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

SUPREME COURT

STATE OF NEVADA

RESOURCES GROUP, LLC, a Nevada Limited Liability Company, Appellant, vs. U.S. BANK NATIONAL ASSOCIATION, ND, a national association, Respondent.	CASE NO.: 84992

JOINT APPENDIX VOLUME 2 PART 1

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

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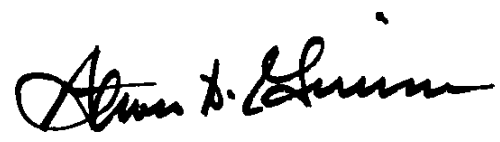

CLERK OF THE COURT

CMSJ
MICHAEL F. BOHN, ESQ.
Nevada Bar No.: 1641
mbohn@bohnlawfirm.com
LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.
376 East Warm Springs Road, Ste. 140
Las Vegas, Nevada 89119
(702) 642-3113/ (702) 642-9766 FAX

Attorney for Resources Group, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

U.S. BANK NATIONAL ASSOCIATION, ND, a national association

Plaintiff,

vs.

GEORGE R. EDWARDS, an individual; ANY AND ALL PERSONS UNKNOWN, CLAIMING TO BE PERSONAL REPRESENTATIVES OF GEORGE R. EDWARDS ESTATE, OR DULY APPOINTED, QUALIFIED, AND ACTING EXECUTOR OF THE WILL OF THE ESTATE OF GEORGE R. EDWARDS; RESOURCES GROUP, LLC, a Nevada Limited Liability Company; GLENVIEW WEST TOWNHOMES ASSOCIATION, a Nevada non-profit corporation; DOES 4 through inclusive; and ROES 1 through 10 inclusive

Defendants.

RESOURCES GROUP, LLC,

Counter-claimant

vs

U.S. BANK NATIONAL ASSOCIATION, ND, a national association

Counter-defendant

CASE NO.: A-12-667690-C
DEPT NO.: XVI

OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND RESOURCES GROUP, LLC'S COUNTERMOTION FOR SUMMARY JUDGMENT

Counter-claimant, Resources Goup, LLC's (hereinafter "Resources"), by and through its attorney, Michael F. Bohn, Esq., files this opposition to the motion for summary judgment filed by plaintiff U.S. Bank National Association, ND (hereinafter "plaintiff") on May 16, 2016. Resources also moves that summary judgment be entered in its favor on all claims for relief asserted by Resources in the counterclaim filed on July 16, 2014. This opposition and countermotion is based upon the points and authorities contained herein.

STATEMENT OF FACTS

Resources is the owner of the real property commonly known as 4254 Rollingstone Drive, Las Vegas, Nevada (hereinafter "Property"). Resources obtained title from the Rollingstone Drive Trust by way of a grant, bargain, sale deed recorded on May 29, 2012. A copy of the grant, bargain, sale deed is Exhibit A. Rollingstone Drive Trust obtained title by way of a foreclosure deed recorded on January 31, 2012. A copy of the recorded foreclosure deed is Exhibit B. The foreclosure deed arises from a delinquency in assessments due from the former owner to the Glenview West Townhomes Association (hereinafter "HOA"), pursuant to NRS Chapter 116.

Plaintiff is the beneficiary of a deed of trust that was recorded as an encumbrance to the Property on March 26, 2009. A copy of the deed of trust is Exhibit C.

Defendant George R. Edwards is the former owner of the Property.

On December 20, 2010, the foreclosure agent for the HOA provided written notice by certified mail to the former owner that he was delinquent in the payment of assessments to the HOA. A copy of the notice is Exhibit D.

The foreclosure agent for the HOA recorded a notice of delinquent assessment (lien) on January 4, 2011. A copy of the notice of delinquent assessment lien is Exhibit E.

The foreclosure agent for the HOA recorded a notice of default and election to sell on March 29, 2011. A copy of the notice of default and election to sell is Exhibit F.

Copies of the notice of default were mailed to the unit owner, plaintiff, and other interested

parties on April 5, 2011. Proof of mailing of the notice of default is Exhibit G.

The HOA foreclosure agent recorded the notice of trustee's sale on October 13, 2011. A copy of the notice of trustee's sale is Exhibit H.

Copies of the notice of trustee's sale were mailed to the unit owner, plaintiff, and other interested parties by certified mail on October 20, 2011. Proof of mailing of the notice of trustee's sale is Exhibit I.

At the public auction held on January 25, 2012, 4254 Rolling Stone Dr Trust purchased the Property for the high bid of $5,331.00.

The interest of each of the plaintiff was extinguished by reason of the foreclosure sale resulting from a delinquency in assessments due from the former owner to the HOA pursuant to NRS Chapter 116.

POINTS AND AUTHORITIES

1. The foreclosure of the HOA's super priority lien extinguished plaintiff's subordinate deed of trust.

At page 5 of its motion, plaintiff argues that as the original and current beneficiary of the deed of trust, plaintiff is "entitled to enforce the same by commencing foreclosure." Likewise, at page 6 of its motion, plaintiff asserts that "U.S. Bank is entitled to a judgment of this Court ordering the Property sold at foreclosure in order to satisfy the amount due and payable."

On the other hand, because plaintiff allowed its deed of trust to be extinguished by the HOA foreclosure sale held on January 25, 2012, plaintiff no longer has an interest in the Property that can be foreclosed.

NRS 116.3116 provides in part:

Liens against units for assessments.

1. **The association has a lien on a unit for** any construction penalty that is imposed against the unit's owner pursuant to NRS 116.310305, **any assessment levied against that unit or any fines imposed against the unit's owner from the time the construction penalty, assessment or fine becomes due**. Unless the declaration otherwise provides, 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. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.

2. A lien under this section is prior to all other liens and encumbrances on a unit

except:

(a) Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to;

(b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent or, in a cooperative, the first security interest encumbering only the unit's owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent; and

(c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.

The lien is also prior to all security interests described in paragraph (b) 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, unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien. If federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior to all security interests described in paragraph (b) must be determined in accordance with those federal regulations, except that notwithstanding the provisions of the federal regulations, the period of priority for the lien must not be less than the 6 months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association. (emphasis added)

NRS 116.3116 (2) provides that the superpriority lien for 9 months of charges is "prior to all security interests described in paragraph (b)." Plaintiff's deed of trust falls squarely within the language of paragraph (b). The statutory language does not limit the nature of this "priority" in any way.

In SFR Investments v. U.S. Bank, 130 Nev. Adv. Op. 75, 334 P.3d 408, 409 (2014), the Nevada Supreme Court held that the foreclosure of the HOA lien extinguishes first trust deeds. The 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 2116.3116(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.

The court went on to hold:

NRS 116.3116(2) gives an HOA 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.

This detailed opinion holds that the 9 month HOA "superpriority" lien has priority over the mortgage lien and that foreclosure of the HOA lien extinguishes a first trust deed. The remedies available to trust deed beneficiaries are to be exercised PRIOR to the time of the HOA foreclosure sale. Once the foreclosure sale has been completed, title is vested in the purchaser free of any first trust deed recorded against the property. The 4254 Rolling Stone Dr Trust therefore acquired title to the property free of plaintiff's extinguished deed of trust.

2. The recitals in the foreclosure deed are conclusive absent proof of grounds for equitable relief.

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).

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 foreclosure deed attached as Exhibit B includes the following recitals:

> 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.

The controlling statute, NRS 116.31166, provides:

> **Foreclosure of liens: Effect of recitals in deed; purchaser not responsible for proper application of purchase money; title vested in purchaser without equity or right of redemption**.
>
> 1. **The recitals in a deed** made pursuant to NRS 116.31164 of:
> (a) Default, the mailing of the notice of delinquent assessment, and the recording of the notice of default and election to sell;
> (b) The elapsing of the 90 days; and
> (c) The giving of notice of sale,
> are **conclusive proof of the matters recited**.
>
> 2. **Such a deed containing those recitals is conclusive against** the unit's former owner, his or her heirs and assigns, **and all other persons**. The receipt for the purchase money contained in such a deed is sufficient to discharge the purchaser from obligation to see to the proper application of the purchase money.
>
> 3. The sale of a unit pursuant to NRS 116.31162, 116.31163 and 116.31164 vests in the purchaser the title of the unit's owner without equity or right of redemption. (emphasis added)

NRS 47.240(6) also provides that conclusive presumptions include "[a]ny other presumption which, by statute, is expressly made conclusive." Because NRS 116.31166 contains such an expressly conclusive presumption, the recitals in the foreclosure deed are "conclusive proof" that copies of both the notice of default and the notice of sale were mailed to plaintiff. Exhibits G and I to this opposition and countermotion prove that these notices were mailed to plaintiff.

In Shadow Wood Homeowners Association v. New York Community Bancorp, Inc., 132 Nev. Ad. Op. 5, 366 P.3d 1105 (2016), the Nevada Supreme Court recognized that "courts retain the power, **in an appropriate case**, to set aside a defective foreclosure sale on equitable grounds." 366 P.3d at 1111. (emphasis added)

The court also stated:

> And, cases elsewhere to have addressed comparable conclusive-or presumptive-effect

recital statutes confirm that such recitals do not defeat equitable relief in a proper case; rather, such recitals are "conclusive, *in the absence of grounds for equitable relief.*" Holland v. Pendleton Mortg. Co., 61 Cal.App.2d 570, 143 P.2d 493, 496 (Cal.Ct.App.1943) (emphasis added); *see* Bechtel v. Wilson, 18 Cal.App.2d 331, 63 P.2d 1170, 1172 (Cal.Ct.App.1936) (distinguishing between a challenge to the sufficiency of pre-sale notice, which was precluded by the conclusive recitals in the deed, and an equity-based challenge based upon the alleged unfairness of the sale); *compare* 1 Grant S. Nelson, *Real Estate Finance Law, supra,* § 7:23, at 986–87 ("After a defective power of sale foreclosure has been consummated, mortgagors and junior lienholders in virtually every state have an equitable action to set aside the sale.") (footnotes omitted), *with id.* § 7:22, at 980–82 (noting that "[m]any states have attempted to enhance the stability of power of sale foreclosure titles by enacting a variety of *presumptive statutes* "), *and* 6 Baxter Dimaway, *Law of Distressed Real Estate,* § 64:161 (2015) (noting that a trustee's deed recital can be overcome on a showing of actual fraud).

Id. at 1111-1112.

The truth of the conclusive recitals in the foreclosure deed are not an issue in this case. The plaintiff produced the recorded notices and proof that copies of all required notices were mailed to the plaintiff and all interested parties. Exhibits G and I prove that copies of both the notice of default and the notice of sale were mailed to the plaintiff.

3. Plaintiff has not provided any evidence that would support a finding that the HOA foreclosure deed is void.

At page 7 of plaintiff's motion, plaintiff claims that the HOA foreclosure sale was defective because the HOA's foreclosure agent mailed the notice of default to U.S. Recordings at the address listed in the upper left hand corner of the deed of trust. Regarding the notice of trustee's sale, on the other hand, plaintiff does not dispute that the notice was timely mailed to and received by plaintiff at its address listed in the deed of trust. Paragraph 10 of the affidavit of Julie Lor states that "Plaintiff did not receive actual notice of the Notice of Default," but the affidavit does not state that plaintiff did not receive the notice of trustee's sale mailed to it on October 20, 2011. Exhibit I proves that the notice of trustee's sale was timely mailed.

The standard is not whether the notice was received, but whether the notice was mailed. The law presumes receipt, and "[a]ctual notice is not necessary as long as the statutory requirements are met." See Hankins v. Administrator of Veterans Affairs 92 Nev. 578, 555 P.2d 483 (1976); Turner v. Dewco 87 Nev. 14, 479 P.2d 462 (1971).

At page 8 of plaintiff's motion, plaintiff cites Nevada Land & Mortgage Co. v. Hidden Wells Ranch, Inc., 83 Nev. 501, 534 P.2d 198 (1967), as authority that "a foreclosure sale is void if not done

in accordance with the foreclosing party's power of sale and 'applicable law.'" No such language appears in the court's opinion. The Supreme Court instead stated:

> There is no contention, in this case, that the foreclosure was not made strictly in accordance with the trustee's power of sale as provided for in the second deed of trust and in the applicable law. There is no charge of fraud. Nothing is alleged which would render the trustee's sale void at law.
>
> 534 P2d at 200.

The Court also stated that "[i]n the proper case, the trial court may set aside a trustee's sale upon the grounds of fraud or unfairness." Id. Plaintiff has failed to produce evidence of any fraud, oppression or unfairness as relates to the HOA foreclosure sale. The notice of trustee's sale included all of the information required by NRS 116.311635(3).

Plaintiff also cites Cedano v. Aurora Loan Services, LLC (In re Cedeno), 470 B.R. 522 (9th Cir. BAP 2012), but in that case, the Court interpreted California foreclosure law and rejected each of the debtor's arguments that the defendants had wrongfully foreclosed a deed of trust.

Plaintiff has cited no authority holding that a nonjudicial foreclosure sale is "void" because a notice of default was not mailed to all of the addresses listed in a deed of trust held by a "subordinate" lien holder. Plaintiff has also cited no authority that this would constitute "fraud."

In 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)

If plaintiff believes that it was damaged by the address used by the HOA's foreclosure agent to

mail the notice of default, plaintiff does not have grounds to set aside the HOA foreclosure sale – plaintiff has a claim against the HOA and its foreclosure agent.

4. The foreclosure process in NRS Chapter 116 does not violate due process because no state actor is involved in the nonjudicial foreclosure process provided in NRS 116.31162 to 116.31168.

At page 11 of its motion, plaintiff asserts that "NRS 116.3116 et seq. does not include a mandatory notice provision to the lender" and that "[t]his is its primary constitutional defect." In order for the "due process" clause to be implicated, however, a "state actor" must participate.

In Lugar v. Edmondson Oil Co., Inc., 475 U.S. 922 (1982), the Supreme Court stated that "[o]ur cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State" and that "fair attribution" required a two-part approach: 1) "the deprivation must be caused by the exercise of some right or privilege created by the State"; and 2) "the party charged with the deprivation must be a person who may fairly be said to be a state actor." Id. at 937. In Lugar, the Court found that "joint participation" between a private party and the Clerk of the state court who issued a writ of attachment, which was then executed by the County Sheriff, satisfied the "state actor" requirement. No "state actor" is involved in the nonjudicial foreclosure process provided by NRS 116.31162 to NRS 116.31168, and by incorporation, NRS 107.090.

The Court in Lugar cited its prior ruling in Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978), and the Court acknowledged that even where the state was responsible for creating a statute, "[a]ction by a private party pursuant to this statute, without something more, was not sufficient to justify a characterization of that party as a 'state actor.'" 475 U.S. at 939. Similarly, in the case of Apao v. Bank of New York, 324 F.3d 1091, 1092 (9th Cir. 2003), the Court of Appeals rejected a due process challenge to Hawaii's nonjudicial foreclosure statute and stated that there had been "no legal or historical development in the intervening years that would require a departure from prior authority." The "prior authority" included the decision in Charmicor v. Deaner, 572 F.2d 694 (9th Cir. 1978), where the Court of Appeals found that the statutory procedure for non-judicial foreclosure sales provided in NRS 107.080 did not transform the private action into state action for due process purposes.

5. The foreclosure process in NRS Chapter 116 does not violate due process because NRS 116.31168(1) incorporates the notice requirements in NRS 107.090 and required that copies of both the notice of default and the notice of sale be mailed to holders of "subordinate" interests.

Plaintiff's notice argument also ignores the express provisions of NRS 107.090, as incorporated by NRS 116.31168(1), that require that copies of both the notice of default and the notice of sale be mailed to holders of "subordinate" interests whether or not they record or mail to the HOA a request for notice.

The first sentence of NRS 116.31168(1) expressly incorporates **all** of the provisions of NRS 107.090, including NRS 107.090(3)(b) and (4), that require copies of both the notice of default and the notice of sale to be mailed to holders of "subordinate" interests whether or not they record or mail to the HOA a request for notice.

In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408, 418 (2014), the Nevada Supreme Court stated:

> In view of the fact that the 'requirements of law' include compliance with NRS 116.31162 through NRS 116.31168 and by incorporation, NRS 107.090, *see* NRS 116.31168, we conclude that U.S. Bank's due process challenge to lack of adequate notice fails, at least at this early stage in the proceeding.
>
> NRS 116.31168(1) states:
>
> **Foreclosure of liens: Requests by interested persons for notice of default and election to sell; right of association to waive default and withdraw notice or proceeding to foreclose.**
>
> 1. **The provisions of NRS 107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed**. The request must identify the lien by stating the names of the unit's owner and the common-interest community. (emphasis added)

This language expressly incorporates **all** of the notice provisions contained in NRS 107.090 "as if" the HOA lien was a deed of trust being foreclosed. Pursuant to NRS 107.090(3)(b), which is expressly incorporated by NRS 116.31168(1), a copy of the notice of default must be mailed to every person with an interest whose interest is "subordinate" to the association's lien. Pursuant to NRS 107.090(4), a copy of the notice of time and place of sale must also be mailed to each person described in NRS 107.090(3).

As provided by NRS 107.090(2), any "person with an interest" may record "an acknowledged

request for a copy of the notice of default or of sale." When a deed of trust is foreclosed, NRS 107.090(3)(a) requires that a copy of the notice of default be mailed to each person who has recorded a request for notice.

In addition, NRS 107.090(3)(b) requires that a copy of the notice of default also be mailed to "[e]ach other person with an interest whose interest or claimed interest is subordinate to the deed of trust." The definition of "person with an interest" in NRS 107.090(1) includes holders of "any right, title or interest in, or lien or charge upon, the real property." This definition includes holders of deeds of trust. NRS 107.090(3)(b) therefore requires that notice be mailed to holders of deeds of trust "subordinate" to "the deed of trust" being foreclosed even if they do not record a request for notice.

At page 14 of plaintiff's motion, plaintiff claims that "NRS 116.31168 only applies to a notice of default and election to sell and does not apply to any other form of notice." NRS 116.31168(1) expressly incorporates "the" provisions in NRS 107.090 and not just the provisions of NRS 107.090(3). NRS 107.090(4) is one of "the" provisions of NRS 107.090, and NRS 107.090(4) requires that a copy of the notice of sale be mailed to each person described in NRS 107.090(3).

The notice requirements in NRS 107.090(3)(b) and 107.090(4) apply regardless of whether the holder of the subordinate interest (deed of trust) records a request to receive the notice required by NRS 107.090(3)(a). **If notice was required only for those persons who had recorded a request for notice, there would be no reason for NRS 107.090(3)(b) to exist because all such persons would already be covered by NRS 107.090(3)(a)**. Because NRS 107.090(3)(a) and NRS 107.090(3)(b) are connected by the word "and," the statute without question requires that notice be provided **both** to holders of interests who have recorded a request for notice **and** to holders of "subordinate" interests even if they have not recorded a request for notice**.**

NRS 116.31168(1) expressly incorporates **"the** provisions of NRS 107.090" and not just the request for notice provisions in NRS 107.090(2). In State v. Steven Daniel P. (In re Steven Daniel P.), 129 Nev., Adv. Op. 73, 309 P.3d 1041, 1046 (2013), the Nevada Supreme Court applied the concept of incorporating a statute by reference in the context of NRS Chapter 62C and stated:

The United States Supreme Court has held that "[w]here one statute adopts the particular

> provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute." Hassett v. Welch, 303 U.S. 303, 314 (1938) (quoting 2 J.G. Sutherland & John Lewis, *Statutes and Statutory Construction* 787 (2d ed. 1904)); *see also* State ex rel. Walsh v. Buckingham, 58 Nev. 342, 349, 80 P.2d 910, 912 (1938) ("A statute by reference made a part of another law becomes incorporated in it and remains so as long as the former is in force.")

Consequently, the provisions of NRS 107.090 requiring that copies of **both** the notice of default **and** the notice of sale be mailed to holders of interests "subordinate" to the HOA's lien must be read as if they were "incorporated bodily" into NRS Chapter 116.

At the bottom of page 14 and top of page 15 of its motion, plaintiff claims that "the caption of NRS 107.090 highlights the fact that it is a 'request for notice' provision, only governing an articulated request." This argument ignores the express provisions of NRS 107.090 that require notice even if a request for notice is not recorded, and it ignores the Nevada Supreme Court's direction that a statute should be interpreted to give the terms their plain meaning, **considering the provisions as a whole**, so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory. Southern Nevada Homebuilders v. Clark County 121 Nev. 446, 117 P.3d 171 (2005). (emphasis added) A statute should be construed so that no part is rendered meaningless**.** Public Employees' Benefits Program v. Las Vegas Metropolitan Police Department 124 Nev. 138, 179 P.3d 542 (2008). When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it. City Council of Reno v. Reno Newspapers, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989).

At the bottom of page 15 of its motion, plaintiff claims that NRS 107.090(3)(b) "cannot apply to lenders for purposes of notice because their interest is not 'subordinate to the deed of trust' – their interest is the deed of trust." This argument ignores the first sentence of NRS 116.31168(1) which provides that the provisions of NRS 107.090 apply to the foreclosure of an association's lien "as if" a deed of trust were being foreclosed. Consequently, NRS 107.090(3)(b) needs to be read "as if" the word's "association's lien" appeared in place of the words "deed of trust." Plaintiff's deed of trust is without question "subordinate" to the superpriority portion of the "association's lien," and this is why the HOA was required to mail copies of the notice of default and the notice of sale to plaintiff.

The Nevada Supreme Court has recognized a general presumption that statutes will be interpreted in compliance with the Constitution. Sereika v. State, 114 Nev. 142, 955 P.2d 175, 180 (1998). The

Nevada Supreme Court has stated that "statutes must be construed consistent with the constitution and, where necessary, in a manner supportive of their constitutionality." Foley v. Kennedy, 110 Nev. 1295, 1300, 885 P.2d 583, 586 (1994). Where a statute is susceptible to both a constitutional and an unconstitutional interpretation, the court is obliged to construe the statute so that it does not violate the constitution. Whitehead v. Nevada Commission on Judicial Discipline, 110 Nev. 380, 878 P.2d 913, 919 (1994), citing Sheriff v. Wu, 101 Nev. 687, 708 P.2d 305 (1985).

The statutory requirements for foreclosure of an HOA lien and trust deed are virtually identical, and the statutes mirror each other. The notices provided to claimants to the real property are the same under both NRS Chapter 107 and NRS Chapter 116, and the notices are adequate. Because these notice requirements are constitutional when used to foreclose a deed of trust, they are also constitutional when used to foreclose an HOA assessment lien.

6. NRS 116.3116 et seq. is not void due to vagueness.

At page 16 of its motion, plaintiff argues that "NRS 116.3116 et seq. is also facially invalid because it fails to provide adequate notice of the conditions precedent to the existence of super-priority lien rights." At the bottom of page 16 of its motion, plaintiff cites Kotecki v. Auguzstiny, 87 Nev. 393, 487 P.2d 925 (1971), as authority that "physical receipt of notice is not enough – content matters." In Kotecki v. Auguzstiny, however, the Court did not focus on the content of the notice to creditors, but the fact that the notice only identified the decedent by her married name and not in her professional name by which her creditors would know her.

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 cited In re Medaglia, 52 F.3d 451, 455 (2d Cir. 1995), as authority 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." 334 P.3d at 418.

At page 17 of its motion, plaintiff claims that the Nevada Supreme Court "did not address a more fundamental issue – notice of the conditions precedent to the existence of the super-priority lien," and plaintiff argues that the super-priority portion is subject to two conditions: (1) institution of an action; and (2) the adoption of a budget pursuant to the provisions of NRS 116.3115. The Court in SFR, however, expressly held that the word "action" included the nonjudicial foreclosure process provided by NRS 116.31162 to 116.31168, and by incorporation, NRS 107.090. Plaintiff has offered no evidence that the

HOA did not adopt a budget pursuant to NRS 116.3115.

7. The interpretation of the HOA's superpriority lien in SFR applies retrospectively.

At page 19 of its motion, plaintiff claims that Resources Group cannot be a bona fide purchaser because the HOA sale occurred before the decision in SFR Investments Pool 1, LLC v. U.S. Bank, N.A. and Resources Group had notice of plaintiff's recorded deed of trust.

Prior to the decision in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408 (2014), and prior to the HOA foreclosure sale in this case, however, NRS 116.3116(2) expressly provided that the HOA's assessment lien was "prior to all security interests described in paragraph (b) . . . ."

Prior to the decision in SFR and prior to the HOA foreclosure sale in this case, NRS 116.1108 expressly provided that "the law of real property" supplemented "the provisions of this chapter, except to the extent inconsistent with this chapter."

Prior to the decision in SFR and prior to the HOA foreclosure sale in this case, the Nevada Supreme Court had repeatedly recognized that the nonjudicial foreclosure of a prior lien extinguishes all junior liens. McDonald v. D.P. Alexander & Las Vegas Boulevard, LLC 121 Nev. 812, 123 P.3d 748 (2005); Brunzell v. Lawyers Title Ins. Co. 101 Nev. 395, 705 P.2d 642 (1985); Aladdin Heating Corp. v. Trustees of Central States 93 Nev. 257, 563 P.2d 82 (1977); Erickson Construction Co. v. Nevada National Bank, 89 Nev. 359, 513 P.2d 1236 (1973).

Prior to the decision in SFR and prior to the HOA foreclosure sale in this case, Comment 1 to Section 3-116 of the UCIOA (1982) stated:

> 2. To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens. Accordingly, subsection (b) provides that the associations's lien takes priority over all other liens and encumbrances except those recorded prior to the recordation of the declaration, those imposed for real estate taxes or other governmental assessments or charges against the unit, and first mortgages recorded before the date the assessment became delinquent. **However, as to prior first mortgages, the association's lien does have priority for 6 months' assessments based on the periodic budget.** A significant department from existing practice, the 6 months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of mortgage lenders. **As a**

> **practical matter, mortgage lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit.** If the mortgage lender wishes, an escrow for assessments can be required. **Since this provision may conflict with the provisions of some state statutes which forbid some lending institutions from making loans not secured by first priority liens,** the law of each state should be reviewed and amended when necessary**.** (emphasis added)

In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408, 413 (2014), the Nevada Supreme Court stated:

> "An official comment written by the drafters of a statute and available to a legislature before the statute is enacted has considerable weight as an aid to statutory construction." Acierno v. Worthy Bros. Pipeline Corp., 656 A.2d 1085, 1090 (Del. 1995). The comments to the 1982 UCIOA were available to the 1991 Legislature when it enacted NRS Chapter 116. Even though the comments emphasize that the split-lien approach is "[a] significant departure from existing practice," 1982 UCIOA § 3-116 cmt. 1, the Legislature enacted NRS 116.3116(2) with UCIOA § 3-116's superpriority provision intact. From this it follows that, however unconventional, the superpriority piece of the HOA lien carries true priority over a first deed of trust.

All of these authorities were available to the plaintiff prior the decision in SFR and provided plaintiff with "fair notice" that the HOA's nonjudicial foreclosure of its superpriority lien would extinguish plaintiff's subordinate deed of trust.

Applying the three factors identified by the Nevada Supreme Court in Breithaupt v. USAA Prop. & Cas. Ins. Co., 110 Nev. 31, 35, 867 P.2d 402, 405(1994), although there was no clear past precedent on the specific issue relating to HOA assessment liens, the decision in SFR relies upon the long-established principle that the nonjudicial foreclosure of a prior lien extinguishes all subordinate liens. Furthermore, as recognized by the Nevada Supreme Court in SFR, its interpretation relied on the official comments to UCIOA§ 3-116 that "forthrightly acknowledge that the split-lien approach represents a 'significant departure from existing practice'" and that lenders would most likely pay the "assessments demanded by the association *rather than have the association foreclose on the unit*." 334 P.3d at 412-413. (emphasis in opinion) Consequently, the interpretation of NRS Chapter 116 adopted in SFR was "clearly foreshadowed."

Regarding the second and third factors, plaintiff should not be rewarded for ignoring the clear provisions of the statute, established law that foreclosure of a senior lien extinguishes all subordinate liens, and the official comments to the UCIOA that all warned the plaintiff of the consequences of

allowing the HOA to foreclose its super priority lien.

Furthermore, in Shadow Wood Homeowners Association v. New York Community Bancorp, Inc., 132 Nev. Adv. Op. 5, 366 P.3d 1105 (2016), the Court recognized that the lender/owner should not be rewarded for its inactions:

> 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):
>
> > 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.
>
> (Emphasis added.) In addition to the required warning, Shadow Wood's NOS listed the lien amount as $8,539.77. For whatever reason, NYCB tendered only $6,783.16.

In the present case, the notice of trustee's sale (Exhibit H) that was mailed to the plaintiff on October 20, 2011 (Exhibit I) contained the same warning and notified plaintiff that the HOA foreclosure sale would take place on November 16, 2011. As reflected by the foreclosure deed (Exhibit B), the sale was continued until January 25, 2012, so plaintiff had ample time to "seek to enjoin the sale pending judicial determination of the amount owed" if plaintiff had any doubts regarding the superpriority lien amount or whether the foreclosure sale would affect plaintiff's "subordinate" deed of trust.

In SFR Investments Pool 1, LLC v. U.S. Bank N.A. 130 Nev. Adv. Op 75, 334 P.3d 408, 418 (2014), the court noted that the bank could have paid the entire lien amount and requested a refund of the balance. Plaintiff also chose not to use this option to protect its "subordinate" deed of trust.

8. A foreclosure sale cannot be found "void" based solely on a claim that the price paid was grossly inadequate.

At page 20 of its motion, plaintiff contends that the Shadow Wood decision "draws a line in the sand: if the sales price obtained at a trustee's foreclosure sale is 20% or less of the property's rough fair market value, it is considered 'grossly inadequate' and void." This is not the standard adopted by the Nevada Supreme Court in Shadow Wood.

It is important to note that Shadow Wood was not a lien extinguishment case. The plaintiff and respondent in the Shadow Wood case was the owner of the property, who was trying to have the lien sale set aside as the former owner of the property and not as a sold out junior lienholder.

Moreover, the reference to the restatement in Shadow Wood was used solely as an example regarding the one factor of inadequacy of price. This portion of the case must be read in context:

> 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. *Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 669, 918 P.2d 314, 318 (1996) (stating the burden of proof rests with the party seeking to quiet title in its favor). **As discussed above, demonstrating that an association sold a property at its foreclosure sale for an inadequate price is not enough to set aside that sale; there must also be a showing of fraud, unfairness, or oppression**. *Long*, 98 Nev. at 13, 639 P.2d at 530.
>
> **NYCB failed to establish that the foreclosure sale price was grossly inadequate as a matter of law**. NYCB compares Gogo Way's purchase price, $11,018.39, to the amount NYCB bought the property for at its foreclosure sale, $45,900.00. Even using NYCB's purchase price as a comparator, and adding to that sum the $1,519.29 NYCB admits remained due on the superpriority lien following NYCB's foreclosure sale, Gogo Way's purchase price reflects 23 percent of that amount and is therefore not obviously inadequate. *See Golden*, 79 Nev. at 511, 387 P.2d at 993 (noting that even where a property was "sold for a smaller proportion of its value than 28.5%," it did not justify setting aside the sale); *see also* **Restatement (Third) of Prop.: Mortgages § 8.3 cmt. b (1997) (stating that while "[g]ross inadequacy cannot be precisely defined in terms of a specific percentage of fair market value[, g]enerally ... 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").** (emphasis added)
>
> 366 P.3d at 1112-1113.

In section C of its opinion, the Court focused only on the burden placed on the former owner that was seeking to overturn the sale that divested it of title. No burden was placed on the bona fide purchaser to prove that it paid at least 20% of fair market value at the HOA foreclosure sale.

A copy of § 8.3 of the Restatement (Third) of Prop.: Mortgages, including comment b, is attached hereto as Exhibit J. At the top of page 584, comment b distinguishes between a case where the holder of a senior interest purchases the property by a credit bid and a case where a bona fide purchaser buys the property:

> 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 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)

Consequently, by referring to comment b to §8.3 of the Restatement (Third) of Prop.: Mortgages, the Court in Shadow Wood did not state that "gross inadequacy" of price alone can justify equitable relief setting aside the sale. Instead, where the property has been sold to a bona fide purchaser as happened here, the holder of a junior interest is limited to an action for damages against the foreclosing mortgagee.

In addition, on March 18, 2016, the Supreme Court issued an unpublished decision in the case of Centeno v. JPMorgan Chase Bank, docket no. 67365. A copy of the decision is attached as Exhibit K. The case involved the denial of an injunction based on the Supremacy Clause and because of a low sales price. The Supreme Court addressed the commercially reasonable argument, stating:

> Similarly, this court's reaffirmation in *Shadow Wood Homeowners Association v. New York Community Bank*, 132 Nev. Ad. Op. 5, ____ P.3d _____ (2016) , that a low sales price is not a basis for voiding a foreclosure sale absent "fraud, unfairness, or oppression," undermines the second basis for the district court's decision.

The Court in Shadow Wood also cited the case of Golden v. Tomiyasu, 79 Nev. 503, 514, 387 P.2d 989, 995 (1963), cert. denied, 382 U.S. 844 (1965), where the Court adopted "the California 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" (quoting Oller v. Sonoma Cty. Land Title Co., 137 Cal.App.2d 633, 290 P.2d 880, 882 (Cal. Ct. App.1955))) . . . ." 366 P.3d at 1111.

This same California rule was applied by the Court in the cases of Long v. Towne, 98 Nev. 11, 639 P.2d 528, 530 (1982); Turner v. Dewco Services, Inc., 87 Nev. 14, 479 P.2d 462 (1971); and Brunzell v. Woodbury, 85 Nev. 29, 449 P.2d 158 (1969).

At page 21 of its motion, plaintiff cites ZyzzX2 v. Dizon, 2016 WL 118666 (D. Nev. March 26, 2016), as authority that "a basis exists to set aside a HOA sale if the CC&R's contain a mortgage protection clause providing that the association's lien is subordinate to a first security interest recorded

prior to the association's notice of default." At page 22 of its motion, plaintiff claims that Section 11 in Article VI of the CC&Rs (Exhibit 7 to plaintiff's motion, pg. USB0164) contains such a provision. In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., however, the Nevada Supreme Court expressly held that NRS 116.1104 prevents a savings clause in CC&R's from waiving the HOA's superpriority lien rights. 334 P.3d at 419. In addition, the decision in ZyzzX2 v. Dizon was not based solely on language in the CC&Rs. The court stated that "[t]he association sent a letter to Wells Fargo and other interested parties stating that its foreclosure would not affect the senior lender/mortgage holder's lien." 2016 WL 118666 at *5. No such letter exists in the present case.

At the bottom of page 22, plaintiff argues that courts in California "routinely hold that when the sales price obtained at a foreclosure is grossly inadequate, that may in itself furnish satisfactory evidence of fraud or misconduct on the part of the trustee or purchaser, and justify vacating the sale."

Odell v. Cox, 151 Cal. 70, 90 P. 194 (1970), involved an execution sale of corporation stock and not real property. Notice of the sheriff's sale was posted on three doors of the county courthouse in the city of Los Angeles, no one notified Odell of the sale, and Cox was the only bidder at the sale. 151 Cal. at 72, 90 P. at 195. Cox bid $26.50 for stock having a cash value of $2,000 in the market. 151 Cal. at 73, 90 P. at 195. The trial court vacated the sale, and Cox appealed. In affirming the trial court, the court of appeals stated that "we have absolute lack of knowledge on the part of the owner of the property of any levy or proposed sale" and that "[t]his lack of knowledge on his part was entirely excusable" because all notices "were posted in a large city, at a point over 20 miles away from the legal situs of the property and the home of the parties." 151 Cal. at 75-76, 90 P. at 196-197.

Haish v. Hall, 90 Cal. App. 547, 265 P. 1030 (1928), involved an execution sale of 30 shares of corporate stock worth $1,290 that were sold for $23.60 to the plaintiff who was the only bidder at the sale. Relying on the decision in Odell v. Cox, the court of appeals affirmed the trial court's order setting aside the sale.

In Young v. Barker, 83 Cal App. 2d 654 (1948), the court recognized that the plaintiff was the sole bidder at the sheriff's sale, that a deed was issued to the plaintiff on January 13, 1944, but the deed was not recorded until November 21, 1944, that the summons and complaint in the municipal court action

were never served on the defendant, that the levy of execution was not made as required by law, that no notice was posted on the property, and defendant received no notice of the levy. (Id. at 656-657)

In the present case, the HOA and its foreclosure agent followed the statutory procedure in NRS 116.31162 to NRS 116.31168, and by incorporation, NRS 107.090, and provided notice by mail, posting, and publication, and the property was sold not to the HOA, but to a third party bidding at a public auction. The only defect identified by plaintiff is that the notice of default was mailed to the address listed in the upper left hand corner of the deed of trust instead of the address listed for plaintiff in the body of the deed of trust. This claimed defect was not repeated with the notice of trustee's sale that was mailed to the plaintiff's address found in the body of the deed of trust. (Exhibit I)

9. An HOA foreclosure sale is not required to be "commercially reasonable."

At page 23 of its motion, plaintiff cites NRS 116.1113 as authority that "associations must act in good faith." Although the comment to Section 1-113 of the UCIOA states that the definition of "good faith" contained in Section1-113 of the UCIOA is derived from and used in the same manner as in Sections 2-103(i)(b) and 7-404 of the Uniform Commercial Code," the definition adopted in the comment does not include the word "commercial."

The amendment to NRS Chapter 104 made in 2005 placed the current definition of "good faith" in Nevada's Uniform Commercial Code in NRS 104.1201(2)(t). NRS 104.1102 expressly provides that Article 1 of the Uniform Commercial Code "applies to a transaction to the extent that is governed by another Article of the Uniform Commercial Code." No provision of the Uniform Commercial Code purports to govern an HOA foreclosure sale.

Prior to the 2005 amendment, the definition of "good faith" contained in NRS 104.2103(1)(b) stated: "'Good faith' **in the case of a merchant** means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." (emphasis added) The HOA is not a "merchant," so the former definition of "good faith" in NRS 104.2103(1)(b) could not apply to it.

In addition, NRS 104.9109(4)(k) that expressly provides that the provisions of Article 9 of the Uniform Commercial Code do not apply to a "lien on real property" except in four instances. An HOA assessment lien is not one of the four instances. NRS 116.1108 supplements NRS Chapter 116 with the

"law of real property," but not with any provisions in the Uniform Commercial Code.

At page 23 of its motion, plaintiff cites Levers v. Rio King Land & Investment Co., 93 Nev. 95, 98-99, 560 P.2d 917, 920 (1977), where the Court applied the language in NRS 104.9504(3) that now appears in NRS 104.9610(2) to a secured party that mailed a letter to the debtor only 8 days before a sale that was attended only by the secured party and a former employee. There was no evidence that the sale was publicized in any manner, and the secured party purchased the collateral for $100 at the sale and re-sold the collateral to a third party for $10,000. Although the Nevada Supreme Court found that the sale in Levers was not commercially reasonable, the Court reversed the district court's judgment setting aside the sale and held that it was enough that the secured party's judgment be reduced by the $10,000 fair market value of the collateral.

In Dennison v. Allen Group Leasing Corp., 110 Nev. 181, 871 P.2d 288 (1994), the Court applied California law to the repossession and sale of two pieces of automobile equipment, and the court found that due to an error in the notice of sale, "it is possible that the equipment sold at public sale by Allen was not the same equipment leased to Dennison." 871 P.2d at 291. In the present case, plaintiff has not identified any error in the notice of trustee's sale. (Exhibit H)

At page 24 of its motion, plaintiff quotes from the decision in Will v. Mill Condominium Owners' Association, 176 Vt. 380, 848 A.2d 336 (2004), but unlike the nonjudicial foreclosure process provided in NRS 116.31162 to 116.31168, 27A V.S.A. § 3-116(j) in Vermont's version of the UCIOA requires that an association's lien be judicially foreclosed pursuant to 12 V.S.A. chapter 172 or subsection (o) of 27A V.S.A. § 3-116. 27A V.S.A. § 3-116(p) expressly provides that "[e]very aspect of a foreclosure, sale, or other disposition under this section, including the method, time, date, place, and terms, must be commercially reasonable." Nevada's version of the UCIOA contains no such language.

At page 24 of its motion, plaintiff argues that the "Exterior BPO Form" prepared by Craig Tann, LTD on February 6, 2012 (Exhibit 3A to the affidavit of Julie Lor) proves that the fair market value of the Property "around the time of sale" was $62,500.00. On the other hand, the following language appears at the bottom of page 3 of Exhibits 3A: "The attached Broker Price Opinion (BPO) has been completed outside of The Uniform Standards of Professional Appraisal Practice (USPAP). The BPO is

an evaluation tool and is **not considered an appraisal of the market value of the property** – it is an opinion of the probable sales price." (emphasis added) Consequently, plaintiff has not provided admissible evidence supporting its claim that "the Property sold for less than the 10% percent of the fair market value, which is naturally well below the 20% threshold."

CONCLUSION

Here, there is no evidence of fraud, oppression or unfairness in regards to the foreclosure sale. Copies of both the notice of default and the notice of foreclosure sale were mailed to the plaintiff at the addresses in the plaintiff's deed of trust, and plaintiff took no action to protect its "subordinate" deed of trust from being extinguished.

Resources Group, LLC respectfully requests that the court enter an order denying plaintiff's motion for summary judgment and granting Resource's countermotion for summary judgment.

DATED this 2nd day of June, 2016

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

By: /s/ Michael F. Bohn, Esq./
Michael F. Bohn, Esq.
376 East Warm Springs Road, Ste. 140
Las Vegas, Nevada 89119
Attorney for counter-claimant,
Resources Group, LLC

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 2nd day of June, 2016, an electronic copy of the foregoing OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND RESOURCE GROUP, LLC'S COUNTERMOTION FOR SUMMARY JUDGMENT was served on opposing counsel via the Court's electronic service system and/or deposited for mailing in the U.S. Mail, postage prepaid to the following:

Sherry A. Moore, Esq.
Benjamin D. Petiprin, Esq.
ZIEVE, BRODNAX & STEELE, LLP
3753 Howard Hughes Parkway
Suite 200
Las Vegas, NV 89169

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

EXHIBIT A

EXHIBIT A

Inst #: 201205290002144
Fees: $18.00 N/C Fee: $0.00
RPTT: $0.00 Ex: #007
05/29/2012 02:44:44 PM
Receipt #: 1178391
Requestor:
RESOURCE GROUP LLC
Recorded By: SCA Pgs: 3
DEBBIE CONWAY
CLARK COUNTY RECORDER

(3) -1

APN: 163-24-111-021
RECORDING REQUESTED BY:

When Recorded Mail Document and Tax Statement To:

Bourne Valley Court Trust
900 S. Las Vegas Blvd #810
Las Vegas, NV 89101

RPTT: $ EXEMPT 7

GRANT, BARGAIN, SALE DEED

THIS INDENTURE WITNESSETH: That Resouces Group LLC, a Nevada Limited Liability Company, Trustee of the Rollingstone Drive Trust dated 01/25/2012 who acquired title as Rollingstone Drive Trust

FOR VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, do(es) hereby Grant, Bargain, Sell and

Convey to Resources Group LLC, a Nevada Limited Liability Company as Trustee of the Bourne Valley Court Trust dated 05/04/2012

all that real property situated in Clark County, State of Nevada, bounded and described as follows:

PARCEL I:

LOT NINETEEN (19) OF GLENVIEW WEST TOWNHOMES, AS SHOWN BY MAP THEREOF ON FILE IN BOOK 30 OF PLATS, PAGE 65, IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA.

PARCEL II:

AN EASEMENT FOR INGRESS AND EGRESS OVER THE COMMON AREA AND PRIVATE STREETS AS SHOWN BY MAP THEREOF ON FILE IN BOOK 30 OF PLATS, PAGE 65, IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA.

SUBJECT TO:1. Taxes for the fiscal year 2011-2012

2. Covenants, Conditions, Reservations, Rights, Rights of Way and Easements now of record.

Together with all and singular tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

DATED: May 29, 2012

STATE OF NV

COUNTY OF Clark

I, Krysta Sitko, a Notary Public of the County and State first above written, do hereby certify that Iyad Haddad personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal, this the 29th of May 2012

Notary Public: Krysta Sitko

My Commission Expires: 4/12/16

(SEAL)

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
KRYSTA SITKO
Appt. No. 04-88388-1
My Appt. Expires April 12, 2016

Rollingstone Drive Trust dated 01/25/2012

By: Resources Group LLC, a Nevada Limited Liability Company

BY: _____
Iyad Haddad, Manager

STATE OF NEVADA
DECLARATION OF VALUE

1. Assessor Parcel Number(s)

a) 163-24-111-021
b) _____
c) _____
d) _____

2. Type of Property:

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

FOR RECORDERS OPTIONAL USE ONLY
Book: _____ **Page:** _____
Date of Recording: _____
Notes: Cert of Trust 5

3. a) Total Value/Sales Price of Property $ _____
b) Deed in Lieu of Foreclosure Only (value of property) $ _____
c) Transfer Tax Value: $ _____
d) Real Property Tax Due $ 0.00

4. If Exemption Claimed:
a) Transfer Tax Exemption, per NRS 375.090, Section: 7
b) Explain Reason for Exemption: TRUST TO TRUST WITHOUT CONSIDERATION

5. Partial Interest: Percentage being transferred: 100.00%

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:** Grantee

SELLER (GRANTOR) INFORMATION (Required)		**BUYER (GRANTEE) INFORMATION** (Required)	
Print Name:	Rollingstone Drive Trust dated 01/25/2012	**Print Name:**	Bourne Valley Court Trust
Address:	900 S. Las Vegas Blvd #810	**Address:**	900 S. Las Vegas Blvd #810
City, State, Zip:	Las Vegas, NV 89101	**City, State, Zip:**	Las Vegas, NV 89101

COMPANY/PERSON REQUESTING RECORDING (required if not the seller or buyer)
Fidelity National Title Agency of Nevada, Inc. **Escrow #: FT13-FT00000442-LC**
3100 W Sahara Avenue #115
Las Vegas, NV 89102

(AS A PUBLIC RECORD THIS FORM MAY BE RECORDED/MICROFILMED)

EXHIBIT B

EXHIBIT B

Inst #: 201201310001704
Fees: $17.00 N/C Fee: $0.00
RPTT: $28.05 Ex: #
01/31/2012 09:09:48 AM
Receipt #: 1052023
Requestor:
ALESSI & KOENIG LLC (JUNES
Recorded By: DXI Pgs: 2
DEBBIE CONWAY
CLARK COUNTY RECORDER

(2)-1

When recorded mail to and
Mail Tax Statements to:
4254 Rolling Stone Dr Trust
PO Box 36208
Las Vegas, NV 89133

A.P.N. No.**163-24-111-021** TS No. **24230-4254**

TRUSTEE'S DEED UPON SALE

The Grantee (Buyer) herein was: **4254 Rolling Stone Dr Trust**
The Foreclosing Beneficiary herein was: **Glenview West Townhomes Association**
The amount of unpaid debt together with costs (Real Property Transfer Tax Value): **$5,331.00**
The amount paid by the Grantee (Buyer) at the Trustee's Sale: **$5,331.00**
The Documentary Transfer Tax: **$28.05**
Property address: **4254 ROLLINGSTONE DR, LAS VEGAS, NV 89103**
Said property is in [ ] unincorporated area: City of **LAS VEGAS**
Trustor (Former Owner that was foreclosed on): **EDWARDS GEORGE R TRUST**

Alessi & Koenig, LLC (herein called Trustee), as the duly appointed Trustee under that certain Notice of Delinquent Assessment Lien, recorded **January 4, 2011** as instrument number **0005412**, in **Clark** County, does hereby grant, without warranty expressed or implied to: **4254 Rolling Stone Dr Trust** (Grantee), all its right, title and interest in the property legally described as: **LOT 19**, as per map recorded in Book **30**, Pages **65** 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 25, 2012** at the place indicated on the Notice of Trustee's Sale.

Ryan Kerbow, Esq
Signature of AUTHORIZED AGENT for **Glenview West Townhomes Association**

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

SUBSCRIBED and SWORN to before me Jan. 27, 2012

WITNESS my hand and official seal.
(Seal)

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

(Signature)

#APPT
* 10-2800-1

STATE OF NEVADA
DECLARATION OF VALUE

1. Assessor Parcel Number(s)
   a. 163-24-111-021
   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 $ 5,331.00
b. Deed in Lieu of Foreclosure Only (value of property) (_____)
c. Transfer Tax Value: $ 5,331.00
d. Real Property Transfer Tax Due $ 28.05

4. **If Exemption Claimed:**
   a. Transfer Tax Exemption per NRS 375.090, Section_____
   b. Explain Reason for Exemption: _____

5. Partial Interest: Percentage being transferred: 100.00 %

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: 4254 Rolling Stoone Dr Trust
Address: 9500 W Flamingo # 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 # 205	
City: Las Vegas	State: NV Zip: 89147

AS A PUBLIC RECORD THIS FORM MAY BE RECORDED/MICROFILMED

EXHIBIT C

EXHIBIT C

(8)

20090326-0003747

Fee: $21.00
N/C Fee: $25.00

03/26/2009 16:35:04
T20090104864
Requestor:
US RECORDINGS INC

Debbie Conway STN
Clark County Recorder Pgs: 8

Prepared By:
Southwest Financial Services, Ltd.
537 E Pete Rose Way, STE 300
Cincinnati, OH 45202

014560224-000028152

Return To (name and address):
US Recordings
2925 Country Drive STE 201
St. Paul, MN 55117

Assessor's Parcel Number: .163-24-111-021.EN

——State of Nevada—————— Space Above This Line For Recording Data ——

7553682-9-NBC
SU628

DEED OF TRUST
(With Future Advance Clause)

☐ Master Mortgage

Recorded By .....

By .....

By .....
(Signature) (Date)

1. **DATE AND PARTIES.** The date of this Deed of Trust (Security Instrument) is ...03/03/2009... ..... . The parties and their addresses are:

GRANTOR:
GEORGE R. EDWARDS, UNMARRIED

163-24-111-021,ENTIRE PROPERTY
☐ If checked, refer to the attached Addendum incorporated herein, for additional Grantors, their signatures and acknowledgments.

TRUSTEE:
U.S. Bank Trust Company, National Association,
a national banking association organized under the laws of the United States
111 SW Fifth Avenue
Portland, OR 97204

LENDER:
U.S. Bank National Association ND,
a national banking association organized under the laws of the United States
4325 17th Avenue SW
Fargo, ND 58103

2. **CONVEYANCE.** For good and valuable consideration, the receipt and sufficiency of which is acknowledged, and to secure the Secured Debt (defined on page 2) and Grantor's performance under this Security Instrument, Grantor irrevocably grants, bargains, conveys and sells to Trustee, in trust for the benefit of Lender, with power of sale, the following described property *(if property description is in metes and bounds the name and mailing address of the person who prepared the legal description must be included)* :
See attached Exhibit "A"

The property is located in ..CLARK COUNTY..... at .....
(County)
.4254 ROLLINGSTONE DR ,.LAS VEGAS....., Nevada ..89103-3407...
(Address) (City) (ZIP Code)

Together with all rights, easements, appurtenances, royalties, mineral rights, oil and gas rights, all water and riparian rights, ditches, and water stock and all existing and future improvements, structures, fixtures, and replacements that may now, or at any time in the future, be part of the real estate described above (all referred to as "Property").

3. **MAXIMUM OBLIGATION LIMIT.** The total principal amount secured by this Security Instrument at any one time shall not exceed $ ...50,000.00..... . This limitation of amount does not include interest and other fees and charges validly made pursuant to this Security Instrument. Also, this limitation does not apply to advances made under the terms of this Security Instrument to protect Lender's security and to perform any of the covenants contained in this Security Instrument.

4. **SECURED DEBT AND FUTURE ADVANCES.** The term "Secured Debt" is defined as follows:

   A. Debt incurred under the terms of all promissory note(s), contract(s), guaranty(ies) or other evidence of debt described below and all their extensions, renewals, modifications or substitutions. *(You **must** specifically identify the debt(s) secured and you should include the **final maturity** date of such debt(s).)*
   Borrower(s): GEORGE R. EDWARDS
   Principal/Maximum Line Amount: 50,000.00
   Maturity Date: 03/02/2034
   Note Date: 03/03/2009

   B. All future advances from Lender to Grantor or other future obligations of Grantor to Lender under any promissory note, contract, guaranty, or other evidence of debt executed by Grantor in favor of Lender after this Security Instrument whether or not this Security Instrument is specifically referenced. If more than one person signs this Security Instrument, each Grantor agrees that this Security Instrument will secure all future advances and future obligations that are given to or incurred by any one or more Grantor, or any one or more Grantor and others. **Future advances are contemplated and are governed by the provisions of NRS 106.300 to 106.400, inclusive.** All future advances and other future obligations are secured by this Security Instrument even though all or part may not yet be advanced. All future advances and other future obligations are secured as if made on the date of this Security Instrument. Nothing in this Security Instrument shall constitute a commitment to make additional or future loans or advances in any amount. Any such commitment must be agreed to in a separate writing.

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C. All other obligations Grantor owes to Lender, which may later arise, to the extent not prohibited by law, including, but not limited to, liabilities for overdrafts relating to any deposit account agreement between Grantor and Lender.
D. All additional sums advanced and expenses incurred by Lender for insuring, preserving or otherwise protecting the Property and its value and any other sums advanced and expenses incurred by Lender under the terms of this Security Instrument.

In the event that Lender fails to provide any required notice of the right of rescission, Lender waives any subsequent security interest in Grantor's principal dwelling that is created by this Security Instrument.

5. **DEED OF TRUST COVENANTS.** Grantor agrees that the covenants in this section are material obligations under the Secured Debt and this Security Instrument. If Grantor breaches any covenant in this section, Lender may refuse to make additional extensions of credit and reduce the credit limit. By not exercising either remedy on Grantor's breach, Lender does not waive Lender's right to later consider the event a breach if it happens again.

Payments. Grantor agrees that all payments under the Secured Debt will be paid when due and in accordance with the terms of the Secured Debt and this Security Instrument.

Prior Security Interests. With regard to any other mortgage, deed of trust, security agreement or other lien document that created a prior security interest or encumbrance on the Property, Grantor agrees to make all payments when due and to perform or comply with all covenants. Grantor also agrees not to allow any modification or extension of, nor to request any future advances under any note or agreement secured by the lien document without Lender's prior written approval.

Claims Against Title. Grantor will pay all taxes, assessments, liens, encumbrances, lease payments, ground rents, utilities, and other charges relating to the Property when due. Lender may require Grantor to provide to Lender copies of all notices that such amounts are due and the receipts evidencing Grantor's payment. Grantor will defend title to the Property against any claims that would impair the lien of this Security Instrument. Grantor agrees to assign to Lender, as requested by Lender, any rights, claims or defenses Grantor may have against parties who supply labor or materials to maintain or improve the Property.

Property Condition, Alterations and Inspection. Grantor will keep the Property in good condition and make all repairs that are reasonably necessary. Grantor shall not commit or allow any waste, impairment, or deterioration of the Property. Grantor agrees that the nature of the occupancy and use will not substantially change without Lender's prior written consent. Grantor will not permit any change in any license, restrictive covenant or easement without Lender's prior written consent. Grantor will notify Lender of all demands, proceedings, claims, and actions against Grantor, and of any loss or damage to the Property.

Lender or Lender's agents may, at Lender's option, enter the Property at any reasonable time for the purpose of inspecting the Property. Lender shall give Grantor notice at the time of or before an inspection specifying a reasonable purpose for the inspection. Any inspection of the Property shall be entirely for Lender's benefit and Grantor will in no way rely on Lender's inspection.

Authority to Perform. If Grantor fails to perform any duty or any of the covenants contained in this Security Instrument, Lender may, without notice, perform or cause them to be performed. Grantor appoints Lender as attorney in fact to sign Grantor's name or pay any amount necessary for performance. Lender's right to perform for Grantor shall not create an obligation to perform, and Lender's failure to perform will not preclude Lender from exercising any of Lender's other rights under the law or this Security Instrument.

Leaseholds; Condominiums; Planned Unit Developments. Grantor agrees to comply with the provisions of any lease if this Security Instrument is on a leasehold. If the Property includes a unit in a condominium or a planned unit development, Grantor will perform all of Grantor's duties under the covenants, by-laws, or regulations of the condominium or planned unit development.

Condemnation. Grantor will give Lender prompt notice of any pending or threatened action, by private or public entities to purchase or take any or all of the Property through condemnation, eminent domain, or any other means. Grantor authorizes Lender to intervene in Grantor's name in any of the above described actions or claims. Grantor assigns to Lender the proceeds of any

DLE _____

award or claim for damages connected with a condemnation or other taking of all or any part of the Property. Such proceeds shall be considered payments and will be applied as provided in this Security Instrument. This assignment of proceeds is subject to the terms of any prior mortgage, deed of trust, security agreement or other lien document.

Insurance. Grantor shall keep Property insured against loss by fire, flood, theft and other hazards and risks reasonably associated with the Property due to its type and location. This insurance shall be maintained in the amounts and for the periods that Lender requires. What Lender requires pursuant to the preceding two sentences can change during the term of the Secured Debt. The insurance carrier providing the insurance shall be chosen by Grantor subject to Lender's approval, which shall not be unreasonably withheld. If Grantor fails to maintain the coverage described above, Lender may, at Lender's option, obtain coverage to protect Lender's rights in the Property according to the terms of this Security Instrument.

All insurance policies and renewals shall be acceptable to Lender and shall include a standard "mortgage clause" and, where applicable, "loss payee clause." Grantor shall immediately notify Lender of cancellation or termination of the insurance. Lender shall have the right to hold the policies and renewals. If Lender requires, Grantor shall immediately give to Lender all receipts of paid premiums and renewal notices. Upon loss, Grantor shall give immediate notice to the insurance carrier and Lender. Lender may make proof of loss if not made immediately by Grantor.

Unless otherwise agreed in writing, all insurance proceeds shall be applied to the restoration or repair of the Property or to the Secured Debt, whether or not then due, at Lender's option. Any application of proceeds to principal shall not extend or postpone the due date of the scheduled payment nor change the amount of any payment. Any excess will be paid to the Grantor. If the Property is acquired by Lender, Grantor's right to any insurance policies and proceeds resulting from damage to the Property before the acquisition shall pass to Lender to the extent of the Secured Debt immediately before the acquisition.

Financial Reports and Additional Documents. Grantor will provide to Lender upon request, any financial statement or information Lender may deem reasonably necessary. Grantor agrees to sign, deliver, and file any additional documents or certifications that Lender may consider necessary to perfect, continue, and preserve Grantor's obligations under this Security Instrument and Lender's lien status on the Property.

6. **WARRANTY OF TITLE.** Grantor warrants that Grantor is or will be lawfully seized of the estate conveyed by this Security Instrument and has the right to irrevocably grant, bargain, convey and sell the Property to Trustee, in trust, with power of sale. Grantor also warrants that the Property is unencumbered, except for encumbrances of record.
7. **DUE ON SALE.** Lender may, at its option, declare the entire balance of the Secured Debt to be immediately due and payable upon the creation of, or contract for the creation of, a transfer or sale of all or any part of the Property. This right is subject to the restrictions imposed by federal law (12 C.F.R. 591), as applicable.
8. **DEFAULT.** Grantor will be in default if any of the following occur:

Fraud. Any Consumer Borrower engages in fraud or material misrepresentation in connection with the Secured Debt that is an open end home equity plan.

Payments. Any Consumer Borrower on any Secured Debt that is an open end home equity plan fails to make a payment when due.

Property. Any action or inaction by the Borrower or Grantor occurs that adversely affects the Property or Lender's rights in the Property. This includes, but is not limited to, the following: (a) Grantor fails to maintain required insurance on the Property; (b) Grantor transfers the Property; (c) Grantor commits waste or otherwise destructively uses or fails to maintain the Property such that the action or inaction adversely affects Lender's security; (d) Grantor fails to pay taxes on the Property or otherwise fails to act and thereby causes a lien to be filed against the Property that is senior to the lien of this Security Instrument; (e) a sole Grantor dies; (f) if more than one Grantor, any Grantor dies and Lender's security is adversely affected; (g) the Property is taken through eminent domain; (h) a judgment is filed against Grantor and subjects Grantor and the Property to action that adversely affects Lender's interest; or (i) a prior lienholder forecloses on the Property and as a result, Lender's interest is adversely affected.

DRE _____

Executive Officers. Any Borrower is an executive officer of Lender or an affiliate and such Borrower becomes indebted to Lender or another lender in an aggregate amount greater than the amount permitted under federal laws and regulations.

9. **REMEDIES ON DEFAULT.** In addition to any other remedy available under the terms of this Security Instrument, Lender may accelerate the Secured Debt and foreclose this Security Instrument in a manner provided by law if Grantor is in default. In some instances, federal and state law will require Lender to provide Grantor with notice of the right to cure, or other notices and may establish time schedules for foreclosure actions.
At the option of the Lender, all or any part of the agreed fees and charges, accrued interest and principal shall become immediately due and payable, after giving notice if required by law, upon the occurrence of a default or anytime thereafter. Lender shall be entitled to, without limitation, the power to sell the Property.
If there is a default, Trustee shall, at the request of Lender, advertise and sell the Property as a whole or in separate parcels at public auction to the highest bidder for cash and convey absolute title free and clear of all right, title and interest of Grantor at such time and place as Trustee designates. Trustee shall give notice of sale, including the time, terms and place of sale and a description of the Property to be sold as required by the applicable law.
Upon the sale of the Property and to the extent not prohibited by law, Trustee shall make and deliver a deed to the Property sold which conveys absolute title to the purchaser, and after first paying all fees, charges, and costs, shall pay to Lender all moneys advanced for repairs, taxes, insurance, liens, assessments and prior encumbrances and interest thereon, and the principal and interest on the Secured Debt, paying the surplus, if any, to Grantor. Lender may purchase the Property. The recitals in any deed of conveyance shall be prima facie evidence of the facts set forth therein.
The acceptance by Lender of any sum in payment or partial payment on the Secured Debt after the balance is due or is accelerated or after foreclosure proceedings are filed shall not constitute a waiver of Lender's right to require complete cure of any existing default. By not exercising any remedy on Grantor's default, Lender does not waive Lender's right to later consider the event a default if it happens again.

10. **EXPENSES; ADVANCES ON COVENANTS; ATTORNEYS' FEES; COLLECTION COSTS.** If Grantor breaches any covenant in this Security Instrument, Grantor agrees to pay all expenses Lender incurs in performing such covenants or protecting its security interest in the Property. Such expenses include, but are not limited to, fees incurred for inspecting, preserving, or otherwise protecting the Property and Lender's security interest. These expenses are payable on demand and will bear interest from the date of payment until paid in full at the highest rate of interest in effect as provided in the terms of the Secured Debt. Grantor agrees to pay all costs and expenses incurred by Lender in collecting, enforcing or protecting Lender's rights and remedies under this Security Instrument. This amount may include, but is not limited to, attorneys' fees, court costs, and other legal expenses. To the extent permitted by the United States Bankruptcy Code, Grantor agrees to pay the reasonable attorneys' fees Lender incurs to collect the Secured Debt as awarded by any court exercising jurisdiction under the Bankruptcy Code. This Security Instrument shall remain in effect until released. Grantor agrees to pay for any recordation costs of such release.

11. **ENVIRONMENTAL LAWS AND HAZARDOUS SUBSTANCES.** As used in this section, (1) Environmental Law means, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, 42 U.S.C. 9601 et seq.), and all other federal, state and local laws, regulations, ordinances, court orders, attorney general opinions or interpretive letters concerning the public health, safety, welfare, environment or a hazardous substance; and (2) Hazardous Substance means any toxic, radioactive or hazardous material, waste, pollutant or contaminant which has characteristics which render the substance dangerous or potentially dangerous to the public health, safety, welfare or environment. The term includes, without limitation, any substances defined as "hazardous material," "toxic substances," "hazardous waste" or "hazardous substance" under any Environmental Law.

Grantor represents, warrants and agrees that:

A. Except as previously disclosed and acknowledged in writing to Lender, no Hazardous Substance is or will be located, stored or released on or in the Property. This restriction does not apply to small quantities of Hazardous Substances that are generally recognized to be appropriate for the normal use and maintenance of the Property.
B. Except as previously disclosed and acknowledged in writing to Lender, Grantor and every tenant have been, are, and shall remain in full compliance with any applicable Environmental Law.
C. Grantor shall immediately notify Lender if a release or threatened release of a Hazardous Substance occurs on, under or about the Property or there is a violation of any Environmental Law concerning the Property. In such an event, Grantor shall take all necessary remedial action in accordance with any Environmental Law.
D. Grantor shall immediately notify Lender in writing as soon as Grantor has reason to believe there is any pending or threatened investigation, claim, or proceeding relating to the release or threatened release of any Hazardous Substance or the violation of any Environmental Law.

12. **ESCROW FOR TAXES AND INSURANCE.** Unless otherwise provided in a separate agreement, Grantor will not be required to pay to Lender funds for taxes and insurance in escrow.
13. **JOINT AND INDIVIDUAL LIABILITY; CO-SIGNERS; SUCCESSORS AND ASSIGNS BOUND.** All duties under this Security Instrument are joint and individual. If Grantor signs this Security Instrument but does not sign an evidence of debt, Grantor does so only to mortgage Grantor's interest in the Property to secure payment of the Secured Debt and Grantor does not agree to be personally liable on the Secured Debt. If this Security Instrument secures a guaranty between Lender and Grantor, Grantor agrees to waive any rights that may prevent Lender from bringing any action or claim against Grantor or any party indebted under the obligation. These rights may include, but are not limited to, any anti-deficiency or one-action laws. The duties and benefits of this Security Instrument shall bind and benefit the successors and assigns of Grantor and Lender.
14. **SEVERABILITY; INTERPRETATION.** This Security Instrument is complete and fully integrated. This Security Instrument may not be amended or modified by oral agreement. Any section in this Security Instrument, attachments, or any agreement related to the Secured Debt that conflicts with applicable law will not be effective, unless that law expressly or impliedly permits the variations by written agreement. If any section of this Security Instrument cannot be enforced according to its terms, that section will be severed and will not affect the enforceability of the remainder of this Security Instrument. Whenever used, the singular shall include the plural and the plural the singular. The captions and headings of the sections of this Security Instrument are for convenience only and are not to be used to interpret or define the terms of this Security Instrument. Time is of the essence in this Security Instrument.
15. **SUCCESSOR TRUSTEE.** Lender, at Lender's option, may from time to time remove Trustee and appoint a successor trustee without any other formality than the designation in writing. The successor trustee, without conveyance of the Property, shall succeed to all the title, power and duties conferred upon Trustee by this Security Instrument and applicable law.
16. **NOTICE.** Unless otherwise required by law, any notice shall be given by delivering it or by mailing it by first class mail to the appropriate party's address on page 1 of this Security Instrument, or to any other address designated in writing. Notice to one grantor will be deemed to be notice to all grantors.
17. **WAIVERS.** Except to the extent prohibited by law, Grantor waives all appraisement and homestead exemption rights relating to the Property.
18. **LINE OF CREDIT.** The Secured Debt includes a revolving line of credit. Although the Secured Debt may be reduced to a zero balance, this Security Instrument will remain in effect until released.

GRE _____

19. **APPLICABLE LAW.** This Security Instrument is governed by the laws as agreed to in the Secured Debt, except to the extent required by the laws of the jurisdiction where the Property is located, and applicable federal laws and regulations.
20. **RIDERS.** The covenants and agreements of each of the riders checked below are incorporated into and supplement and amend the terms of this Security Instrument.
[Check all applicable boxes]
☐ Assignment of Leases and Rents ☐ Other .....
21. ☐ **ADDITIONAL TERMS.**

SIGNATURES: By signing below, Grantor agrees to the terms and covenants contained in this Security Instrument and in any attachments. Grantor also acknowledges receipt of a copy of this Security Instrument on the date stated on page 1.

George R Edwards 3/3/09
(Signature) GEORGE R. EDWARDS (Date) (Signature) (Date)

ACKNOWLEDGMENT:
STATE OF Nevada, COUNTY OF Clark } ss.
This instrument was acknowledged before me this 9th day of March, 2009
(Individual) by GEORGE R. EDWARDS, UNMARRIED
My commission expires: Sept. 19, 2012

Debra A. Grusman
(Notary Public)
Customer Service Manager
(Title and Rank)

DEBRA A. GRUSMAN
Notary Public, State of Nevada
Appointment No. 08-6804-1
My Appt. Expires Sep 19, 2012

EXHIBIT "A" LEGAL DESCRIPTION

Account #: **14560224**
Order Date : **02/27/2009**
Reference : **20090581626510**
Name : **GEORGE R. EDWARDS**
Deed Ref : **20020712928**

Index #:

Parcel #: **163-24-111-021**

SITUATED IN THE STATE OF NEVADA, COUNTY OF CLARK:

LOT NINETEEN (19) OF GLENVIEW WEST TOWNHOME, AS SHOWN BY MAP THEREOF ON FILE IN BOOK 30 OF PLATS, PAGE 65, IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA.

SUBJECT TO ALL EASEMENTS, COVENANTS, CONDITIONS, RESERVATIONS, LEASES AND RESTRICTIONS OF RECORD, ALL LEGAL HIGHWAYS, ALL RIGHTS OF WAY, ALL ZONING, BUILDING AND OTHER LAWS, ORDINANCES AND REGULATIONS, ALL RIGHTS OF TENANTS IN POSSESSION, AND ALL REAL ESTATE TAXES AND ASSESSMENTS NOT YET DUE AND PAYABLE.

BEING THE SAME PROPERTY CONVEYED BY DEED RECORDED IN DOCUMENT NO. 20020712928, OF THE CLARK COUNTY, NEVADA RECORDS.

EXHIBIT D

EXHIBIT D

DAVID ALESSI*

THOMAS BAYARD *

ROBERT KOENIG**

RYAN KERBOW***

* Admitted to the California Bar

** Admitted to the California, Nevada and Colorado Bar

*** Admitted to the Nevada and California Bar

ALESSI & KOENIG

A Multi-Jurisdictional Law Firm

9500 W. Flamingo Road, Suite 100
Las Vegas, Nevada 89147
Telephone: 702-222-4033
Facsimile: 702-222-4043
www.alessikoenig.com

ADDITIONAL OFFICES

AGOURA HILLS CA
PHONE: 818-735-9600

RENO NV
PHONE: 775-626-2323

DIAMOND BAR CA
PHONE: 909-861-8300

December 20, 2010

LIEN LETTER

VIA REGULAR AND CERTIFIED MAIL

EDWARDS GEORGE R TRUST
4254 ROLLINGSTONE DR
LAS VEGAS, NV 89103

Re: Glenview West Townhomes Association/4254 ROLLINGSTONE DR/HO #24230

Dear EDWARDS GEORGE R TRUST ;

Our office has been retained by **Glenview West Townhomes Association** to collect the past due assessment balance on your account. Please find the enclosed Notice of Delinquent Assessment (Lien), signed and dated on behalf of **Glenview West Townhomes Association** on **December 20, 2010**. The total amount due by **January 24, 2011 is $2,460.00.** Please note that the total amount due may differ from the amount shown on the enclosed lien. Please submit payment to our **Nevada** mailing address listed above by **January 24, 2011**. Payment must be in the form of a cashier's check or money order and made payable to **Alessi & Koenig.**

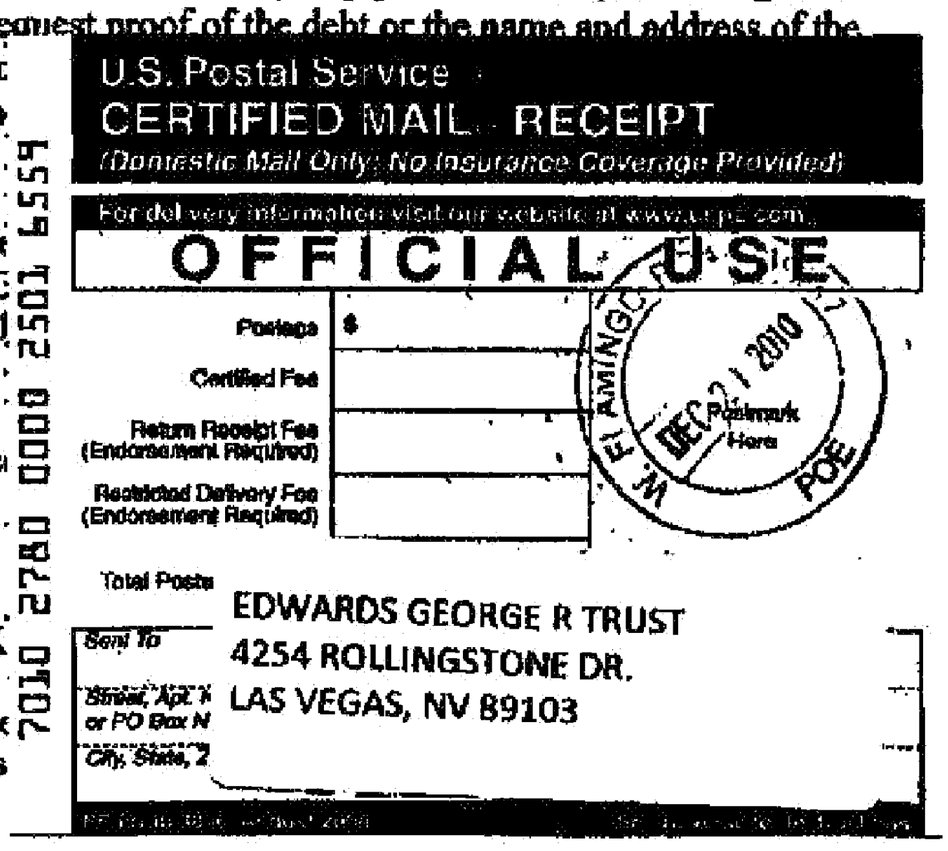
Unless you, within thirty days after receipt of this notice, dispute the validity of this debt, or any portion thereof, our office will assume the debt is valid. If you notify our office in writing within the thirty-day period that the debt, or any portion thereof, is disputed, we will obtain verification of the debt and a copy of such verification will be mailed to you. Upon receipt of your written request within the thirty-day period, we will provide you with the name and address of the original creditor, if different from the current creditor. Please note the law does not require me to wait until the end of the thirty-day period before proceeding to the next step in the collection process. If, however, you request proof of the debt or the name and address of the original creditor within the thirty-day period that begi
to suspend my efforts to collect the debt until I mail th
you have the right to inspect the association records.

In the event Alessi & Koenig, LLC does not r
costs of **$2,460.00** by **January 24, 2011**, a Notice of E
Recorder; resulting in additional fees and costs. Shoul
ownership of your property.

Sinc

ALESSI & K

Please be advised that Alessi & Koenig, LLC is a debt colk
obtained will be us



When recorded return to:

ALESSI & KOENIG, LLC
9500 W. Flamingo Rd., Suite 100
Las Vegas, Nevada 89147
Phone: (702) 222-4033

A.P.N. **163-24-111-021** Trustee Sale # **24230-4254**

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, **Glenview West Townhomes Association** has a lien on the following legally described property.

The property against which the lien is imposed is commonly referred to as **4254 ROLLINGSTONE DR , LAS VEGAS, NV 89103** and more particularly legally described as: **LOT 19** Book **30** Page **65** in the County of **Clark**.

The owner(s) of record as reflected on the public record as of today's date is (are): **EDWARDS GEORGE R TRUST**

The mailing address(es) is: **4254 ROLLINGSTONE DR, LAS VEGAS, NV 89103**

The total amount due through today's date is: **$2,330.00**. Of this total amount **$2,280.00** represent Collection and/or Attorney fees, assessments, interest, late fees and service charges. **$50.00** 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: **December 20, 2010**

By: _____
Mary Indalecio – Legal Assistant
Alessi & Koenig, LLC on behalf of **Glenview West Townhomes Association**

State of Nevada
County of Clark
SUBSCRIBED and SWORN before me **December 20, 2010**

(Seal) (Signature)

_____
NOTARY PUBLIC

EXHIBIT E

EXHIBIT E

Inst #: 201101040005412
Fees: $14.00
N/C Fee: $0.00
01/04/2011 09:46:04 AM
Receipt #: 631834
Requestor:
ALESSI & KOENIG LLC (JUNES
Recorded By: BGN Pgs: 1
DEBBIE CONWAY
CLARK COUNTY RECORDER

When recorded return to:

ALESSI & KOENIG, LLC
9500 W. Flamingo Rd., Suite 100
Las Vegas, Nevada 89147
Phone: (702) 222-4033

A.P.N. **163-24-111-021** Trustee Sale # **24230-4254**

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, **Glenview West Townhomes Association** has a lien on the following legally described property.

The property against which the lien is imposed is commonly referred to as **4254 ROLLINGSTONE DR , LAS VEGAS, NV 89103** and more particularly legally described as: **LOT 19** Book **30** Page **65** in the County of **Clark**.

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The mailing address(es) is: **4254 ROLLINGSTONE DR, LAS VEGAS, NV 89103**

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Date: **December 20, 2010**

By: _____
Mary Indalecio – Legal Assistant
Alessi & Koenig, LLC on behalf of **Glenview West Townhomes Association**

State of Nevada
County of Clark
SUBSCRIBED and SWORN before me **December 20, 2010**

(Seal)

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

(Signature)
_____
NOTARY PUBLIC

EXHIBIT F

EXHIBIT F

Inst #: 201103290002690
Fees: $14.00
N/C Fee: $0.00
03/29/2011 09:54:46 AM
Receipt #: 720898
Requestor:
ALESSI & KOENIG LLC (JUNES
Recorded By: EAH Pgs: 1
DEBBIE CONWAY
CLARK COUNTY RECORDER

When recorded mail to:

THE ALESSI & KOENIG, LLC
9500 West Flamingo Rd., Ste 100
Las Vegas, Nevada 89147
Phone: 702-222-4033

A.P.N. **163-24-111-021** Trustee Sale No. **24230-4254**

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 **$3,800.00** as of **March 2, 2011** and will increase until your account becomes current. To arrange for payment to stop the foreclosure, contact: **Glenview West Townhomes Association**, c/o Alessi & Koenig, 9500 W. Flamingo Rd, Ste 100, Las Vegas, NV 89147.

THIS NOTICE pursuant to that certain Assessment Lien, recorded on **January 4, 2011** as document number **0005412**, of Official Records in the County of **Clark**, State of Nevada. Owner(s): **EDWARDS GEORGE R TRUST ,** of **LOT 19**, as per map recorded in Book **30**, Pages **65**, as shown on the Plan, Recorded on as document number as shown on the Subdivision map recorded in Maps of the County of **Clark,** State of Nevada. PROPERTY ADDRESS: **4254 ROLLINGSTONE DR, LAS VEGAS, NV 89103**. 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 The Alessi & Koenig is appointed trustee agent under the above referenced lien, dated **January 4, 2011**, executed by **Glenview West Townhomes Association** 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 and all subsequent assessments, late charges, interest, collection and/or attorney fees and costs.

Dated: **March 2, 2011**

Mary Indalecio, Alessi & Koenig, LLC on behalf of **Glenview West Townhomes Association**

EXHIBIT G

EXHIBIT G

EDWARDS GEORGE R TRUST
4254 ROLLINGSTONE DR

LAS VEGAS, NV 89103

REPUBLIC SERVICES
ACCT# [redacted]308
PO BOX 98508
LAS VEGAS, NV 89193-8508

US RECORDINGS
2925 COUNTRY DRIVE STE. 201

ST. PAUL, MN 55117

LAW OFFICE OF AJ KUN, LTD
1020 GARCES AVE ,STE 200

LAS VEGAS, NV 89101

ROBERT HAZELL
14983 MAMMOTH PL

FONTANA, CA 92336

7010 1670 0002 4330 7092

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CERTIFIED MAIL... RECEIPT
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OFFICIAL USE

Postage $
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Return Receipt Fee (Endorsement Required)
Restricted Delivery Fee (Endorsement Required)

W. FLAMINGO ROAD 89147
APR 5 2011
Postmark Here
POE

EDWARDS GEORGE R TRUST
4254 ROLLINGSTONE DR

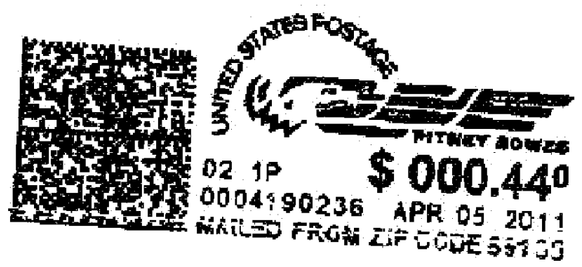
LAS VEGAS, NV 89103

PS

A&K000044

USB0075

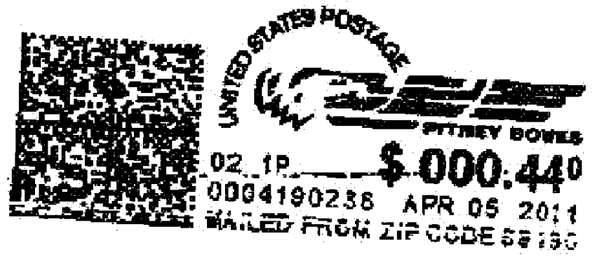
ALESSI
KOENIG
9500 W. Flamingo Rd. Suite 100
Las Vegas, NV 89147



ROBERT HAZELL
14983 MAMMOTH PL

FONTANA, CA 92336

ALESSI
KOENIG
9500 W. Flamingo Rd. Suite 100
Las Vegas, NV 89147



US RECORDINGS
2925 COUNTRY DRIVE STE. 201

ST. PAUL, MN 55117

A&K000045

USB0076

When recorded mail to:

THE ALESSI & KOENIG, LLC
9500 West Flamingo Rd., Ste 100
Las Vegas, Nevada 89147
Phone: 702-222-4033

Inst #: 201103290002690
Fees: $14.00
N/C Fee: $0.00
03/29/2011 09:54:46 AM
Receipt #: 720898
Requestor:
ALESSI & KOENIG LLC (JUNES
Recorded By: EAH Pgs: 1
DEBBIE CONWAY
CLARK COUNTY RECORDER

A.P.N. 163-24-111-021 Trustee Sale No. 24230-4254

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 **$3,800.00** as of **March 2, 2011** and will increase until your account becomes current. To arrange for payment to stop the foreclosure, contact: **Glenview West Townhomes Association**, c/o Alessi & Koenig, 9500 W. Flamingo Rd, Ste 100, Las Vegas, NV 89147.

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Dated: **March 2, 2011**

Mary Indalecio, Alessi & Koenig, LLC on behalf of **Glenview West Townhomes Association**

ALLEN KORNBERG

9500 W. Flamingo Rd. Suite 100
Las Vegas, NV 89147

UNITED STATES POSTAGE PITNEY BOWES
02 1P $ 000.44⁰
0004190236 APR 05 2011
MAILED FROM ZIP CODE 89135

REPUBLIC SERVICES
ACC[redacted]308
PO BOX 98506
LAS VEGAS, NV 89193-8506

ALLEN KORNBERG

9500 W. Flamingo Rd. Suite 100
Las Vegas, NV 89147

UNITED STATES POSTAGE PITNEY BOWES
02 1P $ 000.44⁰
0004190236 APR 05 2011
MAILED FROM ZIP CODE 89135

LAW OFFICE OF AJ KUN, LTD
1020 GARCES AVE ,STE 200

LAS VEGAS, NV 89101

A&K000047

USB0078

EXHIBIT H

EXHIBIT H

Inst #: 201110130001535
Fees: $14.00
N/C Fee: $0.00
10/13/2011 09:49:20 AM
Receipt #: 945329
Requestor:
ALESSI & KOENIG LLC (JUNES
Recorded By: OSA 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: **163-24-111-021** TSN **24230-4254**

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 The 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 16, 2011**, Alessi & Koenig as duly appointed Trustee pursuant to a certain lien, recorded on **January 4, 2011**, as instrument number **0005412**, 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: **4:00 P.M. at 930 S. 4th Street, Las Vegas Nevada 89101.**

The street address and other common designation, if any, of the real property described above is purported to be: **4254 ROLLINGSTONE DR, LAS VEGAS, NV 89103.** The owner of the real property is purported to be: **EDWARDS GEORGE R TRUST**

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 **$5,370.00.** Payment must be in cash, a cashier's check drawn on a state or national bank, a check drawn by a state bank or federal credit union, or a check drawn by a state or federal savings and loan association, savings association, or savings bank specified in section 5102 of the Financial Code and authorized to do business in this state.

Date: **September 16, 2011** Ryan Kerbow

By: Ryan Kerbow, Esq on behalf of Glenview West Townhomes Association

EXHIBIT I

EXHIBIT I

24230

GEORGE R. EDWARDS, TRUSTEE, GEOR
4254 ROLLINGSTONE DR

LAS VEGAS, NV 89103-3407

US RECORDINGS
CLARK CO.NV INST NO. 20090326-
2925 COUNTRY DRIVE STE. 201

ST. PAUL, MN 55117

ROBERT HAZELL
14983 MAMMOTH PL

FONTANA, CA 92336

REPUBLIC SERVICES
ACCT# 620-2221308
PO BOX 98508
LAS VEGAS, NV 89193-8508

LAW OFFICE OF AJ KUN, LTD
1020 GARCES AVE, STE 200

LAS VEGAS, NV 89101

GEORGE R. EDWARDS
4254 ROLLINGSTONE DR

LAS VEGAS, NV 89103-3407

LAW OFFICES OF LES ZIEVE
T.S. NO. 10-11871
18377 BEACH BLVD, SUITE 210

HUNTINGTON BEACH, CA 92648

SOUTHWEST FINANCIAL SERVICES LTD
CLARK CO.NV INST NO. 20090326-
537 E. PETE ROSE WAY, SUITE 300

CINCINNATI, OH 45202

U.S. BANK NATIONAL ASSOCIATION ND
CLARK CO.NV INST NO. 20090326-
4325 17TH AVENUE, SW

FARGO, ND 58103

U.S. BANK TRUST COMPANY, NATIONAL
CLARK CO.NV INST NO. 20090326-
111 SW FIFTH AVE

PORTLAND, OR 97204

OMBUDSMANS OFFICE
251 E. SAHARA AVE #205
LAS VEGAS NV 89104
RE: GORDAN MILDEN

NOTS MAILINGS

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Postage	$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage &	GEORGE R. EDWARDS, TRUSTEE, GEOR
Sent To	4254 ROLLINGSTONE DR
Street, Apt. No.; or PO Box No.	LAS VEGAS, NV 89103-3407
City, State, ZIP+4	

W. FLAMINGO ROAD 89147 — Postmark Here

7011 1570 0002 4887 1444

PS Form 3800, August 2006 — See Reverse for Instructions

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(Domestic Mail Only; No Insurance Coverage Provided)

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EXHIBIT J

EXHIBIT J

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 Anti-deficiency 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 K

EXHIBIT K

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARTIN CENTENO,
Appellant,
vs.
JP MORGAN CHASE BANK, N.A.,
Respondent.

No. 67365

FILED

MAR 18 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER VACATING AND REMANDING

This is a pro se appeal from a district court order denying a motion for a preliminary injunction in a quiet title action. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

The district court denied appellant's request for a preliminary injunction, reasoning that appellant lacked a likelihood of success on the merits of his quiet title claim because (1) the Supremacy Clause prevented the HOA foreclosure sale from extinguishing respondent's deed of trust, which secured a federally insured loan; and (2) the purchase price at the HOA sale was commercially unreasonable.

Having considered the parties' arguments that were made in district court, *see Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981), we conclude that the district court underestimated appellant's likelihood of success on the merits and therefore abused its discretion in denying injunctive relief.[1] *See Boulder Oaks Cmty. Ass'n v. B & J Andrews Enters., LLC*, 125 Nev. 397, 403, 215 P.3d 27, 31 (2009) (recognizing that a district court may abuse its discretion in denying

[1]We disagree with respondent's suggestion that this appeal is moot, as appellant's request for injunctive relief sought more than to simply prevent respondent from selling the subject property at foreclosure.

injunctive relief if its decision is based on an error of law). In particular, the district court summarily based its Supremacy Clause analysis on non-binding, non-uniform precedent. *Compare Washington & Sandhill Homeowners Ass'n v. Bank of Am.*, 2014 WL 4798565, at *6 (D. Nev. Sept. 25, 2014), *with Freedom Mortg. Corp. v. Las Vegas Dev. Grp.*, 106 F. Supp. 3d 1174, 1183-86 (D. Nev. 2015).[2] Similarly, this court's reaffirmation in *Shadow Wood Homeowners' Ass'n v. New York Community Bancorp, Inc.*, 132 Nev., Adv. Op. 5, ___ P.3d ___ (2016), that a low sales price is not a basis for voiding a foreclosure sale absent "fraud, unfairness, or oppression," undermines the second basis for the district court's decision. Accordingly, we

ORDER the judgment of the district court VACATED AND REMAND this matter to the district court for proceedings consistent with this order.

Hardesty, J.

Saitta, J.

Pickering, J.

cc: Hon. Kathleen E. Delaney, District Judge
Martin Centeno
Smith Larsen & Wixom
Ballard Spahr, LLP
Eighth District Court Clerk

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[2]We recognize that the *Freedom Mortgage* decision was not issued until after the district court entered the order being challenged in this appeal.

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ZIEVE, BRODNAX & STEELE, LLP
Benjamin D. Petiprin, Esq. (NV Bar 11681)
Sherry A. Moore, Esq. (NV Bar 11215)
3753 Howard Hughes Parkway, Suite 200
Las Vegas, Nevada 89169
Tel: (702) 948-8565
Fax: (702) 446-9898

Attorney for plaintiff, U.S. Bank National Association as successor by merger to U.S. Bank National Association ND

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

U.S. BANK NATIONAL ASSOCIATION ND, a national association,

Plaintiff,

vs.

GEORGE R. EDWARDS, an individual; ANY AND ALL PERSONS UNKNOWN, CLAIMING TO BE PERSONAL REPRESENTATIVES OF GEORGE R. EDWARDS ESTATE, OR DULY APPOINTED, QUALIFIED, AND ACTING EXECUTOR OF THE WILL OF THE ESTATE OF GEORGE R. EDWARDS; RESOURCES GROUP, LLC, a Nevada limited-liability company; GLENVIEW WEST TOWNHOMES ASSOCIATION, a Nevada non-profit corporation; DOES 4 through 10, inclusive, and ROES 1 through 10, inclusive.

Defendants.

RESOURCES GROUP, LLC,

Counter-claimant,

vs.

U.S. BANK NATIONAL ASSOCIATION, ND, a national association,

Counter-defendant

CASE NO.: A-12-667690-C

DEPT. NO.: XVI

U.S. BANK NATIONAL ASSOCIATION, ND'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO RESOURCES GROUP, LLC'S COUNTERMOTION FOR SUMMARY JUDGMENT

COMES NOW Plaintiff, U.S. Bank National Association as successor by merger to U.S. Bank National Association ND ("U.S. Bank"), who submits the following Reply in Support of its Motion for Summary Judgment and Opposition to Resources Group, LLC's ("Resources Group") Countermotion for Summary Judgment.

MEMORANDUM OF POINTS AND AUTHORITIES

I. LEGAL ARGUMENT

A. RESOURCES GROUP'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND COUNTERMOTION FOR SUMMARY JUDGMENT IS UNTIMELY AND SHOULD NOT BE CONSIDERED

Resources Group has filed its Opposition and Countermotion for Summary Judgment well beyond the dispositive motion deadline of May 16, 2016 per the Stipulation and Order to Extend Deadlines entered into between the parties on November 30, 2015. Pursuant to NRCP 16(e), the Scheduling Order "shall control the subsequent course of the action unless modified by a subsequent order" and "shall be modified only to prevent manifest injustice." The Scheduling Order may be modified only upon a showing of good cause. NRCP 16(b).

Because the Opposition and Countermotion is untimely, the Court should not consider it and strike it from the record. *See Guarino v. Las Vegas Metropolitan Police Dept.*, 2015 WL 3724336, at *6 (D. Nev. June 12, 2015) (striking Plaintiff's countermotion for summary judgment, as it was filed beyond the dispositive motion deadline); U.*S. ex rel. Intern. Business Corp. v. Hartford Fire Ins. Co.*, 112 F.Supp.2d 1023, 1028 (Haw. 2000) (Court denied cross-motion for summary judgment filed after the dispositive motion deadline because "Defendant was well aware of the deadlines imposed by the Scheduling Order, it did not specifically request that the court modify its Scheduling Order, nor did it seek relief from the Scheduling Order."); U.*S. Dominator, Inc. v. Factory Ship Robert E. Resoff*, 768 F.2d 1099, 1104 (9th Cir.1985) (court may deny as untimely a motion filed after the scheduling order cut-off date where no request to modify the order has been made).

Here, the parties had already stipulated to the extension of discovery and the dispositive motion deadlines in this case, which has been pending since 2012. Yet Plaintiff failed to bring

its own motion for summary judgment by the dispositive motion deadline or otherwise seek an additional extension to the deadline to bring such a motion, instead waiting on U.S. Bank to do so in an effort to sneak its own motion in beyond the deadline. Nor did Resources Group "set forth any explanation for its untimely motion." *Harford Fire*, 112 F.Supp.2d at 1028. To allow consideration of this untimely Motion when Resources Group has failed to exercise due diligence in filing the motion before the deadline or seeking an extension to the deadline would result in severe prejudice to U.S. Bank.

B. THE SALE IS VOID PER *SHADOW WOOD* AND THE RESTATEMENT (THIRD) OF PROPERTY, AS THE SALES PRICE WAS GROSSLY INADEQUATE AND THE LACK OF PROPER NOTICE CONSTITUTED FRAUD, OPPRESSION AND/OR UNFAIRNESS WARRANTING THE SETTING ASIDE OF THE SALE. ALTERNATIVELY, THE SALE IS VOID UNDER GENERAL EQUITY PRINCIPLES

Through the recent Nevada Supreme Court decision in *Shadow Wood Homeowners Ass'n, Inc. v. N.Y. Cmty. Bancorp.*, 132 Nev. Adv. Op. 5 (2016), the Court finally provided much-needed guidance on what constitutes a commercial unreasonability for purposes of setting aside a sale: if the sales price obtained at a trustee's foreclosure sale is 20% or less of the property's rough fair market value, it is considered "grossly inadequate" and void. Here, the Property sold for less than 10% of its fair market value of the Property.

In its Opposition and Countermotion, Resources Group glosses over the fact that there are two readings of *Shadow Wood* as outlined in Plaintiff's Motion. The first and most plausible reading is that any association sale where the property sells for less than 20% of its fair market value is absolutely void because of a "gross inadequacy" in the sales price. Under this reading, Plaintiff need not show that there was something other than a grossly inadequate price: the price is inadequate on its face to justify setting aside the sale. While Resources Group cites to the recent, unpublished Nevada Supreme Court holding in *Centeno v. JP Morgan Chas Bank, N.A.*, No. 67365 (March 18, 2016) (**Exh. K to Countermotion**), the Court noted only that a "low sales price" absent a showing of fraud, unfairness, or oppression is insufficient to void a sale.

However, *Shadow Wood* distinguishes between a low price (one 20% of fair market value and above) and a grossly inadequate price (those sales below 20%). While the former requires a showing of "something more" than a low price, the latter requires only a showing of the grossly inadequate price itself to justify the invalidation of a sale.

The second reading of *Shadow Wood* is that in addition to evidencing a "grossly inadequate" sales price, the party seeking to void the sale must also show "proof of some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price." *Shadow Wood* at 13 (citing *Golden v. Tomiyasu*, 79 Nev. 503, 514 (1963)). Assuming the Court reads *Shadow Wood* this second way, which would make little sense considering that the *Golden* case already allowed for this interpretation, U.S. Bank only needs to show very slight evidence of unfairness or oppression because the sales price is so grossly inadequate. "[I]t is universally recognized that inadequacy of price is a circumstance of greater or less weight to be considered in other circumstances impeaching the fairness of the transaction as a cause of vacating it, and that, where the inadequacy is palpable and great, very slight additional evidence of unfairness or irregularity is sufficient to authorize the granting of the relief sought . . . ." *Golden*, 79 Nev. at 514 (citing *Odell v. Cox*, 151 Cal. 70 (1907)(emphasis added); *see also Smith v. Kessler*, 43 Cal.App. 3d 26, 117 (1974) (any evidence of unfairness or taking undue advantage is enough to interpose court equity when combined with a grossly inadequate sales price).

The foreclosure notices fail to indicate anywhere that the Sale was that of a super-priority lien, which almost certainly depressed bidding and consequently resulted in the grossly inadequate price in the first place. While Plaintiff relies on *SFR Investments* in claiming that the HOA was not required to provide notice of the super-priority amount and that the mortgage savings clause in the CC&R's do not trump NRS 116.3116's statutory mandates, the lack of proper notice of the super-priority amount coupled with the grossly inadequate price and the mortgage-savings clause comprises the additional "slight" evidence that is required to justify setting aside the sale under both commercial unreasonableness and general equity principles. So even if this Court interprets *Shadow Wood* as adopting the *Golden* rule even in those cases where the sale is substantially less than the 20% benchmark, the Sale must still be void because the

sales price itself is on-its-face, coupled with lack of proper notice, evidences that the Sale was conducted with irregularities which led to the depressed bidding and purchase price.

C. NRS 116.3116 IS UNCONSTITUTIONAL BECAUSE IT DOES NOT PROVIDE PRIOR NOTICE OR A HEARING TO THE PARTY WHOSE PROPERTY RIGHTS ARE IMPAIRED BY THE FORECLOSURE OF THE LATER-RECORDED HOA LIEN. MOREOVER, SUFFICIENT STATE ACTION IS INVOLVED TO IMPLICATE DUE PROCESS

A line of cases holding lien statutes unconstitutional for lack of notice and a chance to be heard makes very clear that NRS116.3116 is unconstitutional. For example, Maryland's highest court struck down the nation's oldest mechanic's lien law (dating to 1791) because the statute created liens that "temporarily deprive[d] a debtor of a significant property interest" without actual notice to the party whose rights were impaired or a prior hearing. *Barry Properties v. Fick Bros.*, 242 A.2d 222, 232 (Md. 1976). Deprivation of a property interest without notice or a hearing meant the lien statute violated the Due Process Clause, and was unconstitutional. *Id.* The *Barry* court was clear that there was state action implicating the Due Process Clause: "[w]e think it clear that mechanics' liens involve state action since they are created, regulated and enforced by the State." *Id.* (citations omitted). So the result must be here. NRS 116.3116 does not temporarily deprive U.S. Bank of a property interest: it extinguishes it forever. NRS 116.3116 does not require notice or a hearing before extinguishment, as Due Process requires. And it is clear that the HOA failed to serve the Notice of Default on U.S. Bank, or give proper notice of the super-priority lien prior to the Sale. So as applied in this case, if NRS 116.3116 authorized what the HOA did in selling the Property and extinguishing U.S. Bank's property interest, it is unconstitutional.

While a homeowner's association is not necessarily an arm of the government simply because it conducts non-judicial sales, the real issue is not whether NRS 116.3116 by itself implicates due process, but whether speculator-investors invoking the court's jurisdiction to avoid security in real property implicates due process, and it does. "When a state permits a private actor to use the machinery of government to deprive another actor of his constitutional

rights, the first actor may in some cases be treated as a state actor for the purpose of the Fourteenth Amendment." *U.S. Bank, N.A. v. SFR Investments Pool 1, LLC*, 2015 WL 5023450, *10 (D. Nev. Aug. 26, 2015) (Order Granting and Denying Motions to Dismiss); *Barry*, 242 A.2d at 228; *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 715 (2010) ("But the particular state actor is irrelevant. If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property . . .").

In *Shelley v. Kraemer*, 334 U.S. 1 (1948), the Supreme Court ruled that the judicial enforcement of a racially restrictive covenant by a homeowner's association constituted state action. The Court first noted that the Equal Protection Clause of the Fourteenth Amendment spoke to the constitutional issue of race discrimination. *See id.* at 10. Here, the Due Process Clause of the Fifth Amendment speaks to the constitutional issue of notice. Second, the Court noted that in the case before it, as here, the rule had not been imposed by the state or municipal legislature, but by a private homeowner's association. *See id.*, 334 U.S. at 12-13. The Court ruled that "the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed . . . by the Fourteenth Amendment . . . But here there was more." *Id.* at 13. That "something more" was the judicial enforcement of the restrictions. *See id.* at 13-14. The same is true here with respect to Resources Group's claim for quiet title. A plain reading of *Shelley* compels the Court to apply it against the quiet title claim, and Due Process is therefore implicated.

Many other courts have likewise invalidated lien statutes that, like NRS 116.3116, conferred power on private actors to impair other persons' property rights without notice, without a hearing, or both. Where Connecticut passed a law under which mechanic's liens could be filed and perfected "without authorization, supervision, or control by a judicial officer," and provided no right to hearing to the party whose property interest was affected, that law violated the Due Process Clause. *Roundhouse Const. Corp. v. Telesco Masons Supplies Co.*, 365 A.2d 393, 394 (Conn. 1976). Nevada's landlord lien law was held unconstitutional to the extent it allowed deprivation of property by a landlord against a tenant without notice or a hearing.

Adams v. Joseph F. Sanson Inv. Co., 376 F. Supp. 61, 68-69 (D. Nev. 1974). California's Innkeeper's Lien Law proved unconstitutional under the Due Process where it permitted a private party to create a lien without a hearing before the lien was imposed. *Klim v. Jones*, 315 F. Supp. 109, 122 (N.D. Cal. 1970). *Klim* emphasized the state action in fashioning this private lien, calling it "action encouraged, indeed only made possible, by explicit state action." *Id.* at 114. Finally, Georgia's statute authorizing all liens on personalty was held unconstitutional because it did not require notice or a hearing before the lienor deprived someone of his interest in his property, and thus did not provide due process. *Mason v. Garris*, 360 F. Supp. 420, 423 (N.D. Ga.) amended, 364 F. Supp. 452 (N.D. Ga. 1973).

In contrast, drafting a lien statute that does not violate the Due Process Clause is a straightforward endeavor. All that is required to do so is to provide notice and a chance to be heard that all the foregoing invalid statute lacked. And it is important to note that Nevada's Legislature unanimously repealed the features of the Statute that made it violate the Due Process Clause in its first session after the Nevada Supreme Court issued *SFR Investments*, underscoring that NRS 116.3116 was being used in a way that violates constitutional and national norms of due process.

D. THE *SHADOW WOOD* COURT ALSO OPINED THAT THE DEED RECITALS ARE NOT AUTOMATICALLY ENTITLED TO A CONCLUSIVE PRESUMPTION THAT THE SALE WAS CONDUCTED IN ACCORDANCE WITH NRS 116.3116 AND IN A COMMERCIALLY REASONABLE MATTER

Resources Group relies on the foreclosure recitals as constituting irrefutable proof that the HOA sale was conducted in accordance with NRS 116.3116. In support of this assertion, it cites to nonbinding case law, NRS 116.3116, and *SFR Investments*. However, in *Shadow Wood*, which obviously postdates the cases upon which Resources Group relies, the Court ruled that the recitals in the Foreclosure Deed are not conclusive proof that the sale was conducted properly. *Shadow Wood* at 2. ("[Appellants] argue that NRS 116.31166 (2013), which says that certain recitals in an HOA trustee's sale deed are 'conclusive proof of the matters recited,' renders such deeds unassailable. We disagree."). While *Shadow Wood* ruled that the sale in that matter was

not commercially unreasonable because the Property sold for more than 20% of the fair market value and that the notices and recitals contained therein were sufficient, the Court also noted that NYCB did not dispute that it defaulted on the super-priority portion, nor did NYCB dispute that *Shadow Wood* complied with the NRS 116.3116 notice and publication requirements. *See Shadow Wood* at 10. Unlike NYCB in *Shadow Wood*, Plaintiff contends that no notice of the super-priority was given and Plaintiff was not in default to the HOA because it was not yet record owner of the Property at the time of the HOA sale. Because Plaintiff was not yet the record owner, it was required to pay only the super-priority amount to stop the sale, which it was unable to do because no notice of this amount was given. Hence, the *Shadow Wood* Court's finding that the foreclosure notices were conclusive proof of compliance with NRS 116.3116 in that case is distinguishable here, where Plaintiff is in fact disputing that the HOA complied with the NRS 116.3116 notice and publication requirements.

Resources Group also argues that there is no authority that mandates that an HOA act in good faith by conducting the sale in a commercially reasonable manner by because the HOA is not a "merchant" under NRS 104.2103(1)(b). This argument is absurd because it ignores *Shadow Wood*, wherein the Court opined a sale may be set aside, notwithstanding the generally conclusive Foreclosure Deed recitals, if that sale is unreasonable, either from a commercial standpoint or under a general equity standard. Therefore, *Shadow Wood* affirms the HOA's duty as outlined in NRS 116.1113's to act in good faith in conducting these sales to ensure that the best possible price is secured to afford maximum recovery to subordinate lienholders whose interests are potentially extinguished by such sales.

Here, the super-priority amount was not provided in the various foreclosure notices which led to the depressed bidding process and the grossly inadequate sales price. This combined with the inadequate sales price, and the facial unconstitutionality of the statute requiring a lender to "opt in" to receive notice, constitutes sufficient proof that the sale was not conducted in accordance with NRS 116.3116. Therefore, equity demands that the sale be set aside due to being conducted in a commercially unreasonable manner.

E. THE HOA SALE IS VOID BECAUSE NRS 116.3116 AND NRS 107.090 MANDATE THAT THE HOA SERVE BOTH THE NOTICE OF DEFAULT AND THE NOTICE OF SALE

Resources Group contends that the sale cannot be set aside due to the low sales price alone because there is no demonstration of fraud, oppression or unfairness. Additionally, Resources Group alleges that the mailings show that the Notice of Default was mailed to U.S. Bank. However, U.S. Bank has demonstrated fraud, oppression or unfairness in this matter, as the HOA Trustee failed to comply with the notice provisions of NRS 116.3116 and NRS 107.090 in failing to serve the Notice of Default on U.S. Bank, the subordinate lienholder. Again, the mailings show that US Recordings, rather than U.S. Bank, was served, an entity listed on the Deed of Trust. However, this entity is 1) clearly not U.S. Bank and is thus, not the real party in interest and 2) the address for US Recordings is different from the two addresses listed in the Deed of Trust for U.S. Bank, the same addresses to which the HOA Trustee allegedly served the Notice of Sale. The HOA Trustee's attempt to serve the Notice of Sale on U.S. Bank at the correct addresses demonstrates that it knew its prior service of the Notice of Default was improper. However, this attempt does not save the HOA sale because the NRS 116.3116 and NRS 107.090 statutory service provisions have not met.

Resources Group itself admits that NRS 116.090 provides that all subordinate lienholders must be mailed both the Notice of Sale AND Notice of Default. *See* Opposition and Countermotion, p. 10, paragraph 5 (NRS 107.090 "require[s] that copies of both the notice of default and the notice of sale be mailed to holders of 'subordinate' interests"); *id.*, p. 12, ll. 5-6 ("[c]onsequently, the provisions of NRS 107.090 requiring that copies of **both** the notice of default **and** the notice of sale be mailed to holders of interests 'subordinate' to the HOA's lien…") (emphasis in original). But prior to this, Resources Group argues that the alleged service of just the Notice of Sale to U.S. Bank in effect cures this prior deficiency (*see id.*, p. 7, ll. 17-19: "Regarding the notice of trustee's sale, on the other hand, plaintiff does not dispute that the notice was timely mailed to and received by plaintiff at its addressed listed in the deed of trust"). This is Resources Group wanting it both ways.

Additionally, Resources Group flat out mischaracterizes Plaintiff's argument in relation to the Notice of Sale: Plaintiff stated in its Motion that while the certified mailings on their face may appear to show that the Notice of Sale was mailed, these mailings are still insufficient to demonstrate that they were in fact properly mailed. However, even if the Notice of Sale were properly mailed, or U.S. Bank received actual notice of the sale[1], this is irrelevant, as the sale is still void because the Notice of Default was not served in accordance with NRS 107.090. Since the Notice of Sale stems from the Notice of Default, the any defect relating to the Notice of Default also taints and invalidates the Notice of Sale and thus, the Sale.

Despite Resources Group's contention that Plaintiff's valuation is inadmissible, this is inaccurate, as it was authenticated by affidavit as a business record that was received and kept in the ordinary course and business. Resources Group offers no affidavit or other admissible evidence refuting U.S. Bank's valuation and cites to no law that states an exterior valuation is not a proper determination of the fair market value of a property. *McPeek v. Harrah's Imperial Palace Corp.,* 2015 WL 5286794, at *2 (D. Nev. Sep. 9, 2015) ("If the moving party satisfies Rule 56 by demonstrating the absence of any genuine issue of material fact, the burden shifts to the party resisting summary judgment to 'set forth specific fact showing that there is a genuine issue for trial. . . The court only considers properly authenticated admissible evidence in deciding a motion for summary judgment") (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *Celote Corp. v. Catrettx*, 477 U.S. 317, 323 (1986)).

It is industry standard for lenders to order and rely upon exterior valuations to evaluate a property's fair market value. *See* Nevada Foreclosure Mediation Rule 13(3) ("The mediator may accept a BPO in addition to **or in lieu of the appraisal**.") (emphasis added); NRS 645.2515(2) (indicating that the purposes of a BPO is for "an existing or potential seller for the purposes of listing and **selling** a parcel of real property" or "an existing or potential buyer of a parcel of real property," or "a third party making decisions or performing due diligence related to the potential

[1] U.S. Bank does not concede that notice is unimportant, but it is for determining statutory compliance. Nor has U.S. Bank conceded to having received actual notice of the Notice of Trustee Sale. Resources Group implies such concession by the absence of any affirmative statement in the Affidavit of Julie Lor indicating that the Notice of Sale was not received. Absence of a statement is not admission that the Notice of Sale was properly served in accordance with NRS 116.3116 and NRS 107.090.

listing, offering, **sale**, exchange, option, lease or acquisition price of real property.") (emphasis added).

Here, because the sale price was grossly inadequate, the failure of the HOA to serve the Notice of Default on U.S. Bank (a fact Resources Group does not dispute), and the foreclosure notices were defective in putting the subordinate lienholders on notice that the sale was that of a super-priority portion of the HOA's lien, Resources Group was not a bona fide purchaser and equity principles mandate that the sale should be set aside.

F. RESOURCES GROUP FAILS TO DEMONSTRATE THAT THE HOA SALE SATISFIED NRS 116.3116'S AND NRS 107.090'S MAILING AND NOTICE REQUIREMENTS

The Nevada Supreme Court in SFR held that NRS 116.3116 requires proof, or statements of compliance with the mailing and notice provisions of NRS 116.3116 et seq. *See SFR Investments,* 334 P.3d at 411. Resources Group does not offer any admissible evidence that the HOA sale complied with applicable notice and mailing requirements, other than by reliance on and reference to the conclusory deed recitals and *SFR Investments*.

In order to invoke the NRS 116.31166 presumptions, the Trustee's Deed Upon Sale must actually contain those recitals. The Trustee's Deed doesn't contain those recitals, and a generous reading indicates it contains at best conclusory statements that fail to describe what the HOA or its trustee actually did to foreclose its lien. In *Albice v. Premier Mortg. Services of Washington, Inc.*, 157 Wash.App.912, 239 P.3d 1148 (2010) *aff'd*, 174 Wash. 2d 560, 276 P.3d 1277 (2012), the Court of Appeals of Washington considered a very similar deed that recited "information about the underlying debt obligation, the failure to cure the default, the lender's request to sell the property, and the fulfillment of notice requirements prior to the sale." *Id.* at 922. The court declined to apply a conclusive presumption prescribed by statute because "the deed contains legal conclusions but not factual recitals that establish compliance" with the law. *Id.* at 925-26. Likewise, the Supreme Court of Alaska, in considering a very similar matter, stated "[w]e are persuaded that what is required is a recital of fact specifying what the trustee has done, not a mere conclusory statement that the trustee has complied with the law." *Rosenberg v. Smidt*, 727

P.2d 778, 785 (Alaska 1986). Here, neither the HOA nor Alessi & Koenig, its Trustee, states to whom the notices were allegedly mailed or when. These bare conclusory statements therefore do not rise to the level required to invoke the conclusive presumptions in NRS 116.31166. The HOA's purported agent for the association has not included many of the recitals that would justify the application of the conclusive presumption by failing to recite facts that can actually be used to create such a presumption.. Rather, the purported agent has simply provided generic conclusions about what it allegedly did when specifics are required. If courts do not give such conclusions any presumption of truth under NRCP 12(b)(5) even though they must accept factual allegations as true (*see Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949-50 (2009) (interpreting the federal counterpart to NRCP 12(b)(5)), then, by analogy, courts should not give such legal conclusions any conclusive presumption under NRS 116.31166. In the end, there is an enormous evidentiary shortcoming in the Countermotion because Resources Group has failed to provide admissible evidence establishing a valid foreclosure sale under a NRS 116 super-priority lien.

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. "In a quiet title action, the burden of proof rests with Plaintiff to prove good title in himself." *Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 918 P.2d 314, 318 (1996); *see also Wensley v. First Nat. Bank of Nevada*, 2012 WL 1971773 (D. Nev. 2012). This means Resources Group has the burden to establish good title in itself.

Contrary to Resources Group's over-reading of *SFR*, that decision declined to resolve questions involving facts that had not yet been established. *SFR Investments* reversed the granting of a motion to dismiss, accepting as true for purposes of reviewing the district court's decision to grant the motion to dismiss, the complaint's allegations that the HOA sale complied with the Statute. It did not find those allegations to be true as a matter of law. Here, Resources Group does not provide any admissible evidence demonstrating compliance with NRS 116.3116 and NRS 107.090. Instead, Resources Group relies on mere certified mailing receipts obtained from the HOA, with no certifying Affidavit of Mailing indicating that the notice of sale was in

fact served on U.S. Bank. *See Nationstar Mortgage, LLC v. SFR Investments Pool 1, LLC*, 2016 WL 1718374, at *5 (D. Nev. 2016) (noting that while certified mailings may allow a jury or factfinder to infer notice, those mailings do not mandate that a jury or factfinder must find notice).

Even in *SFR v. U.S. Bank*, the Court held only that a foreclosure deed provided sufficient basis to withstand a defendant's motion to dismiss before remanding the matter for further proceedings. 334 P.3d at 418. The Court never held that, as a matter of law, the foreclosure deed was conclusive proof that all third-party purchasers from an HOA sale have clear title and an HOA sale extinguishes a first deed of trust. That is absurd. Moreover, if *SFR v. U.S. Bank* did in fact support Resources Group's contention, then the Court would have entered judgment in favor of SFR rather than remanded.

Finally, the Nevada Legislature's recent amendment of NRS 116.3116 and *Shadow Wood* underscore the unreasonableness of granting summary judgment in favor of Resources Group. Apparently appreciating the concerns of both the public and litigating stakeholders who are disenfranchised by the Statute, the Legislature amended NRS 116.3116 to require notice to lenders before a HOA super-priority lien sale, and to provide lenders an opportunity to redeem until 60 days after sale, merely by paying the amount of the HOA lien. SB 306. These significant changes to NRS 116.3116 underline how unreasonable it is to grant summary judgment in favor of Resources Group.

Therefore, Resources Group cannot establish as a matter of law that it is entitled to relief in the form of an order quieting title to the Property to itself. Therefore, U.S. Bank's Motion for Summary Judgment should be granted and Resources Group's countermotion for summary judgment should be denied.

G. TRIABLE ISSUES OF FACT EXIST CONCERNING WHETHER THE ASSOCIATION AUTHORIZED THE TRUSTEE TO FORECLOSE ON ITS BEHALF

NRS 116.31162(1) requires satisfactions of many conditions before an "association may foreclose its lien by sale." One such condition is that "[t]he notice of default and election to sell

must be signed by the person designated in the declaration or by the association for that purpose or, if no one is designated, by the president of the association." *Id.* 116.31162(2). Here, there is a triable issue of whether an appropriate person signed association's Notice of Default.

There is no admissible evidence in the record showing that the Declaration (i.e., the CC&Rs) designated the HOA Trustee to execute Notice of Default or that the association designated the trustee as its agent for that purpose. And there is no dispute that the president of the association did not execute Notice of Default. When viewing all evidence, including its inferences, in Resources Group's favor, the foreclosure of the Property was unauthorized under the plain language of NRS 116.31162.

In addition, there is no admissible evidence in the record that the Association authorized its trustee to execute the Lien for Delinquent Assessments (**Exh. E to Countermotion**), the Notice of Default (**Exh. F to Countermotion**), the Notice of Sale, the Trustee's Deed (**Exh. B to Countermotion**), or otherwise conduct the foreclosure on its behalf. And this Court cannot assume such authority, especially when Resources Group bears the burden of proof and when this Court must view "the evidence, and any reasonable inferences drawn from it, … in a light most favorable to [the non-moving party]." *See Wood v. Safeway, Inc.*, 121 Nev. 724, 729-732, 121 P.3d 1026, 1029-31 (2005) (summary judgment cannot be based upon "gossamer threads of whimsy, speculation, and conjecture"). Therefore, U.S. Bank has rebutted any presumption created by NRS 47.250(17).

To the extent that Resources Group relies on inadmissible hearsay in the Notice of Assessment Lien, the Notice of Default, the Notice of Sale, or the Trustee's Deed to show an agency relationship between the association and its trustee, courts have consistently required admissible evidence beyond the language in the instrument executed by the purported agent. *See, e.g., Berhe v. Fed. Nat. Mortgage Ass'n*, No. 2:13-CV-00552-RCJ, 2013 WL 3491272, at *2 (D. Nev. July 9, 2013); *Mathison v. Countrywide Home Loans, Inc.*, No. 3:11-CV-479-RCJ-WGC, 2012 WL 3205854, at *3 (D. Nev. Aug. 3, 2012) (holding that there is a triable issue of "whether First American truly was an agent of ReconTrust when it executed the notice of default"); , No. 3:11-CV-00871-RCJ, 2012 WL 1739721, at *1 (D. Nev. May 11, 2012) (finding

potential defects with a foreclosure in part because, although First American Title Co. filed a notice of default as agent for a trustee, "there is no extrinsic evidence of its agency on behalf of [the trustee] other than First American [Title Co.]'s own say-so on the [notice]"). *Berhe v. Federal National Mortgage Association* is instructive.

In that case, the court found the nonjudicial foreclosure at issue to be defective. *Berhe*, 2013 WL 3491272, at *2.

> [T]he Substitution of QLS as trustee was executed by an entity (non-party Seterus, Inc.) purporting to be an agent of the beneficiary (GTS), but there is no evidence that it was in fact an agent of GTS apart from Seterus's own claim of agency on the Substitution. Where this is the case, the Court has required defendants to provide evidence of the agency at the summary judgment stage.

Id.

Likewise, there is a requirement for Resources Group to submit extrinsic evidence of the association designating the trustee as its agent for purposes of foreclosing on the Property. And as explained above, Resources Group has failed to satisfy this requirement.

H. TRIABLE ISSUES OF FACT EXIST AS TO WHETHER THE FORECLOSURE NOTICES SUFFICIENTLY DESCRIBE THE CONDITIONS PRECEDENT TO THE CREATION OF SUPER-PRIORITY LIEN RIGHTS

NRS 116.31162(b)(1) provides that the notice of default must "[d]escribe the deficiency in payment." The language in this subsection is distinct from either the statute governing a notice of delinquent assessment, NRS 116.31162(1), or the statute governing the notice of sale, NRS 116.311635. The Notice of Delinquent Assessment statute and the Notice of Sale statute call for the association to provide an "amount." However, NRS 116.31162 requires the association to "describe." Black's Law Dictionary defines "[d]escribe" as "[t]o narrate, express, explain, set forth, relate recount, narrate, depict, delineate, portray." Black's Law Dictionary 400 (5th ed. 1979). Moreover, Black's Law Dictionary defines "[d]escription" as "[a] delineation or account of a particular subject by the recital of its characteristic accidents and qualities." *Id.* As a result, the notice of default must describe the quality of the deficiency in payment including whether the deficiency was for assessments adopted pursuant to a periodic budget pursuant to the provisions

of NRS 116.3115. Anything short of such a description would render the entire non-judicial foreclosure statute constitutionally infirm for failure to give notice of the conditions precedent to the deprivation of property rights of a first deed of trust holder.

In the present case, there is no recital in the Notice of Default, or any document for that matter, that the Association complied with the provisions of NRS 116.3115. Accordingly, as a matter of law, there is a triable issue of whether the Association complied with statutory requirements to create a super-priority lien. Alternatively, this Court must find that the provisions of NRS 116.31162 et seq. are constitutionally infirm.

The adverse impact of this omission on a notice of delinquent assessment, notice of default, or notice of foreclosure sale cannot be understated. For example, the role of the foreclosure auctioneer has always been to maximize the value of the asset by providing clear information about the property being sold. *See Hatch v. Collins*, 225 Cal. App. 3d 1104, 1112, 275 Cal. Rptr. 476, 480 (1990) ("[A] trustee has a general duty to conduct the sale 'fairly, openly, reasonably and with due diligence,' exercising sound discretion to protect the rights of the mortgagor and others"). More information provides greater certainty in bidding and encourages vigorous bidding. Without a recitation that the super-priority conditions have been satisfied, bidders are taking risks by bidding in at the sale. The risk that the super-priority conditions have not been satisfied and that the lien was junior to a first deed of trust would severely dampen bidding interest. The lack of disclosure could encourage illicit information gathering from the associations and their collection agents. Further, it would allow for manipulation of bidding by parties who had obtained the undisclosed information. In the end, it is the borrower who would pay the price from suppressed bidding. Furthermore, it is not reasonable to expect that a lender would be required to investigate the existence of a super-priority lien when that may be contained in a notice of default or a notice of foreclosure sale to determine if its rights are affected when there is no recital that the conditions to super-priority even exist. The problems with the notice are also reflected in the fact that the purchasers will never be able to obtain title insurance.

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In *SFR Investments*, the Nevada Supreme Court identified two distinct parts to an association's lien. 334 P.3d at 411. Each part has its own size, scope, and priority. Further, the super-priority portion is dependent upon the association complying with the proper budget adoption provisions of NRS 116.3115. Specifically, NRS 116.3116(2) provides that one of the conditions precedent to a super-priority lien is that it is only "to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to [NRS] 116.3115…." Accordingly, to the extent that the Association has not complied with NRS 116.3115 in this case, there is no super-priority lien.

The notices in this case do not provide any language that the Association complied with the provisions of the super-priority lien. The notice statute indicates that this notice must be provided. NRS 116.31162(1)(b) (emphasis added) provides:

> Not less than 30 days after mailing the notice of delinquent assessment pursuant to paragraph (a), the association or other person conducting the sale has executed and caused to be recorded, with the county recorder of the county in which the common-interest community or any part of it is situated, a notice of default and election to sell the unit to satisfy the lien which must contain the same information as the notice of delinquent assessment and which must also comply with the following:
> (1) Describe the deficiency in payment.
> (2) State the name and address of the person authorized by the association to enforce the lien by sale….

In light of the fact that an association's lien has two pieces, as recognized by the Nevada Supreme Court, the notice requires that the deficiency be adequately described. *SFR Investments Pool 1*, 334 P.3d at 411. The broader language of "description" is necessary to ensure that all parties are equipped with the knowledge necessary to ensure protection of their constitutional rights. This is especially important here because judicially noticeable facts show a triable issue concerning the deficiency in payment. Since the notices in this case failed to contain any information or description that would demonstrate compliance with NRS 116.31162(1)(b), there is no admissible evidence that a super-priority lien was ever created and that the Deed of Trust was ever extinguished.

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II. CONCLUSION

Due to the foregoing, Resources Group's Opposition and countermotion are untimely, contrary to law and consequently, without merit, and U.S. Bank's Motion for Summary Judgment should be granted in its entirety.

DATED: June 9, 2016

ZIEVE, BRODNAX & STEELE, LLP

By: /s/ Sherry A. Moore
Sherry A. Moore, Esq.
Benjamin D. Petiprin, Esq.
Attorneys for Plaintiff
U.S. Bank National Association as successor by merger to U.S. Bank National Association ND

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the Law Offices of Les Zieve, and not a party to nor interested in the within matter; that on the 9th day of June 2016 service of the **U.S. BANK NATIONAL ASSOCIATION, ND'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO RESOURCES GROUP, LLC'S COUNTERMOTION FOR SUMMARY JUDGMENT** was made:

(X) by serving the following parties electronically through CM/ECF/WIZNET as set forth below;

Michael F. Bohn, Esq.
Law Offices of Michael F. Bohn
376 East Warm Springs Road, Ste. 140
Las Vegas, NV 89119
office@bohnlawfirm.com
mbohn@bohnlawfirm.com

/s/ Jenny Humphrey
Jenny Humphrey, an employee of
Law Offices of Les Zieve

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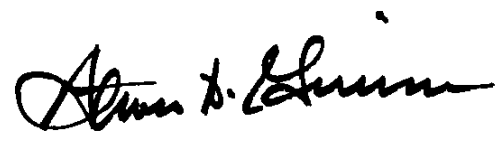

CLERK OF THE COURT

RIS
MICHAEL F. BOHN, ESQ.
Nevada Bar No.: 1641
mbohn@bohnlawfirm.com
LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.
376 East Warm Springs Road, Ste. 140
Las Vegas, Nevada 89119
(702) 642-3113/ (702) 642-9766 FAX

Attorney for Resources Group, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

U.S. BANK NATIONAL ASSOCIATION, ND, a national association

Plaintiff,

vs.

GEORGE R. EDWARDS, an individual; ANY AND ALL PERSONS UNKNOWN, CLAIMING TO BE PERSONAL REPRESENTATIVES OF GEORGE R. EDWARDS ESTATE, OR DULY APPOINTED, QUALIFIED, AND ACTING EXECUTOR OF THE WILL OF THE ESTATE OF GEORGE R. EDWARDS; RESOURCES GROUP, LLC, a Nevada Limited Liability Company; GLENVIEW WEST TOWNHOMES ASSOCIATION, a Nevada non-profit corporation; DOES 4 through inclusive; and ROES 1 through 10 inclusive

Defendants.

RESOURCES GROUP, LLC,

Counter-claimant

vs

U.S. BANK NATIONAL ASSOCIATION, ND, a national association

Counter-defendant

CASE NO.: A-12-667690-C
DEPT NO.: XVI

REPLY IN SUPPORT OF RESOURCES GROUP, LLC'S COUNTERMOTION FOR SUMMARY JUDGMENT

Counter-claimant, Resources Goup, LLC's (hereinafter "Resources"), by and through its attorney, Michael F. Bohn, Esq., files this reply in support of its countermotion for summary judgment, filed on June 2, 2016. This reply is based upon the points and authorities contained herein.

POINTS AND AUTHORITIES

1. The court has the discretion to consider the countermotion filed by Resources.

At page 5 of its reply filed on June 9, 2016, plaintiff argues that the countermotion by Resources should not be considered because it was filed "well beyond the dispositive motion deadline of May 16, 2016 per the Stipulation and Order to Extend Deadlines entered into between the parties on November 30, 2015."

Plaintiff waited until the deadline of May 16, 2016 to file its motion for summary judgment, and plaintiff does not argue that the opposition filed by Resources is untimely. Plaintiff only asserts that the court should not consider the countermotion by Resources.

NRCP 16(b) empowers the court to modify the scheduling order "upon a showing of good cause."

In the present case, if the court denies plaintiff's motion for summary judgment, it will be because the court agrees that the HOA foreclosure sale held on January 25, 2012 extinguished plaintiff's "subordinate" deed of trust. As a result, good cause exists to allow the filing of the countermotion, so that the parties and the court are not forced to incur the time and expense of a trial in order to apply to same conclusion to decide the counterclaim filed by Resources.

2. The recitals in the foreclosure deed are conclusive absent proof of grounds for equitable relief.

At page 3 of its reply filed on June 9, 2016, plaintiff argues that the opinion in Shadow Wood Homeowners Association v. New York Community Bancorp, Inc., 132 Nev. Adv. Op. 5, 366 P.3d 1105 (2016), "provided much-needed guidance on what constitutes commercial unreasonability for purposes of setting aside a sale." The Shadow Wood opinion, however, never discusses "commercial unreasonability," and the words do not appear in the opinion. Instead, consistent with NRS 116.1108, the Court applied the "law of real property" to adopt the requirement that a party seeking to avoid the

conclusive recital statute in NRS 116.31166 must provide "proof of some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price." 366 P.3d at 1111.

Plaintiff argues that "[t]he first and most plausible reading is that any association sale where the property sells for less than 20% of its fair market value is absolutely void because of a 'gross inadequacy' in the sales price." If plaintiff's argument were true, then there would be no need for Section B of the Shadow Wood opinion to exist, and the Court would not have adopted the rule in Golden v. Tomiyasu 79 Nev. 503, 387 P.2d 989 (1963), which expressly rejected the argument that inadequate price alone can justify setting aside a foreclosure sale.

At page 4 of its reply, plaintiff argues that the standard in Golden v. Tomiyasu is satisfied because the foreclosure notices failed to "indicate anywhere that the Sale was that of a super-priority lien, **which almost certainly depressed bidding** and consequently resulted in the grossly inadequate price in the first place." Plaintiff has produced no evidence proving this assertion. 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 held that "it was appropriate to state the total amount of the lien" (334 P.3d at 418) and that a mortgage savings clause in the CC&Rs could not affect the HOA's super priority lien rights (334 P.3d at 419). Yet, plaintiff claims that these perfectly appropriate actions by the HOA are the "additional 'slight' evidence that is required to justify setting aside the sale under both commercial unreasonableness and general equity principles." This is not the standard adopted by the Nevada Supreme Court in Shadow Wood.

3. The foreclosure process in NRS Chapter 116 does not violate due process.

At page 5 of its reply, plaintiff cites Barry Properties v. Fick Bros. Roofing Co., 353 A.2d 222, 232 (Md. App. 1976), where the court stated: "We think it is clear that mechanics' liens involve state action since they are created, regulated and enforced by the State." On the other hand, no "state actor" participates in the nonjudicial enforcement of an HOA assessment lien pursuant to NRS 116.31162 to 116.31168, and by incorporation, NRS 107.090.

At the bottom of page 5 of its reply, plaintiff cites U.S. Bank, N.A. v. SFR Investments Pool 1, LLC, 124 F. Supp. 3d 1063 (D. Nev. 2015), as authority that "speculators-investors invoking the court's jurisdiction to avoid security in real property implicates due process." The district court, however, relied

on expanding the concept of "substantive due process" well beyond the scope of the decision in Obergefell v. Hodges, 135 S. Ct. 2584 (2015). The decision also relied on Shelley v. Kramer, 334 U.S. 1 (1948), that reversed a lower court's order enforcing a restrictive covenant based on race. As stated by the United States Supreme Court in Washington v. David, 426 U.S. 229, 239 (1976), "[t]he central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." The present case does not involve any claim of racial discrimination.

At the bottom of page 6 of its reply, plaintiff argues that courts have invalidated lien statutes that "conferred power on private actors to impair other persons' property rights without notice, without a hearing, or both." In Melara v. Kennedy, 541 F.2d 802, 804 (9th Cir. 1976), however, the court of appeals stated that "[t]he authorization by statute of the challenged conduct does not by itself require a finding of state action." Because no "state actor" participates in the nonjudicial foreclosure process provided by NRS 116.31162 to NRS 116.31168, and by incorporation, NRS 107.090, due process is not an issue in this case.

Furthermore, NRS 107.090(3)(b) and NRS 107.090(4), which are expressly incorporated by NRS 116.31168(1), require that copies of the notice of default and the notice of sale be mailed to holders of "subordinate" interests. The HOA's foreclosure agent timely mailed the required notices to the plaintiff. Plaintiff's only objection is that the notice of default was mailed to an incorrect address. No such objection was made regarding the notice of trustee's sale that was mailed to plaintiff on October 20, 2011. (Exhibit I to countermotion)

4. Plaintiff's inaction must be considered by the Court.

At the bottom of page 7 of its reply, plaintiff quotes from Shadow Wood and argues that "Shadow Wood ruled that the sale in that matter was not commercially unreasonable because the Property sold for more than 20% of the fair market value and that the notices and recitals contained therein were sufficient." Plaintiff then claims at page 8 that "no notice of the super-priority was given and Plaintiff was not in default to the HOA because it was not yet the record owner of the Property at the time of the HOA sale."

In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408

(2014), on the other hand, the Court held that it was appropriate for the HOA to state the total amount of the lien, and the Court cited In re Medaglia, 52 F.3d 451 (2d Cir. 1995), as authority 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."

In Section D of its opinion in Shadow Wood, the Court specifically directed that in considering whether to grant equitable relief from the conclusive foreclosure deed, a court must "consider the entirety of the circumstances that bear upon the equities." 366 P.3d at 1114. The Court also stated:

> When a trustee forecloses on and sells a property pursuant to a power of sale granted in a deed of trust, it terminates the owner's legal interest in the property. *Charmicor, Inc. v. Bradshaw Fin. Co.*, 92 Nev. 310, 313, 550 P.2d 413, 415 (1976). This principle equally applies in the HOA foreclosure context because NRS Chapter 116 grants associations the authority to foreclose on their liens by selling the property and thus divest the owner of title. *See* NRS 116,31162(1) (providing that "the association may foreclose its lien by sale" upon compliance with the statutory notice and timing rules); NRS 116.31164(3)(a) (stating the association's foreclosure sale deed "conveys to the grantee all title of the unit's owner to the unit"). **And if the association forecloses on its superpriority lien portion, the sale also would extinguish other subordinate interests in the property**. *SFR Invs.*, 334 P.3d at 412–13. So, when an association's foreclosure sale complies with the statutory foreclosure rules, as evidenced by the recorded notices, such as is the case here, and without any facts to indicate the contrary, the purchaser would have only "notice" that the former owner had the ability to raise an equitably based post-sale challenge, the basis of which is unknown to that purchaser. (emphasis added)
>
> 366 P.3d at 1116.

The Court made it clear that a lender like plaintiff has a duty to action to prevent the property from being sold to a bona fide purchaser pursuant to the HOA's superpriority lien. Because plaintiff took no such action, plaintiff cannot now obtain equitable relief to reverse the extinguishment of its "subordinate" deed of trust.

5. Plaintiff has produced no evidence that the HOA's foreclosure agent acted without authority.

At page 14 of its reply, plaintiff argues that there is no admissible evidence that the HOA authorized its foreclosure agent to execute the lien, the notice of default, the notice of sale, the trustee's deed, "or otherwise conduct the foreclosure on its behalf." Plaintiff, however, has produced no evidence that Alessi & Koenig acted without authority. Resources has attached as Exhibit A the authorization form signed by the HOA on November 23, 2011. This document was produced as part of plaintiff's

supplemental disclosures that were electronically served on December 1, 2015.

At the bottom of page 15 and top of page 16 of its reply, plaintiff argues that according to the definition of the word "description" that appears in Black's Law Dictionary, "the notice of default must describe the quality of the deficiency in payment including whether the deficiency was for assessments adopted pursuant to a periodic budget pursuant to the provisions of NRS 116.3115." The Nevada Supreme Court instead held in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., that it was appropriate for the notices "to state the total amount of the lien." 334 P.3d at 418.

CONCLUSION

By reason of the foregoing, Resources Group, LLC respectfully requests that the court enter an order denying plaintiff's motion for summary judgment and granting Resource's countermotion for summary judgment.

DATED this 13th day of June, 2016.

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

By: /s/ Michael F. Bohn, Esq./
Michael F. Bohn, Esq.
376 East Warm Springs Road, Ste. 140
Las Vegas, Nevada 89119
Attorney for counter-claimant,
Resources Group, LLC

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 13th day of June, 2016, an electronic copy of the foregoing REPLY IN SUPPORT OF RESOURCE GROUP, LLC'S COUNTERMOTION FOR SUMMARY JUDGMENT was served on opposing counsel via the Court's electronic service system and/or deposited for mailing in the U.S. Mail, postage prepaid to the following:

Sherry A. Moore, Esq.
Benjamin D. Petiprin, Esq.
ZIEVE, BRODNAX & STEELE, LLP
3753 Howard Hughes Parkway
Suite 200
Las Vegas, NV 89169

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

EXHIBIT A

EXHIBIT A

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

* Admitted to the California Bar
** Admitted to the California, Nevada and Colorado Bar
*** Admitted to the Nevada Bar
**** Admitted to the Nevada and California Bar

ALESSI KOENIG
A Multi-Jurisdictional Law Firm

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

ADDITIONAL OFFICES

AGOURA HILLS, CA
PHONE: 818-735-9600

RENO NV
PHONE: 775-626-2323
&
DIAMOND BAR CA
PHONE: 909-843-6590

AUTHORIZATION TO CONCLUDE NON-JUDICIAL FORECLOSURE AND CONDUCT TRUSTEE SALE

Dear Board of Directors and Management:

Alessi & Koenig, LLC is processing the posting and publication of a Notice of Trustee Sale for the below referenced property. Prior to the sale taking place, Alessi & Koenig requests a member of the Board of Directors, or a managing agent of the Board of Directors, sign this authorization.

If there are no bidders at the trustee sale, the property will revert to the homeowners association (HOA); and the HOA will acquire ownership of the property. Alessi & Koenig will record a Trustee's Deed Upon Sale on behalf of the HOA and advance the real property transfer tax.

Should the property revert to the HOA, Alessi & Koenig will provide an invoice for foreclosure fees and reimbursement of costs; including transfer tax and title insurance. Alessi & Koenig fees approximate $2,500 to $2,950.

Delinquent homeowner's name(s): **EDWARDS GEORGE R TRUST**

Homeowner Association name: **Glenview West Townhomes Association**

Delinquent homeowner's property address: **4254 ROLLINGSTONE DR, LAS VEGAS, NV 89103**

Estimated Trustee Sale Date: **November 16, 2011**

Approximate amount owed bank (1st mortgage): **$50,000.00*** Approx Equity:

Approximate Amount owed HOA (delinquent assessment): **$2,110.00**

Bank Foreclosing:

The undersigned has been authorized to execute this agreement on behalf of the above referenced Homeowners Association. Execution of this agreement authorizes Alessi & Koenig to conduct a public auction via trustee sale of the above referenced property.

Signed: _____ ***Dated:*** 11/23/11
AGENT for **Glenview West Townhomes Association**

p.1

28 Nov 11 10:15
Alessi Dx 4254 Rollingstone000086

USB0261

DISTRICT COURT
CLARK COUNTY, NEVADA

Title to Property	**COURT MINUTES**	**June 16, 2016**

A-12-667690-C U S Bank National Association, Plaintiff(s)
vs.
George Edwards, Defendant(s)

June 16, 2016 **9:00 AM** **All Pending Motions**

HEARD BY: Williams, Timothy C. **COURTROOM:** RJC Courtroom 12D

COURT CLERK: Lorna Shell

PARTIES PRESENT:

Bohn, Michael F	Attorney for Resources Group
Moore, Sherry A.	Attorney for US Bank
Trippiedi, Adam R.	Attorney for Resources Group

JOURNAL ENTRIES

- U.S. BANK NATIONAL ASSOCIATION, ND'S MOTION FOR SUMMARY JUDGMENT .. OPPOSITION TO MOTION FOR DISMISSAL AND PLAINTIFF'S COUNTERMOTION FOR SUMMARY JUDGMENT .. OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND RESOURCES GROUP COUNTER-MOTION FOR SUMMARY JUDGMENT

Ms. Moore argued the sales price was grossly inadequate, the notice of default was not sent to Bank of America rather it went to US Recordings, and that the notice of sale and default must be sent to all lienholders. Mr. Bohn argued regarding the finality of a foreclosure sale and that banks want their sales final, that the notice went to the office of Les Zieve who was representing Bank of America, and that the bank had three months between the notice and the bankruptcy sale to protect their lien and the failed to do so. Following further arguments by counsel COURT STATED FINDINGS AND ORDERED, both Motions for Summary Judgment DENIED.

PRETRIAL/CALENDAR CALL:
Mr. Bohn requested a date late in the stack and noted the trial would be for one to two days. COURT ORDERED, Trial Date SET and noted if the parties wished to stipulate to the factual issues; that would take the procedural issues off the table.

08/04/16 10:30 AM BENCH TRIAL

McCARTHY & HOLTHUS, LLP
Kristin A. Schuler-Hintz (NSB# 7171)
Thomas N. Beckom (NSB# 12554)
9510 West Sahara Avenue, Suite 200
Las Vegas, NV 89117
Telephone: (702) 685-0329
Facsimile: (866) 339-5691
Attorneys for Defendant

IN THE EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

U.S. BANK NATIONAL ASSOCIATION ND, A NATIONAL ASSOCIATION

Plaintiff,

v.

GEORGE R. EDWARDS, an individual, ANY AND ALL PERSON UNKNOWN, CLAIMING TO BE PERSONAL REPRESENTATIVES OF GEORGE R. EDWARDS ESTATE OR DULY APPOINTED, QUALIFIED, AND ACTING EXECUTOR OF THE WILL OF THE ESTATE OF GEORGE R. EDWARDS; RESOURCES GROUP, LLC a Nevada Limited-Liability Company; GLENVIEW WEST TOWNHOMES ASSOCIATION , a Nevada non-profit corporation; DOES 4 through 10, inclusive, and ROES 1 through 10, inclusive

Defendants.

RESOURCES GROUP, LLC

Counter Plaintiff,

v.

U.S. BANK N.A., ND, A NATIONAL ASSOCIATION

Counter Defendant

Case No. A-12-667690-C

Dept. No. XVI

STIPULATION AND ORDER TO RE-OPEN DISCOVERY , VACATE TRIAL, AND EXTEND THE 5 YEAR RULE PURSUANT TO NEV. R. CIV. PRO 41(e).

IT IS HEREBY STIPULATED AND AGREED, pursuant to EDCR 2.35 as well as NRCP 41(e), by and between the parties, U.S. BANK N.A. ("U.S. BANK"); and RESOURCES GROUP, LLC through their undersigned counsels of record, that discovery be re-opened, trial be re-set, and that the timeline to bring the action to trial be extended past 5 years.

I. DESCRIPTION OF THE ACTION AND PROCEDURAL HISTORY

This matter involves disputed title to the real property located at 4154 Rollingtstone Dr., Las Vegas, NV 89103 (the "Property"), which was sold at an HOA foreclosure sale. Resources purchased the Property at the sale and claims to own the Property free and clear of any first deed of trust. U.S. Bank contends to be the current beneficiary of a first deed of trust still encumbering the Property.

On August 30, 2012, U.S. Bank filed a complaint for judicial foreclosure under a Deed of Trust. Resources Group, LLC ("Resources") filed its answer to the complaint on July 16, 2014, which included counterclaims against U.S. Bank. U.S. Bank filed an answer to the Counterclaim on February 20, 2015.

An Early Case Conference was held. A joint case conference report was filed on April 15, 2015 and a scheduling order was entered on May 18, 2015. On November 30, 2015; the parties extended discovery. Pursuant to this scheduling order, the current discovery timeline is as follows:

1. Discovery cut-off – April 15, 2016
2. Motions to amend pleadings/add parties – August 14, 2015
3. Initial expert disclosures – August 14, 2015
4. Rebuttal expert disclosures – September 14, 2015
5. Dispositive motions – May 16, 2016

Moreover, an order setting civil jury trial was entered on June 5, 2015. This order was amended on November 25, 2015.

As detailed further below, the parties have complied with the requirements of EDCR 2.35 and good cause exists for the requested extension.

McCARTHY & HOLTHUS, LLP
ATTORNEYS AT LAW
9510 WEST SAHARA AVENUE, SUITE 200
LAS VEGAS, NV 89117
TELEPHONE (702) 685-0329/Facsimile (866) 339-5961

II. DISCOVERY COMPLETED TO DATE

1. Rule 16.1 early case conference.
2. Resources served its initial disclosures.
3. U.S. Bank served its initial disclosures.
4. Propounded written discovery on U.S. Bank, which U.S. Bank answered.
5. U.S. Bank subpoenaed the HOA as well as the collection company and disclosed these responses.

III. DISCOVERY THAT REMAINS TO BE COMPLETED

1. Depose Resources
2. Despose Alessi & Koenig
3. Disclose a valuation expert

IV. THE REASON WHY DISCOVERY WAS NOT COMPLETED WITHIN THE TIME LIMIT SET BY THE DISCOVERY PLAN

U.S. Bank has opted to change counsel and the parties agree that additional discovery as well as renewed motions may result in dealing with this matter on Summary grounds. As such the parties agree that discovery should be re-opened on the following terms.

V. PROPOSED SCHEDULE FOR COMPLETING ALL DISCOVERY

Based upon their agreement, the parties propose the following amended discovery plan and applicable deadlines reflecting an extension as follows:

1. Discovery cut-off – November 1, 2016
2. Motions to amend pleadings/add parties – August 1, 2016
3. Initial expert disclosures – August 1, 2016
4. Rebuttal expert disclosures – August 31, 2016
5. Dispositive motions – December 1, 2016

VI. CURRENT TRIAL DATE

The case is set to be tried on August 4 & 5, 2016. The parties are desirous to have trial re-

McCARTHY & HOLTHUS, LLP
ATTORNEYS AT LAW
9510 WEST SAHARA AVENUE, SUITE 200
LAS VEGAS, NV 89117
TELEPHONE (702) 685-0329/Facsimile (866) 339-5961

set to a time and date convenient for the Court sometime at the beginning of 2017.

VII. FIVE YEAR RULE

This case was filed on August 30, 2012 and will be five (5) years old on August 30, 2017. To the extent any scheduling runs up against the 5 year deadline, the parties hereby stipulate to waive the five year rule pursuant to Nev. R. Civ. Pro 41(e).

DATED this 30th day of June, 2016.

LAW OFFICES OF MICHAEL F. BOHN, ESQ

MICHAEL F. BOHN, ESQ.
Nevada Bar No. 1641
376 E. WARM SPRINGS RD.
Las Vegas, NV 89119
Attorney for Resources Group, LLC

DATED this 7 day of July, 2016.

MCCARTHY & HOLTHUS, LLP

KRISTIN A. SCHULER-HINTZ, ESQ.
Nevada Bar No. 7171
THOMAS N. BECKOM, ESQ.
Nevada Bar No. 12554
9510 W. Sahara Avenue, Suite 200
Las Vegas, Nevada 89117
Attorneys for U.S. Bank

ORDER

IT IS SO ORDERED this 15th day of July, 2016. as amended

Trial date will be vacated.

DISTRICT COURT JUDGE

McCARTHY & HOLTHUS, LLP
ATTORNEYS AT LAW
9510 WEST SAHARA AVENUE, SUITE 200
LAS VEGAS, NV 89117
TELEPHONE (702) 685-0329/Facsimile (866) 339-5961

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CLERK OF THE COURT

McCarthy & Holthus, LLP.
Kristin A. Schuler-Hintz, Esq. Nevada State Bar No. 7171
Thomas N. Beckom, Esq. Nevada State Bar No. 12554
9510 West Sahara Avenue, Suite 200
Las Vegas, NV 89117
Telephone: (702) 685-0329
Facsimile: (866) 339-5691
Attorneys for Plaintiff/Counter Defendant U.S. Bank National Association

IN THE EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK COUNTY

U.S. BANK N.A., NO, A NATIONAL ASSOCIATION

Plaintiff,

v.

CANYON GATE MASTER ASSOCIATION; and Does 1 through 50 inclusive; Roe Corporations 1-50 inclusive.

Defendants.

RESOURCES GROUP, LLC

Counter Plaintiff

v.

U.S. BANK N.A., NO, A NATIONAL ASSOCIATION

Counter Defendant

Case No. A-2-667690-C

Dept No. XVI

NOTICE OF ENTRY OF STIPULATION AND ORDER TO REOPEN DISCOVERY , VACATE TRIAL AND EXTEND THE 5 YEAR RULE PURSUANT TO NEV R. CIV. PRO 41 (e)

YOU AND ALL OF YOU PLEASE TAKE NOTICE that the following Notice of Entry of Stipulation and Order to Re-Open Discovery, Vacate Trial, and Extend the 5 Year Rule Pursuant to NEV. R. CIV. PRO 41(e) was entered on July 20, 2016 for the above captioned matter. A true and correct copy of said Order is attached hereto.

Dated: July 22, 2016

McCarthy & Holthus, LLP

By: _____
Thomas N. Beckom, Esq.

NV-16-736927-CV

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

SUPREME COURT

STATE OF NEVADA

RESOURCES GROUP, LLC, a Nevada Limited Liability Company, Appellant, vs. U.S. BANK NATIONAL ASSOCIATION, ND, a national association, Respondent.	CASE NO.: 84992

JOINT APPENDIX VOLUME 2 PART 2

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

McCARTHY & HOLTHUS, LLP
Kristin A. Schuler-Hintz (NSB# 7171)
Thomas N. Beckom, Esq (NSB# 12554)
9510 West Sahara Avenue, Suite 200
Las Vegas, NV 89117
(702)685-0329(Phone)
(866)339-5691(Fax)
Attorneys for Plaintiff/ Counter Defendant

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

U.S. BANK NATIONAL ASSOCIATION ND, A NATIONAL ASSOCIATION Plaintiff, v. GEORGE R. EDWARDS, an individual, ANY AND ALL PERSON UNKNOWN, CLAIMING TO BE PERSONAL REPRESENTATIVES OF GEORGE R. EDWARDS ESTATE OR DULY APPOINTED, QUALIFIED, AND ACTING EXECUTOR OF THE WILL OF THE ESTATE OF GEORGE R. EDWARDS; RESOURCES GROUP, LLC a Nevada Limited-Liability Company; GLENVIEW WEST TOWNHOMES ASSOCIATION , a Nevada non-profit corporation; DOES 4 through 10, inclusive, and ROES 1 through 10, inclusive Defendants. And All Related Claims	Case No. A-12-667690-C Dept. No. XVI **PLAINTIFF'S MOTION TO AMEND THEIR ANSWER TO THE COUNTERCLAIM**

Plaintiff/ Counter Defendant, U.S. BANK NATIONAL ASSOCIATION ND, A NATIONAL ASSOCIATION, (hereinafter "U.S. Bank"), by and through their attorney of record Thomas N. Beckom, Esq of the law firm of McCarthy Holthus LLP hereby files Motion to Amend their Answer

NOTICE OF MOTION

PLEASE TAKE NOTICE that the undersigned will bring MOTION TO AMEND on for a hearing on the 1st day of September, 2016 at 9:00 am, in Department VII of the above-entitled Court, or as soon thereafter as counsel may be heard.

By: /s/ Thomas N. Beckom, Esq
Thomas N. Beckom, Esq
Nevada Bar No. 12554

McCARTHY & HOLTHUS, LLP
ATTORNEYS AT LAW
9510 WEST SAHARA AVENUE, SUITE 200
LAS VEGAS, NV 89117
TELEPHONE (702) 685-0329/Facsimile (866) 339-5961

I. INTRODUCTION

On May 8, 2013; BONY filed suit for *inter alia* a judicial foreclosure of real property commonly known as 4254 Rollingstone Dr., Las Vegas, NV. U.S. Bank sued *inter alia* the 1659 Resources as well as the borrowers George Edwards. On July 16, 2014; the Resources Group filed an answer to the judicial foreclosure complaint and further alleged that they had a deed which was free and clear of BONY's security interest based on a January 31, 2012 foreclosure sale.

BONY answered the counter claim on February 20, 2015. Much has happened in the world of HOA foreclosures since that time. To place the Resources Group on fair notice, U.S. Bank wishes to amend the answer to add case specific affirmative defenses commonly known in this jurisdiction and commonly known to the Resources Group.

II. LAW AND ARGUMENT

A. STANDARD FOR A MOTION TO AMEND

U.S. Bank respectfully requests that they be allowed to assert additional affirmative defenses in this matter and further put all parties on notice as to what they intend to do. Given the liberal

standard of allowing amendments, U.S. Bank should be allowed to amend as they have done so promptly and all of the amendments as pled are potentially meritorious.

Nev. R. Civ Pro 15(a) states in pertinent part that:

> "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

Leave to amend historically has been left properly to the discretion of the District Court Judges in this district however; the Rule specifically requires that leave shall be freely given absent some enumerated reason such as undue delay, bad faith, or dilatory motive on the part of the movant. *Stephens v. Southern Nev. Music Co.*89 Nev. 104 (1973). In this respect, leave to amend is indeed discretionary; however the discretion is innately limited by certain factors and the preference for freely given amendments.

Dilatory Motive is typically defined in relation to the procedural posture as it relates to the inevitable trial. *Kantor v. Kantor* 116 Nev. 886 (2000). If a Motion to Amend is brought to close to the trial date, it can be denied because the parties have relied on the position of the original pleadings when preparing their case. *Id.*

The Nevada Supreme Court has commented on the meaning of "undue delay" in that again it mainly has to with the procedural posture of the case as it relates to trial. *Garmong v. Rogney & Sons Constr.,* 2011 Nev. Unpub LEXIS 863. In *Garmong* the trial court found that adding 31 new claims a few months before trial would have caused "undue delay" in that it would have resulting in postponing a trial in order to allow the Defendants time to prepare the defense for the new claims. *Id.* Again the theme of procedural posture as it relates to trial is prevalent in this setting.

U.S. Bank has timely brought this motion with the deadlines to amend the complaint and as such no prejudice will attach to any party. Additionally, U.S. Bank finds it hard to believe that these amendments are any great shock to any party or their attorneys .

As delineated below, U.S. Bank wishes to add the following affirmative defenses:

McCARTHY & HOLTHUS, LLP
ATTORNEYS AT LAW
9510 WEST SAHARA AVENUE, SUITE 200
LAS VEGAS, NV 89117
TELEPHONE (702) 685-0329/Facsimile (866) 339-5961

1. The HOA foreclosure sale was/ is Voidable Under NRS Chapter 112;
2. The Sale has an unfair purchase price and is the result of Fraud, Unfairness, and Oppression
3. Various Constitutional Claims

While the Court need not make a decision on these claims on a dispositive basis now, U.S. Bank should be allowed to assert these additional defenses so that U.S. Bank can put the parties on notice and a complete record can be compiled.

B. NEVADA'S UNIFORM FRAUDULEN TRANSFER ACT (NRS CHAPTER 112) APPLIES TO THIS INSTANT TRANSACTION

1. The Transfer is Voidable Pursuant to NRS §112.190(1)

A claim under NRS §112.190 (hereinafter "UFTA" or "NUFTA") is not futile for purposes of amending the complaint. In describing why states should adopt fraudulent transfer law the Uniform Law Commission has made the following statement:

> "Credit is essential to the economic life of this country. Consumer credits, commercial credit, secured and unsecured credit enter into our lives everyday. Credit remains available so long as those who extend it are given certain assurances about their rights at default[1]."

The UFTA , as adopted through NRS Chapter 112, is intended to provide these assurances. NRS §112.190(1) which states in pertinent part that a transfer of an asset of a debtor is voidable if the creditor's claim arose before the transfer and the debtor received less that reasonably equivalent value at a time when he or she was insolvent and/or became insolvent thereafter. The Nevada Supreme Court has stated that the underlying policy behind the UFTA is to "preserve the debtor's assets for the benefit of creditors." *Herup v. First Boston Fin., LLC* 123 Nev. 228 at FN 15 (2007)[2]. A claim under NRS §112.190(1) is very straight forward. It does not require proof of intent to defraud and all a creditor must prove is that (1) their claim arose before the transfer,

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[1] Available at http://www.uniformlaws.org/Narrative.aspx?title=Why States Should Adopt UVTA

[2] For clarity to the Court, this pleading periodically references Bankruptcy law. In Nevada Bankruptcy law is *in pari material* to the UFTA and therefore this is proper. *Herup v. First Boston Fin., LLC* 123 Nev. 228 at FN 15 (2007)

McCARTHY & HOLTHUS, LLP
ATTORNEYS AT LAW
9510 WEST SAHARA AVENUE, SUITE 200
LAS VEGAS, NV 89117
TELEPHONE (702) 685-0329/Facsimile (866) 339-5961

(2)there was a lack of reasonably equivalent value in the exchange, and (3) the debtor was insolvent at the time of making the transfer or became insolvent afterwards. *Sportsco Enters v. Morris* 112 Nev. 625, 631(1996).

As outlined in greater depth below, the Fraudulent Transfer Claim is not a futile amendment and in light of the liberal standard for amendments leave to amend should be granted.

i. The HOA Foreclosure was a Covered Transfer under the Act

Under the UFTA any transfer with greatly reduces the value of assets available to creditors is considered a covered transfer under the act. In interpreting the state of Washington's UFTA, a federal court in Washington has noted that "any transaction that greatly reduces the value of a debtor's estate may be a transfer."*Aqua-Chem, Inc v. Marine Sys.* 2014 U.S. Dist. LEXIS (2014) A Florida Bankruptcy Court has echoed this sentiment in that a transfer is to be construed as broadly as possible and that "all technicality and narrowness of meaning is precluded." *In re Thrift Dutchman, Inc* 97 B.R. 101 (Fl 1988). The Nevada Bankruptcy Court has noted that the term transfer is to be construed as broadly as possible as fraudulent transfer law was intended to provide the maximum protection of creditors. *Lehtonen v. Time Warner Inc.* 332 B.R. 417 (D.Nev 2005). Additionally, NRS §112.150(12) clarifies what is considered a transfer and specifically states that transfer means "every mode" and goes on to state that involuntary disposition or parting with an asset is considered a transfer[3].

The statute is clear on its face that every mode, including the involuntary disposition of an asset, is subject to the UFTA. There can be no argument that this is not a transfer.

[3] "Transfer" means **every mode**, direct or indirect, absolute or conditional, voluntary or **involuntary**, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease and creation of a lien or other encumbrance." NRS §112.150(12) (Emphasis Added).

McCARTHY & HOLTHUS, LLP
ATTORNEYS AT LAW
9510 WEST SAHARA AVENUE, SUITE 200
LAS VEGAS, NV 89117
TELEPHONE (702) 685-0329/Facsimile (866) 339-5961

ii. The Relevant Transfer Date is the Date the Deed was Recorded.

U.S. Bank Claims their interest via a Deed of Trust On this basis, U.S. Bank should be covered under NRS §112.190(1). This amendment is not futile on this basis.

In this instant case, the transfer being challenged is not the creation of the HOA lien, but rather the HOA's foreclosure sale of the Property which involuntarily disposed of the Borrower's interest in the property. Numerous courts have held that the relevant transfer date is not the date of the creation of the lien, but the date of the foreclosure sale itself. *CF Realty Trust v. Town of Hampstead* 160 B.R. 461 (1993)(rejecting the town's argument that the transfer occurred on the date the town recorded the tax collector's lien and holding that the transfer occurred on the date the deed was recorded because that's the date when the interest of the debtor is transferred); *see also Butler v. Lomas & Nettleton Co.,* 862 F.2d 1015 (Bankr. Ct. App. 3rd Cir 1988)(holding that the time of the transfer in determining whether a fraudulent conveyance occurred is the time of the sheriff's sale); *In re Brown* 104 B.R. 609 (Bankr. S.D.N.Y 1989)(a transfer under the fraudulent conveyance statute occurs at the time of the foreclosure sale); *Skagit Valley Publ. Co. v. Kajac. Inc* 1997 Wash App. LEXIS 531 (1997) (holding that under the UFTA, the transfer date is the date of the foreclosure sale).

Under the case law as long as BONY's deed of trust encumbered the property at the time of the transfer, the HOA transfer is subject to the provisions of NRS §112.190(1). Additionally by the plain language of NRS §116.3116 the Association only has a lien when fines, assessment, or construction penalties become due. They do not have a lien and enforceable debt in perpetuity[4]. Therefore the HOA does not have a lien in perpetuity and as such the HOA foreclosure was a covered transfer. This favors leave to amend.

[4] The association has a lien on a unit for any construction penalty that is imposed against the unit's owner pursuant to NRS 116.310305, any assessment levied against that unit or any fines imposed against the unit's owner **from the time the construction penalty, assessment or fine becomes due.** NRS §116.3116(1)(Emphasis Added).

McCARTHY & HOLTHUS, LLP
ATTORNEYS AT LAW
9510 WEST SAHARA AVENUE, SUITE 200
LAS VEGAS, NV 89117
TELEPHONE (702) 685-0329/Facsimile (866) 339-5961

iii. An HOA foreclosure does not provide reasonably equivalent value in Nevada.

NRS §112.170 does exempt certain foreclosures from the act, yet actually **excludes** the HOA foreclosure. NRS §112.170 states in pertinent part 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 for the acquisition or disposition of the interest of the debtor upon default **under a mortgage, deed of trust or security agreement."**

The Nevada UFTA expressly delineates between a lien created by agreement and a statutory lien. NRS §112.150(8). Yet the term "statutory lien" is nowhere to be found in NRS §112.170(2). The HOA super-priority lien is clearly a statutory lien in direct derogation to the common law.

When construing a statute Courts must first inquire whether an ambiguity exists in the language of the statute. *State v. Quinn* 117 Nev. 709, 718 (2001). If the words of the statute have a definite and ordinary meaning, Courts should not look beyond the plain language of the statue unless it is clear that the meaning was not intended. *Id.* On this analysis, the language in NRS Chapter 112 is plain on its face that a statutory HOA lien is not included as receiving reasonably equivalent value under state law. This places the HOA lien outside of the purview and protections of NRS §112.170

The Nevada Supreme Court has additionally noted that when a statute, such as NRS §112.170 includes a list of items to be included, the anything not included on the list is to be expressly excluded. *Galloway v. Truesdell* 83 Nev. 13 (1967)(the maxim *Expressio Unius Est Exclusio Alterius* states the expression of one thing leads to the exclusion of other*) see also SFR Invs. Pool 1, LLC v. U.S. Bank N.A.* 334 P.3d 408 (Nev. 2014)(stating that under the maxim *Expressio Unius Est Exclusio Alterius* the only enumerated restriction in NRS 116 on an HOA foreclosure was institution of a foreclosure mediation and that therefore this excluded the requirement for a judicial foreclosure). The term statutory lien and/ or HOA lien is not included in NRS §112.170.

McCARTHY & HOLTHUS, LLP
ATTORNEYS AT LAW
9510 WEST SAHARA AVENUE, SUITE 200
LAS VEGAS, NV 89117
TELEPHONE (702) 685-0329/Facsimile (866) 339-5961

Under *Truesdell* this draws a negative inference that an HOA foreclosure was never intended to be included under the protections of NRS §112.170.

NRS §112.170 does not say "HOA foreclosure" or "foreclosure under NRS Chapter 116." Under NRS §112.170 this type of foreclosure is excluded from the statute. This makes logical pragmatic sense in that a foreclosure under a mortgage, deed of trust, or security agreement respect the common law "first in time first in right" laws of attachment while this statutory lien completely circumvents these requirements. Additionally these types of commercial loans have a loan to value component to them while the HOA lien is typically for a de minuimus amount. All of this protects the parties to the transaction in a manner that a foreclosure under NRS §116.3116 *et seq* does not. On it's face the statute is clear. An HOA foreclosure does not provide reasonably equivalent value as a matter of law. As such on this basis, amending the complaint to assert a claim under NRS §112.190(1) is not futile.

iv. U.S. Bank's Mortgage Must Now Be Included in the Insolvency Analysis.

The dissent in the *SFR* Court noted that once the HOA foreclosure takes place, the first deed of trust becomes entirely unsecured and the borrower is still obligated on the debt. *SFR Invs. Pool 1 LLC v. U.S. Bank N.A.* 334 P.3d 408, 422(2014)[5] NRS §112.160(5) thereafter states that "debts under this section do not include an obligation to the extent it is secured by a valid lien" yet it cannot be disputed that post-*SFR* if the sale stands U.S. Bank does not have a valid lien. In this vein, U.S. Bank must now be included in the insolvency analysis under NRS §112.160.

Under NRS §112.160(2) all BONY need do it demonstrate that the Homeowner was not paying his debts as they came due. The Official Comments to the Uniform Act state that "the presumption imposes on the party against whom the presumption is direct the burden of proving the nonexistence of insolvency." Additionally the official comment to the act indicates that U.S.

[5] "After the first deed of trust loses its security in the property pursuant to the association's foreclosure of its superpriority lien, the former homeowner will generally be liable for the amount still owed on the debt."

McCARTHY & HOLTHUS, LLP
ATTORNEYS AT LAW
9510 WEST SAHARA AVENUE, SUITE 200
LAS VEGAS, NV 89117
TELEPHONE (702) 685-0329/Facsimile (866) 339-5961

Bank would not need to prove nonpayment on a majority of debts in order to proof general nonpayment.

The Complaint itself alleges that the Homeowner was note paying his mortgage and his HOA dues. This in of itself states a claim under NRS §112.190(1). In light of the liberal standard for amendments, and the case law cited *supra* an amendment to allow a claim under NRS §112.190(1) must be allowed. This claim is not futile.

C. INSUFFICIENT PRICE PLUS SOME ELEMENT OF FRAUD, UNFAIRNESS, AND OPPRESSION CLEARLY IS A BASIS TO SET ASIDE THE SALE UNDER NEVADA LAW.

Finally there can be no argument that under *Shadow Wood Homeowners Ass'n v. New York Cmty. Bancorp* that an insufficient price plus some element of fraud, unfairness, or oppression can set aside this sale. 366 P.3d 1105 (Nev. 2016). Here the recording of an HOA credit bid, which essentially is an exchange for zero money, and the immediate credit bid are suspect and a fertile ground for a finding of fraud, unfairness, and oppression. On this basis the amendment should be granted.

III. CONCLUSION

In light of the liberal standard for granting amendments in Nevada, this Honorable Court should allow U.S. Bank to Amend their complaint in order to assert the claims as delineated *supra*. For these reasons stated above these are not futile amendment and the Amended Complaint states a claim and is not futile under Nev. R. Civ. Pro 15

DATED: August 1, 2016.

McCarthy & Holthus, LLP

By: /s/ *Thomas N. Beckom, Esq*
Thomas N. Beckom, Esq

McCARTHY & HOLTHUS, LLP
ATTORNEYS AT LAW
9510 WEST SAHARA AVENUE, SUITE 200
LAS VEGAS, NV 89117
TELEPHONE (702) 685-0329/Facsimile (866) 339-5961

McCARTHY & HOLTHUS, LLP
Kristin A. Schuler-Hintz (NSB# 7171)
Thomas N. Beckom, Esq (NSB# 12554)
9510 West Sahara Avenue, Suite 200
Las Vegas, NV 89117
Telephone: (702) 685-0329
Facsimile: (866) 339-5691

Attorneys for *U.S. BANK*

IN THE EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

U.S. BANK NATIONAL ASSOCIATION ND, A NATIONAL ASSOCIATION Plaintiff, v. GEORGE R. EDWARDS, an individual, ANY AND ALL PERSON UNKNOWN, CLAIMING TO BE PERSONAL REPRESENTATIVES OF GEORGE R. EDWARDS ESTATE OR DULY APPOINTED, QUALIFIED, AND ACTING EXECUTOR OF THE WILL OF THE ESTATE OF GEORGE R. EDWARDS; RESOURCES GROUP, LLC a Nevada Limited-Liability Company; GLENVIEW WEST TOWNHOMES ASSOCIATION , a Nevada non-profit corporation; DOES 4 through 10, inclusive, and ROES 1 through 10, inclusive Defendants.	Case No. A-12-667690-C Dept. No. XVI **FIRST AMENDED ANSWER TO THE COUNTERCLAIM**

COMES NOW U.S. BANK NATIONAL ASSOCIATION ND, A NATIONAL ASSOCIATION ("U.S. BANK") by and through its attorney of record Thomas N. Beckom, Esq and Kristin A. Schuler-Hintz, Esq of the law firm of McCarthy Holthus LLP and hereby files this answer to the counterclaim

.

1. This answering Defendant DENIES the allegations in paragraph 1.

2. This answering Defendant does not have sufficient information to either admit or deny the and on this basis DENIES the allegations in paragraph 2.

3. This answering Defendant is without sufficient information to either admit or deny the allegations contained in paragraph 3 and therefore DENIES the allegations contained in paragraph 3.

[sic] 6. The answering Defendant DENIES the allegations in paragraph 6.

7. This answering Defendant DENIES the allegations in paragraph 7.

8. This answering Defendant DENIES the allegations in paragraph 8.

SECOND CLAIM FOR RELIEF

9. This answering Defendant incorporates it's answers to paragraphs 1 through 8 as if fully set forth herein.

10. This answering Defendant DENIES the allegations in paragraph 10.

11. This answering Defendant DENIES the allegations in paragraph 11.

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. Any allegations not specifically admitted are denied. U.S. Bank further expressly incorporates all affirmative defenses delineated in Nev. R. Civ. Pro 8. In further answer to the Complaint, and by way of additional defenses U.S. Bank avers as follows:

FIRST AFFIRMATIVE DEFENSE

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

McCARTHY & HOLTHUS, LLP
ATTORNEYS AT LAW
9510 WEST SAHARA AVENUE, SUITE 200
LAS VEGAS, NV 89117
TELEPHONE (702) 685-0329/Facsimile (866) 339-5961

SECOND AFFIRMATIVE DEFENSE

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

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

FOURTH AFFIRMATIVE DEFENSE

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

FIFTH AFFIRMATIVE DEFENSE

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

SIXTH AFFIRMATIVE DEFENSE

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

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff has cited no rule and/ or statute to override the American Rule regarding attorney fee shifting.

EIGHTH AFFIRMATIVE DEFENSE

The sale of the property is unconstitutional pursuant to Federal Law, the due process clause of the 14th amendment of the United States Constitution, and Article 1 Sec. 8 of the Nevada Constitution.

NINTH AFFIRMATIVE DEFENSE

The Plaintiff received a deed which was void and/ or voidable pursuant to NRS Chapter 112.

McCARTHY & HOLTHUS, LLP
ATTORNEYS AT LAW
9510 WEST SAHARA AVENUE, SUITE 200
LAS VEGAS, NV 89117
TELEPHONE (702) 685-0329/Facsimile (866) 339-5961

TENTH AFFIRMATIVE DEFENSE

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

ELEVENTH AFFIRMATIVE DEFENSE

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

TWELETH AFFIRMATIVE DEFENSE

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

THIRTEENTH AFFIRMATIVE DEFENSE

The homeowners' association did not provide proper notice of the "superpriority" assessment amount and the homeowners' association foreclosure sale, and any such notice failed to comply with the statutory and common law requirements of Nevada and with state and federal constitutional law.

FOURTEENTH AFFIRMATIVE DEFENSE

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

FIFTEENTH AFFIRMATIVE DEFENSE

U.S. Bank is entitled to an offset of some, if not all, of the Plaintiffs alleged damages, if any.

SIXTEENTH AFFIRMATIVE DEFENSE

The Plaintiff assumed the risk in taking the actions they now aver caused them damage.

SEVENTEETH AFFIRMATIVE DEFENSE

NRS 116.3116 *et seq* violates the 5th amendment takings clause.

EIGHTEENTH AFFIRMATIVE DEFENSE

NRS 116.3116 *et seq* violates U.S. Bank's Substantive Due Process Right and Fundamental rights under the Nevada and Federal Constitution

McCARTHY & HOLTHUS, LLP
ATTORNEYS AT LAW
9510 WEST SAHARA AVENUE, SUITE 200
LAS VEGAS, NV 89117
TELEPHONE (702) 685-0329/Facsimile (866) 339-5961

NINETEENTH AFFIRMATIVE DEFENSE

The foreclosure sale price is low, the sale is the result of oppression, fraud, and unfairness, and further the Plaintiff is not a bona fide purchaser.

TWENTIETH AFFIRMATIVE DEFENSE

This entire action is barred by the statute of limitations.

WHEREFORE the Counter Plaintiff prays to this Honorable Court that the Court:

1. Void the Sale under NRS Chapter 112;
2. In the alternative, enter judgment against LVRR #77 in an amount equal to U.S. Bank's interest in the property.
3. In the alternative, Quiet Title in the name of the Homeowner;
4. Issue a order an order declaring that the HOA sale did not comply with NRS Chapter 116 and is void or voidable;
5. Use the Equitable Powers of this Court to Void the Sale
6. Issue an order declaring the sale unconstitutional under the United States Constitution;
7. Any other relief which is just and proper.

DATED: August 1, 2016

McCarthy & Holthus, LLP

By: /s/ *Thomas N. Beckom, Esq*
Thomas N. Beckom, Esq

McCARTHY & HOLTHUS, LLP
ATTORNEYS AT LAW
9510 WEST SAHARA AVENUE, SUITE 200
LAS VEGAS, NV 89117
TELEPHONE (702) 685-0329/Facsimile (866) 339-5961

NOT
McCARTHY & HOLTHUS, LLP
Kristin A. Schuler-Hintz (NSB# 7171)
Thomas N. Beckom, Esq (NSB# 12554)
9510 West Sahara Avenue, Suite 200
Las Vegas, NV 89117
Telephone: (702) 685-0329
Facsimile: (866) 339-5691

IN THE EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

U.S. BANK NATIONAL ASSOCIATION ND, A NATIONAL ASSOCIATION

Plaintiff,

v.

GEORGE R. EDWARDS, an individual, ANY AND ALL PERSON UNKNOWN, CLAIMING TO BE PERSONAL REPRESENTATIVES OF GEORGE R. EDWARDS ESTATE OR DULY APPOINTED, QUALIFIED, AND ACTING EXECUTOR OF THE WILL OF THE ESTATE OF GEORGE R. EDWARDS; RESOURCES GROUP, LLC a Nevada Limited-Liability Company; GLENVIEW WEST TOWNHOMES ASSOCIATION , a Nevada non-profit corporation; DOES 4 through 10, inclusive, and ROES 1 through 10, inclusive

Defendants.

And all related claims.

Case No. A-12-667690-C

Dept. No. XVI

NOTICE OF DEPOSITION

Person: NRCP 30(b)(6) witness(es) for Resources Group, LLC

Date: October 25, 2016
Time: 1:00pm.

PLEASE TAKE NOTICE that pursuant to Nev. R. Civ. Pro 30 U.S. BANK NATIONAL ASSOCIATION ND ("U.S. BANK"), by and through their counsel of record, Thomas Beckom, Esq. of the law firm McCarthy & Holthus, LLP, hereby notices the deposition of the Nev. R. Civ. Pro 30(b)(6) witness for RESOURCES GROUP, LLC ("RESOURCES"). RESOURCES is ordered to designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf. The person(s) you designate will be examined, and are ordered to

testify, on the matters set forth below that are known or reasonably available to the organization. Nev. R. Civ. Pro. 30(b)(6).

RESOURCES is hereby direct to appoint and prepare a NRCP30(b)(6) witness(es) knowledgeable in the following areas:

1) the HOA foreclosure auction of the property which is the subject of this instant action *to wit* 4254 Rollingstone Dr., Las Vegas, NV 89103 (hereinafter "Subject Property") at which RESOURCES gained their purported interest;

2) Any other property RESOURCES and/ or any other affiliate or parent corporation of RESOURCES [1] owns as a result of an HOA foreclosure from January 1, 2011 to present;

3) the Litigation History of RESOURCES from January 1, 2011 to present;

4) RESOURCES interactions with Alessi & Koenig, LLC, including any employee, officer, director, or other affiliated party of Alessi & Koenig, LLC

5) the operations and/or management, generally, of RESOURCES;

6) any discussion, non-privileged, regarding the anticipated effect of NRS §116.3116 *et seq*

7) RESOURCES business plan and/ or investment strategies from January 1, 2011 to present

/…/…/

/…/…/

/…/…/

[1] These include would the master LLC as well as any other series in the master LLC.

McCARTHY & HOLTHUS, LLP
ATTORNEYS AT LAW
9510 WEST SAHARA AVENUE, SUITE 200
LAS VEGAS, NV 89117
TELEPHONE (702) 685-0329/Facsimile (866) 339-5961

Please be advised that pursuant to Nev. R. Civ. Pro. 30(b)(6) you must produce either a witness or multiple witnesses whom are knowledgeable in ALL of these areas. Failure to produce witnesses knowledgeable in all of these areas may result in adverse court action. The deposition will be held on 25th day, October, 2016 at 1:00 p.m. at Depo International 703 S. 8th Street Las Vegas, Nevada 89101. This deposition shall be recorded by sounds, sound-and-visual, or stenographic means.

DATED: September 20, 2016

McCarthy & Holthus, LLP

By: /s/ *Thomas Beckom, Esq*
Thomas N. Beckom, Esq.

McCARTHY & HOLTHUS, LLP
ATTORNEYS AT LAW
9510 WEST SAHARA AVENUE, SUITE 200
LAS VEGAS, NV 89117
TELEPHONE (702) 685-0329/Facsimile (866) 339-5961

McCARTHY & HOLTHUS, LLP
Kristin A. Schuler-Hintz (NSB# 7171)
Thomas N. Beckom (NSB# 12554)
9510 West Sahara Avenue, Suite 200
Las Vegas, NV 89117
Telephone: (702) 685-0329
Facsimile: (866) 339-5691
Attorneys for Defendant

IN THE EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

U.S. BANK NATIONAL ASSOCIATION ND, A NATIONAL ASSOCIATION Plaintiff, v. GEORGE R. EDWARDS, an individual, ANY AND ALL PERSON UNKNOWN, CLAIMING TO BE PERSONAL REPRESENTATIVES OF GEORGE R. EDWARDS ESTATE OR DULY APPOINTED, QUALIFIED, AND ACTING EXECUTOR OF THE WILL OF THE ESTATE OF GEORGE R. EDWARDS; RESOURCES GROUP, LLC a Nevada Limited-Liability Company; GLENVIEW WEST TOWNHOMES ASSOCIATION , a Nevada non-profit corporation; DOES 4 through 10, inclusive, and ROES 1 through 10, inclusive Defendants. AND ALL RELATED CLAIMS	Case No. A-12-667690-C Dept. No. XVI **STIPULATION AND ORDER TO EXTEND DISCOVERY DEADLINES** **(Second Request)**

IT IS HEREBY STIPULATED AND AGREED, pursuant to EDCR 2.35, by and between the parties, U.S. BANK NATIONAL ASSOCIATION ("U.S. BANK"); and RESOURCES GROUP, LLC through their undersigned counsels of record, that the deadline to complete discovery be extended 30 days. This stipulation is made in good faith and not for purposes of delaying these proceedings.

I. DESCRIPTION OF THE ACTION AND PROCEDURAL HISTORY

This matter involves disputed title to the real property located at 4254 Rollingstone Dr., Las Vegas, NV 89103 (the "Property"), which was sold at an HOA foreclosure sale. Saticoy purchased the Property at the sale and claims to own the Property free and clear of any first deed of trust. U.S. Bank contends to be the current beneficiary of a first deed of trust still encumbering the Property.

On August 30, 2012, U.S. Bank filed a complaint for judicial foreclosure. The Resources Group, LLC filed an answer to the complaint on July 16, 2014 which included a claim for Quiet Title.

An Early Case Conference was held on August 17, 2015. A joint case conference report was filed on September 21, 2015 and a scheduling order was entered on October 16, 2015. Thereafter on July 20, 2016; the parties agreed to re-open discovery as well as waive/ extend the 5 year rule. Pursuant to the new scheduling order, the current discovery timeline is as follows:

1. Discovery cut-off – November 1, 2016
2. Motions to amend pleadings/add parties – August 1, 2016
3. Initial expert disclosures – August 1, 2016
4. Rebuttal expert disclosures – August 31, 2016
5. Dispositive motions – December 1, 2016

Moreover, an order new order setting civil jury trial was entered on July 20, 2016.

As detailed further below, the parties have complied with the requirements of EDCR 2.35 and good cause exists for the requested extension.

II. DISCOVERY COMPLETED TO DATE

1. Rule 16.1 early case conference.
2. Saticoy served its initial disclosures.
3. U.S. Bank issued subpoenas on the HOA and Alessi & Koenig and have supplemented their disclosure according.
4. U.S. Bank deposed Iydad Haddad, the Nev. R. Civ. Pro 30(b)(6) witness for

McCARTHY & HOLTHUS, LLP
ATTORNEYS AT LAW
9510 WEST SAHARA AVENUE, SUITE 200
LAS VEGAS, NV 89117
TELEPHONE (702) 685-0329/Facsimile (866) 339-5661

Resources Group, LLC

5. Both parties disclosed valuation expert.

III. DISCOVERY THAT REMAINS TO BE COMPLETED

1. Depose Alessi & Koenig

2. Depose the Homeowners Association

3. Supplements to 16.1 initial disclosures.

IV. THE REASON WHY DISCOVERY WAS NOT COMPLETED WITHIN THE TIME LIMIT SET BY THE DISCOVERY PLAN

On October 26, 2016; Counsel for Glenview West Townhomes Association contacted counsel for U.S. Bank and requested additional time to produce a properly prepared Nev. R. Civ. Pro 30(b)(6) witness for their deposition. In the spirit of professional courtesy, U.S. Bank and Resources Group, LLC gladly extended this courtesy. On October 27, 2016; U.S. Bank and Resources Group, LLC attempted to depose the Nev. R. Civ. Pro 30(b)(6) witness for Alessi & Koenig, LLC. No witness attended. Both parties at 15 minutes after the appointed time contacted Steve Loizzi, Esq; an attorney for Alessi & Koenig, whom explained that there had been a an inadvertent calendaring error. Both Resources Group as well as U.S. Bank again extended professional courtesy and resolved this matter without the need for Court intervention, however the repeated professional courtesies and re-scheduling has necessitated the extension of discovery, which the parties surmised would be a better use of time than protracted motion work.

V. PROPOSED SCHEDULE FOR COMPLETING ALL DISCOVERY

Based upon their agreement, the parties propose the following amended discovery plan and applicable deadlines reflecting an extension as follows:

1. Discovery cut-off – December 1, 2016

2. Motions to amend pleadings/add parties – August 1, 2016 [No Change]

3. Initial expert disclosures – August 1, 2016 [No Change]

4. Rebuttal expert disclosures – August 31, 2016 [No Change]

5. Dispositive motions – January 3, 2017

McCARTHY & HOLTHUS, LLP
ATTORNEYS AT LAW
9510 WEST SAHARA AVENUE, SUITE 200
LAS VEGAS, NV 89117
TELEPHONE (702) 685-0329/Facsimile (866) 339-5961

VI. CURRENT TRIAL DATE

The case is set to be tried on a five-week stack to begin on March 6, 2017. At this time, the parties do not wish to continue the trial date.

DATED this 27th day of October, 2016.

LAW OFFICES OF MICHAEL F. BOHN, ESQ

MICHAEL F. BOHN, ESQ.
Nevada Bar No. 1641
376 E. WARM SPRINGS RD.
Las Vegas, NV 89119
Attorney for Resources Group LLC

DATED this 2 day of November, 2016.

MCCARTHY & HOLTHUS, LLP

KRISTIN A. SCHULER-HINTZ, ESQ.
Nevada Bar No. 7171
THOMAS N. BECKOM, ESQ.
Nevada Bar No. 12554
MICHAEL PLANK, ESQ
Nevada Bar No. 14257
9510 W. Sahara Avenue, Suite 200
Las Vegas, Nevada 89117
Attorneys for U.S. Bank

McCARTHY & HOLTHUS, LLP
ATTORNEYS AT LAW
9510 WEST SAHARA AVENUE, SUITE 200
LAS VEGAS, NV 89117
TELEPHONE (702) 685-0329/Facsimile (866) 339-5961

ORDER

IT IS SO ORDERED this 9 day of November, 2016.

The discovery deadline will be extended as agreed to by the parties hereto; a separate amended scheduling order will not be issued; the trial date of 3-6-17 stands.

DISCOVERY COMMISSIONER

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CLERK OF THE COURT

McCarthy & Holthus, LLP.
Kristin A. Schuler-Hintz, Esq. Nevada State Bar No. 7171
Thomas N. Beckom, Esq. Nevada State Bar No. 12554
9510 West Sahara Avenue, Suite 200
Las Vegas, NV 89117
Telephone: (702) 685-0329
Facsimile: (866) 339-5691
Attorneys for Plaintiff/Counter Defendant U.S. Bank National Association

IN THE EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK COUNTY

U.S. BANK N.A., NATIONAL ASSOCIATION ND, A NATIONAL ASSOCIATION Plaintiff, v. GEORGE R. EDWARDS, an individual, ANY AND ALL PERSON UNKNOWN, CLAIMING TO BE PERSONAL REPRESENTATIVES OF GEORGE R. EDWARDS EST ATE OR DULY APPOINTED, QUALIFIED, AND ACTING EXECUTOR OF THE WILL OF THE ESTATE OF GEORGE R. EDWARDS; RESOURCES GROUP, LLC a Nevada Limited-Liability Company; GLENVIEW WEST TOWNHOMES ASSOCIATION , a Nevada non-profit corporation; DOES 4 through 10, inclusive, and ROES 1 through 10, inclusive Defendants. AND ALL RELATED CLAIMS	Case No. A-2-667690-C Dept No. XVI **NOTICE OF ENTRY OF STIPULATION AND ORDER TO EXTEND DISCOVERY DEADLINES (SECOND REQUEST)**

YOU AND ALL OF YOU PLEASE TAKE NOTICE that the following Notice of Entry of Stipulation and Order to Extend Discovery Deadlines (second request) was entered on November 15, 2016 for the above captioned matter. A true and correct copy of said Order is attached hereto.

Dated: November 16, 2016

McCarthy & Holthus, LLP

By: _____
Thomas N. Beckom, Esq.

NV-16-736927-CV

CERTIFICATE OF MAILING

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. I certify that on November 16, 2016, I caused the foregoing document entitled: **Notice of Entry of Stipulation and Order to Extend Discovery Deadlines (second request)**
[X] Pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail; and/or;

Hall Jaffe & Clayton

Name	Email		Select
Amber Geiman	ageiman@lawhjc.com	☑	☑

Law Offices of Michael F. Bohn, Esq.

Name	Email		Select
Eserve Contact	office@bohnlawfirm.com	☑	☐
Michael F Bohn Esq	mbohn@bohnlawfirm.com	☑	☑

Les Zieve Law Office

Name	Email		Select
Benjamin D. Petiprin, Esq.	bpetiprin@zievelaw.com	☑	☑

McCarthy & Holthus, LLP.

Name	Email		Select
Kristin Schuler-Hintz	dcnv@mccarthyholthus.com	☑	☑

McCarty & Holthus, LLP.

Name	Email		Select
Thomas N. Beckom	tbeckom@mccarthyholthus.com	☑	☑

Joni Rispalje
An employee of McCarthy & Holthus, LLP

McCARTHY & HOLTHUS, LLP
Kristin A. Schuler-Hintz (NSB# 7171)
Thomas N. Beckom (NSB# 12554)
9510 West Sahara Avenue, Suite 200
Las Vegas, NV 89117
Telephone: (702) 685-0329
Facsimile: (866) 339-5691
Attorneys for Defendant

IN THE EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

U.S. BANK NATIONAL ASSOCIATION ND, A NATIONAL ASSOCIATION Plaintiff, v. GEORGE R. EDWARDS, an individual, ANY AND ALL PERSON UNKNOWN, CLAIMING TO BE PERSONAL REPRESENTATIVES OF GEORGE R. EDWARDS ESTATE OR DULY APPOINTED, QUALIFIED, AND ACTING EXECUTOR OF THE WILL OF THE ESTATE OF GEORGE R. EDWARDS; RESOURCES GROUP, LLC a Nevada Limited-Liability Company; GLENVIEW WEST TOWNHOMES ASSOCIATION , a Nevada non-profit corporation; DOES 4 through 10, inclusive, and ROES 1 through 10, inclusive Defendants. AND ALL RELATED CLAIMS	Case No. A-12-667690-C Dept. No. XVI **STIPULATION AND ORDER TO EXTEND DISCOVERY DEADLINES (Second Request)**

McCARTHY & HOLTHUS, LLP
ATTORNEYS AT LAW
9510 WEST SAHARA AVENUE, SUITE 200
LAS VEGAS, NV 89117
TELEPHONE (702) 685-0329 Facsimile (866) 339-5691

IT IS HEREBY STIPULATED AND AGREED, pursuant to EDCR 2.35, by and between the parties, U.S. BANK NATIONAL ASSOCIATION ("U.S. BANK"); and RESOURCES GROUP, LLC through their undersigned counsels of record, that the deadline to complete discovery be extended 30 days. This stipulation is made in good faith and not for purposes of delaying these proceedings.

MCCARTHY & HOLTHUS, LLP
ATTORNEYS AT LAW
9510 WEST SAHARA AVENUE, SUITE 200
LAS VEGAS, NV 89117
TELEPHONE (702) 685-0329 FACSIMILE (866) 339-5567

I. DESCRIPTION OF THE ACTION AND PROCEDURAL HISTORY

This matter involves disputed title to the real property located at 4254 Rollingstone Dr., Las Vegas, NV 89103 (the "Property"), which was sold at an HOA foreclosure sale. Saticoy purchased the Property at the sale and claims to own the Property free and clear of any first deed of trust. U.S. Bank contends to be the current beneficiary of a first deed of trust still encumbering the Property.

On August 30, 2012, U.S. Bank filed a complaint for judicial foreclosure. The Resources Group, LLC filed an answer to the complaint on July 16, 2014 which included a claim for Quiet Title.

An Early Case Conference was held on August 17, 2015. A joint case conference report was filed on September 21, 2015 and a scheduling order was entered on October 16, 2015. Thereafter on July 20, 2016; the parties agreed to re-open discovery as well as waive/ extend the 5 year rule. Pursuant to the new scheduling order, the current discovery timeline is as follows:

1. Discovery cut-off – November 1, 2016
2. Motions to amend pleadings/add parties – August 1, 2016
3. Initial expert disclosures – August 1, 2016
4. Rebuttal expert disclosures – August 31, 2016
5. Dispositive motions – December 1, 2016

Moreover, an order new order setting civil jury trial was entered on July 20, 2016.

As detailed further below, the parties have complied with the requirements of EDCR 2.35 and good cause exists for the requested extension.

II. DISCOVERY COMPLETED TO DATE

1. Rule 16.1 early case conference.
2. Saticoy served its initial disclosures.
3. U.S. Bank issued subpoenas on the HOA and Alessi & Koenig and have supplemented their disclosure according.
4. U.S. Bank deposed Iydad Haddad, the Nev. R. Civ. Pro 30(b)(6) witness for

Resources Group, LLC

5. Both parties disclosed valuation expert.

III. DISCOVERY THAT REMAINS TO BE COMPLETED

1. Depose Alessi & Koenig
2. Depose the Homeowners Association
3. Supplements to 16.1 initial disclosures.

IV. THE REASON WHY DISCOVERY WAS NOT COMPLETED WITHIN THE TIME LIMIT SET BY THE DISCOVERY PLAN

On October 26, 2016; Counsel for Glenview West Townhomes Association contacted counsel for U.S. Bank and requested additional time to produce a properly prepared Nev. R. Civ. Pro 30(b)(6) witness for their deposition. In the spirit of professional courtesy, U.S. Bank and Resources Group, LLC gladly extended this courtesy. On October 27, 2016; U.S. Bank and Resources Group, LLC attempted to depose the Nev. R. Civ. Pro 30(b)(6) witness for Alessi & Koenig, LLC. No witness attended. Both parties at 15 minutes after the appointed time contacted Steve Loizzi, Esq; an attorney for Alessi & Koenig, whom explained that there had been a an inadvertent calendaring error. Both Resources Group as well as U.S. Bank again extended professional courtesy and resolved this matter without the need for Court intervention, however the repeated professional courtesies and re-scheduling has necessitated the extension of discovery, which the parties surmised would be a better use of time than protracted motion work.

V. PROPOSED SCHEDULE FOR COMPLETING ALL DISCOVERY

Based upon their agreement, the parties propose the following amended discovery plan and applicable deadlines reflecting an extension as follows:

1. Discovery cut-off – December 1, 2016
2. Motions to amend pleadings/add parties – August 1, 2016 [No Change]
3. Initial expert disclosures – August 1, 2016 [No Change]
4. Rebuttal expert disclosures – August 31, 2016 [No Change]
5. Dispositive motions – January 3, 2017

McCARTHY & HOLTHUS, LLP
ATTORNEYS AT LAW
9510 W. SAHARA AVENUE, SUITE 200
LAS VEGAS, NV 89117
TELEPHONE (702) 685-0329/FACSIMILE (866) 339-5691

VI. CURRENT TRIAL DATE

The case is set to be tried on a five-week stack to begin on March 6, 2017. At this time, the parties do not wish to continue the trial date.

DATED this 31st day of October, 2016.

LAW OFFICES OF MICHAEL F. BOHN, ESQ

MICHAEL F. BOHN, ESQ.
Nevada Bar No. 1641
376 E. WARM SPRINGS RD.
Las Vegas, NV 89119
Attorney for Resources Group LLC

DATED this 2 day of November, 2016.

McCARTHY & HOLTHUS, LLP

KRISTIN A. SCHULER-HINTZ, ESQ.
Nevada Bar No. 7171
THOMAS N. BECKOM, ESQ.
Nevada Bar No. 12554
MICHAEL PLANK, ESQ
Nevada Bar No. 14257
9510 W. Sahara Avenue, Suite 200
Las Vegas, Nevada 89117
Attorneys for U.S. Bank

McCARTHY & HOLTHUS, LLP
ATTORNEYS AT LAW
9510 WEST SAHARA AVENUE, SUITE 200
LAS VEGAS, NV 89117
TELEPHONE (702) 685-0329/Facsimile (866) 339-5691

ORDER

IT IS SO ORDERED this 9 day of November, 2016.

The hearing dates are extended to accord to the parties based; a separate Amended Scheduling order will not be issued. The Trial date is 3-6-17 stands.

DISCOVERY COMMISSIONER

McCARTHY & HOLTHUS, LLP
Kristin A. Schuler-Hintz, Esq. Nevada State Bar No. 7171
Thomas N. Beckom, Esq. Nevada State Bar No. 12554
9510 West Sahara Avenue, Suite 200
Las Vegas, NV 89117
Telephone: (702) 685-0329
Facsimile: (866) 339-5691
Attorneys for Plaintiff/Counter Defendant U.S. Bank National Association

IN THE EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK COUNTY

U.S. BANK N.A., NATIONAL ASSOCIATION ND, A NATIONAL ASSOCIATION Plaintiff, v. GEORGE R. EDWARDS, an individual, ANY AND ALL PERSON UNKNOWN, CLAIMING TO BE PERSONAL REPRESENTATIVES OF GEORGE R. EDWARDS EST ATE OR DULY APPOINTED, QUALIFIED, AND ACTING EXECUTOR OF THE WILL OF THE ESTATE OF GEORGE R. EDWARDS; RESOURCES GROUP, LLC a Nevada Limited-Liability Company; GLENVIEW WEST TOWNHOMES ASSOCIATION , a Nevada non-profit corporation; DOES 4 through 10, inclusive, and ROES 1 through 10, inclusive Defendants. And all related claims.	Case No. A-2-667690-C Dept No. XVI **RE-NOTICE OF DEPOSITION** **Date: November 29, 2016** **Time: 1:00 pm**

Please be advised that the Deposition of Glenview West Townhomes Association's date and time is set for Tuesday, November 29, 2016 at 1:00 pm at the Offices of Depo International, 703 S. 8th St., Las Vegas, NV 89101.

DATED: November 17, 2016.

By: McCarthy & Holthus, LLP
Thomas N. Beckom, Esq

NV-16-736927-CV

McCARTHY & HOLTHUS, LLP
Kristin A. Schuler-Hintz (NSB# 7171)
Thomas N. Beckom, Esq. (NSB# 12554)
9510 West Sahara Avenue, Suite 200
Las Vegas, NV 89117
(702)685-0329(Phone)
(866)339-5691(Fax)
Attorneys for Plaintiff/ Counter Defendant

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

U.S. BANK NATIONAL ASSOCIATION ND, A NATIONAL ASSOCIATION Plaintiff, v. GEORGE R. EDWARDS, an individual, ANY AND ALL PERSON UNKNOWN, CLAIMING TO BE PERSONAL REPRESENTATIVES OF GEORGE R. EDWARDS ESTATE OR DULY APPOINTED, QUALIFIED, AND ACTING EXECUTOR OF THE WILL OF THE ESTATE OF GEORGE R. EDWARDS; RESOURCES GROUP, LLC a Nevada Limited-Liability Company; GLENVIEW WEST TOWNHOMES ASSOCIATION , a Nevada non-profit corporation; DOES 4 through 10, inclusive, and ROES 1 through 10, inclusive Defendants. And All Related Claims	Case No. A-12-667690-C Dept. No. XVI ORDER ON PLAINTIFF'S MOTION TO AMEND THEIR ANSWER TO THE COUNTERCLAIM

On September 1, 2016, Plaintiff, U.S. BANK NATIONAL ASSOCIATION ND, A NATIONAL ASSOCIATION, (hereinafter "U.S. Bank") brought for hearing a Motion to Amend their Answer to the Counterclaim of Resources Group, LLC. No other party filed an opposition or otherwise responded.

There being no opposition, U.S. Bank;s Motion to Amend their Answer is hereby GRANTED as unopposed.

Dated this 28th day of January, 2016

DISTRICT COURT JUDGE

McCarthy & Holthus, LLP

By: /s/ Thomas N. Beckom

Thomas N. Beckom, Esq

McCARTHY & HOLTHUS, LLP
ATTORNEYS AT LAW
9510 W. SAHARA AVENUE, SUITE 200
Las Vegas, NV 89117
TELEPHONE (702) 685-0329 Facsimile (866) 339-5691

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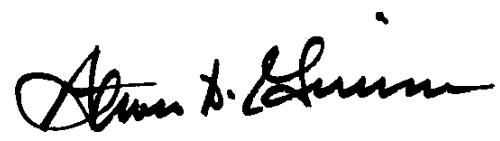


CLERK OF THE COURT

MSJD
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 East Warm Springs Road, Ste. 140
Las Vegas, Nevada 89119
(702) 642-3113/ (702) 642-9766 FAX
Attorneys for defendant/counterclaimant Resources Group, LLC

DISTRICT COURT
CLARK COUNTY, NEVADA

U.S. BANK NATIONAL ASSOCIATION, ND, a national association

Plaintiff,

vs.

GEORGE R. EDWARDS, an individual; ANY AND ALL PERSONS UNKNOWN, CLAIMING TO BE PERSONAL REPRESENTATIVES OF GEORGE R. EDWARDS ESTATE, OR DULY APPOINTED, QUALIFIED, AND ACTING EXECUTOR OF THE WILL OF THE ESTATE OF GEORGE R. EDWARDS; RESOURCES GROUP, LLC, a Nevada Limited Liability Company; GLENVIEW WEST TOWNHOMES ASSOCIATION, a Nevada non-profit corporation; DOES 4 through inclusive; and ROES 1 through 10 inclusive

Defendants.

RESOURCES GROUP, LLC,

Counter-claimant

vs

U.S. BANK NATIONAL ASSOCIATION, ND, a national association

Counter-defendant

CASE NO.: A-12-667690-C
DEPT NO.: XVI

MOTION FOR SUMMARY JUDGMENT

Defendant/counterclaimant, Resources Group, LLC, by and through its attorneys, Michael F. Bohn, Esq.

and Adam R. Trippiedi, Esq., moves for summary judgment on its counterclaims for quiet title and declaratory relief.

This motion is based upon the points and authorities contained herein.

DATED this 3rd day of January, 2017.

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

By: / s /Michael F. Bohn, Esq. . /
Michael F. Bohn, Esq.
Adam R. Trippiedi, Esq.
376 East Warm Springs Road, Suite 140
Las Vegas, Nevada 89119
Attorneys for defendant/counterclaimant

NOTICE OF MOTION

TO: Parties above named; and

TO: Their respective counsel of record:

YOU AND EACH OF YOU, PLEASE TAKE NOTICE that the undersigned will bring the above and foregoing Motion on for hearing before the above entitled Court, Department XVI, on the 07 day of FEBRUARY, 2017, at 9:00 a.m. or as soon thereafter as counsel can be heard.

DATED this 3rd day of January 2017.

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

By: / s / Michael F. Bohn, Esq./
Michael F. Bohn, Esq.
Adam R. Trippiedi, Esq.
376 East Warm Springs Road, Suite 140
Las Vegas, Nevada 89119
Attorneys for defendant/counterclaimant

FACTS

1. Facts regarding the foreclosure sale

Defendant/counterclaimant Resources Group, LLC, as trustee of the Bourne Valley Court Trust (hereinafter "Resources Group") is the owner of the real property commonly known as 4254 Rollingstone Drive, Las Vegas, Nevada ("the Property"). Resource Group's predecessor in interest, Resources Group LLC, a Nevada Limited Liability Company, Trustee of the Rollingstone Drive Trust acquired the property

by Foreclosure Deed recorded with the Clark County Recorder on January 31, 2012. A copy of the foreclosure deed is Exhibit 1 hereto. Defendant/counterclaimant Resources Group obtained title to the Property by way of a grant, bargain, sale deed recorded with the Clark County Recorder on May 29, 2012. A copy of the grant, bargain, sale deed is Exhibit 2. The foreclosure deed arises from a delinquency in assessments due from the former owner to the HOA (hereinafter "HOA"), pursuant to NRS Chapter 116.

Plaintiff/counterdefendant, U.S. Bank National Association, ND ("plaintiff"), is the beneficiary of a deed of trust that was recorded as an encumbrance on the subject property on March 26, 2009.

On December 20, 2010, the foreclosure agent sent the former owners the prelien letter and a copy of the notice of lien. A copy of the letter and the proof of mailing is Exhibit 3.

On January 4, 2011, the foreclosure agent recorded the notice of lien. A copy of the notice of lien is attached as Exhibit 4.

On March 29, 2011, the foreclosure agent recorded the notice of default and election to sell. The notice of default was mailed to the former owner, U.S. Bank, and other interested parties. A copy of the notice of default and proof of mailing is attached as Exhibit 5.

On October 13, 2011, the foreclosure agent recorded a notice of sale. A copy of the notice of sale is attached as Exhibit 6. The foreclosure agent also mailed a copy of the notice of sale to the former owner, U.S. Bank, and other interested parties. A copy of the proof of mailing is Exhibit 7.

The notice of foreclosure sale under the lien for delinquent assessments was also served upon the unit owner by posting a copy of the notice in a conspicuous place on the property. The notice of sale was also posted in three locations within the county. Additionally, the foreclosure agent published the notice of sale in Nevada Legal News.

As reflected by the recitals in the foreclosure deed, the predecessor in interest to defendant/counterclaimant Resources Group, LLC appeared at the public auction conducted on January 25, 2012, and entered the high bid of $5,331.00 to purchase the Property.

The interest of the plaintiff has been extinguished by reason of the foreclosure resulting from a delinquency in assessment due from the former owner to the HOA pursuant to NRS Chapter 116.

Plaintiff bank was on actual notice of the HOA foreclosure and failed to take any action to its own

detriment. Defendant/Counterclaimant Resources Group now moves for summary judgment on its counterclaims for quiet title and declaratory relief and for dismissal of Plaintiff's complaint.

2. Discovery conducted during litigation

Plaintiff conducted the deposition of the custodian of records for Alessi & Koenig, LLC, the foreclosure agent. Plaintiff produced a copy of the file produced by the custodian as a supplement to its 16.1 disclosures. The file contained the affidavit of the custodian of records to verify the authenticity of the documents produced. A copy of the affidavit is Exhibit 8. Exhibits 1, 3, 5, 7 and 8 were contained in the Alessi & Koenig, LLC file as produced by the plaintiff. Exhibits 4 and 6 were contained in the Glenview West Townhomes Association's production of documents as produced by Plaintiff.

During discovery in this case, the plaintiff was served with interrogatories regarding the defendant/counterclaimant Resource Group's status as a bona fide purchaser, and for proof of fraud, oppression or unfairness or irregularities regarding the noticing or the sale of the property. The plaintiff's answers contained objections and were otherwise non-responsive. A copy of the answers to interrogatories is Exhibit 9.

The defendant/counterclaimant propounded interrogatory 19:

> **INTERROGATORY NO. 19**: Identify all facts, information, and evidence of which you are aware that contradicts defendant's assertion that it was a bona fide purchaser for value at the Association foreclosure sale.

The plaintiff's response was:

> See response to Interrogatory No. 11. [**RESPONSE TO INTERROGATORY NO. 11:** First, the sale is commercially unreasonable and void because it is commercially unreasonable that a sale for the amount of $5,331.00 could extinguish a Deed of Trust in the original amount of $50,000.00. Additionally, per a Broker's Price Opinion dated as of February 6, 2012, which was around the time of the HOA sale date of January 25, 2012, the approximate value of the Property was at least $62,500.00. Therefore, it is wholly unreasonable that a HOA sale can extinguish a first position Deed of Trust fo an amount that is nowhere near the fair market value of the Property at the time of the sale. Second, the sale is void because the HOA did not provide proper notice of the super priority portion of the lien to U.S. Bank. Third, Defendant is not a bona fide purchaser fo value because it had constructive notice that U.S. Bank's security interest was still of record and did nothing to ensue U.S. Bank was paid in full to effectuate a reconveyance of its security interest. Defendant also had actual notice of the contentious state of the law at the time of the HOA sale, i.e., that the state of the law at the time of the foreclosure sale was that a HOA sale could not extinguish a first position deed of trust. Therefore, Defendant knew or should have known that the purchase of the subject real property could, and actually did,

result in litigation. Fourth, NRS Chapter 116 is void because it is vague and thus facially unconstitutional, as it does not provide for actual notice to a first position deed of trust holder prior to the foreclosure of any HOA. Fifth, the sale is void because the HOA has not produced any documentation in response to U.S. Bank's subpoena request demonstrating that it complied with the mandatory budget provisions of NRS 116.3115. In support of these factual assertions, Responding Party refers Propounding Party to the exhibits attached to its Complaint, Second Amendment to Complaint, the exhibits attached to its 16.1 Initial Disclosures, the exhibits attached to its Supplemental Disclosures, its Response to Request for Production No. 1 served contemporaneously herewith. Responding Party reserves the right to supplement this response at a later date.]

The defendant/counterclaimant propounded interrogatory 24:

INTERROGATORY NO. 24: Identify all facts, information, and evidence of which you are aware which evidences any fraud, oppression or unfairness in regards to the association foreclosure sale.
The plaintiff's response was:

See Response to Interrogatory No. 11.

The defendant/counterclaimant propounded interrogatory 25:

INTERROGATORY NO. 25: Identify all facts, information, and evidence of which you are aware which evidences that the association foreclosure sale was not properly conducted.

The plaintiff's response was:

See Response to Interrogatory No. 11.

The defendant/counterclaimant propounded interrogatory 26:

INTERROGATORY NO. 26: Identify all facts, information, and evidence of which you are aware which evidences that the association foreclosure sale was not properly noticed.

The plaintiff's response was:

See Response to Interrogatory No. 11.

The plaintiff has no proof that the defendant/counterclaimant Resources Group was not a bona fide purchaser. The plaintiff also has no proof of any fraud, oppression or unfairness, or that the sale was not properly noticed or conducted. For this reason, the court should grant summary judgment granting quiet title to the defendant/counterclaimant and dismiss plaintiff's complaint.

POINTS AND AUTHORITIES

A. The bank is not entitled to relief against the bona fide purchaser

Under both the Restatement and Nevada law, the plaintiff bank has no remedies against Resources Group in regard to the foreclosure sale because any damages which the plaintiff may have sustained as a result of an alleged wrongful foreclosure can be compensated with money damages.

The decision in the case of Shadow Wood Homeowners Association v. New York Community Bank, 132 Nev. Adv. Op 5, 366 P.3d 1105 (2016) has limited application because Shadow Wood dealt with title divestment of the former owner. This case, however, deals with the extinguishment of the plaintiff's security interest in the property. However, because Resources Group 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 sale; 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 Section 8.3 from the Restatement is attached as Exhibit 10.

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 available to itself an adequate remedy at law.

Back in 1868, the court in Sherman v. Clark 4 Nev. 138 (1868) the 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 Page, 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 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 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 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 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)

The rule that equity will not be imposed is consistent with Nevada case law protecting the interests of a bona fide purchaser. Any defects in the sale gives the party damaged thereby a claim for money damages against the foreclosure agent. The Supreme Court in the Shadow Wood decision repeatedly stated the rule 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.

In discussing the bona fide purchaser doctrine the court stated:

> 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) (emphasis omitted); *see also Moore v. De Bernardi,* 47 Nev. 33, 54, 220 P. 544, 547 (1923) (**"The decisions are uniform that the bona fide purchaser of a legal title is not affected by any latent equity founded either on a trust, [e]ncumbrance, or otherwise, of which he has no notice, actual or constructive."**). Although, as mentioned, NYCB might believe that Gogo Way purchased the property for an amount lower than the property's actual worth, that Gogo Way paid "valuable consideration" cannot be contested. *Fair v. Howard,* 6 Nev. 304, 308 (1871) ("The question is not whether the consideration is adequate, but whether it is valuable."); see *also Poole v. Watts,* 139 Wash.App. 1018 (2007) (unpublished disposition) **(stating that the fact that the foreclosure sale purchaser purchased the property for a "low price" did not in itself put the purchaser on notice that anything was amiss with the sale).** 366 P.3d at 1115-6 (emphasis added)

The plaintiff has adduced no evidence that would put the Resources Group on any kind of notice of any type of claim that the plaintiff bank may have. The court should therefore find that title is properly in the name of Resources Group and that the plaintiff's trust deed has been extinguished.

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

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.

The plaintiff therefore has no claim for relief which may be granted against the purchaser, Resources Group because it is a bona fide purchaser.

B. The Trust Deed has been Extinguished.

In its decision 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 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 Investments Pool 1, LLC v. U.S. Bank, N.A., this Honorable 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 the plaintiff bank on the date of sale. As a result, this Court should rule that the deed of trust held by plaintiff was extinguished by the HOA's foreclosure sale.

C. There is no requirement that the foreclosure agent obtain sums to satisfy junior liens.

There is no authority for the proposition that a foreclosure agent must seek sufficient sums at foreclosure sale to satisfy the claims of junior lienholders. This was noted by Judge Pro in Bourne Valley Court Trust v.Wells Fargo Bank, 80 F. Supp. 3d 1131 (D. Nev. 2015). The decision addresses commercial reasonableness and notes that there is no duty to obtain sums in excess of the sums necessary to satisfy the HOA lien. The Court stated:

> Wells Fargo next argues that even if the HOA foreclosure sale extinguished its first deed of trust on the property, the HOA foreclosure sale was "commercially unreasonable" and therefore was void. (Opp'n at 5–7.) Specifically, Wells Fargo argues the HOA foreclosure sale was not conducted in good faith because "the HOA made no effort to obtain the best price or to protect either Johnson or Wells Fargo" by selling the property for $4,145.00 when the assessed value of the property was $90,543.00. (*Id.* at 7.) Bourne Valley replies that Chapter 116 does not require an HOA foreclosure sale to be commercially reasonable. Bourne Valley further argues that the inadequacy of the price is not sufficient to void the HOA foreclosure sale when there is no evidence of fraud, procedural defects, or other irregularities in the conduct of the sale.
>
> The commercial reasonableness here must be assessed as of the time the sale occurred. Wells Fargo's argument that the HOA foreclosure sale was commercially unreasonable due to the discrepancy between the sale price and the assessed value of the property ignores the practical reality that confronted the purchaser at the sale. Before the Nevada Supreme Court issued *SFR Investments,* purchasing property at an HOA foreclosure sale was a risky investment, akin to purchasing a lawsuit. Nevada state trial courts and decisions from the United States District Court for the District of Nevada were divided on the issue of whether HOA liens are true priority liens such that their foreclosure

extinguishes a first deed of trust on the property. *SFR Investments,* 334 P.3d at 412. Thus, a purchaser at an HOA foreclosure sale risked purchasing merely a possessory interest in the property subject to the first deed of trust. This risk is illustrated by the fact that title insurance companies refused to issue title insurance policies on titles received from foreclosures of HOA super priority liens absent a court order quieting title. (Mot. to Remand to State Court (Doc. # 6), Decl. of Ron Bloecker.) Given these risks, a large discrepancy between the purchase price a buyer would be willing to pay and the assessed value of the property is to be expected.

Moreover, Wells Fargo does not point to any evidence or legal authority indicating the Court must void an HOA foreclosure sale because the purchaser bid only a fraction of the property's assessed value. Wells Fargo does not point to evidence of fraud or any other procedural defects or other irregularities in the conduct of the sale that would require the Court to void the sale, or any evidence indicating the HOA acted in bad faith by selling the property for an amount that would satisfy the unpaid assessments. Nor does Wells Fargo point to evidence or legal authority indicating that beyond selling the property to the highest bidder, the HOA was responsible for protecting Wells Fargo and Johnson's interests in addition to the homeowners' interests. *See* *Carmen v. S.F. Unified Sch. Dist.,* 237 F.3d 1026, 1028–31 (9th Cir.2001) (stating that a court need not "comb the record" looking for a genuine issue of material fact if the party has not brought the evidence to the court's attention) (quotation omitted)). Thus, no genuine issue of material fact remains as to whether the HOA foreclosure sale was commercially unreasonable. Under the specific facts presented here, it was not. (emphasis added)

Id. at 1135-1136.

In the case of BFP v. Resolution Trust Corporation, 511 U.S. 531, 548-49 (1994), the U.S. Supreme Court explained why the fair market value of a property sold at foreclosure or a "forced sale" is in fact the price said at the foreclosure sale:

> ...the fact that a piece of property is legally subject to forced sale, like any other fact bearing upon the property's use or alienability, necessarily affects its worth. Unlike most other legal restrictions, however, foreclosure has the effect of completely redefining the market in which the property is offered for sale; normal free-market rules of exchange are replaced by the far more restrictive rules governing forced sales. Given this altered reality, and the concomitant inutility of the normal tool for determining what property is worth (fair market value), the only legitimate evidence of the property's value at the time it is sold is the foreclosure-sale price itself.

This BFP case is also cited in Restatement (Third) of Prop.: Mortgages § 8.3.

The court should first consider that the Shadow Wood case was not an HOA lien extinguishment case. In Shadow Wood, the property owner was trying to set aside the foreclosure sale. Next, the position taken by most bank counsel ignores the requirement, set forth more than once in the Shadow Wood case, that there must be evidence of fraud, unfairness or oppression.

As demonstrated by the authorities cited above, the bank's remedy for a wrongful foreclosure would be a claim for money damages against the foreclosure agent because Resources Group is a bona fide purchaser.

D. The plaintiff's inactions must be viewed by the court

The Supreme Court in both SFR and Shadow Wood noted that the defendant banks were responsible for their own damages. In SFR Investments Pool 1 v. U.S. Bank 130 Nev. Adv. Op. 75, 334 P.3d 408 (2014) the court said not once, but twice, that the price paid at the foreclosure sale was not an issue because the bank could simply have paid the super priority amount 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 the case of Shadow Wood Homeownwers Association v. New York Community Bank, 132 Nev. Ad. Op. 5, 366 P.3d 1105 (2016), the Supreme Court stated other ways that 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 the Shadow Wood case 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)

The plaintiff bank had remedies available to it to protect its interests before the foreclosure sale and failed to avail itself of these remedies. It cannot now seek relief from this court, especially when it has failed to demonstrate fraud, oppression or unfairness.

E. 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).

Nevada has a disputable presumption that "the law has been obeyed." See NRS 47.250(16). This creates a disputable presumption that the foreclosure sale was conducted in compliance with the law. By statute, the recitals in the deed are sufficient and conclusive proof that the required notices were mailed by the HOA. The foreclosure deed, attached hereto as Exhibit 1, recites in part:

> This conveyance is made pursuant to the powers granted to association claimant and conferred upon appointed trustee by the provisions of the Declaration of Covenants, Conditions, and Restrictions recorded 5/12/1998 as Instrument No. 01569 Book 980512 Page County of Clark and pursuant to NRS 116.3115 et. seq. and NRS 116.3116 through 116.3118 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, recorded on as Document No. Book Page of Official Records in the Office of the Recorder of Clark County, Nevada. ATC Assessment Collection Group, LLC has complied with all requirements of law including, but not limited to, the elapsing of 90 days, mailing of copies of Notice of Delinquent Assessment Lien and Notice of Default and the Posting and Publication of the Notice of Sale. Said property was sold by said Trustee at public auction on 8/1/2012 at the place named in the Notice of Trustee's Sale, in the County of Clark, Nevada, in which the property is situated.
> The controlling statute, NRS 116.31166, provides in part:.
>
> **Foreclosure of liens: Effect of recitals in deed; purchaser not responsible for proper application of purchase money; title vested in purchaser without equity or right of redemption**.
>
> 1. **The recitals in a deed** made pursuant to NRS 116.31164 of:
>
> (a) Default, the mailing of the notice of delinquent assessment, and the recording of the notice of default and election to sell;
>
> (b) The elapsing of the 90 days; and
>
> (c) The giving of notice of sale,
>
> are **conclusive proof of the matters recited**.
>
> 2. **Such a deed containing those recitals is conclusive against** the unit's former owner, his or her heirs and assigns, **and all other persons**. The receipt for the purchase money contained in such a deed is sufficient to discharge the purchaser from obligation to see to the proper application of the purchase money.
>
> (emphasis added)

The recitals in the deed between the foreclosure agent and the purchaser at the foreclosure sale are conclusive from this statute, NRS116.31166. The sole exception would be in the case of fraud or

other grounds for equitable relief. See Shadow Wood Homeowners Association v. New York Community Bank, 132 Nev. Ad. Op. 5, 366 P.3d 1105 (2016).

In addition to the recitals, the exhibits attached to the motion are additional proof that the notices were served. It is respectfully submitted that this court should find that the foreclosure deed received by the Resource Group's predecessor in interest at the time it obtained title to the Property is conclusive and sufficient proof that title is vested in the Resources Group and not subject to attack from the plaintiff bank.

F. Defendant/counterclaimant Resources Group is a bona fide purchaser

The only contention of the plaintiff in the answers to interrogatories disputing that Resources Group is a bona fide purchaser is the fact that Resource Group's predecessor in interest was aware of the deed of trust before the sale. However, because the foreclosure sale extinguished the plaintiff's deed of trust, there was nothing for the defendant/counterclaimant's predecessor in interest to be on notice of.

Shadow Wood discusses bona fide purchaser in detail. The many points contained in the decision can be summarized as:

1. A bona fide purchase is without notice of any **prior equity.**

2. "The decisions are uniform" that the title of a bona fide purchaser is not affected by any matter of which he has no notice.

3. The bona fide purchaser must pay **valuable** consideration, not "adequate" consideration.

4. The fact that the foreclosure price may be "low" is not sufficient to put the purchaser on notice of any alleged defects with the sale.

5. The fact that the court retains equitable power to void the sale does deprive the purchaser of bona fide purchaser status.

6. The time to determine the status of bona fide purchaser is at the time of the sale.

Resources Group is a bona fide purchaser as a matter of law, and the law must protect its title as to all matters to which it does not have notice of.

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.

In HOA foreclosure cases, the bona fide purchaser doctrine rarely comes into play because all interests on the property other than prior existing debts and taxes are extinguished by the foreclosure. 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.

G. Shadow Wood's limited application supports judgment in the purchaser's favor

The so called "20%" rule from the Restatement stated in Shadow Wood has no application in this case because Resources Group is a bona fide purchaser, there are no irregularities regarding the sale, and if there were any irregularities, equity would not interfere because the party harmed would have a claim against the foreclosing agent. However, because the price paid is raised as an issue, Resources Group will address it here and show that it has no application without a showing of "fraud, oppression or unfairness as accounts for and brings about the inadequacy of price"

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

The first citation to the fraud, oppression or unfairness standard specifically reaffirms the standards as set forth in both the Long and Golden cases. The court's first reference to the standard was:

> Shadow Wood and Gogo Way maintain that, under NRS 116.31166, recitals such as these bar any post-sale challenge regardless of basis, whether it disputes the HOA's compliance with the statutory default, notice, and timing requirements or, as here, seeks to set aside the sale for equity-based reasons. If true, this interpretation would call into question this court's statement in *Long v. Towne,* that a common-interest community association's nonjudicial foreclosure sale may be set aside, just as a power-of-sale foreclosure sale may be set aside, upon a showing of grossly inadequate price plus "fraud, unfairness, or oppression." 98 Nev. at 13, 639 P.2d at 530 (citing *Golden v. Tomiyasu,* 79 Nev. 503, 514, 387 P.2d 989, 995 (1963) (stating that, while a power-of-sale foreclosure may not be set aside for mere inadequacy of price, it may be if the price is grossly inadequate and there is "in addition proof of some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price" (internal quotation omitted))).
>
> 366 P.3d at 1110.

The second reference reaffirms the court's equitable power to set aside a foreclosure sale in the limited instances when an inadequate price is accompanied by fraud, oppression or unfairness, and cites the Nevada and California case law that discusses these requirements:

> While not directly addressing the preemption argument Shadow Wood and Gogo Way make as to NRS 116.31166, our post-NRS 107.030(8) cases reaffirm that courts retain the power, in an appropriate case, to set aside a defective foreclosure sale on equitable grounds. ***See Golden v. Tomiyasu,*** **79 Nev. at 514, 387 P.2d at 995 (adopting the California 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"** (quoting *Oller v. Sonoma Cty. Land Title Co.,* 137 Cal.App.2d 633, 290 P.2d 880, 882 (Cal.Ct.App.1955))); *McLaughlin v. Mut. Bldg. & Loan Ass'n,* 57 Nev. 181, 191, 60 P.2d 272, 276 (1936) (noting that, in the context of an action to recover possession of a property after a trustee sale, "[h]ad the conduct of the trustee and respondent, in connection with the sale, been accompanied by any actual fraud, deceit, or trickery, a more serious question would be presented"); *see also Nev. Land & Mortg. Co. v. Hidden Wells Ranch, Inc.,* 83 Nev. 501, 504, 435 P.2d 198, 200 (1967) ("In the proper case, the trial court may set aside a trustee's sale upon the grounds of fraud or unfairness."). And, cases elsewhere to have addressed comparable conclusive-or presumptive-effect recital statutes confirm that such recitals do not defeat equitable relief in a proper case; rather, such recitals are "conclusive, *in the absence of grounds for equitable relief.*" *Holland v. Pendleton Mortg. Co.,* 61 Cal.App.2d 570, 143 P.2d 493, 496 (Cal.Ct.App.1943) (emphasis added); *see Bechtel v. Wilson,* 18 Cal.App.2d 331, 63 P.2d 1170, 1172 (Cal.Ct.App.1936) (distinguishing between a challenge to the sufficiency of pre-sale notice, which was precluded by the conclusive recitals in the deed, and an equity-based challenge based upon the alleged unfairness of the sale); *compare* 1 Grant S. Nelson, *Real Estate Finance Law, supra,* § 7:23, at 986–87 ("After a defective power of sale foreclosure has been consummated, mortgagors and junior lienholders in virtually every state have an equitable action to set aside the sale.") (footnotes omitted), *with id.* § 7:22, at 980–82 (noting that "[m]any states have attempted to enhance the stability of power of sale foreclosure titles by enacting a variety of *presumptive statutes* "), *and* 6 Baxter Dimaway, *Law of Distressed Real Estate,* § 64:161 (2015) (noting that a trustee's deed recital can be overcome on a showing of actual fraud).
>
> 366 P.3d at 1110.

The third reiteration of the standard is in the paragraph immediately before the reference to the Restatement. The court, having twice stated the standards of an inadequate price as the result of fraud, oppression and unfairness, therein begins its review of these standards. The first element reviewed is the standard for inadequate price, which contains a limited reference to the Restatement. The reference to the Restatement must therefore be read in context with the prior paragraph which is the beginning of the court's analysis of each of the elements required for the court to invoke its equitable powers. The full, two paragraph citation reads:

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. *Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 669, 918 P.2d 314, 318 (1996) (stating the burden of proof rests with the party seeking to quiet title in its favor). **As discussed above, demonstrating that an association sold a property at its foreclosure sale for an inadequate price is not enough to set aside that sale; there must also be a showing of fraud, unfairness, or oppression**. *Long*, 98 Nev. at 13, 639 P.2d at 530.

NYCB failed to establish that the foreclosure sale price was grossly inadequate as a matter of law. NYCB compares Gogo Way's purchase price, $11,018.39, to the amount NYCB bought the property for at its foreclosure sale, $45,900.00. Even using NYCB's purchase price as a comparator, and adding to that sum the $1,519.29 NYCB admits remained due on the superpriority lien following NYCB's foreclosure sale, Gogo Way's purchase price reflects 23 percent of that amount and is therefore not obviously inadequate. *See Golden*, 79 Nev. at 511, 387 P.2d at 993 (noting that even where a property was "sold for a smaller proportion of its value than 28.5%," it did not justify setting aside the sale); *see also* **Restatement (Third) of Prop.: Mortgages § 8.3 cmt. b (1997) (stating that while "[g]ross inadequacy cannot be precisely defined in terms of a specific percentage of fair market value[, g]enerally ... 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").** (emphasis added)

366 P.3d at 1112

A examination of the Restatement shows that the entirety of comment b to section 8.3 actually favors the purchaser's position because it is specific to legal proceedings occurring post foreclosure when a bona fide purchaser acquires title to the real property.

A portion of comment a to Section 8.3 notes that "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."

The "Reporters' Note" portion of the Restatement contained on page 590 states in part:

> 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. (case citations omitted)

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

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

The requirements for relief from a foreclosure sale when the property has been purchased by a third party in the Restatement, as well as Shadow Wood, Long 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 court use any language to question the validity of the standards or overturn the court's prior rulings.

Many bank attorneys are selectively citing the 20% language of the Restatement cited by the court in Shadow Wood to argue that sales price alone is sufficient to set aside the sale. However, on March 18, 2016, the Supreme Court issued an unpublished decision in the case of Centeno v. JPMorgan Chase Bank, docket no. 67365. A copy of the decision is attached as Exhibit 11. The case involved the denial of an injunction based on the Supremacy Clause and because of a commercially unreasonable sales price. The Supreme Court addressed the commercially reasonable argument, stating:

> ....Similarly, this court's reaffirmation in Shadow Wood Homeowners Association v. New York Community Bank, 132 Nev. Ad. Op. 5, ____ P.3d _____ (2016) , that a low sales price is not a basis for voiding a foreclosure sale absent "fraud, unfairness, or oppression," undermines the second basis for the district court's decision.

BrunsonJiu is a Las Vegas Valuation, Consulting, and Real Estate Damage Analytics firm. Michael L. Junson of this firm reviewed the appraisal report presented by Plaintiff and found it to lack credibility and to be misleading. Whereas Plaintiff's appraisal found a value of $48,000.00, the BrunsonJiu report sets forth numerous reasons why a valuation at the time of the sale of $5,300.00 was more probable. A copy of BrunsonJiu's appraisal review setting forth the reasons for this conclusion, including Plaintiff's appraisal failing to take into account the nature of the sale, is Exhibit 12.

Here, the plaintiff has failed to show any instances of fraud, oppression or unfairness in regard to the foreclosure sale. Absent any showing of fraud, oppression or unfairness, there are no grounds to set aside the foreclosure sale or declare that the deed of trust has survived the sale. The motion for summary judgment should be granted in favor defendant/counterclaimant Resources Group, LLC.

H. The claim for fraudulent transfer should be dismissed

The HOA foreclosure sale cannot be a fraudulent transfer as a matter of law because the Property in this case is not an "asset" as defined by NRS 112.150(2).

NRS 112.190(1) provides: "A **transfer** made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the **transfer** was made or the obligation was incurred if the debtor made the **transfer** or incurred the obligation without receiving a reasonably equivalent value in exchange for the **transfer** or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the **transfer** or obligation." (emphasis added)

NRS 112.150(12) defines "transfer" as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an **asset** or an interest in an **asset**, and includes payment of money, release, lease and creation of a lien or other encumbrance." (emphasis added)

NRS 112.150(2) defines the word "asset" and provides:

> 2. "Asset" means property of a debtor, **but the term does not include:**
>
> (a) **Property to the extent it is encumbered by a valid lien**;
> (b) **Property to the extent it is generally exempt under nonbankruptcy law**; or
> © An interest in property held in tenancy by the entireties or as community property to the extent it is not subject to process by a creditor holding a claim against only one tenant. (emphasis added)

Here, the Property does not constitute an "asset" under NRS 112.150 because at the time of the HOA foreclosure sale, the Property was encumbered by valid liens.

NRS 21.090(1)(l) exempts from execution "[t]he homestead as provided for by law," and NRS 115.010(1) provides that "[t]he homestead is not subject to forced sale on execution or any final process from any court, except as provided by subsections 2, 3 and 5, and NRS 115.090 and except as otherwise required by federal law." In the case of Savage v. Pierson, 123 Nev. 86, 157 P.3d 697 (2007),

the Nevada Supreme Court recognized that "Nevada's Constitution provides for a homestead exemption" and that "[t]he Legislature enacted what is now NRS 21.090 to fulfill the mandate set forth in Nevada's Constitution." The Court also stated that "the exemptions set forth in NRS 21.090 are 'absolute and unqualified,' with few exceptions, 'and [their] effect is to remove the property beyond the reach of legal process."

NRS 115.010(2) provides that the homestead exemption "extends only to that amount of equity in the property held by the claimant which does not exceed $550,00 in value . . . ." In the present case, defendant cannot prove that George R. Edwards held equity in the property that exceeded the amount of $550,000 even if defendant's extinguished deed of trust is not counted as a lien against the property. Consequently, the property sold at the HOA foreclosure sale was not an "asset" as provided by NRS 112.150(2)(b).

Comment (2) to section 1 of the Uniform Fraudulent Transfer Act discusses the definition of the word "asset" and recognizes:

> Subparagraphs (I), (ii), and (iii) provide clarification by excluding from the term not only generally exempt property but also an interest in a tenancy by the entirety in many states and an interest **that is generally beyond reach by unsecured creditors because subject to a valid lien.** This Act, like its predecessor and the Statute of 13 Elizabeth, declares rights and provides remedies for unsecured creditors against transfers that impede them in the collection of their claims. The laws protecting valid liens against impairment by levying creditors, **exemption statutes**, and the rules restricting levyability of interest in entireties property **are limitations on the rights and remedies of unsecured creditors, and it is therefore appropriate to exclude property interests that are beyond the reach of unsecured creditors from the definition of "asset" for the purposes of this Act.** (emphasis added)

As revealed by this comment, the clear intent of the Uniform Fraudulent Transfer Act is to protect "unsecured" creditors from having a debtor place **nonexempt** assets beyond their reach. No part of the Act is intended to protect a "secured" creditor from losing its security when it allows a senior interest to be foreclosed. Here, because the plaintiff is or was a secured creditor, the statutes do not apply to the plaintiff, and the claim for fraudulent transfer should be dismissed.

The Nevada Supreme Court has repeatedly held that foreclosure of a senior lien extinguishes all subordinate liens. McDonald v. D.P. Alexander & Las Vegas Boulevard, LLC, 121 Nev. 812, 818, 123 P.3d 748 (2005); Brunzell v. Lawyers Title Ins. Co., 101 Nev. 395, 705 P.2d 642 (1985); Aladdin

Heating Corp. v. Trustees of Central States, 93 Nev. 257, 563 P.2d 82 (1977); Erickson Construction Co. v. Nevada National Bank, 89 Nev. 359, 513 P.2d 1236 (1973). The Nevada Supreme Court applied this same rule in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408, 419 (2014), when it held that "NRS 116.3116(2) gives an HOA a true superpriority lien, proper foreclosure of which will extinguish a first deed of trust." No provision in the Uniform Fraudulent Transfer Act leads to a different result.

NRS 116.31166 provides this exact protection for purchasers at HOA foreclosure sales. NRS 116.31166(2) states that the foreclosure deed is "conclusive against the unit's former owner, his or her heirs and assigns, **and all other persons**." (emphasis added) "All other persons" necessarily includes unsecured creditors asserting that the HOA foreclosure sale was a fraudulent transfer.

NRS 116.31166(3) states that the title of the unit's owner vests in the purchaser "without equity or right of redemption." This same language is used in NRS 107.080(5) to describe the title received by a purchaser at a deed of trust foreclosure sale. As noted by the Nevada Supreme Court in Golden v. Tomiyasu, 79 Nev. 503, 387 P.2d 989 (1963), cert. denied, 382 U.S. 844 (1965), a mortgagor or trustor cannot unilaterally create a right of redemption by disputing the price paid at a nonjudicial foreclosure sale. The same rule applies to the plaintiff in this case.

The Nevada Supreme Court has stated that a provision which specifically applies to a given situation will take precedence over one that only applies generally. Nevada Power Co. v. Haggerty, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999); SIIS v. Surman, 103 Nev. 366, 368, 741 P.2d 1357, 1359 (1987); Sierra Life Ins. Co. v. Rottman, 95 Nev. 654, 656, 601 P.2d 56, 57-58 (1979); W.R. Co. v. City of Reno, 63 Nev. 330, 172 P.2d 158 (1946). To allow plaintiff to collaterally attack the "conclusive" HOA foreclosure deed based on general provisions in the Uniform Fraudulent Transfer Act would violate this rule of statutory construction by reading the specific protections in NRS 116.31166 out of the

CONCLUSION

The HOA's foreclosure sale extinguished both the plaintiff's deed of trust, and its interest in the subject property. As conclusively evidenced by the recitals in the foreclosure deed, the HOA's foreclosure sale complied with all requirements of Nevada law. The recitals are supported by

documentation to show the notices went out. The plaintiff has not produced any evidence to show that Resources Group is not a bona fide purchaser, and has failed to demonstrate any fraud, oppression or unfairness to justify setting aside the foreclosure sale.

Accordingly, it is respectfully requested that this Court enter an order granting the defendant/counterclaimant's motion for summary judgment and quieting title to the Property in the name of Resources Group, free and clear of all liens and encumbrances and forever enjoining plaintiff from asserting any estate, title, right, interest, or claim to the property adverse to the defendant/counterclaimant, and dismissing the plaintiff's complaint.

DATED this 3rd day of January, 2017

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

By: / s / Michael F. Bohn, Esq. /
Michael F. Bohn, Esq.
376 E. Warm Springs Road, Ste. 140
Las Vegas, Nevada 89119
Attorney for Resources Group

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 3rd day of January, 2017, an electronic copy of the **MOTION FOR SUMMARY JUDGMENT** was served on opposing counsel via the Court's electronic service system to the following counsel of record:

Kristin A. Schuler-Hintz, Esq.
Thomas N. Beckom, Esq.
McCarthy & Holthus, LLP
9510 W. Sahara Ave., Ste. 200
Las Vegas, NV 89117

Attorney for plaintiff/counterdefendant

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

AFFT
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 East Warm Springs Road, Ste. 140
Las Vegas, Nevada 89119
(702) 642-3113/ (702) 642-9766 FAX

Attorney for defendant-counter claimant, Resources Group, LLC

DISTRICT COURT

CLARK COUNTY NEVADA

U.S. BANK NATIONAL ASSOCIATION, ND, a national association

Plaintiff,

vs.

GEORGE R. EDWARDS, an individual; ANY AND ALL PERSONS UNKNOWN, CLAIMING TO BE PERSONAL REPRESENTATIVES OF GEORGE R. EDWARDS ESTATE, OR DULY APPOINTED, QUALIFIED, AND ACTING EXECUTOR OF THE WILL OF THE ESTATE OF GEORGE R. EDWARDS; RESOURCES GROUP, LLC, a Nevada Limited Liability Company; GLENVIEW WEST TOWNHOMES ASSOCIATION, a Nevada non-profit corporation; DOES 4 through inclusive; and ROES 1 through 10 inclusive

Defendants.

CASE NO.: A667690
DEPT NO.: XVI

RESOURCES GROUP, LLC,

Counter-claimant

vs

U.S. BANK NATIONAL ASSOCIATION, ND, a national association

Counter-defendant

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

IYAD HADDAD being first duly sworn, deposes and says;

1. Affiant is the person most knowledgeable for Resources Group, LLC, the defendant-counter claimant herein, and makes this affidavit based on personal knowledge.

2. Defendant-Counter Claimant, Resources Group, LLC, is the owner of the real property commonly known as 4254 Rollingstone Dr., Las Vegas, Nevada.

3. 4254 Rolling Stone Dr Trust acquired title to the property at foreclosure sale conducted on January 25, 2012 as evidenced by the foreclosure deed recorded on January 31, 2012.

4. The foreclosure deed reflects that valuable consideration in the sum of $5,331.00 was paid for the property.

5. On May 29, 2012, 4254 Rollingstone Drive Trust recorded a Grant, Bargain, Sale Deed, transferring the Property to Bourne Valley Court Trust.

6. The defendant-counter claimant's title stems from a foreclosure deed arising from a delinquency in assessments due from the former owner to the Glenview West Townhomes Association pursuant to NRS Chapter 116.

7. Prior to and at the time of the foreclosure sale, there was nothing recorded in the public record to put me on notice of any claims or notices that any portion of the lien had been paid.

8. Prior to and at the time of the foreclosure sale, there is no way for myself or any other potential bidder at the foreclosure sale to research if the notices were sent to the proper parties at the proper address. I, and other potential bidders are forced to rely only on the professional foreclosure agent to have obtained a trustee's sale guarantee issued by a local title and escrow company and to serve the notices upon the parties who are entitled to notice.

9. As a result of the limited information available to myself and other potential bidders, I, on behalf of the defendant-counter claimant, am a bona fide purchaser of the property, for value, without

notice of any claims on the title to the property.

10. At no time prior to the foreclosure sale did I receive any information from the HOA or the foreclosure agent about the property or the foreclosure sale.

11. Neither myself or anyone associated with defendant-counter claimant, Resources Group, LLC, have any affiliation with the HOA board or the foreclosure agent.

12. If called upon to testify to the above facts, affiant could do so competently.

IYAD HADDAD

SUBSCRIBED and SWORN to before me
this 22 day of December, 2016.

NOTARY PUBLIC in and for said
County and State

MAURIZIO MAZZA
Notary Public State of Nevada
No. 05-94588-1
My Appt. Exp. Feb. 1, 2017

EXHIBIT 1

EXHIBIT 1

Inst #: 201201310001704
Fees: $17.00 N/C Fee: $0.00
RPTT: $28.05 Ex: #
01/31/2012 09:09:48 AM
Receipt #: 1052023
Requestor:
ALESSI & KOENIG LLC (JUNES
Recorded By: DXI Pgs: 2
DEBBIE CONWAY
CLARK COUNTY RECORDER

(2)-1

When recorded mail to and
Mail Tax Statements to:
4254 Rolling Stone Dr Trust
PO Box 36208
Las Vegas, NV 89133

A.P.N. No.**163-24-111-021** TS No. **24230-4254**

TRUSTEE'S DEED UPON SALE

The Grantee (Buyer) herein was: **4254 Rolling Stone Dr Trust**
The Foreclosing Beneficiary herein was: **Glenview West Townhomes Association**
The amount of unpaid debt together with costs (Real Property Transfer Tax Value): **$5,331.00**
The amount paid by the Grantee (Buyer) at the Trustee's Sale: **$5,331.00**
The Documentary Transfer Tax: **$28.05**
Property address: **4254 ROLLINGSTONE DR, LAS VEGAS, NV 89103**
Said property is in [ ] unincorporated area: City of **LAS VEGAS**
Trustor (Former Owner that was foreclosed on): **EDWARDS GEORGE R TRUST**

Alessi & Koenig, LLC (herein called Trustee), as the duly appointed Trustee under that certain Notice of Delinquent Assessment Lien, recorded **January 4, 2011** as instrument number **0005412**, in **Clark** County, does hereby grant, without warranty expressed or implied to: **4254 Rolling Stone Dr Trust** (Grantee), all its right, title and interest in the property legally described as: **LOT 19**, as per map recorded in Book **30**, Pages **65** 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 25, 2012** at the place indicated on the Notice of Trustee's Sale.

Ryan Kerbow, Esq
Signature of AUTHORIZED AGENT for **Glenview West Townhomes Association**

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

SUBSCRIBED and SWORN to before me Jan. 27, 2012

WITNESS my hand and official seal.
(Seal)

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

(Signature)

#APPT
* 10-2800-1

STATE OF NEVADA
DECLARATION OF VALUE

1. Assessor Parcel Number(s)
   a. 163-24-111-021
   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 $ 5,331.00
b. Deed in Lieu of Foreclosure Only (value of property) (_____)
c. Transfer Tax Value: $ 5,331.00
d. Real Property Transfer Tax Due $ 28.05

4. **If Exemption Claimed:**
   a. Transfer Tax Exemption per NRS 375.090, Section_____
   b. Explain Reason for Exemption: _____

5. Partial Interest: Percentage being transferred: 100.00 %

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: 4254 Rolling Stoone Dr Trust
Address: 9500 W Flamingo # 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 # 205	
City: Las Vegas	State: NV Zip: 89147

AS A PUBLIC RECORD THIS FORM MAY BE RECORDED/MICROFILMED

EXHIBIT 2

EXHIBIT 2

Inst #: 201205290002144
Fees: $18.00 N/C Fee: $0.00
RPTT: $0.00 Ex: #007
05/29/2012 02:44:44 PM
Receipt #: 1178391
Requestor:
RESOURCE GROUP LLC
Recorded By: SCA Pgs: 3
DEBBIE CONWAY
CLARK COUNTY RECORDER

(3) -1

APN: 163-24-111-021
RECORDING REQUESTED BY:

When Recorded Mail Document and Tax Statement To:

Bourne Valley Court Trust
900 S. Las Vegas Blvd #810
Las Vegas, NV 89101

RPTT: $ EXEMPT 7

GRANT, BARGAIN, SALE DEED

THIS INDENTURE WITNESSETH: That Resouces Group LLC, a Nevada Limited Liability Company, Trustee of the Rollingstone Drive Trust dated 01/25/2012 who acquired title as Rollingstone Drive Trust

FOR VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, do(es) hereby Grant, Bargain, Sell and

Convey to Resources Group LLC, a Nevada Limited Liability Company as Trustee of the Bourne Valley Court Trust dated 05/04/2012

all that real property situated in Clark County, State of Nevada, bounded and described as follows:

PARCEL I:

LOT NINETEEN (19) OF GLENVIEW WEST TOWNHOMES, AS SHOWN BY MAP THEREOF ON FILE IN BOOK 30 OF PLATS, PAGE 65, IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA.

PARCEL II:

AN EASEMENT FOR INGRESS AND EGRESS OVER THE COMMON AREA AND PRIVATE STREETS AS SHOWN BY MAP THEREOF ON FILE IN BOOK 30 OF PLATS, PAGE 65, IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA.

SUBJECT TO:1. Taxes for the fiscal year 2011-2012

2. Covenants, Conditions, Reservations, Rights, Rights of Way and Easements now of record.

Together with all and singular tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

DATED: May 29, 2012

STATE OF NV

COUNTY OF Clark

I, Krysta Sitko, a Notary Public of the County and State first above written, do hereby certify that Iyad Haddad personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal, this the 29th of May 2012

Notary Public: Krysta Sitko

My Commission Expires: 4/12/16

(SEAL)

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
KRYSTA SITKO
Appt. No. 04-88388-1
My Appt. Expires April 12, 2016

Rollingstone Drive Trust dated 01/25/2012

By: Resources Group LLC, a Nevada Limited Liability Company

BY: _____
Iyad Haddad, Manager

STATE OF NEVADA
DECLARATION OF VALUE

1. Assessor Parcel Number(s)

a) 163-24-111-021
b) _____
c) _____
d) _____

2. Type of Property:

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

FOR RECORDERS OPTIONAL USE ONLY
Book: _____ **Page:** _____
Date of Recording: _____
Notes: Cert of Trust 5

3. a) Total Value/Sales Price of Property $ _____
b) Deed in Lieu of Foreclosure Only (value of property) $ _____
c) Transfer Tax Value: $ _____
d) Real Property Tax Due $ 0.00

4. If Exemption Claimed:
a) Transfer Tax Exemption, per NRS 375.090, Section: 7
b) Explain Reason for Exemption: TRUST TO TRUST WITHOUT CONSIDERATION

5. Partial Interest: Percentage being transferred: 100.00%

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:** Grantee

SELLER (GRANTOR) INFORMATION (Required)		**BUYER (GRANTEE) INFORMATION** (Required)	
Print Name:	Rollingstone Drive Trust dated 01/25/2012	**Print Name:**	Bourne Valley Court Trust
Address:	900 S. Las Vegas Blvd #810	**Address:**	900 S. Las Vegas Blvd #810
City, State, Zip:	Las Vegas, NV 89101	**City, State, Zip:**	Las Vegas, NV 89101

COMPANY/PERSON REQUESTING RECORDING (required if not the seller or buyer)
Fidelity National Title Agency of Nevada, Inc. **Escrow #: FT13-FT00000442-LC**
3100 W Sahara Avenue #115
Las Vegas, NV 89102

(AS A PUBLIC RECORD THIS FORM MAY BE RECORDED/MICROFILMED)

EXHIBIT 3

EXHIBIT 3

DAVID ALESSI*

THOMAS BAYARD *

ROBERT KOENIG**

RYAN KERBOW***

* Admitted to the California Bar

** Admitted to the California, Nevada and Colorado Bar

*** Admitted to the Nevada and California Bar

ALESSI & KOENIG

A Multi-Jurisdictional Law Firm

9500 W. Flamingo Road, Suite 100
Las Vegas, Nevada 89147
Telephone: 702-222-4033
Facsimile: 702-222-4043
www.alessikoenig.com

ADDITIONAL OFFICES

AGOURA HILLS CA
PHONE: 818-735-9600

RENO NV
PHONE: 775-626-2323

DIAMOND BAR CA
PHONE: 909-861-8300

December 20, 2010

LIEN LETTER

VIA REGULAR AND CERTIFIED MAIL

EDWARDS GEORGE R TRUST
4254 ROLLINGSTONE DR
LAS VEGAS, NV 89103

Re: Glenview West Townhomes Association/4254 ROLLINGSTONE DR/HO #24230

Dear EDWARDS GEORGE R TRUST ;

Our office has been retained by **Glenview West Townhomes Association** to collect the past due assessment balance on your account. Please find the enclosed Notice of Delinquent Assessment (Lien), signed and dated on behalf of **Glenview West Townhomes Association** on **December 20, 2010**. The total amount due by **January 24, 2011 is $2,460.00.** Please note that the total amount due may differ from the amount shown on the enclosed lien. Please submit payment to our **Nevada** mailing address listed above by **January 24, 2011**. Payment must be in the form of a cashier's check or money order and made payable to **Alessi & Koenig.**

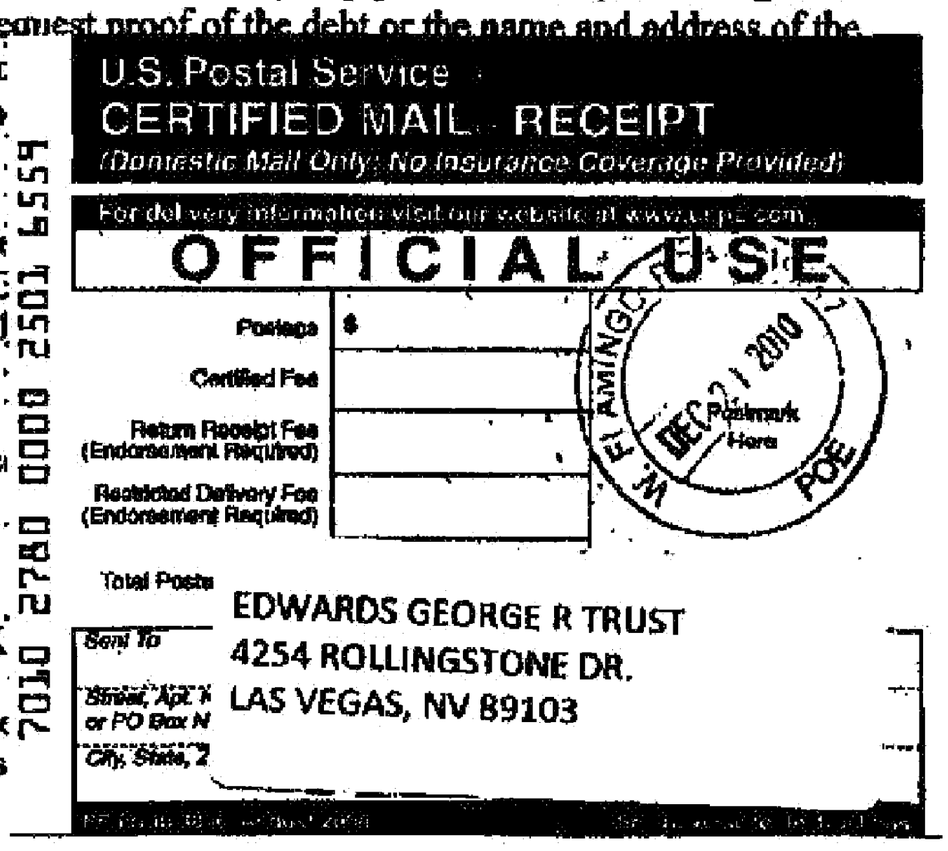
Unless you, within thirty days after receipt of this notice, dispute the validity of this debt, or any portion thereof, our office will assume the debt is valid. If you notify our office in writing within the thirty-day period that the debt, or any portion thereof, is disputed, we will obtain verification of the debt and a copy of such verification will be mailed to you. Upon receipt of your written request within the thirty-day period, we will provide you with the name and address of the original creditor, if different from the current creditor. Please note the law does not require me to wait until the end of the thirty-day period before proceeding to the next step in the collection process. If, however, you request proof of the debt or the name and address of the original creditor within the thirty-day period that begi
to suspend my efforts to collect the debt until I mail th
you have the right to inspect the association records.

In the event Alessi & Koenig, LLC does not r
costs of **$2,460.00** by **January 24, 2011**, a Notice of E
Recorder; resulting in additional fees and costs. Shoul
ownership of your property.

Sinc

ALESSI & K

Please be advised that Alessi & Koenig, LLC is a debt colk
obtained will be us



When recorded return to:

ALESSI & KOENIG, LLC
9500 W. Flamingo Rd., Suite 100
Las Vegas, Nevada 89147
Phone: (702) 222-4033

A.P.N. **163-24-111-021** Trustee Sale # **24230-4254**

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, **Glenview West Townhomes Association** has a lien on the following legally described property.

The property against which the lien is imposed is commonly referred to as **4254 ROLLINGSTONE DR , LAS VEGAS, NV 89103** and more particularly legally described as: **LOT 19** Book **30** Page **65** in the County of **Clark**.

The owner(s) of record as reflected on the public record as of today's date is (are): **EDWARDS GEORGE R TRUST**

The mailing address(es) is: **4254 ROLLINGSTONE DR, LAS VEGAS, NV 89103**

The total amount due through today's date is: **$2,330.00**. Of this total amount **$2,280.00** represent Collection and/or Attorney fees, assessments, interest, late fees and service charges. **$50.00** 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: **December 20, 2010**

By: _____
Mary Indalecio – Legal Assistant
Alessi & Koenig, LLC on behalf of **Glenview West Townhomes Association**

State of Nevada
County of Clark
SUBSCRIBED and SWORN before me **December 20, 2010**

(Seal) (Signature)

_____
NOTARY PUBLIC

EXHIBIT 4

EXHIBIT 4

Inst #: 201101040005412
Fees: $14.00
N/C Fee: $0.00
01/04/2011 09:46:04 AM
Receipt #: 631834
Requestor:
ALESSI & KOENIG LLC (JUNES
Recorded By: BGN Pgs: 1
DEBBIE CONWAY
CLARK COUNTY RECORDER

When recorded return to:

ALESSI & KOENIG, LLC
9500 W. Flamingo Rd., Suite 100
Las Vegas, Nevada 89147
Phone: (702) 222-4033

A.P.N. 163-24-111-021 Trustee Sale # **24230-4254**

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, **Glenview West Townhomes Association** has a lien on the following legally described property.

The property against which the lien is imposed is commonly referred to as **4254 ROLLINGSTONE DR , LAS VEGAS, NV 89103** and more particularly legally described as: **LOT 19** Book **30** Page **65** in the County of **Clark**.

The owner(s) of record as reflected on the public record as of today's date is (are): **EDWARDS GEORGE R TRUST**

The mailing address(es) is: **4254 ROLLINGSTONE DR, LAS VEGAS, NV 89103**

The total amount due through today's date is: **$2,330.00**. Of this total amount **$2,280.00** represent Collection and/or Attorney fees, assessments, interest, late fees and service charges. **$50.00** 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: **December 20, 2010**

By: _____
Mary Indalecio – Legal Assistant
Alessi & Koenig, LLC on behalf of **Glenview West Townhomes Association**

State of Nevada
County of Clark
SUBSCRIBED and SWORN before me **December 26, 2010**

(Seal)

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

(Signature) _____
NOTARY PUBLIC

USB451

EXHIBIT 5

EXHIBIT 5

EDWARDS GEORGE R TRUST
4254 ROLLINGSTONE DR

LAS VEGAS, NV 89103

REPUBLIC SERVICES
ACCT# [redacted]308
PO BOX 98508
LAS VEGAS, NV 89193-8508

US RECORDINGS
2925 COUNTRY DRIVE STE. 201

ST. PAUL, MN 55117

LAW OFFICE OF AJ KUN, LTD
1020 GARCES AVE ,STE 200

LAS VEGAS, NV 89101

ROBERT HAZELL
14983 MAMMOTH PL

FONTANA, CA 92336

7010 1670 0002 4330 7092

U.S. Postal Service
CERTIFIED MAIL... RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)
For delivery information, visit our website at www.usps.com
OFFICIAL USE

Postage $
Certified Fee
Return Receipt Fee (Endorsement Required)
Restricted Delivery Fee (Endorsement Required)

W. FLAMINGO ROAD 89147
APR 5 2011
Postmark Here
POE

EDWARDS GEORGE R TRUST
4254 ROLLINGSTONE DR

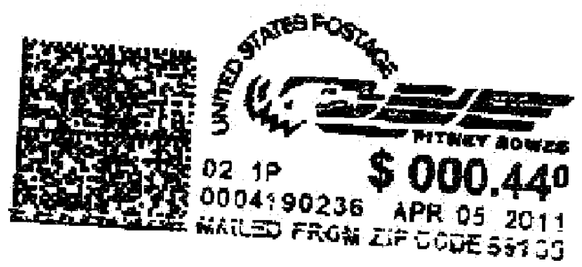
LAS VEGAS, NV 89103

PS

A&K000044

USB0075

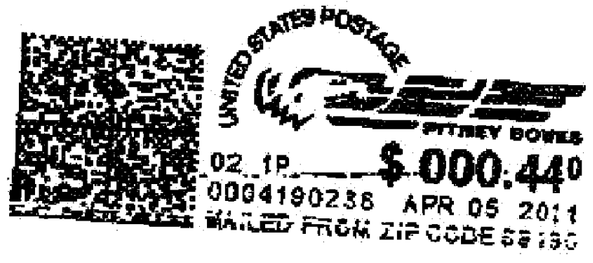
ALLEN
KORNIG
9500 W. Flamingo Rd. Suite 100
Las Vegas, NV 89147



ROBERT HAZELL
14983 MAMMOTH PL

FONTANA, CA 92336

ALLEN
KORNIG
9500 W. Flamingo Rd. Suite 100
Las Vegas, NV 89147



US RECORDINGS
2925 COUNTRY DRIVE STE. 201

ST. PAUL, MN 55117

A&K000045

USB0076

APP000416

When recorded mail to:

THE ALESSI & KOENIG, LLC
9500 West Flamingo Rd., Ste 100
Las Vegas, Nevada 89147
Phone: 702-222-4033

Inst #: 201103290002690
Fees: $14.00
N/C Fee: $0.00
03/29/2011 09:54:46 AM
Receipt #: 720898
Requestor:
ALESSI & KOENIG LLC (JUNES
Recorded By: EAH Pgs: 1
DEBBIE CONWAY
CLARK COUNTY RECORDER

A.P.N. 163-24-111-021 Trustee Sale No. 24230-4254

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 **$3,800.00** as of **March 2, 2011** and will increase until your account becomes current. To arrange for payment to stop the foreclosure, contact: **Glenview West Townhomes Association**, c/o Alessi & Koenig, 9500 W. Flamingo Rd, Ste 100, Las Vegas, NV 89147.

THIS NOTICE pursuant to that certain Assessment Lien, recorded on **January 4, 2011** as document number **0005412**, of Official Records in the County of **Clark**, State of Nevada. Owner(s): **EDWARDS GEORGE R TRUST** , of **LOT 19**, as per map recorded in Book **30**, Pages **65**, as shown on the Plan, Recorded on as document number as shown on the Subdivision map recorded in Maps of the County of **Clark**, State of Nevada. PROPERTY ADDRESS: **4254 ROLLINGSTONE DR, LAS VEGAS, NV 89103**. 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 The Alessi & Koenig is appointed trustee agent under the above referenced lien, dated **January 4, 2011**, executed by **Glenview West Townhomes Association** 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 and all subsequent assessments, late charges, interest, collection and/or attorney fees and costs.

Dated: **March 2, 2011**

Mary Indalecio, Alessi & Koenig, LLC on behalf of **Glenview West Townhomes Association**

ALLEN KORNBERG

9500 W. Flamingo Rd. Suite 100
Las Vegas, NV 89147

UNITED STATES POSTAGE PITNEY BOWES
02 1P $ 000.44⁰
0004190236 APR 05 2011
MAILED FROM ZIP CODE 89135

REPUBLIC SERVICES
ACC[redacted]308
PO BOX 98506
LAS VEGAS, NV 89193-8506

ALLEN KORNBERG

9500 W. Flamingo Rd. Suite 100
Las Vegas, NV 89147

UNITED STATES POSTAGE PITNEY BOWES
02 1P $ 000.44⁰
0004190236 APR 05 2011
MAILED FROM ZIP CODE 89135

LAW OFFICE OF AJ KUN, LTD
1020 GARCES AVE ,STE 200

LAS VEGAS, NV 89101

A&K000047

USB0078

*See

www.eppraisal.com

A&K000048

USB0079

EXHIBIT 6

EXHIBIT 6

Inst #: 201110130001535
Fees: $14.00
N/C Fee: $0.00
10/13/2011 09:49:20 AM
Receipt #: 945329
Requestor:
ALESSI & KOENIG LLC (JUNES
Recorded By: OSA 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: **163-24-111-021** TSN **24230-4254**

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 The 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 16, 2011**, Alessi & Koenig as duly appointed Trustee pursuant to a certain lien, recorded on **January 4, 2011**, as instrument number **0005412**, 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: **4:00 P.M. at 930 S. 4th Street, Las Vegas Nevada 89101.**

The street address and other common designation, if any, of the real property described above is purported to be: **4254 ROLLINGSTONE DR, LAS VEGAS, NV 89103.** The owner of the real property is purported to be: **EDWARDS GEORGE R TRUST**

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 **$5,370.00.** Payment must be in cash, a cashier's check drawn on a state or national bank, a check drawn by a state bank or federal credit union, or a check drawn by a state or federal savings and loan association, savings association, or savings bank specified in section 5102 of the Financial Code and authorized to do business in this state.

Date: **September 16, 2011** Ryan Kerbow

By: Ryan Kerbow, Esq on behalf of Glenview West Townhomes Association

USB462

EXHIBIT 7

EXHIBIT 7

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

APN: **163-24-111-021** TSN **24230-4254**

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 The 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 16, 2011**, Alessi & Koenig as duly appointed Trustee pursuant to a certain lien, recorded on **January 4, 2011**, as instrument number **0005412**, 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: **4:00 P.M. at 930 S. 4th Street, Las Vegas Nevada 89101.**

The street address and other common designation, if any, of the real property described above is purported to be: **4254 ROLLINGSTONE DR, LAS VEGAS, NV 89103.** The owner of the real property is purported to be: **EDWARDS GEORGE R TRUST**

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 **$5,370.00**. Payment must be in cash, a cashier's check drawn on a state or national bank, a check drawn by a state bank or federal credit union, or a check drawn by a state or federal savings and loan association, savings association, or savings bank specified in section 5102 of the Financial Code and authorized to do business in this state.

Date: **September 16, 2011** Ryan Kerbow

By: Ryan Kerbow, Esq on behalf of Glenview West Townhomes Association

24230

GEORGE R. EDWARDS, TRUSTEE, GEOR
4254 ROLLINGSTONE DR

LAS VEGAS, NV 89103-3407

REPUBLIC SERVICES
ACCT# [redacted]1306
PO BOX 98508
LAS VEGAS, NV 89193-8508

LAW OFFICES OF LES ZIEVE
T.S. NO. 10-11871
18377 BEACH BLVD. SUITE 210

HUNTINGTON BEACH, CA 92648

U.S. BANK TRUST COMPANY, NATIONAL
CLARK CO.NV INST NO. 20090326-
111 SW FIFTH AVE

PORTLAND, OR 97204

US RECORDINGS
CLARK CO.NV INST NO. 20090326-
2925 COUNTRY DRIVE STE. 201

ST. PAUL, MN 55117

LAW OFFICE OF AJ KUN, LTD
1020 GARCES AVE, STE 200

LAS VEGAS, NV 89101

SOUTHWEST FINANCIAL SERVICES LTD
CLARK CO.NV INST NO. 20090326-
537 E. PETE ROSE WAY, SUITE 300

CINCINNATI, OH 45202

OMBUDSMANS OFFICE
251 E. SAHARA AVE #205
LAS VEGAS NV 89104
RE: GORDAN MILDEN

ROBERT HAZELL
14983 MAMMOTH PL

FONTANA, CA 92336

GEORGE R. EDWARDS
4254 ROLLINGSTONE DR

LAS VEGAS, NV 89103-3407

U.S. BANK NATIONAL ASSOCIATION ND
CLARK CO.NV INST NO. 20090326-
4325 17TH AVENUE, SW

FARGO, ND 58103

NOTS MAILINGS

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)
For delivery information visit our website at www.usps.com.
OFFICIAL USE
Postage $
Certified Fee
Return Receipt Fee (Endorsement Required)
Restricted Delivery Fee (Endorsement Required)
Total Postage & Fees $
Postmark Here
W. FLAMINGO ROAD 89147
POE
Sent To GEORGE R. EDWARDS, TRUSTEE, GEOR
Street, Apt. No.; or PO Box No. 4254 ROLLINGSTONE DR
City, State, ZIP+4 LAS VEGAS, NV 89103-3407
PS Form 3800, August 2006 See Reverse for Instructions
7011 1570 0002 4882 1444

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)
For delivery information visit our website at www.usps.com.
OFFICIAL USE
Postage $
Certified Fee
Return Receipt Fee (Endorsement Required)
Restricted Delivery Fee (Endorsement Required)
Total Postage & Fees $
Postmark Here
W. FLAMINGO ROAD 89147
POE
Sent To US RECORDINGS
Street, Apt. No.; or PO Box No. CLARK CO.NV INST NO. 20090326-
City, State, ZIP+4 2925 COUNTRY DRIVE STE. 201
ST. PAUL, MN 55117
PS Form 3800, August 2006 See Reverse for Instructions
7011 1570 0002 4882 1406

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)
For delivery information visit our website at www.usps.com.
OFFICIAL USE
Postage $
Certified Fee
Return Receipt Fee (Endorsement Required)
Restricted Delivery Fee (Endorsement Required)
Total Postage & Fees $
Postmark Here
W. FLAMINGO ROAD 89147
POE
Sent To ROBERT HAZELL
Street, Apt. No.; or PO Box No. 14983 MAMMOTH PL
City, State, ZIP+4 FONTANA, CA 92336
PS Form 3800, August 2006 See Reverse for Instructions
7011 0470 0001 1873 2468

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)
For delivery information visit our website at www.usps.com.
OFFICIAL USE
Postage $
Certified Fee
Return Receipt Fee (Endorsement Required)
Restricted Delivery Fee (Endorsement Required)
Total Postage & Fees $
Postmark Here
W. FLAMINGO ROAD 89147
POE
Sent To REPUBLIC SERVICES
Street, Apt. No.; or PO Box No. ACCT# [redacted]308
City, State, ZIP+4 PO BOX 98508
LAS VEGAS, NV 89193-8508
PS Form 3800, August 2006 See Reverse for Instructions
7011 1570 0002 4882 1437

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)
For delivery information visit our website at www.usps.com.
OFFICIAL USE
Postage $
Certified Fee
Return Receipt Fee (Endorsement Required)
Restricted Delivery Fee (Endorsement Required)
Total Postage & Fees $
Postmark Here
W. FLAMINGO ROAD 89147
POE
Sent To LAW OFFICE OF AJ KUN, LTD
Street, Apt. No.; or PO Box No. 1020 GARCES AVE, STE 200
City, State, ZIP+4 LAS VEGAS, NV 89101
PS Form 3800, August 2006 See Reverse for Instructions
7011 1570 0002 4882 1390

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)
For delivery information visit our website at www.usps.com®
OFFICIAL USE

7011 0470 0001 1871 2451

Postage $
Certified Fee
Return Receipt Fee (Endorsement Required)
Restricted Delivery Fee (Endorsement Required)
Total Postage & Fees $

Postmark Here

Sent To: GEORGE R. EDWARDS
Street, Apt. No.; or PO Box No.: 4254 ROLLINGSTONE DR
City, State, ZIP+4: LAS VEGAS, NV 89103-3407

PS Form 3800, August 2006 See Reverse for Instructions

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)
For delivery information visit our website at www.usps.com®
OFFICIAL USE

7011 1570 0002 4887 1420

Postage $
Certified Fee
Return Receipt Fee (Endorsement Required)
Restricted Delivery Fee (Endorsement Required)
Total Postage & Fees $

Postmark Here

Sent To: LAW OFFICES OF LES ZIEVE
Street, Apt. No.; or PO Box No.: T.S. NO. 10-11871
City, State, ZIP+4: 18377 BEACH BLVD, SUITE 210
HUNTINGTON BEACH, CA 92648

PS Form 3800, August 2006 See Reverse for Instructions

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)
For delivery information visit our website at www.usps.com®
OFFICIAL USE

7011 0470 0001 1871 2475

Postage $
Certified Fee
Return Receipt Fee (Endorsement Required)
Restricted Delivery Fee (Endorsement Required)
Total Postage & Fees $

Postmark Here

Sent To: SOUTHWEST FINANCIAL SERVICES LTD
Street, Apt. No.; or PO Box No.: CLARK CO.NV INST NO. 20090328-
City, State, ZIP+4: 537 E. PETE ROSE WAY, SUITE 300
CINCINNATI, OH 45202

PS Form 3800, August 2006 See Reverse for Instructions

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)
For delivery information visit our website at www.usps.com®
OFFICIAL USE

7011 0470 0001 1871 2482

Postage $
Certified Fee
Return Receipt Fee (Endorsement Required)
Restricted Delivery Fee (Endorsement Required)
Total Postage & Fees $

Postmark Here

Sent To: U.S. BANK NATIONAL ASSOCIATION ND
Street, Apt. No.; or PO Box No.: CLARK CO.NV INST NO. 20090328-
City, State, ZIP+4: 4325 17TH AVENUE, SW
FARGO, ND 58103

PS Form 3800, August 2006 See Reverse for Instructions

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)
For delivery information visit our website at www.usps.com®
OFFICIAL USE

7011 1570 0002 4887 1413

Postage $
Certified Fee
Return Receipt Fee (Endorsement Required)
Restricted Delivery Fee (Endorsement Required)
Total Postage & Fees $

Postmark Here

Sent To: U.S. BANK TRUST COMPANY, NATIONAL
Street, Apt. No.; or PO Box No.: CLARK CO.NV INST NO. 20090328-
City, State, ZIP+4: 111 SW FIFTH AVE
PORTLAND, OR 97204

PS Form 3800, August 2006 See Reverse for Instructions

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)
For delivery information visit our website at www.usps.com®
OFFICIAL USE

7011 1570 0002 4887 1451

Postage $
Certified Fee
Return Receipt Fee (Endorsement Required)
Restricted Delivery Fee (Endorsement Required)
Total Postage & Fees $

Postmark Here

Sent To: OMBUDSMANS OFFICE
Street, Apt. No.; or PO Box No.: 251 E. SAHARA AVE #205
City, State, ZIP+4: LAS VEGAS NV 89104
RE: GORDAN MILDEN

PS Form 3800, August 2006 See Reverse for Instructions

A&K000052

USB0083

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

APN: 163-24-111-021 **TSN 24230-4254**

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 The 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 16, 2011**, Alessi & Koenig as duly appointed Trustee pursuant to a certain lien, recorded on **January 4, 2011**, as instrument number **0005412**, 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: **4:00 P.M. at 930 S. 4th Street, Las Vegas Nevada 89101.**

The street address and other common designation, if any, of the real property described above is purported to be: **4254 ROLLINGSTONE DR, LAS VEGAS, NV 89103.** The owner of the real property is purported to be: **EDWARDS GEORGE R TRUST**

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 **$5,370.00.** Payment must be in cash, a cashier's check drawn on a state or national bank, a check drawn by a state bank or federal credit union, or a check drawn by a state or federal savings and loan association, savings association, or savings bank specified in section 5102 of the Financial Code and authorized to do business in this state.

Date: **September 16, 2011** Ryan Kerbow

By: Ryan Kerbow, Esq on behalf of Glenview West Townhomes Association

EXHIBIT 8

EXHIBIT 8

AFFIDAVIT OF DAVID ALESSI, ESQ. AS CUSTODIAN OF RECORDS FOR ALESSI & KOENIG, LLC

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

NOW COMES, DAVID ALESSI, ESQ., who after first being duly sworn, deposes and says:

1. That Affiant is the Managing Partner of Alessi & Koenig, LLC and in his capacity as Managing Partner is a Custodian of the Records of Alessi & Koenig, LLC.

2. That Alessi & Koenig, LLC is licensed to do business as a law firm in the State of Nevada.

3. That on the 14th day October, 2015, Affiant was served with a Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in connection with the case entitled *U.S. BANK NATIONAL ASSOCIATION ND v, GEORGE R. EDWARDS;, et al.* (case no. A-12-667690-C), calling for the production of records pertaining to:

1. Copies of any and all documents in your possession concerning or relating to the real property commonly known as 4254 Rollingstone Drive, Las Vegas, NV 89103 (APN #163-24-111-021) (the "Property") from January 1, 2011 to present.

2. Copies of any and all documents in your possession concerning or relating to the foreclosure sale of the Property conducted by you on behalf of Glenview West Townhomes Association, which occurred on or about January 25, 2012.

3. Copies of any and all documents in your possession concerning or relating to any and all notices of delinquent assessment lien prepared, recorded, or mailed by you on the behalf of Glenview West Townhomes Association concerning the Property from January 1, 2011, to the present. This includes but is not limited to books, records, and

other tangible things which demonstrate an accounting of the purported unpaid debt on the Property from January 1, 2011 to present, including the nature of the assessments, fines, and penalties which make up this amount.

4. Copies of any and all documents in your possession concerning or relating to any and all notices of default prepared, recorded, or mailed by you on the behalf of Glenview West Townhomes Association, concerning the Property from January 1, 2011, to the present. This includes but is not limited to books, records, and other tangible things which demonstrate nan accounting of the purported unpaid debt on the Property from January 1, 2011 to present, including the nature of the assessments, fines, and penalties which make up the amount purportedly in default.

5. Copies of any and all documents in your possession concerning or relating to any and all notices of sale prepared, recorded, or mailed by you on the behalf of Glenview West Townhomes Association concerning the Property from January 1, 2011, to the present. This includes but is not limited to books, records, and other tangible things which demonstrate an accounting of the purported unpaid debt on the Property from January 1, 2011 to present, including the nature of the assessments, fines, and penalties which make up the amount

6. Copies of any and all documents evidencing correspondence between you and Glenview West Townhomes Association, concerning the Property from January 1, 2011, to the present. This includes but is not limited to letters, emails, and transcribed telephone calls.

7. Copies of any and all documents evidencing your compliance with preparing and adopting a periodic budget pursuant to NRS 116.3115 from January 1, 2011, to

the present.

8. Copies of any and all documents evidencing your compliance with preparing and adopting a periodic budget pursuant to NRS 116.31151 from January 1, 2011, to the present.

9. Copies of any and all documents evidencing correspondence between you and any mortgage lender or servicer concerning the Property from January 1, 2011, to the present. This includes but is not limited to letters, emails, and transcribed telephone calls.

4. That Affiant has examined the original of those records and has made or caused to be made a true and exact copy of them and that the reproduction of them attached hereto is true and complete, except for those records which are subject to attorney-client privilege and/or other valid privilege or objection.

5. That the original of those records was made at or near the time of the act, event, condition, opinion or diagnosis recited therein by or from information transmitted by a person with knowledge, in the course of a regularly conducted activity of Affiant or Alessi & Koenig, LLC.

FURTHER AFFIANT SAYETH NAUGHT.

DAVID ALESSI, ESQ.,
Affiant

SUBSCRIBED AND SWORN before me this 19th day of November, 2015.

Notary Public, in and for said
County and State.

NOTARY PUBLIC
HEIDI A. HAGEN
STATE OF NEVADA - COUNTY OF CLARK
MY APPOINTMENT EXP. MAY 17, 2017
No: 13-10629-1

EXHIBIT 9

EXHIBIT 9

LAW OFFICES OF LES ZIEVE
Benjamin D. Petiprin, Esq. (NV Bar 11681)
Sherry A. Moore, Esq. (NV Bar 11215)
3753 Howard Hughes Parkway, Suite 200
Las Vegas, Nevada 89169
Tel: (702) 948-8565
Fax: (702) 446-9898

Attorneys for Plaintiff U.S. Bank National Association, ND

EIGHTH JUDCIAL DISTRICT COURT

CLARK COUNTY, NEVADA

U.S. BANK NATIONAL ASSOCIATION, ND, a national association

Plaintiff,

vs.

GEORGE R. EDWARDS, an individual; ANY AND ALL PERSONS UNKNOWN, CLAIMING TO BE PERSONAL REPRESENTATIVES OF GEORGE R. EDWARDS ESTATE, OR DULY APPOINTED, QUALIFIED, AND ACTING EXECUTOR OF THE WILL OF THE ESTATE OF GEORGE R. EDWARDS; RESOURCES GROUP, LLC, a Nevada Limited Liability Company; GLENVIEW WEST TOWNHOMES ASSOCIATION, a Nevada non-profit corporation; DOES 4 through inclusive; and ROES 1 through 10 inclusive

Defendants.

RESOURCES GROUP, LLC,

Counter-claimant,

vs

U.S. BANK NATIONAL ASSOCIATION, ND, a national association

Counter-defendant.

CASE NO.: A-12-667690-C

DEPT. NO.: XVI

RESPONSES AND OBJECTIONS OF PLAINTIFF TO INTERROGATORIES PROPOUNDED BY DEFENDANT RESOURCES GROUP, LLC

PROPOUNDING PARTY: RESOURCES GROUP, LLC

RESPONDING PARTY: U.S. BANK NATIONAL ASSOCIATION, ND

PRELIMINARY STATEMENT

Pursuant to Nevada Rule of Civil Procedure Section 34, Plaintiff U.S. Bank National Association, ND ("US BANK" or "Responding Party"), responds to the Defendant's First Set of Interrogatories ("Request"), propounded by Resources Group, LLC ("Defendant" or "Propounding Party").

Each response set forth herein, is subject to the stated limitations and to this Preliminary Statement, and is as complete as the information reasonably available to Responding Party as of the date of these responses. Responding Party's pre-trial discovery, investigation, and analysis are continuing, and Responding Party may learn of additional information subsequent to the date of these responses. The responses set forth herein are subject to being amended with information and documents subsequently discovered, inadvertently omitted, or mistakenly identified in these initial responses. Moreover, as discovery, investigation, and legal research progress, new facts may be discovered and previously known facts may take on new meaning or significance, thereby changing any conclusions, opinions, representations, objections, and/or statements made herein.

All evidentiary objections shall be reserved for the time of trial and no waiver of any objection is to be implied from this Response or any production made pursuant hereto. By this Response and the ensuing production, Responding Party is not making any writing admissible at the time of trial which would otherwise be inadmissible.

To the extent that this Response or any production pursuant hereto might waive, whether implicitly or explicitly, any otherwise assertable objection to discovery, such waiver shall be limited to this Response and to the ensuing production only, and shall not extend to any further requests for production or to any discovery proceedings or to any requests or subpoenas for the production of any such writings at the time of trial.

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To the extent that all or any of the requests seek information and/or documents subject to the attorney-client privilege then the Responding Party asserts the attorney-client and/or work product privileges to each of such requests as appropriate and to the extent necessary to avoid a waiver of such privileges.

Responding Party responds to each and every discovery request subject to the foregoing, and each of the foregoing statements and objections are incorporated by reference into each of the following responses.

INTERROGATORY NO. 1:

State the name, address, and phone number for each person who you intend to call as a witness in the trial in this case.

RESPONSE TO INTERROGATORY NO. 1:

Objection. This interrogatory is unreasonably burdensome, oppressive, and overbroad. Without waiving these objections, Responding Party refers Propounding Party to the witnesses identified in its 16.1 Initial Disclosures. Responding Party reserves the right to supplement this response at a later date.

INTERROGATORY NO. 2:

For each person identified by you in interrogatory number 1, please give a brief description of the testimony you anticipate that each witness will give at the trial in this case.

RESPONSE TO INTERROGATORY NO. 2:

See Response to Interrogatory No. 1.

INTERROGATORY NO. 3:

State the name, address, and phone number, and the area of expertise for each expert you have consulted regarding this case.

RESPONSE TO INTERROGATORY NO. 3:

N/A.

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INTERROGATORY NO. 4:

State the name, address, and phone number, and area of expertise for each expert you have retained as a witness to testify in the trial in this case.

RESPONSE TO INTERROGATORY NO. 4:

N/A.

INTERROGATORY NO. 5:

For each expert witness identified by you in interrogatory number 4, please give a brief description of the testimony you anticipate that each expert witness will give at the trial in this case.

RESPONSE TO INTERROGATORY NO. 5:

N/A.

INTERROGATORY NO. 6:

Identify each document or other exhibit you intend to introduce in evidence in the trial of this case.

RESPONSE TO INTERROGATORY NO. 6:

Responding Party refers Propounding Party to the exhibits attached to its Complaint, Second Amendment to Complaint, the exhibits attached to its 16.1 Initial Disclosures, the exhibits attached to its Supplemental Disclosures, its Response to Request for Production No. 1 served contemporaneously herewith, and any document or other exhibit Defendant Resources Group, LLC shall introduce in evidence in trial. Responding Party reserves the right to supplement this response at a later date.

INTERROGATORY NO. 7:

Please state the amount of damages you will be seeking at trial.

RESPONSE TO INTERROGATORY NO. 7:

Responding Party refers Propounding Party to its Complaint.

INTERROGATORY NO. 8:

Please explain the basis for each item of damages you will be seeking at trial.

RESPONSE TO INTERROGATORY NO. 8:

See Response to Interrogatory No. 7.

INTERROGATORY NO. 9:

Please explain what efforts, if any, you have made to mitigate your damages in this case.

RESPONSE TO INTERROGATORY NO. 9:

N/A.

INTERROGATORY NO. 10:

To the extent you answered any of the Requests for Admissions served upon you contemporaneously herewith, anything other than an unqualified "Admit," then for each and every such answer, set forth the specific basis or grounds for your answer, whether you are aware of any information, facts, writings or evidence whatsoever relating to this litigation that either supports or contradicts your answer, and the identity of all persons who have any knowledge or information which either supports or contradicts each of your answers which are not an unqualified admission.

RESPONSE TO INTERROGATORY NO. 10:

Objection. This interrogatory is also unreasonably burdensome, oppressive, and overbroad. Without waiving these objections, Plaintiff directs Defendant to the documents produced with Plaintiff's responses to request for production of documents, the documents attached as exhibits in Plaintiff's Complaint for judicial foreclosure of deed of trust, Second Amendment to Complaint, the documents submitted in Plaintiff's initial disclosure of witnesses and documents pursuant to NRCP 16.1, and the documents submitted in Plaintiff's Supplemental Disclosures. U.S. Bank is the custodian of records for the security instruments that are the subject of the instant action. U.S. Bank may be contacted through counsel the Law Offices of Les Zieve.

INTERROGATORY NO. 11:

Identify the facts, information and evidence of which you are aware that supports each

affirmative defense claimed in your answer.

RESPONSE TO INTERROGATORY NO. 11:

First, the sale is commercially unreasonable and void because it is commercially unreasonable that a sale for the amount of $5,331.00 could extinguish a Deed of Trust in the original amount of $50,000.00. Additionally, per a Broker's Price Opinion dated as of February 6, 2012, which was around the time of the HOA sale date of January 25, 2012, the approximate value of the Property was at least $62,500.00. Therefore, it is wholly unreasonable that a HOA sale can extinguish a first position Deed of Trust for an amount that is nowhere near the fair market value of the Property at the time of the sale.

Second, the sale is void because the HOA did not provide proper notice of the super-priority portion of the lien to U.S. Bank.

Third, Defendant is not a bona fide purchaser for value because it had constructive notice that U.S. Bank's security interest was still of record and did nothing to ensure U.S. Bank was paid in full to effectuate a reconveyance of its security interest. Defendant also had actual notice of the contentious state of the law at the time of the HOA sale, i.e. that the state of the law at the time of the foreclosure sale was that a HOA sale could not extinguish a first position deed of trust. Therefore, Defendant knew or should have known that the purchase of the subject real property could, and actually did, result in litigation.

Fourth, NRS Chapter 116 is void because it is vague and thus facially unconstitutional, as it does not provide for actual notice to a first position deed of trust holder prior to the foreclosure of any HOA.

Fifth, the sale is void because the HOA has not produced any documentation in response to U.S. Bank's subpoena request demonstrating that it complied with the mandatory budget provisions of NRS 116.3115.

In support of these factual assertions, Responding Party refers Propounding Party to the exhibits attached to its Complaint, Second Amendment to Complaint, the exhibits attached to its 16.1 Initial Disclosures, the exhibits attached to its Supplemental Disclosures, its Response

to Request for Production No. 1 served contemporaneously herewith. Responding Party reserves the right to supplement this response at a later date.

INTERROGATORY NO. 12:

Identify the facts, information and evidence of which you are aware that supports or contradicts your assertion that you were not properly noticed of the Association foreclosure sale.

RESPONSE TO INTERROGATORY NO. 12:

See Response to Interrogatory No. 11.

INTERROGATORY NO. 13:

Identify all communications between you and the Association and/or the Association's agents regarding the Property.

RESPONSE TO INTERROGATORY NO. 13:

Objection. This interrogatory seeks information that is not reasonably calculated to lead to the discovery of relevant or admissible evidence, as it is not Responding Party's responsibility to ensure that Borrower makes all payments to the HOA and a lender need only tender payment of the super-priority amount after receiving proper notice of same to protect its lien interest. Due to the HOA's failure to provide proper notice of the super priority amount to either Responding Party or its predecessor in interest, no action could be taken to tender payment of the super-priority portion of the HOA's lien.

INTERROGATORY NO. 14:

Identify any pooling and servicing agreement and/or servicing guidelines applicable to your security interest in the Property, including any pooling and servicing agreements for prior servicers.

RESPONSE TO INTERROGATORY NO. 14:

Objection. This interrogatory seeks information that is not reasonably calculated to lead to the discovery of relevant or admissible evidence, and seeks information that is equally

available to the Propounding Party. Responding Party reserves the right to supplement this response at a later date.

INTERROGATORY NO. 15:

Identify all communications between you and the current and any prior servicer of your loan regarding any association lien on the Property.

RESPONSE TO INTERROGATORY NO. 15:

Objection. This interrogatory is vague, ambiguous, is unreasonably burdensome, oppressive, and overbroad. Without waiving said objection, Responding Party cannot produce such communications because they do not exist.

INTERROGATORY NO. 16:

Please provide a list of each and every monetary payment sent to the Association or its agents relating to an Association lien on the Property. For each payment, please include the date of payment, amount of payment, the name and address of the person/entity to whom the payment was sent, the method and manner the payment was sent, the name of the person who sent the payment, and whether the payment was accepted or rejected.

RESPONSE TO INTERROGATORY NO. 16:

Objection. This interrogatory is vague, ambiguous, is unreasonably burdensome, oppressive, and overbroad. Without waiving said objection, see Response to Interrogatory No. 13.

INTERROGATORY NO. 17:

Identify any steps you took to ensure the Association received the assessments owed in relation to the Property.

RESPONSE TO INTERROGATORY NO. 17:

Objection. This interrogatory is vague, ambiguous, is unreasonably burdensome, oppressive, and overbroad. Without waiving said objection, see Response to Interrogatory No. 13.

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INTERROGATORY NO. 18:

Describe any action you or your predecessors in interest took relating to the Association lien, if any, after receiving foreclosure notices, including, but not limited to, notice of delinquent assessment lien, notice of default, and notice of sale.

RESPONSE TO INTERROGATORY NO. 18:

Objection. This interrogatory is vague, ambiguous, is unreasonably burdensome, oppressive, and overbroad. Without waiving said objection, see Response to Interrogatory No. 13.

INTERROGATORY NO. 19:

Identify all facts, information, and evidence of which you are aware that contradicts Plaintiff's assertion that it was a bona fide purchaser for value at the Association foreclosure sale.

RESPONSE TO INTERROGATORY NO. 19:

See Response to Interrogatory No. 11.

INTERROGATORY NO. 20:

Describe any interest that any federal government entity may have in the loan.

RESPONSE TO INTERROGATORY NO. 20:

N/A.

INTERROGATORY NO. 21:

Identify the current and all prior servicers for the loan allegedly secured to the Property by the First Deed of Trust.

RESPONSE TO INTERROGATORY NO. 21:

U.S. Bank is the original and current beneficiary. U.S. Bank may be contacted through counsel Law Offices of Les Zieve.

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INTERROGATORY NO. 22:

State the name and mailing address for any servicing agent who has serviced any loans on your behalf from the time you acquired the deed of trust in question in this case until the present date.

RESPONSE TO INTERROGATORY NO. 22:

See Response to Interrogatory No. 21.

INTERROGATORY NO. 23:

State each address, including post office boxes where you receive any mail from the time you acquired your interest in the deed of trust until the present.

RESPONSE TO INTERROGATORY NO. 23:

Objection. This interrogatory is vague, ambiguous, is unreasonably burdensome, oppressive, and overbroad. Without waiving said objection, Responding Party refers Propounding Party to the exhibits attached to its Response to Request for Production No. 1 served contemporaneously herewith.

INTERROGATORY NO. 24:

Identify all facts, information, and evidence of which you are aware which evidences any fraud, oppression or unfairness in regards to the association foreclosure sale.

REPONSE TO INTERROGATORY NO. 24:

See Response to Interrogatory No. 11.

INTERROGATORY NO. 25:

Identify all facts, information, and evidence of which you are aware which evidences that the association foreclosure sale was not properly conducted.

RESPONSE TO INTERROGATORY NO. 25:

See Response to Interrogatory No. 11.

INTERROGATORY NO. 26:

Identify all facts, information, and evidence of which you are aware which evidences that the association foreclosure sale was not properly noticed.

RESPONSE TO INTERROGATORY NO. 26:

See Response to Interrogatory No. 11.

INTERROGATORY NO. 27:

Please state all amounts that you have paid for taxes or insurance on the subject property since the date of the Association foreclosure sale.

RESPONSE TO INTERROGATORY NO. 27:

Objection. This interrogatory is vague, ambiguous, is unreasonably burdensome, oppressive, overbroad, and seeks information that is not reasonably calculated to lead to the discovery of relevant or admissible evidence. Therefore, Responding Party is unable to respond to this Interrogatory.

DATED: January 13, 2016

LAW OFFICES OF LES ZIEVE

By: /s/ Sherry A. Moore
Benjamin D. Petiprin, Esq.
Sherry A. Moore, Esq.
Attorneys for Plaintiff
U.S. Bank National Association, ND

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the Law Offices of Les Zieve, and not a party to nor interested in the within matter; that on the 13th day of January 2016 service of the **RESPONSES AND OBJECTIONS OF PLAINTIFF TO INTERROGATORIES PROPOUNDED BY DEFENDANT RESOURCES GROUP, LLC** was made:

(X) by serving the following parties electronically through CM/ECF/WIZNET as set forth below;

() by depositing a copy in the United States Mail postage prepaid to the parties listed below:

Michael F. Bohn, Esq.
Law Offices of Michael F. Bohn
376 East Warm Springs Road, Ste. 140
Las Vegas, NV 89119
office@bohnlawfirm.com
mbohn@bohnlawfirm.com

/s/ Jenny Humphrey
Jenny Humphrey, an employee of
Law Offices of Les Zieve

EXHIBIT 10

EXHIBIT 10

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 Anti-deficiency 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 11

EXHIBIT 11

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARTIN CENTENO,
Appellant,
vs.
JP MORGAN CHASE BANK, N.A.,
Respondent.

No. 67365

FILED

MAR 18 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER VACATING AND REMANDING

This is a pro se appeal from a district court order denying a motion for a preliminary injunction in a quiet title action. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

The district court denied appellant's request for a preliminary injunction, reasoning that appellant lacked a likelihood of success on the merits of his quiet title claim because (1) the Supremacy Clause prevented the HOA foreclosure sale from extinguishing respondent's deed of trust, which secured a federally insured loan; and (2) the purchase price at the HOA sale was commercially unreasonable.

Having considered the parties' arguments that were made in district court, *see Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981), we conclude that the district court underestimated appellant's likelihood of success on the merits and therefore abused its discretion in denying injunctive relief.[1] *See Boulder Oaks Cmty. Ass'n v. B & J Andrews Enters., LLC*, 125 Nev. 397, 403, 215 P.3d 27, 31 (2009) (recognizing that a district court may abuse its discretion in denying

[1]We disagree with respondent's suggestion that this appeal is moot, as appellant's request for injunctive relief sought more than to simply prevent respondent from selling the subject property at foreclosure.

injunctive relief if its decision is based on an error of law). In particular, the district court summarily based its Supremacy Clause analysis on non-binding, non-uniform precedent. *Compare Washington & Sandhill Homeowners Ass'n v. Bank of Am.*, 2014 WL 4798565, at *6 (D. Nev. Sept. 25, 2014), *with Freedom Mortg. Corp. v. Las Vegas Dev. Grp.*, 106 F. Supp. 3d 1174, 1183-86 (D. Nev. 2015).[2] Similarly, this court's reaffirmation in *Shadow Wood Homeowners' Ass'n v. New York Community Bancorp, Inc.*, 132 Nev., Adv. Op. 5, ___ P.3d ___ (2016), that a low sales price is not a basis for voiding a foreclosure sale absent "fraud, unfairness, or oppression," undermines the second basis for the district court's decision. Accordingly, we

ORDER the judgment of the district court VACATED AND REMAND this matter to the district court for proceedings consistent with this order.

Hardesty, J.

Saitta, J.

Pickering, J.

cc: Hon. Kathleen E. Delaney, District Judge
Martin Centeno
Smith Larsen & Wixom
Ballard Spahr, LLP
Eighth District Court Clerk

[2]We recognize that the *Freedom Mortgage* decision was not issued until after the district court entered the order being challenged in this appeal.