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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 6

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Assembly Bill No. 612—Committee on Judiciary

CHAPTER 573

AN ACT relating to property; making various changes in the Uniform Common-Interest Ownership Act; and providing other matters properly relating thereto.

[Approved July 12, 1993]

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 116 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 to 8, inclusive, of this act.

Sec. 2. *1. Except as otherwise provided in subsection 2, the declaration may provide for a period of declarant's control of the association, during which a declarant, or persons designated by him, may appoint and remove the officers of the association and members of the executive board. Regardless of the period provided in the declaration, a period of declarant's control terminates no later than the earlier of:*

(a) Sixty days after conveyance of 75 percent of the units that may be created to units' owners other than a declarant, except that if a majority of the units are divided into time shares, the percentage is 80 percent;

(b) Five years after all declarants have ceased to offer units for sale in the ordinary course of business; or

(c) Five years after any right to add new units was last exercised.

A declarant may voluntarily surrender the right to appoint and remove officers and members of the executive board before termination of that period, but in that event the declarant may require, for the duration of the period of declarant's control, that specified actions of the association or executive board, as described in a recorded instrument executed by the declarant, be approved by the declarant before they become effective.

2. Not later than 60 days after conveyance of 25 percent of the units that may be created to units' owners other than a declarant, at least one member and not less than 25 percent of the members of the executive board must be elected by units' owners other than the declarant. Not later than 60 days after conveyance of 50 percent of the units that may be created to units' owners other than a declarant, not less than 33 1/3 percent of the members of the executive board must be elected by units' owners other than the declarant.

Sec. 3. *1. Except as otherwise provided in subsection 5 of NRS 116.2120, not later than the termination of any period of declarant's control, the units' owners shall elect an executive board of at least three members, at least a majority of whom must be units' owners. The executive board shall elect the officers. The members and officers of the executive board shall take office upon election.*

2. An officer, employee, agent or director of a corporate owner of a unit, a trustee or designated beneficiary of a trust that owns a unit, a partner of a partnership that owns a unit, and a fiduciary of an estate that owns a unit may be an officer or member of the executive board. In all events where the person serving or offering to serve as an officer or member of the executive board is

other permits and approvals so issued and applicable which are required by law to be kept on the premises of the community.

9. Written warranties of the contractor, subcontractors, suppliers and manufacturers that are still effective.

10. A roster of owners and mortgagees of units and their addresses and telephone numbers, if known, as shown on the declarant's records.

11. Contracts of employment in which the association is a contracting party.

12. Any contract for service in which the association is a contracting party or in which the association or the units' owners have any obligation to pay a fee to the persons performing the services.

Sec. 6. *The association or other person conducting the sale shall also mail, within 10 days after the notice of default and election to sell is recorded, a copy of the notice by first-class mail to:*

1. Each person who has requested notice pursuant to NRS 107.090 or 116.31168;

2. Any holder of a recorded security interest encumbering the unit's owner's interest who has notified the association, 30 days before the recordation of the notice of default, of the existence of the security interest; and

3. A purchaser of the unit, if the unit's owner has notified the association, 30 days before the recordation of the notice, that the unit is the subject of a contract of sale and the association has been requested to furnish the certificate required by subsection 2 of NRS 116.4109.

Sec. 7. *The association or other person conducting the sale shall also, after the expiration of the 60 days and before selling the unit:*

1. Give notice of the time and place of the sale in the manner and for a time not less than that required by law for the sale of real property upon execution, except that a copy of the notice of sale must be mailed, on or before the date of first publication or posting, by certified or registered mail, return receipt requested, to the unit's owner or his successor in interest at his address if known, and to the address of the unit.

2. Mail, on or before the date of first publication or posting, a copy of the notice by first-class mail to:

(a) Each person entitled to receive a copy of the notice of default and election to sell notice under section 6 of this act; and

(b) The holder of a recorded security interest or the purchaser of the unit, if either of them has notified the association, before the mailing of the notice of sale, of the existence of the security interest, lease or contract of sale, as applicable.

Sec. 8. *1. In a condominium or planned community:*

(a) Except as otherwise provided in paragraph (b), a judgment for money against the association, if a copy of the docket or an abstract or copy of the judgment is recorded, is not a lien on the common elements, but is a lien in favor of the judgment lien holder against all of the units in the common-interest community at the time the judgment was entered. No other property of a unit's owner is subject to the claims of creditors of the association.

(b) If the association has granted a security interest in the common elements to a creditor of the association pursuant to NRS 116.3112, the holder

(b) The reasonable expenses of securing possession before sale, holding, maintaining, and preparing the unit for sale, including payment of taxes and other governmental charges, premiums on hazard and liability insurance, and, to the extent provided for by [agreement between the association and the unit's owner,] *the declaration,* reasonable attorney's fees and other legal expenses incurred by the association;

(c) Satisfaction of the association's lien;

(d) Satisfaction in the order of priority of any subordinate claim of record; and

(e) Remittance of any excess to the unit's owner.

Sec. 39. NRS 116.31166 is hereby amended to read as follows:

116.31166 1. The recitals in [such] a deed *made pursuant to NRS 116.31164* of:

(a) Default [and the recording] , *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 60 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 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 and 116.31164 *and section 6 of this act* vests in the purchaser the title of the unit's owner without equity or right of redemption.

Sec. 40. NRS 116.31168 is hereby amended to read as follows:

116.31168 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. [The association must also give reasonable notice of its intent to foreclose to all holders of liens in the unit who are known to it.]

2. An association may, after recording a notice of default and election to sell, waive the default and withdraw the notice or any proceeding to foreclose. The association is thereupon restored to its former position and has the same rights as though the notice had not been recorded.

Sec. 41. NRS 116.4101 is hereby amended to read as follows:

116.4101 1. NRS 116.4101 to 116.4120, inclusive, apply to all units subject to this chapter, except as otherwise provided in subsection 2 or as modified or waived by agreement of purchasers of units in a common-interest community in which all units are restricted to nonresidential use.

2. Neither a public offering statement nor a certificate of resale need be prepared or delivered in the case of a:

(a) Gratuitous disposition of a unit;

(b) Disposition pursuant to court order;

(c) Disposition by a government or governmental agency;

(d) Disposition by foreclosure or deed in lieu of foreclosure;

(e) Disposition to a dealer;

EXHIBIT M

EXHIBIT M

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 N

EXHIBIT N

August 31, 2016

Resources Group LLC,
Represented by attorney Michael F. Bohn
Law Offices of Michael F. Bohn, Esq. Ltd.
376 E. Warm Springs Rd, Suite 140, Las Vegas, NV 89119

RE: U S Bank National Association, v. George Edwards, et al
(Case #A-12-667690-C)

Dear Mr. Bohn:

Per your request, I have examined the expert appraisal report completed by George P. Holmes of Eagle Appraisal, Inc. (Holmes report or Holmes appraisal). The Holmes report is a retrospective, market value appraisal of the fee simple interest of the subject (4254 Rollingstone Drive) as of January 25, 2012. Communication is via a general-purpose residential form with numerous narrative and graphic addenda. The Holmes report contains 16 pages in total; includes development of the sales comparison approach, utilizing six comparable sales. The signing date was July 28, 2016.

Federal law and/or state law requires professional appraisers to comply with the edition of the Uniform Standards of Professional Appraisal Practice (USPAP) in effect as of the effective date of their work. The USPAP require specific professional ethics, disclosure, and performance when an appraiser is engaged to perform a service requiring his or her appraisal expertise. The USPAP are promulgated by the Appraisal Foundation and are the recognized measure of professional due diligence for all licensed or certified appraisers.

This assignment falls under the category of Appraisal Review as defined by the USPAP. It complies with the current edition of that document. This is a desktop assignment. All opinions, conclusions, and analysis are developed and communicated without advocacy or bias. They are communicated in a manner that is meaningful and not misleading within the context of the intended use, intended users, and scope of work for this assignment.

It is assumed under an Extraordinary Assumption that the factual data presented in the Holmes report is accurate. The independent opinion of value is based on the assumption that the subject was in average condition as of the retrospective effective date. ***Use of these assumptions is reasonable but may have affected the assignment results.*** In the case of conflicting data, additional research will be conducted (if necessary) to determine which information is most reliable in order to allow my report to arrive at credible assignment results.

The client for this assignment is Resources Group LLC. The Intended Use is for litigation in the case noted above. Intended Users include the Client represented by the Law Offices of Michael F. Bohn, Esq. Ltd. The Scope of Work for my assignment includes an appraisal review (as defined) of the Holmes report and an independent opinion of the retrospective disposition value. My review emphasizes compliance with the USPAP and generally accepted appraisal methodology. I have examined the techniques and methodology of the Holmes appraisal in order to determine the completeness, adequacy, relevance, appropriateness, and reasonableness of the work under review, developed in the context of the requirements applicable to that work.

The accompanying appraisal review report complies with USPAP Standards Rules 3-4, 3-5 and 3-6. It contains statements and summary discussions of the data, reasoning, and analyses that used in the process of developing my opinions. Supporting documentation concerning the data, reasoning, and analyses is in my work file.

The depth of discussion within this report is specific to the client and intended use stated below. Neither I, nor Brunson-Jiu, LLC is responsible for unauthorized use of this review.

Conclusions – Holmes Expert Appraisal Report

The risk associated with a property following an HOA foreclosure and subject to unresolved litigation is a Detrimental Condition that impairs the subject value as of the retrospective effective date. The appraisal report completed by Holmes purports to provide an opinion of the unimpaired market value. However, it does so in a manner that does not comply with professional standards or generally accepted appraisal methodology.

The report contains numerous errors, violations of the Uniform Standards of Professional Appraisal Practice, and fails to use generally recognized appraisal methodology. These errors of omission and commission cause the appraisal to lack credibility and the report to be misleading.

Moreover, Nevada is a mandatory licensing state for real estate appraisers. Nevada law indicates that licensed appraisers are precluded from conducting complex appraisal assignments.[1] By completing this assignment Mr. Holmes may have exceed the scope of his credential.

[1] NRS 645C.280.1(a)(2)

Conclusions – Independent Opinion of Value

The subject had been a distressed property since at least 1Q 2011. HOA foreclosure properties contain risks and limitations on their bundle of rights. The risk and limited rights associated with an HOA foreclosure property are a Detrimental Condition (DC) that impair its value. A foreclosure sale under NRS 116 can be classified as a Type II DC (Transactional Conditions).

The risk and limitations to the bundle of rights require a definition of value other than Market Value. They preclude the use of traditional owner-equity sales in an analysis of value. They limit the use of non-traditional sales (REO, short sales, or 107 foreclosure sales) in an analysis of value. Similar HOA foreclosure sales and consideration of "current" market conditions provide the best measure of value for this type of transaction.

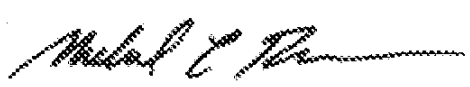
As an HOA foreclosure property, affected by a Class II detrimental condition, the fee simple impaired value as of January 25, 2012 was:

$5,300
Five Thousand Three Hundred Dollars (rounded)

Specific findings in support of these conclusions appear in the individual sections of the report that follows this letter. Readers of this report should refer to appropriate versions of the USPAP or relevant cited documents for proper understanding of this appraisal review report. I invite your attention to the accompanying report, from which the above opinions were derived.

Documents relevant to my opinions and conclusions, including but not limited to the workfile for the Holmes report, have not been produced. While I can properly review the report, I cannot fully evaluate whether the analyses, opinions, and conclusions were properly *developed*. Additional findings may apply once the workfile is made available. Future stages of the assignment may include additional valuation services, including but not limited to an independent retrospective appraisal. I reserve my right to amend my findings based on future production of relevant documents.

Respectfully submitted,



Michael L. Brunson, MNAA, SRA
AQB Certified USPAP Instructor / Nevada Certified General Appraiser #A.0207222-CG
August 31, 2016

Assumptions and Limiting Conditions

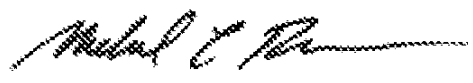
The submitted report is subject to underlying assumptions and limiting conditions qualifying the information it contains as follows:

1. Possession of this review or copy thereof does not carry with it the right of publication.
2. The purpose of the assignment is to review the appropriateness of the conclusions and the compliance with the USPAP determined within the submitted report.
3. This review is intended solely for the use of the identified Client and Intended User(s). Neither all nor any part of the contents of this review shall be disseminated to the public through advertising, public relations, news, sales, or other media without the prior written consent of the reviewer.
4. Unless stated otherwise in the review, the analyses, opinions, and conclusions in this review are based solely on the data, analyses, and conclusions contained in the appraisal report, appraisal review report, and/or the workfile under review.
5. All analyses, opinions, and conclusions expressed by the reviewer are limited by the scope of the review process as defined herein.
6. The conclusions apply only to the property specifically identified and described herein and in the reviewed, appraisal review reports, appraisal reports, and/or associated workfiles.
7. The reviewer has made no legal survey, nor has he commissioned one to be prepared; therefore, reference to a sketch, plat, diagram or previous survey appearing in the report is only for the purpose of assisting the reader to visualize the property.
8. No responsibility is assumed for legal matters existing or pending outside of the existing case.
9. Disclosure of the contents of this review is governed by the Nevada Commission of Appraisers and the USPAP.
10. The compensation received for this assignment is in no manner contingent upon the conclusion of the review.
11. Reviewer Competency: Michael L. Brunson is an AQB Certified USPAP Instructor and is fully competent regarding the proper interpretation and application of the USPAP. He is also a Certified General Appraiser in Nevada and has the geographic competency to appraise the subject and similar properties within the Southern Nevada area.

Appraiser Certification

I certify that, to the best of my knowledge and belief:

- The statements of fact contained in this report are true and correct.
- The reported analyses, opinions, and conclusions are limited only by the reported assumptions and limiting conditions and are my personal, impartial, and unbiased professional analyses, opinions, and conclusions.
- I have no present or prospective interest in the properties that are the subject of the work under review and no personal interest with respect to the parties involved.
- I have performed no other services, as an appraiser or in any other capacity, regarding the property that is the subject of the work under review within the three-year period immediately preceding acceptance of this assignment.
- I have no bias with respect to the properties that are the subject of the work under review or to the parties involved with this assignment.
- My engagement in this assignment was not contingent upon developing or reporting predetermined results.
- My compensation is not contingent on an action or event resulting from the analyses, opinions, or conclusions in this review or from its use.
- My compensation for completing this assignment is not contingent upon the development or reporting of predetermined assignment results or assignment results that favors the cause of the client, the attainment of a stipulated result, or the occurrence of a subsequent event directly related to the intended use of this appraisal review.
- My analyses, opinions, and conclusions were developed, and this report has been prepared, in conformity with the *Uniform Standards of Professional Appraisal Practice*.
- I have made no inspection of the subject of the work under review.
- William Slivinski (NV Lic #A.0003887-RES) provided significant professional appraisal review assistance to the person signing this certification.
- The reported analyses, opinions, and conclusions were developed, and this report has been prepared, in conformity with the Code of Professional Ethics and Standards of Professional Appraisal Practice of the Appraisal Institute.
- The use of this report is subject to the requirements of the Appraisal Institute relating to review by its duly authorized representatives.
- As of the date of this report, I have completed the continuing education program for Designated Members of the Appraisal Institute.



Michael L. Brunson, MNAA, SRA
AQB Certified USPAP Instructor
NV Certified General Appraiser # A.0207222-CG
August 31, 2016

DEFINITIONS

For the purpose of this report, the following definitions apply:

Appraisal[2]

(noun) The act or process of developing an opinion of value; an opinion of value. (adjective) of or pertaining to appraising and related functions such as appraisal practice or appraisal services.

Comment: An appraisal must be numerically expressed as a specific amount, as a range of numbers, or as a relationship (e.g., not more than, not less than) to a previous value opinion or numerical benchmark (e.g., taxable value, collateral value).

Appraisal Review[3]

The act or process of developing and communicating an opinion about the quality of another appraiser's work that was performed as part of an appraisal or appraisal review assignment.

Comment: The subject of an appraisal review assignment may be all or part of a report, workfile, or a combination of these.

Assessment Stage[4]

The first stage of a detrimental condition analysis. It includes all costs and losses of income.

Assumption[5]

That which is taken to be true.

Class II Detrimental Condition – Transactional Conditions[6]

Class II transactional conditions relate to situations in which some particular and unique issue impacted a specific transaction. This classification includes transactions in which a buyer pays more than necessary to acquire a property or a seller disposes of a property at a discount.

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[2] USPAP 2016-2017 Edition, the Appraisal Foundation.
[3] Ibid.
[4] Randall Bell, PhD, MAI, Real Estate Damages: Applied Economics and Detrimental Conditions, 3rd ed. (Chicago: Appraisal Institute, 2016), p. 456.
[5] USPAP 2016-2017 Edition, the Appraisal Foundation.
[6] Randall Bell, PhD, MAI, Real Estate Damages: Applied Economics and Detrimental Conditions, 3rd ed. (Chicago: Appraisal Institute, 2016), p. 73.

Credible[7]

Worthy of belief.

Comment: Credible assignment results require support, by relevant evidence and logic, to the degree necessary for the intended use.

Detrimental Condition[8]

Any issue or condition that may cause a diminution in value to real estate.

Disposition Value[9]

The most probable price that a specified interest in real property should bring under the following conditions:

1. Consummation of a sale within a future exposure time specified by the client.
2. The property is subjected to market conditions prevailing as of the date of valuation.
3. Both the buyer and seller are acting prudently and knowledgeably.
4. The seller is under compulsion to sell.
5. The buyer is typically motivated.
6. Both parties are acting in what they consider to be their best interests.
7. An adequate marketing effort will be made during the exposure time specified by the client.
8. Payment will be made in cash in U.S. dollars or in terms of financial arrangements comparable thereto.
9. The price represents the normal consideration for the property sold, unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

Extraordinary Assumption[10]

An assumption, directly related to a specific assignment, which, if found to be false, could alter the appraiser's opinions or conclusions.

Comment: Extraordinary assumptions presume as fact otherwise uncertain information about physical, legal, or economic characteristics of the subject property; or about conditions external to the property, such as market conditions or trends; or about the integrity of data used in an analysis.

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[7] USPAP 2016-2017 Edition, the Appraisal Foundation.
[8] Randall Bell, PhD, MAI, Real Estate Damages: Applied Economics and Detrimental Conditions, 3rd ed. (Chicago: Appraisal Institute, 2016), p. 458.
[9] The Dictionary of Real Estate Appraisal, 6th Edition, (Chicago: Appraisal Institute, 2015).
[10] USPAP 2016-2017 Edition, the Appraisal Foundation.

Fee Simple Estate[11]

Absolute ownership unencumbered by any other interest or estate, subject only to the limitations imposed by the governmental powers of taxation, eminent domain, police power, and escheat.

Highest and Best Use[12]

The reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value. The four criteria the highest and best use must meet are legal permissibility, physical possibility, financial feasibility, and maximum productivity.

Hypothetical Condition[13]

That which is contrary to what exists but is supposed for the purpose of analysis.

Comment: Hypothetical conditions assume conditions contrary to known facts about physical, legal, or economic characteristics of the subject property; or about conditions external to the property, such as market conditions or trends; or about the integrity of data used in an analysis.

Impaired Value[14]

The indicated value of a property with a detrimental condition reached upon the application of one or more of the three approaches to value.

1. Buyer and seller are typically motivated;
2. Both parties are well informed or well advised, and each is acting in what they consider their own best interest;
3. A reasonable time is allowed for exposure in the open market;
4. Payment is made in terms of cash in U.S. dollars or in terms of financial arrangements comparable thereto; and,
5. The price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

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[11] The Dictionary of Real Estate Appraisal, 6th Edition, (Chicago: Appraisal Institute, 2015).
[12] Ibid.
[13] USPAP 2016-2017 Edition, the Appraisal Foundation.
[14] Randall Bell, PhD, MAI, Real Estate Damages: Applied Economics and Detrimental Conditions, 3rd ed. (Chicago: Appraisal Institute, 2016), p. 461.

Liquidation Value[15]

The most probable price that a specified interest in real property should bring under the following conditions:
1. Consummation of a sale within a short time period.
2. The property is subjected to market conditions prevailing as of the date of valuation.
3. Both the buyer and seller are acting prudently and knowledgeably.
4. The seller is under extreme compulsion to sell.
5. The buyer is typically motivated.
6. Both parties are acting in what they consider to be their best interests.
7. A normal marketing effort is not possible due to the brief exposure time.
8. Payment will be made in cash in U.S. dollars or in terms of financial arrangements comparable thereto.
9. The price represents the normal consideration for the property sold, unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

Market Area[16]

The area associated with a subject property that contains its direct competition.

Market Value[17]

The most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently, knowledgeably and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:

1. Buyer and seller are typically motivated;
2. Both parties are well informed or well advised, and each is acting in what they consider their own best interest;
3. A reasonable time is allowed for exposure in the open market;
4. Payment is made in terms of cash in U.S. dollars or in terms of financial arrangements comparable thereto; and,
5. The price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

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[15] The Dictionary of Real Estate Appraisal, 6th Edition, (Chicago: Appraisal Institute, 2015).
[16] The Dictionary of Real Estate Appraisal, 6th Edition, (Chicago: Appraisal Institute, 2015).
[17] Title XI, Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), [Pub. L. No. 101-73 103 Stat. 183 (1989)], 12 U.S.C. 3310, 3331-3351, and Section 5 (b) of the Bank Holding Company Act, 12 U.S.C. 1844 (b); Part 225, Subpart G: Appraisals; Paragraph 225.62(f).

Neighborhood[18]

A group of complementary land uses; a congruous grouping of inhabitants, buildings, or business enterprises.

Sales Comparison Approach[19]

The process of deriving a value indication for the subject property by comparing market information for similar properties with the property being appraised, identifying appropriate units of comparison and making qualitative comparisons with or quantitative adjustments to the sale prices (or unit prices, as appropriate) of the comparable properties based on relevant, market-derived elements of comparison.

Unimpaired Value[20]

The value as if no detrimental condition exists.

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[18] The Dictionary of Real Estate Appraisal, 6th Edition, (Chicago: Appraisal Institute, 2015).

[19] Ibid.

[20] Randall Bell, PhD, MAI, Real Estate Damages: Applied Economics and Detrimental Conditions, 3rd ed. (Chicago: Appraisal Institute, 2016), p. 468.

Appraisal Review

INTRODUCTION

File No.: 1608.3115

Client:

Resources Group LLC
Engaged by Law Offices of Michael F. Bohn, Esq. Ltd.

Review Appraiser:

Michael L. Brunson, MNAA, SRA
AQB Certified USPAP Instructor
Nevada Certified General Appraiser #A.0207222-CG
Brunson-Jiu, LLC

Intended User(s):

Client only. Use of this report by others is not intended. Parties to this litigation other than the Client might be granted access to the report and related workfile. However, as noted in the USPAP Advisory Opinion 36,

> *Parties who receive a copy of an appraisal or appraisal review as a consequence of disclosure requirements applicable to an appraiser's client do not become intended users of the report unless they were specifically identified by the appraiser at the time of the assignment.*

Intended Use:

Litigation in the matter of *U S Bank National Association, v. George Edwards, et al* (Case #A-12-667690-C). This report is not intended for any other use or in any other case.

Appraisers Who Completed the Work under Review:

George P. Holmes, Nevada Licensed Residential Appraiser #A.0006387-RES[21]

[21] NRS 645C.280.1(a)(2) Indicates that licensed appraisers in Nevada cannot complete an appraisal on complex property.

Identification of the Work under Review:

The Holmes report is a general-purpose form report that includes 16 pages. It is a retrospective appraisal with an effective date of January 25, 2012 and a signed date of July 28, 2016.

Subject Property Address:	4254 Rollingstone Drive, Las Vegas, Nevada 89103
APN:	163-24-111-021
Location:	Southwest – Glenview West Townhouse
Property Type:	Attached townhouse residential
Owner of Record:	Edwards, George R Trust (Current: Bourne Valley Court Trust & Resources Group LLC Trs)
Interest Appraised:	Fee Simple

Purpose and Scope of Assignment:

The purpose of this assignment is to develop a credible and reliable opinion as to the completeness, adequacy, relevance, appropriateness, and reasonableness of the work under review. This opinion is developed in the context of compliance with the USPAP and generally accepted appraisal methodology. An independent value opinion is part of the scope of this assignment. The following scope of work was developed in accordance with the objective of the assignment and in compliance with the USPAP.

- Collected and analyzed pertinent background information about the subject property.
- Examined various documents provided and requested of the client.
- Examined the expert report completed by Holmes.
- Verified relevant data from the work under review with the cited source when available or other reliable source as applicable.
- Noted compliance and lack of compliance with relevant sections of the USPAP.
- Noted compliance or lack of compliance with generally accepted appraisal methodology
- Developed opinions of the quality of the work under review.
- Developed an independent opinion of retrospective value.
- Concluded to final opinions.

My Appraisal Review Report is a summary report of the data, analysis, and conclusions. Supporting documentation is retained in the work file. Future stages of the assignment may include additional valuation services, including but not limited to additional analysis, consulting, deposition, and/or testimony.

Relevant Dates:

Date subject acquired at auction:	January 25, 2012
Effective date of Holmes appraisal:	January 25, 2012
Date subject viewed by Holmes:	July 28, 2016
Transmittal date of Holmes appraisal:	July 28, 2016

Additional relevant dates are noted in the body of the review.

Relevant version of the USPAP:

The 2016-2017 version of the USPAP is relevant to the Holmes appraisal. This review and the independent value are subject to the 2016-2017 version of the USPAP.

Reviewer Competency and Professional Assistance:

The Competency Rule of the USPAP states in part that, *"the appraiser must determine, prior to accepting an assignment, that he or she can perform the assignment competently."* As an AQB Certified USPAP Instructor, I am competent concerning the Uniform Standards and their application. As a Certified General Appraiser, I am competent concerning the type of property and the analytical methods necessary to produce credible assignment results. My primary area of practice is Southern Nevada. I am competent concerning the geographic area and market. William Slivinski (Nevada Licensed Residential Appraiser #A.0003887-RES) assisted in the confirmation of data and the preparation of this report.

USPAP Background:

The Uniform Standards of Professional Appraisal Practice, promulgated by the Appraisal Foundation, are the recognized measure of professional due diligence for all licensed or certified appraisers. The preamble of the USPAP provides a brief overview as to the purpose and intent of the Uniform Standards, stating in part:

> The purpose of the *Uniform Standards of Professional Appraisal Practice* (USPAP) is to promote and maintain a high level of public trust in appraisal practice by establishing requirements for appraisers. It is essential that appraisers develop and communicate their analyses, opinions, and conclusions to **intended users** of their services in a manner that is **meaningful** and **not misleading**…
> (Bold added for emphasis).

The following excerpt from the 2016-2017 Preamble helps the reader understand the relevance and applicability of the specific portions of the USPAP referenced in the report that follows.

USPAP addresses the ethical and performance obligations of appraisers through DEFINITIONS, Rules, Standards, Standards Rules, and Statements.

- The DEFINITIONS establish the application of certain terminology in USPAP.
- The ETHICS RULE sets forth the requirements for integrity, impartiality, objectivity, independent judgment, and ethical conduct.
- The RECORD KEEPING RULE establishes the workfile requirements for appraisal, appraisal review, and appraisal consulting assignments.
- The COMPETENCY RULE presents pre-assignment and Assignment Conditions for knowledge and experience.
- The SCOPE OF WORK RULE presents obligations related to problem identification, research, and analyses.
- The JURISDICTIONAL EXCEPTION RULE preserves the balance of USPAP if a portion is contrary to law or public policy of a jurisdiction.
- The ten Standards establish the requirements for appraisal, appraisal review, and appraisal consulting service and the manner in which each is communicated.
    - STANDARDS 1 and 2 establish requirements for the development and communication of a real property appraisal.
    - STANDARD 3 establishes requirements for the development and communication of an appraisal review.
    - (Note: STANDARDS 4 and 5 have been retired)
    - STANDARD 6 establishes requirements for the development and communication of a mass appraisal.
    - STANDARDS 7 and 8 establish requirements for the development and communication of a personal property appraisal.
    - STANDARDS 9 and 10 establish requirements for the development and communication of a business or intangible asset appraisal.
- There are currently no active Statements on Appraisal Standards.
- Comments are an integral part of USPAP and have the same weight as the component they address. These extensions of the DEFINITIONS, Rules, and Standards Rules provide interpretation and establish the context and conditions for application.

It is important to note that the USPAP make a significant distinction between the *Development* of an appraisal or appraisal review and the *Communication* (reporting) of an appraisal or appraisal review. Standards Rule 1 (SR-1) applies to the *Development* of an appraisal of real property whereas SR-2 applies to the *Communication* of the appraisal. SR-3 is one of two Standards Rules where both development and communication are addressed in the same rule. However, the sections of SR-3 that apply to the development of an appraisal review are clearly labeled and the sections that apply to communication are clearly labeled.

This review focuses on compliance with generally accepted appraisal methodology and the USPAP – specifically the Preamble, Definitions, General Rules, Standards Rule 1, and Standards Rule 2 for the Development and Reporting of a Real Property Appraisal.

Documents relevant to my opinions and conclusions, including but not limited to the workfile for the Holmes report, have not been produced. While I can properly review the report, I cannot fully evaluate whether the analyses, opinions, and conclusions were properly *developed*. Additional findings may apply once the workfile is made available. Future stages of the assignment may include additional valuation services, including but not limited to an independent retrospective appraisal. I reserve my right to amend my findings based on future production of relevant documents.

The table on the following page provides a summary of the Standards Rules applicable to the Holmes appraisal and a brief summary of my findings related to each specific USPAP rule. Green cells indicate compliance. Red cells indicate a lack of compliance. Yellow cells indicate either; technical violations of USPAP that do not significantly influence the overall credibility of the appraisal; or issues that are subject to interpretation.

Appraisal Report Std-3 Review Checklist (2016-2017 USPAP)				
USPAP Reference	**Item**	**Location**	**Notes**	**Compliance**
2-1(a)	Clear, Accurate, Not Misleading		Errors. Provides unimpaired value with no comment on the impairment.	N
2-1(b)	Sufficient Information for Understanding		Fails to disclose details of the HOA auction and the conditions assumed not to exist.	N
2-1(c)	Disclose all Assumptions & Limiting Conditions	Form, Addenda	Disclosed, but not clear and accurate.	Y
2-2	Report Type Prominently Disclosed	Form		Y
Identify Problem and Determine Adequate Scope of Work				**Compliance**
2-2(a)(vi)	Transmittal Date	1,4,10		Y
	Effective Date 1-2(d)			
	Report Date			
2-2(a)(i) 1-2(a)	Client Identity	1,2,10		Y
2-2(a)(i); 1-2(a)	Intended User(s)	2		Y
2-2(a)(ii); 1-2(b)	Intended Use	2	Statement-9	Y
2-2(a)(iii); 1-2(e)	Legal Description or Other Property ID	2		Y
2-2(a)(iv); 1-2(e)(ii)	Property Interest	2	Reports Tenant occupied and fee simple interest.	N
2-2(a)(v) 1-2(c)	Type of Value	2,10	Appraisal of Unimpaired Value. Definition and source are disclosed. No clear indication of how the definition applies to the problem to be solved.	Y
	Definition of Value	10		
	Source of Definition	10		
	Applicability/Application of Definition	No		
	Reasonable Exposure Time (if developed)	3		
2-2(a)(vii) 1-2(h)	Scope of Work	9	Proper disclosure.	Y
Analysis and Development				**Compliance**
2-2(a)(ix); 1-3(a)(b)	Use Existing, Use Appraised	2		Y
2-2(a)(x)	Summarize HABU (if developed)	2		Y
2-2(a)(xi) 1-2(f) 1-2(g)	Standard Assumptions and Limiting Conditions	9	Stated EA does not address condition of the interior. Stated assumption of no DC lacks required disclosure of potential effect. Reconciliation indicates "as-is" with no disclosure of assumptions.	N
	- Extraordinary Assumptions	3		
	Disclosure of Affect	3		
	- Hypothetical Conditions	3		
	Disclosure of Affect	No		
2-2(a)(viii)	Collect/Verify/Analyze Info for Credible Results		Questionable adjustment methodology.	Y
1-4	(a) Sales Comparison Approach	3,5		
	(b) Cost Approach	-		
	(c) Income Approach	-		
1-5(a)&(b)	Sales, Contracts and Listing History	3	Reports the prior sale with no analysis.	N
1-6	Reconcile Data/Analysis and Approaches	4	"as-is" no disclosure of assumptions.	N
1-1(a)	Be Aware of, Understand, Correctly Employ	-	Numerous issues noted above.	N
1-1(b)	Substantial Error: Omission or Commission	-	Numerous issues noted above.	N
1-1(c)	Carelessness or Negligence	-	Totality of errors. Potential negligent performance.	N
Certification				**Compliance**
2-2(a)(xii)	Include a Signed Certification (SR 2-3)	10	No certification regarding prior services.	N
2-3	USPAP Certification	10		
General Rules				**Compliance**
ETHICS RULE	Conduct	Avoid Bias or Advocacy; Gross Negligence; Disclosure of Prior Work	-		Y
	Management	Disclosure of Payment to Procure; Contingent Compensation; Proper Advertising; Signature Issues	-		
	Confidentiality	Protect Appraiser-Client Relationship	-		
RECORD KEEPING RULE		Prepare and maintain a workfile. Must exist prior to issuance of any report. Must contain name of client/intended users; true copies of all reports; summaries of oral reports; and all data, info, docs to support opinions/conclusions and show compliance with USPAP.	workfile	Unknown. Workfile not provided.	-
COMPETENCY RULE		Applies to factors such as, but not limited to, an appraiser's familiarity with a specific type of property or asset, a market, a geographic area, an intended use, specific laws and regulations, or an analytical method.		Lack of competent performance.	N
SCOPE OF WORK RULE		Problem Identification	9	Unimpaired Value. No disclosure of economic reality that creates the impairment.	N
		SOW Acceptability	9		
		Disclosure	9		
JURISDICTIONAL EXCEPTION RULE			-		N/A

FINDINGS - Holmes Appraisal

Finding No. 1:

The Holmes appraisal purports to provide an ***"unimpaired opinion of market value."***[22] While it is acceptable to perform this analysis, the Holmes report contains numerous errors, lacks sufficient information for understanding, and ultimately does not comply with the USPAP.

Key Observations:

The central issue of this litigation is the HOA foreclosure under NRS 116 (a forced sale). The subject sold at auction on the effective date for $5,331. This sale is disclosed on page three of the Holmes report. However, both the form and the USPAP require more than a simple reporting of the factual date and price of the sale. The USPAP require ***analysis*** and a summary of that analysis in order for the report to be considered "*meaningful and not misleading.*"

The letter of transmittal states, *"The property rights appraised are fee simple title ownership,* ***assuming no indebtedness against the property****. The purpose of this report is to estimate the MARKET VALUE of the subject property as of the effective date."*[23] (**Bold** added for emphasis). Holmes discloses the intended use as, *"To establish retrospective market value [sic] for attorney as of 1/25/2012."*[24]

On the bottom of the third page, Holmes states,

> *The client assigned the report effective date, the appraiser has completed [sic] assignment developing an unimpaired opinion of market value employing the use of an assumption that no detrimental conditions existed as of the effective date and reserves the right to modify [sic] report and opinion of value if court deems effective date inappropriate or misleading to appraisal problem or assignment.*

[22] Holmes report, p 3.
[23] Holmes report, p 1.
[24] Holmes report, p 2.

The USPAP would define the assumption of no detrimental conditions as a Hypothetical Condition (an assumption contrary to known fact). While the USPAP does not require the use of the specific term, it does require:

- That all hypothetical conditions result in a credible analysis.
    - Credible analysis requires some disclosure of the facts regarding the HOA foreclosure. It is significant to note that the HOA foreclosure is not even mentioned in the Holmes report.

- That the assumption be ***"clearly and conspicuously"*** reported.
    - Disclosure of such a foundational assumption *only* on the bottom of the third page of a 13-page report is neither clear nor conspicuous. Furthermore, the reconciliation presents conflicting information indicating the appraisal is completed "as-is" with no assumptions.

- That the reporting of the disclosure include a statement that the use of the assumption might have affected the assignment results.
    - No such statement exists in the Holmes report.

As noted, the central issue of this litigation is the HOA foreclosure under NRS 116. Use of an assumption regarding detrimental conditions is acceptable. However, the lack of clear and conspicuous reporting, the conflicting information in the reconciliation, and the lack of any comment regarding the potential impact on the credibility of the assignment results - cause the Homes report to lack credibility and the appraisal to be misleading.

Additional noted errors include, but are not limited to:

- Reporting *tenant* occupied and *fee simple* rights.
- Growth rate reported as "Stable" when data indicates slow.
- Property values reported as "Stable" wen data indicates declining.
- Demand/Supply reported as "In Balance" when data indicates oversupply.
- Predominate occupancy reported as "Owner" when data indicates 66.3% tenant.
- Assumptions lacking required disclosure of potential affect.
- No assumption regarding interior condition in a retrospective assignment.
- Reporting subject off-sites as "public" when they are private.
- Presentation of conflicting information.
- Questionable adjustments in the sales comparison.

- Reporting sale 1 as fee simple when it was tenant occupied.
- Failure to report known concessions to sale 3
- Use of REO sales as comparables with no additional comment/adjustment.
- False statements.
- Questionable use of the UAD in a non-UAD assignment.
- Lack of required disclosure of prior services.
- Inapplicable boilerplate language.

Conclusion:

The Holmes appraisal purports to provide an opinion of the unimpaired market value. However, simply stating the assumption of no detrimental condition without any comment on the economic realities affecting the subject causes the appraisal to lack credibility and the report to be misleading. Moreover, the appraisal contains numerous errors and inconsistencies that individually could be benign, but in aggregate cause the credibility of the appraisal to suffer all the more.

Conclusion – Holmes Expert Appraisal Report

The risk associated with a property following an HOA foreclosure and subject to unresolved litigation is a Detrimental Condition that impairs the subject value as of the retrospective effective date. The appraisal report completed by Holmes purports to provide an opinion of the unimpaired market value. However, it does so in a manner that does not comply with professional standards or generally accepted appraisal methodology.

The report contains numerous errors, violations of the Uniform Standards of Professional Appraisal Practice, and fails to use generally recognized appraisal methodology. These errors of omission and commission cause the appraisal to lack credibility and the report to be misleading.

Moreover, the effective date of the Holmes appraisal is 7-months subsequent to the HOA foreclosure auction that is the central issue in this litigation. This effective date is not relevant in the context of this litigation. Therefore, even if it were credible, the Holmes appraisal is not useful to the trier of fact in establishing an unimpaired value as of the date of the HOA foreclosure sale.

Documents relevant to my opinions and conclusions, including but not limited to the workfile for the Holmes report, have not been produced. While I can properly review the report, I cannot fully evaluate whether the analyses, opinions, and conclusions were properly *developed*. Additional findings may apply once the workfile is made available. Future stages of the assignment may include additional valuation services, including but not limited to an independent retrospective appraisal. I reserve my right to amend my findings based on future production of relevant documents.

Documents relevant to my opinions and conclusions, including but not limited to the workfile for the Holmes report, have not been produced. While I can properly review the report, I cannot fully evaluate whether the analyses, opinions and conclusions were properly *developed*. Additional findings may apply once the workfile is made available. Future stages of the assignment may include additional valuation services, including but not limited to an independent retrospective appraisal. I reserve my right to amend my findings based on future production of relevant documents.

The appraisal (including the appraised value) lacks credibility. Therefore, an independent opinion of value is provided on the pages that follow.

All assignment characteristics from the review extend to the independent opinion of value. Uncontested information from the Holmes appraisal regarding physical characteristics are assumed accurate. The retrospective condition is assumed to have been *average*. ***The use of these assumptions is reasonable but may have affected the assignment results.***

Relevant Dates

Date	Information	Party	Source
9/17/2010	Utility Lien	Republic Services	Doc. #201009170001706
1/4/2011	Notice of Deliquent Assessment Lien	Glenview West Townhomes Assoc.	Doc. #201101040005412
3/29/2011	Notice of Default & Election to Sell	Glenview West Townhomes Assoc.	Doc. #201103290002690
4/8/2011	Utility Lien	Republic Silver State Disposal Inc	Doc. #201104080002551
5/10/2011	Notice of Breach & Election to Sell *	Law Offices of Les Zieve	Doc. #201105100001579
9/20/2011	Notice of Trustee Sale	Law Offices of Les Zieve	Doc. #201109200002964
9/28/2011	Certificate Foreclosure Mediation NV	Law Offices of Les Zieve	Doc. #201109280002291
10/13/2011	Notice of Trustee Sale	Glenview West Townhomes Assoc.	Doc. #201110130001535
10/13/2011	Default Recission *	Edwards, George R	Doc. #201110130001802
12/19/2011	Utility Lien	Republic Silver State Disposal Inc	Doc. #201112190000447
1/25/2012	**$5,331 Sale at HOA Auction**	**Alessi & Koenig (Trustee)**	**Doc. #201201310001704**
1/25/2012	**$48,000 Unimpaired Market Value**	**Holmes Appraisal Report**	**Holmes report, p 4**
1/31/2012	Recording of HOA Auction Sale	4254 Rolling Stone Dr Trust	Doc. #201201310001704

The subject had been a distressed property since at least 1Q 2011. As of the retrospective effective date, it was subject to utility liens and facing foreclosure under NRS 116. A certificate of foreclosure had been issued in favor of the Law Offices of Les Zieve. While a prior NRS 107 foreclosure was rescinded, it was likely to resume.

Type and Definition of Value

Generally accepted appraisal methodology indicates, *"The intended use of an appraisal dictates which definition of market value is applicable."*[25] The intended use of this appraisal is litigation in the matter of *U S Bank National Association, v. George Edwards, et al* (Case #A-12-667690-C). The deed indicates that after appropriate notices, disclosures, and waiting periods, the subject sold at auction as an HOA foreclosure sale in compliance with NRS 116.

The subject was a distressed property in a distressed market. The seller was under compulsion to sell. Therefore, the traditional definition of Market Value cannot apply. In fact, the forced sale under NRS 116 precludes *any* definition of value that includes a requirement that neither party is under compulsion to sell, or any similar requirement that buyer and seller are typically motivated. Professional appraisers recognize that *"other types of value might be more appropriate for properties when a forced sale or some other*

[25] The Appraisal of Real Estate, 14th Edition, p 60. (Chicago: Appraisal Institute, 2013).

form of distress is influencing the decisions of the buyer or seller."[26] Appraisers familiar with real estate damages know that, *"liquidation value is often associated"*[27] with foreclosure transactions that contain some sort of duress, non-market motivation, and/or limited exposure.

Appraisal texts, advisories, and guide notes suggest the use of either *Liquidation Value* or *Disposition Value* when valuing distressed properties and/or when faced with a distressed market. Disposition Value most closely captures the circumstances of an HOA foreclosure sale under NRS 116. However, because 116 foreclosures are so unique, they do not fit either definition perfectly. The lack of a perfect fit has caused confusion in several other 116 cases. Therefore, in order to avoid confusion, it is logical to use *Impaired Value* as defined on the following page.

> Impaired Value The indicated value of a property with a detrimental condition reached upon the application of one or more of the three approaches to value.[28]

VALUATION METHODOLOGY

Approach to Value and Selection of Comparable Sales

Neither the income approach nor the cost approach are necessary for credible assignment results. Neither approach is part of the scope of work for this assignment. The sales comparison approach represents the most reasonable methodology for this assignment.

The premise of the sales comparison approach is the economic principle of Substitution. This principle states that when comparably equivalent goods or services are available, a buyer in an open market will choose the one with the lowest price. The sales comparison approach also considers the secondary principles of Supply and Demand, Balance, and Externalities. An appraiser develops an indicated value by analyzing closed sales, listings, and/or pending sales of properties similar to the subject, using relevant units and elements of comparison.

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[26] Ibid, p 65.
[27] Randall Bell, PhD, MAI, Real Estate Damages: Applied Economics and Detrimental Conditions, 3rd ed. (Chicago: Appraisal Institute, 2016), p. 77.
[28] Ibid, p 461.

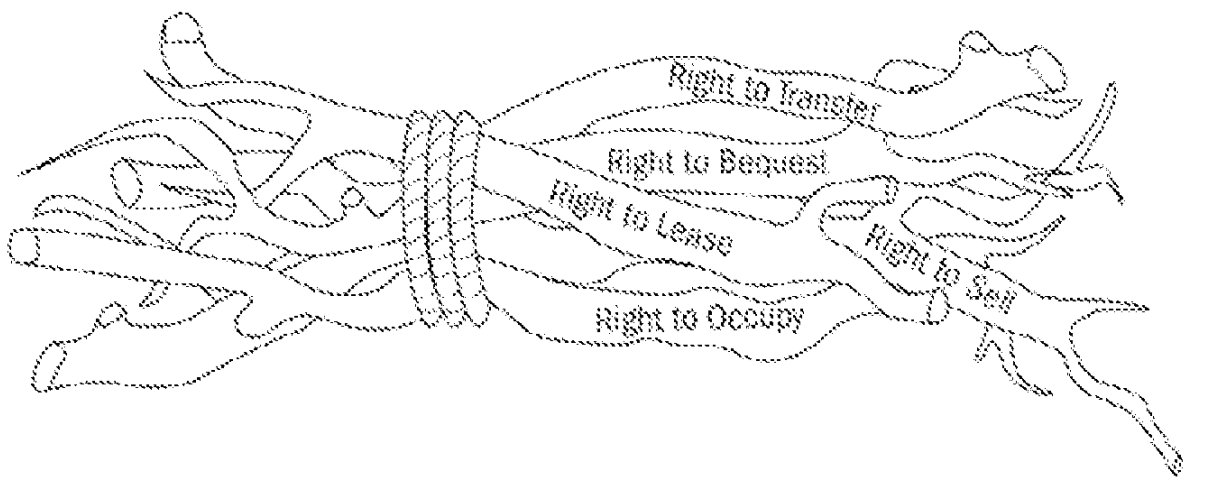
Units of comparison represent the way that typical buyers measure and compare similar properties. Elements of comparison explain the differences in price between properties based on transactional and property characteristics. Generally accepted appraisal methodology requires transactional adjustments be applied before property adjustments **and** in the specific sequence shown below.

1. Real property rights conveyed
2. Financing terms
3. Conditions of sale
4. Expenditures made immediately after purchase
5. Market conditions

The 14th edition states: *Before a comparable sale property can be used in sales comparison analysis, the appraiser must first ensure that the sale price of the comparable property applies to property rights that are similar to those being appraised.*[29]

The bundle of rights is a common way of referencing the components of interest in real estate. A proper understanding of the bundle of rights is foundational to a properly developed and communicated appraisal. The interest or rights associated with real estate ownership include the right to: use the real estate; sell it; lease it; enter it; and give it away. Each stick has value and can be separated and traded in the market. As shown on the following page, they are often illustrated as a bundle of sticks.

The Bundle of Rights



[30]

[29] The Appraisal of Real Estate, 14th Edition, p 406. (Chicago: Appraisal Institute, 2013).
[30] Ibid, p 5.

In this assignment, the interest appraised is fee simple. However, there were limitations on the bundle of rights that must be considered. Buyers of HOA foreclosures can face limitations on any or all of the rights including but not limited to restrictions on occupancy, possession, or use of the property. This risk to the rights was not present in traditional, short sale, REO, or 107 foreclosure transactions.

Another consideration is the limitation on salability and financing. The retrospective effective date is January 25, 2012 (the date of acquisition at public auction). As of that date, there was no title company in Southern Nevada willing to issue title insurance following an HOA foreclosure sale. The lack of insurable clear title would have precluded traditional financing options to a typical buyer. This represents risk to the right of transfer and precludes typical financing options to future buyers. These issues were not present in traditional, short sale, REO, or non-HOA foreclosure transactions.

> The 14th Edition states:
> *The real property rights to be appraised are singled out among the relevant characteristics of the property because, like the appropriate type and definition of value for the assignment, the property rights appraised are a fundamental element of the assignment. An oversight in the analysis of some other characteristic of the property may or may not have a noticeable effect on the ultimate opinion of value, but a poor understanding of what precisely is being valued guarantees a critical error in the development of the appraisal.*[1] *... Real property appraisal involves not only the identification and valuation of a variety of different rights, but also the analysis of the many limitations on those rights, and the effect that the limitations have on value.* [31]

The cited Appraisal Journal article deals solely with commercial property. However, the concept, that the bundle of rights is fundamental to an appraisal assignment, applies. An additional risk in the purchase of HOA lien properties was the likelihood of litigation. As of the retrospective effective date, numerous district court cased had ended with decision both in favor of and opposed to a buyer's position. The Nevada Supreme Court had not yet interpreted NRS 116.3116. These circumstances are the Detrimental Condition that is referenced in the Holmes appraisal.

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[31] The Appraisal of Real Estate, 14th Edition, p 69-70. (Chicago: Appraisal Institute, 2013).

1 See David Lennhoff, "You Can't Get the Value Right If You Get the Rights Wrong," *The Appraisal Journal* (Winter 2009): 60-65.

Detrimental Condition

Foreclosures are typically classified as a Class II DC. A brief restatement of the classification and the risk factors appear below.

Class II Detrimental Condition – Transactional Conditions:

> *Class II transactional conditions relate to situations in which some particular and unique issue impacted a specific transaction. This classification includes transactions in which a buyer pays more than necessary to acquire a property or a seller disposes of a property at a discount.*[32]

Under the Class II classification, the book Real Estate Damages states, *"Distress sales often reflect prices below market value due to specific seller motivation including bankruptcy, lender repossessions (real estate-owned or REO), and other factors. When dealing with distressed properties, real estate professionals need to be aware of why these properties may be discounted below market value. ... Forced or semi-forced sales such as REO transactions may result in below market sale prices and, as a result, would not be indicative of typical motivations associated with most definitions of market value."*[33]

The Detrimental Condition Matrix: Real property affected by a detrimental condition will typically have a life cycle of three stages: Assessment, Repair, and Ongoing. During each stage, a property may be affected by three related issues: Cost, Use, and Risk. The Detrimental Condition Matrix (reproduced from *Real Estate Damages)* appears below.

Detrimental Condition Matrix

	Assessment	Repair	Ongoing
Cost	Assessment Costs & Responsibility	Repair Costs & Responsibility	Ongoing Costs & Responsibility
Use	Use Impacts While Assessed	Use Impacts While Repaired	Impact on Highest & Best Use
Risk	Uncertainty Factor	Project Incentive	Market Resistance

[32] Randall Bell, PhD, MAI, Real Estate Damages: Applied Economics and Detrimental Conditions, 3rd ed. (Chicago: Appraisal Institute, 2016), p. 73.
[33] Ibid, p 76 and 77.

DCs follow a logical sequence of events. The market reaction to this DC varied depending on the date of value. Because of the variance, the subject DC would fall somewhere between the *Assessment* and *Repair* stages as of the retrospective effective date. *Cost* issues related to legal expenses and repairs to the property. *Use* issues related to the varying limits on the bundle of rights. The foremost factor facing 116 properties as of the HOA auction date was *Risk* (uncertainty and/or incentive).

Risk: At the time of the HOA auction, there were many unknowns. The risk associated with the subject would be similar to the risk of purchasing a car without the ability to turn the ignition or open the hood. It could also be likened to buying a dented can from a grocery shelf that was missing its label. The typical buyer in these circumstances will require a substantial discount as an incentive to buy. HOA foreclosure properties contained an additional risk. It was a known possibility that even ***after*** a purchase, the original lien holder might ignore any ownership rights and sell the property out from under the 116 buyer. The typical buyer in these circumstances will require an even greater discount.

Conclusion

The most likely buyer was an investor. The risk noted above represents a Class II Detrimental Condition - Transactional Conditions. The risk and associated costs would have affected a typical investor's decision to purchase. Thereby, reducing the number of potential buyers. The typical buyer for an HOA foreclosure property would require a substantial discount to offset the associated risk.

Traditional sales are so different that they cannot be used as comparable measures of worth for HOA lien properties. Short sales, REO sales and 107 foreclosures should not be used as comparable measures of worth for HOA lien properties without analysis and adjustment of the transactional elements of comparison.

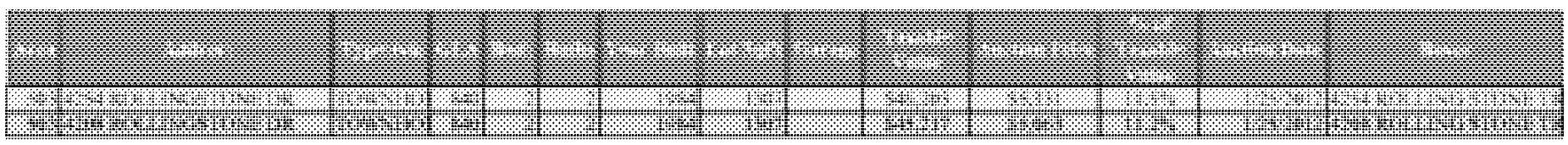
Based on the above analysis, the most logical definition of value would be Impaired Value. The most similar transactions, and therefore the best comparable sales, are other HOA foreclosures.

Sales Comparison Analysis

Research of historical foreclosures and trustees deeds in the MLS tax assessor's database revealed 26,468 transactions, recorded in Clark County, between January 1, 2011, and June 30, 2012. Restricting the search criteria to attached townhouses less than 1,300 square feet of GLA, and built between 1974 and 1994 reduced the number of transactions to 410. Further restricting the search to MLS areas 501-504 revealed 90 potential transactions.

Based on prior analysis, the best comparable sales will be similar HOA foreclosures. Research into the deeds found that only two of those properties (including the subject) were HOA foreclosures under NRS 116. Those transactions appear in the table on the following page. They are sorted by auction date with the most current transactions on top. The subject is highlighted in green. The property at 4208 Rollingstone is located on the same street and built to the same plan.

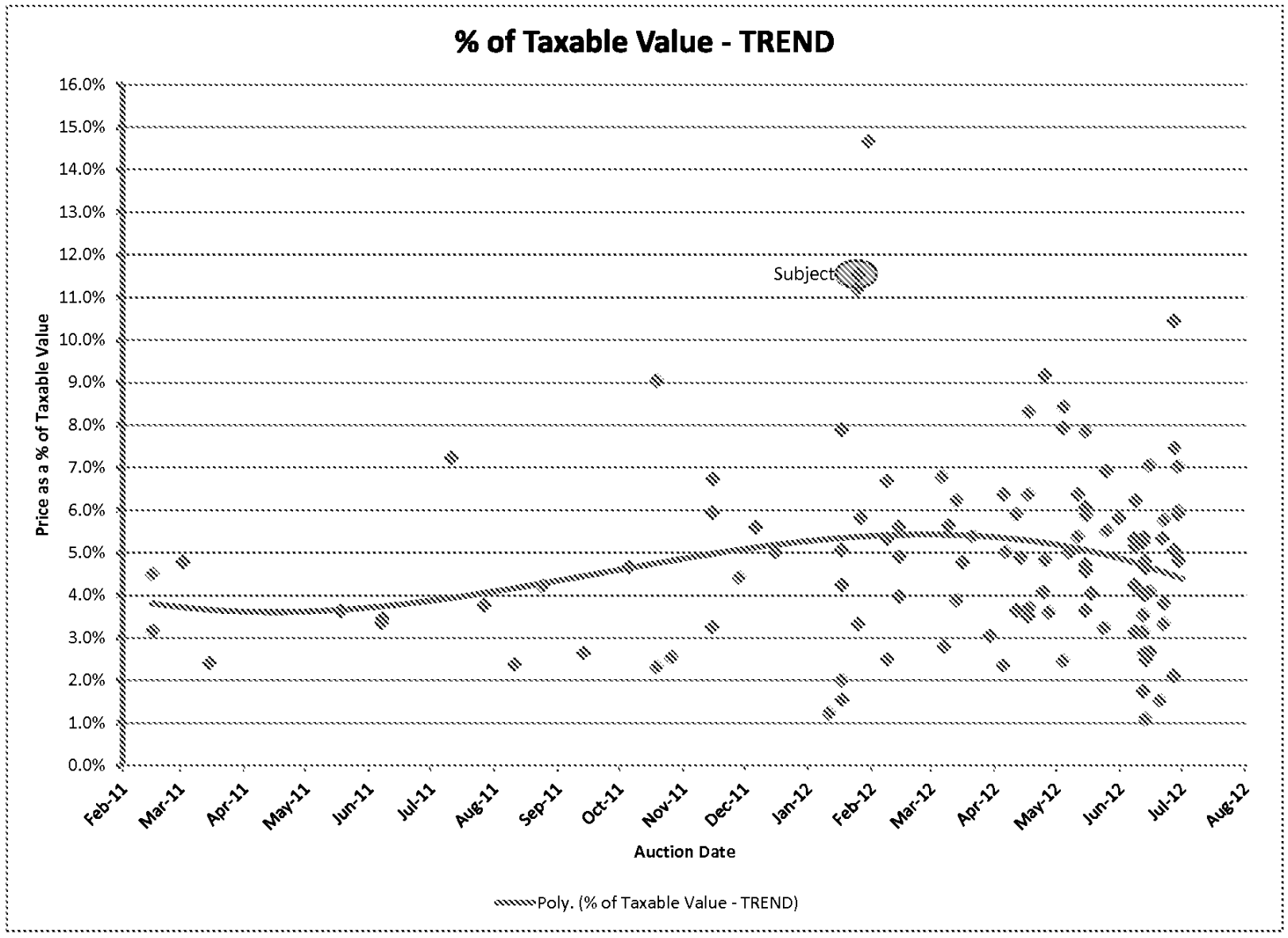
Comparable 116 Sales



Two sales is not enough data from which to draw a conclusion. The subject sale takes place early in the life cycle of 116 foreclosures in Nevada. Therefore, I expanded the search criteria to include all 116 foreclosures of all properties within the specified period. Omitting outliers, the search resulted in 117 properties that sold at 116 auction. In many HOA lien transactions, the assessed value was used to calculate the real property transfer tax. Assessed value becomes a constant point of reference for comparison. The point statistics for that sample appear in the table below.

[illegible]	4.9%
[illegible]	4.8%
[illegible]	6.4%
[illegible]	2.2%
[illegible]	1.1%
[illegible]	14.7%

Looking at the auction price as a percentage of the assessed value reveals a range from 1.1% to 14.7%. The subject auction price of $5,331 is 11.5% of the retrospective assessed value. The trend indicated by the sample of all properties appears on the following page.



The shaded oval indicates the subject. It falls above the overall trend and is the second highest of all the sales in the sample. The subject sale is also above the median and mean for the overall sample.

Reconciliation

The subject auction price of $5,331 (11.5% of the retrospective assessed value) falls above the overall trend and is the second highest of all the sales in the sample. The subject sale is also above the median and mean for the overall sample. It represents the upper end of the range demonstrated by contemporaneous transactions. Based on these facts, my professional opinion is that the subject's acquisition price is equivalent to or above a reasonable, retrospective, impaired value.

As an HOA foreclosure property, affected by a Class II detrimental condition, the fee simple impaired value as of January 25, 2012 was:

$5,300
Five Thousand Three Hundred Dollars (rounded)
-- END OF REPORT --

Addenda

A. Qualifications of Michael Brunson
B. Expert Disclosure for Michael Brunson

Addendum A: Qualifications of Michael Brunson

Michael L. Brunson, MNAA, SRA

AQB Certified USPAP Instructor
Nevada Certified General Appraiser #A.0207222-CG
California Certified General Appraiser #3003517
Member of the Nevada Real Estate Division Appraisal Advisory Review Committee
Collateral Valuation Specialist
mike@brunson-jiu.com www.brunson-jiu.com

VALUATION BUSINESS BACKGROUND

Brunson-Jiu, LLC (Partner, 2011 – Present) Founding partner of a firm providing real property valuations, consulting and expert witness services. Areas of specialty include: real estate damages analysis for residential, commercial, vacant land and multi-family properties; and business valuation and exit planning strategies.

Bell Anderson & Sanders LLC (Contract Appraiser, 2008 – 2014) Engagement involved studying the economic impact of detrimental conditions, including issues such as environmental contamination, construction defects, legal conditions such as eminent domain, and proximity effects.

Columbia Institute (Instructor, 2009-Present) Approved to teach pre-licensing and continuing education courses related to residential appraisal

Ascent Appraisal, Inc. (Principle/Chief Appraiser, 1997 – 2011) An independent real estate valuation and consulting firm providing a comprehensive range of professional valuation products and services. We specialize in expert witness services; litigation support and consulting; forensic review; and complex valuation assignments.

Institute for Real Estate and Appraisal Studies (Instructor, 2003 – 2009) Approved to teach both pre-licensing and continuing education courses related to residential appraisal.

Ascent Inspection, Inc. (Owner/Primary Inspector, 2001 – 2003) An independent residential and commercial inspection firm providing both pre-purchase and pre-listing property inspections.

Berry & Associates (Registered Intern/Office Manager, 1995 – 1997) Performed single and multi-family residential appraisal assignments in form reports on various property types; conducted extensive market research & due diligence; performed internal appraisal review function; and appraisal office management.

EXPERT WITNESS / CONSULTING

AQB Certified USPAP Instructor The Uniform Standards of Professional Appraisal Practice (USPAP) are the recognized standard of care for professional appraisers. Michael is one of only four certified appraisers qualified as an AQB Certified USPAP Instructor in Nevada. He teaches USPAP courses and provides USPAP consultation to attorneys, appraisers, and lending clients. Michael has completed assignments for civil, probate, real estate damages, and divorce cases. He has qualified as an expert witness in real estate valuation in the 8th Judicial District Court of Clark County, Nevada.

Assignments in which an expert has provided deposition or court testimony are disclosed in compliance with state/federal law. Cases lacking such testimony are confidential.

Cases with Court Testimony:	SFR v Green Tree Servicing, A-680704 Wilmington Trust v Edward Webb, A-700347 SFR v Green Tree, A-695002 Shaw v Citi Mortgage, 3:13-cv-00445-LRH-VPC Peach v McKay, A-605325 (Arbitration) Johnson et al v Stanpark, A-606013 Santos Probate, P-068058 Dennett v Miller, A-459131
Deposition Testimony:	Bank of America NA v SFR, 2:15-cv-00693-GMN-VCF Alessi & Koenig v Storm, A-699883 PNC Bank v Wingfield CA, 3:15-cv-00349-MMD-VPC Platinum Realty v Wells Fargo, 2:13-cv-00535-GMN-NJK SFR v Wells Fargo, A-688212 SFR v US Bank, A-673671 Wells Fargo v SFR, 2:15-cv-00577-APG-PAL Wells Fargo v SFR, 2:15-cv-00748-APG-GWF Poshbaby v Elsinore III, A-699435 Sunlight Trust v Brogan, A-691473 Wells Fargo v SFR, 2:15-cv-00576-RFB-CWH SFR v Green Tree Servicing, A-680704 FDIC v CoreLogic, SACV11-704 DOC Nguyen v Taylor, A-644936 Aguirre v American Nevada, A-600566 Copper Sands HOA v Copper Sands Realty, A-560139 Deutsche Bank v Mha, A-532836 Carlisle v Pardee, A-421939 Demby v Chamberlin, A-443513

INTERVIEWS, PUBLICATIONS AND PUBLIC TESTIMONY

Local and national media recognize Michael as an expert in the Las Vegas Real Estate market.

- Interviewed by Real Estate Today, Show 385, 10 Ways to Increase the Value of Your Home, aired June 25, 2016.
- Author, Highlights from the Recent TAFAC Meeting, *Appraiser Focus, 2nd Quarter 2016*, National Association of Appraisers.
- Co-author, Can I get a witness? 10 tips for landing and performing work as an expert witness appraiser, January 14, 2016, *Valuation, Volume 20, Number Four*, The Appraisal Institute.
- Panel Member, Spring 2015 Housing Outlook, Homebuilders Research (May 29, 2015)
- Panel Member, Lied Institute and Nevada Department of Business and Industry - Nevada Housing Forum (September 22, 2014)
- Panel Member, Using the Cost Addendum for High Performance Homes (October, 16, 2013)
- Panel Member, The Green Home Valuation Summit, Phoenix, AZ (September 23, 2013)
- Appraisal Industry Representative, Special City Council Meeting of the City of North Las Vegas, Regarding the underwater mortgage crisis (June 11, 2013)
- Panel Member, Spring 2013 Housing Outlook, Homebuilders Research (April 12, 2013)
- Interviewed by Diana Olick of CNBC (March 5, 2013 published on cnbc.com and aired on the NPR Nightly Business Report)
- Panel Member and Presenter, 2012 High Performance Home & Building Summit (August 15-16, 2012)
- Panel Member, Spring 2012 Housing Outlook, Homebuilders Research (April 27, 2012) Quoted by Hubble Smith of the Las Vegas Review Journal.
- Real Estate Panel Member, Spring 2011 Economic Outlook, UNLV Center for Business and Economic Research, (June 20, 2011)
- Interviewed by Jason Morgan of *Valuation Review*, Appraisers caught in the middle of Las Vegas housing market tensions, Online: March, 31, 2011, Print: April 25, 2011
- Interviewed by Calvert Collins of KLAS-TV (aired March 28, 2011)
- Author, Growing Business: Giving Clients What They Need, Vol. 217, March 21, 2011, *Working RE Magazine*
- Interviewed by Hubbel Smith of the Las Vegas Review-Journal (August 5, 2010).
- Interviewed by Calvert Collins of KLAS-TV (aired May 5, 2010)
- Interviewed by Dana Gentry of Las Vegas 1 (aired March 27, 2009)
- Interviewed by Chris Saldana of KLAS-TV (aired March 9, 2009)
- Interviewed by Stephanie Dhue of the Nightly Business Report (aired October 262, 2007).
- Interviewed by Hubbel Smith of the Las Vegas Review-Journal (June 7, 2007).

Michael has provided public comment and testimony before the Nevada Commission of Real Estate Appraisers, the Nevada Assembly Committee on Commerce and Labor and the Nevada Senate Committee on Commerce and Labor on numerous occasions.

MEMBERSHIPS

Appraisal Institute: SRA Designated Member. Awarded February 2015.

National Association of Appraisers: Founding Member. 2010-2016 Director; 2013, 2014 President; 2010-2012 Vice President; Representative to The Appraisal Foundation Advisory Council (TAFAC).

Coalition of Appraisers in Nevada: Founding Member. 2009-2016 Director; 2010-2011 President; 2009 Vice President; Government Relations Committee Chair 2009-2015.

National Association of Realtors

Greater Las Vegas Association of Realtors

TEACHING EXPERIENCE

Approved by the State of Nevada to teach both pre-licensing and continuing education appraisal courses. Michael has also been approved to teach courses in California, Arizona, Indiana, Michigan, Wisconsin, and Utah. A partial list of classes includes:

Fundamentals of Real Estate Appraisal
Applied Residential Appraisal Techniques I
Appraisal Law in Nevada
Highest & Best Use Analysis I
Appraising Small Residential Income Properties
Cost Approach Revisited
Communicating the Appraisal I, II, III and IV
7 and 15 Hour National Uniform Standards of Professional Appraisal Practice
How Finance affects Value
Advanced Neighborhood and Market Area Analysis
Appraising 2-4 & Multi-Family Properties
Foreclosures & Short Sales: Dilemmas and Solutions

Private seminars authored and instructed by Mr. Brunson:

Neighborhood and Market Analysis I and II
Cost Approach – The Square Foot Method
Mortgage Fraud – An Appraiser's Perspective (NV CLE Seminar)
Residential Real Estate Appraisal (For Brokers/Agents)
How to Select & Evaluate an Expert Witness (NV CLE Seminar)

EDUCATION

Professional Education

University of Nevada, Las Vegas, Introductory and Intermediate Statistics
Clark County Community College, Principles of Real Estate Appraisal
Appraisal Institute, Standards of Professional Practice, Part A (410)
Appraisal Institute, Standards of Professional Practice, Part B (420)
Appraisal Institute, Standards of Professional Practice, Part C (430)
Appraisal Institute, Nevada Appraisal Statutes
Appraisal Institute, FHA and the Appraisal Process
Appraisal Institute, Complex Litigation Appraisal Case Studies
Appraisal Institute, Analyzing the Effects of Environmental Contamination on Real Estate
Appraisal Institute, Advanced Income Capitalization
Appraisal Institute, Advanced Spreadsheet Modeling for Valuation Applications
Appraisal Institute, General Appraiser Site Valuation and Cost Approach
Appraisal Institute, General Appraiser Sales Comparison Approach
Appraisal Institute, General Appraiser Market Analysis and Highest and Best Use
Appraisal Institute, Real Estate Finance, Statistics, and Valuation Modeling
Appraisal Institute, Advanced Residential Report Writing, Part I and II
Nevada Commission of Appraisers, Valuing Residential Energy Efficiency
Chicopee Group, Impact of Financing on Appraisals
TWI Systems, 50 hours of Professional Inspection Training
Clark County Community College, 60 hours of home Inspectors Training
Institute for Real Estate and Appraisal Studies, Applied Residential Appraisal Techniques I
Institute for Real Estate and Appraisal Studies, Highest and Best Use Analysis I
Institute for Real Estate and Appraisal Studies, Introduction to Business Appraisal
Institute for Real Estate and Appraisal Studies, Small Residential Income Properties I
Institute for Real Estate and Appraisal Studies, Introduction to Commercial Appraisal
Institute for Real Estate and Appraisal Studies, Income Capitalization I and II
IRWA, Principles of Real Estate Engineering
IRWA, Understanding Environmental Contamination in Real Estate
IRWA, Environmental Due Diligence and Liability
(Current Continuing Education course list available upon request)

Other Education

University of Nevada at Las Vegas, Las Vegas, NV - 1991
B.A. in Psychology. Emphasis on experimental psychology and methodology.

Chaparral High School, Las Vegas, NV ▪ 1987
Graduated with High Honors.

REFERENCES

- Available upon request

Addendum B: Expert Disclosure Requirements

Compensation for Study and Testimony: Michael L. Brunson charged an hourly rate of $400 per hour for this stage of the assignment. Michael's hourly rate is $400 for non-testimony time and $450 for testimony time. Non-testimony time is billed for research, consultation, meetings, field inspections, travel, analysis, deposition preparation, and court preparation. **There is a two-hour minimum for deposition and court testimony. Anticipated fees for deposition and court testimony are to be paid 48 hours prior to the scheduled appearance.**

Publications:

- Author, Highlights from the Recent TAFAC Meeting, *Appraiser Focus, 2nd Quarter 2016*, National Association of Appraisers
- Co-author, Can I get a witness? 10 tips for landing and performing work as an expert witness appraiser, January 14, 2016, *Valuation, Volume 20, Number Four*, The Appraisal Institute.
- Author, Growing Business: Giving Clients What They Need, March 21, 2011, Vol. 217, *Working RE Magazine*
- National Association of Appraisers, Appraisal 4-1-1 e-newsletters

Summary of Recent Testimony:

Cases with Court Testimony:	SFR v Green Tree Servicing, A-680704 Wilmington Trust v Edward Webb, A-700347 SFR v Green Tree, A-695002 Shaw v Citi Mortgage, 3:13-cv-00445-LRH-VPC Peach v McKay, A-605325 (Arbitration) Johnson et al v Stanpark, A-606013 Santos Probate, P-068058 Dennett v Miller, A-459131
Deposition Testimony:	Bank of America NA v SFR, 2:15-cv-00693-GMN-VCF Alessi & Koenig v Storm, A-699883 PNC Bank v Wingfield CA, 3:15-cv-00349-MMD-VPC Platinum Realty v Wells Fargo, 2:13-cv-00535-GMN-NJK SFR v Wells Fargo, A-688212 SFR v US Bank, A-673671 Wells Fargo v SFR, 2:15-cv-00577-APG-PAL Wells Fargo v SFR, 2:15-cv-00748-APG-GWF Poshbaby v Elsinore III, A-699435 Sunlight Trust v Brogan, A-691473 Wells Fargo v SFR, 2:15-cv-00576-RFB-CWH SFR v Green Tree Servicing, A-680704 FDIC v CoreLogic, SACV11-704 DOC Nguyen v Taylor, A-644936 Aguirre v American Nevada, A-600566 Copper Sands HOA v Copper Sands Realty, A-560139 Deutsche Bank v Mha, A-532836 Carlisle v Pardee, A-421939 Demby v Chamberlin, A-443513

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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.

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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.

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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

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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: January 20, 2017

McCarthy & Holthus, LLP

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

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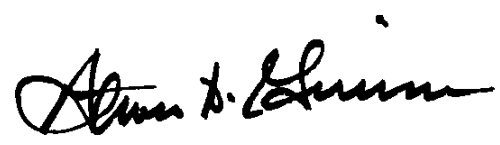

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DISTRICT COURT

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

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

Defendant/counterclaimant, Resources Group, LLC, as Trustee for the Bourne Valley Court Trust (hereinafter "Resources Group"), by and through its attorneys, Michael F. Bohn, Esq. and Adam R. Trippiedi, Esq., submits the following points and authorities in support of its motion for summary judgment, filed on January 3, 2017, and in response to the arguments raised by U.S. Bank National Association ND (hereinafter "plaintiff") in its opposition to motion for summary judgment, filed on January 17, 2017.

POINTS AND AUTHORITIES

Legal Argument

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

At page 6 of its opposition, plaintiff argues that this court should adopt the ruling by the Ninth Circuit court of appeals in Bourne Valley Court Trust v. Wells Fargo Bank, N.A., 832 F.3d 1154 (9th Cir. 2016), and find that "NRS § 116.3116 *et seq* is unconstitutional in all respects due to the 'opt in' noticing as outlined in the statute." The decision in Bourne Valley, however, is not a binding interpretation of the statute, and the Nevada Supreme Court has expressly rejected the due process argument adopted by the majority opinion in that case.

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

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

and stated: "However, for the aforementioned reasons, we decline to follow its holding."

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 also rejected the lender's argument that the statutory scheme granting to the HOA its superpriority lien rights violated due process:

> The contours of U.S. Bank's due process argument are protean. **To the extent U.S. Bank argues that a statutory scheme that gives an HOA a superpriority lien that can be foreclosed nonjudicially, thereby extinguishing an earlier filed deed of trust, offends due process, the argument is a nonstarter**. As discussed in 7912 Limbwood Court Trust, 979 F. Supp. 2d at 1152'.
>
> > Chapter 116 was enacted in 1991, and thus [the lender] was on notice that by operation of the statute, the [earlier recorded] CC & Rs might entitle the HOA to a super priority lien at some future date which would take priority over a [later recorded] first deed of trust.... Consequently**, the conclusion that foreclosure on an HOA super priority lien extinguishes all junior liens, including a first deed of trust recorded prior to a notice of delinquent assessments, does not violate [the lender's] due process rights.** (emphasis added)
>
> 334 P.3d at 418.

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

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

> We note initially that the decisions of the federal district court and panels of the federal circuit court of appeal are not binding upon this court. United States ex rel. Lawrence v. Woods, 432 F.2d 1072, 1075-76 (7th Cir. 1970), *cert. denied*, 402 U.S. 983, 91 S.Ct. 1658, 29 L.Ed. 2d 140 (1971). Even *en banc* decision of a federal circuit court would not bind Nevada to restructure the court system of this state. Our state constitution binds the courts of the State of Nevada to the United States Constitution as interpreted by the United States Supreme Court. art. I, §2. See Bargas v. Warden, 87 Nev. 30, 482 P.2d 317, *cert. denied*, 403 U.S. 935, 91 S. Ct. 2267, 29 L.Ed.2d 715 (1971).

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

> We recognize that it is **solely within the province of the state courts to authoritatively construe state legislation**. *See* United States v. Thirty–Seven (37) Photographs, 402 U.S. 363, 369, 91 S. Ct. 1400, 28 L. Ed. 2d 822 (1971). Nor are we authorized to rewrite the law so it will pass constitutional muster. Virginia v. American Booksellers Ass'n, Inc., 484 U.S. 383, 397, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988). A federal court's duty, when

faced with a constitutional challenge such as this one, is to employ traditional tools of statutory construction to determine the statute's "allowable meaning." Grayned v. City of Rockford, 408 U.S. 104, 110, 92 S. Ct. 2294, 33 L.Ed.2d 222 (1972); Stoianoff v. Montana, 695 F.2d 1214, 1218 (9th Cir.1983). In doing so, **we look to the words of the statute itself as well as state court interpretations of the same or similar statutes**. Grayned, 408 U.S. at 109–10, 92 S. Ct. 2294. Moreover, before invalidating a state statute on its face, a federal court **must determine whether the statute is "readily susceptible" to a narrowing construction by the state courts.** American Booksellers, 484 U.S. at 397, 108 S. Ct. 636; Nunez v. City of San Diego, 114 F.3d 935, 942 (9th Cir.1997). (emphasis added)

271 F.3d at 1146-1147.

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

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

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

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

In the present case, the notice of delinquent assessment lien recorded on January 4, 2011 (Exhibit 4 to Resource Group's motion) stated that the assessment lien was recorded in accordance with Nevada Revised Statutes and the Association's Declaration of Covenants Conditions and Restrictions (CC&Rs) recorded in the official records of Clark County, Nevada. A copy of the CC&Rs is Exhibit K to Resource Group's opposition, filed on January 19, 2017. Plaintiff's deed of trust was not recorded until March 26, 2009. (Exhibit 2 to plaintiff's opposition)

Because the CC&Rs were recorded prior to the adoption of the UCIOA in Nevada in 1991, the CC&Rs do not expressly refer to the rights held by the HOA pursuant to NRS Chapter 116. NRS 116.1206(1) provides:

> 1. Any provision contained in a declaration, bylaw or other governing document of a common-interest community that violates the provisions of this chapter:
>
> (a) **Shall be deemed to conform with those provisions by operation of law**, and **any such declaration, bylaw or other governing document is not required to be amended to conform to those provisions.**
>
> (b) Is superseded by the provisions of this chapter, regardless of whether the provision contained in the declaration, bylaw or other governing document became effective before the enactment of the provision of this chapter that is being violated. (emphasis added)

As a result, the CC&Rs recorded in 1983 are "deemed to conform" with the provisions of NRS 116.3116 "by operation of law," including the provisions in NRS 116.3116(2) defining the HOA's superpriority lien rights.

As recognized by the Nevada Supreme Court in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408, 419 (2014), NRS 116.1104 prevents that language in Article VI, Section 11 of the CC&Rs from varying or waiving the HOA's superpriority lien rights under NRS 116.3116(2).

At the time that plaintiff's deed of trust was recorded on March 26, 2009, NRS 116.3116(5) stated:

> Recording of the declaration constitutes record notice and perfection of the lien. No recordation of any claim of lien for assessment under this section is required.

As recognized by the Nevada Supreme Court in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., the CC&Rs recorded on December 12, 1983 and the statute enacted in 1991 provided plaintiff with notice that its deed of trust was subordinate to the HOA's superpriority lien rights.

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

B. Judicial Estoppel does not apply.

At pages 7 to 9 of its opposition, plaintiff argues that because Southwest Financial Services was scheduled as a creditor holding a secured claim in Schedule D filed by Bourne Valley Court Trust on June 13, 2012 in Case No. 12-16387-btb (Exhibit 15 to plaintiff's motion for summary judgment, filed on January 3, 2017), Resources Group has taken an inconsistent position.

Unlike the facts in Hamilton v. State Farm Fire & Cas. Co., 210 F.3d 778 (9th Cir. 2001), in the present case, the Property was fully disclosed in Schedule A at page 3 of 29. The secured claim by Southwest Financial Services against the Property was disclosed in Schedule D at page 8 of 29 as "disputed" and for an "unknown" amount. Bourne Valley Court Trust's compliance with the Bankruptcy Code's requirement that the debtor schedule this "disputed" claim is entirely consistent with Resources Group's argument that the deed of trust was extinguished by the HOA foreclosure sale held on January 25, 2012. Judicial estoppel does not apply in the present case.

C. Resources Group is protected as the grantee of a bona fide purchaser.

Plaintiff has identified no evidence that would have put 4254 Rolling Stone Dr Trust on notice of any basis for plaintiff to dispute the extinguishment of its subordinate deed of trust. 4254 Rolling Stone Dr Trust therefore qualifies as a bona fide purchaser for value.

Shadow Wood Homeowners Association v. New York Community Bancorp, Inc., 132 Nev. Adv. Op 5, 366 P.3d 1105 (2016) (hereinafter "Shadow Wood"), discusses bona fide purchaser status 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, actual or constructive.

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 not 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.

In Shadow Wood, the court concluded its discussion regarding Gogo Way's status as a bona fide purchaser by stating:

> And NYCB points to no other evidence indicating that Gogo Way had notice before it purchased the property, either actual, constructive, or inquiry, as to NYCB's attempts to pay the lien and prevent the sale, or that Gogo Way knew or should have known that

> Shadow Wood claimed more in its lien than it actually was owed, especially where the record prevents us from determining whether that is true. ***Lennartz v. Quilty,* 191 Ill. 174, 60 N.E. 913, 914 (Ill.1901) (finding a purchaser for value protected under the common law who took the property without record or other notice of an infirmity with the discharge of a previous lien on the property)**. Because the evidence does not show Gogo Way had any notice of the pre-sale dispute between NYCB and Shadow Wood, the potential harm to Gogo Way must be taken into account and further defeats NYCB's entitlement to judgment as a matter of law.
>
> 366 P.3d at 1116 (emphasis added)

In the present case, plaintiff has likewise failed to identify any fact, recorded document or other evidence showing that plaintiff held a latent equity in the Property of which 4254 Rolling Stone Dr Trust knew or should have known.

As the grantee of a bona fide purchaser, Resources Group enjoys the same protections as 4254 Rolling Stone Dr Trust. "[A] title or lien held by a bona fide purchaser or encumbrancer can be conveyed to a grantee or assignee free and clear of a prior unknown interest even if the grantee or assignee does not fulfill the requirements of a bona fide purchaser or encumbrancer." 5 Miller & Starr, Cal. Real Est. § 11:58 (3d ed.) (citing Jones v. Independent Title Co., 23 Cal. 2d 859 (1944)).

D. Plaintiff is not entitled to equitable relief against Resources Group.

At page 9 of plaintiff's opposition, plaintiff states that "U.S. Bank humbly comes to this Court, sitting in Equity, for assistance." Under both the Restatement and Nevada law, plaintiff is not entitled to equitable relief against Resources Group because any damages which the plaintiff may have sustained as a result of an alleged wrongful foreclosure can be compensated with money damages.

As stated at page 6 of Resources Group's motion, comment b to section 8.3 recognizes that where a 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. This authority from the Restatement is consistent with the Nevada Supreme Court decisions stating that there is no equity jurisdiction when a party has available to itself an adequate remedy at law. County of Washoe v. City of Reno 77 Nev. 152, 360 P.2d 602, 604 (1961) State v. Second Judicial District Court 49 Nev. 145, 241 P.317, 321-322, 43 A.L.R. 1331 (1925); Turley v. Thomas, 31 Nev. 181, 101 P. 568 (1909); and Conley v. Chedic, 6 Nev. 222, 224 (1870); Sherman v. Clark, 4 Nev. 138, 141 (1868).

Comment b to the Restatement also recognizes that any claim that plaintiff may have cannot be asserted against Resources Group, but is limited to a claim for damages against the foreclosure agent. See Moeller v. Lien, 25 Cal. App. 4th 822, 831-832, 30 Cal. Rptr. 2d 777 (1994).

At the time of the HOA foreclosure sale, NRS 116.31166(1) provided that the recitals in the foreclosure deed were "conclusive proof" of default, mailing of the notice of delinquent assessment, recording of the notice of default, the elapsing of the 90 days, and the giving of notice of sale. The foreclosure deed (Exhibit 1 to Resources Group's motion) includes each of the required recitals. NRS 116.31166(2) provided that "[s]uch a deed containing those recitals is conclusive against the unit's former owner, his or her heirs and assigns, and all other persons."

At the top of page 10 of its opposition, plaintiff quotes the Nevada Supreme Court's statement in Shadow Wood that "in an appropriate case, a court can grant equitable relief from a defective HOA lien foreclosure sale." 366 P.3d at 1107. At the middle of page 10 of its opposition, plaintiff quotes the Nevada Supreme Court's comment on the conclusive recital language found in NRS 116.31166 stating that "such recitals are '*conclusive, in the absence of grounds for equitable relief.*'" 366 P.3d at 1112 (quoting Holland v. Pendleton Mortg. Co., 61 Cal. App. 2d 570, 143 P.2d 493, 496 (Cal. Ct. App.1943)). (emphasis in original)

Because the foreclosure deed contains each of the recitals required by NRS 116.31166, it is plaintiff's burden to prove that it is entitled to equitable relief from the "conclusive" foreclosure deed. In First Fidelity Thrift & Loan Ass'n v. Alliance Bank, 60 Cal. App. 4th 1433, 71 Cal. Rptr. 2d 295 (1998), the court recognized that where a party is seeking equitable relief, the burden is on the party seeking equitable relief to allege and prove that the person holding legal title is not a bona fide purchaser:

> **That Alliance had knowledge of First Fidelity's equitable claim for reinstatement of its reconveyed deed of trust was an element of First Fidelity's case**. "The general rule places the burden of proof upon a person claiming bona fide purchaser status to present evidence that he or she acquired interest in the property without notice of the prior interest. (Bell v. Pleasant (1904) 145 Cal. 410, 413-414, 78 P. 957; Alcorn v. Buschke (1901) 133 Cal. 655, 657-658, 66 P. 15; Hodges v. Lochhead (1963) 217 Cal. App.2d 199, 203, 31 Cal. Rptr. 879; 2 Miller & Starr, Current Law of Cal. Real Estate [1977] § 11:28, p. 51.) ... [¶] If the prior party claims an equitable rather than a legal title, however, the burden of proof is upon the person asserting that title. (Bell v. Pleasant, *supra*, 145 Cal. 410, 414-415, 78 P. 957; Garber v. Gianella (1893) 98 Cal. 527, 529-530, 33 P. 458; 2 Miller & Starr, Current Law of Cal. Real Estate, *supra*, § 11:28, pp. 52-53.)" (Gates

> Rubber Co. v. Ulman (1989) 214 Cal. App. 3d 356, 366, fn. 6, 262 Cal. Rptr. 630.) (2b) **Showing that Alliance was not an innocent purchaser for value was hence an element of First Fidelity's claim**. (Firato v. Tuttle, *supra*, 48 Cal.2d 136, 138, 308 P.2d 333.) (emphasis added)
>
> 60 Cal. App. 4th at 1442, 71 Cal. Rptr. at 301.

In Firato v. Tuttle, 48 Cal. 2d 136, 308 P.2d 333 (1957), the California Supreme Court held that the beneficiaries under a trust deed could not prevail against a bona fide purchaser who relied on recordation of a reconveyance deed even though the deed of reconveyance was issued without authority and the indebtedness had not been paid:

> The rule indicated by section 2243, which would protect innocent purchasers for value who take without any notice that the conveyance by the trustee was unauthorized, is in accord with the rule protecting such purchasers who acquire their interests from one who holds a general power and who makes a conveyance for an unauthorized purpose (see Alcorn v. Buschke, 133 Cal. 655, 66 P. 15, and cases cited) or from a trustee under a secret trust. (Ricks v. Reed, 19 Cal. 551; Rafftery v. Kirkpatrick, 29 Cal.App.2d 503, 508, 85 P.2d 147; Civ. Code, 869].) The protection of such purchasers is consistent "with the purpose of the registry laws, with the settled principles of equity, and with the convenient transaction of business." (Williams v. Jackson, 107 U.S. 478, 484, 2 S.Ct. 814, 27 L.Ed. 529. It also finds support in the better reasoned cases from other jurisdictions which have dealt with similar problems upon general equitable principles and in the absence of statutory provisions. Simpson v. Stern, 63 App. D.C. 161, 70 F.2d 765,(certiorari denied 292 U.S. 649, 54 S.Ct. 649, 54 S.Ct. 859, 78 L.Ed. 1499; Williams v. Jackson, supra, 107 U.S. 478, 2 S.Ct. 814; Town of Carbon Hill v. Marks, 204 Ala. 622, 86 So. 903; Lennartz v. Quilty, 191 Ill. 174, 60 N.E. 913; Millick v. O'Malley, 47 Idaho 106, 273 P. 947; Day v. Brenton, 102 Iowa 482, 71 N.W. 538; Willamette Collection & Credit Service v. Gray, 157 Ore. 77, 79, 70 P.2d 39; Locke v. Andrasko, 178 Wash. 145, 34 P.2d 444.
>
> 48 Cal. 2d at 139-140, 308 P.3d at 335.

At pages 6 to 9 of its motion for summary judgment, Resources Group explained how plaintiff's unrecorded claim that the notice of default had been mailed to the wrong address cannot support equitable relief against either 4254 Rolling Stone Dr Trust or Resources Group because plaintiff has an adequate remedy at law against the HOA and its foreclosure agent. Plaintiff's opposition cites no contrary authority.

In Shadow Wood, the court also stated:

> 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)

366 P.3d at 1115, n.7.

Like the lender in Shadow Wood, plaintiff failed to take any action to prevent the Property from being sold to a bona fide purchaser without notice of plaintiff's unrecorded claim that the notice of default had been mailed to the wrong address. Plaintiff cannot now assert that claim against the bona fide purchaser.

At page 10 of its opposition, plaintiff describes Wright v. Cradlebaugh, 3 Nev. 341 (1867), as "[t]he seminal opinion regarding due process in this state," but that case involved a tax sale by Ormsby County. As noted at page 2 above, because no "state actor" participates in an HOA foreclosure sale, due process is not an issue in the present case. Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage, 133 Nev., Adv. Op. 5 (Jan. 26, 2017).

E. Even if the Property was sold for less than 20% of fair market value, plaintiff cannot satisfy the California rule adopted in Shadow Wood.

At page 11 of its opposition, plaintiff asserts that "[i]n *Shadow Wood* the Nevada Supreme Court adopted the Restatement of Property Mortgages § 8.3 as the bench mark for gross inadequacy." In Shadow Wood, the Nevada Supreme Court instead applied the California rule that was first adopted by the Nevada Supreme Court in Golden v. Tomiyasu, 79 Nev. 503, 387 P.2d 989 (1963). This is appropriate because NRS 116.1108 states that "[t]he principles of law and equity, including . . . the law of real property . . . supplement the provisions of this chapter, except to the extent inconsistent with this chapter."

Unlike the case law from Alaska, New Mexico, Oklahoma, West Virginia and Arizona cited at page 12 of plaintiff's opposition, the California rule adopted in Shadow Wood recognizes that a grossly inadequate sale price does not justify relief from a foreclosure sale unless the grossly inadequate sales price is caused by fraud, oppression or unfairness.

In Shadow Wood, there are three instances before the court refers to the Restatement where the Court states, without contradiction or criticism, the standard that a foreclosure sale will not be set aside

absent fraud, oppression or unfairness which results in a grossly inadequate sales price.

As quoted at page 16 of Resources Group's motion, the first citation to the fraud, oppression or unfairness standard specifically reaffirms the standards as set forth in both the Long and Golden cases. As quoted at page 17 of Resources Group's motion, 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 cases that discuss these requirements.

As quoted at page 18 of Resources Group's motion, the third reference discusses only the first element of the California rule and the failure by NYCB "to establish that the foreclosure sale price was grossly inadequate as a matter of law." 366 P.3d at 1112.

At page 12 of its opposition, plaintiff cites the retrospective appraisal report attached as Exhibit 12 to its opposition as proof that the fair market value of the Property on the date of the HOA foreclosure sale was $48,000.00. At the bottom of page #3 of the report, however, the report states:

> The appraiser made an exterior only inspection which involves the use of an extraordinary assumption that no adverse conditions exist that may affect the livability, soundness, or structural integrity, and all subject data used from assessor records and MLS, which if found to be false, could affect the appraisers opinion of value and conclusions.

Plaintiff's opposition is not supported by any evidence proving that the "extraordinary assumption" is true, so the retrospective appraisal report is not competent evidence of the fair market value of the Property on the date of the HOA foreclosure sale.

The appraisal report also fails to mention the Detrimental Condition that distinguishes the Property in the present case from the six comparable sales listed at pages 3 and 5 of the appraisal report. Unlike the six comparable sales (3 traditional sales, 1 REO sale,1 FHA foreclosure, 1 foreclosure), 4254 Rolling Stone Dr Trust did not receive insurable clear title to the Property because no title company in Southern Nevada is willing to issue title insurance following an HOA foreclosure sale. The lack of insurable clear title precludes traditional financing options to future buyers and adversely affects Resources Group's right of disposition of the Property.

The Appraisal of Real Estate, 14th Edition, p. 406 (Chicago: Appraisal Institute, 2013) states:

"Before a comparable sale property can be used in sales comparison analysis, the appraiser must first ensure that the sale price of the comparable property applies to **property rights that are similar** to those being appraised." (emphasis added) Because the appraisal report offered by plaintiff violates this standard, the value assigned to the Property by plaintiff's appraiser is merely hypothetical.

As proved by the appraisal review, dated August 31, 2016, prepared by Brunson Jiu LLC (Exhibit 12 to Resource Group's motion), the fee simple impaired value of the Property as of January 25, 2012 was only $5,300.

F. Plaintiff's opposition is not supported by the required evidence of fraud, unfairness, or oppression "as accounts for and brings about the claimed inadequacy of price.

At page 18 of its opposition, plaintiff advances two "theories" to support its claim that unfairness is present. First, plaintiff claims that the CC&Rs misrepresent the asset being sold because Article VI, Section 11 of the CC&Rs states that "[t]he lien of the assessments provided for herein shall be subordinate to the lien of any first mortgage." (Exhibit K to Resource Group's opposition, filed on January 19, 2017)

As discussed at pages 4 and 5 above, when Nevada adopted the UCIOA in Nevada in 1991, NRS 116.1206(1) expressly provided that the CC&Rs "shall be deemed to conform with those provisions by operation of law, and any such declaration, bylaw or other governing document is not required to be amended to conform to those provisions." Likewise, in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408, 419 (2014), the Nevada Supreme Court held that NRS 116.1104 prevented any language in the CC&Rs from varying or waiving the HOA's superpriority lien rights. Plaintiff's opposition does not include any evidence proving that any person chose not to bid on the Property because of the language in Article VI, Section 11 of the CC&Rs.

At the bottom of page 19 of its opposition, plaintiff states: "U.S. Bank contends the bidding was unintentionally chilled per the Restatement as adopted by *Shadow Wood*." The foreclosure sale in the present case took place on January 25, 2012, so the bidding could not have been influenced by the reference to the Restatement made in Shadow Wood on January 28, 2016. On the other hand, Nevada's adoption of the California rule took place long before January 25, 2012.

At page 20 of its opposition, plaintiff argues that "[t]he publically available documents, which are subject to constructive notice, stated *publically* that this was a sale Subject to a mortgage." No such language appears in the notice of delinquent assessment (lien), the notice of default, or the notice of trustee's sale. Each of these notices stated "the total amount of the lien" as approved by the Nevada Supreme Court in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 334 P.3d at 418.

At page 20 of its opposition, plaintiff argues that fraud is present because Ryan Kerbow, "an individual who conducted a sale which was not noticed on U.S. Bank was the *purchaser's attorney*." (emphasis by plaintiff) Plaintiff's opposition is not supported by any evidence that Ryan Kerbow conducted the public auction held on January 25, 2012 or that Ryan Kerbow represented Mr. Haddad or 5254 Rolling Stone Dr Trust on the date of the sale. In his deposition, Mr. Haddad testified that he did not know when he first hired Ryan Kerbow to file quiet title actions or when he stopped using Mr. Kerbow. See pg. 49, ll. 3-18, and pg. 50, ll. 2-7 of Exhibit 14 to plaintiff's motion, filed on January 4, 2017.

Plaintiff also argues that "[t]he Notice of Default was not noticed on U.S. Bank, which is completely undisputed." To the contrary, Exhibit 5 to Resources Group's motion for summary judgment proves that a copy of the notice of default was mailed on April 5, 2014 to "US Recordings, 2925 Country Drive Ste 201, St. Paul, MN 55117," which is the mailing address listed as the "Return To (name and address)" in the upper left hand corner of the deed of trust.

Furthermore, Exhibit 7 to Resources Group's motion for summary judgment proves that copies of the notice of foreclosure sale were timely mailed to the same "Return To (name and address)" in the upper left hand corner of the deed of trust and also to the address for U.S. Bank National Association ND, 4325 17th Avenue SW, Fargo, ND 58103 listed in Paragraph 1 on page 1 of the deed of trust.

Plaintiff has not produced any evidence proving that it did not receive both of the notices.

As a result, plaintiff's claim at page 20 of its opposition that "[t]his is insider dealing at it's worst" is not supported by competent evidence.

G. Plaintiff has not produced any evidence proving that 4254 Rolling Stone Dr Trust was not a bona fide purchaser.

At page 20 of its opposition, plaintiff asserts that "Resources has not met their burden of production under Nevada law as bona fide purchaser status is their burden." To the contrary, as discussed at page 8 above, because plaintiff is seeking equitable relief from the "conclusive" foreclosure deed, it is plaintiff's burden to allege and prove that 4254 Rolling Stone Dr Trust was not a bona fide purchaser. First Fidelity Thrift & Loan Ass'n v. Alliance Bank, 60 Cal. App. 4th 1433, 71 Cal. Rptr. 2d 295 (1998).

At page 20 of its opposition, plaintiff argues that "they had constructive notice of the defective lien documents which resulted in chilled bidding." Plaintiff's motion is not supported by any evidence proving this claim. At the top of page 21 of its opposition, plaintiff cites Cooper v. Pacific Auto Insurance Co., 95 Nev. 798, 603 P.2d 281 (1979), but that case involve the application of NRS 104.2403(1)(b) to a car purchased for cash in the nighttime on a weekend at a bar. In the present case, on the other hand, the foreclosure agent conducted a public auction during normal business hours at the business location where real property auctions are typically held in Las Vegas. Moreover, as noted above, the Uniform Commercial Code does not apply to an HOA foreclosure sale.

In the middle of page 21 of its opposition, plaintiff cites Berge v. Fredericks, 95 Nev. 183, 591 P.2d 246 (1979), where the court reversed a summary judgment entered in favor of the respondent (purchaser) because the respondent and the seller were intimately related and because the respondent had actual notice of appellant's residence on the property being sold. The court quoted the general rule that "open, notorious, and exclusive possession and occupation of lands by a stranger to a vendor's title, as of record, at the time of a purchase" is sufficient to put a purchaser on inquiry as to the legal or equitable rights of the party in possession. 591 P.2d at 249. No such evidence exists in the present case.

In the last paragraph on page 21 of its opposition, plaintiff argues that "[t]he CC&R's disclaim *everything*." (emphasis added). The exact opposite is true. Article VI in the CC&Rs expressly provides that the HOA has the authority to record an assessment lien against the Property. NRS Chapter 116.3116(2) defined the superpriority portion of the lien. NRS 116.31162 to NRS 116.31168, and by incorporation, NRS 107.090, defined the nonjudicial procedure used to foreclose the lien. NRS 116.1206 confirmed that the provisions of the CC&Rs would be deemed to conform with the provisions of NRS Chapter 116 "by operation of law." NRS 116.1104 confirmed that the HOA's superpriority lien rights

could not be varied or waived by any language in the CC&Rs.

Consequently, absolutely nothing appeared in the public record that would charge 4254 Rolling Stone Dr Trust with notice of any defect in the foreclosure of the HOA's superpriority lien and the extinguishment of plaintiff's subordinate deed of trust.

H. The HOA foreclosure sale is not voidable as a fraudulent transfer.

At page 22 to 24 of its opposition, plaintiff argues that if the court assumes that the Property was worth $48,000.00 at the time of the HOA foreclosure sale, and if the court ignores plaintiff's deed of trust and treats the HOA's lien as being $1,170.00, then "'[t]here was $46,830 in equity over and above this lien."

First, the notice of trustee's sale proves that $5,370.00 was owed to the HOA as of September 16, 2001. (Exhibit 7 to Resources Group's motion for summary judgment)

Second, in order to determine if **the debtor** made a fraudulent transfer of **an asset** that removed property from the reach of **unsecured** creditors, all of the liens recorded against the Property must be considered and not just the lien being foreclosed. From the point of view of the debtor and its unsecured creditors, the Property had no equity that could be obtained by sale and paid to unsecured creditors.

Third, plaintiff has not produced any evidence that the unit owner was insolvent at the time of the HOA foreclosure or became insolvent as a result of the HOA foreclosure sale.

Fourth, at pages 27 and 28 of its opposition, plaintiff argues that the cases cited by Resources Group at pages 21 to 22 of Resources Group's motion for summary judgment are factually different than the present case. Plaintiff, however, cites no authority contradicting the "fundamental principle of mortgage law" that a nonjudicial foreclosure sale that complies with applicable statutory notice and other requirements "terminates not only the owner's title and equitable redemption rights, but also all other junior interests." Comment a to Restatement (Third) of Prop.: Mortgages, §7.1 (1997). The general provisions of the Uniform Fraudulent Transfer Act cannot be used to negate this specific rule that applies to nonjudicial HOA foreclosure sales. I

In BFP v. Resolution Trust Corp., 511 U.S. 531 (1994), the United States Supreme Court held that "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" and "the only legitimate evidence of the property's value at the time it is sold is the foreclosure-sale price itself." Id. at 548-549.

Although footnote 3 in the BFP v. Resolution Trust Corp. opinion limits its application to "only mortgage foreclosures of real estate," the court of appeals in Tracht Gut, LLC v Los Angeles County Treasurer (In re Tracht Gut, LLC), 836 F.3d 1146, 1149 (9th Cir. 2016), held that "the price received at a California tax sale conducted in accordance with state law conclusively establishes 'reasonably equivalent value' for purposes of 11 U.S.C. § 548(a)." The tenth circuit has applied the holding in BFP to a tax sale challenged under a state fraudulent transfer law. Kojima v. Grandote Int'l Ltd. Liab. Co. (In re Grandote Country Club, Ltd.), 252 F.3d 1146, 1152 (10th Cir. 2001).

The standards adopted in BFP v. Resolution Trust Corp. therefore protect Resources Group from plaintiff's argument that the HOA foreclosure sale can be set aside as a fraudulent transfer.

I. The nonjudicial foreclosure sale did not violate the Takings clauses of the United States and Nevada Constitutions or the Eighth Amendment

At page 29 of its opposition, plaintiff incorporates by reference "it's arguments in it's own Motion for Summary Judgment that this is an unconstitutional taking and violates the 8th amendment."

In Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage, 133 Nev., Adv. Op. 5 (Jan. 26, 2017), the Nevada Supreme Court expressly held that "the extinguishment of a subordinate deed of trust through an HOA's nonjudicial foreclosure does not constitute a governmental taking." Id. at *11. The Eighth Amendment prohibits the government from requiring excessive bail, imposing excessive fines, or inflicting cruel and unusual punishment. The nonjudicial foreclosure sale in the present case involved no such conduct.

In the last paragraph on page 29, plaintiff claims that "[i]t would seem to be fair to provide Resources a first priority lien for their purchase price and declare the remaining amounts subject to U.S. Bank's Security Interest." Plaintiff cites no authority that would support such an absurd result that ignores established principles of real property foreclosure law. Plaintiff allowed the HOA to foreclose its superpriority lien and extinguish plaintiff's subordinate deed of trust without objection, and plaintiff's only remedy, if any, is now against the HOA and its foreclosure agent.

CONCLUSION

Accordingly, defendant respectfully requests that this Court enter an order granting Resources Group's motion for summary judgment.

DATED this 31st day of January, 2017

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By: / s / Michael F. Bohn, Esq. /
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5, NEFCR 9 and EDCR 8.05, I hereby certify that I am an employee of Law Offices of Michael F. Bohn., Esq., and on the 31st day of January, 2017, an electronic copy of the RESOURCES GROUP, LLC'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT was served on opposing counsel via the Court's electronic service system to the following counsel of record:

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DISTRICT COURT

CLARK COUNTY 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

REPLY IN SUPPORT OF US BANK'S MOTION FOR SUMMARY JUDGMENT

COMES NOW 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 and hereby files this reply in support of Summary Judgment.

I. LAW AND ARGUMENT

A. RECENT CHANGES IN THE LAW

This writer acknowledges that a recent change in the law has substantially undercut many of the arguments presented in the pleadings regarding constitutionality. *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage* 133 Nev. Adv. Op. 5(2017)(holding that Nevada's HOA foreclosure statutes do not constitute state action sufficient to implicate due process provisions). This opinion has placed the Nevada State Courts directly at odds with the Federal District Court in the interpretation of Federal Law in this jurisdiction. *Bourne Valley Court Tr. V. Wells Fargo Bank N.A.*832 F.3d, 1154 (9th Cir. 2016)(holding that Nevada HOA Foreclosure Statutes do constitute state action sufficient to implicate due process provisions.). U.S. Bank will not use this time to throw some type of court room temper tantrum as that is assuredly improper and not constructive. *Drum v. City of Long Beach* 1988 U.S. App. LEXIS 21908 (9th 1988)(affirming Summary Judgment on a claim under 42 U.S.C. §1983 by an attorney who "was arrested when he threw a temper tantrum in the hallways of the Long Beach, California Municipal Courthouse" and claimed that this violated his constitutional rights).

To be clear and for the purposes of non waiver U.S. Bank in this instance argues that *Bourne Valley Court Tr. V. Wells Fargo Bank N.A.* was the correct interpretation of this statute. U.S. Bank acknowledges that the trial court is now bound by *Saticoy Bay*, however *Bourne Valley Court Tr. V. Wells Fargo Bank N.A.* should be adopted and most likely this will be resolved by the United State Supreme Court given this split in authority[1]. Irrespective, this sale does not stand under the current state of *state* law and U.S. Bank would encourage the Court to grant summary judgment on other grounds.

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[1] A viewing party with popcorn would seem to be more appropriate in this instance.

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B. BONA FIDE PURCHASER IS AN AFFIRMATIVE DEFENSE, AND RESOURCES HAS NOT MADE ANY TYPES OF APPROPRIATE SHOWING

1. Resources has failed to demonstrate they are bona fide purchasers

This writer is persistently confused as to how and why it is appropriate for an HOA purchaser to devote a page and a half to their own bona fide purchaser status when this is an affirmative defense. Resources group simply cannot be anointed bona fide purchaser. This is imporper

U.S. Bank unequivocally argued "Resources has not met their burden of production under Nevada law as bona fide purchaser status is their burden." U.S. Bank's MSJ p. 16 Line 17-19. No evidence was produced that somehow Resources was unaware of the CC&R's which blatantly stated that the purchase was subject to a mortgage and were filed in the Resources records. No evidence was produced that Resources did not have constructive notice that Saticoy was not aware of the provisions of the CC&R's which blatantly said NRS Chapter 116 did not apply. Even the Nevada Supreme Court has noted that it is an HOA purchasers burden to establish good title in themselves and that when they fail to do this, Summary Judgment is properly granted. *Centeno v. Mortg. Elec. Registration Sys.* 2016 Nev. LEXIS 590 (2016)(Noting that a purchaser "failed to meet their burden to prove that BOA's first deed of trust was properly extinguished").

It has been the law for over hundred years that "the defense of bona fide purchaser is an affirmative one." *Krueger v. United States* 246 U.S. 69 (1918)(ruling that burden is on bona fide purchaser to defeat claims in equity and further affirming judgment that purchaser was not a bona purchaser because she failed to sustain her burden); *Wright-Blodgett Co. v. United States* 236 U.S. 397(1915)(bona fide purchaser status must be affirmatively proven). In fact six years after the Constitution was ratified, one of the first things that the U.S. Supreme Court did was declare that the bona fide purchaser defense required an affirmative showing by the party asserting the defense. *Talbot v. Janson* 3 U.S. 133 (1795)(Supreme Court case discussing how when someone buys a ship from pirates, they must affirmatively show they are bona fide purchaser in order to

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prevail). This is the law in Nevada and even respected jurisists such as Judge Pro have held that bona fide purchaser is an affirmative defense which must be proven by the party asserting said. *W. Charleston Lofts I, LLC v. R& O Constr. Co.* 915 F.Supp.2d 1191 (D.Nev. 2013) *citing Berge v. Ferdericks* 95 Nev. 183 (1979).

Yet here even over and above the aforementioned documents which unequivocally generate constructive, here Resources was on *actual* notice. Resources filed a Federal Bankruptcy after the sale claiming that their property was encumbered by U.S. Bank's mortgage. (MSJ Ex. 15). Independent witnesses, including David Alessi, repeatedly testified that Haddad thought the property was subject to a mortgage. (MSJ Ex. 16 p. 51) Resources has failed to meet their burden here, when numerous document filed in the property records placed them on constructive notice that there was an issue with their purchase.

2. Saticoy Cannot be Bona Fide Purchase Because of the Disclaimer of Warranties in the Deed.

Another microcosm of this HOA foreclosure issue is that recently Judge Jones issued an opinion that the following placed SFR Investment Pool 1, LLC on notice and thereby eviscerated their bona fide purchaser status: (1) their fractional purchase price and (2) the deed without warranties. *U.S. Bank v. SFR Invs. Pool 1,* 2016 U.S. Dist. LEXIS 113120 (D.Nev. 2016) *citing Berge v. Fredericks* 591 P2d 246 (Nev. 1979). In addition, Judge Jones noted that" The law was not clear at the time of the sale that the sale would extinguish the DOT at all, superpriority tender or not,and a reasonable purchaser therefore would have perceived a serious risk that it would not. *Id.*at 35.

All of these elements are present here. The foreclosure document persistently dance back and forth between which statute they are foreclosing under. The CC&R's say the sale is subject to a mortgage.

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> Section 11. Subordination of the Lien to Mortgages. The lien of the assessments provided for herein shall be subordinate to the lien of any first mortgage. Sale or transfer of any Lot shall not affect the assessment lien. However, the sale or transfer of any Lot pursuant to mortgage foreclosure or any proceeding in lieu thereof, shall extinguish the lien of such assessments as to payments which became due prior to such sale or transfer. No sale or transfer shall relieve said Lot from liability for any assessments thereafter becoming due or from the lien thereof.

This Court should not condone "real property roulette" irrespective of whether or not this sale occurred in Las Vegas. These are people's lives, not a bouncing balls determining the faith and destiny of thousands hundreds of thousands of dolalrs. Our law cannot and not condone this type of gamesmanship in the foreclosure process.

C. AT LEAST TWO FEDERAL COURTS HAVE CONSTRUED MISPRESENTATIONS AT HOA FORECLOSURES WHICH LEAD TO CHILLED BIDDING TO BE UNFAIR

Two Federal Courts to date have ruled that the unfairness that U. Bank decries is sufficient to set aside a sale. Both Judge Gordon and Judge Mahan have ruled that chilled bidding based on misstatements of facts can be unfair.

1. Mahan on Bid Chilling Being Unfair

As previously brief, in *Zyzzx 2 v. Dizon* the Honorable Judge Mahan dealt with the type HOA foreclosure there. *Zyzzx 2 v. Dizon* 2016 U.S. Dist. LEXIS 39467 (2016). That case Judge Mahan found a grossly inadequate price when the property was worth $210,000 and the purchaser paid $15,000.00 for the property (three times what LVRR paid). Judge Mahan found that the purchase price was grossly inadequate. Judge Mahan then went on to find that when the HOA "represented to both the general public as well as Wells Fargo that the association's foreclosure would not extinguish the first deed of trust" this was unfair. As previously briefed, this must be compare to the the CC&R's which states:

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> Section 11. Subordination of the Lien to Mortgages. The lien of the assessments provided for herein shall be subordinate to the lien of any first mortgage. Sale or transfer of any Lot shall not affect the assessment lien. However, the sale or transfer of any Lot pursuant to mortgage foreclosure or any proceeding in lieu thereof, shall extinguish the lien of such assessments as to payments which became due prior to such sale or transfer. No sale or transfer shall relieve said Lot from liability for any assessments thereafter becoming due or from the lien thereof.

Similarly to *Dizon* the HOA misrepresented to (1) Resources (2) US Bank, and (3) the Public the nature of what was being sold. It is small wonder that the sale was for such a paltery amount based on the chilled bidding and misrepresentation which Saticoy took constructive notice of.

2. Gordon on Bid Chilling Being Unfair

In *7912 Limbwood Court Trust v. Wells Fargo* the Honorable Judge Gordon contemplated more similar misrepresentations by HOAs and their sales agent which result in chilled bidding. There, the HOA made similar misrepresentations about their lien priority prior to the sale. *7912 Limbwood Court Trust v. Wells Fargo Bank* 2015 U.S. Dist. LEXIS 116223. In voiding the sale, Judge Mahan noted that the sale must be voided be "Fairness also dictates this result." *Id.* Judge Gordon specifically speaks to chilled bidding as being a nexus of unfairness. Again, the bidding *pattern*, not the purchase price, shows that people were completely uncertain as to what was being purchased.

D. SATICOY HAS CHERRY PICKED PORTIONS OF THE RESTATEMENT OF MORTGAGES WHICH LARGELY DOES NOT SUPPORT THEIR POSITION

First and primarily, the *Restatement (Third) Property: Mortgages* §8.3 unequivocally says:

> "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 defect unless the price is grossly inadequate."

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If Nevada follows the Restatement approach in this context, then this sale is flawed because Saticoy purchased the property for $5,331.00 when it was worth anywhere between $44,000,00 to $85,000.00. But yet the Restatement goes on.

Comment A to the Restatement, Section §8.3, states 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" as noted by Saticoy. Yet compare the comments of Justice Gibbons that 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 generally will be liable for the amount still owed on the debt." *SFR Invs. Pool 1 LLC v. U.S. Bank N.A.* 334 P.3d 408 (Nev. 2014)(Gibbons dissenting). This comment in combination with the realities of *SFR* make it clear that if this Court finds anything wrong with this sale, it is full well within it's power to overturn the sale.

E. THIS FORECLOSURE IS VOIDABLE UNDER THE UNIFORM FRAUDULENT TRANSFER ACT

US Bank has previously briefed why summary judgment should be granted to US Bank in their own motion for summary judgment. US Bank incorporates those arguments here and moreover, takes this opportunity to rebut the assertions and Resources.

1. To the Extent there is Equity Past the Lien, the Subject Property is an Asset by the Plain Language of NRS §112.150

NRS §112.150(2) defines "Assets" as

"property of a debtor, but the term does not include

(a) Property to the extent it is encumbered by a valid lien"

The Uniform Fraudulent Transfer Act clarifies the intent behind the definition of asset in that it is meant to protect interests "generally beyond reach by unsecured creditors because [it is] subject to a valid lien." *Uniform Fraudulent Transfer Act* Section 1 Official Comment 2. Therefore the UFTA provides protections from levying unsecured creditors against value which is

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liened by a secured creditor such as the HOA. Therefore to an extent some "assets" are indeed exempt from the UFTA if they are subject to a valid security interest.

Resources has taken the position however that the mere presence of a lien however exempts the entire asset from the UFTA and NRS Chapter 112. Respectfully, this is contrary to law. This exact same issue was discussed in depth by the Oregon Court of Appeals in *Greer* and it is important to note that, much like other uniform acts, NRS Chapter 112 "must be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among the states enacting it. NRS §112.250. *Oregon Account Sys. V. Greer* 165 Ore.App.738 (2000). In *Greer* the transferee argued that because a lien was present on the property that the entire value of the property was exempt on Oregon's UFTA. *Oregon Account Sys. V. Greer* 165 Ore.App.738 (2000). The Oregon Court of Appeals performed an in-depth analysis of the phrase "to the extent it is encumbered by a valid lien" and determined that only the value of the property actually encumbered by the lien was exempted from being an "Asset" under the Oregon UFTA. The Court reasoned that an interpretation, similar to Saticoy's, that the mere presence of a lien excluded the entire asset would render the phrase "to the extent" superfluous in contravention to the basic tenants of statutory construction. *Id.*

A Federal District Court has echoed this interpretation and ruled that:

> "Moreover, because property is *not* an 'asset" *to the extent* is it is encumbered by a valid lien the plain meaning of the statutory definition of "asset" is that "property of the debtor" is an "asset" to the extent it is *not* encumbered by a valid lien i.e. to the extent that the debtor has any equity in the property."
>
> *Webster Indus v. Northwood Doors Inc* 320 F.Supp 2d 821 (D.Io 2004)

US Bank asserts that the interpretation that the definition of "assets" prevents the application of NRS Chapter 112 because the definition of "asset" excludes property to the extent it is encumbered by a valid quizzical on a basic factual basis in that Saticoy, in it's Complaint, stated clearly contends that there are no liens on this property.

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Finally, equity drives the transfer. *People's United Bank v. Lilly* 2012 Conn.Super.LEXIS 3077 (2012) Additionally only the liens which survived the foreclosure can be taken into account when determining the amount of the equity. *Miller v. NLVK, LLC* 454 F.3d 899, 903(8th Cir 2006).

With that being said, Bombassei's HOA dues for his HOA were $130.00. (Ex. 6). George Holmes' expert report shows the property was worth $48,000.00 at the time of the sale. 9 months worth of HOA dues in this instance is $1,170.00. There was $46,830.00 in equity over and above this lien. $46,830.00 of this house is an asset by the plain language of the UFTA.

2. The Homestead Exemption does not Save Saticoy

US Bank's understanding of Resource's argument is that the Subject Property was the the homeowner's homestead, therefore exempt under nonbankruptcy law from execution and unavailable as an asset under Nevada's UFTA. Respectfully, U.S. Bank contends that a deeper analysis of NRS §112.150(2)(b) leads to a conclusion that this is incorrect.

NRS §112.150(2)(b) states that a property is not an asset "to the extent it is generally exempt under nonbankruptcy law". NRS 21 §21.090(l) thereafter provides that the homestead is exempt from execution "as provided for by law." The extent of the homestead exemption is thereafter governed by NRS §115.005 *et seq*. In most cases, the homestead is exempt.

Yet as outlined in greater detail below, there are two flaws in Resource's homestead argument. First, the borrower must file a declaration of homestead which is a necessary predicate to a homestead exemption. Secondly, the homestead exemption does not provide an exemption as to US Banl as they are a mortgage creditor and therefore the definition of "assets" does not preclude Lakeview from seeking relief.

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3. Resources has not demonstrated a declaration of Homestead was filed

The Homeowner's never exempted their property under Nevada's homestead law prior to the foreclosure. As such the property is not exempt under nonbankruptcy law and is subject to Nevada's UFTA.

Even the United States Supreme Court has acknowledged that the Nevada homestead exemption only takes effect "if the selection and recording occurs at any time before actual sale under execution." *Myers v. Matley* 318 U.S. 622 (1943). The Nevada Supreme Court has also echoed this ruling in that "to secure the benefits of the constitutional and statutory provisions exempting the homestead from forced sale under process…it is necessary that a declaration of homestead be filed for record." *McGill v. Lewis* 61 Nev. 34 (1941).

The Homeowner never filed a declaration of homestead in the property records of the subject property, a necessary predicate to claiming a homestead exemption and claiming the property as exempt. Saticoy cannot now claim some genre of *nunc pro tunc* homestead exemption as they lack standing by operation of NRS §115.005 which states that only the owner of the home can claim said exemption. This was never done and Resources cannot stand in the shoes of the Homeowner and accomplish this task now. Therefore by operation of NRS §115.005 *et seq* the property is not exempt under nonbankruptcy law and subject to Nevada's UFTA.

4. Even Assuming *Arguendo* that the Homeowner's filed a Homestead Exemption, it would still be exempt as to U.S. Bank.

NRS §112.150 provides limiting language to the definition of asset for UFTA purposes in that asset only includes property to the extent it is exempt under nonbankruptcy law. A deeper reading of the homestead statutes however shows that the homestead does not provide a nonbankruptcy exemption as to Lakeview because they are a mortgage creditor under a deed of trust. As such Nevada's UFTA applies.

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NRS §112.150 states that property is not an "asset" "**to the extent** it is generally exempt under nonbankruptcy law." (Emphasis Added) NRS §112.150(2)(b). A Montana Federal District Court ruled that this language in Montana's UFTA provided that if an asset was subject to a judicial process by the creditor seeking to set aside a conveyance, it is an asset for UFTA purposes. *U.S. Bank v. United States IRS* 2013 U.S. Dist. LEXIS 28628 (Mont. 2013). In *U.S. Bank*, the IRS attempted to set aside a real property conveyance under the UFTA from a husband with substantial tax liability to a wife with no tax liability. *Id.* U.S. Bank, in a similar manner to Resources, argued that this was improper because the Homeowners had declared the property at issue as their homestead and as such the property was exempt from being considered an asset. *Id.* The Montana Court noted that if a specific creditor could proceed against an asset then it was not exempt from the UFTA and voided the transfer under the UFTA because the homestead did not provide protection from the IRS. *Id.*

This sentiment is also echoed by the Supreme Court of Oklahoma in *Burrows v. Burrows*. In *Burrows* an ex-spouse brought a UFTA claim for her ex-husband's transfer of his home and the 40 acres of land the home was located on to his parents for $5,151.04 in order to avoid execution on past-due alimony and child support. *Burrows v. Burrows* 1994 OK 129 (Ok 1994). The ex-husband claimed that the transfer was not voidable pursuant to Oklahoma's UFTA because he had taken a homestead exemption. *Id.* The trial court agreed however was subsequently reversed by the Supreme Court of the state. *Id.* The Oklahoma Supreme Court ruled that because under Oklahoma homestead law the ex-husband's real property was not exempt as to the ex-wife for the payment of alimony and child support, that the homestead exemption could not be used as a basis to defeat a UFTA claim. *Id.*

Both of these rules are illustrative of the idea that any party whom is exempt under the homestead laws of the state can proceed with a UFTA claim based on the "to the extent" limiting language. Therefore a closer analysis of Nevada's Homestead law is warranted.

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NRS 115.010(3) delineates several enumerated exemptions from a declaration of homestead and specifically states that the homestead does no exempt the dwelling from:

> "Any mortgage or deed of trust hereon executed and given, including without limitation, any second or subsequent mortage, mortgage obtained through refinancing, line of credit taken against the property and a home equity "

Even assuming *arguendo* that the Homeowners had filed a homestead exemption, which they did not, it would still not function to defeat a UFTA claim because the exemption does not protect the homeowner from a mortgage creditor. In this instant case, U.S. Bank is a first mortgage creditor of the Homeowners and as such they are not precluded from filing a claim under Nevada's UFTA because Nevada's homestead exemption does not extend to them.

5. Resources Cases are Distinguishable

Resources cites a line of cases on pp. 4-5 of their brief, including *McDonald, Brunzell, Aladdin,* and *Erickson,* for the proposition that the UFTA does not apply because senior liens wipe out junior liens by operation of law. A closer review of the fact patterns of these cases however demonstrates that the UFTA simply could not have applied to the facts of those cases, unlike this instant case.

In *Aladdin* the Deed of Trust creditor credit bid a casino project for $5,000,000.00 on a $6,500,000.00 loan. *Aladdin Heating Corp v. Trustees of Cent. States,* 93 Nev. 257 (1977). While the record is devoid of what the actual value of the casino was, $5,000,000.00 is quite a large sum of money and therefore it can be inferred that this was reasonably equivalent value for the project. The same fact pattern is present in *Erickson* in that the bank obtained property through a credit bid of $48,712.12 on a $66,000.00 loan. *Erickson Constr. Co. v. Nevada Nat'l Bank* 89 Nev. 350 (1973) Again the facts lead to an inference that the junior lien holders could not meet the reasonably equivalent value standard. Finally in *Brunzell* no sale had ever occurred because the foreclosing mechanics lien claimant had been enjoined from consummating a sheriff's sale.

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Brunzell v. Lawyers Title Ins. Co. 101 Nev. 395(Nev. 1985). As such the lienor had not consummated a "transfer" sufficient to make the UFTA applicable.

McDonald is equally inapplicable as the McDonald court was determining whether or not a formally secured creditor, whose security had been voided as a preferential transfer in a Chapter 11 Bankruptcy, was covered under Nevada's one action rule and therefore was barred from pursuit of the underlying debt against a guarantor. *McDonald v. D.P. Alexander * Las Vegas Boulevard, LLC* 121 Nev. 812 (2005)

None of these cases, for one reason or the other, operate to undermine the applicability of Nevada's UFTA. Unlike the aforementioned cases, there has been a consummated transfer and this transfer was for less than reasonably equivalent value. In sum, the UFTA applies.

F. THE APPRAISAL IS PROPER

1. Per *Unruh* Fair Market Value is the Only Proper Indicator of Value

In *Shadow Wood v. N.Y. Comm Bank*, the Nevada Supreme Court most definitely delineated a standard for analyzing this sale and announced, in line with the Restatement of Property: Mortgages §8.3 that "Fair Market Value" was the proper indicator here. 132 Nev. Adv. Op. 5 at 15 (2016). This writer contends here that arguing "HOA foreclosure value" is simply a "nonstarter" and simply not relevant in this action as fair market value is the only true indicator.

The Alaska Supreme Court, citing to the U.S. Supreme Court noted that "Fair Market Value" has been defined as :

> "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."
>
> *Baskurt v. Beal* 101 P.3d 1041 (Ak 2004)

Blacks Law Dictionary similarly defines "Fair Market Value" as:

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> "The amount at which 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 the relevant facts."
>
> *Blacks Law Dictionary 597* (6th Ed. 1990)

Finally "Fair Market Value" is not a new idea in Nevada and Fair Market Value is defined as as "the price which a purchaser, willing but not obligated to pay, would pay an owner willing but not obligated to sell, taking into consideration all uses to which the property is adopted and might in reason be applied." *Lee v. Verex Assur* 103 Nev. 515 (Nev. 1987) *also Unruh v. Streight* 96 Nev. 684 (Nev. 1980)

Black's then goes on to state that Fair Market Value must be assessed based on the "highest and most profitable use." *Id.* On this basis, the "value" assessment must be done at Market Value based on the highest and best use per *Shadow Wood*. On this basis, the "bundle of sticks" appraisal as well as the purported "sub market" is irrelevant and therefore only the Holm appraise is relevant.

The Brunson report repeatedly relies on forced sale value and only uses forced sale comparables. This is completely improper in this context. *Unruh v. Streight* 96 Nev. 684 (Nev. 1980). The Nevada Supreme Court has indicated "fair market value" to be the proper indicator and the Brunson report is anything but fair market value.

2. The Use of An "Extraordinary Assumption" in an Appraisal is Proper

"The Definition of "extraordinary assumption" is an assumption which if found to be false could alter the resulting opinion or conclusion." *United States v. 1.604 Acres of Land* 2012 U.S. LEXIS 103243 (D.Va 2012). The Uniform Standards of Professional Appraisal Practices "allows the use of extraordinary assumptions but imposes te duty of justifying their use and analyzing their impact on value." *Bruno v. Restuccia* 2005 Mass.Super. LEXIS 93 (Ma2005)

Resources misapprehends the phrase extraordinary assumption. Given the necessity of finding a highest and best use, it is imperative that Mr. Holmes assume the proper is in the

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appropriate condition. The term "extraoridinary assumption" is assuredly misleading in it's pertinence but an extraordinary assumption that the interior of the property is at it's highest and best use is proper in this jurisdiction for the purposes of determining foreclosure value in this instance.

III. CONCLUSION

On this basis, US Bank respectfully requests that the HOA foreclose sale be declare subject to US Bank's Deed of Trust. This would seem to be a "fair" remedy. *Shadow Wood* dictates that this Court can and should consider a fair remedy weighing the rights of the purchaser and US Bank here.

DATED: January 31, 2016

McCarthy & Holthus, LLP

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

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DISTRICT COURT
CLARK COUNTY, NEVADA

Title to Property	**COURT MINUTES**	**March 07, 2017**
A-12-667690-C	U S Bank National Association, Plaintiff(s) vs. George Edwards, Defendant(s)	

March 07, 2017 **3:00 PM** **Minute Order Re: U.S. Bank's Motion for Summary Judgment**

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

COURT CLERK: Lorna Shell

PARTIES PRESENT: None

JOURNAL ENTRIES

- After a review and consideration of the points and authorities on file herein, and oral argument of counsel, the COURT DETERMINED as follows:

COURT ORDERED, Plaintiff U.S. Bank National Association's Motion for Summary Judgment shall be DENIED in light of the Nevada Supreme Court decision in **Saticoy Bay, LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage, A Division of Wells Fargo Bank N.A., 133 Nev. Adv. Op. 5 (2017).**

Furthermore, the issue of the adequacy of the sale price at the HOA sale is not, itself, sufficient grounds for setting aside an HOA sale legally made without proof of some element of fraud, unfairness or oppression. Counsel for Resources Group, LLC, shall prepare a detailed Order based not only on the foregoing Minute Order, but also on the record on file herein. This is to be submitted to adverse counsel for review and approval and/or submission of a competing Order or objections, prior to submitting to the Court for review and signature.

CLERK'S NOTE: A copy of this minute order was electronically served to all Wiznet registered parties by the Judicial Executive Assistant./ls 3-7-17

Electronically Filed
04/03/2017 10:11:31 AM

CLERK OF THE COURT

SAO
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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

STIPULATION AND ORDER TO TOLL NRCP41(e)

Defendant/counterclaimant, Resources Group, LLC, as Trustee for the Bourne Valley Court Trust (hereinafter "plaintiff"), by and through its attorneys, Michael F. Bohn, Esq. and Adam R. Trippiedi, Esq.;

plaintiff/counterdefendant U.S. Bank National Association, ND (hereinafter "defendant"), by and through its attorney, Thomas N. Beckom, Esq.; and defendant Glenview West Townhomes Association, by and through its attorney, Stuart J. Taylor, Esq., hereby submit the following Stipulation and Order to Toll NRCP 41(e).

1. The parties have recently agreed to stipulate to continue the trial date in this matter.

2. The complaint in this matter was filed on August 30, 2012.

3. In order to avoid running afoul of NRCP 41(e)'s requirement to bring a matter to trial within five years of the filing of the complaint, the parties hereby agree that NRCP 41(e) is hereby tolled through November 3, 2017.

DATED this 30 day of March, 2017.

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By::_____
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Resources Group, LLC

HALL JAFFE & CLAYTON, LLP

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Attorney for defendant Glenview West
Townhomes Association

MCCARTHY HOLTHUS LLP

By:_____
Thomas N. Beckom, Esq.
9510 West Sahara Avenue, Suite 200
Las Vegas, Nevada 89117
Attorney for plaintiff

ORDER

Based on the foregoing Stipulation by and between the parties, and good cause appearing,

IT IS HEREBY ORDERED that the calculation of time under NRCP 41(e) is hereby tolled through November 3, 2017.

IT IS SO ORDERED this 30th day of March, 2017

DISTRICT COURT JUDGE
Case No. A667690

Respectfully submitted by:

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MICHAEL F. BOHN, ESQ., LTD.

By: _____
MICHAEL F. BOHN, ESQ.
ADAM R. TRIPPIEDI, ESQ.
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Attorney for defendant Resources Group, LLC

DISTRICT COURT

CLARK COUNTY NEVADA

A-12-667690-C

CASE NO.: ~~A667690~~
DEPT NO.: XVI

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

NOTICE OF ENTRY OF ORDER

TO: Parties above-named; and

TO: Their Attorney of Record

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that an **STIPULATION AND ORDER TO TOLL NRCP 41(e)** has been entered on the 3rd day of April, 2017, in the above captioned matter, a copy of which is attached hereto.

Dated this 4th day of April, 2017.

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By: */s/ /Michael F. Bohn, Esq./*
MICHAEL F. BOHN, ESQ.
376 E. Warm Springs Rd., Ste. 140
Las Vegas, NV 89119
Attorney for plaintiff

CERTIFICATE OF SERVICE

Pursuant to NRCP 5, NEFCR 9 and EDCR 8.05, I hereby certify that I am an employee of LAW OFFICES OF MICHAEL F. BOHN., ESQ., and on the 4th day of August, 2016, an electronic copy of the **NOTICE OF ENTRY OF ORDER** was served on opposing counsel via the Court's electronic service system to the following counsel of record:

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Attorney for plaintiff/counterdefendant

Stuart J. Taylor, Esq.
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Attorney for defendant Glenview West Townhomes Association

/s/ /Marc Sameroff /
An Employee of the LAW OFFICES OF
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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

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

STIPULATION AND ORDER TO TOLL NRCP41(e)

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plaintiff/counterdefendant U.S. Bank National Association, ND (hereinafter "defendant"), by and through its attorney, Thomas N. Beckom, Esq.; and defendant Glenview West Townhomes Association, by and through its attorney, Stuart J. Taylor, Esq., hereby submit the following Stipulation and Order to Toll NRCP 41(e).

1. The parties have recently agreed to stipulate to continue the trial date in this matter.

2. The complaint in this matter was filed on August 30, 2012.

3. In order to avoid running afoul of NRCP 41(e)'s requirement to bring a matter to trial within five years of the filing of the complaint, the parties hereby agree that NRCP 41(e) is hereby tolled through November 3, 2017.

DATED this 30 day of March, 2017.

LAW OFFICES OF
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MCCARTHY HOLTHUS LLP

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By:_____
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Attorney for defendant Glenview West
Townhomes Association

ORDER

Based on the foregoing Stipulation by and between the parties, and good cause appearing,

IT IS HEREBY ORDERED that the calculation of time under NRCP 41(e) is hereby tolled through November 3, 2017.

IT IS SO ORDERED this 30th day of March, 2017

DISTRICT COURT JUDGE
Case No. A667690

Respectfully submitted by:

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Attorneys for Plaintiff,

U.S. Bank N.A.

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 **U.S. BANK'S PRETRIAL DISCLOSURES**

Pursuant to Rule 16.1 of the Nevada Rules of Civil Procedure, Plaintiff, U.S. BANK

MCCARTHY & HOLTHUS, LLP
ATTORNEYS AT LAW
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NATIONAL ASSOCIAITON ND ("U.S. BANK"), by and through its undersigned counsel of record Thomas N. Beckom, Esq of the law firm of McCarthy Holthus hereby submits the following Pre-trial Disclosures.

I.
WITNESSES

1. Witnesses Expected to Call

    a. George "Chip" Holmes
    3565 S. Las Vegas Blvd Suite 366
    Las Vegas, NV 89109

    b. Corporate Witness
    U.S. Bank National Association
    c/o Thomas Beckom, Esq
    9510 W. Sahara Ave., Suite 200
    Las Vegas, NV 89117

2. Witnesses to be Subpoenaed

    a. Corporate Witness
    Resources Group, LLC
    c/o Michael F. Bohn, Esq
    376 Warm Spring Rd. Suite 140
    Las Vegas, NV 89119

    b. Corporate Witness
    Glenview West Townhomes Association
    c/o Marquis Aubach Coffing P.C.
    10001 Park Run Dr.
    Las Vegas, NV 89145

    c. David Alessi
    Alessi & Koenig, LLC
    c/o Robert A. Koenig
    9500 W. Flamingo Rd. Unit 101
    Las Vegas, NV 89147

3. Witnesses Plaintiff May call if the Need Arises

MCCARTHY & HOLTHUS, LLP
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Any witness named by any party to this matter or disclosed in U.S. Bank's 16.1 Disclosures

4. Witnesses Whose Testimony is Expected to be Presented by Means of Deposition

None expected at this time, however Plaintiff reserves the right to disclose deposition testimony for the individuals whom have been deposed in this action.

II.

LIST OF DOCUMENTS AND EXHIBITS

1. Documents Plaintiff Expects to Present

Bates No	**Description**
Legal Description of Subject Property	USB0001
Delinquent Taxes for the Fiscal 2003-2004	USB002-004
U.S. Bank Equiline Agreement	USB0005-0010
Deed of Trust	USB0011-0019
Notice of Claim of Lien	USB0020-0022
Tax Trustee Deed	USB0023-0025
Alessi & Koenig, LLC's Production of Documents	USB0026-0175
Glenview West Townhomes Association's Production of Documents	USB0176-0261
Trustee's Deed Upon Sale	USB0262-0263
Miscellaneous BPO's	USB0264-0310
Documents from Bankruptcy of the Bourne Valley Court Trust	USB311-361

2. Documents Plaintiff May Offer if Need Arises

i. Any document disclosed by any party to this action and all documents disclosed by BONY as well as any documents filed in the property records.

III.
DEMONSTRATIVES

1. Power Point

Plaintiff reserves the right to produce any and all document produced by other parties to this litigation as well as impeachment and rebuttal evidence as necessary.

DATED: August 31, 2017.

McCarthy & Holthus, LLP

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

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Richard Vilkin
Nevada Bar No. 8301
Geisendorf & Vilkin, PLLC
2470 St. Rose Parkway, Suite 309
Henderson, Nevada 89074
Direct Dial: (702) 476-3211
Office phone: (702) 873-5868
Email: Richard@gvattorneys.com
Attorneys for plaintiff and counterdefendant Resources Group, LLC

DISTRICT COURT

CLARK COUNTY, 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; GENVIEW 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, v. U.S. BANK NATIONAL ASSOCIATION, ND, Counter-claimant.	Case No.: A-12-667690-C Dept. No.: XVI PRE-TRIAL DISCLOSURES OF DEFENDANT AND COUNTER-CLAIMANT RESOURCES GROUP, LLC

GEISENDORF & VILKIN, PLLC
2470 St. Rose Parkway, Suite 309 Henderson, Nevada 89074
Phone: 702.873.5868 § Fax: 702.548.6335

Defendant and counter-claimant Resources Group, LLC hereby presents its pre-trial disclosures pursuant to NRCP 16.1(a)(3) as follows:

I.

WITNESSES EXPECTED TO BE PRESENTED AT TRIAL

1. Iyad Eddie Haddad as manager of Resources Group, LLC, c/o Geisendorf & Vilkin, PLLC.
2. David Alessi of Alessi & Koenig, LLC, as deposed in this case, to be subpoenaed.
3. 30(b)(6) representative of Glenview West Townhomes Association, as deposed in this case, to be subpoenaed.
4. Michael Brunson, c/o Geisendorf & Vilkin, PLLC.
5. 30(b)(6) witness of U.S. Bank National Association
6. All other witnesses as designated by other parties as witnesses in this case pursuant to their disclosures pursuant to NRCP 16.1.

II.

DOCUMENTS EXPECTED TO BE PRESENTED AT TRIAL

1. USB 1-263, 417-488.
2. Tax Deed recorded 06122012, produced by Resources Group, LLC.
3. Grant, Bargain and Sale Deed recorded 052912 by Resources Group, LLC.
4. Exhibits 1-11 attached to Resources Group, LLC's Motion for Summary Judgment filed January 3, 2017.

5. Exhibits A-K attached to Resources Group, LLC's Opposition to U.S. Bank's Motion for Summary Judgment, filed January 19, 2017.

6. Report of Michael Brunson dated August 31, 2016.

7. Interrogatories, Requests for Production and Requests for Admissions served on October 19, 2015 U.S. Bank by Resources Group, LLC.

8. Responses and Objections of U.S. Bank to Resources Groups, LLC's Interrogatories, Requests for Production and Requests for Admissions served by U.S. Bank on January 13, 2016.

9. All documents recorded as part of the non-judicial foreclosure and sale, including Foreclosure Deed.

10. If necessary, all other documents produced by all parties in this case.

Date: September 2, 2017

GEISENDORF & VILKIN, PLLC

By: */s/ Richard J. Vilkin*
Richard J. Vilkin, Esq. (8301)
2470 St. Rose Parkway, Suite 309
Henderson, Nevada 89074
Attorneys for plaintiff and defendant Lyric Arbor Drive Trust

Certificate of Service

On September 2, 2017, I served the foregoing by E-Service by serving same by electronic service on the Eighth District Court Odyssey File and Serve system by requesting that the document be e-served on all persons who have signed up for e-service for this case.

Executed this 2nd day of September, 2017 at Henderson, NV. I declare the above is true.

/s/ Richard Vilkin

Richard Vilkin

PTM
McCARTHY & HOLTHUS, LLP
Kristin A. Schuler-Hintz, Esq. (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 Defendant, *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. AND ALL RELATED CLAIMS	Case No. A-12-667690-C Dept. No. XVI **PLAINTIFF'S PRE-TRIAL MEMORANDUM**

COMES NOW Plaintiff, U.S. BANK NATIONAL ASSOCIATION ("U.S. BANK"); by and through their counsel of record, Thomas N. Beckom, Esq., of McCarthy & Holthus, LLP, hereby submit their Pre-Trial Memorandum in accordance with EDCR 2.67 and NRCP 16.1.

Date Conference was held by Counsel: September 11, 2017

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A. STATEMENT OF FACTS

1. On March 3, 2009; U.S. Bank N.A. gave George Edwards a $50,000.00 Equity Line of Credit secured by 4254 Rollingstone Dr., Las Vegas, NV 89103. This loan was secured by a Deed of Trust with a Future Advance Clause filed in the property records on March 28, 2009.
2. The Subject Property was located in the Glenview West Townhomes HOA and governed by the Covenants Conditions and Restrictions of Glenview West Townhomes HOA. ("CC&Rs").
3. The CC&R's are patently misleading and include illegal provisions. *Id.* The CC&R's misrepresent to U.S. Bank, Edwards and the Public the effect of an HOA foreclosure and expressly state:

> Section 11. Subordination of the Lien to Mortgages. The lien of the assessments provided for herein shall be subordinate to the lien of any first mortgage. Sale or transfer of any Lot shall not affect the assessment lien. However, the sale or transfer of any Lot pursuant to mortgage foreclosure or any proceeding in lieu thereof, shall extinguish the lien of such assessments as to payments which became due prior to such sale or transfer. No sale or transfer shall relieve said Lot from liability for any assessments thereafter becoming due or from the lien thereof.

4. On November 3, 2010; Alessi sent Mr. Edwards a pre-lien letter stating that $1,855.00 was due and owed.
5. This was based the internal accounting by Glenview. Glenview's ledger showed that Mr. Edward's HOA dues were $130.00 dollars, that he ceased paying his HOA dues in February, 2010.
6. On this basis, Alessi, on behalf of Glenview, liened the Subject Property.
7. Thereafter, on March 2, 2011; Alessi and Glenview indicated in the property records that they would be selling the property and filed a Notice of Default and Election to Sell under Homeowners Association Lien in the property records.

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8. It is worth noting at this juncture that U.S. Bank National Association indicated in their Deed of Trust that their mailing address was 4325 17th Avenue SW, Fargo, ND 58103..
9. At his deposition, David Alessi, the person most knowledgeable for Alessi & Koenig testified that at no point was the Notice of Default ever mailed to U.S. Bank's address. (Ex. 16 p. 23)(Q. "So the Notice of Default was not mailed to the address for the lender. Can we agree on that? **A. It does—It appears that the Notice of Default was not mailed to U.S. Bank National Association ND at their Fargo, North Dakota address…..**)
10. On September 16, 2011; Alessi and Glenview indicated that they would exercise their rights to sell the property and filed in the property records a notice of sale. The Notice of Sale indicated that $5,379.00 was owed on the property and was signed by Ryan Kerbow..
11. On January 25, 2012; the property sold for $5,331.00 dollars, less than the amount owed, to the 4254 Rollingstone Dr. Trust.
12. No one bid on the Subject Property at the Sale according to the testimony of Eddie Haddad.
13. From there, a Trustee's Deed Upon Sale, also signed by Ryan Kerbow, Esq as Authorized Agent for Glenview West Townhomes Association, was filed in the property records memorializing this sale.
14. The Declaration of Value, attached to the Deed, stated the property was worth $5,331.00.
15. U.S. Bank's expert will testify that the property is worth $48,000.00 based on a fair market value analysis.
16. The BPO's from U.S. Bank's loan file show that the property is worth anywhere from $44,000.00 to $85,000.00 dollars.
17. Mr. Haddad, the controlling individual behind the Resources Group was aware that litigation would be involved with his purchase at an HOA sale and prior to the sale:

Q Did you think you were getting a property free and clear of a mortgage when you purchased this property in January of 2012?

A Yes. That's the only reason why I bought it.

Q So you had no reason to be concerned about any kind of deed of trust on 4254 Rollingstone Drive, correct?

A Only the cost of litigation.

18. Mr. Haddad, the controlling manager for Resources Group, actually filed a bankruptcy involving the Subject Property in which he represented to the Bankruptcy Court that the Subject Property was encumbered by a mortgage. .

19. In addition, independent witnesses from Alessi further testified that they believe Mr. Haddad thought this property was subject to the Bank's lien.

20. Mr. Haddad also testified under penalty of perjury that the Subject Property was worth $35,000.00.

21. Alessi, the entity the represented Glenview and foreclosed on the property, via their attorney Ryan Kerbow, Esq *also* represented Mr. Haddad at the exact same time as this sale.

22. Mr. Kerbow, whom also signed the Notice of Sale and the Trustee's Deed, represented Resources Group in Quiet Title Action.

23. The relationship between Alessi & Koenig and Haddad was so close, that Alessi actually paid Mr. Haddad's transfer tax.

B. LIST OF CLAIMS

a. U.S. Bank's Complaint

i. Judicial Foreclosure of Deed of trust, against All Defendants

b. Resource's Group's Counterclaim

i. Quiet Title

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ii. Declaratory Relief

C. U.S. BANK'S AFFIRMATIVE DEFENSES TO THE COMPLAINT

FIRST AFFIRMATIVE DEFENSE

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

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

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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.

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

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ATTORNEYS AT LAW
9510 WEST SAHARA AVENUE, SUITE 200
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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

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.

D. LIST OF EXHIBITS

Bates No	**Description**
Legal Description of Subject Property	USB0001
Delinquent Taxes for the Fiscal 2003-2004	USB002-004
U.S. Bank Equiline Agreement	USB0005-0010
Deed of Trust	USB0011-0019
Notice of Claim of Lien	USB0020-0022
Tax Trustee Deed	USB0023-0025
Alessi & Koenig, LLC's Production of Documents	USB0026-0175
Glenview West Townhomes Association's Production of Documents	USB0176-0261
Trustee's Deed Upon Sale	USB0262-0263
Miscellaneous BPO's	USB0264-0310

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Documents from Bankruptcy of the Bourne Valley Court Trust	USB311-361
Deposition Transcipt of Iydad Haddad	USB362-416
Miscellaneous Title Documents	USB 417-488
Deposition Transcript of Glenview West	
Deposition Transcript of David Alessi	
Deposition Transcript of Iydad Haddad	

E. LIST OF WITNESSES

1. Corporate Designee
   U.S. Bank National Association
   c/o McCarthy Holthus LLP
   9510 W. Sahara, Suite 200
   Las Vegas, Nevada 89117

This person is expected to testify regarding his/ her knowledge of facts and circumstances surrounding the allegations and defenses made in this case

2. Custodian of Records
   U.S. Bank National Association
   c/o McCarthy Holthus
   9510 W. Sahara, Suite 200
   Las Vegas, Nevada 89117

This person will testify as to the authenticity and genuineness of any records, notes, papers, that resulted from the transaction(s) and/ or events giving rise to this litigation.

1. NRCP 30(b)(6) Witness
   Resources Group, LLC
   c/o Michael F. Bohn, Esq
   376 Warm Spring Rd. Suite 140
   Las Vegas, NV 89119

McCARTHY & HOLTHUS, LLP
ATTORNEYS AT LAW
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This person is expected to testify regarding his/ her knowledge of facts and circumstances surrounding the allegations and defenses made in this case

2. Custodian of Records
Resources Group, LLC
c/o Michael F. Bohn, Esq
376 Warm Spring Rd. Suite 140
Las Vegas, NV 89119

This person will testify as to the authenticity and genuineness of any records, notes, papers, that resulted from the transaction(s) and/ or events giving rise to this litigation.

3. George Edwards
Address Unknown

This person is expected to testify regarding his/ her knowledge of facts and circumstances surrounding the allegations and defenses made in this case

4. Nev. R. Civ. Pro 30(b)(6) Witness
Glenview West Townhomes Association
c/o Marquis Aubach Coffing P.C.
10001 Park Run Dr.
Las Vegas, NV 89145

This person is expected to testify regarding his/ her knowledge of facts and circumstances surrounding the allegations and defenses made in this case

5. Board of Directors
Glenview West Townhomes Association
c/o Marquis Aubach Coffing P.C.
10001 Park Run Dr.
Las Vegas, NV 89145

This person is expected to testify regarding his/ her knowledge of facts and circumstances surrounding the allegations and defenses made in this case

6. Custodian of Records
Glenview West Townhomes Association
c/o Marquis Aubach Coffing P.C.
10001 Park Run Dr.
Las Vegas, NV 89145

This person will testify as to the authenticity and genuineness of any records, notes, papers, that resulted from the transaction(s) and/ or events giving rise to this litigation.

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7. NRCP 30(b)(6) Witness
Alessi & Koenig, LLC
c/o Robert A. Koenig
9500 W. Flamingo Rd. Unit 101
Las Vegas, NV 89147

This person is expected to testify regarding his/ her knowledge of facts and circumstances surrounding the allegations and defenses made in this case.

8. Custodian of Records
Alessi & Koenig, LLC
c/o Robert A. Koenig
9500 W. Flamingo Rd. Unit 101
Las Vegas, NV 89147

This person is expected to testify regarding his/ her knowledge of facts and circumstances surrounding the allegations and defenses made in this case.

9. David Alessi
Alessi & Koenig, LLC
c/o Robert A. Koenig
9500 W. Flamingo Rd. Unit 101
Las Vegas, NV 89147

This person is expected to testify regarding his/ her knowledge of facts and circumstances surrounding the allegations and defenses made in this case.

10. Person Most Knowledgeable
Edwards George R. Trust

This person is expected to testify regarding his/ her knowledge of facts and circumstances surrounding the allegations and defenses made in this case.

11. Mary Indalecio
c/o Alessi & Koenig, LLC
c/o Robert A. Koenig
9500 W. Flamingo Rd. Unit 101
Las Vegas, NV 89147

This person is expected to testify regarding his/ her knowledge of facts and circumstances surrounding the allegations and defenses made in this case.

12. Carolyn Paige
Address unknown

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This person is expected to testify regarding his/ her knowledge of facts and circumstances surrounding the allegations and defenses made in this case.

13. Coporate Representative
Republic Services, Inc
c/o The Corporation Trust Company of Nevada
701 S. Carson St. Suite 200
Carson City, NV 89701

This person is expected to testify regarding his/ her knowledge of facts and circumstances surrounding the allegations and defenses made in this case.

14. Iyad Haddad
c/o Michael F. Bohn, Esq
376 Warm Spring Rd. Suite 140
Las Vegas, NV 89119

This person will testify as to the authenticity and genuineness of any records, notes, papers, that resulted from the transaction(s) and/ or events giving rise to this litigation.

15. Craig's Plumbing
c/o Law Offices of AJ Kung
1020 Garces Ave. Suite 200
Las Vegas, NV 89101

This person is expected to testify regarding his/ her knowledge of facts and circumstances surrounding the allegations and defenses made in this case.

16. Ryan Kerbow
Address Unknown

This person is expected to testify regarding his/ her knowledge of facts and circumstances surrounding the allegations and defenses made in this case.

17. Nev. R. Civ. Pro 30(b)(6) Witness
Sin City Realty LLC
c/o Matt Edward Mitchell
9500 W. Flamingo Rd. Suite 101
Las Vegas, NV 89147

This person is expected to testify regarding his/ her knowledge of facts and circumstances surrounding the allegations and defenses made in this case.

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18. Huong Lam, Esq
Address Unknown

This person is expected to testify regarding his/ her knowledge of facts and circumstances surrounding the allegations and defenses made in this case.

19. Ryan Alexander, Esq
Address Unknown

This person is expected to testify regarding his/ her knowledge of facts and circumstances surrounding the allegations and defenses made in this case.

20. Nadia Haddad
Address Unknown

This person is expected to testify regarding his/ her knowledge of facts and circumstances surrounding the allegations and defenses made in this case.

21. Naomi Eden
Address Unknown

This person is expected to testify regarding his/ her knowledge of facts and circumstances surrounding the allegations and defenses made in this case.

22. Heidi Hagen
Address Unknown

This person is expected to testify regarding his/ her knowledge of facts and circumstances surrounding the allegations and defenses made in this case.

23. George "Chip" Holmes
EAGLE APPRAISAL
3565 S. Las Vegas Blvd Suite 366
Las Vegas, NV 89109

Mr. Holmes is an expert appraiser. Mr. Holmes will testify as to the value of the property. A copy of his expert report and required materials is attached.

24. Judith Fenner
4855 W. Desert Inn Rd.
Las Vegas, NV 89102

This person is expected to testify regarding his/ her knowledge of facts and circumstances surrounding the allegations and defenses made in this case.

25. Old West Realty, Inc
c/o Judith Fenner
4855 W. Desert Inn Rd.
Las Vegas, NV 89102

This person is expected to testify regarding his/ her knowledge of facts and circumstances surrounding the allegations and defenses made in this case.

26. J. Michal Bloom
c/o U.S. Department of Justice
Office of the US Trustee
300 Las Vegas Boulevard South
Suite 4300
Las Vegas, NV 89101

This person is expected to testify regarding his/ her knowledge of facts and circumstances surrounding the allegations and defenses made in this case

27. Corporate Representative
Great Bridge Properties, LLC
c/o Stephanie Cooper Herdman, Esq
820 South Valley View
Las Vegas, NV 89107

This person is expected to testify regarding his/ her knowledge of facts and circumstances surrounding the allegations and defenses made in this case.

28. Matt Mitchell
Address Unknown

This person is expected to testify regarding his/ her knowledge of facts and circumstances surrounding the allegations and defenses made in this case.

29. Heather *Last Name Unknown*
Address Unknown

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This individual worked for Nevada legal News and periodically cried sales. This person is expected to testify regarding his/ her knowledge of facts and circumstances surrounding the allegations and defenses made in this case.

30. Robert Hazell
14983 Mammoth Pl.
Fontana, Ca 92336

This person is expected to testify regarding his/ her knowledge of facts and circumstances surrounding the allegations and defenses made in this case.

D. OBJECTIONS

1) U.S. Bank Reserves the Right to Object to the Admission of Evidence on Foundational Grounds.

E. ISSUES OF LAW

1) Should the Court declare the Sale Void due to Failure to Serve the Notice of Default?

This writer is of the opinion that a foreclosure in this manner is not "voidable" but "void." This is an important difference. The Honorable Justice Lee H. Rosenthal summed up what Deutsche advances here in *Ocwen Loan Servicing LLC v. Gonzalez Fin Holding Inc* 77 Supp. 584 (S.D. Tx 2015) when she ruled that "If a property transfer is void, rather than voidable, then it cannot be taken by a bona fide purchaser." This is not the only jurisdiction to hold as such. *Rosenberg v. Schmidt* 727 P.2d 778 (Ak 1986)(stating that a lack of a substantive basis to foreclose renders a sale "void" and that only voidable sales raise an issue of bona fide purchaser status).

It is well established that a void, as opposed to voidable sale, can be invalidated regardless of any purported bona fide purchaser status. *Sonderman v. Remington Constr. Co.* 127 N.J. 96 (1996); *Fjeldsted v. Lien (In re Fjelsted)* 293 B.R. 12 (2003)("bona fide purchaser status alone is not cause to validate a [void]sale"); *Ocwen Loan Servicing LLC v. Gonzalez Fin Holding Inc* 77

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Supp. 584 (S.D. Tx 2015)("if the foreclosure sale is void, rather than voidable, then it cannot be taken by a bona fide purchaser").

In *Dimock v. Emerald Properties* the California State Court of Appeals ruled that even conclusive presumptions can be overcome by a void deed. 81 Cal.App.4th 868 (Cal. 2000), The Court ruled that the recitals in the deed must specifically state that something has occurred, as "conclusive" in order for the conclusive recitals to render a Deed "voidable" rather than "void." *Id.* Due to an errant substitution of Trustee in that case, and no specific "conclusive" recitation that the trustee was the proper trustee, the sale was rendered "void" not "voidable".

Here it is it will be shown at trial that the Notice of Default was never served on U.S. Bank, the beneficiary under the Deed of Trust. The proper procedures were not followed. This sale is not voidable, this sale is void.

2) Should the Court Unwind the Sale under *Shadow wood v. N.Y. Comm. Bank* 132 Nev. Adv. Op. 5 (2016)?

U.S. Bank contends that the sales is for an inadequate purchase price and was the result of unfairness and oppression. *Shadow wood v. N.Y. Comm. Bank* 132 Nev. Adv. Op. 5 (2016). At trial U.S. Bank will evidence that (1) the purchase price was inadequate, (2) the sale was "unfair" and oppressive" per the restatement of mortgages, and (3) RESOURCES Management LLC Series 6521 First View is simply not, and never was, a bona fide purchaser.

i. U.S. Bank will evidence the Value is Insufficient

U.S. Bank contends as an issue of law, this honorable Court will have to determine the "value" of the property. It is U.S. Bank's position that "Fair Market Value" is the "the price which a purchaser, willing but not obligated to pay, would pay an owner willing but not obligated to sell, taking into consideration all uses to which the property is adopted and might in reason be applied." *Lee v. Verex Assur* 103 Nev. 515 (Nev. 1987) *also Unruh v. Streight* 96 Nev. 684 (Nev. 1980). To the extent that valuation testimony is elicited that uses a different valuation standard other than

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Unruh; U.S. Bank intends to objection to its admission on relevancy grounds. U.S. Bank will evidence at trial that the sale price is "obviously inadequate" per *Shadow Wood*. U.S. Bank contends that per *Shadow Wood* an "obviously inadequate" sale price is proof of unfairness and this in of itself should conclude trial.

ii. U.S. Bank Will Evidence the Sale was Defective and Unfair

Notwithstanding this U.S. Bank additionally intends to evidence that the sale was unfair and "defective." In *Shadow Wood* the Nevada Supreme Court relied on Restatement of Property: Mortgages §8.3 for it's analysis of whether or not the sale can be set aside. Unfairness and oppression in sales per the Restatement can be evidenced by chilled bidding and defecting notices of sale. Restatement of Property: Mortgages §8.3 Comment(c). First the Notice of Sale advertising to the public that it was (1) foreclosure under CC&R's that stated the HOA lien was subordinate, (2) failed to guarantee that the property was free and clear of the mortgage. On this basis, the bidding was inadvertently or possibly intentionally chilled per the Restatement of Mortgage. Secondly U.S.Bank will demonstrate that Ryan Kerbow, the attorney for Iyad Haddad, was also the individual whom conducted the sale.

iii. U.S. Bank will Evidence that RESOURCES is not a Bona Fide Purchaser

It is incumbent on RESOURCES here to prove they are bona fide purchasers. *Price v. Ward* 26 Nev. 387 (1902)(" The burden is on the purchaser to show that he did not have notice of a third person's title") *Moore v. De Bernardi*47 Nev. 33 (1923)(Burden is on Purchaser to Establish Bona Fide Purchaser Status). U.S. Bank will prove that RESOURCES has no evidence they are a bona fide purchaser.

Finally U.S. Bank will prove that there is no set of facts under which RESOURCES could be a bona fide purchaser. RESOURCES had constructive notice of all the foreclosure documents disclaiming the proper foreclosing statute and fully disclaiming title. *Berge v. Fredericks* 95 Nev.

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183 (1979). Finally, U.S. Bank will demonstrate that RESOURCES had *actual* notice of chilled bidding and under *Shadow Wood* they cannot be a bona fide purchaser.

3) **Should the Court Unwind the Sale as a Fraudulent Transfer**

U.S. Bank asserted as an affirmative defense NRS Chapter 112 which does not require proof of intent to defraud and all a creditor must prove is that (1) their claim arose before the transfer, (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). The underlying policy behind the UFTA is to preserve a debtor's assets for the benefit of creditors. *Herup v. First Boston Fin., LLC* 123 Nev. 228 at FN 15 (2007). As such, this Court should unwind the sale under NRS §112.190(1) as constructive fraudulent. At trial U.S. Bank will be able to prove all of the elements of a fraudulent transfer.

U.S. Bank will prove that this sale was not for reasonably equivalent value and, similar to the *Shadow Wood* argument, no competent evidence is present that it was. The reasonably equivalent value analysis must be performed from the creditor's perspective of value of the asset, not the Defendants. *Brandt v. nVidia Corp (In re 3dfx Interactive, Inc)* 389 B.R. 842 (reasonably equivalent value must be determined from the creditor's, not the debtor's perspective); *Pjara Dunes Rental Agency Inc v. Spitters* 174 B.R. 557, 578 (Bankr. N.D. Cal 1994)(same); *Frontier Bank v. Brown* 371 F.3d 1056, 1059(9th Cir 2004)(primary focus is on the net effect of the transaction on the debtor's estate and the funds available to pay creditors).

U.S. Bank will additionally evidence that their claim arose before the transfer. 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).

At the time of the HOA foreclosure in; U.S. Bank's Deed of Trust had encumbered the property for quite some time. There is no legitimate argument that U.S. Bank's deed did not encumber the property. Moreover, it does not matter whether or not the HOA recorded their CC&R's "first" under this act. All that does matter is that U.S. Bank's obligation was in existence at the time of the foreclosure. They most definitely were. On this basis, there is no genuine issue of material fact on this point.

Under NRS §112.160(2) all U.S. Bank 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 HSBC would not need to prove nonpayment on a majority of debts in order to prove general nonpayment. Finally, if a creditor can prove that the sum of a debtor's debt is greater than their assets at fair valuation then the Debtor is considered insolvent. NRS §112.160(1). U.S. Bank was attempting to foreclose on the Subject Property. The HOA was attempting to foreclose on the Subject Property. On this basis the Wendell's were not paying his debts as they came due.

/…/…/

/…/…/

/…/…/

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F. TIME REQUIRED FOR TRIAL

a. Plaintiff estimates that trial will take 2-3 days.

DATED: September 13, 2017

McCarthy & Holthus, LLP

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

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Attorneys for defendant and counterclaimant Resources Group, LLC

DISTRICT COURT

CLARK COUNTY, 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; GENVIEW 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, v. U.S. BANK NATIONAL ASSOCIATION, ND, Counter-claimant.	Case No.: A-12-667690-C Dept. No.: XVI PRE-TRIAL MEMORANDUM OF DEFENDANT AND COUNTERCLAIMANT RESOURCES GROUP, LLC; OBJECTIONS TO THE PRE TRIAL MEMORANDUM OF PLAINTIFF

GEISENDORF & VILKIN, PLLC
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On September 11, 2017, the undersigned traveled to the office of counsel for plaintiff, McCarthy Holthus, for the purpose of conducting the meeting required by EDCR 2.67. The undersigned met with attorney Thomas Beckom of McCarthy Holthus. The 2.67 meeting was conducted and all requirements completed. Counsel agreed on how to number exhibits and everything else. There were no disputes.

Counsel Beckom informed the undersigned that he had drafted a Pre Trial Memorandum. The undersigned requested that a Word version of same be sent to the undersigned (and provided his email) so that the undersigned could make his insertions to complete a Joint Pre Trial Memorandum as required by EDCR 2.67. Counsel Beckom agreed to this. The undersigned never received the Word version. On September 13, 2017, without consulting the undersigned, counsel Beckom went ahead and filed a separate Pre Trial Memorandum in violation of EDCR 2.67, which requires a Joint Pre Trial Memorandum.

Defendant and counterclaimant Resources Group, LLC objects to the Pre Trial Memorandum filed by plaintiff as not in compliance with ERCR 2.67 because it is not joint, because it is an advocacy document on behalf of plaintiff, because plaintiff inserts a long list of purported facts when EDCR 2.67 requires a "brief statement of the facts," because Resource Group, LLC's affirmative defenses were not included, and because the list of documents does not include some documents agreed to at the 2.67 meeting.

Defendant and counter-claimant Resources Group, LLC hereby presents its Pre-Trial Memorandum

I.

Brief statement of facts: Defendant purchased the subject residential property (4254 Rollingstone Drive, Las Vegas, NV 89103) at an HOA foreclosure sale on January 12, 2012. Plaintiff owned the beneficial interest in a deed of trust on the property at the time of sale. Plaintiff contends that its deed of trust survived the sale, defendant claims that it was extinguished.

Claims for relief: Both plaintiff/counterdefendant US Bank and defendant/counterclaimant Resources Group, LLC seek quiet title and declaratory relief as to the residential property located at 4254 Rollingstone Drive, Las Vegas, NV.

Defendant's Affirmative Defenses: Defendant/counterclaimant Resources Group, LLC has asserted affirmative defenses of failure to state a claim upon which relief can be granted; plaintiff's damages if any were caused by its own acts or omissions; plaintiff's damages if any were caused by third persons over whom this answering defendant has no control; plaintiff is guilty of laches and unclean hands; plaintiff is barred from discovery by virtue of the doctrine of equitable estoppel; and plaintiff has failed to mitigate its damages.

Exhibits: The following exhibits were agreed to by the parties as to admissibility and authenticity at the EDCR 2.67 meeting:

Exhibit 1: USB 1-25

Exhibit 2: USB 26-175

Exhibit 3: USB 176-261

Exhibit 4: USB: 262-263

Exhibit 7: USB 417-488

Exhibit 8: Tax deed recorded 6/12/2012 by Resources Group, LLC

Exhibit 9: Grant, Bargain and Sale Deed recorded 5/29/2012 by Resources Group, LLC

The following exhibits were not agreed to as to admissibility and authenticity:

Exhibit 5: USB 264-310

Exhibit 6: USB 311-361

Exhibit 11: Plaintiff expert's report

Exhibit 12: Defendant expert's report

Exhibit 13: Defendant's interrogatories to and responses of plaintiff

Exhibit 14: Defendant's request for admissions to and responses of plaintiff

Exhibit 15: Defendant's request for production to and responses of plaintiff

Defendant's witnesses: Defendant intends to call the following witnesses:

1. Iyad Eddie Haddad, manager of Resources Group, LLC.
2. David Alessi, principal of the sales trustee Alessi & Koenig, LLC.
3. Michael Brunson, plaintiff's valuation expert.
4. The 30(b)(6) witness for plaintiff.
5. The 30(b)(6) witness for the Glenview HOA.

The principal issue of law to be decided at this trial is whether the first deed of trust of plaintiff was extinguished by the homeowner association foreclosure sale pursuant to *SFR*

Investments Pool I, LLC v. U.S. Bank, 334 P.3d 408, 130 Nev. Adv. Op. 75 (2014). Plaintiff contends it was not, defendant contends it was.

Time for trial: Counsel for defendant estimates time for trial at two days.

Date: September 24, 2017

GEISENDORF & VILKIN, PLLC

By: */s/ Richard J. Vilkin*
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Henderson, Nevada 89074
Attorneys for defendant and counterclaimant Resources Group, LLC

Certificate of Service

On September 24 2017, I served the foregoing by E-Service by serving same by electronic service on the Eighth District Court Odyssey File and Serve system by requesting that the document be e-served on all persons who have signed up for e-service for this case.

Executed this 24th day of September, 2017 at Henderson, NV. I declare the above is true.

/s/ Richard Vilkin

Richard Vilkin

Richard Vilkin
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Email: Richard@gvattorneys.com
Attorneys for defendant and counterclaimant Resources Group, LLC

DISTRICT COURT

CLARK COUNTY, 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; GENVIEW 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, v. U.S. BANK NATIONAL ASSOCIATION, ND, Counter-claimant.	Case No.: A-12-667690-C Dept. No.: XVI JOINT PRE-TRIAL MEMORANDUM

GEISENDORF & VILKIN, PLLC
2470 St. Rose Parkway, Suite 309 Henderson, Nevada 89074
Phone: 702.873.5868 § Fax: 702.548.6335

On September 11, 2017, all parties conferred at the office of counsel for plaintiff, McCarthy Holthus, for the purpose of conducting the meeting required by EDCR 2.67. In attendance at this meeting was Thomas N. Beckom, Esq on behalf of U.S. Bank N.A. and Richard Vilkin, Esq on behalf of Resources Group, LLC. The 2.67 meeting was conducted and all requirements completed. The parties have agreed to the designation of exhibits as well as admissibility as stated below. The parties also agree to withdraw their separate Pre Trial Memorandums previously filed.

I.

A. BRIEF STATEMENT OF FACTS

Defendant purchased the subject residential property (4254 Rollingstone Drive, Las Vegas, NV 89103) at an HOA foreclosure sale on January 12, 2012. Plaintiff owned the beneficial interest in a deed of trust on the property at the time of sale. Plaintiff contends that its deed of trust survived the sale, defendant claims that it was extinguished. Specifically, U.S. Bank claims that they will be able to evidence an insufficient purchase price as well as elements of fraud, unfairness, and oppression in the conduct of this sale. Furthermore U.S. Bank contends that Resources Group is not a bona purchaser based on its presale knowledge, information contained in the filed documents, as well as documents filed in the Bankruptcy proceeding for the Bourne Valley Court Trust of which this property was included. Resources Group disputes these claims and claims that U.S. Bank did not exhaust its legal remedies and thus is not entitled to equitable relief, that the sale was properly conducted under Nevada law, and that it is a bona fide purchaser with no notice of any dispute as to title.

/…/…/

/…/…/

B. CLAIMS FOR RELIEF

Both plaintiff/counterdefendant US Bank and defendant/counterclaimant Resources Group, LLC seek quiet title and declaratory relief as to the residential property located at 4254 Rollingstone Drive, Las Vegas, NV. In addition U.S. Bank seeks a judicial foreclosure judgment from this Court allowing them to foreclose on the property which is the Subject of the action.

C. DEFENDANT'S AFFIRMATIVE DEFENSES

Defendant/counterclaimant Resources Group, LLC has asserted affirmative defenses of failure to state a claim upon which relief can be granted; plaintiff's damages if any were caused by its own acts or omissions; plaintiff's damages if any were caused by third persons over whom this answering defendant has no control; plaintiff is guilty of laches and unclean hands; plaintiff is barred from discovery by virtue of the doctrine of equitable estoppel; and plaintiff has failed to mitigate its damages.

D. PLAINTIFF'S AFFIRMATIVE DEFENSES TO THE COUNTERCLAIM

FIRST AFFIRMATIVE DEFENSE

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

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.

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

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.

E. EXHIBITS:

The following exhibits were agreed to by the parties as to admissibility and authenticity at the EDCR 2.67 meeting:

Exhibit 1: USB 1

Exhibit 2: USB 002-004

Exhibit 3: USB 0005-0010

Exhibit 4: USB: 0011-0019

Exhibit 5: USB0020-0022

Exhibit 6: USB0023-0025

Exhibit 7: USB0026-175

Exhibit 8: USB 176-261

Exhibit 9- USB 262-263

Exhibit 12: USB 417-488

The following exhibits were not agreed to as to admissibility and authenticity:

Exhibit 10: USB 264-310

Exhibit 11: USB 311-361

Exhibit 13: Plaintiff expert's report

Exhibit 14: Defendant expert's report

Exhibit 15: Defendant's interrogatories to and responses of plaintiff

Exhibit 16: Defendant's request for admissions to plaintiff and responses of plaintiff

Exhibit 17: Defendant's request for production to and responses of plaintiff

Plaintiff/ Defendant's witnesses: The parties intend to call the following witnesses:

1. Iyad Eddie Haddad, manager of Resources Group, LLC.

2. David Alessi, principal of the sales trustee Alessi & Koenig, LLC.

3. Michael Brunson, Defendant's valuation expert.

4. George Holmes, Plaintiff's Valuation Expert.

5. The 30(b)(6) witness for plaintiff.

6. The 30(b)(6) witness for the Glenview HOA.

The principal issue of law to be decided at this trial is whether the first deed of trust of plaintiff was extinguished by the homeowner association foreclosure sale pursuant to *SFR Investments Pool 1, LLC v. U.S. Bank*, 334 P.3d 408, 130 Nev. Adv. Op. 75 (2014). Plaintiff contends it was not, defendant contends it was. Specifically, Plaintiff contends that due to issue in the sale process the sale should be set aside under *Shadow Wood Homeowners Ass'n v. New York Cmty Bancorp Inc.* 366 P.3d 1105 (Nev. 2016).

Time for trial: Counsel for defendant estimates time for trial at 2-3 days.

Date: September 26, 2017

GEISENDORF & VILKIN, PLLC

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Date: September 26, 2017

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U.S. BANK ND

DISTRICT COURT
CLARK COUNTY 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

U.S. BANK'S BRIEF IN SUPPORT OF TRIAL

COMES NOW 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 and hereby submits this trial brief pursuant to EDCR 7.27. U.S. Bank respectfully requests that this Court should declare that Resources Group

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LLC (hereinafter "Resources") either took this property subject to U.S. Bank's Deed of Trust or that the sale is void.

I. INTRODUCTION

This Court today will be one sitting in equity weighing all the facts and circumstances of this case. The nexus of this claim is that on January 25, 2012; the Glenview West Townhomes HOA (the "HOA") sold real property commonly known as 4254 Rollingstone Dr., Las Vegas, NV 89103 (hereinafter referred to as "Subject Property"). The evidence in this case will show that this sale price was $5,331.00 as the property was purchased by 4254 Rollingstone Drive Trust and thereafter transferred to Resources Group LLC ("RESOURCES") while U.S. Bank's expert will testify that the value of the property was $48,000.00 at the time of the sale and/ or 11.1% of the fair market value of this property. This property was for an obviously inadequate price. The property was secured by a deed of trust in favor U.S. Bank.

On August 30, 2012; U.S. Bank sued on one claim for a judicial foreclosure alleging that it properly held constructive possession of the note and the deed of trust and moreover that George R. Edwards was not paying the payment under the loan note and deed of trust. U.S. Bank sued all subordinate interests of record, including a "subordinate" interest held by Resources whom had ostensibly purchased at an HOA foreclosure sale. On September 18, 2014; the Nevada Supreme Court issued it's opinion in *SFR Invs. Pool 1, LLC v. U.S. Bank N.A.* 334 P.3d 408 (2014) stating that portions of an HOA lien are "super priority." This changed the face of the litigation as in response Resources had brought a claim against U.S. Bank for Quiet Title stemming from the sale. U.S. Bank responded and asserted affirmative defense that *inter alia* the sale was a fraudulent transfer under NRS §112.190(1); was voidable by this Court sitting in equity as a result of a low purchase price and elements of fraud, unfairness, and oppression.

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During the course of this litigation, the Nevada Supreme Court issued a clarifying opinion in *Shadow Wood Homeowners Ass'n v. New York Cmty Bancorp* 366 P.3d 1105 (Nev. 2016). The Nevada Supreme Court clarified that under the equitable power of the District Court, a sale could be set aside if there was insufficiency of price, plus some element of fraud, unfairness, and oppression. The potential bona fide purchaser status of a purchaser at an HOA foreclosure sale must also be considered. While assuredly, the burden of proof is a preponderance of the evidence here, it is especially worth noting at this juncture that U.S. Bank contends their burden is slight given the sale price. As the price goes down, and in this instance the property was purchased for a mere 11.1% of its asserted fair market value, a court can and should seize on any potential unfairness as a means to void this sale. *Ballentyne v. Smith* 205 U.S. 285 (1907). At the end of the day, if this Court sitting in equity finds that anything is slightly unfair with this sale, then the Court has the power to void this sale or declare this subject to the mortgage.

This is not a high burden for U.S. Bank to meet today.

II. FACTS

U.S. Bank believes they will be able to evidence at trial the following:

1. On March 3, 2009; U.S. Bank N.A. gave George Edwards a $50,000.00 Equity Line of Credit secured by 4254 Rollingstone Dr., Las Vegas, NV 89103. This loan was secured by a Deed of Trust with a Future Advance Clause filed in the property records on March 28, 2009.
2. While the Note itself was lost, U.S. Bank was entitle to enforce the note at the time of the loss and the loss of possession was not the result of a transfer by U.S. Bank or a lawful seizure.

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3. The Subject Property was located in the Glenview West Townhomes HOA and governed by the Covenants Conditions and Restrictions of Blue Diamond Ranch..

4. The CC&R's are patently misleading and include illegal provisions. The CC&R's misrepresent to U.S. Bank, Edwards and the Public the effect of an HOA foreclosure and expressly state:

> Section 11. Subordination of the Lien to Mortgages. The lien of the assessments provided for herein shall be subordinate to the lien of any first mortgage. Sale or transfer of any Lot shall not affect the assessment lien. However, the sale or transfer of any Lot pursuant to mortgage foreclosure or any proceeding in lieu thereof, shall extinguish the lien of such assessments as to payments which became due prior to such sale or transfer. No sale or transfer shall relieve said Lot from liability for any assessments thereafter becoming due or from the lien thereof.

5. On November 3, 2010; Alessi sent Mr. Edwards a pre-lien letter stating that $1,855.00 was due and owed.

6. This was based the internal accounting by Glenview. Glenview's ledger showed that Mr. Edward's HOA dues were $130.00 dollars, that he ceased paying his HOA dues in February, 2010.

7. On this basis, Alessi, on behalf of Glenview, liened the Subject Property.

8. Thereafter, on March 2, 2011; Alessi and Glenview indicated in the property records that they would be selling the property and filed a Notice of Default and Election to Sell under Homeowners Association Lien in the property records.

9. It is worth noting at this juncture that U.S. Bank National Association indicated in their Deed of Trust that their mailing address was 4325 17th Avenue SW, Fargo, ND 58103.

10. David Alessi, the person most knowledgeable for Alessi & Koenig will testify that at no point was the Notice of Default ever mailed to U.S. Bank's address.

11. On September 16, 2011; Alessi and Glenview indicated that they would exercise their rights to sell the property and filed in the property records a notice of sale. The Notice

of Sale indicated that $5,379.00 was owed on the property and was signed by Ryan Kerbow.

12. On January 25, 2012; the property sold for $5,331.00 dollars, less than the amount owed, to the 4254 Rollingstone Dr. Trust.

13. No one bid on the Subject Property at the Sale.

14. From there, a Trustee's Deed Upon Sale, also signed by Ryan Kerbow, Esq as Authorized Agent for Glenview West Townhomes Association, was filed in the property records memorializing this sale.

15. U.S. Bank's expert will testify that the property is worth $48,000.00 based on a fair market value analysis.

16. The BPO's from U.S. Bank's loan file show that the property is worth anywhere from $44,000.00 to $85,000.00 dollars.

17. Mr. Haddad, the controlling individual behind the Resources Group was aware that litigation would be involved with his purchase at an HOA sale and prior to the sale.

18. Mr. Haddad, the controlling manager for Resources Group, actually filed a bankruptcy involving the Subject Property in which he represented to the Bankruptcy Court that the Subject Property was encumbered by a mortgage.

19. In addition, the independent witnesses from Alessi will testify that they believe Mr. Haddad thought this property was subject to the Bank's lien.

20. Mr. Haddad also testified under penalty of perjury that the Subject Property was worth $35,000.00 during the Bankruptcy

21. Alessi, the entity the represented Glenview and foreclosed on the property, via their attorney Ryan Kerbow, Esq *also* represented Mr. Haddad at the exact same time as this sale.

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22. Mr. Kerbow, whom also signed the Notice of Sale and the Trustee's Deed, represented Resources Group in Quiet Title Actions.

23. The relationship between Alessi & Koenig and Haddad was so close, that Alessi actually paid Mr. Haddad's transfer tax.

III. STANDARDS FOR TRIAL

A. JUDICIAL FORECLOSURE AND ESTABLISHMENT OF A LOST NOTE

A beneficiary under a deed of trust has two potential remedies for a breach under the mortgage agreement: (1) to proceed with a non judicial foreclosure under NRS Chapter 107 or (2) to proceed judicially under NRS §40.430 *et seq*. *Nevada Land & Mortgage Co. v. Hidden wells Ranch* 83 Nev. 501 (1967). This has been the law for quite some time in that once a mortgage company can show a breach under a secured promissory note, then they can absolutely proceed under NRS §40.430. *McMillan v. United Mortgage Co.*82 Nev. 117 (1966).

In addition, U.S. Bank will also have to prove its ability to enforce a lost note. This governed by NRS §104.3309 which has its own elements needed to prove U.S. Bank ability to enforce. NRS §104.3309 states:

> "1. A person not in possession of an instrument is entitled to enforce the instrument if:
>
> - (a) The person seeking to enforce the instrument:
> - (1) Was entitled to enforce the instrument when loss of possession occurred; or
> - (2) Has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred;
> - (b) The loss of possession was not the result of a transfer by the person or a lawful seizure; and
> - (c) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.
>
> 2. A person seeking enforcement of an instrument under subsection 1 must prove the terms of the instrument and his or her right to enforce the instrument. If that proof is made, NRS 104.3308 applies to the case as if the person seeking enforcement had produced the

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> instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means."

This statutory provision allows U.S. Bank to enforce lost or stolen instruments through constructive possession of the promissory note as codified through Nevada's Uniform Commercial Code (hereinafter "UCC"). *A.I. Credit Corp v. Gohres* 299 F.Supp.2d 1156 (D.Nev. 2004). U.S. Bank will need to prove that they were entitled to enforce the instrument, there was no lawful seizure, and that the mortgage note's whereabouts cannot be determined. NRS §104.3309. U.S. Bank must also prove the terms of the mortgage note. *Id.* In addition, U.S. Bank will be able to prove that the borrower is adequately protected from a subsequent holder. *Id.*at (2). This elements is meant to deal with issues such as the legitimacy of the promissory note or if there is the possibility that a third party may later surface and try to enforce the same promissory note. *Branch Banking & trust Co. v. S&S Dev. Inc* 620 Fed. Appx 698 (11 Cir. 2015). Adequate protection need not be provided in every case, if there is certainty that the current party is the proper party to enforce the obligation. *Id.*

U.S. Bank will evidence through testimony that they have constructive possession of the note, that the note was not lost via a transfer or law seizure, and that no subsequent party will appear claiming possession of the note through the testimony of its witness. U.S. Bank will also testify that there is a breach of the note and that they are entitled to foreclose assuming that their Deed of trust is still attached to the property. As outline below, they will be able to prove this element as well.

B. QUIET TITLE

As outlined *infra* U.S. bank comes to this Court, sitting in equity, for assistance. Equity and common sense have always consistently gone hand in hand. *Gass v. Hampton* 16 Nev. 185 (1881)(apply equity and common sense hand in hand); *Sims v. Irvine* 3 U.S. 425 (1799)(same);

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*Friends for All Children Inc v. Lockheed Aircraft Corp*746 F.2d 816 (DC. App. 1984)(noting that equity and common sense go hand in hand). As outlined below, U.S. Bank contends that the sale is for an "obviously inadequate" price and moreover that due to misstatements in the HOA lien documents that the bidding was chilled, that there was a inappropriate relationship between the seller and the buyer, and that U.S. Bank did not receive the Notice of Sale.

As a predicate matter, Resources has the burden to establish quiet title in itself. In Nevada in a quiet title action, the burden of proof rests with the plaintiff to prove good title. *Breliant v. Preferred Equities corp* 918 P.2d 314 (Nev. 1996). Nevada courts post *Shadow Wood* have typically imposed this burden on a purchaser at a HOA foreclosure sale. *Las Vegas Dev. Grp LLC v. Yfantis* 2016 U.S. dist. LEXIS 39735 (D.Nev 2016) *citing Shadow Wood Homeowners Ass'n v. New York Cmty Bancorp* 366 P.3d 1105 (Nev. 2016).

Shadow Wood lay out three relevant and germane inquires in this matter. There must be an inadequate price, plus some element of fraud, unfairness, or oppression. *Shadow Wood Homeowners Ass'n v. New York Cmty Bancorp* 366 P.3d 1105 (Nev. 2016). Additionally, bona fide purchaser status must be considered. *Id.* U.S. Bank will discuss each in turn.

1. U.S. Bank will evidence that the price is insufficient

i. The Subject Property Must be Assessed Based on It's Highest and Best Use and/ or Market Value

In *Shadow Wood v. N.Y. Comm Bank*, the Nevada Supreme Court delineated a standard for analyzing this sale and announced, in line with the Restatement of Property: Mortgages §8.3 that "Fair Market Value" was the proper indicator here. 132 Nev. Adv. Op. 5 at 15 (2016). U.S. Bank anticipates that Resources will argue some form of "HOA litigation embroiled foreclosure value" however U.S. Bank contends here that arguing "HOA foreclosure value" is simply not relevant in this action as fair market value is the only true indicator.

The Alaska Supreme Court, citing to the U.S. Supreme Court noted that "Fair Market Value" has been defined as :

> "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."
>
> *Baskurt v. Beal* 101 P.3d 1041 (Ak 2004)

Blacks Law Dictionary similarly defines "Fair Market Value" as:

> "The amount at which 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 the relevant facts."
> *Blacks Law Dictionary 597* (6th Ed. 1990)

Finally "Fair Market Value" is not a new idea in Nevada and Fair Market Value is defined as as "the price which a purchaser, willing but not obligated to pay, would pay an owner willing but not obligated to sell, taking into consideration all uses to which the property is adopted and might in reason be applied." *Lee v. Verex Assur* 103 Nev. 515 (Nev. 1987) *also Unruh v. Streight* 96 Nev. 684 (Nev. 1980).Black's then goes on to state that Fair Market Value must be assessed based on the "highest and most profitable use." *Id.* On this basis, the "value" assessment must be done at Fair Market Value based on the highest and best use per *Shadow Wood*. Even the Restatement takes the following approach:

> "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 "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." *Restatement of Property Third: Mortgages* §8.3 Comment(b)

The appraisal produced by U.S. Bank appraises the property at $48,000.00 based on a fair market purchase price with a willing buyer and seller.

U.S. Bank will meet the first prong of the *Shadow Wood* test on the day of trial.

/…/…/

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ii. A Sale of Less than 20% is Proof of Unfairness

In *Shadow Wood* the Nevada Supreme Court adopted the Restatement of Property Mortgages Section §8.3 as the bench mark for gross inadequacy. Numerous other jurisdictions have held that *gross* inadequacy is grounds to set aside a foreclosure sale. U.S. Bank contends this is now the law in Nevada and that an "obviously inadequate" purchase price is proof of unfairness sufficient to satisfy *Golden* and *Shadow Wood*.. The Restate of Property Mortgage 3d §8.3(a) states

> "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."

The Gross Inadequacy bench mark is the law in multiple other jurisdictions. *Baskurt v. Beal* 101 P.3d 1041 (Ak 2004)(invalidating sale based on price alone where it was grossly inadequate at 15 % of fair market value). *Crown Life Ins. Co. v. Candlewood Ltd* 112 N.M. 633 (NM 1991)(15% of fair market value was inadequate and was a basis to set aside the sale on price alone); *United Oklahoma Bank v. Moss* 1990 OK 50 (Okla 1990)(20% of fair market value inadequate and reversing trial court when said court refused to vacate the sale);. *Rife v. Woolfolk* 169 W.Va 660 (W.Va 1982)(holding 14% of fair market value inadequate and that "there need be no showing of fraud, or any impropriety in the conduct of the sale, to set aside a sale where the price paid is so inadequate that it shocks the conscience"); *also Shadow Wood Homeowners Association inc v. NY Com. Bank* 132 Nev. Adv. Op 5 at 15 (2016) *citing Restatement (Third) of Prop: Mortgages* §8.3 cmt b.(1997)("A court is warranted in invalidating a sale where the price is less than 20 percent of fair market ….").

In analyzing and adopting the Restatement §8.3, the Supreme Court of Arizona noted that a sale of real property under power of sale…may be set aside solely on the basis that the bid price was *grossly* inadequate." *Krohn v. Sweetheart Props LTD* 203 Ariz. 205 (Az 2002). In Arizona,

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as in Nevada, there must be an insufficiency of price plus a elements of fraud unfairness, or oppression as accounts for and brings about the inadequacy of price. *Id.*at 212.

Yet in adopting the Restatement §8.3 the Arizona Supreme Court noted that "*gross* inadequacy *is* proof of unfairness "sufficient to set aside a sale and further adopted the Restatement §8.3 at the 20% benchmark. *Id.*

U.S. Bank contends that the Nevada Supreme Court has now adopted this stance. *Shadow Wood Homeowners Association inc v. NY Com. Bank* 132 Nev. Adv. Op 5 at 15 (2016) *citing Restatement (Third) of Prop: Mortgages* §8.3 cmt b.(1997)("A court is warranted in invalidating a sale where the price is less than 20 percent of fair market …").The 3rd Circuit Court of Appeals has noted in applying Restatement §8.3 that:

> Under the Restatement, Third of Property: Mortgages § 8.3, with respect to the adequacy of a foreclosure sale price, the term "gross inadequacy" is clarified to some extent by the Comment which provides that 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." Restatement (Third) of Prop.: Mortgages § 8.3 cmt. b. (1997). The Comment further states that the trial court's judgment in matters of price adequacy is entitled to particular deference but notes that 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."
>
> *Bank of N.S. v. Family Broad Inc. 121 Fed. Appx. 440 (2005)*

The State of Washington, in applying Restatement §8.3 takes the same approach. *Alpha Imperial Bldg v. Schnitzer Family Investment* , LLC 2005 Wash.App. LEXIS 482 (Wa App. 2005)(noting that that a foreclosure sale can and should be set aside under Restatement §8.3 if it is less than 20%).

Here U.S. Bank has performed an appraisal showing that the property was worth $48,000.00 at the time of the foreclosure sale. Resources paid $5,331.00 for the Subject Property at the time of the sale. This is 11.1% of Fair Market Value and under Shadow Wood and the Restatement §8.3 this is grossly and/ or "obviously" inadequate. On this basis, the sale can be voided or declared subject to U.S. Bank's Deed of Trust.

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2. U.S. Bank will evidence that the sale is unfair

Even if the price is not unfair as a matter of law, sufficient unfairness is present to void this sale under *Tomiyasu* and *Shadow Wood*. U.S. Bank contends that the "unfairness" is a moving target and that the "unfairness" necessary to void a sale moves down. This sale is for less than 3% of Fair Market Value.

There is little actual case law in Nevada as to what constitutes "unfairness." The U.S. Supreme Court in *Ballentyne* indicated that when the inadequacy of price is great then the slightest circumstances of unfairness will operate to set aside the sale. *Ballentyne v. Smith* 205 U.S. 285 (1907). The Nevada Federal Court has recently used *Ballentyne* as a basis to void a sale under *Shadow Wood*. *Zyzzx 2 v. Dizon* 2016 U.S. Dist. LEXIS 39467 (D.Nev. 2016)("if there be great inadequacy, slight circumstances of unfairness in the conduct of the party benefited by the sale will be sufficient to justify setting it aside. It is difficult to formulate any rule more definite than this, and each case must stand upon its own peculiar facts."). The Arizona Supreme Court has echoed this sentiment. *Krohn v. Sweetheart Props LTD* 203 Ariz 205 (Ariz 2002) *citing Baldwin v. Brown* 193 Cal. 345 (Cal 1924). Other jurisdictions have further indicated that that "when the inadequacy of consideration is great and the notice of sale given by the officers is vague, or from any act of his, bidders are kept away from the place of sale, who would have bid for the land if there, an unconscionable advantage was obtained by the purchaser, who bid off the land at a grossly inadequate price, a court of equity will interfere and set aside the sale so made." *Parker v. Glenn* 72 Ga. 637 (1884) This sentiment has been expressed more recently in Missouri, in that a defective Notice of Sale, no matter how slight the defect, is grounds for a court in equity in invalidate the sale when the price is grossly inadequate. *Meng v. Citimortgage Inc* 2013 U.S. Dist. LEXIS 45402 (Mo 2013).

Unfairness is not limited to mere actions of the purchaser and/ or trustee in some circumstances. "Unfairness from any cause which operates to the prejudice of an interested will abundantly justify

a…court in refusing to approve a sale. *Levy v. Broadway-Carmen Bldg* Corp 366 Ill 279 (Ill 1937) Unfairness is not a set standard. Under California law "gross inadequacy of price coupled with even slight unfairness or irregularity is a sufficient basis" for setting aside a sale. *Whitman v. Transtate Title Co.* 165 Cal. App. 3d 312 (1985)

Illustrations of "slight unfairness" are numerous. A grossly inadequate price coupled with a failure to postpone a sale is considered slightly unfairness in California. *Whitman v. Transtate Title Co.* 165 Cal.App.3d 312 (1985). The 9th Circuit has found also under California Law that listing a property as being on the "Southwest Corner" as opposed to the "Southwest Quarter" coupled with a grossly inadequate sales prices is unfair and grounds to avoid a sale when there is a grossly inadequate price. *In re Worcester* 811 F.2d 1224 (9th Cir. 1987). Indeed in Arkansas, stating that one is selling property "under attachment" as opposed to "under execution" when coupled with a grossly inadequate sales prices is considered sufficient unfairness to set aside a sale. *Hinton v. Elliot* 187 Ark. 907 (1933). "Where there is gross inadequacy, the courts seize upon slight additional circumstances which render confirmation inequitable." *Id.*at 910.

The Supreme Court of the United States in *Ballentyne* noted that there was sufficient unfairness present when there was (1) a meager sum bid by a purchaser and (2) the property was worth well in excess of the price sold that on that basis the sale could be set aside. *Ballentyne v. Smith*205 U.S. 285 (1907). *Graffam v. Burgess* sets out numerous interesting things which constitute unfairness. *Graffam v. Burgess* 117 U.S. 180 (1886). A storm on the day of a judicial sale has been found to unfair. *Id.*192. Additionally "Gross inadequacy of price…needs but slight additional support, such as utter absence of description of property to be sold…"

Kloepping v. Stellmacher is another interesting microcosm of mortgage foreclosure law. In New Jersey inadequacy of price itself is not sufficient to set aside a conveyance, nor is it *per se* proof of fraud. 21 N.J. 328 (1871). In *Kloepping* no fraud was shown as to the purchaser or the sheriff conducting the sale and the totally of the circumstance showed the sale was conducted

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legally. *Id. Kloepping* received process and indeed actually tore up the summons. *Id.* The sale was set aside. *Id.*

U.S. Bank will evidence slight unfairness today as delineated *infra*.

i. The Notice of Sale Fails to Guarantee the Property

The evidence will show that the HOA causes a problem in their Notice of Sale and states:

> 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

NRS §116.31165 governs the Notice of Sale. NRS §116.31165(3)(b) only requires expressly the following statement in the Notice of Sale:

> "WARNING! A SALE OF YOUR PROPERTY IS IMMINENT! UNLESS YOU PAY THE AMOUNT SPECIFIC 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 QUESTION PLEASE CALL (name and telephone number of the contact person for the association). IF YOU NEED ASSISTANCE PLEASE CALL THE FORECLOSURE SECTION OF THE OMBUDSMAN'S OFFICE, NEVADA REAL ESTATE DIVISION AT (tolle-free telephone designate by the Division IMMEDIATELY."

NRS §116.31165(3)(a) requires "the amount necessary to satisfy the lien as of the date of the proposed sale" The HOA's Notice of Sale includes these two provisions. NRS §116.31165 however does not require the following statement:

> 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

It is the portion of this notice which U.S. Bank takes issue in the respects that the sale is made without covenant or warranty, assumedly to acknowledge the lack of a warranty deed, yet

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then goes on to state that the purchaser may not have (1) title, (2) possession, and may (3) have to pay a mortgage.

Despite the sale's location in Las Vegas, Foreclosure Law does not contemplate an invitation to play real property "roulette" which is what the Notice of Sale does. The Notice of Sale adds in verbal surplusage, not required by statute, which invites a bidder to "spin the wheel" and purchase a *chance* to possibly own a piece of real property. The HOA states the buyer may not get a house. Similar to *Worcester* and *Hinton* cited above the HOA simply cannot hide behind NRS 116.31164 (requiring a deed without warranty) as grounds to justify a notice of sale which is an invitation to gamble, not an advertisement for real property. If placed the word "corner" instead of "quarter" is unfair then if the Court adopts the reasoning in *Worcester* the sale mush be set aside. 811 F.2d 1224 (9th Cir. 1987). In fact, this notice of sale is similar to selling property "under attachment" as opposed to "under execution" and U.S. Bank contends the Arkansas Supreme Court would also set this sale aside. *Hinton v. Elliot* 187 Ark. 907 (1933). U.S. Bank contends that this advertisement actually discourages the public from attending this sale in light of this and no party not "in the know" would attend this sale. For emphasis, "where there is gross inadequacy, the courts seize upon slight additional circumstances which render confirmation inequitable." *Id.*at 910. This Notice of Sale meets the unfairness threshold here.

ii. The Notice of Lien and the Notice of Default Allude to a Sub Priority Lien Sale

As delineated *supra* the Notice of Lien and both Notices of Default reference NRS §117.070 as the statute which the HOA may be foreclosing under. The reference to NRS §117.070 is critical because NRS §117.070 states that a Condominium lien is a sub priority lien. NRS §117.070 specifically states

> "Such lien shall be prior to all other liens recorded subsequent to the recordation of the notice of assessment except that the declaration of restrictions may provide for the subordination thereof to any other liens and encumbrances. Unless sooner satisfied and released or the enforcement thereof initiated as provided in subsection 3, such lien shall

> expire and be of no further force or effect 1 year from the date of recordation of the notice of assessment, but the 1-year period may be extended by the management body for not to exceed 1 additional year by recording a written extension thereof."

It is critical here that an HOA needs to explain what they are selling to the public. The purpose of an HOA sale is to maximize the value of assets for the benefit of the homeowners, the HOA, and all of the secured lenders. The lien documents need to be calculated to generate bidders. Here time and time again, the HOA tries to use some genre of catch all not to conduct the sale in good faith but protect themselves. This is not and should not be how a foreclosure sale operates. As delineated *infra* these cumulative errors here lead to an inequitable result for U.S. Bank and Mr. Webb. Similar to *Worcester* and *Hinton* this sale should either be set aside or declared subject to U.S. Bank's Deed of Trust.

iii. The Bidding Was Inadvertently Chilled

The cumulative errors in the Notice of Sale, Notice of Default, and Notice of Lien ultimately led to inadvertent bid chilling on the day of the sale as will be evidenced by the testimony of Iydad Haddad and others.

Chilled bidding can and is a type of unfairness sufficient to set aside a foreclosure sale. *Gelfert v. National city Bank* 313 U.S. 221, 232 (1941). Misunderstanding as to the risk associated with a particular piece of real property which causally relate to chilled bidding do constitute unfairness to set aside a sale. *Golfland Enteertainment Ctrs. V. Peaks Inv.* 119 F.3d 852, 860 (10th Cir 1997); *United States v. Clinger* 2002 U.S. Dist. LEXIS 20458 (D.Colo 2002); *also United States v. Tempelman* 2002 U.S. Dist. LEXIS 3111 (D.NH 2002)

U.S. Bank contends the bidding was unintentionally chilled per the Restatement as adopted by *Shadow Wood*. "Chilled bidding" comes in 2 forms: intentional and unintentional. *Alpha Imperial Bldg LLC v. Schnitzer Family Investment LLC* 2005 Wash. App. LEXIS 482 (WashApp. 2005). Intentional chilled bidding occurs when there is collusion for the purpose of holding down the bids.

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Id. The second, and more applicable, standard however consists of inadvertent and unintentional acts by the trustee that have the effect of suppressing the bidding. *Id.*

The evidence will show that Mr. Haddad was aware bidding was chilled at these sales. The HOA inadvertently, in effort to mitigate their own liability, advertised (a lien sale which may have been subject to a mortgage. These cumulative errors by the HOA invoke the *Balentyne* sliding scale analysis wherein minor unfairness voids the sale, especially at less than 3% of Fair Market Value. "Unfairness from any cause which operates to the prejudice of an interested will abundantly justify a…court in refusing to approve a sale. *Levy v. Broadway-Carmen Bldg* Corp 366 Ill 279 (Ill 1937). This is another reason for a court in equity to either declare this sale subject to the deed of trust or set aside the sale.

iv. The HOA misrepresented the asset being sold in their CC&R's

In *Zyzzx 2 v. Dizon* the Honorable Judge Mahan again dealt with the type HOA foreclosure there. *Zyzzx 2 v. Dizon* 2016 U.S. Dist. LEXIS 39467 (2016). That case Judge Mahan found a grossly inadequate price when the property was worth $210,000 (such as here) and the purchaser paid $15,000.00 for the property (three times what Resources paid). Judge Mahan found that the purchase price was grossly inadequate. Judge Mahan then went on to find that when the HOA "represented to both the general public as well as Wells Fargo that the association's foreclosure would not extinguish the first deed of trust" this was unfair. As previously briefed, this must be compare to the) a Notice of Sale which completely disclaims title and Section 5.08 of the CC&R's which states:

> Section 11. Subordination of the Lien to Mortgages. The lien of the assessments provided for herein shall be subordinate to the lien of any first mortgage. Sale or transfer of any Lot shall not affect the assessment lien. However, the sale or transfer of any Lot pursuant to mortgage foreclosure or any proceeding in lieu thereof, shall extinguish the lien of such assessments as to payments which became due prior to such sale or transfer. No sale or transfer shall relieve said Lot from liability for any assessments thereafter becoming due or from the lien thereof.

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Similarly to *Dizon* the HOA misrepresented to (1) Resources, (2) U.S. Bank, and (3) the Public the nature of what was being sold. Testimony from the HOA and a reading of the CC&R's will show this. It is small wonder that the sale was for such a paltry amount based on the chilled bidding and misrepresentation which Resources took constructive notice of.

v. Fraudulent Conduct of Alessi

Finally there is the issue of the fraudulent conduct of Alessi and Resources in this transaction. Ryan Kerbow, an individual who conducted a sale which was not noticed on U.S. Bank, was the *purchaser's attorney*. The Notice of Default was not noticed on U.S. Bank, which is completely undisputed. The CC&R's misrepresented the lien status of the lien. No one showed up at this sale. This is insider dealing at it's worst.

vi. Failure to Serve the Notice of Default is Unfair and/ or renders the Sale Void

This writer is of the opinion that a foreclosure in this manner is not "voidable" but "void." This is an important difference. The Honorable Justice Lee H. Rosenthal summed up what Deutsche advances here in *Ocwen Loan Servicing LLC v. Gonzalez Fin Holding Inc* 77 Supp. 584 (S.D. Tx 2015) when she ruled that "If a property transfer is void, rather than voidable, then it cannot be taken by a bona fide purchaser." This is not the only jurisdiction to hold as such. *Rosenberg v. Schmidt* 727 P.2d 778 (Ak 1986)(stating that a lack of a substantive basis to foreclose renders a sale "void" and that only voidable sales raise an issue of bona fide purchaser status).

It is well established that a void, as opposed to voidable sale, can be invalidated regardless of any purported bona fide purchaser status. *Sonderman v. Remington Constr. Co.* 127 N.J. 96 (1996); *Fjeldsted v. Lien (In re Fjelsted)* 293 B.R. 12 (2003)("bona fide purchaser status alone is not cause to validate a [void]sale"); *Ocwen Loan Servicing LLC v. Gonzalez Fin Holding Inc* 77 Supp. 584 (S.D. Tx 2015)("if the foreclosure sale is void, rather than voidable, then it cannot be taken by a bona fide purchaser").

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In *Dimock v. Emerald Properties* the California State Court of Appeals ruled that even conclusive presumptions can be overcome by a void deed. 81 Cal.App.4th 868 (Cal. 2000), The Court ruled that the recitals in the deed must specifically state that something has occurred, as "conclusive" in order for the conclusive recitals to render a Deed "voidable" rather than "void." *Id.* Due to an errant substitution of Trustee in that case, and no specific "conclusive" recitation that the trustee was the proper trustee, the sale was rendered "void" not "voidable".

Here the evidence will show that the Notice of Default was never served on U.S. Bank, the beneficiary under the Deed of Trust. (The proper procedures were not followed. This sale is not voidable, this sale is void.

3. Resources will not be found to be a bona fide purchaser

The evidence will show that Resources is not a bona fide purchaser for two reasons. First Resources will not met their burden of production under Nevada law as bona fide purchaser status is their burden. Secondly, they had constructive notice of the defective lien documents which resulted in the chilled bidding.

It is incumbent on Resources here to prove they are bona fide purchasers. *Price v. Ward* 26 Nev. 387 (1902)(" The burden is on the purchaser to show that he did not have notice of a third person's title") *Moore v. De Bernardi*47 Nev. 33 (1923)(Burden is on Purchaser to Establish Bona Fide Purchaser Status). The Nevada Supreme Court cited to both *Moore* as well as *Bailey* in *Shadow Wood*. *Shadow Wood HOA v. N.Y. Cmnt* Back 132 Nev. Adv. Op. 5 At 23 (2016). In *Bailey* the burden of establishing bona fide purchaser status was directly at issue and the Nevada Supreme Court held:

> "The authorities are practically unanimous in holding that, in a suit by one asserting a prior equity, unless exceptional circumstances exist, the duty devolves upon the defendant, who seeks to establish a superior equity upon the basis that he is a bona fide purchaser, to both allege and prove all of the essential elements constituting him such bona fide purchaser, that is to say, a purchaser for a valuable consideration without notice of the prior agreement and the equity resulting therefrom."

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Bailey v. Butner 64 Nev. 1 (1947)

Moreover in Nevada this is a general common sense approach. *Cooper v. Pacific Auto Ins. Co.*95 Nev. 798 (1979). For example, in Nevada an individual cannot purchase a car at a bar for $5,000.00, be given all lawful documents for ownership of the car, have no actual notice of any issues, and thereafter claim bona fide purchaser status. *Cooper v. Pacific Auto Ins. Co.*95 Nev. 798 (1979). This is because, as the trial judge in that case found, basic common sense dictates that you should not buy a discounted car at a bar while having no clue what you are getting. *Id.* In Nevada people are simply not "bona fide" when common sense dictates that something is amiss. *Id.*

Once someone is put on inquiry notice of something as basic as whether or not the property was free and clear of a mortgage or whether or not they were going to be trespassed, in Nevada time and time again this ripens the burden of proof for bona fide purchaser status *to the party asserting the status*. *Berg v. Fredicks* 591 P.2d 246 (Nev. 1979). Legitimate questions of possession have always raised a presumption **against** bona fide purchaser status in favor of the party moving to set aside the transaction. *Brophy Mining Co.v. Brophy & Dale Gold & Silver Mining Co.*15 Nev. 101 (1880). It is incumbent on RESOURCES to demonstrate that they are bona fide purchasers.

Under *Berg* Notices of Default, the chilled bidding, and the Mortgage Protection Clause raise a presumption against bona fide purchaser status here. The Notice of Sale disclaims *everything*. At this point, under *Berg* the burden shifts to Resources as under *Berg* "[the] purchaser put upon inquiry may rebut the presumption of notice by showing that he made due investigation without discovering the prior right or title he was bound to investigate ." *Berge v. Fredericks* 95 Nev. 183 (1979). The Honorable Justice Belknap summarize this very effectively in 1902 when he wrote on behalf of a unanimous Nevada Supreme Court that

> "Purchasers are bound to use a due degree of caution in making their purchases, or they will not be entitled to protection. Caveat emptor is one of the best settled maxims of the law, and applies exclusively to a purchaser. He must take care, and make due inquiries, or he may not be a bona fide purchaser. He is bound not only by actual, but also by constructive notice, which is the same in its effect as actual notice. He must look to the title papers under which

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> he buys, and is charged with notice of all the facts appearing upon their face, or to the knowledge of which anything there appearing will conduct him. He has no right to shut his eyes or his ears to the inlet of information, and then say he is a bona fide purchaser without notice." (Simmons Creek Coal Co. v. Doran, 142 U.S. 437; Everdson v. Mayhew, 65 Cal. 163; Beatty v. Crewdson, 124 Cal. 577.)
> *Price v. Ward* 26 Nev. 387 (1902)

It is completely unclear to this writer how a Notice which says "You may have to pay a mortgage and may not have title" is not sufficient to put Resources on inquiry and even constructive notice that there was an issue with their title. This language is not required *anywhere* in NRS §116.3116 *et seq* and essential functions as a caveat emptor for the purchaser. .

B. THIS SALE IS VOID UNDER THE UNIFORM FRAUDULENT TRANSFER ACT

Additionally, the HOA sale will be found void as a constructively fraudulent transfer under NRS §112.190(1). 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 every day. 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 than 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, (2) there was

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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 it is persuasive and therefore this is proper. *Herup v. First Boston Fin., LLC* 123 Nev. 228 at FN 15 (2007)

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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, U.S. Bank can prove all of the elements of a constructively fraudulent transfer under NRS §112.190(1). Per NRS §112.210(1)(a), this Court must order this transfer avoided to the extent necessary to satisfy U.S. Bank's claim.

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

Under the UFTA any transfer which 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, such as a foreclosure, is considered a transfer[3].

Finally, to take away any question on this to the contrary, Official Comment 12 to Section 1 of the Uniform Act which discusses the meaning of "transfer" refers to no less than four (4) cases, all of which involve execution and foreclosure sales and states that are covered under the act.

[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).

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Uniform Fraudulent Transfer Act Section 1 Official Comment 12 *citing Hearn 45 St. Corp. v. Jano*, 283 N.Y. 139, 27 N.E.2d 814, 128 A.L.R. 1285 (1940) (execution and foreclosure sales); *Lefkowitz v. Finkelstein Trading Corp.*, 14 F.Supp. 898, 899 (S.D.N.Y. 1936) (execution sale); *Langan v. First Trust & Deposit Co.*, 277 App.Div. 1090, 101 N.Y.S.2d 36 (4th Dept. 1950), aff'd, 302 N.Y. 932, 100 N.E.2d 189 (1951) (mortgage foreclosure); *Catabene v. Wallner*, 16 N.J.Super. 597, 602, 85 A.2d 300, 302 (1951) (mortgage foreclosure).

The statute is clear on its face that every mode, including the involuntary disposition of an asset and specifically a foreclosure sale, is subject to the UFTA. There can be no argument that this is not a transfer. The evidence will show the HOA foreclosed on January 25, 2012 yet U.S. Bank will evidence that the Deed of Trust which U.S. Bank claims their rights has encumbered the property since 2009. The evidence will show the first Lien Notice did was not issued until 2010. All of this demonstrates that the Deed of Trust predated the HOA's lien and/ or foreclosure rights.

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

The UFTA actually specifically contemplates voiding foreclosures. True to this point NRS §112.170 exempts certain foreclosures from the act, yet ***does not*** exempt 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

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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. 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. The legislature is presumed to be aware of every single provision of law when they draft a statute. Even when NRS §112.220 was revised by legislature in 1999, after the enactment of NRS §116.3116 *et seq*, in the adoption of an updated Uniform Commercial Code, the legislature continued to not exempt the HOA. Both NRS §112.220 as well as NRS §116.3116 were actually amended in 1999, side by side, in Senate Bill 62 as Sections 162 and 163 yet even then the legislature never took the additional step of exempting the HOA foreclosure from NRS Chapter 112 and only exempted the Uniform Commercial Code[4] specifically and by name and specific reference to the stattue. NRS §112.220(5)(b) Moreover, under basic due process principals in this state NRS §116.31166 does

[4] Available at http://www.leg.state.nv.us/Statutes/70th/Stats199903.html#Stats199903page389 (Last Visited November 5, 2015)

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not provide a defense to a claim under the UFTA. *Wright v. Cradlebaugh* 3 Nev. 341 (1867)(holding that a Statute providing that a deed was "conclusive proof" would violate the Nevada Constitution and therefore cannot be interpreted in that manner). At this juncture this Court should not only presume this was intentional, but the balance of everything leads to the conclusion that this *actually* intentional.

3. Since the HOA foreclosure does not provide statutory reasonably equivalent value, Value must Be Assessed from the Creditor's Perspective at Market Value

To the extent that the Resources attempts to argue that somehow the value of the asset was tainted by a legal and factual scenario instigated by the HOA and their purchasers, this argument will be without merit. Value under NRS Chapter 112 must be analyzed from the creditor's perspective and at market value.

The underlying policy behind the UFTA is to preserve a debtor's assets for the benefit of creditors. *Herup v. First Boston Fin., LLC* 123 Nev. 228 at FN 15 (2007) In light of this basic public policy behind the act, reasonably equivalent value analysis must be performed from the creditor's perspective of value of the asset, not the Defendants. *Brandt v. nVidia Corp (In re 3dfx Interactive, Inc)* 389 B.R. 842 (reasonably equivalent value must be determined from the creditor's, not the debtor's perspective); *Pjara Dunes Rental Agency Inc v. Spitters* 174 B.R. 557, 578 (Bankr. N.D. Cal 1994)(same); *Frontier Bank v. Brown* 371 F.3d 1056, 1059(9th Cir 2004)(primary focus is on the net effect of the transaction on the debtor's estate and the funds available to pay creditors).

. U.S. Bank's expert appraisal will testify the property was worth $48,000.00 at the time of the sale. The property sold for $5,331.00. This is not reasonably equivalent value for this asset.

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

U.S. Bank had a secured deed of trust at the time of the fraudulent transfer and recorded their Deed of Trust in 2009. As such there can be no argument that U.S. Bank is covered under NRS §112.190(1).

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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 U.S. Bank'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[5].

The evidence will show that at the time of the HOA foreclosure in January, 2012; U.S. Bank's Deed of Trust had encumbered the property for 3 years. There is no legitimate argument that U.S. Bank's deed did not encumber the property. Moreover, it does not matter whether or not the HOA recorded their CC&R's "first" under this act. All that does matter is that U.S. Bank's obligation was in existence at the time of the foreclosure. They most definitely were. On this basis, there is no genuine issue of material fact on this point.

[5] 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).

5. Mr. Edwards was insolvent.

Under NRS §112.160(2) all U.S. Bank 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. Bank would not need to prove nonpayment on a majority of debts in order to prove general nonpayment. Finally, if a creditor can prove that the sum of a debtor's debt is greater than their assets at fair valuation then the Debtor is considered insolvent. NRS §112.160(1).

U.S. Bank was attempting to foreclose on the Subject Property. The HOA was attempting to foreclose on the Subject Property. U.S. Bank's witness will testify that Edwards was neither paying property taxes, his property insurance, nor his mortgage which is now unsecured. On this basis Mr. Edwards was not paying his debts as they came due.

IV. CONCLUSION

On this basis, U.S. Bank respectfully requests that the January 25, 2012 HOA foreclosure sale be declared subject to U.S. Bank's Deed of Trust or void. This would seem to be a "fair" remedy and the evidence will show this. *Shadow Wood* dictates that this Court can and should consider a fair remedy weighing the rights of the purchaser and U.S. Bank here.

DATED: September 28, 2017

McCarthy & Holthus, LLP

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

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CASE NO. A-12-667690-C

DOCKET U

DEPT. XVI

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

U S BANK NATIONAL ASSOCIATION,

Plaintiff,

vs.

GEORGE EDWARDS,

Defendant.

REPORTER'S TRANSCRIPT
OF
BENCH TRIAL

BEFORE THE HONORABLE JUDGE TIMOTHY C. WILLIAMS

DISTRICT COURT JUDGE

DATED TUESDAY, OCTOBER 2, 2017

REPORTED BY: PEGGY ISOM, RMR, NV CCR #541,

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EXHIBITS

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* * * * *

LAS VEGAS, NEVADA; TUESDAY, OCTOBER 2, 2017

9:55 A.M.

P R O C E E D I N G S

* * * * * * *

09:48:14

THE COURT: All right. Good morning.

MR. VILKIN: Good morning, your Honor.

THE COURT: And let's go ahead and note our appearances on the record.

09:55:33 MR. VILKIN: Richard Vilkin for defendant and counter-claimant Resources Group LLC as trustee.

MR. GEISENDORF: Charles Geisendorf for Resources Group.

THE COURT: All right. Has everybody noted

09:55:47 their appearance?

MR. BECKOM: Thomas Beckom on behalf of US Bank and with me here is Priscilla Baker also from McCarthy Holthus as well as Bryan Heifner on behalf of US Bank.

09:55:57 MR. VILKIN: Also with us, your Honor, is Eddie Haddad, the manager of Resources Group.

MR. HADDAD: Good morning, your Honor.

THE COURT: Good morning. So anyway, at this time are we ready to proceed?

09:56:07 MR. VILKIN: Yes, your Honor.

09:56:08 THE COURT: Okay.

MR. VILKIN: But --

THE COURT: From a witness perspective, how many witnesses do you anticipate calling?

09:56:13 MR. BECKOM: We're hoping to -- we have six witnesses total for this entire case. We're hoping to get -- knock out the four fact witnesses and take experts tomorrow is my understanding.

THE COURT: I understand.

09:56:22 MR. VILKIN: Your Honor, we do have some logistical issues that I'd like to present to the Court. We've got two witnesses that have other obligations this afternoon. Our plan was to take the bank's witness first. That should be relatively short.

09:56:39 Then we have the sales trustee who will be somewhat lengthy. He's supposed to testify in another matter at 1:00 o'clock.

There's also an HOA witness who just told me that she has to be somewhere else at a board meeting at

09:56:54 2:00 o'clock.

So in talking to counsel beforehand, we're not sure we can get done, we can get all those done by -- to accommodate all these witnesses.

THE COURT: I understand.

09:57:07 MR. VILKIN: So we're open to --

09:57:08 THE COURT: I'm not really concerned about that, and I'll tell you why. That's one of the beauties of a bench trial. Right? I only become concerned with witness availability in a jury trial
09:57:21 setting. We'll get this case done. If we don't get it done exactly when we plan to get it done, we'll get it done within the next week or so. So I'm not worried about it. I'll get a chance to work with all the witnesses, and so on. We'll work with the
09:57:35 availability.

MR. VILKIN: All right. Thank you, your Honor.

THE COURT: So that should be a nonissue.

MR. BECKOM: And one pragmatic thing I would
09:57:39 request is that Mr. Heifner here was staying at Tropicana last night.

THE COURT: I heard about that, yes.

MR. BECKOM: Yes. We would ask respectfully that after he gives his testimony this morning, if we
09:57:49 could just let him go. He's had very little sleep over the last 24 hours just because of some of the incidents that happened down on the strip.

MR. VILKIN: Would he be available tomorrow if needed? He's leaving today?

09:58:07 MR. BECKOM: He's leaving tomorrow at

10:00 a.m.

MR. VILKIN: All right.

THE COURT: Yeah. I mean, hypothetically, I mean, I don't know exactly what's going to happen, but I do understand probably the necessity for him to leave today. I have no problem with that. If for whatever reason he needs to be recalled, we can handle that telephonically. I mean, think about it. I will have a chance to have met him live. If there's anything additional we need, I can do it telephonically.

MR. VILKIN: That would be great, your Honor.

THE COURT: I don't see where there's an issue because it -- these are very unfortunate times; right?

MS. BAKER: True.

THE COURT: Probably the best way to say it. So, okay, opening statements.

MS. BAKER: Yes, your Honor.

THE COURT: And, ma'am, you need the lectern. Let's see if we can get her set up, Mr. Marshal, if she needs.

THE MARSHAL: Your Honor.

THE COURT: Yes, a lectern.

THE MARSHAL: The lectern. Yes, your Honor. Excuse me. Ladies and gentlemen, will this suffice or do you want that big beast out in the hallway?

MR. VILKIN: No.

THE MARSHAL: I have to ask, so ...

MS. BAKER: That's fine.

Good morning, your Honor.

THE COURT: Good morning --

MS. BAKER: This case is regarding property located at 4254 Rolling Stone Drive, Las Vegas, Nevada, 89103.

When plaintiff US Bank first became involved in this property, the owner of the property was George Edwards. He entered into an agreement with US Bank on a home equity line of credit. He signed a note on March 3, 2009, for credit of $50,000. It was secured by a future advances deed of trust that was recorded against the property. The monthly payments were 201-dollar -- $201.09.

Mr. Edwards became in default on the note and the deed of trust in November 2, 2001 (sic). During about that time, the borrower also passed away, but US Bank wanted to keep or work with the heirs and the borrower to keep the property with them. However, there was a hitch in the plan. The borrower also became delinquent in the HOA assessments.

The delinquency began in February 2010. Glenview West Townhome Associations, which is the

10:00:48 defendants herein placed a lien on the property in January 14, 2011. The HOA assessments were $130 a month. So the property ended up being sold in January 25th, 2012, for $5,331. The value of the property is 10:01:11 estimated anywhere between $35,000 and $48,000 at that time, which was about 11 percent of the fair market value.

Before going to sale, after the lien was recorded, Robert Hazel, as part of the estate, 10:01:32 attempted to make a part -- well, made a partial payment on the HOA liens for about $700, which only delayed the sale from November 2011, the HOA sale to January 25th, 2012.

The HOA recorded a notice of default in March 10:01:54 2011; however, the evidence will show that US bank was not served notice of the notice of default. They were served notice of the sale, which were sent to two different addresses which were on the deed of trust listed.

10:02:12 Pursuant to NRS 106 there was a requirement that if US Bank wanted to get notice anywhere other than what was addressed in the recordings of the notice of default, it would have had to record a new -- record notice that it wanted to be at a different address, 10:02:29 which it did not do. US Bank wanted to be served where

it was stated in the notice of default. Which was also shown and the notice of sale was actually served at the two addresses that were used in the notice -- or in the deed of trust.

The evidence will also show that there were no bidders at the sale. It was sold back to the trust -- a trust, as well as the CC&Rs had a subordination agreement putting people on notice that the lien would have been subordinate to the first deed of trust regardless.

The evidence will also show that Resources Group is not a bona fide purchaser because the deed of trust put everybody on notice that there was a lien against the property, the sale was prior to SFR as well as Bourne Valley, which was then deeded the property in May 2012. Listed this property in the bankruptcy subject to the deed of trust. And that's where the Bourne Valley put a value of the property at $35,000, signed under penalty of perjury.

Based on the situation, US Bank now seeks a judicial foreclosure. And evidence will show that US Bank isn't entitled to the judicial foreclosure -- entitled to enforce the note, and they're the current beneficiary of the deed of trust. Thank you.

THE COURT: Thank you, ma'am.

10:04:20 MR. VILKIN: Good morning, your Honor. On behalf of defendant and counter-claimant Resources Group LLC as trustee for the Bourne Valley Court Trust, the current defendant, my client, obtained the property 10:04:37 after the sale by way of grant, bargain and sale deed. But at the sale, Eddie Haddad was the person who appeared at the sale and purchased the property for, counsel is correct, $5,331.

This was a public auction. It was advertised 10:04:59 in the Nevada Legal News and posted around town, so it conformed to all the requirements of the sale.

And Mr. Haddad was the high bidder at the sale and paid cash that day and had title vested in an entity known at 4254 Rolling Stone Drive Trust, and 10:05:19 Resources Group was the trustee of that trust and later transferred the property to the current plaintiff Bourne Valley Court Trust.

So at the time of the sale Mr. Haddad had no information about any allegations that you'll hear in 10:05:43 this case concerning alleged defects in the sale. He knew nothing about it. The only thing he knew at the time of sale was what was contained in the recorded documents on the property. And there's nothing in any of the recorded documents that talk about any of the 10:06:02 alleged defects that the bank is going to focus on.

10:06:06 And, in fact, you just heard in argument that the fact that the first deed of trust was recorded on the property was enough to destroy his status as a bona fide purchaser; however, that is not the law in this
10:06:19 state. And the Shadow Wood case, the Nevada Supreme Court said the fact that a holder of a first deed of trust may bring an action of quiet title is not sufficient to destroy bona fide purchaser status.

So we believe the evidence is going to show
10:06:36 that our client was a bona fide purchaser without notice of any defect in title or anything else that should prevent him from quieting title in this action. Because this is a quiet title action and both parties have alleged quiet title against each other.

10:06:54 The Court will hear evidence that the sale was not commercially reasonable because the price was approximately 10 percent of the alleged value at the time of the sale. However, in order to be commercially unreasonable, there also needs to be evidence of fraud,
10:07:13 oppression, or unfairness leading to the lower price. And we don't believe there's any such evidence that's going to be presented to the Court.

With regard to the notice issue, your Honor, the first and most important part of this is that in
10:07:33 order to be entitled to notice under NRS 116 at the

time of the sale in January of 2012, the bank was required to notify the association of its secured interest. Otherwise, it wasn't entitled to notice. This is the so-called opt-in aspect of Nevada law which the Nevada Supreme Court has ruled is constitutional. So there was no requirement that the bank get any of the notices in this case.

However, they, in fact, did get the notices. But it was voluntary. And what happened was -- even though counsel has told you they didn't get notice, what happened was they recorded a deed of trust, your Honor, which had three addresses on it. And the Court will get to see that document. And at the top of the document it had a name and an address of where to mail the recorded deed of trust. And that is the address that the sales trustee used in mailing out the notices in this case.

There were in addition two other addresses that the bank included in that deed of trust, but the bank said nothing in the document about where to send the notices. And so the bank created the confusion by having the three addresses, but not saying where they wanted the notices or where they wanted any information sent.

Finally, with regard to the superpriority lien

10:09:13 issues in this case. As the Court knows, the superpriority lien consists of nine months of assessments immediately proceeding the institution of an action to enforce the lien.

10:09:24 In this case the institution of the action began in January of 2011 when the notice of delinquent assessment lien was recorded. So the superpriority lien consisted of nine months of assessments prior to that dating back to April of 2013. The evidence is

10:09:43 going to show that when this sale occurred, the association was paid assessments actually going back two months earlier, and so the nine months calculated out to about $1170. There was a partial payment for $414. But it still wasn't sufficient to pay off the

10:10:09 superpriority lien. And the HOA was, in fact, paid off its superpriority lien, and the evidence is going to show that's, in fact, what was foreclosed on at this sale. So we're going to ask the Court at the end to quiet title in the name of defendant. And thank you.

10:10:28 THE COURT: Thank you, sir.

Anything else from the defense? Is that it?

MR. GEISENDORF: That's it.

THE COURT: Okay.

MR. BECKOM: US Bank would call as their first

10:10:36 witness Bryan Heifner, corporate representative of US

Bank.

BRYAN HEIFNER,

having been first duly sworn to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

THE COURT CLERK: Please be seated. And if you will state and spell your name for the record, please.

THE WITNESS: Bryan, B-R-Y-A-N. Heifner. H-E-I-F-N-E-R.

DIRECT EXAMINATION

BY MR. BECKOM:

Q. Good morning, Mr. Heifner.

A. Good morning.

Q. As a predicate matter, why don't you tell us what you do for a living.

A. I am a litigation analyst for US Bank National Association.

Q. Okay. And you were here today on behalf of the US Bank National Association?

A. Yes.

Q. Okay. And can you tell me what a litigation analyst for US Bank National Association does?

A. I prepare for testimonies at any depositions,

litigations, trials. I also appear at mediations and settlement conferences as well.

Q. Okay. And I believe you said you were employed by US Bank; correct?

A. Yes.

Q. What does US Bank do?

A. US Bank -- US Bank National Association, the division I work for originates, holds, services, and sometimes owns mortgages.

Q. Okay. And did you originate a mortgage on behalf of -- or for George Edwards?

A. US Bank National Association did originate a mortgage on behalf of Mr. Edwards.

Q. Okay. Let's go ahead. Do we have an exhibit binder up there for you?

THE COURT CLERK: It's behind him.

MR. BECKOM: Okay.

BY MR. BECKOM:

Q. Why don't we go ahead and grab that exhibit binder. And I would direct you to -- its right there in the big binder. I would direct you to Exhibit 3 of that binder.

A. Okay.

Q. You've seen this document before, Mr. Heifner?

A. No. The US Bank equity line agreement, that's

what we're looking at; correct?

Q. Okay.

A. There's three.

Q. And then, I believe, on the bottom right-hand corner there's a series of numbers, USB005, and then a document ends in USB0010. Do you have five pages of this document as well?

A. I do.

Q. Okay. Have you seen this document before, Mr. Heifner?

A. Yes.

Q. Okay. And what is this document that we're looking at?

A. This is the equiline agreement or also the note.

Q. And this was the note that US Bank -- or the agreement that US Bank entered into with Mr. Edwards for the home equiline agreement, correct?

A. Yes.

Q. Okay. And you have no reason to believe that this is -- this is a true and correct version of the note that US Bank has with Mr. Edwards; correct?

A. Yes.

Q. Now, it was my understanding that this note, that this note is kept in electronic form only;

correct?

A. That is correct.

Q. Can you tell me the name of the system that this form -- that this note is kept within?

A. Yeah. Typically, refer to the system by letters. LDRS, which stands for Lender Document Retrieval System.

Q. Okay. And in your experience with dealing with LDRS, this is a reliable system for the retrieval of documents such as Exhibit 3?

A. Yes.

Q. Okay. And in this system, LDRS, there's only one authoritative company of your equiline agreement with Mr. Edwards?

A. Yes.

Q. Okay. Now, on this document I would direct you over to USB0010. That's the very last page.

Do you see in the bottom -- I guess, in the middle of page on the bottom left-hand corner where it says this note is a transferable record?

A. Yes.

Q. What is your understandings of this provision of the equiline agreement?

A. That we would keep an electronic copy of the record and force and service it based on that

10:15:47 electronic copy.
Q. Okay.
A. And in many cases or the most cases the original will be destroyed, and we would enforce it
10:15:55 based on the copy.
Q. Based on the electronic copy?
A. Yes.
Q. Okay.
MR. BECKOM: I would, therefore, move to admit
10:16:01 Exhibit 3 to the extent it was not admitted already?
MR. VILKIN: No objection.
MR. BECKOM: Okay.
THE COURT: Okay. It will be admitted.
So admitted.
10:16:10 (Exhibit 3 admitted)
BY MR. BECKOM:
Q. On what bank -- on what date did US Bank enter into this agreement with Mr. Edwards?
A. March 3, 2009.
10:16:46 Q. Okay.
A. On this one, yes.
Q. Okay. And where -- are you basing your testimony off of, like, the top left-hand corner of the first page?
10:16:56 A. I was referring to the signature date.

10:16:58 Q. Okay.
A. Which is the same as the top left-hand corner.
Q. Now what amount of money did US Bank agree to lend to Mr. Edwards?
10:17:10 A. The line of credit was up to $50,000.
Q. $50,000. And what was the purpose that Mr. Edwards was taking out this loan for?
A. This was -- the reasoning behind this was medical bills. And I believe some of them may have
10:17:32 paid off a prior line of credit.
Q. Okay. Let's go over to USB0006 which is the second page of Exhibit 3. Do you see on the top left-hand corner where it says initial rate?
A. Yes.
10:17:52 Q. Okay. Is it your understanding that this loan had an initial rate of 4.75 percent?
A. Yes.
Q. Okay. And then down in the middle of the page where it says annual percentage rate. It also had an
10:18:09 annual percentage rate of 3.99 percent?
A. Yes. That's the lowest -- it will never decrease below 3.99.
Q. Okay. Or it would not decrease below 3.99?
A. Yeah, 3.99.
10:18:25 Q. Okay. Let's go to USB0007. Do you see in the

top left-hand corner of Exhibit 3 where it says security?

A. Yes.

Q. Is it your understanding that US Bank took out a security interest in the real property commonly known as 4254 Rolling Stone Drive, Las Vegas, Nevada, 89103?

A. Yes.

Q. Okay. Moving down, I guess, down this document where it says assumption. It sues someone buying your house cannot assume the remainder of the mortgage on the original terms. Is it your understanding that this document bars a transfer of interest in the property from Mr. Edwards to any other entity?

A. Yes.

Q. Okay. And would a transfer of interest to any other entity either involuntary or voluntary result in a breach of this loan agreement?

A. Yes.

Q. Okay. I'm going to direct you over then to the left column of USB0007. Do you see the portion that says priority?

A. You said left side; right?

Q. I apologize. Right side.

A. Okay. Yes.

10:19:57 Q. Okay. This portion of Exhibit 3 says the residence that secures this loan is the primary security, and the security interest granted herein will be resorted to only in the event of a deficiency in the 10:20:16 equity of the residence. Do you see what I'm talking about?

A. Yes, I do.

Q. Again, that is your understanding that US Bank had a security interest in this property pursuant to 10:20:23 this loan noted Exhibit 3?

A. Yes.

Q. Okay. On the very bottom of the right-hand column on USB0007, do you see where it says cost of the collection?

10:20:39 A. Yes.

Q. Okay. And it says you agree to pay the costs we incur to collect this debt and realize on any collateral in the event of your default; do you see that provision?

10:20:51 A. I do.

Q. Is it your understanding that Mr. Edwards had agreed to US Bank that the -- in the event of a default under this loan note, that costs of collection including attorney's fees and other provisions would be 10:21:05 paid by the borrower pursuant to this agreement?

10:21:08 A. Yes.
Q. Okay. Let's move over to USB0008. In the right-hand column where it says default. Let me know when you get there.
10:21:22 A. Yes, I'm there.
Q. Okay. Under default it says you'll be defaulted on this agreement if any of the following occur. Subsection 2 says subject to any right to cure you may have, if any, if you do not meet the repayment
10:21:36 terms or otherwise fail to perform any obligation under this agreement; do you see what I'm talking about?
A. Yes.
Q. And so if Mr. Edwards failed to make payments under this equiline agreement, would that be a breach
10:21:49 in the agreement?
A. Yes.
Q. Okay. Subsection 3 of that same provision says, Your action or inaction adversely affects it's -- let me come at that a different way.
10:22:07 It says that you will be defaulted under this agreement if any of the following occur. Subsection 3 says, your action or inaction adversely affects the collateral or our rights in the collateral including but not limited to failure to maintain property
10:22:21 insurance on the dwelling, the transfer of the

property, failure to maintain the property, or use it in destructive manner in the commission of waste, failure to pay taxes on the property, otherwise fail to act and thereby cause a lien to be filed against the property that is senior to our lien.

And then after that it also discusses the death of the borrower; do you see what I'm discussing?

A. Yes.

Q. Okay. So if there was a senior lien filed against this property that adversely affected US Bank's rights in the 4254 Rolling Stone Drive property, US Bank's understanding of this agreement would be that that would be a breach of the agreement between US Bank and Mr. Edwards?

A. Yes.

Q. Okay. And in addition, if the borrower died, that would also be a breach under this agreement; is that your understanding as well?

A. Yes.

Q. Okay. So you've reviewed US Bank's records in regards to this property today; correct?

A. Yes.

Q. What is your understanding about the current status of Mr. Edwards?

A. Mr. Edwards is deceased.

Q. Mr. Edwards is deceased? How were you able to come to that determination?

A. We were notified by, initially by his son --

Q. Okay.

A. -- who sent us the executor of the estate information so that we could speak to him in regards to the payments. And he proceeded to make payments on the account for some time.

Q. Okay. But it's your understanding that, though, that Mr. Edwards is no longer with us today?

A. That is correct.

Q. And according to US Bank's understanding of this agreement that would be a breach under the equiline agreement between US Bank and Mr. Edwards; correct?

A. Correct.

Q. Okay. And, I guess, seems slightly redundant, but we'll go down this route anyway. US Bank's understanding is US Bank aware of an HOA foreclosure on this property?

A. Now we are, yes.

Q. Now you are. Okay.

And your understanding of this agreement is that if there was a senior HOA lien filed against this property due to the inaction of Mr. Edwards that that

would be a breach under this equiline agreement?

A. Yes.

Q. Okay. Mr. Edwards, I believe you said that the executor of his estate was paying for some time and then Mr. Edwards -- and then they stopped paying. Did you mention that earlier?

A. Yes. There was a prior -- we had a prior sale scheduled just before I think it was in 2011. We had a prior sale scheduled, and we had to cancel that sale because the day before was reinstated by Mr. Hazel who I believe is the son of Mr. Edwards.

Q. Okay.

A. Or the executor of the estate which stopped the prior sale that we had scheduled for the foreclosure.

Q. It might take a minute to get over here, but let's move over to Exhibit 17. This is USB0308.

Let me know when you get there.

A. You said 17; right?

Q. Exhibit 17, USB0308 is the Bates No. in the lower right-hand corner.

MR. VILKIN: I'm sorry. What was the Bates?

MR. BECKOM: 0308.

BY MR. BECKOM:

Q. Have you seen this document before,

Mr. Heifner? Oh, are you not -- are you still getting there?

A. You said 0308?

Q. Yes, sir.

A. All right. I had to flip a little bit past there. If I'm on the correct page, it would be a screenshot of our system; is that correct?

Q. Yes. I mean, it's --

A. 03.

Q. Have you seen this document before?

A. Yes.

Q. Okay. What is it that we're looking at?

A. This is a direct screenshot of our servicing system.

Q. Okay. And what does this document tell you based on your review?

A. This is giving me the loan information: Name, address, dates and amounts in regards to the line of credit.

Q. Okay. Does this also demonstrate the past due amount as well as the date of first delinquency?

A. Yes, it does.

Q. Okay. And this is kept in the ordinary course of your -- this is kept in US Bank's system; correct?

A. That's correct, yes.

10:27:23 Q. And the data that the system would rely on would be inputted as the delinquency occurs; correct?
A. Yes.
Q. Okay.
10:27:30 MR. BECKOM: On that basis I would move to admit Exhibit 17 USB0308 into evidence, your Honor.
MR. VILKIN: I'm going to object as lack of foundation. We don't know. No information has been provided as to who input this information, what sort of
10:27:48 safeguards were used in order to check and determine the accuracy of the information. And I just think foundation is lacking.
MR. BECKOM: Mr. Heifner has testified he's competent as US Bank's corporate witness. He's
10:28:04 identified this document as directly coming from their system. The default would be clearly relevant in this scenario, and it would be a business record that he has testified as being entered into.
THE COURT: Why is all this relevant, his
10:28:15 testimony?
MR. BECKOM: This is a judicial foreclosure action and so --
THE COURT: No. I understand that. But, I mean, at the end of the day it seems to me that today's
10:28:23 trial will focus primarily on the three issues. One

would be the notice and whether it was required to the bank. Two would be the BFP status. And number three, the commercial reasonableness of the transaction.

MR. BECKOM: We still --

THE COURT: There's no tender; right?

MR. VILKIN: Correct.

THE COURT: Yes.

MR. BECKOM: We still -- we still, I guess -- and I might be wrong in this regard, but it's my understanding that we still have to prove up -- ultimately, we're asking for a judicial foreclosure judgment against, you know, possibly Resources Group depending on the outcome of this action if the property has been held subject to the deed of trust.

We will need to establish sufficient default on that basis in order to establish that we have the ability to foreclose based on the breach of contract claim, the underlying breach of contract between US Bank and Mr. Edwards. And so that's why, I would contend anyway, that that's relevant. While it might not be relevant for the Shadow Wood factors, I guess, we would respectfully argue that is relevant in terms of establishing breach in order to foreclose.

THE COURT: Anything you want to add to that?

MR. VILKIN: Nothing further, your Honor.

10:29:27 THE COURT: Okay. So, but, I mean, my ultimate decision is going to make a determination as to whether or not the HOA sale resulted in an extinguishment of the first deed of trust pursuant to
10:29:44 SFR: Right? So why does it matter?

Because one of two things will happen: Either the defendant takes free and clear or they don't; right? So I'm trying to figure out why all this information is really and truly necessary.

10:29:59 MR. BECKOM: My understanding of a judicial foreclosure action is that we would get a judicial foreclosure judgment against both Resources Groups as trustee for the Bourne Valley Trust as well as all the other subordinate lienholders and Mr. Edwards and his
10:30:14 estate.

From there we would need a writ of execution in order to have a sheriff sale after the one year right of redemption from the judicial foreclosure. We'd need the breach to be incorporated into whatever
10:30:28 judgment the Court issues here today. Because we will be unable to sell the property at a sheriff sale as to all parties if we cannot read into the record the default which has occurred.

THE COURT: So, I guess, that's contingent
10:30:41 upon what my ultimate decision would be --

10:30:43 MR. BECKOM: Yes.

THE COURT: -- as it relates to the notice issue, the BFP issue, and the commercial reasonableness of the sale.

10:30:49 MR. BECKOM: Yes. I mean, obviously, like, we can establish a breach all day long, but if we don't have a security interest, there's not a lot to foreclose on.

But it's our position, anyway, that we would 10:30:59 still establish the breach, and then also continue to establish all the factors under Shadow Wood as well as the mechanical defects of the sale.

THE COURT: No. I understand that.

Anything else I need to know?

10:31:10 MR. BECKOM: Um.

THE COURT: I'll overrule.

MR. BECKOM: Overrule?

THE COURT: Yeah.

MR. BECKOM: Okay.

10:31:19 THE COURT: So we got a breach. Now what?

THE COURT CLERK: I need to clarify, does that mean that the exhibit is admitted.

THE COURT: Yes, it's admitted.

THE COURT CLERK: Okay. So I need to --

10:31:28 THE COURT: What exhibit number is that?

MR. BECKOM: That is Exhibit 17. Just Bates No. USB0308.

THE COURT CLERK: So we'll call it 17A.

MR. BECKOM: Sounds like a plan to me. Whatever makes it easier for the Court.

THE COURT CLERK: Thank you.

(Exhibit 17A admitted)

THE COURT: So we have a breach. Maybe it would be breaches; right?

MR. HADDAD: Stack them up.

MR. BECKOM: Breaches all over the place, your Honor.

BY MR. BECKOM:

Q. We've got a -- we've got a deceased borrower, and we've got a transfer of property, and then also Mr. Heifner. So this is -- so according to this printout from US Bank's system, do you see where it says first DELQ date?

A. (No audible response.)

Q. On the bottom left-hand corner.

A. Yes, I just looked at this earlier. Yes, I see that now. Yes. Correct. First delinquency date, DELQ date of December 2011.

Q. Okay. And what does that information tell you in regards to Mr. Edwards' payment on the loan note?

10:32:37 A. That would indicate that December of 2011 payment was not made.
Q. Okay. To the best of your knowledge has he made -- did he make any payments since December of 2011
10:32:47 towards the US Bank equiline agreement?
A. No.
Q. Are you able to tell from this document the amount currently in default to US Bank as far as payments go?
10:32:59 A. As far as payments the -- at the time that this document was printed, the payments were due at $4,662. The balance was 60 -- be $4,000.
Q. Okay. And so that would be the amount at the time this document was printed that was owed to US
10:33:20 Bank; correct?
A. Correct.
Q. Okay. I believe you stated earlier that this note was secured against the property 4254 Rolling Stone Drive; correct?
10:33:32 A. Yes.
Q. How does US Bank typically secure their loan agreements in Nevada?
A. Deed of trust.
Q. Okay. I can direct you to Exhibit 4. Now,
10:34:21 just to be -- oh, take your time.

10:34:23 A. I'm there.
Q. Now, just to be clear, my Exhibit 4 is showing as USB0011, and then ends at USB0019. Is that what your document is showing as well?
10:34:43 A. Yes.
Q. And what is this document that we are looking at here today, Mr. Heifner?
A. This is a recorder copy of the deed of trust between US Bank National Association, ND and Mr. George
10:34:58 R. Edwards.
Q. So this is the deed of trust that secured the agreement between your employer US Bank and Mr. Edwards; correct?
A. Yes.
10:35:05 Q. Okay.
MR. BECKOM: On that basis I would move to admit Exhibit 4 for all purposes?
MR. VILKIN: No objection.
THE COURT: So admitted.
10:35:17 (Exhibit 4 admitted)
BY MR. BECKOM:
Q. I'm going to go over a couple pages to USB0017.
A. Okay.
10:35:48 Q. Do you see where it's circled and says

signatures?

A. I do see the signatures.

Q. Okay. Is your understanding that this is Mr. Edwards' signature on this document?

A. Yes.

Q. Okay. And it appears that he executed this document on March the 3rd, 2009; is that correct?

A. Yes.

Q. Okay. And so US Bank's and your understanding of this is that this is the agreement to secure 4254 Rolling Stone Drive or to secure the note that we discussed earlier against 4254 Rolling Stone Drive; correct?

A. Yes.

Q. Okay. Let's go back to the first page. I want to take a look at a couple of the entities here that you listed under the deed of trust with a future advance clause. Would you be able to take a moment for me and identify where US Bank, who you are here representing today, where they are listed on this deed of trust for the Court and for all the parties present?

A. Yeah. It's near the bottom of the page under the bold title lender.

Q. Okay. And so that is who you are here on behalf of today, US Bank National Association, ND;

10:37:25 correct?
A. Yes.
Q. There's an address below 4325, 17th Avenue Southwest, Fargo, North Dakota, 58103. Do you see what
10:37:37 I'm talking about?
A. Yes.
Q. Is that the address for US Bank?
A. That would be one of the addresses for US Bank. For this loan in question, that would be the
10:37:45 address.
Q. So if I wanted to send correspondence to US Bank, I could send it to this address?
A. Yes.
Q. Okay. Now, let's go up and talk about some of
10:37:57 the other entities here on US Bank's deed of trust. Do you see in the upper left-hand corner where it says Southwest Financial Services Ltd?
A. Yes.
Q. Do you know who Southwest Financial Services
10:38:13 Ltd is?
A. I do not.
Q. Okay. Are they in any way affiliated with US Bank?
A. Not to my knowledge.
10:38:23 Q. Okay. So if I sent a letter or any kind of

correspondence to Southwest Financial at their 537 East Pete Rose Way, Suite 300, Cincinnati, Ohio, would that reach US Bank?

A. No.

Q. Okay. Let's go down to the next one where it says return to. Do you see what I'm talking about?

A. Yes.

Q. Okay. Are you familiar with the entity US Recordings?

A. I am not.

Q. Okay. Is US recordings in any way affiliated with US Bank?

A. Not to my knowledge.

Q. If I sent mail to 2925 Country Drive, Suite 201, St. Paul, Minnesota, 55117, would that reach US Bank?

A. No.

Q. Okay. And so -- and does US Bank place their address in this deed of trust in order to get notice?

A. Yes.

Q. Okay. And it was US Bank's understanding that they wished to receive notice at 4325 17th Avenue Southwest, Fargo, North Dakota, 58103?

A. Yes.

Q. Okay. And if it was sent to any of the other

addresses on the first deed of trust, it is US Bank's -- your understanding that US Bank would not have received that notice?

A. That is correct.

Q. And also is it your understanding that US Bank did not indicate they wanted to receive notices there under this deed of trust?

A. That is correct.

Q. Okay. And they -- and did US Bank specifically file this document in the property records to delineate an address for service on to US Bank?

A. Yes.

Q. Okay. Over on to USB0013. Under where it says payments; do you see what I'm talking about?

A. Yes.

Q. And then it says grantor agrees that all payments under the secured debt will be paid when due; correct?

A. Yes.

Q. That is just one more indication that an agreement between Mr. Edwards and US Bank that US Bank would be paid; correct?

A. That is correct.

Q. Okay. Let's go down to where it says claims against title.

10:41:11 So let's take a look at this one. It says grantor will pay all taxes, assessments, liens, encumbrances, lease payments, ground rents, utilities and other charges relating to the property when due. 10:41:26 Lender may require grantor to provide lender copies of all notices that such amounts are due and the receipt evidencing grantor's payment.

Grantor will defend title to the property against any claims that would impair the lien of this 10:41:39 security interest. Grantor agrees to assign to lender as requested by lender any rights, claims, or defenses grantor may have against parties who supply labor and materials to maintain or improve the property. Do you see what I'm talking about?

10:41:57 A. Yes.

Q. Okay. Is it your understanding that Mr. Edwards was supposed to discharge liens that became superior to US Bank's deed of trust?

A. Yes. He's to -- well, first to prevent any 10:42:12 liens from occurring. Second to satisfy those liens or notify us of those liens so that we may do so.

Q. I understand.

Did Mr. Edwards notify US Bank of any superior liens on the property?

10:42:25 A. No.

10:42:25 Q. Okay. Was US Bank, when you review there -- well, actually did you review the internal systems, US Bank's internal system prior to coming here today?

A. Yes.

10:42:39 Q. Did you see any indication whatsoever in US Bank's file that they received any foreclosure notices from any kind of homeowners association associated with 4254 Rolling Stone Drive at all?

A. Not at all.

10:43:00 Q. Let me ask you this. Are you familiar with US Bank's policies and procedures in regard to superior liens?

A. Yes.

Q. If US Bank had received a notice from a 10:43:10 homeowners association regarding a homeowners association foreclosure, can you explain to the Court and all the parties here what US Bank would have done?

A. Yes. I actually worked in our collection department in 2011. I was trained then specifically on 10:43:26 states such as Nevada in what to do if we were notified of a lien by the actual borrower.

And US Bank received notice or notified of that would request contact information, payoff information, or would pay the lien off if we received 10:43:42 the notice of default in order to protect our interest

10:43:46 in states where we would need to do so.

Q. So US Bank's policies and procedures is if they had received the notice of default, they would have paid off the lien; correct?

10:43:55 A. Yes.

Q. Was there an available -- was there -- I believe you stated this is a home equity line of credit; correct?

A. Yes.

10:44:04 Q. And so they, Mr. Edwards just withdraws money from the line of credit and then there's still additional money available on that line of credit, correct?

A. Yes.

10:44:14 Q. Okay. Was there an available -- was there available credit on the line of credit to discharge the entirety -- to discharge any kind of superior homeowners association lien in 2011?

A. Depending on the amount, I believe there would

10:44:30 have been. There was some available credit there, and upon reading the deed of trust along with the notes, it does state that that would be a possibility, or that would be our right to do so to protect our interest would be to pull from that line of credit to satisfy

10:44:49 any liens.

10:44:51 Q. So to be -- just to be clear then, we discussed on the first page of the deed of trust that there is a Fargo, North Dakota, address that US Bank has delineated as their address for service; correct?

10:45:06 A. Yes.

Q. And if US Bank had received a notice of default for a homeowners association to that address, your company's policies and procedures were to pay that lien off in full?

10:45:20 A. Yes.

Q. Okay. And then you did not receive or you can find no record in US Bank's systems of ever receiving a notice of default on this property at all?

A. Yes. We've searched our records. I've

10:45:35 actually read all the notes in the account. When they searching for records when we were noticed of this case, we have no record of our legal system -- or our legal addresses receiving any notice of default. And all of our documents received are scanned into our

10:45:48 document retrieval system. And I've looked through every document on there as well, and there's no documents that would indicate so.

Q. Okay.

MR. BECKOM: I don't believe I have any

10:46:13 further questions for this witness.

10:46:14 THE COURT: All right. Cross-examination.

MR. VILKIN: Thank you, your Honor.

CROSS-EXAMINATION

10:46:16 BY MR. VILKIN:

Q. Mr. Heifner, good morning.

A. Good morning.

Q. You've testified that in 2011 you worked in, was it the collection department?

10:46:29 A. Yes.

Q. And you were trained to do that work; is that correct?

A. We were trained to fill -- when speaking to our customers to notify certain departments or open

10:46:43 certain tasks if we were advised by the borrower that there was a lien or an HOA foreclosure proceeding of any type so that we can notify that department verbally.

Q. Were you trained as to what the law was in

10:46:56 Nevada in terms of whether a bank was required to be given notice of default?

A. As a collection representative, no. We typically aren't trained, or in most cases need to try to analyze the law in any way or make any type of

10:47:19 speculation in regards to the law. That's why we have

counsel, and legal counsel and corporate counsel that helps make our policies and relate it to law.

Q. Well, do you know whether a bank such as yours in 2011 was required to be given a notice of default if it had not notified the homeowners association of its secured interest in the property?

MR. BECKOM: Objection. He's asking for a legal conclusion of my witness which is not a fact relevant -- he's not listing facts. He's listing conclusions of law.

THE COURT: I'll sustain. You can reframe it.

BY MR. VILKIN:

Q. Well, your job was to try and protect the interests of the bank, correct, in the collection department?

A. Yes.

Q. And would you consider significant to know whether or not a bank was required to be given notice of default if it had not notified a homeowners association of its secured interest?

MR. BECKOM: Same objection. He's still asking for conclusions of law.

THE COURT: Overrule.

THE WITNESS: In my position at that time, I would have followed our policies and procedures which

would have been put in place by our legal team who would specialize in that.

BY MR. VILKIN:

Q. Well, was there a policy in place that required your bank to give notice to a homeowners association of its secured interest in the property once it obtained that secured interest?

A. My role then wouldn't -- wouldn't have had anything to do with that. I wouldn't -- the policies and procedures that I would have been following in my role would be how to handle and field calls in related to loans in default or when notified of any HOA sale or any HOA default and who to notify of that.

Q. Is the answer is you don't know?

A. I don't know in regards to your question and the law around that, no.

Q. Okay. Now, you said that you reviewed all of the documents that your bank has concerning this loan; correct?

A. Yes.

Q. And did you see in there any notice that the bank gave to the Glenview -- I'm sorry, Glenview West Townhomes Association of its secured interest in the property at any time?

A. Not to my knowledge.

10:49:44 Q. Take a look if you would at Exhibit 17.

You don't have to look through it right now. I'm going to ask my question, and then you can look through it.

10:50:17 A. Okay.

Q. My question is, sir, if you could look through there and tell me if you see in there any document that could be considered a notice from your bank to the Glenview West Townhomes Association of its secured interest in the property? Take as much time as you need.

A. Your question was specifically related to us giving notice to?

Q. Right. To the Glenview West Townhomes Association of its secured interest in the property?

10:52:05 A. Well, our secured interest in the property would have been indicated when the deed of trust was recorded on March 26, 2009, to my knowledge.

Q. Well, I understand that. What I'm asking is did your bank ever give a notice to the association that it had a secured interest in the property?

10:52:25 A. And when you're asking of notice are you referring to us directly sending something to the association ourselves?

10:52:43 Q. Yes.

10:52:43 A. Or not to my knowledge. I don't know of us sending anything directly to them.

Q. Okay. Could you just look through all those documents in Exhibit 17 and tell us whether or not 10:52:52 there's anything in there that you would consider a notice sent from US Bank to the Glenview West Townhomes Association notifying them of their secured interest.

THE COURT: I would anticipate if US Bank had requested notice, that document would have been 10:59:48 produced; right?

MR. VILKIN: Yes, your Honor. That is what he's examining, though, the response to the request.

THE COURT: I understand.

MR. VILKIN: Yeah.

11:02:11 THE WITNESS: I do not see a document sent directly to owner other than the deed of trust recorded, advising that.

BY MR. VILKIN:

Q. Advising what?

11:02:25 A. Advising of your question a document sent directly to the HOA requesting notice other than the deed of trust which is recorded.

Q. And no document advising the HOA that you had a security interest in the property; correct?

11:02:41 A. The deed of trust.

11:02:42 Q. Other than the deed of trust; correct?
A. In that stack, I did not see anything. I know there was a prior sale. I don't know if -- how or if any type of notice would have been with that in regards 11:02:57 to that prior sale that was occurring. And then didn't occur just months prior to the HOA sale.
Q. Well, you keep talking about the deed of trust. Did you see anything there where US Bank sent any kind of communications to the HOA enclosing the 11:03:16 deed of trust?
A. Not to my knowledge.
MR. VILKIN: Your Honor, I move to admit Exhibit 17.
MR. BECKOM: It's our document. So no 11:03:29 objection.
THE COURT: So admitted.
(Exhibit 17 admitted)
BY MR. VILKIN:
Q. Okay. Mr. Heifner, if you would, I want to 11:03:36 ask you some questions about the notice of sale in this case. You told us -- you told the Court earlier that you had reviewed US Bank's complete file in this matter; correct?
A. Yes.
11:03:47 Q. Is it your testimony that you have no record

of ever receiving the notice of sale?
A. I -- prior to the sale or around the time of the sale there are no records. I mean, they even searched after the sale had taken place to see if we received it, and there was still no -- no record of receiving that at our addresses that we would receive those documents at.
Q. Well, I'm not asking about anything about addresses. All I'm asking is in the record you reviewed did you see any indication that US Bank had received the notice of sale prior to the sale date of January 25th, 2012?
A. No. I did not see it myself either.
Q. But it's your testimony that if you had received the notice of sale prior to the actual sale date that it was the policy of the company to find out what the payoff amount was and pay it off; correct?
A. It would be our policy to pay it off, yes.
Q. Take a look if you would again at Exhibit 4.
A. I'm there.
Q. You're there at Exhibit 4?
A. Yes.
Q. That's a deed of trust, correct?
A. Yes.
Q. And correct me if I'm wrong, but I believe you

testified that the company US Recordings in the upper left-hand corner, you don't believe has any affiliation with US Bank; correct?

A. No. Not to my knowledge.

Q. Okay. Why would this document -- this document was prepared on behalf of US Bank; would you agree with that?

A. It was prepared by Southwest Financial Service. The document was prepared by them.

Q. Well, do you think this document was prepared on behalf of US Bank?

A. It was prepared -- I mean, in all of my recollection of dealing with mortgages and deeds of trusts, a lot of times the title company, the mortgage broker information who is actually closing the loan, the information at times, or who's that information is up there. I'm not familiar with the company that's up there. I don't -- to my knowledge they're not affiliated with US Bank.

Q. Well, this -- you would agree with me, would you not, that this deed of trust is for the benefit of US Bank; correct?

A. Yes. It's a lender US Bank National Association.

Q. And US Bank, obviously, after the document is

executed and recorded is going to want a copy of it; correct?

A. Yes.

Q. And on this document, the direction is to return to US Recordings, correct?

A. US Recordings is who recorded it. So the recording was requested by US Recordings. Doesn't say that they received it after it was recorded.

Q. Well, but the upper left-hand corner it says return to name and address. You see that?

A. Correct. But the closing company or whoever was handling that, I would say was Southwest Financial Services would have had it, I'm assuming, recorded using the recording company who requested the recording and then we would have received the document to hold and own after that in our system.

Q. So are you telling me that US Recordings would have sent it to US Bank?

A. Yes.

MR. BECKOM: Objection, argumentative?

THE COURT: Overruled.

THE WITNESS: Yes.

BY MR. VILKIN:

Q. Now how many addresses does this deed of trust have on it?

A. On the face of it the first page there are -- the deed of trust contains --

Q. I'm just asking how many addresses.

A. -- four complete addresses I believe.

Q. Okay. And why doesn't this document say who documents concerning this deed of trust should be mailed to?

A. I didn't create the document. All I can attest to is the information in the document. I can't state why or why not someone -- why it wouldn't say something.

Q. Well --

A. I could state what it does say or does not.

Q. Would you agree with me that somebody not associated with US Bank looking at this recorded document might have confusion over where to send documents concerning this deed of trust given that there's four addresses on it?

MR. BECKOM: Objection, argumentative.

THE COURT: Overruled.

THE WITNESS: If I were a homeowners association or an attorney, I -- I mean, being that I'm not, I would -- if just me, I would note to contact the lender who would be the person that would -- I mean, I wouldn't contact a recording company. I mean, and I'm

not an attorney.
BY MR. VILKIN:
Q. Did I ask you what you would do?
A. You asked if it would be -- if it's obvious, and I'm just stating I think it's obvious to myself --
Q. Okay.
A. -- that to notify the lender.
Q. What about somebody who's not somebody at a title company that is searching records? How would they know which address to send it to if the document doesn't tell them?
A. You just asked how the title company know?
Q. Yeah, a title company, correct?
A. They're very well knowledgeable in those procedures, title companies are.
Q. Well, wouldn't it have been better if US Bank had been specific on this document and said we want all notices concerning this deed of trust to go to whatever address they wanted instead of putting -- allowing four different addresses to be on it and creating confusion?
MR. BECKOM: Objection. Calls for a conclusion.
THE COURT: I'll sustain.
BY MR. VILKIN:
Q. Well, do you know why the document does not

specify which of the four addresses US Bank wants notices to be sent to?

A. The only answer to your question that I could give you would be that lender -- assumably suffice in that question being that the lender would be who's lending the funds --

Q. Okay.

A. -- in securing the property.

Q. My question is: Do you know why it doesn't specify which of the four addresses it wants notices sent to?

A. No. I mean as I stated earlier I can't really attest to why the document may not be -- may not contain that. I could just say why I believe that. And if that's what you're asking, I can say that because most people, I would assume, would understand that the lender is the company securing and lending the money against the property.

MR. VILKIN: Nothing further, your Honor. Thank you.

THE COURT: Anything else, sir?

MR. BECKOM: One thing.

REDIRECT EXAMINATION

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11:11:46 BY MR. BECKOM:

Q. Mr. Heifner, can you direct your attention to Exhibit 4 USB0016.

A. Yes.

11:12:05 Q. Can you go down to Section 16 that's entitled Notice?

A. Yes.

Q. Says:

Unless otherwise required by law any notice shall be given by delivering it to or by mailing it by First Class Mail to the appropriate party's address on page 1 of this security instrument or any other address designated in writing.

11:12:28 Do you see what I'm talking about?

A. Yes.

Q. Is it your understanding that that provision is just -- that's directing every -- like, direct everyone who reads this deed of trust that they need to

11:12:40 send it to the correct address that's listed on that first page of the deed of trust?

A. Yes.

Q. Okay. And then going back to USB0011, the address delineated for US Bank National Association, ND

11:12:57 again is the 4325 17th Avenue, Southwest, Fargo, North

Dakota, 58103.

Is that your understanding?

A. Yes.

Q. Okay. And so this deed of trust actually does direct parties to notice US Bank in Fargo, South Dakota? Or is that your understanding?

A. It is. And also it goes on to say that notice to one is not notice to all so an error of caution.

Q. Okay.

A. Notice to each address.

Q. So US Bank actually does request notice in Fargo, South Dakota under this deed of trust?

A. Yes.

Q. And is that deed of trust was filed in the property records on March 28, 2009; correct?

A. Yeah. I think there was a prior recording that we refinanced. There was a prior deed of trust on the property through US Bank with the same borrower that was refinanced advancing additional funds --

Q. So US Bank --

A. -- dating back longer than that. So this one would be the most -- the latest deed of trust recorded by US Bank.

Q. Fair enough. And so by the latest recording in the property records prior to, let's say, 2012, US

Bank had indicated to everyone on the property records that they wanted to be served process in Fargo, North Dakota?

A. Yes.

Q. Okay.

MR. BECKOM: I don't think I have anything further from this witness, your Honor.

THE COURT: Anything else, sir?

MR. VILKIN: Yes, your Honor, a couple.

RECROSS-EXAMINATION

BY MR. VILKIN:

Q. Mr. Heifner, with regard to Exhibit 4, paragraph 16, it's talking about notice; correct?

A. Yes.

Q. Do you know whether that's notice between the parties to the agreement or notice to parties not part of the agreement?

A. Without making a legal speculation, I would say any parties given that it's any notice shall be given -- any notice shall be given by delivering it by mailing it first class mail. I would say the indication of any party. Any party involved in the contract will be noticed by this method.

Q. Any party involved in this --

11:15:23 A. So if anyone --
Q. -- contract; correct?
A. If you wanted to notice someone within these parties, this is how you would notice them.
11:15:29 Q. Okay. 16 also talks about sending it to the appropriate party; correct?
A. Yes.
Q. Okay. How is someone not a party to this agreement supposed to know who the appropriate party is
11:15:43 based on the four addresses on page 1 of Exhibit 4?
A. The document --
MR. BECKOM: Objection. Calls for speculation.
THE WITNESS: -- will --
11:15:52 MR. VILKIN: It's their document, your Honor. They're saying they should have got notice. I'm asking how somebody is supposed to know where to send it.
THE COURT: I'll overrule.
MR. VILKIN: Thank you.
11:16:07 THE WITNESS: My -- the document is recorded. And it also goes on to state that notice of one grantor will not be notice to all. So this would be a public record.
BY MR. VILKIN:
11:16:18 Q. So in your view if you sent the notice to one

of the four it would be deemed notice to all; correct?
A. No. It specifically states that notice to one is not notice to all.
Q. It says -- in item 16?
A. I believe so.
Q. Take a look at the last sentence. Is that what you're talking about?
A. Yes. Notice to one is notice to all.
MR. VILKIN: Thank you. Nothing further.
MR. BECKOM: I have one further clarification I'd like to make, your Honor.

FURTHER REDIRECT EXAMINATION

BY MR. BECKOM:

Q. It says -- now going back to Section 16 of the notice provision. I believe my colleague here is discussing the sentence that says notice to one grantor will be deemed notice to all grantors. Do you see what I'm talking about?
A. Yes.
Q. Let's go back to page 1 of the deed of trust. Who is listed as a grantor under this document?
A. The unmarried man of George R. Edwards.
Q. Okay. And then your understanding was US Bank. US Bank's understanding is that they are not a

grantor under this document?

A. That is correct.

Q. Okay.

MR. BECKOM: Nothing further.

MR. VILKIN: I have nothing further, your Honor.

THE COURT: Okay. Will there be any need to call this witness back? Are we finished?

MR. VILKIN: I don't intend to, your Honor.

THE COURT: All right.

MR. BECKOM: I can talk to him whenever I want.

THE COURT: But as far as calling him back.

MR. BECKOM: I don't believe so. If anything changes, I have his cell phone number, and we can get him back here on pretty short order on the phone.

THE COURT: Sir, you're released. Thank you.

THE WITNESS: Thank you, your Honor.

THE MARSHAL: Please watch your step as you step down.

MR. VILKIN: Thank you, your Honor. If I may just have a moment with counsel on planning here.

THE COURT: You sure can.

MR. VILKIN: Your Honor, addressing the issue we raised earlier, we've got two witnesses. One

11:18:09 witness will be relatively short. She has a 2:00 p.m. appointment. The other witness has a 1:00 p.m. other testimony. If we started him after the short witness, we probably wouldn't get done. But if the Court is 11:18:21 willing to finish him at another time, no problem.

THE COURT: Okay.

MR. BECKOM: Probably. You think it's going to be an issue?

THE COURT: I want to take the short witness. 11:18:30 Are we going to take him right now; right? Take a quick break and then take a short witness.

MR. VILKIN: Yes.

THE COURT: And then -- and the longer witness, what's anticipated? What do you anticipate to 11:18:44 add to the case?

MR. BECKOM: Mr. Alessi is the corporate witness for Alessi & Koenig.

THE COURT: Okay.

MR. BECKOM: Who is the trust deed that 11:18:52 conducted the sale. We, at least US Bank, expects extensive testimony from Mr. Alessi regarding the sale.

MR. VILKIN: And as do we, your Honor. He's going to be longest witness of the case.

THE COURT: Okay. So what do you want to do 11:19:04 with him?

11:19:06 MR. VILKIN: Well --
MR. BECKOM: We can call -- if he's got a trial at 1:00, I have no objection to --
THE COURT: He's busy, huh.
11:19:11 MR. BECKOM: Pretty busy.
MR. GEISENDORF: Maybe we can check and see if he's being called at 1:00 or 3:00 or 4:00.
MR. VILKIN: He's very busy.
THE COURT: What I'll do, we'll step down for
11:19:20 15.
MR. VILKIN: Okay.
THE COURT: You have one short witness; right?
MR. VILKIN: Right.
THE COURT: We can bring him in after this,
11:19:25 and we will deal with him when we have to deal with him.
MR. VILKIN: Okay.
MR. BECKOM: Sounds good, your Honor.

-o0o-
(Recess)
11:19:29 -o0o-

THE COURT: All right. We can go back on the record.
MR. BECKOM: We have one minor housekeeping matter. I guess, we briefly talked before we recessed.
11:48:43 I was talking to Mr. Vilkin about this that Mr. Alessi

11:48:47 is actually under a trial subpoenaed right next door in Courtroom 12C with Judge Miley at 1:00. We're trying to figure out the best way to handle getting him in. I think we're taking a short witness now, but we do
11:48:59 expect --

THE COURT: I mean, it's one of those things where it would be nice if we could get him in today. I don't know if we can or not, but I'm willing to work with whatever availability we have. If we can get him
11:49:11 done today, I think we can make fairly significant inroads into the trial.

MR. BECKOM: No. Agreed. So we'll try to get him in?

THE COURT: Might be 2:30; right? Could be.
11:49:21 MR. VILKIN: What, until we finish with him?

THE COURT: No. I mean, when we start with him.

MR. VILKIN: Yeah. Could be.

MR. GEISENDORF: The door was locked.
11:49:28 MR. VILKIN: Right. We went and checked in the Department 23 to see if we could find out anything. But the door is locked.

THE COURT: Is the door locked? Are they in session next door; do you know?
11:49:40 Mike, are they in session next door?

11:49:44 THE MARSHAL: No, your Honor, they were not. But I can check on them again for you. They had a hearing or calendar earlier.

THE COURT: So they might be starting. Find 11:49:50 out real quick if they're in session next.

THE MARSHAL: Who's the person we're looking for?

MR. VILKIN: David Alessi.

MR. BECKOM: He's under a trial subpoena for 11:50:00 both. This department as well as --

THE COURT: Just find out if they're going to start trial at 1:00 o'clock.

THE MARSHAL: Yes, sir.

THE COURT: I guess, we can bring -- how long 11:50:08 is this next witness going to take?

MR. BECKOM: Not long.

MR. VILKIN: 15, 20 minutes hopefully.

THE COURT: Okay. Let's see if we can get it done.

11:50:17 MR. BECKOM: You want to call him.

MS. BAKER: Yeah. Are we ready?

THE COURT: Yeah.

MS. BAKER: I'd like to call the representative for Glenview West Townhomes Association. 11:50:27 We have to wait for the Marshal to get her.

11:50:30 THE COURT: You can get her.

MS. BAKER: Okay. I'm going to set up the ...

KIM KALLFELZ,

having been first duly sworn to testify to the truth, 11:50:37 the whole truth and nothing but the truth, was examined and testified as follows:

THE COURT CLERK: Please be seated. And if you will state and spell your name for the record, please.

11:51:36 THE WITNESS: Kim Kallfelz. First name Kim, K-I-M. Last name Kallfelz, K-A-L-L-F-E-L-Z.

DIRECT EXAMINATION

BY MR. BECKOM:

11:51:48 Q. Good morning, Kim. Can you please tell me what your occupation is?

A. I own HOA Management.

Q. Okay. And how are you affiliated with Glenview West Townhomes Association?

11:52:01 A. August 1st of 2017 I became their community manager.

Q. Okay. So you've been just recently?

THE MARSHAL: They had morning trial calendar. It's all done. But they do have something at 1300 11:52:15 that's a civil bench trial.

11:52:17 THE COURT: That's 1:00 o'clock?
THE MARSHAL: Yes, sir. Nobody could say anything specific about Brian Alessi.
MR. VILKIN: David Alessi.
11:52:24 THE MARSHAL: David, David. They couldn't say specifically about him. But at 1300, they do have a trial if it's the same person.
THE COURT: We'll find out.
MR. VILKIN: Yeah. And he may not be
11:52:35 scheduled to go first too, so.
THE COURT: I understand.
Okay. Continue on, ma'am.
MS. BAKER: Thank you.
BY MS. BAKER:
11:52:43 Q. So you're a manager, and you manage -- you own your own company; is that -- I'm just understanding what's going on.
A. Correct.
Q. Recapping. And then you're hired by Glenview
11:52:55 to do what?
A. To be their community manager.
Q. Okay. And what are the duties of the community manager?
A. Well, we handle all of the financial vendors,
11:53:08 collection of dues, payment of -- payments every month.

Basically --

Q. Okay.

A. -- it's a corporation. We take care of all of the parts of the corporation.

Q. Okay. And how many homes are in this association?

A. Fifty.

Q. All right. And are you familiar with the account for 4254 Rolling Stone Drive?

A. Well, I am familiar with that address, yes. It's part.

Q. You're familiar with the address?

A. Yes.

Q. Have you had a chance to review the records for this property?

A. I have to a very limited degree.

Q. Okay. There's an exhibit book in front of you. I'm going to have you open it to Exhibit Tab 7. Starts on page USB0154. It's on the bottom. You can see they're numbered. You want to go to 0154.

So the document I'm referring to goes through?

A. 054 or 45?

Q. 54.

A. Okay.

Q. And the document ends at USB0169. Do you have

11:54:37 all those pages in between?
A. I do, yes.
Q. Okay. And is this the declaration of covenants, conditions, and restrictions for the HOA?
11:54:48 A. It looks like it, yes.
Q. And it looks like a true and correct copy and we're going to call it CC&Rs?
A. Okay. That's correct.
Q. Okay. And this CC&R, what is this? What are
11:55:01 CC&Rs?
A. These are the governing documents of the association.
Q. And does this document put everyone on notice, potential buyers or anybody that this is what the
11:55:12 duties of the HOA and what homeowner's responsibilities are?
A. Yes.
Q. Okay. And homeowners need to pay a monthly due?
11:55:25 A. Correct.
Q. And how much are the monthly dues?
A. $130 right now.
Q. Okay. And is that was the same in 2011, 2010?
A. I don't know.
11:55:35 Q. Okay. And in looking at the CC&Rs, I'm going

11:55:42 to have you look at -- let's see, USB0164. Or actually can I admit --

MS. BAKER: I'm going to admit the CC&Rs into evidence.

11:55:55 MR. VILKIN: No objection.

THE COURT: So admitted. What exhibit is that, ma'am?

MS. BAKER: This is under Exhibit 7.

MR. VILKIN: Your Honor, I believe we have a

11:56:06 stipulation that all of Exhibit 7 is admitted.

THE COURT: Okay.

MR. BECKOM: I believe that is correct.

BY MS. BAKER:

Q. But specifically, let's look at page USB164.

11:56:22 Let's see. The article starts on actually on USB0160. Can you -- what's the title of this article? I'm saying Article 5, association members voting rights; is that correct?

A. Correct. Section 1 Article 4.

11:56:48 Q. Okay. Sorry.

A. 5, I meant.

Q. Sorry. Let's go USB0161. Article 6 is covenant for maintenance assessments; is that correct?

A. Yes, it is.

11:57:03 Q. Okay. And then Section 11 is within that

11:57:06 article. It's on USB164?
A. Correct.
Q. Okay. And Section 11 is a subordination of the lien to mortgages; is that correct?
11:57:17 A. Correct.
Q. Okay. And this states that the lien of the assessments provided herein shall be subordinate to the lien of any first mortgage; is that correct?
A. That's what it says.
11:57:32 Q. Okay. So what is the HOA's stance in how -- is it -- let me question this.
Is it the HOA's policy to subordinate their lien to the first mortgages based on these CC&Rs?
A. Well, of course, the CC&Rs are subject to
11:57:53 NRS statutes and changes.
Q. I understand that. But this, I'm looking at --
A. So they supersede this number 11.
Q. I'm not asking what per the statute. I'm
11:58:03 asking what these CC&Rs state. These CC&Rs, the interpretation here is that it subordinates the lien; is that correct?
A. Well, I would say that it's correct as these words are, but it's not correct in practice.
11:58:20 Q. Okay. But it was the HOA's intent to

11:58:29 subordinate the lien per these CC&Rs; is that correct?
A. I'd say, yes, but --
Q. Okay.
A. -- back when this was --
11:58:36 Q. And then?
A. -- record --
Q. That's fine.
THE COURT: One at a time. Thank you.
BY MS. BAKER:
11:58:41 Q. And then let's go further into this. The last sentence is: No sale or transfer shall relieve said lot from liability for assessments therein becoming due -- or sorry; is that correct? That's what it says?
A. That's correct what it says.
11:59:03 Q. Okay.
A. Yes.
Q. And then the sentence before that says: However, the sale or transfer of any lot purchase or mortgage foreclosure or any proceeding in lieu thereof
11:59:13 shall extinguish the lien of such assessments as to any payments which became due prior to the sale or transfer?
A. That's what it says.
Q. Okay. Okay. And then let's go to page --
11:59:37 it's page 14 of the CC&Rs, but it's USB0168. Under

Article 11, General Provisions. Section 3 is Amendment. So what is your understanding of how -- how to amend these CC&Rs?

A. Well, in Section 11 it says that if there is an amendment to the CC&Rs, then they would need a 75 percent vote of the lot owners.

Q. Okay. Well, in Section 3 of the amendment it says, Not less than 90 percent of the lot owners or -- let's see.

For the first 30-year -- for the first 30 years; is that correct? And then after that it's 75?

A. Yes. That's correct.

Q. And how many board members are there? Or lot owners? You said there's 50 lot owners; correct?

A. Um-hum, correct.

Q. And how many board members?

A. Five board members.

Q. Okay. And do you have regular contact with the board members?

A. Yes, I do.

Q. All right. And you speak to them regularly?

A. Yes, I do.

Q. Okay. And so it's -- to amend the CC&Rs it's -- it's pretty easy to amend the CC&Rs based on if there's a provision that gives the availability to

amend?

A. It is never easy to amend CC&Rs.

Q. Okay. But there is a provision to amend the CC&Rs?

A. There is.

Q. Okay. And what is the HOA's collection policy?

A. Currently?

Q. In 2011 and 2012.

A. I do not know.

Q. What is currently the collection policy?

A. What is the collection policy currently? Well, I don't have it with me, so I can't tell you verbatim, but it's pretty much that after 60 days, a letter can be sent to the delinquent homeowner with -- they have four or five things that they can have as options. They can pay it in full. They can get into a payment plan. They can have a hearing, or if they don't respond within 30 days, they can be sent to collections.

Q. Going back to the amendment of the CC&Rs, to your understanding has the CC&Rs been amended at all?

A. Not to my knowledge.

Q. Okay. Has there been any attempt to amend the CC&Rs?

12:02:48 A. I do not know.
Q. Okay. So your question is it's never -- it's not easy to amend. How do you know it's not easy to amend the CC&Rs?
12:02:56 A. Well, I've been in business 18 years.
Q. Okay.
A. And in order to get an amendment to the CC&Rs, it's very difficult to get the percentage you need of owners to amend CC&Rs.
12:03:11 Q. All right. But there's only 50 owners; correct?
A. Correct.
Q. And you'd only need 75 percent. But if you got 75 percent, you were able to amend the CC&Rs; is
12:03:28 that correct?
A. That's correct.
Q. Okay. Going back to collection, you said the policy is to send out a letter. And then you said the efforts to work out a resolution with a delinquent
12:03:43 homeowner would be to pay in full or a payment plan. Is there any other options?
A. Yes. They can have a hearing. Right now currently?
Q. Yes.
12:03:53 A. They can have a hearing in front of the board.

Q. And if they wanted to challenge, say, the amount owed, they don't believe the amount owed is accurate, they would ask for a hearing?

A. They could do that. I mean, you know, the amount owed is generally done in a ledger so that it's pretty clear.

Q. Okay.

A. But certainty anybody can say it's wrong.

Q. Okay. Have you looked at the accounting of this property at 4254 Rolling Stone Drive?

A. Yes.

Q. Okay. And how -- what was the accounting like in 2010, 2011?

A. I do not know.

Q. But you reviewed the records?

A. I know. But I reviewed my records, and the records of Pinnacle.

Q. Okay. What about the records prior to Pinnacle?

A. I do not have any records prior to Pinnacle.

MS. BAKER: Nothing further at this time.

CROSS-EXAMINATION

BY MR. VILKIN:

Q. Good afternoon, or good morning, ma'am.

12:04:59 A. Good afternoon.
Q. I'll try to be brief. If you could look at Exhibit 8 page 207. Are you there?
A. Yes, I am.
12:05:28 Q. Okay. So if you could just look at pages 207 through 212. And my question is what is that?
A. This looks like a ledger of the county for 4254 Rolling Stone Drive.
Q. And do you know who prepared this?
12:05:54 A. No, I do not.
Q. Does this look like something -- well, back in 2012 was your company the manager for Glenwest?
A. No, it was not.
Q. Glenview, I'm sorry. So when did you become
12:06:08 manager?
A. August 1st, 2017.
MR. VILKIN: Nothing further, your Honor.
THE COURT: Okay. Anything else?
MS. BAKER: Yes.
12:06:20

REDIRECT EXAMINATION

BY MS. BAKER:
Q. So prior to you taking over as manager for Glenview, there was -- do you know the person by the
12:06:36 name of George -- or sorry, Ronald Stevenson.

A. I did not know him.
Q. Okay. Did you know of him?
A. I know that he worked for Pinnacle.
Q. Okay.
A. And he was their manager I think.
Q. Okay.
A. For a while.
Q. So he was a manager for a while for the HOA?
A. Yes.
Q. Do you know why he's no longer the manager?
A. Well, Pinnacle no longer manages --
Q. Okay.
A. -- Glenview West, but I think Ronny Stevenson is deceased.
Q. Okay. Would you be -- you would not be surprised if he was called as a witness for a deposition for this matter?
A. No, I would not.
Q. Okay.
MS. BAKER: Your Honor, I do have a copy of -- a certified copy of the deposition transcript of Ronald Stevenson. I'd like to admit it as evidence being that he is deceased.
THE COURT: To have it admitted as evidence, you have to have it published --

MS. BAKER: Or published.

THE COURT: -- first and foremost.

And number two, if you want portions of the deposition transcript read into the record, they have to be designated. The other side gets an opportunity to designate. And then we make a determination as to whether -- what portions of the record are going to be read in -- I mean, the deposition are going to be read into the record. So I -- it's not admitted.

MR. VILKIN: I was not aware of this.

MS. BAKER: Okay.

THE COURT: There's a specific rule --

MS. BAKER: Yes.

THE COURT: -- on uses of deposition at the time of trial. Right? Am I missing something?

MS. BAKER: No. I'll withdraw it. Thank you.

THE COURT: All right. Anything else of this witness?

MS. BAKER: No. Nothing further.

MR. VILKIN: Nothing, your Honor.

THE COURT: Okay. Thank you, ma'am.

THE WITNESS: Thank you, sir.

THE MARSHAL: Please watch your step, ma'am.

THE COURT: So when is a good time to meet for this afternoon? 2:00 o'clock, do you think?

12:08:54 MR. VILKIN: Court's preference, your Honor. Whatever.

THE COURT: How is 2:00 o'clock? And we'll know. Because tomorrow we have two experts; right?

12:09:02 MR. VILKIN: Correct.

THE COURT: Okay.

MR. VILKIN: We do have Mr. Haddad.

THE COURT: Okay.

MR. VILKIN: Also which could be any time

12:09:10 today.

THE COURT: All right. Well, we'll try -- I think what we'll do then, so would you call Mr. Haddad out of order? Is that fine?

MR. VILKIN: Do you want to call him right

12:09:23 now? Or after lunch.

THE COURT: No, no. We got to go to lunch.

MR. VILKIN: Okay.

THE COURT: Right. I'm just trying to -- how about -- okay, this is what we can do. Because we want

12:09:31 to be efficient. We'll break now until 1:30. And then if -- we'll know specifically, I would anticipate, the whereabouts of the other witness. And if he -- if he's not available, maybe we can call Mr. Haddad for about a hour or so.

12:09:47 MR. VILKIN: That's fine, your Honor, as long

as I have the ability to call Mr. Haddad after Mr. Alessi should something come up.

THE COURT: You can call him for redirect.

MR. VILKIN: Okay.

THE COURT: Any objection to that?

MR. BECKOM: We'll talk to whoever wants to talk whenever they want to talk, so we have no objection.

THE COURT: That's the beauty of a bench trial. Okay. So we will be in recess for lunch.

MR. VILKIN: Thank you, your Honor.

-o0o-
(Lunch Recess)
-o0o-

THE COURT: All right. Good afternoon.

MR. VILKIN: Afternoon.

MR. BECKOM: Afternoon.

THE COURT: Let's go ahead and note our appearances for the record.

MR. BECKOM: Thomas Beckom, Priscilla Baker on behalf of US Bank.

MR. VILKIN: Richard Vilkin, Charles Geisendorf and Eddie Haddad for the defendant. Mr. Haddad representing the client.

THE COURT: All right. So how are we going to proceed this afternoon?

01:35:05 MR. BECKOM: I think US Bank would like to call David Alessi to the stand. My understanding is that his trial this afternoon has been canceled.

THE COURT: So he's here.

01:35:12 MR. VILKIN: He's here. We're ready to go.

THE COURT: So I timed that perfectly.

MR. HADDAD: Yes, nicely done.

THE COURT: Okay.

THE MARSHAL: Yes, your Honor.

01:35:38 DAVID ALESSI,

having been first duly sworn to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

THE COURT CLERK: Please be seated. And if

01:35:55 you will state and spell your name for the record, please.

THE WITNESS: David Alessi. A-L-E-S-S-I.

THE COURT: Okay, sir, you have the floor.

MR. BECKOM: Thank you.

01:36:17

DIRECT EXAMINATION

BY MR. BECKOM:

Q. Good morning, Mr. Alessi. And thank you for being here today.

01:36:27 A. Good morning.