, but also on any other affected component.

Section 7.2 Committee Membership. The Architectural Committee shall be composed of three (3) members of the Association appointed by the Board. In selecting members for the Architectural Committee, the Board of Directors shall, when available, endeavor to select persons whose occupations or education will provide technical knowledge and expertise relevant to matters within the Architectural Committee's jurisdiction. Architectural Committee members shall serve for one (1) year terms, subject to the Board's power to remove any Architectural Committee member and to appoint a successor. Members of the Architectural Committee shall not be entitled to any compensation for services performed pursuant hereto.

Section 7.3 Duties of Committee. It shall be the duty of the Architectural Committee to consider and act upon the proposals and plans submitted to it pursuant to this Declaration, to adopt Architectural Rules pursuant to this Article, to perform other duties delegated to it by the Board, and to carry out all other duties imposed upon it by this Declaration.

Section 7.4 Meetings. The Architectural Committee shall meet from time to time as necessary to properly perform its duties hereunder. The vote or written consent of a majority of the Architectural Committee members shall constitute the action of the Architectural Committee, and the Architectural Committee shall keep and maintain a written record of all actions taken.

The Owner-Applicant shall be entitled to appear at any meeting of the Architectural Committee at which the Owner's proposal has been scheduled for review and consideration. The Owner shall be entitled to be heard on the matter and may be accompanied by an architect, engineer, and/or contractor. Other Owners whose properties may be affected by the proposed

Improvement in terms of the structural integrity of any adjoining Lot, view, or solar access of the Applicant's or any adjacent Lot, noise, or other considerations shall also be entitled to attend the meeting.

Reasonable notice of the time, place, and proposed agenda for Architectural Committee meetings shall be communicated before the date of the meeting to any Owner-Applicant whose application is scheduled to be heard.

Section 7.5 Architectural Rules. The Architectural Committee may, from time to time and with approval of the Board of Directors, adopt, amend, and repeal rules and regulations to be known as "Architectural Rules." Said Architectural Rules shall interpret and implement the provisions hereof by setting forth: (a) the standards and procedures for Architectural Committee review, including the required content of Improvement plans and specifications; (b) guidelines for architectural design, placement of any work of Improvement or color schemes, exterior finishes and materials and similar features which are recommended or required for use within the Project; and (c) the criteria and procedures for requesting variances from any property use restrictions that would otherwise apply to the proposed Improvement under the Governing Documents.

Section 7.6 Basis for Approval of Improvements. When a proposed Improvement is submitted to the Architectural Committee for review, the Architectural Committee shall grant the requested approval only if the Architectural Committee, in its sole discretion, finds that all of the following provisions have been satisfied:

(a) The Owner has complied with those provisions of the Architectural Rules pertaining to the content and procedures for submissions of plans and specifications;

(b) The Owner's plans and specifications: (i) conform to this Declaration and to the

Architectural Rules in effect at the time such plans are submitted to the Architectural Committee; (ii) will result in the construction of an Improvement that is in harmony with the external design of other structures and/or landscaping within the Project; and (iii) will not interfere with the reasonable enjoyment of any other Owner of his/her Unit; and

(c) The proposed Improvement(s), if approved, will otherwise be consistent with the architectural and aesthetic standards prevailing within the Project and with the overall plan and scheme of the development and the purposes of this Declaration.

The Architectural Committee shall be entitled to determine that a proposed Improvement or component thereof is unacceptable when proposed on a particular Lot, even if the same or a similar Improvement or component has previously been approved for use at another location within the Project, if factors such as drainage, topography, or visibility from roads, Common Elements or other Lots or prior adverse experience with the product or components used in construction of the Improvement, design of the Improvement, or its use at other locations within the Project mitigate against erection of the Improvement or use of a particular component thereof on the Lot involved in the Owner's submission. It is expressly agreed that the Architectural Committee shall be entitled to make subjective judgments and consider the aesthetics of a proposal when considering an Owner's request so long as the Architectural Committee acts reasonably and in good faith.

Section 7.7 Proceeding With Work. Upon receipt of approval of an Improvement from the Architectural Committee, the Owner shall, as soon as practicable, diligently proceed with the construction, if required, pursuant to said approval. Work on an Improvement project shall commence within three (3) months from the date of such approval and be completed within one

(1) year. If the Owner fails to comply with this Section, any approval given pursuant to this Article VII shall be deemed revoked unless the Architectural Committee, upon written request of the Owner prior to the expiration of the initial one (1) year period, extends the time for commencement or completion.

Section 7.8 Landscaping. If the Board so delegates, the Architectural Committee shall establish written Rules and Regulations pertaining to landscaping. Landscaping shall include lawns, shrubs, trees, flowers, and any landscaped structures. The use of artificial materials such as plastic plants, flowers, or astro turf will be disapproved by the Architectural Committee.

Section 7.9 Enforcement.

(a) In addition to other enforcement remedies set forth in this Declaration, the Architectural Committee shall have enforcement rights with respect to any matters required to be submitted to and approved by it, and may enforce such architectural control by any proceeding at law or in equity. In addition, the Architectural Committee shall have the authority to order an abatement of any construction, alteration or other matter for which approval is required, to the extent that it has not been approved by the Architectural Committee or if it does not conform to the plans and specifications submitted to the Architectural Committee. No work for which approval is required shall be deemed to be approved simply because it has been completed without a complaint, notice of violation, or commencement of a suit to enjoin such work. If any legal proceeding is initiated to enforce any of the provisions hereof, the prevailing party shall be entitled to recover reasonable attorneys' fees in addition to the costs of such proceeding.

(b) If the Owner fails to remedy any noticed noncompliance within thirty (30) days from the date of such notification, the Architectural Committee shall notify the Board in writing

of such failure. The Board shall then set a date on which a hearing before the Board shall be held regarding the alleged noncompliance. The hearing date shall not be more than thirty (30) days nor less than fifteen (15) days after the notice of the noncompliance is issued by the Board to the Owner, to the Architectural Committee and, in the discretion of the Board, to any other interested party.

(c) At the hearing, the Owner, a representative(s) of the Architectural Committee and, in the Board's discretion, any other interested person may present information relevant to the question of the alleged noncompliance. After considering all such information, the Board shall determine whether there is a noncompliance and if so, the nature thereof and the estimated cost of correcting or removing the same. If a noncompliance is determined to exist, the Board shall require the Owner to remedy or remove the same within such period or within any extension of such period as the Board, at its discretion, may grant. If the Owner fails to take corrective action after having a reasonable opportunity to do so, the Board at its option, may either remove the noncomplying Improvement or remedy the noncompliance and the Owner shall reimburse the Association upon demand for all expenses incurred in connection therewith. If such expenses are not properly repaid by the Owner to the Association, the Board shall recover such expenses through the levy of a Single Lot Assessment against such Owner.

(d) The approval by the Architectural Committee of any plans, drawings or specifications for any work of Improvement done or proposed, or for any other matter requiring the approval of the Architectural Committee under this Declaration, or any waiver thereof, shall not be deemed to constitute a waiver of any right to withhold approval of any similar plan, drawing, specification, or matter subsequently submitted for approval by the same or some other

Owner.

Section 7.10 Variances. The Architectural Committee, in its sole discretion, shall be entitled to allow reasonable variances in any procedures specified in this Article, or in any land use restriction specified in Article VIII to overcome practical difficulties, avoid unnecessary expenses, or prevent unnecessary hardship to Owner-applicants, provided that the Architectural Committee is able to make a good faith written determination that the variance is consistent with one or more of the following criteria: (i) the requested variance will not constitute a material deviation from any restriction contained herein or that the proposal allows the objectives of the violated requirement(s) to be substantially achieved despite noncompliance; (ii) the variance relates to a land use restriction or minimum construction standard otherwise applicable hereunder that is unnecessary or burdensome under the circumstances; or (iii) the variance, if granted, will not result in a material detriment, or create an unreasonable nuisance with respect to any other Lot or Common Area within the Project.

Section 7.11 Limitation on Liability. Neither the Association, its Architectural Committee, nor any member thereof shall be liable to any Owner for any damage, loss, or prejudice suffered or claimed on account of any mistakes in judgment, negligence or nonfeasance arising out of: (a) the approval or disapproval of any plans, drawings, and specifications, whether or not defective; (b) the construction or performance of any work of Improvement, whether or not pursuant to approved plans, drawings, or specifications; (c) the execution and filing of a notice of noncompliance pursuant to Section 7.9 above whether or not the facts therein are correct, provided that such member has acted in good faith upon the basis of such information as may be possessed by him or her.

Section 7.12 Compliance with Government Regulations. Review and approval by the Architectural Committee of any proposals, plans, or other submissions pertaining to Improvements shall in no way be deemed to constitute satisfaction of, or compliance with, any building permit process or any other governmental requirements, the responsibility for which shall rest solely with the Owner who desires to construct, install, or modify the Improvement.

Section 7.13 Appeals. Appeals from decisions of the Architectural Committee may be made to the Board of Directors, which may elect, in its discretion, to hear the appeal or, in the alternative, to affirm the decision of the Architectural Committee. The Association Rules shall contain procedures to process appeals pursuant to this Section.

Section 7.14 Handicapped. Notwithstanding any other Rule or Regulation, the Board of Directors shall make reasonable accommodations in the Rules and Regulations if those accommodations may be necessary or be required by law to afford a handicapped person equal opportunity to use and enjoy his or her Lot.

Section 7.15 Declarant Exception. The provisions of this Article shall not apply to the initial construction by the Declarant of Residences or other Improvements to the Property, and neither the Board nor any Committee appointed by the Board shall have any authority or right to approve or disapprove the initial construction by the Declarant of Residences or other Improvements to the Property.

ARTICLE VIII

USE RESTRICTIONS/DECLARANT'S EXCEPTIONS

Section 8.1 Alterations. No Improvement to the exterior of a Residence, garage, or other structure on a Lot may be altered, remodeled, or modified in any other way except with

the prior written approval of the Architectural Committee.

Section 8.2 Declarant's Exceptions. The Declarant (and its sales agents and representatives) may maintain signs, sales and management offices, and models within the Project until the earlier of the sale of the last Lot in the Project or seven (7) years from recording of the Declaration. No provision contained in this Article VIII shall be applicable to or prohibit any acts or activities by the Declarant (and its agents, suppliers, and contractors) in connection with or incidental to the Declarant's improvement and development of the Property during the Declarant's Control Period.

Section 8.3 Drainage. All slopes and patios on any Lot shall be maintained so as to prevent any erosion or drainage upon adjacent Lots.

Section 8.4 Drilling. No oil drilling, oil development operations, oil refining, quarrying, or mining operations of any kind shall be permitted upon or in any Lot, nor shall oil wells, tanks, tunnels, or mineral excavations or shafts be permitted upon the surface of any Lot or within five hundred (500) feet below the surface of the Project. No derrick or other structure designed for use in boring for water, oil, or natural gas shall be erected, maintained, or permitted upon any Lot.

Section 8.5 No Parking. There shall be absolutely no parking in designated fire lanes or parking along any curb or in any area that is designated as a "no parking" zone by red paint or signs. Parking shall not be allowed on any interior streets except in designated parking areas. Any vehicle which is parked in violation of same may be towed without any further notice as soon as reported by any Member or guest of the Association. All Members of the Association accept the responsibility for reporting such violators in the best interest of the public safety of the

remaining Members. All parking violations shall be reported to the Association or Manager. The owners of the vehicle found to be in violation shall be responsible for all fines and costs associated with such towing as established by the towing company.

Section 8.6 Garages. Garages shall be kept closed at all times, except as reasonably required for ingress to and egress from the interior of the garages.

Section 8.7 Landscape Maintenance. Owners shall keep and maintain in good repair and appearance all portions of the Lot and Residence thereon.

Section 8.8 Lease. Each Owner shall have the right to lease his/her Lot, provided such lease is in writing and that it provides that the tenant shall be bound by and obligated to the provisions of this Declaration, the Articles, Bylaws and Rules and Regulations of the Board. Failure to comply with the provisions of these documents shall be a default of the lease allowing the Association the same rights of action as the Owner against the tenant. For the purpose of exercising such rights, the Owner grants to the Association a special power of attorney, which includes the power of eviction against the tenant as well as the Owner because of the default. No Owner shall lease his/her Lot for transient or hotel purposes. Any Lease which is either for a period of less than six (6) months or pursuant to which the Owner provides any services normally associated with a hotel shall be deemed to be for transient or hotel purposes. A signed lease shall be filed with the Association within ten (10) days of occupancy by the tenant.

Section 8.9 Manufactured Homes. Manufactured Homes as defined in NRS §489.113 are prohibited in the Project.

Section 8.10 Nuisance. No rubbish or debris of any kind shall be placed or permitted to accumulate anywhere within the Project, and no odor shall be permitted to arise therefrom so as

to render the Project or any portion thereof unsanitary, unsightly, or offensive. No noise or other nuisance shall be permitted to exist or operate upon any portion of a Lot so as to be offensive or detrimental to any other Lot or to its occupants. Alarm devices used exclusively to protect the security of a Lot and its contents shall be permitted, provided that such devices do not produce annoying sounds or conditions as a result of frequently occurring false alarms. Nothing other than draperies and window covering as permitted by this Declaration may be installed on any Lot so as to be visible from the exterior of the Lot without the prior written approval of the Executive Board. No clothing or household fabrics shall be hung, dried, or aired in a manner that is visible from any Private Street.

Section 8.11 Outside Antenna/Satellite Dishes. Other than satellite dishes exempted by the FCC, no television, radio, or other electronic antenna, dish or device of any type shall be erected, constructed, placed, or permitted to remain on any of the Lots or buildings constructed on the Lots unless and until the same shall have been approved in writing by the Architectural Committee. Use of electronic devices which interfere with the operation of the garage door openers, television reception and cellular phones, and the like are prohibited.

Section 8.12 Parking and Vehicular Restrictions. Owners shall not park, store, or keep on their driveway or on any street (public or private) within the Property any large commercial type vehicle (including, but not limited to, any dump truck, cement mixer truck, oil or gas truck, or delivery truck); any recreational vehicle (including, but not limited to, any camper, travel trailer, or motor home); any bus, trailer, trailer coach, camp trailer, boat, aircraft or mobile home; or any inoperable vehicle. Subject to Board approval, camper trucks and similar vehicles up to and including one ton when used for everyday-type transportation may be kept on the

Property. No Owner shall park, store, or keep anywhere within the Property any vehicle or vehicular equipment, mobile or otherwise, deemed to be a nuisance by the Board. All boats, trailers, campers, and similar recreational vehicles shall be parked on an Owner's Lot behind screened side or rear yards or in enclosed Garages. They may be parked in driveways for a maximum twenty-four (24) hour period to allow for loading or unloading. Off road or unlicenced vehicles are not permitted on the Property at any time, except when being transported to or from storage on the Owner's Lot. No vehicles of any kind (licensed or unlicenced) are to be driven on any portion of unimproved, vacant or common area within the Association.

Section 8.13 Pets. Animals, livestock, and poultry shall not be raised, bred or kept on any Lot, except domestic household pets (e.g., cats and dogs) not exceeding a total of two (2), may be kept on each Lot, provided it is not kept, bred or maintained for any commercial purpose. Pets shall be kept on the Lot, except when under leash or when being transported to or from the Lot in a motor vehicle. (Owner's will be responsible for removal of pet's feces.) If a pet becomes a nuisance or an annoyance to the other Owners, the Board may, after appropriate notice and a hearing, confine or remove the animal at the Owner's expense.)

Section 8.14 Playground Equipment. All bicycles, tricycles, scooters, skateboards, and other play equipment, wading pools, baby strollers, and similar items shall be stored on the Lot when not in use. Basketball backboards shall not be placed or stored in the street or on a sidewalk.

Section 8.15 Residential Use Only. Other than the Declarant's exceptions per Section 8.2, no part of the Project shall ever be used or caused to be used or allowed or authorized in any way, directly or indirectly, for any business, commercial, manufacturing, mercantile, storing,

vending, or other such non-residential purposes except for sales office on a temporary basis. The provisions of this Section shall not preclude an occupant who is engaged in individual professional work (e.g. accountant, bookkeeper) without external evidence thereof, so long as: (i) such occupant conducts its activities in conformance with all ordinances, (ii) such business activity is merely incidental to the use thereof as a Residence, and (iii) such occupant does not solicit or invite the public to such Residence as part of such business activity.

Section 8.16 Security Interest Liens. Breach of any of the covenants in this Article VIII shall not defeat or render invalid the lien of any First Security Interest made in good faith and for value as to said Lots or Property, or any part thereof, but such provisions, restrictions, or covenants shall be binding and effective against any Owner whose title thereto is acquired by foreclosure, Trustee's sale or otherwise.

Section 8.17 Signs. No sign, poster, billboard, advertising device, or other display of any kind shall be displayed so as to be visible from outside any Lot without the approval of the Executive Board except that one (1) sign of not greater than six (6) square feet may be displayed on each Lot advertising the Lot for sale or lease.

Section 8.18 Temporary Buildings. No temporary structure, trailer, mobile home, camper, tent, shack, garage, barn, or other out-building shall be used on any Lot at any time as a Residence.

Section 8.19 Timeshare. No Lot shall be made subject to any time share program, interval ownership, or similar program whereby the right to exclusive use of the Lot rotates among multiple owners or members of the program on a fixed or floating time schedule over a period of years.

Section 8.20 Trash. All rubbish, trash, and garbage shall be regularly removed from the Lots, and shall not be allowed to accumulate thereon. All clotheslines, refuse containers, woodpiles, storage area, and machinery and equipment shall be prohibited upon any Lot, unless obscured from view at ground level of adjoining Lots and streets, by a masonry wall or appropriate screen approved by the Architectural Committee.

Section 8.21 Vehicle Repair. No Owner or other occupant of any Lot shall conduct repairs or restorations of any motor vehicle, boat, trailer, aircraft, or other vehicle upon a Lot within the Project, except wholly within the Owner's Lot; provided, however, that such activity shall at no time be permitted if it is determined by the Board to be a nuisance. Notwithstanding the foregoing, these restrictions shall not be interpreted in such a manner so as to permit any activity which would be contrary to any local ordinance.

Section 8.22 Window Coverings. Within thirty (30) days from the date of becoming an Owner, such Owner shall install draperies and window coverings for all windows and glass doors in such Owner's Lot. Reflective window coverings are prohibited.

ARTICLE IX

RIGHTS OF ELIGIBLE SECURITY INTEREST

Section 9.1 Rights of Eligible Security Interest. No breach of the covenants, conditions, and restrictions in this Declaration, nor the enforcement thereof or of any lien provision, except as provided in Section 4.14, shall defeat or render invalid the lien of any Security held by an Eligible Security Interest made in good faith and for value. However, all of the covenants, conditions, and restrictions in this Declaration shall be binding upon any Owner whose title is derived through foreclosure or exercise of power of sale, or otherwise.

Section 9.2 Notice to Eligible Security Interest.

(a) Notice of Action. Upon written request to the Association, identifying the name and address of the Eligible Security Holder, Eligible Insurer or Guarantor, and the Lot number or address, any such Eligible Security Holder or Eligible Insurer, or Guarantor will be entitled to timely notice of:

(i) Any delinquency in the payments of assessments or charges owned by an Owner of a Lot subject to an eligible mortgage held, insured, or guaranteed by such Eligible Security Holder, Eligible Insurer, or Guarantor, which remains uncured for a period of sixty (60) days;

(ii) Condemnation or casualty loss that effects a material portion of the Project.

Section 9.3 Time of Notice to Security Interest. The Board shall give thirty (30) days prior written notice to each Eligible Security Interest represented in the real property of any amendment or alteration of the Declaration or Articles. In addition, the Board shall give each Security Holder, who requests same in writing, a copy of notices of liens filed against any Lot.

Section 9.4 Condemnation. If any Lot or portion thereof or the Association Property and facilities or any portion thereof is made the subject matter of any condemnation or eminent domain proceeding, no provision of this Declaration, Articles, Bylaws, or equivalent documents will entitle the Owner of a Lot or other party to priority over an institutional Holder of any First Security Interest or equivalent security interest on a Lot with respect to any distribution to such Lot of the proceeds of any award or settlement.

ARTICLE X

DISPUTES

Section 10.1 Legal Proceedings. The Board shall not institute any civil action[1] against any person without first providing the Members at least twenty-one (21) days' prior written notice of the meeting of the Association to consider institution of a civil action.

The notice shall describe the purpose of the legal proceeding, the parties to the proceeding, the anticipated cost to the Association (including attorneys' fees) in the proceeding, the source of funds to fund the proceedings (reserves or special or regular assessments), and suggested information that should be disclosed to third parties, such as prospective purchasers and lenders, while the proceeding is being prosecuted, except as otherwise provided in this Section, the Association may commence a civil action only upon a vote or agreement of the Owners of Lots to which at least a majority of the votes of the Members of the Association are allocated. The provisions of this Section do not apply to a civil action that is commenced:

(a) To enforce the payment of an assessment;

(b) To enforce the Declaration, Bylaws, or Rules of the Association;

(c) To proceed with a counterclaim; or

(d) To protect the health, safety, and welfare of the Members of the Association.

Section 10.2 Arbitration/Mediation. Notwithstanding the foregoing and subject to NRS Chapter 38, the Association, the Declarant and any Owner shall have the right to enforce by an

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[1]Defined as an action for damages or equitable relief. The term does not include an action for injunctive relief in which there is an immediate threat of irreparable harm, or relating to title to real property.

"Action" at law or in equity, each covenant, condition, restriction and reservation, now or hereafter imposed by this Declaration. Each Owner shall have a right of Action against the Association for any failure by the Association to comply with the provisions of this Declaration, the Bylaws or Articles. In any Action, including Arbitration, reasonable attorney's fees may be awarded to the prevailing party.

ARTICLE XI

GENERAL PROVISIONS

Section 11.1 Non-Waiver. Failure by the Association, the Declarant, or any Owner to enforce any covenant, condition, restriction or reservation contained in this Declaration shall not be deemed a waiver of the right to do so thereafter.

Section 11.2 Severability. Should any provision in this Declaration be void or become invalid or unenforceable in law or equity by judgment or court order, the remaining provisions hereof shall be and remain in full force and effect.

Section 11.3 Amendments. During the period of time prior to expiration of the Declarant's Control Period, this Declaration may be amended by an instrument approved by sixty-seven percent (67%) of the Voting Power of each class of Members of the Association. The amendment shall become effective upon its recording in the Office of the County Recorder of Clark County, Nevada. At the expiration of the Declarant's Control Period, the Declaration may be amended by approval of (i) Sixty-seven percent (67%) of the total Voting Power of the Association, and (ii) at least sixty-seven percent (67%) of the Voting Power of Members of the Association other than Declarant.

Notwithstanding any other provisions of this Section 11.3, for so long as the Declarant

owns any portion of the Property, but not later than seven (7) years from the recording of this Declaration, the Declarant may unilaterally amend this Declaration by recording a written instrument signed by the Declarant in order to conform this Declaration to the requirements then in effect for the State of Nevada or any County or City or other applicable agency which has jurisdiction over the Project.

In the event this Declaration is amended, as provided herein, the Secretary of the Association shall, within thirty (30) days of the adoption of such amendment, prepare a copy of the amendment that was made and cause it to be hand-delivered or sent prepaid, by United States mail to the mailing address of each Residence, or to any other mailing address designated in writing by a Lot Owner.

Section 11.4 Extension of Declaration. Each and all of these covenants, conditions, and restrictions shall run with and bind the land for a term of twenty (20) years from the date this Declaration is recorded, after which date they shall automatically be extended for successive periods of ten (10) years unless they are canceled in writing by Owners of at least fifty-one percent (51%) of the Voting Power of the Association. All amendments must be recorded in the Office of the County Recorder of Clark County, Nevada.

ARTICLE XII

ANNEXATION

Section 12.1 Annexation of Additional Property by Association. Upon approval in writing of the Association, pursuant to two-thirds (2/3) of a majority of the Voting Power of its Members, or the written assent of such Members, the owner of any property who desires to add it to the scheme of this Declaration and to subject it to the jurisdiction of the Association, may file

or record a Declaration of Annexation which shall extend the scheme of this Declaration to such Project.

Section 12.2 Annexation by Declarant. If within seven (7) years from the date of the recording of this Declaration with the Clark County, Nevada, Recorder, the Declarant should develop the additional Phases (as set forth in Recital D), such additional Phases or any portion thereof may be added to the Property and be subject to this Declaration and included within the jurisdiction of the Association by action of the Declarant without the assent of Members of the Association; provided, however, that the development of the additional land shall be consistent with Improvements in the initial Phase of development in terms of quality of construction. All Improvements in each Phase will be substantially completed prior to annexation.

Said annexation may be accomplished by the recording of a Declaration of Annexation or separate Declaration of Restrictions which requires Lot Owners therein to be Members of the Association. At the time of recording of the Declaration of Annexation, Declarant shall also by deed transfer to the Association the Association Property in the area being annexed.

The obligation of Lot Owner to pay dues to the Association and the right of such Lot Owners to exercise voting rights in the Association in such annexed property shall not commence until the first day of the month following close of the first sale of a Lot by the Declarant in that particular Phase of development.

Subject to annexation of additional property as set forth in this subsection:

(a) The Declarant hereby reserves for the benefit of and appurtenant to subsequent Phases described in Recital D, the non-exclusive easements to use the Association Property on the Property, until such time as all Phases are annexed pursuant to this Section, or until expiration

of the right to annex.

(b) The Declarant hereby reserves the right to grant, until expiration of the right to annex, for the benefit of and appurtenant to each Lot in the Property in Phase 1 a non-exclusive easement to use the Association Property in the Phased Areas not yet annexed pursuant to the provisions of and in the same manner prescribed by this Declaration to the same extent and with the same effect as if each of the Owners of Lots in Phase 1 owned a Lot in the Association Property of the Phased Areas to be annexed.

These reciprocal cross-easements shall be effective as to each Phase, and as to the Property, only until such time as each Phase has been annexed by the recording of a Declaration of Annexation or a separate Declaration of Covenants, Conditions, and Restrictions by the Declarant, or expiration of the right to annex pursuant to this Article.

Section 12.3 De-annexation. The Declarant may delete all or any portion of a Phase of development from coverage of this Declaration and the jurisdiction of the Association, so long as the Declarant is the Owner of all of said Phase or Phases to be annexed, and provided that:

(a) The Notice of De-Annexation is recorded in the same manner as the applicable Declaration of Annexation was recorded;

(b) The Declarant has not exercised any Association vote with respect to any portion of such Phase;

(c) Assessments have not yet commenced with respect to any portion of such Phase;

(d) No Lot has been sold in said Phase to a member of the general public; and

(e) The Association has not made any expenditures of any obligation respecting any portion of said Phase.

ARTICLE XIII

BOUNDARY WALLS

Section 13.1 General Rules of Law to Apply. Each Boundary Wall which is built as a part of the original construction of the Project, or subsequently built on the dividing line between Lots, shall constitute a "Boundary Wall," and the Owner of each adjoining Lot shall have joint use, and when not inconsistent with this Article, the rules of law as to the rights and liabilities regarding Boundary and Party Walls shall apply.

Section 13.2 Repair/Restoration. Should the Boundary Wall or Party Wall be damaged or destroyed by the fault, negligence, or other act or omission of one of the Owners, then that Owner(s) shall repair or rebuild the wall at his/her/their expense and compensate for any damages to the property of the other Lot Owner(s) or the Association, as the case may be. Should the Boundary Wall or Party Wall at any time be damaged by any cause other than the act or omission of an Owner, then the wall shall be repaired or rebuilt at the joint expense of the Owners sharing the Party Wall, less any funds received as a result of insurance coverage.

Section 13.3 Right to Contribution Runs With the Land. The right of any Owner to contribution from any other Owner under this Article shall be appurtenant to the land and shall pass to such Owner's successors in title.

Section 13.4 Disputes. Any dispute relating to a Boundary Wall or a Party Wall shall, at the option of any affected Owner, be subject to resolution before the Architectural Committee, who shall conduct the hearing in accordance with its applicable rules. In the absence of such rules, the American Arbitration Association rules for construction disputes shall be used. Written demand for resolution of the dispute shall be given by the affected Owner to the Architectural

Committee with a copy to other affected Owners.

IN WITNESS WHEREOF, the undersigned, being Declarant herein, has executed this instrument the day and year first above written.

W.L. Homes LLC, a Delaware limited liability company, dba Watt Homes-Nevada Division

BY: _____
TODD LARKIN
Its Division President

[Acknowledgment follows on next page]

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

On this 18 day of February, 2000, personally appeared before me, a Notary Public Todd Larkin, the Division President of W.L. Homes LLC, a Delaware limited liability company, dba Watt Homes-Nevada Division known to me to be the person who executed the within DECLARATION OF COVENANTS, CONDITIONS, AND RESTRICTIONS OF COUNTRY GARDEN, and who acknowledged to me that he executed the same for the uses and purposes therein mentioned.

MARLA BRADLEY
Notary Public, State of Nevada
Appointment No. 99-59084-1
My Appt. Expires Aug. 6, 2003

_____
NOTARY PUBLIC

February 2, 2000
P:\OFFICE\CLIENTS\John Lam Homes\COUNTRY.GAR\CCR3

CLARK COUNTY, NEVADA
JUDITH A. VANDEVER, RECORDER
RECORDED AT REQUEST OF:
DERNER DERNER ET AL
02-25-2000 14:19 BJB 58
OFFICIAL RECORDS
BOOK: 20000225 INST: 00963
FEE: 64.00 RPTT: .00

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EXHIBIT B

FOF/COL
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DISTRICT COURT

CLARK COUNTY, NEVADA

A ORO, LLC,

Plaintiff,

v.

GREEN TREE SERVICING LLC, NORTHWEST TRUSTEE SERVICES, INC.; WING WAH HO, an individual; DOES I through X, and ROE CORPORATIONS I through X, inclusive,

Defendants.

Case No.: A-14-705977-C

Dept. No.: XII

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING DITECH'S MOTION FOR SUMMARY JUDGMENT

GREEN TREE SERVICING LLC,

Counterclaimant,

v.

A ORO, LLC, a Nevada limited liability company; HOMEOWNER ASSOCIATION SERVICES, INC., a Nevada corporation; TREO NORTH AND SOUTH HOMEOWNERS' ASSOCIATION; and

DOES I through X, inclusive; ROE ENTITIES XI through XX,

Counter-Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING DITECH'S MOTION FOR SUMMARY JUDGMENT

This matter concerning Plaintiff/Counter-Defendant, A Oro, LLC's ("Plaintiff"), *Motion for Summary Judgment;* Defendant/Counterclaimant, Ditech Financial LLC's ("Ditech"), *Motion for Summary Judgment*; all Oppositions and Replies thereto, having come on for hearing on the 17th day of April, 2017, in Department XII of the Eighth Judicial District Court, Clark County, Nevada before the Honorable Michelle Leavitt.

Plaintiff was represented by its attorney of record, Shawn Walkenshaw, Esq., of Takos Law, Ltd.; Ditech was represented by its attorney of record, Michael R. Brooks, Esq., of Brooks Hubley, LLP; and Treo North and South Homeowners Association ("Treo") was represented by Kelley K. Blatnik, Esq., of counsel for Boyack Orme & Anthony. No one was present on behalf of Homeowner Association Services, Inc. ("HAS").

This Court, having reviewed the papers and pleadings on file herein, judicially noticeable materials and heard oral arguments of counsel makes the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1) Defendants, Wing-Wah Ho and Wai Ching Eileen Ho ("Borrowers") were the prior owners of certain real property located at 9462 Oro Silver Court, Las Vegas, Nevada 89178, with Assessor's Parcel Number 176-20-312-073 ("Subject Property"). In 2005, the Borrowers

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obtained a mortgage loan from Community Lending, Inc., in the amount of $247,600.00. In exchange, the Borrowers executed a promissory note ("Note"), which was secured by a Deed of Trust recorded against the Subject Property. The Deed of Trust was recorded in the Official Records of the Clark County Recorder as Instrument No. 20051031-0007434.

2) The Deed of Trust granted a security interest to Community Lending, Inc., and named Mortgage Electronic Registration Systems, Inc. ("MERS") as beneficiary solely as nominee for the lender and the lender's successors and assigns.

3) On May 17, 2010, MERS recorded a Corporation Assignment of Deed of Trust Nevada in the Official Records of the Clark County Recorder, as Instrument No. 201005170002369, transferring the beneficial interest in the Deed of Trust to BAC Home Loans Servicing LP f/k/a Countrywide Home Loans Servicing LP ("BAC").

4) On July 2, 2013, Bank of America, N.A., successor by merger to BAC, recorded an assignment which named Green Tree Servicing LLC n/k/a Ditech Financial LLC ("Ditech") as the new beneficiary of record. The Assignment is recorded in the official records of the Clark County Recorder as Instrument No. 201307020001089.

5) The Subject Property is located within a common-interest community governed by Treo North and South Homeowners Association ("Treo"), which was established pursuant to NRS Chapter 116. Homeowner Association Services, Inc. ("HAS") is the collection agency retained and authorized by Treo to pursue unpaid assessments, fines and other costs, by way of foreclosure or otherwise, from the association's delinquent owner-members.

6) On or about September 14, 2010, HAS, as purported agent of Treo, recorded a Notice of Claim of Lien - Homeowner Assessment against the Subject Property in the Official Records of Clark County Recorder, as Instrument No. 201009140002380. According to the

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Notice, as of September 2, 2010, the total amount due and owing was $400.40.

7) Thereafter, on May 4, 2011, HAS, on behalf of Treo, recorded a Notice of Default and Election to Sell ("Notice of Default") in the Official Records of the Clark County Recorder as Instrument No. 201105040001473. The Notice of Default stated that the amount due as of April 22, 2011, was $909.54.

8) On or about May 5, 2014, HAS, on behalf of Treo, recorded a Notice of Sale in the Official Records of the Clark County Recorder as Instrument No. 20140505-0003738. The Notice of Sale set the date of the sale for May 22, 2014, and listed a total amount due and owing of $6,906.10.

9) On or about May 22, 2014, HAS received a check from Ditech in the amount of $3,737.99. The amount of the check represented the superpriority portion of Treo's lien. HAS subsequently postponed the foreclosure sale to a later date.

10) On or about June 12, 2014, HAS, on behalf of Treo, worked with Nevada Legal Support Services ("NLSS") to conduct a homeowners' association foreclosure sale of the Subject Property. HAS provided an opening bid amount of $2,600.00, which reflected the remaining subpriority portion of Treo's lien, after the earlier receipt of Ditech's payment. HAS instructed NLSS to announce that the superpriority portion of the lien had been paid.

11) NLSS conducted the foreclosure sale (the "HOA Lien Sale"), and Plaintiff purchased its interest in the Subject Property for $2,626.00. At no time did any bidder, including Plaintiff, ask or otherwise request information concerning the type of interest they were purchasing.

12) On or about June 26, 2014, HAS, as agent for Treo, recorded a Release of Super-Priority Lien Pursuant to NRS 116.3116(2) ("Release"). The Release identified the payment of

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$3,737.99 from Ditech, and "acknowledge[s] full satisfaction of the super-priority portion of the Notice of Claim of Lien..." The Release was recorded in the Official Records of the Clark County Recorder as Instrument No. 20140626-0000379.

11) On or about August 7, 2014, a Foreclosure Deed Upon Sale ("Foreclosure Deed") was recorded against the Subject Property in the Official Records of the Clark County Recorder as Instrument No. 20140807-0002613. The Foreclosure Deed states that the Subject Property was sold on June 12, 2014, to Plaintiff for $2,626.00.

12) On or about August 21, 2014, Plaintiff filed a Complaint in the Eighth Judicial District Court, naming Ditech as a Defendant, and seeking Declaratory Relief and Quiet Title. Ditech filed an Answer and Counterclaim on October 7, 2014, and an Amended Answer and Counterclaim on November 6, 2015, similarly seeking an interpretation of NRS 116.3116 and a declaration regarding the effect Treo's foreclosure sale on Ditech's deed of trust.

CONCLUSIONS OF LAW

1) In a quiet title action, the plaintiff bears the burden of proof to prove good title in itself including the presences and enforcement of any superpriority rights under the HOA's assessment lien. *Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 669, 918 P.2d 314, 318 (Nev. 1996).

2) NRS 116.3116 discusses provides for homeowner association liens against units or homes for unpaid or delinquent assessments.

3) The Nevada Supreme Court in the *SFR* Decision acknowledged that an HOA's lien is "prior to all other liens and encumbrances on a unit... If subsection 2 (of NRS 116.3116(2)) ended there, a first deed of trust would have complete priority over an HOA lien. But it goes on to carve out a partial exception to subparagraph (2)(b)'s exception for first security interests."

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SFR Investments Pool 1 v. U.S. Bank (hereafter, the "*SFR* Decision"), 130 Nev. Adv. Op 75, 334 P.3d 408, 410 (Nev. 2014).

4) A party seeking to invoke the benefits of an exception to a rule must prove the existence of the exception. *Simpson Strong-Tie Co., Inc. v. Gore*, 49 Cal. 4th 12, 23, 230 P.3d 1117, 1124 (2010), *see also Trade Comm'n v. Morton Salt Co.* (1948) 334 U.S. 37, 44–45, 68 S.Ct. 822, 92 L.Ed. 1196 ("the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits ...").

5) Ditech has established, and it is undisputed, that it holds a first position deed of trust.

6) Plaintiff has failed to meet its burden of production regarding evidence that the HOA Lien Sale was a superpriority assessment lien sale or that the Foreclosure Deed transferred superpriority assessment lien rights.

7) Defendants have produced undisputed evidence and testimony to confirm that the HOA Lien Sale was a subpriority assessment lien sale.

8) As a defense to a superpriority assessment lien claims, a lender can protect its interest by determining the superpriority amount and tendering it in advance of the sale. *SFR* Decision at 418, *see also Salvador v. Bank of America, N.A.*, 2016 WL 1170987 *2 (D. Nev. 2016).

9) Here, on or about May 22, 2014, Ditech paid the purported superpriority portion of Treo's lien in advance of the foreclosure sale of the Subject Property. As such, by operation of law, any superpriority portion was extinguished.

10) HAS postponed the May 22, 2014, foreclosure sale.

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11) The total amount of the lien as stated in the May 5, 2014, Notice of Sale was $6,906.10, but the opening bid at the June 12, 2014, foreclosure sale was $2,600.00, reflecting a reduction in the total due to the payment by Ditech of the purported superpriority portion.

12) The person who cried the sale provided a Declaration stating that she announced the payment of the superpriority portion of Treo's lien. Plaintiff provided a declaration that no such announcement was made. Although Plaintiff disputes whether the announcement occurred, it is not a material fact that would preclude summary judgment.

13) Plaintiff did not make the reasonable inquiry necessary to be a bona fide purchaser of anything other than a subpriority interest.

14) Nevada law does not require that a release of the superpriority portion of an HOA's lien be recorded against the subject property prior to an HOA foreclosure sale.

Based upon the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that Plaintiff's Motion for Summary Judgment is hereby DENIED.

IT IS FURTHER ORDERED that Ditech's Motion for Summary Judgment is hereby GRANTED.

IT IS FURTHER ORDERED that the foreclosure sale conducted on June 12, 2014, by Homeowners Association Services, Inc., purporting to transfer the real property located at 9462 Oro Silver Court, Las Vegas, Nevada 89178, with Assessor's Parcel Number 176-20-312-073, was a sale subject to Ditech's senior Deed of Trust.

IT IS HEREBY ORDERED that A Oro, LLC's interest in the Subject Property is subject to Ditech's first position deed of trust.

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IT IS HEREBY ORDERED that a certified copy of this Order may be recorded with the Clark County Recorder as evidence of the findings of this Court and the continuing viability of the Deed of Trust.

IT IS HEREBY ORDERED that any *lis pendens* recorded against the Subject Property is expunged.

IT IS SO ORDERED.

Dated this 5 day of June, 2017.

DISTRICT COURT JUDGE

Respectfully Submitted By:

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Approved as to Form and Content:

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