IN THE SUPREME COURT OF THE STATE OF NEVADA

BANK OF AMERICA, N.A., AND THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF CWALT, INC., ALTERNATIVE LOAN TRUST 2006 J-8, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-J8, Appellants, v. NV EAGLES, LLC, Respondent.	Supreme Court Case No. 84552

APPEAL

from the Eighth Judicial District Court, Department XXIX
The Honorable David M. Jones, District Judge
District Court Case No. A-13-685203-C

APPELLANT'S APPENDIX, VOLUME II

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DATED this 14th day of September, 2022.

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CERTIFICATE OF SERVICE

I certify that I electronically filed on September 14, 2022, the foregoing **APPELLANT'S APPENDIX, VOLUME II** with the Clerk of the Court for the Nevada Supreme Court by using the Court's electronic file and serve system. I further certify that all parties of record to this appeal are either registered with the Court's electronic filing system or have consented to electronic service and that electronic service shall be made upon and in accordance with the Court's Master Service List.

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

/s/ Patricia Larsen
An employee of AKERMAN LLP

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DISTRICT COURT

CLARK COUNTY, NEVADA

MELISSA LIEBERMAN, an individual, on behalf of itself and all others similarly situated;

Plaintiff,

v.

MADEIRA CANYON HOMEOWNERS' ASSOCIATION, a Nevada homeowners association, NEVADA ASSOCIATION SERVICES, INC., a Nevada corporation, BANK OF AMERICA, N.A., a federal savings bank, RESURGENT CAPITAL SERVICES, LP, a national corporation, UNDERWOOD PARTNERS, LLC, an unknown business entity, and DOES 1 through 10, inclusive; ROE CORPORATIONS 1 through 10, inclusive,

Defendants.

Case No.: A-13-685203-C
Dept. No.: XXXII

Consolidated with: A-13-690944-C

BANK OF AMERICA AND THE BANK OF NEW YORK MELLON, AS TRUSTEE'S TRIAL BRIEF

The Bank of New York Mellon FKA The Bank of New York, as Trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trust 2006 J-8, Mortgage Pass-Through Certificates, Series 2006-J8 (**BoNYM**) and Bank of America, N.A. (**BANA**) submit this trial brief per EDCR 7.27 to provide this Court with an overview of the material issues of law and facts they intend to prove or have proven at trial and the legal outcome of those facts under controlling law.

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I. INTRODUCTION

NV Eagles bought property from Underwood Partners, who bought the property at an HOA foreclosure sale that came with zero warranties, and now NV Eagles asks the Court to give it title free and clear of BoNYM's senior Deed of Trust. NV Eagles cannot have such extraordinary relief because: 1) the loan servicer, Bank of America, N.A. (**BANA**), through its counsel at Miles, Bauer, Bergstrom & Winters LLP (**Miles Bauer**), tendered payment for what its good-faith calculation of the superpriority amount of the HOA's lien; and (2) the HOA sold the property for an inadequate price at an unfair sale, and the equities weigh in favor of a finding that BoNYM's Deed of Trust survived.

II. FACTS ALREADY PROVEN OR THAT WILL BE PROVEN AT TRIAL

The Property

1. This matter concerns title to real property located at 2184 Pont National Drive, Henderson, Nevada 89044; Parcel No. 190-20-311-033 (**Property**). **Stip. Facts**, at ¶ 1.

2. The Property is governed by the Declaration of Covenants, Conditions, and Restrictions (**CC&Rs**) of Madeira Canyon Homeowners Association (**HOA**), which were recorded in the Clark County Recorder's Office as Instrument Number 20050524-0002414. **Stip. Facts**, at ¶ 2; **Trial Ex. 8**.

The Deed of Trust

3. On or about November 20, 2006, Melissa Lieberman (**Borrower**) executed a $511,576.00 promissory note (**Note**) in favor of Pulte Mortgage, LLC. **Trial Ex. 1**; *see also* **Stip. Facts**, at ¶ 3.

4. The Note was secured by a deed of trust recorded in the Clark County Recorder's Office as Instrument Number 20061127-0002922 (**Deed of Trust**). **Trial Ex. 1**; *see also* **Stip. Facts**, at ¶ 4.

5. The Deed of Trust's PUD Rider contains the following provision: "If Borrower does not pay [HOA] dues and assessments when due, then Lender may pay them." **Trial Ex. 1**, at BANA17.

6. On or about September 14, 2011, the Deed of Trust was assigned to BoNYM via an Assignment of Deed of Trust recorded in the Clark County Recorder's Office as Instrument Number 20110919-0000030. **Stip. Facts**, at ¶ 4; **Trial Ex. 2**.

7. As of late 2017, the total amount due under the Note was $845,088.76. **Trial Ex. 15**.

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The HOA's Lien

8. After the Borrower defaulted on her obligations to the HOA, the HOA retained Nevada Association Services, Inc. (**NAS**) to collect the delinquency. **Stip. Facts**, at ¶ 5.

9. The HOA's contract with NAS stated: "NAS is given full power and authority to act on behalf of and in the name of the [HOA] to do all things which NAS deems appropriate to effect the collection of the delinquency." **Trial Ex. 11**, at BANA000156.

10. On October 27, 2010, NAS recorded a Notice of Delinquent Assessment Lien in the Clark County Recorder's Office as Instrument Number 20101027-0002037. **Stip. Facts**, at ¶ 6; **Trial Ex. 3**.

11. On December 21, 2010, NAS recorded a Notice of Default and Election to Sell Under Homeowners Association Lien in the Clark County Recorder's Office as Instrument Number 20101221-0000548. **Stip. Facts**, at ¶ 7; **Trial Ex. 4**.

Miles Bauer's Tender Efforts

12. After it received the Notice of Default, BANA, who serviced the loan secured by the Deed of Trust, retained Miles Bauer to satisfy the superpriority portion of the lien to protect the Deed of Trust, in accordance with its policy of retaining Miles Bauer to protect its deeds of trust from association-lien foreclosures. **Trial Ex. 9**; *see also* **Stip. Facts**, at ¶ 8; **Testimony of Diane Deloney**.

13. Miles Bauer's procedure for these files was to first send a letter to the association's collection agent that (1) requested a statement of account so that Miles Bauer could calculate the superpriority amount, and (2) offered to pay that amount. **Testimony of Rock Jung**.

14. If the agent provided a ledger, or if Miles Bauer had another ledger from the same association, Miles Bauer's procedure was to tender a superpriority payment to the association's agent on BANA's behalf. *Id.*

15. Consistent with these policies, Rock Jung, an attorney at Miles Bauer, sent a letter to NAS on February 22, 2011, seeking to determine the superpriority amount of the HOA's lien and "offer[ing] to pay that sum upon presentation of adequate proof of the same by the HOA." **Trial Ex. 9**, at BANA000131–32; *see also* **Stip. Facts**, at ¶ 9; **Testimony of Rock Jung**.

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16. NAS responded on or about March 12, 2011, sending Jung a document showing the total amount the Borrower owed the HOA broken down by categories, including amounts due for "monthly assessments." *See* **Trial Ex. 9**, at BANA000134–35; **Stip. Facts**, at ¶ 10.

17. The document showed the "Present rate" of the "Quarterly Assessment Amount" as $162.00. **Trial Ex. 9**, at BANA000134. The ledger listed three separate "Prior rate[s]" of the Quarterly Assessment Amount: (1) $210.00; (2) $180.00; (3) $234.00. *Id.* It did not specify the dates for which each Prior Rate applied, not did it include any superpriority number. *Id.*

18. The ledger did not show the HOA had incurred any maintenance or nuisance-abatement charges. *Id.*; **Stip. Facts**, at ¶ 11.

19. On or about April 1, 2011, Miles Bauer sent a $486.00 check to NAS, enclosed by a letter explaining the check was equal to "9 months worth of delinquent assessments" and intended to satisfy BONY's "obligations to the HOA as a holder of the first deed of trust against a property," via its runner, Legal Wings. **Trial Ex. 9**, at BANA000137–41; **Testimony of Rock Jung**.

20. NAS rejected the $486.00 check. **Trial Ex. 9**, at BANA000141; **Testimony of Susan Moses**; **Testimony of Rock Jung**.

NAS Rejects Miles Bauer's Tenders as a Matter of Course

21. Jung knew NAS would reject any payment that was not for the full amount of the HOA's lien when he tendered the $486.00 check based on previous experience. **Testimony of Rock Jung**.

22. NAS received hundreds of superpriority tenders from Jung and other attorneys at Miles Bauer. **Testimony of Susan Moses**; **Testimony of Rock Jung**.

23. NAS rejected these tenders as a matter of course. **Testimony of Susan Moses**; **Testimony of Rock Jung**.

24. NAS rejected Miles Bauer's superpriority tenders for two reasons. First, NAS did not believe the foreclosure of an association's lien could extinguish a senior deed of trust because it did not believe an association's superpriority lien existed until the senior deed of trust encumbering the same property was foreclosed. **Trial Ex. 13**, at BANA784–86. Second, NAS believed the superpriority amount included not only nine months of assessments, but also nine months of interest,

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nine late fees, a transfer fee, and all costs of collecting. **Trial Ex. 14**, at BANA910–12, 994; **Testimony of Susan Moses**.

25. NAS made these positions clear in global litigation between BANA and dozens of homeowners associations and collection agents, in which BANA sought a declaration regarding the priority and scope of associations' superpriority liens. *See* **Trial Ex. 13**.

26. In its motion to dismiss BANA's complaint in that case, NAS stated that "until such time as [BANA] actually forecloses on [a] property, there is and can be no priority dispute" between BANA and an association because an association's "Super Priority Lien is **triggered** by foreclosure of the first deed of trust." *Id.*, at BANA000786; *see also* BANA000791 ("Prior to [BANA]'s foreclosure, there is no application of NRS 116.3116[.]"); BANA000796 ("[U]nless and until it becomes the owner of a property subject to a Super Priority Lien, [BANA] is not liable for any of the amounts owing under the Super Priority Lien.").

27. In its reply in support of its motion to dismiss, NAS declared that BANA's "pre-payment scheme"—that is, the "scheme" of submitting superpriority payments before an association's sale to protect its senior deeds of trust—"is, at its core, a hypothetical scenario void of sufficient definiteness to enable this Court to dispose of this controversy." *Id.*, at BANA000803. The "[r]eason being," NAS explained, is that "in the absence of foreclosure of a first deed of trust, there is no super-priority analysis under NRS 116.3116." *Id.*, at 3.

28. Making clear its intent to reject all of BANA's superpriority tenders, NAS declared that "nothing in NRS 116.3116 prohibits [NAS] from rejecting [Miles Bauer]'s tender prior to foreclosure." *Id.*, at BANA000806.

NAS finishes foreclosure

29. After rejecting Jung's superpriority tender here, NAS encouraged the HOA to press forward with foreclosure, explaining that it had "discovered that more properties are now being sold at the foreclosure auction to third party investors. When this happens, all parties get paid." **Trial Exhibit 11**, at BANA271. "All parties" included the HOA, NAS, the management company, and the HOA's other vendors—not the beneficiary of the Deed of Trust.

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30. On April 1, 2013, NAS recorded a Notice of Foreclosure Sale in the Clark County Recorder's Office, which set the sale for April 26, 2013. **Stip. Facts**, at ¶ 12; **Trial Ex. 5**.

31. No sale occurred on that date. **Stip. Facts**, at ¶ 13.

32. On June 7, 2013, NAS foreclosed, selling the Property to Underwood Partners, LLC (**Underwood**) for $30,000.00. **Stip. Facts**, at ¶ 14; **Trial Ex. 6**.

33. The Property's fair market value at the time of the sale was $430,000.00. *See* **Stip. Facts**, at ¶ 16; **Trial Ex. 12**, at BANA1156.

34. Underwood made no effort to determine whether the superpriority portion of the HOA's lien was satisfied before the sale.

35. On September 18, 2013—*after* the borrower brought a lawsuit challenging the foreclosure, Underwood conveyed its interest in the Property to NV Eagles. **Stip. Facts**, at ¶ 15; **Trial Ex. 7**.

III. LEGAL ARGUMENT

A. Burden of Proof.

As explained by the Nevada Supreme Court on multiple occasions, "the burden of proof rests with the party seeking to quiet title in its favor." *Shadow Wood Homeowners Ass'n, Inc. v. N.Y. Cmty. Bancorp.*, 132 Nev. 49, 366 P.3d 1105 (2016) (citing *Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 669, 918 P.2d 314, 318 (1996)); *see also Res. Grp., LLC as Tr. of E. Sunset Rd. Tr. v. Nevada Ass'n Servs., Inc.*, 135 Nev. Adv. Op. 8, 437 P.3d 154, 156 (2019) ("each party to a quiet title action has the burden of demonstrating superior title in himself or herself"). NV Eagles bears the burden of proof on all its claims against defendants. Further, deed recitals are not conclusive. *See Shadow Wood, supra*. To the extent there is any evidentiary value found in deed recitals, it is limited only to "default, notice, and publication," and statutory prerequisites to the sale. *Id.* The recitals do not address the issues in this case, including tender and the equities of the sale.

B. Miles Bauer's superpriority tender protected the Deed of Trust.

The Nevada Supreme Court has established binding precedent regarding the effect of Miles Bauer's superpriority tenders—the purchaser at the association's foreclosure sale takes title subject to the senior deed of trust. *See Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 134 Nev. 604,

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427 P.3d 113 (2018) (***Diamond Spur***). In *Diamond Spur*, Miles Bauer tendered payment for nine months of delinquent assessments to the foreclosing association's agent, enclosed by a letter explaining that the payment was meant to satisfy the superpriority portion of the association's lien. *See* 134 Nev. at 605. The collection agent rejected Miles Bauer's tender. *Id.* The district court granted summary judgment in the purchaser's favor, finding the tender did not extinguish the lien's superpriority portion because it was conditional. *Id.*

The Supreme Court reversed. The Court rejected the argument that the tender was impermissibly conditional, noting Miles Bauer's letter contained only one condition—that "acceptance of the tender would satisfy the superiority portion of the lien, preserving Bank of America's interest in the property." *Id.*, at 607. The Court explained this was not "an improper condition" because it was a correct statement of Nevada law—a senior lender's pre-foreclosure, superpriority payment does satisfy that portion of an association's lien. *Id.* The Court also held the HOA-sale purchaser's "status as a BFP [was] irrelevant" because Miles Bauer's tender rendered the subsequent foreclosure "void as to the [lien's] superpriority portion," meaning the purchaser took "the property subject to the deed of trust" as a matter of law. *Id.*, at 612.[1]

Just as it did in *Diamond Spur*, here Miles Bauer sent a letter to the HOA's collection agent, here NAS, seeking to determine the superpriority amount of the HOA's lien and "offer[ing] to pay that sum upon presentation of adequate proof of the same by the HOA." **Trial Ex. 9**, at BANA000131–32; *see also* **Stip. Facts**, at ¶ 9; **Testimony of Rock Jung**. In response, NAS provided a document that listed four different quarterly assessment amounts without delineating which amount applied to which time period. *See* **Trial Ex. 9**, at BANA000134–35. Jung chose the most recent of the four

[1] Since *Diamond Spur*, the Supreme Court has issued numerous unpublished decisions confirming Miles Bauer's tenders protect senior deeds of trust as a matter of law. *See, e.g., TRP Fund IV, LLC v. U.S. Bank, N.A., as Trustee for SROF-2013-S3 Remic Trust 1A*, 430 P.3d 431 (Table), 2018 WL 6134028, at *1 (Nev. Nov. 19, 2018) (unpublished) (holding Miles Bauer's tender of "the defaulted superpriority portion of the HOA's lien cured the default as to that portion of the lien such that the ensuing foreclosure sale did not extinguish the first deed of trust"); *BAC Home Loans Servicing, LP v. Karmi Properties, LLC*, 430 P.3d 530 (Table), 2018 WL 6133889, at *1 (Nev. Nov. 19, 2018) (unpublished) (holding Miles Bauer's tender "cured the default as to the superpriority portion of the HOA's lien" and protected the senior deed of trust); *Bank of America, N.A. v. 7229 Millerbird Street Trust*, 429 P.3d 1258 (Table), 2018 WL 6134210, at *1 (Nev. Nov. 20, 2018) (unpublished) (same).

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quarterly-assessment amounts, multiplied it by three to calculate nine months of assessments as $486.00, and tendered a check for that amount to NAS with a letter explaining that amount was equal to nine months of assessments. *See id.*, at BANA000137–39. NAS followed the same protocol it had followed hundred (if not thousands) of times when it received Miles Bauer's superpriority tenders—its receptionist rejected the tender in NAS's lobby because it was not for the full amount secured by the HOA's **entire** lien (both subpriority and superpriority portions). **Testimony of Susan Moses**; **Testimony of Rock Jung**.

While NV Eagles contends Miles Bauer miscalculated the superpriority amount and attempts to fault them for doing so, any miscalculation is irrelevant under *Diamond Spur* because it was caused by NAS's refusal to provide the superpriority amount. The Supreme Court confirmed that BANA and Miles Bauer could rely on the information provided by an association's collection agent in calculating their superpriority tenders in *Diamond Spur*, explaining that:

> The record establishes that Bank of America tendered the correct amount to satisfy the superpriority portion of the lien on the property. **Pursuant to the HOA's accounting**, nine months' worth of assessment fees totaled $720, **and the HOA did not indicate that the property had any charges for maintenance or nuisance abatement**. Bank of America sent the HOA a check for $720 in June 2012. On the record presented, this was the full superpriority amount.

134 Nev. at 607 (emphasis added). Earlier in the opinion, the Supreme Court stated that Miles Bauer tendered the correct superpriority amount "based on the HOA's representations" to Miles Bauer. *See id.*, at 605; *see also* 74 AM. JUR. 2d *Tender* § 4 (explaining that offering to pay a specific amount is "excused" if "the amount depends on the balance shown by accounts that are inaccessible to the party from whom the tender would otherwise be required … and such information is ascertainable only from the accounts of the creditor, who does not disclose the required information to the debtor"); *Cochran v. Griffith Energy Serv., Inc.*, 993 A.2d 153, 168 (Md. App. 2010) (holding that an offer to pay, coupled with a request for information for the amount owed, was a sufficient tender because the creditor refused to provide the amount owed). Jung had a right to rely on the document provided to him by NAS to calculate the superpriority amount.

Further, NAS's receptionist rejected the tender check not because Jung's superpriority calculation was off by a few dollars—NAS rejected the check because it was not for the full amount

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secured by the HOA's **entire** lien (both subpriority and superpriority portions). **Testimony of Susan Moses**. Under the tender doctrine, "a person to whom a tender is made must, at the time, specify the objections to it, or they are waived." *See First Sec. Bank of Utah, N.A. v. Maxwell*, 659 P.2d 1078, 1081 (Utah 1983); *see also Sellwood v. Equitable Life Ins. Co. of Iowa*, 42 N.W. 2d 346, 353 (Minn. 1950) ("the grounds of objections to a tender must be specified by the creditor"); *Blackford v. Judith Basin Cty.*, 98 P.2d 872, 876 (Mont. 1940) ("objections to a tender are waived unless specified at the time"). By failing to object to Miles Bauer's tender based on Jung's slight miscalculation of the superpriority amount, NAS waived any objection to the tender on that basis.

Finally, even if Jung slightly miscalculated the superpriority amount, the tender was still effectively under *Diamond Spur* and the doctrine of substantial compliance. The doctrine of "[s]ubstantial compliance may be sufficient to avoid harsh, unfair[,] or absurd consequences." *Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 475–76, 255 P.3d 1275, 1278 (2011) (internal quotation omitted). The Nevada Supreme Court has applied the substantial compliance doctrine to an HOA's compliance with NRS 116's requirements to otherwise validate foreclosures that did not strictly comply with NRS. *See, e.g., Saticoy Bay 9050 W Warm Springs 2079 v. NAS*, 444 P.3d 428, 135 Nev. Adv. Op. 23 (2019); *U.S. Bank, N.A. v. Resources Grp.*, 444 P.3d 442, 135 Nev. Adv. Op. 26 (2019).

A small miscalculation—which NV Eagles did not prove anyway—should not result in the loss of a large lien, as the Nevada Supreme Court indicated in *Fondren v. K/L Complex Ltd.*, 106 Nev. 705, 800 P.2d 719 (1990). Rejecting an argument that a mechanic's lien was invalid due to minor miscalculations in the amounts the lien secured, the Supreme Court explained that "[i]t is not realistic to become so technical that such errors defeat an otherwise valid lien for a large amount." 106 Nev. at 713 (citing *Hayes v. Pigg*, 267 Or. 143, 515 P.2d 924 (1973)). The quotation also included the similar doctrine of *de minimis non curat lex*, meaning the law does not concern itself with trifles. *Black's Law Dictionary* 524 (10th ed. 2014).

If lenders have the right to pay the superpriority amount, then lenders must then also have the right to know what that amount is. *See U.S. Bank ND, N.A. v. Resources Group, LLC*, 135 Nev. Adv. Op. 26, 444 P.3d 442, 447 (2019) (explaining that the "Legislature has mandated [that] the deed of trust holder [have] time to cure" a superpriority lien). NAS refused to tell Jung the superpriority

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amount, leaving him to do his best to estimate that amount and tender payment.[2] NAS's receptionist rejected the superpriority tender, again without telling Jung what the superpriority amount was. Even if Jung had sent a check in the amount NV Eagles claims was the superpriority here, NAS's consistent policy of rejecting Miles Bauer's superpriority tenders leaves no doubt the result would have been the same.

If homeowners associations are entitled to the doctrine of substantial compliance, so are BANA and Miles Bauer. Otherwise, the result is "harsh, unfair, and absurd" in light of Miles Bauer's tender of its best estimate of the superpriority amount and NAS's rejection of that tender for reasons wholly unrelated to Jung's *de minimis* miscalculation of the superpriority amount.

C. Alternatively, Miles Bauer was excused from tendering a superpriority payment because it would have been futile and NAS prevented it from learning the superpriority amount.

In fact, NAS's conduct excused Miles Bauer from attempting to submit a superpriority payment in the first place. The tender doctrine's express purpose is protecting a junior lienholder from a senior lienholder's refusal to allow the satisfaction of its senior lien. *See* 74 Am. Jur. 2d *Tender* § 2 (2012) ("the purpose of the law of tender is to enable the debtor to … relieve [its] property of encumbrance by offering [its] creditor all that [the creditor] has any right to claim"). To that end, there are universally recognized exceptions to the general rule that tender requires an offer to pay the full amount due that apply if a lienholder prevents or refuses to accept a proper tender.

First, tendering payment of the full amount due is excused "when the party entitled to payment, by declaration or by conduct, proclaims that, if tender of the amount due is made, it will not be accepted." 74 Am. Jur. 2d *Tender* § 4 (2012); 86 C.J.S. *Tender* § 5 (2017) (same); *Mark Turner Props., Inc. v. Evans*, 274 Ga. 547, 554 S.E. 2d 492, 495 (2001) ("Tender of an amount due is waived when the party entitled to payment, by declaration *or by conduct*, proclaims that, if tender of the amount due is made, an acceptance of it will be refused.") (emphasis in original); *Cladianos v. Friedhoff*, 69 Nev. 41, 45, 240 P.2d 208, 210 (1952) ("The law is clear ... that any affirmative tender

[2] NAS's obstruction also violated the HOA's CC&Rs, which entitled lenders to information and to pay a homeowner's delinquencies just as the homeowner could. *See* Section 7.7 ("the performance or payment shall be accepted as if performed by the Owner.").

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of performance is excused when performance has in effect been prevented by the other party to the contract.").[3] Put another way, tendering payment is "excused where it is reasonably clear that if made, such a tender would be of no avail[.]" 74 Am. Jur. 2d *Tender* § 4.

Second, tendering payment of the full amount due is excused when the party entitled to payment prevents the tendering party from learning that amount. *Id.* (tendering payment is excused when "the amount depends on the balance shown by accounts that are inaccessible to the [tendering] party ... and such information is ascertainable only from the accounts of the creditor, who does not disclose the required information to the debtor"); 86 C.J.S. *Tender* § 5 ("tender of an amount due is therefore waived when the party entitled to payment ... obstructs or prevents a tender").

Both exceptions apply here. First, NAS made it clear to BANA and Miles Bauer that it would reject a payment for the correct superpriority amount by taking that exact position in litigation against BANA and by rejecting the hundreds of superpriority payments Miles Bauer tendered for other properties. Second, NAS withheld the superpriority amount from Miles Bauer.

1. Tendering payment of the full superpriority amount was excused because it would have been futile.

The Nevada Supreme Court recognized the futility exception to tender in the NRS 116 context in *Bank of America, N.A. v. Thomas Jessup, LLC Series VII*, 135 Nev. 42, 435 P.3d 1217, 1220 (2019) (***Jessup***).[4] While the *Jessup* panel's opinion is being reconsidered *en banc*, the panel's correct application of the futility exception to a case with similar facts is illustrative.

[3] *See also, e.g., Needy v. Sparks*, 74 Ill. App. 3d 914, 918, 393 N.E. 2d 1252, 1255 (Ill. App. 1979) ("Where a creditor… informs the party under obligation to pay that he will not accept the amount actually due in discharge of the indebtedness, the party under obligation to pay is relieved of the duty of tendering the amount actually due."); *Chiles, Heider & Co. v. Pawnee Meadows, Inc.*, 217 Neb. 315, 321, 350 N.W. 2d 1, 5 (1984) ("A formal tender is not necessary where a party has shown by act or word that it would not be accepted if made."); *Alfrey v. Richardson*, 204 Okla. 473, 477, 231 P.2d 363, 368 (1951) ("if a strict legal tender had been made, [and] defendant would not have accepted the money," tender is waived); *Land O'Lakes Creameries, Inc. v. Commodity Credit Corp.*, 308 F.2d 604, 609 (8th Cir. 1962) ("The familiar rule that the law does not require one to do a vain or useless thing excuses the making of formal tender which would otherwise be required, where it is reasonably plain and clear that, if made, such a tender would be an idle ceremony and of no avail.").

[4] *See also Telemark Dev. Grp., Inc. v. Mengelt*, 313 F.3d 972, 978 (7th Cir. 2002) ("tender may be excused when the conduct of the creditor makes it 'reasonably clear that such [tender] would be a vain, idle, or useless act.'"); *Quality Motors v. Hays*, 225 S.W.2d 326 (Ark. 1949) (tender is immaterial when it would be vain and useless); *Donnellan v. Rocks*, 22 Cal. App. 3d 925, 929 (1st Dist. 1972) ("it

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In *Jessup*, BANA retained Miles Bauer to pay the superpriority amount of an association's lien to protect its deed of trust. *Id.*, at 44. Jung sent a letter to the association's collection agent, requesting a payoff ledger showing the superpriority amount and offering to pay that amount once the ledger was provided. *Id.* The collection agent responded with a letter in which it explained:

> [I]n conversations past, you have stated [BANA]'s position of paying for 9 months of assessments … all occurring ***before*** foreclosure by [BANA].
>
> I am making you aware that it is our view that without the action of foreclosure [by BANA], *a 9 month Statement of Account is not valid.* At this time, I respectfully request that you submit the Trustees Deed Upon Sale showing [BANA]'s possession of the property and the date that it occurred. *At that time, we will provide a 9 month super priority lien Statement of Account* …
>
> *We recognize your client's position as the first mortgage company as the senior lien holder*. Should you provide us with a recorded Notice of Default or Notice of Sale, we will hold our action so your client may proceed.

Id. (bolded emphasis in agent's letter to Miles Bauer, italicized emphasis added by Supreme Court). At trial, Jung testified that "he interpreted the letter as [the agent] having waived [the association's] entitlement to a superpriority tender." *Id.*, at 47. The district court nonetheless held the association's foreclosure extinguished BANA's deed of trust. *Id.*

A panel of the Supreme Court reversed, holding that "Miles Bauer's offer to pay the superpriority portion of [the association]'s lien, coupled with [the agent]'s rejection of that offer," cured the superpriority default and protected the Deed of Trust. *Id.* The panel explained that while the collection agent's response to Jung "did not explicitly state that [the agent] would reject a superpriority tender, we believe this is the only reasonable construction of the [agent's response], which stated that 'a 9 month Statement of Account is not valid' and refuted Miles Bauer's 'position of paying for 9 months

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is equally well established that the law does not require the performance of an idle act and a formal tender of performance is excused by the refusal in advance of the party to accept the performance."); *Fox Run Properties, LLC v. Murray*, 654 S.E.2d 676 (Ga. App. 2007) ("tender is excused or waived where the seller, by conduct or declaration, proclaims that if a tender should be made, acceptance would be refused" because "the law does not require a futile tender or other useless act."); *Chapman v. Olbrich*, 217 S.W.3d 482, 491 (Tex. App. 2006) ("Tender of performance is excused under certain circumstances, such as when a tender would be futile or when the defendants have repudiated the contract."); *Roundville Partners, L.L.C. v. Jones*, 118 S.W.3d 73, 79 (Tex. App. 2003) ("when actual tender would have been a useless act, an idle ceremony, or wholly nugatory, constructive tender will suffice.").

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of assessments … all occurring ***before*** foreclosure by [BANA].'" *Id.* (quoting the agent's letter to Jung (emphasis in original)). The panel ignored the district court's finding that "Mr. Jung understood that failure to pay the superpriority portion of the lien would result in the loss of his client's interest," explaining that it was "unwilling to characterize this observation as a factual finding entitled to deference in light of the district court having failed to address the" language in the agent's letter to Jung and Jung's interpretation of that letter. *Id.*

The operative facts here are analogous. Just as he was in *Jessup*, here Rock Jung was excused from tendering a superpriority payment because NAS had made clear on numerous occasions that "it would reject any such tender if attempted." *See Jessup*, 135 Nev. at 47. Jung knew that NAS would reject a payment for the correct superpriority amount of the HOA's lien because Jung had sought to protect senior deeds of trust by tendering superpriority payments to NAS on hundreds of prior occasions, and NAS categorically rejected those payments. **Testimony of Rock Jung**; *see also Mark Turner Props.*, 274 Ga. at 554 ("Tender of an amount due is waived when the party entitled to payment, by declaration *or by conduct*, proclaims that, if tender of the amount due is made, an acceptance of it will be refused.") (emphasis in original) (internal quotation marks and alterations omitted)); 74 Am. Jur. 2d *Tender* § 4 ("A tender of an amount due is waived when the party entitled to payment, by declaration *or by conduct*, proclaims that, if tender of the amount due is made, it will not be accepted.") (emphasis added); 86 C.J.S. *Tender* § 5 (same); *In re Pickel*, 493 B.R. 258, 271 (Bankr. D.N.M. 2013) ("Tender is unnecessary if the other party has stated that the amount due would not be accepted.").[5]

NAS also made clear to BANA that it would not accept Miles Bauer's superpriority payments in global litigation between BANA and dozens of homeowners associations and collection agents, in which BANA sought a declaration regarding the priority and scope of associations' superpriority liens. *See* **Trial Ex. 13**. In its motion to dismiss BANA's complaint, NAS stated that "until such time as [BANA] actually forecloses on [a] property, there is and can be no priority dispute" between BANA and an association because an association's "Super Priority Lien is **triggered** by foreclosure of the first deed of trust." *Id.*, at BANA000786; *see also* BANA000791 ("Prior to [BANA]'s foreclosure, there

[5] The Nevada Supreme Court cited each of these cases and treatises in *Jessup*, 135 Nev. at 46.

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is no application of NRS 116.3116[.]"); BANA000796 ("[U]nless and until it becomes the owner of a property subject to a Super Priority Lien, [BANA] is not liable for any of the amounts owing under the Super Priority Lien."). In its reply in support of its motion to dismiss, NAS declared that BANA's "pre-payment scheme"—that is, the "scheme" of submitting superpriority payments before an association's sale to protect its senior deeds of trust—"is, at its core, a hypothetical scenario void of sufficient definiteness to enable this Court to dispose of this controversy." *Id.*, at BANA000803. The "[r]eason being," NAS explained, is that "in the absence of foreclosure of a first deed of trust, there is no super-priority analysis under NRS 116.3116." *Id.*, at 3. Making clear its intent to reject all of BANA's superpriority tenders, NAS declared that "nothing in NRS 116.3116 prohibits [NAS] from rejecting [Miles Bauer]'s tender prior to foreclosure." *Id.*, at BANA000806.

The standard for futility is whether it is "reasonably clear" to the tendering party that the creditor would reject a tender for the correct amount. 74 Am. Jur. 2d *Tender* § 4; *see also RH Kids, LLC v. MTC Financial*, 367 F.Supp. 3d 1179, 1186 (D. Nev. 2019) (holding senior deed of trust survived association's foreclosure because Miles Bauer was excused from sending a superpriority tender, as NAS's policies showed it "would have rejected [the] tender and foreclosed anyway"). It was perfectly clear to BANA and its attorney, Jung, that NAS would reject a tender for the correct superpriority amount here given NAS's positions in litigation against BANA and its categorical rejection of hundreds of superpriority payments Jung had previously tendered for other properties. In fact, the futility of tendering the correct superpriority amount here was confirmed because Jung did send a check for his calculation of the superpriority amount, and NAS's receptionist rejected the payment only because it was not for the full amount secured by the HOA's **entire** lien. If Jung would have sent a check for the correct superpriority amount, the result would have been the exact same.

2. Tendering payment of the full superpriority amount was excused because it NAS did not provide the superpriority amount to Miles Bauer.

Miles Bauer was excused from tendering a superpriority payment for another reason—NAS did not provide sufficient information to calculate the superpriority amount to Jung. Nevada has long recognized "that any affirmative tender of performance is excused when performance has in effect been prevented by the other party to the contract." *Cladianos*, 69 Nev. at 45 (cited in *Jessup*, 135 Nev.

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at 46). Ample authority supports the common-sense proposition that tendering payment is excused if the party entitled to payment prevents the tendering party from learning the correct amount due. *See* 74 Am. Jur. 2D *Tender* § 4 (tendering payment is "excused" if "the amount depends on information [that] is ascertainable only from the accounts of the creditor, who does not disclose the required information to the debtor"); 86 C.J.S. *Tender* § 5 ("[t]ender of an amount due is therefore waived when the party entitled to payment… obstructs or prevents a tender"); *Mark Turner Props.*, 274 Ga. at 550 (tendering payment excused where creditor "refused… to name the amount she claimed to be due her").[6]

As the Nevada Supreme Court has explained, "a plain reading of NRS 116.3116" shows that a senior lender has the right to satisfy the superpriority portion of an association's lien to protect its deed of trust. *See Diamond Spur*, 134 Nev. at 608; *see also Jessup*, 135 Nev. at 43. The necessary corollary is that a senior lender is entitled to know the superpriority amount it must pay. *See U.S. Bank ND*, P.3d at 447 (explaining that the "Legislature has mandated [that] the deed of trust holder [have] time to cure" a superpriority lien). Since the publicly-recorded foreclosure notices do not provide that information, an association's collection agent must provide it to a senior lender. In fact, the Supreme Court has held that a collection agent's "refus[al] to give information regarding the monthly assessments" to Miles Bauer supports a finding that the agent "lacked good faith in rejecting [Miles Bauer]'s tender." *See Nevada Ass'n Serv., Inc. v. Las Vegas Rental & Repair, LLC Series 78*, 432 P.3d 744 (Table), 2018 WL 6829004, at *1 (Nev. Dec. 27, 2018) (unpublished).

[6] *See also, e.g., In re Campbell*, 105 F.2d 197, 200 (9th Cir. 1939) (tender of the specific amount due under a promissory note was excused because of the creditor's "failure to inform the debtor as to the net amount which had accrued under the agreement"); *Diamond v. Sandpoint Title Ins., Inc.*, 132 Idaho 145, 151, 968 P.2d 240, 246 (1998) (holding that creditor's misrepresentation about the amount owed and refusal to provide wiring instructions excused tender); *Kriegel v. Scott*, 439 S.W. 2d 445, 448 (Tex. Ct. App. 1969) (holding tender was excused by creditor's refusal to provide the amount owed; "[a]ppellee could hardly tender payment of a sum whose total could not be determined"); *Isaacson v. House*, 216 Ga. 698, 703, 119 S.E. 2d 113, 703 (1961) (tender excused when "defendant refused to divulge the information [about the amount owed] to the plaintiff and thus prevented a tender of the amount due"); *Barnett v. O'Neal*, 270 Ala. 58, 61, 116 So. 2d 375, 377–78 (1959) (tender excused when the amount due could not be ascertained by the offering party); *Spinks v. Jordan*, 108 Miss. 133, 66 So. 405, 406 (1914) ("it was [not] necessary for [debtors] to make a tender" in a case where the balance owed "could only be ascertained from the books of [the lender]").

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Here, as discussed at length above, the document NAS provided Jung did not list the superpriority amount or provide enough information to accurately calculate it. That document listed four different quarterly assessment amounts without delineating which amount applied to which time period. *See* **Trial Ex. 9**, at BANA000134–35. Miles Bauer took the first-listed of the four quarterly-assessment amounts, multiplied it by three to calculate nine months of assessments as $486.00, and tendered a check for that amount to NAS. *See id.*, at BANA000137–39. NAS rejected the superpriority tender without informing Jung which quarterly-assessment amount was the correct one to use to calculate the superpriority.[7]

At bottom, any minor miscalculation of the superpriority amount made no practical difference. NAS would have rejected any payment from Miles Bauer that was for less than the entire amount of the HOA's lien (both subpriority and superpriority portions) because it did not understand that the superpriority portion of the HOA's lien existed at the time or that the superpriority amount was limited to nine months of delinquent assessments. The excuse of tender doctrine serves to ensure NAS's ignorance of the laws under which it purported to foreclose does not cause BoNYM's Deed of Trust to be extinguished after its loan servicer, BANA, did exactly what Nevada law required to protect the Deed of Trust—tender the superpriority amount.

D. Alternatively, the sale should be set aside as to any superpriority because such a sale would be inequitable under these facts.

In the second alternative, the Deed of Trust survived as an equitable matter because the HOA's foreclosure sale was unfair. If an association sells a property for a price that is "palpabl[y] and great[ly] inadequate," all that is needed to show the deed of trust survived as a matter of equity is "very slight additional evidence of unfairness." *Nationstar Mortgage, LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. 740, 749, 405 P.3d 641, 648 (2017), *reh'g denied* (Dec. 13, 2017), *reconsideration en banc denied* (Feb. 23, 2018); *see also U.S. Bank ND, N.A. v. Resources Group, LLC*, 135 Nev. Adv. Op. 26, 444 P.3d 442, 448 (2019) ("The relationship is hydraulic: where

[7] In reality, NAS did not know the correct quarterly-assessment amount to use because it did not believe the superpriority portion of the HOA's lien existed at the time it rejected Miles Bauer's superpriority tender. *See* **Trial Ex. 13**, at BANA000791 ("Prior to [BANA]'s foreclosure [of the Deed of Trust], there is no application of NRS 116.3116[.]").

the inadequacy is palpable and great, very slight additional evidence of unfairness or irregularity is sufficient to authorize the granting of the relief sought.") (quoting *Shadow Canyon*, 133 Nev. at 749). A price below 20% of fair market value is "obviously inadequate." *See Shadow Wood Homeowners Ass'n, Inc. v. N.Y. Cmty. Bancorp, Inc.*, 132 Nev. 49, 60, 366 P.3d 1105, 1112 (2016).

Here, the Property was sold for $30,000.00. **Stip. Facts**, at ¶ 14; **Trial Ex. 6**. BoNYM's expert opined that the Property's fair market value at the time of the sale was $430,000.00, and NV Eagles offered no fair market value evidence of its own at trial. *See* **Stip. Facts**, at ¶ 16; **Trial Ex. 12**, at BANA1156. The Property was thus sold for less than 7% of its fair market value—a "palpabl[y] and great[ly]" inadequate sales price. *See Shadow Canyon*, 133 Nev. at 749.

The Nevada Supreme Court does not require unfairness to have caused a low sale price before equitable relief is warranted. Some kinds of unfairness justifying relief do not cause low prices, like "lull[ing]" an affected party "into a false security." *Golden v. Tomiyasu*, 387 P.2d 989, 995 (Nev. 1963). Other kinds of unfairness might sometimes cause a low price but are unfair enough to justify equitable relief regardless of whether causation can be proven. *See San Florentine Ave. Tr. v. JPMorgan Mortg. Acquisition Corp.*, 427 P.3d 125 (Nev. 2018).

In *San Florentine*, for instance, the Nevada Supreme Court considered whether an association's sale was unfair because the association's collection agent sent letters "stating that the HOA's lien was subordinate to [the] deed of trust, with the implication being that any ensuing foreclosure sale would not extinguish [the] deed of trust." *San Florentine*, 427 P.3d at 125. The court agreed with the trial court's decision to set aside the sale on equitable grounds. *Id.* It reached this conclusion even though the trustee only sent letters to parties with a property interest and not potential bidders, and despite the lack of evidence the lender relied on the letters. *See id.* at 125 n.1 (noting the letters warned "[t]his Lien may affect your position."). The representations in *San Florentine*, like the defective notices in *Resources Group*, did not cause the low price. Similarly, in *Shadow Canyon*, the supreme court explained whether a lender "tried to tender payment" before the sale is "significant[]" to determine whether the lender's deed of trust survived as an equitable matter. *See id.*, 113 Nev. at 750.

These are the exact forms of unfairness present here. As discussed above, NAS took the position in global litigation against BANA that an association's foreclosure could not extinguish a

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senior deed of trust. *See* **Trial Ex. 13**, at BANA000791 ("Prior to [BANA]'s foreclosure [of the Deed of Trust], there is no application of NRS 116.3116[.]"). BANA, through Miles Bauer, nonetheless tendered payment for what it calculated to be the superpriority amount of the HOA's lien here to ensure the Deed of Trust was protected, but NAS rejected the tender and foreclosed. *See* **Trial Ex. 9**, at BANA000137–39. This is another example of unfairness the Supreme Court explicitly identified in *Shadow Canyon*. *See* 133 Nev. at 753 (explaining that whether a senior lender "tried to tender payment" to an association before the sale is "significant[]" to determine whether the lender's deed of trust survived as an equitable matter).

As discussed above, Miles Bauer's superpriority offer, coupled with the futility of sending *any* payment to NAS, satisfied the superpriority portion of the HOA's lien, which protected the Deed of Trust as a matter of law and rendered equitable doctrines irrelevant. Even if Miles Bauer's tender efforts did not protect the deed of trust as a matter of law, they still provides evidence of unfairness that shows the sale did not extinguish the Deed of Trust as a matter of equity. *See Shadow Canyon*, 133 Nev. at 753.

In balancing the equities, NV Eagles has offered no evidence of harm. Moreover, it is not harmed by a finding that the Deed of Trust survived the sale. It did no research whatsoever regarding the property beforehand. It purchased the property anyway, assuming all title risks. NV Eagles did not prove Underwood Partners was a bona fide purchaser and offered no proof NV Eagles is a bona fide purchaser either, which was its burden to do. *See, e.g., Berge v. Fredericks*, 95 Nev. 183, 185, 591 P.2d 246, 248 (1979) (explaining that the **putative bona fide purchaser "was required to show** that legal title had been transferred to her before she had notice of the prior conveyance to appellant") (emphasis added); *see also RLP-Ampus Place, LLC v. U.S. Bank, N.A.*, 408 P.3d 557 (table), 2017 WL 6597148, at *1 (Nev. Dec. 22, 2017) (unpublished) ("[A] putative BFP must introduce some evidence to support its BFP status beyond simply claiming that status.").

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IV. CONCLUSION

Whether in equity, or because of Miles Bauer's tender attempts and futility in delivering a physical check, the Court should conclude that BoNYM's Deed of Trust survived the sale.

DATED this 15th day of January, 2020.

AKERMAN LLP

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on this 15th day of January 2020 and pursuant to NRCP 5, I caused to be served a true and correct copy of the foregoing **BANK OF AMERICA AND THE BANK OF NEW YORK MELLON, AS TRUSTEE'S TRIAL BRIEF**, in the following manner:

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

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

/s/ Patricia Larsen
An employee of AKERMAN LLP

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DISTRICT COURT

CLARK COUNTY, NEVADA

MELISSA LIEBERMAN, an individual, on behalf of itself and all others similarly situated,

Plaintiff,

vs.

MADERA CANYON HOMEOWNERS' ASSOCIATION, et al.,

Defendants.

And related claims.

CASE NO.: A-13-685203-C

DEPT. NO.: XXXII

NV EAGLES, LLC'S POST TRIAL BRIEF

COMES NOW, NV Eagles, LLC ("NVE"), by and through its attorney of record, JOSEPH Y. HONG, ESQ. of HONG & HONG, and hereby submits its Post Trial Brief.

This Brief is made and based upon the papers and pleadings previously filed and submitted to the Court, and the evidence that was admitted at the time of trial.

DATED this 28th day of January, 2020.

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MEMORANDUM OF POINTS AND AUTHORITIES

1. Procedural Background

As the Court is aware, this case, like hundreds presently pending in the Eighth Judicial District Courts, involves a HOA's superpriority lien pursuant to NRS Chapter 116 and the HOA's foreclosure of same extinguishing a bank's first deed of trust encumbering a property. The case between NVE and Bank of America, N.A. and Bank of New York Mellon (collectively "Bank") went to trial on January 14 and 15, 2020. At the conclusion of the trial, this Court made an absolute finding of fact pursuant to the evidence admitted that the superpriority portion of the HOA's lien was $540.00 and, therefore, the attempted tender of a check for $486.00 by Miles Bauer, on behalf of the Bank, was an **incorrect** amount. Again, this Court reiterated its absolute finding that Miles Bauer, on behalf of the Bank, attempted to tender an **incorrect** amount since the check in the amount of $486.00 was short $54.00 as to the $540.00, which was the correct amount of the superpriority portion of the HOA's lien.

This Court then directed the parties to submit Post Trial Briefs outlining if there were any cases from the Nevada Supreme Court or the Nevada Appellate Court as to the effect of a bank having attempted to tender an incorrect amount, i.e., an amount less than the superpriority portion of the HOA's lien.

NVE's Post Trial Brief now follows.

2. Argument

As the Court is well aware, these HOA superpriority lien cases pursuant to NRS Chapter 116 are a new phenomenon that has caused somewhat divergent rulings by the Eighth Judicial District Court Justices. The Nevada Supreme Court and the Nevada Appellate Court, therefore, have issued Decisions and Orders, published and unpublished, that are expressly and specifically tailored to these HOA superpriority lien cases. The Bank, which has been involved as a party to many of these Nevada Supreme Court and Nevada Appellate Court cases, now conveniently cites

to *other* case law [1] that are ***not related*** to these HOA superpriority lien cases because it clearly knows that it cannot prevail in the present case pursuant to the Nevada Supreme Court and Nevada Appellate Court case law that specifically addresses these HOA superpriority lien cases.

Is there Nevada case law that addresses the effects of an attempted tender by a bank for an incorrect amount, i.e., less than the amount of the superpriority portion of the HOA's lien?

The answer to this question is a resounding YES. It is undisputed that the Bank in this case attempted to physically deliver a check in the amount of $486.00 to the HOA trustee, who rejected same. The Nevada Supreme Court, in the case of *Bank of America, N.A. v. SFR*, 134 Nev. Adv. Op. 72 (September 13, 2018) ("*Diamond Spur*"), *a copy of which is attached hereto as* ***Exhibit "1"*** *wherein NVE has underlined and starred the relevant portions of the Decision*, issued a unanimous published Decision by the full panel of the 7 Supreme Court Justices that addressed and answered this very question. In *Diamond Spur*, like in the present case, the bank attempted to physically deliver a check for the superpriority amount to the HOA trustee, who rejected same. The Nevada Supreme Court made it absolutely and expressly clear that a "lien may be lost by ...payment or tender of the ***proper amount*** of the debt secured by the lien." Emphasis added. *See Diamond Spur, pages 3 and 4.* The Nevada Supreme Court also expressly held that a "[v]alid tender requires ***payment in full***." Emphasis added. *Id at pages 3 and 4.* Thus, in *Diamond Spur*, unlike what happened in the present case, because the record established that the bank tendered the correct amount to satisfy the superpriority portion of the HOA's lien, the attempted tender, even though it was rejected by the HOA trustee, was deemed a valid tender for these HOA superpriority cases. *Id. atpage 5.*

Thus, pursuant to the Nevada Supreme Court's absolute and unequivocal holding in *Diamond Spur*, the Bank's attempted tender in the present case was ***not*** a valid tender and did ***not*** satisfy the superpriority portion of the HOA's lien since it was not for the proper or correct amount or payment in full. **There are no ifs, ands or buts about it.**

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[1] Per the Bank's Trial Brief that was previously filed.

Approximately 6 months after the *Diamond Spur* Decision, the Nevada Supreme Court, on March 14, 2019, issued another published Decision in *Resources Group, LLC v. Nevada Association Services, Inc.*, 135 Nev. Adv. Op. 8 (March 14, 2019) ("*Resources Group*"), *a copy of which is attached hereto as* ***Exhibit "2"*** *wherein NVE has underlined and starred the relevant portion of the Decision*, that again confirmed that the party contesting the validity of the HOA's foreclosure of its superpriority lien bears the burden of demonstrating that it tendered its "delinquency-curing check," and whether it met the burden by proving that it "paid the delinquency amount in full prior to the sale." Emphasis added. *Id at pages 8-9.*

Thus, pursuant to the Nevada Supreme Court's absolute and unequivocal holding in *Resources Group*, the Bank's attempted tender in the present case was ***not*** a valid tender and did ***not*** satisfy the superpriority portion of the HOA's lien since the check was not a "delinquency-curing check" and did not satisfy the "delinquency amount in full prior to the sale." **There are no ifs, ands or buts about it.**

In fact, as recently as January 23, 2020, the Nevada Supreme Court issued an Order of Affirmance in the case of *Nationstar v. 2016 Marathon Keys Trust*, case # 75967 (unpublished Order, January 23, 2020) ("*Marathon*"), *a copy of which is attached hereto as* ***Exhibit "3,"*** *wherein NVE has underlined and starred the relevant portion of the Order*, that again absolutely and unequivocally reconfirmed the *Diamond Spur* holding of a "[v]alid tender requires payment **in full.**" Emphasis added. *Id at page 1.*

The Bank's attempted tender of an incorrect amount in the present case, therefore, pursuant to the absolute and unequivocal holdings of the Nevada Supreme Court, as recently as January 23, 2020, did ***not*** satisfy the superpriority portion of the HOA's lien as a matter of Nevada law directly related to these HOA superpriority lien cases.

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The Bank's anticipated arguments knowing that it did not satisfy the superpriority portion of the HOA's lien since it attempted to tender a check for an incorrect amount, i.e. less than the superpriority amount

NVE anticipates that the Bank will argue "substantial compliance" or "miscalculation" and cite to case law that have absolutely no relevance nor bearing to these HOA superpriority cases. As to the Nevada Supreme Court cases that the Bank may cite to in support of its argument that the doctrine of substantial compliance was applied in these HOA superpriority lien cases, said cases addressed issues, i.e. notices, **other than** full payment of the superpriority portion. There is not one single Nevada Supreme Court case for these HOA superpriority lien cases that states substantial compliance will be applied when an attempted tender is not for the full amount of the superpriority amount. It is no different than a homeowner/borrower who is in default of his mortgage trying to cure the delinquency amount of his/her mortgage loan to prevent a bank foreclosure wherein the homeowner/borrower must tender payment for the correct and full amount of the delinquency to stop the foreclosure, rather than allowing a homeowner/borrower to argue the doctrine of substantial compliance by tendering an incorrect amount and claiming satisfaction of the delinquency. This would be absurd.

NVE also anticipates that the Bank will argue *Jessup* for excused tender. First, the Nevada Supreme Court has entered an Order reconsidering its Decision in *Jessup*. Notwithstanding, the Bank cannot in any way argue excused tender since it actually attempted to make a tender. That is, excused tender can only be invoked if no actual attempted tender has been made with no payoff amount having been provided by the HOA or HOA trustee. In the present case, it was undisputed that the HOA trustee provided Miles Bauer with a ledger for the Subject Property via email on March 12, 2011. *See admitted Trial Exhibit 11, bate stamped pages 205-207, and attached hereto as* ***Exhibit "4."***

Moreover, as stated above, Miles Bauer actually attempted to tender a check, and so there was no evidence of any kind that Miles Bauer did not attempt to tender a payment because it could not calculate the superpriority amount or because it knew the HOA trustee would reject a superpriority tender. The Nevada Supreme Court in its January 23, 2020 *Marathon* Order

specifically rejected the bank's excused tender argument by expressly holding as follows:

> "Alternatively, appellants contend that formal tender should be excused in light of the letter from the HOA's agent, Absolute Collection Services (ACS), declining to provide a superpriority payoff amount free of charge and suggesting that a superpriority tender, if made, would be rejected. We similarly disagree with this argument, as no evidence indicates that Miles Bauer decided to not make a payment because it could not calculate the superpriority amount or because it knew ACS would reject a superpriority tender." Emphasis added. *Marathon at page 2, see* ***Exhibit "3."***

Thus, the Bank cannot argue excused tender in this case because it actually tendered. As the Bank's counsel at closing argument made an analogy to a basketball player attempting to make a free throw shot, the Bank in the present case actually took the free throw shot and missed,—tendered incorrect amount --- and now is trying to argue that it is somehow excused from the miss –excused tender--- because the referee would not have given the Bank the ball to shoot the free throw. As the Court will agree, it just does not work that way, and Nevada law as to these HOA superpriority lien cases does not support such an absurd argument.

The Bank's anticipated argument as to the HOA foreclosure sale *allegedly* being inequitable due to same *allegedly* being unfair

NVE anticipates that the Bank will conveniently ignore the absolute and unequivocal holdings of the Nevada Supreme Court in the *Shadow Wood* and *Shadow Canyon* cases wherein for an HOA foreclosure sale to be set aside as to the superpriority lien portion, "there must be some element of fraud, unfairness or oppression ***as accounts for and brings about*** the inadequacy of price." *See Nevada Supreme Court's Order in the Marathon case,* ***Exhibit "3"*** *page 2*, and the Nevada Appellate Court's Order in *Wells Fargo v. Premier One*, case # 76988-COA, (unpublished Order, December 13, 2019) ("*Premier One*"), *attached hereto as Exhibit* ***"5,"*** *page 4 wherein NVE has underlined and starred the relevant portion of the Order.* It is significant to note that the Nevada Supreme Court in *Marathon* and the Nevada Appellate Court

in *Premier One* expressly emphasized "**as accounts for and brings about the inadequacy of price.**" The Nevada Supreme Court further reconfirmed the mandate that an act of unfairness must **account for and bring about the inadequacy of price** in its published Decision in *SFR v. U.S. Bank*, 135 Nev. Adv. Op. 45 (September 26, 2019), *a copy of which is attached hereto as* ***Exhibit "6"*** *wherein NVE has underlined and starred the relevant portions of the Decision.* As the Court will note, the Nevada Supreme Court held that even if the HOA foreclosure sale having violated an automatic bankruptcy stay could have been an act of unfairness, the bank failed to prove that said act of unfairness ***resulted in an inadequate price***. Id at page 9.

Thus, as a matter of Nevada law for these HOA superpriority lien cases, there **must** be a nexus between an act of unfairness and the inadequacy of price [2] wherein the act of unfairness **must account for and bring about the inadequacy of price.** A mere showing of unfairness is not enough. Therefore, even if for argument sake that the ledger provided to Miles Bauer by the HOA trustee, *see* ***Exhibit "4,"*** may not have been too clear as to the amount of the superpriority portion of the HOA's lien, i.e. 9 months of delinquent assessments, there was absolutely no evidence of any kind that this alleged act of unfairness ***accounted for and brought about*** the inadequacy of price at the HOA foreclosure sale. Thus, the Bank's argument to set aside the superpriority portion of the HOA foreclosure sale fails as a matter of law.

However, it is significant to note that there was no act of unfairness whatsoever by the HOA trustee since this Court even noted at the time of trial in questioning Rock Jung, Esq. of Miles Bauer that there were other amounts as "prior rates" on the ledger that he could have used to calculate the 9 months of delinquent assessments. Moreover, Rock Jung, Esq. testified that Miles Bauer could have responded to the email from the HOA trustee that attached the ledger in requesting what years represented the "prior rates." NVE acknowledges that if Miles Bauer requested the HOA trustee to provide a ledger showing the years of the "prior rates" and the HOA trustee refused, then this could have been deemed an act of unfairness. However, even in

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[2] NVE in no way concedes that the price was inadequate. However, inadequacy of price is moot since there was no evidence of any kind that any act of unfairness accounted for and brought about the inadequacy of price.

such a scenario, the Bank would still have to prove that said act of unfairness ***accounted for and brought about the inadequacy of price*** at the time of the HOA foreclosure sale. However, as testified to by Rock Jung, Esq., Miles Bauer chose to not request a ledger showing the years for the "prior rates" even though Miles Bauer clearly could have done so. Furthermore, Miles Bauer received the ledger via email on March 12, 2011. The HOA foreclosure sale did not occur until June 7, 2013, *approximately 2 years* after Miles Bauer received the ledger via email on March 12, 2011. Miles Bauer chose to do nothing, and instead erroneously calculated the superpriority amount.

Therefore, as a matter of absolute Nevada law for these HOA superpriority lien cases, the Court cannot set aside the superpriority portion of the HOA sale based on equity and unfairness.

CONCLUSION

Pursuant to the evidence admitted at the time of trial, and the Nevada Supreme Court and Appellate Court's holdings directly related to these HOA superpriority lien cases, the Court must enter Judgment in favor of NVE and against the Bank quieting title to the Subject Property, i.e, extinguishment of the deed of trust and any assignments, in favor of NVE.

DATED this 28th day of January, 2020.

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Attorney for NV Eagles, LLC.

EXHIBIT "1"

134 Nev., Advance Opinion 72

IN THE SUPREME COURT OF THE STATE OF NEVADA

BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP, F/K/A COUNTRYWIDE HOME LOANS SERVICING, LP,
Appellant,
vs.
SFR INVESTMENTS POOL 1, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Respondent.

No. 70501

FILED

SEP 13 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

Appeal from a district court order granting summary judgment to the buyer and denying summary judgment to the first deed of trust holder in a quiet title action following an HOA lien foreclosure sale. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Reversed and remanded.

Akerman, LLP, and Darren T. Brenner, Thera A. Cooper, and Vatana Lay, Las Vegas,
for Appellant.

Kim Gilbert Ebron and Jacqueline A. Gilbert, Howard C. Kim, Zachary Clayton, and Jason G. Martinez, Las Vegas,
for Respondent.

BEFORE THE COURT EN BANC.

OPINION

By the Court, PICKERING, J.:

This is a quiet title dispute between the buyer at an HOA lien foreclosure sale and the holder of the first deed of trust on the property. The

holder of the first deed of trust tendered the amount needed to satisfy the superpriority portion of the lien to the HOA before the sale but the trustee proceeded with foreclosure anyway. The question presented is whether the buyer took title subject to the first deed of trust. We hold that a first deed of trust holder's unconditional tender of the superpriority amount due results in the buyer at foreclosure taking the property subject to the deed of trust. We therefore reverse the district court's grant of summary judgment for SFR Investments Pool 1, LLC and remand for further proceedings consistent with this opinion.

I.

In 2012, the original owner of 3617 Diamond Spur Avenue (Property) fell behind on his payments to the Sutter Creek Homeowners Association (HOA). The HOA initiated foreclosure proceedings, recording a delinquent assessment lien and a notice of default and election to sell. After receiving notice of the default, Bank of America, the holder of the first deed of trust on the property, contacted the HOA, seeking to clarify the superpriority amount and offering to pay that amount in full. Based on the HOA's representations, Bank of America tendered payment of $720—nine months' worth of assessment fees—to the HOA. The letter included with the tender stated that the HOA's acceptance would be an "express agreement that [Bank of America]'s financial obligations towards the HOA in regards to the [Property] have now been 'paid in full.'" The HOA rejected the payment and sold the property at foreclosure to respondent SFR Investments Pool 1, LLC.

After the foreclosure sale, litigation ensued with Bank of America and SFR both claiming title to the Property. On cross-motions for summary judgment, the district court granted summary judgment to SFR and denied summary judgment to Bank of America, from which order Bank

of America timely appealed. The case was routed to the court of appeals, which reversed and remanded. SFR then petitioned for review of the decision under NRAP 40B(a), which we granted.

II.

Bank of America argues that its tender was valid and satisfied the superpriority portion of the HOA's lien. SFR responds that the HOA's rejection was in good faith because at the time of the tender it was unsettled as to the amount of the superpriority portion of the lien, and the tender was conditional. SFR also asserts that it is protected as a bona fide purchaser of the property.

The grant or denial of summary judgment is reviewed de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate if the pleadings and other evidence on file, viewed in the light most favorable to the nonmoving party, demonstrate that no genuine issue of material fact remains in dispute and that the moving party is entitled to judgment as a matter of law. *Id.* "A genuine issue of material fact exists if, based on the evidence presented, a reasonable jury could return a verdict for the nonmoving party." *Butler ex rel. Biller v. Bayer*, 123 Nev. 450, 457-58, 168 P.3d 1055, 1061 (2007).

A.

Bank of America asserts that it tendered the correct amount to satisfy the superpriority portion of the HOA lien and that it was not required to do more. A valid tender of payment operates to discharge a lien. *Power Transmission Equip. Corp. v. Beloit Corp.*, 201 N.W.2d 13, 16 (Wis. 1972) ("Common-law and statutory liens continue in existence until they are satisfied or terminated by some manner recognized by law. A lien may be lost by . . . payment or tender of the proper amount of the debt secured

by the lien."); *see also* 74 Am. Jur. 2d *Tender* § 41 (2012). Valid tender requires payment in full. Annotation, *Tender as Affected by Insufficiency of Amount Offered*, 5 A.L.R. 1226 (1920). The HOA refused to accept Bank of America's tender, because it did not satisfy both the superpriority and subpriority portions of the lien.

NRS 116.3116 governs liens against units for HOA assessments and details the portion of the lien that has superpriority status. At the time of the tender in 2012, the statute provided that the superpriority portion of an HOA lien was prior to a first security interest on a unit

> to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 [maintenance and nuisance abatement] and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien.

NRS 116.3116(2) (2012). A plain reading of this statute indicates that the superpriority portion of an HOA lien includes only charges for maintenance and nuisance abatement, and nine months of unpaid assessments. We explained as much in *SFR Investments Pool 1 v. U.S. Bank*, 130 Nev. 742, 748, 334 P.3d 408, 412 (2014), and *Horizons at Seven Hills v. Ikon Holdings*, 132 Nev., Adv. Op. 35, ___, 373 P.3d 66, 72 (2016).[1]

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[1]Citing *Horizons at Seven Hills*, 132 Nev., Adv. Op. 35, at n.4, 373 P.3d at 69 n.4, SFR argues for the first time in its petition for review that Bank of America's tender was insufficient because it did not include collection costs and attorney fees. SFR waived this argument, both by failing to raise it timely in district court or on appeal and by failing to cogently distinguish the statutory and regulatory analysis in *Horizons at Seven Hills*. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3,

The record establishes that Bank of America tendered the correct amount to satisfy the superpriority portion of the lien on the property. Pursuant to the HOA's accounting, nine months' worth of assessment fees totaled $720, and the HOA did not indicate that the property had any charges for maintenance or nuisance abatement. Bank of America sent the HOA a check for $720 in June 2012. On the record presented, this was the full superpriority amount.

B.

The district court deemed Bank of America's tender insufficient because it was conditional. It based this finding on the letter Bank of America sent with its payment, which stated,

> This is a non-negotiable amount and any endorsement of said cashier's check on your part, whether express or implied, will be strictly construed as an unconditional acceptance on your part of the facts stated herein and express agreement that [Bank of America]'s financial obligations towards the HOA in regards to the [property] have now been "paid in full."

SFR argues, and the district court found, that this clause imposed an impermissible condition on the tender, as it required the HOA to potentially accept less than the full amount it was due under NRS 116.3116, given that the scope of the superpriority portion of an HOA's lien was not yet clarified at the time of the tender.

In addition to payment in full, valid tender must be unconditional, or with conditions on which the tendering party has a right

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252 P.3d 668, 672 n.3 (2011) (arguments not raised on appeal are deemed waived); *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (an appellate court needed not consider claims that are not cogently argued).

to insist. 74 Am. Jur. 2d *Tender* § 22 (2012). "The only legal conditions which may be attached to a valid tender are either a receipt for full payment or a surrender of the obligation." *Heath v. L.E. Schwartz & Sons, Inc.*, 416 S.E.2d 113, 114-15 (Ga. Ct. App. 1992); *see also Stockton Theatres, Inc. v. Palermo*, 3 Cal. Rptr. 767, 768 (Ct. App. 1960) (tender of entire judgment with request for satisfaction of judgment was not conditional); *cf. Steward v. Yoder*, 408 N.E.2d 55, 57 (Ill. App. Ct. 1980) (concluding tender with request for accord and satisfaction was conditional, but not unreasonable).

Although Bank of America's tender included a condition, it had a right to insist on the condition. Bank of America's letter stated that acceptance of the tender would satisfy the superiority portion of the lien, preserving Bank of America's interest in the property. Bank of America had a legal right to insist on this. SFR's claim that this made the tender impermissibly conditional because the payment required to satisfy the superpriority portion of an HOA lien was legally unsettled at the time is unpersuasive. As discussed in Section A, a plain reading of NRS 116.3116 indicates that at the time of Bank of America's tender, tender of the superpriority amount by the first deed of trust holder was sufficient to satisfy that portion of the lien. Thus, this issue was not undecided, and Bank of America's tender of the superpriority portion of the lien did not carry an improper condition.

C.

SFR claims that even if Bank of America's tender was valid, the HOA's good-faith rejection because of a belief that Bank of America needed to tender the entire amount of the lien, is a defense to the tender. Bank of America responds that SFR's assertion is speculative because the HOA

never gave a reason for its rejection, and thus cannot serve as the basis for summary judgment in SFR's favor.

Bank of America first contacted the HOA for assistance in determining the property's monthly assessment fee so it could pay the superpriority portion of the lien. The HOA responded with a demand that Bank of America pay the entire HOA lien to halt the foreclosure proceedings. Bank of America then tendered nine months of the property's assessment fees, along with a statutory analysis explaining that the amount was sufficient. The HOA returned the check a few weeks later and continued with foreclosure proceedings, giving no explanation for its rejection.

SFR did not present its good-faith rejection argument to the district court. *But see Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 436, 245 P.3d 542, 544 (2010) ("[A] de novo standard of review does not trump the general rule that '[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.'") (second alteration in original) (quoting *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981)). The authorities it cites to this court for that proposition do not support it. We therefore reject SFR's claim that the HOA's asserted "good faith" in rejecting Bank of America's tender allowed the HOA to proceed with the sale, thereby extinguishing Bank of America's first deed of trust.

D.

SFR next claims that if Bank of America's tender was valid and discharged the superpriority portion of the HOA lien, Bank of America's failure to record its tender or keep the tender good renders it unenforceable against SFR.

I.

SFR argues that Bank of America was required to record its tender under either NRS 111.315 or NRS 106.220.[2] Issues of statutory interpretation are questions of law reviewed de novo. *Taylor v. State, Dep't of Health & Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013). If a statute is unambiguous, this court does not look beyond its plain language in interpreting it. *Westpark Owners' Ass'n v. Eighth Judicial Dist. Court*, 123 Nev. 349, 357, 167 P.3d 421, 427 (2007). "Whenever possible, a court will interpret a rule or statute in harmony with other rules or statutes." *Nev. Power Co. v. Haggerty*, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999).

NRS 111.315 states that "[e]very conveyance of real property, and every instrument of writing setting forth an agreement to convey any real property, or whereby any real property may be affected, proved acknowledged and certified in the manner prescribed in this chapter . . . shall be recorded . . . ." NRS 111.010 defines conveyance as "every instrument in writing, except a last will and testament . . . by which any estate or interest in lands is created, alienated, assigned or surrendered." Thus, when an interest in land is created, alienated, assigned, or surrendered, the instrument documenting the transaction must be recorded.

By its plain text, NRS 111.315 does not apply to Bank of America's tender. Tendering the superpriority portion of an HOA lien does not create, alienate, assign, or surrender an interest in land. Rather, it

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[2]In 2015, the Legislature amended NRS Chapter 116 to add NRS 116.31164(2), which imposes recording requirements on certain superpriority lien satisfactions. This statute is not at issue on this appeal, because the tender and foreclosure sale predated its enactment.

preserves a pre-existing interest, which does not require recording. *See* Baxter Dunaway, *Interests and Conveyances Outside Acts—Recordable Interests*, 4 L. of Distressed Real Est. § 40:8 (2018) ("[D]ocuments which do not create or transfer interests in land are often held to be nonrecordable; the records, after all, are not a public bulletin board."). SFR's argument that the tender was an instrument affecting real property is unpersuasive. NRS 111.315 pertains to written instruments "setting forth an agreement . . . whereby any real property may be affected . . . *in the manner prescribed in this chapter* . . . ." (Emphasis added.) NRS Chapter 111 governs the creation, alienation, assignment, or surrendering of property interests, and their subsequent recording. Bank of America's tender did not bring about any of these actions, and therefore did not affect the property as prescribed in NRS Chapter 111. Accordingly, NRS 111.315 did not require Bank of America to record its tender.

NRS 106.220 provides that "[a]ny instrument by which any mortgage or deed of trust of, lien upon or interest in real property is subordinated or waived as to priority, must . . . be recorded . . . ." The statute further states that "[t]he instrument is not enforceable under this chapter or chapter 107 of NRS unless and until it is recorded." NRS Chapter 106 does not define instrument as used in NRS 106.220, but Black's Law Dictionary defines the term as "[a] written legal document that defines rights, duties, entitlements, or liabilities, such as a statute, contract, will, promissory note, or share certificate." *Instrument, Black's Law Dictionary* (10th ed. 2014). Thus, NRS 106.220 applies when a written legal document subordinates or waives the priority of a mortgage, deed of trust, lien, or interest in real property.

The changes in the lien priority caused by Bank of America's tender do not invoke NRS 106.220's recording requirements. Generally, the creation and release of a lien cause priority changes in a property's interests as a result of a written legal document. But Bank of America's tender discharged the superpriority portion of the HOA's lien by operation of law. *See* NRS 116.3116; 53 C.J.S. Liens § 14 (2017) ("A statutory lien is created and defined by the legislature. The character, operation and extent of a statutory lien are ascertained solely from the terms of the statute."). NRS Chapter 116's statutory scheme allows banks to tender the payment needed to satisfy the superpriority portion of the HOA lien and maintain its senior interest as the first deed of trust holder. NRS 116.3116(1)-(3); *see also* Unif. Common Interest Ownership Act (UCIOA) § 3-116 cmt. (amended 2008), 7 pt. 2 U.L.A. 124 (2009) ("As a practical matter, secured lenders will most likely pay the [9] months' assessments demanded by the association rather than having the association foreclose on the unit."). Thus, under the split-lien scheme, tender of the superpriority portion of an HOA lien discharges that portion of the lien by operation of law. Because the lien is not discharged by using an instrument, NRS Chapter 106 does not apply.

2.

SFR also argues that Bank of America should have taken further actions to keep its tender good, such as paying the money into court or an escrow account. Bank of America responds that NRS Chapter 116 does not require any further action beyond tender of the superpriority portion of the lien to preserve its interest in the property.

Whether a tendering party must pay the amount into court depends on the nature of the proceeding and the statutory and common law of the jurisdiction. *See* Annotation, *Necessity of Keeping Tender Good in*

Equity, 12 A.L.R. 938 (1921) ("Generally, there is no fixed rule in equity which requires a tender to be kept good in the sense in which that phrase is used at law."); *see also* Restatement (Third) of Prop.: Mortgages § 6.4 (Am. Law Inst. 1997) ("The tender must be kept good in the sense that the person making the tender must continue at all times to be ready, willing, and able to make the payment."). Where payment into court is not explicitly required, "averment of a readiness and willingness to bring the money into court, and pay the same on the order of the court, is sufficient." Annotation, *Necessity of Keeping Tender Good in Equity*, 12 A.L.R. 938 (1921). And, "the necessity of keeping a tender good and of paying the money into court has no application to a tender made for the purpose of discharging a mortgage lien." Annotation, *Unaccepted Tender as Affecting Lien of Real Estate Mortgage*, 93 A.L.R. 12 (1934) (explaining that such a tender would either immediately discharge the mortgage lien or the lien would remain unimpaired by the tender).

To satisfy the superpriority portion of an HOA lien, the tendering party is not required to keep a rejected tender good by paying the amount into court. HOA liens created under NRS Chapter 116 are statutory liens and thus enforcement of the lien is governed by statute. *See Phifer v. Gulf Oil Corp.*, 401 S.W.2d 782, 785 (Tenn. 1966) ("A lien created by statute is limited in operation and extent by the terms of the statute, and can arise and be enforced only in the event and under the facts provided for in the statute . . . ."). Neither NRS 116.3116, the related statutes in NRS Chapter 116, nor the UCIOA, indicates that a party tendering a superpriority portion of an HOA lien must pay the amount into court to satisfy the lien.

To judicially impose such a rule would only obstruct the operation of the split-lien scheme. The practical effect of requiring the first deed of trust holder to pay the tender into court is that a valid tender would no longer serve to discharge the superpriority portion of the lien. Instead, the tendering party would have to bring an action showing that the tender is valid and paid into court before the lien is discharged. With such conditions, a tendering party could only achieve discharge of the superpriority portion of the lien by litigation. This process negates the purpose behind the unconventional HOA split-lien scheme: prompt and efficient payment of the HOA assessment fees on defaulted properties. UCIOA § 3-116 cmt. (amended 2008), 7 pt. 2 U.L.A. 124 (2009) (recognizing the superpriority lien "strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders"). Accordingly, after tendering the superpriority portion of an HOA lien to preserve its interest as first deed of trust holder, a party is not required to pay the amount into court, and need only be ready and willing to pay to keep the tender good.

E.

SFR claims that even if Bank of America's tender discharged the superpriority portion of the HOA lien, SFR's status as a bona fide purchaser (BFP) gives it title to the property free and clear of Bank of America's interest, citing *Shadow Wood Homeowners Ass'n v. New York Community Bancorp, Inc.*, 132 Nev. 49, 366 P.3d 1105 (2016). Bank of America responds that *Shadow Wood* is inapplicable because it concerned the bank as the owner of the property, not the deed of trust holder, and that SFR has failed to prove its BFP status.

A party's status as a BFP is irrelevant when a defect in the foreclosure proceeding renders the sale void. *See Henke v. First S. Props., Inc.*, 586 S.W.2d 617, 620 (Tex. App. 1979) ("[T]he doctrine of good faith purchaser for value without notice does not apply to a purchaser at the void foreclosure sale."); *see also* Baxter Dunaway, *Trustee's Deed: Generally*, 2 L. of Distressed Real Est. § 17:16 (2018) ("A void deed carries no title on which a bona fide purchaser may rely . . . ."). Because a trustee has no power to convey an interest in land securing a note or other obligation that is not in default, a purchaser at a foreclosure sale of that lien does not acquire title to that property interest. *See id.*; *cf. Deep v. Rose*, 364 S.E.2d 228 (Va. 1988) (when defect renders a sale wholly void, "[n]o title, legal or equitable, passes to the purchaser").

A foreclosure sale on a mortgage lien after valid tender satisfies that lien is void, as the lien is no longer in default. *See* 1 Grant S. Nelson, Dale A. Whitman, Ann M. Burkhart & R. Wilson Freyermuth, Real Estate Finance Law § 7:21 (6th ed. 2014) ("The most common defect that renders a sale void is that the mortgagee had no right to foreclose . . . ."); *see also Henke*, 586 S.W.2d at 620 (concluding the payment of past-due installments cured loan's default such that subsequent foreclosure on the property was void). It follows that after a valid tender of the superpriority portion of an HOA lien, a foreclosure sale on the entire lien is void as to the superpriority portion, because it cannot extinguish the first deed of trust on the property.

Because Bank of America's valid tender discharged the superpriority portion of the HOA's lien, the HOA's foreclosure on the entire lien resulted in a void sale as to the superpriority portion. Accordingly, the

HOA could not convey full title to the property, as Bank of America's first deed of trust remained after foreclosure. *See* Baxter Dunaway, *Trustee's Deed: Generally*, 2 L. of Distressed Real Est. § 17:16 (2018) ("Any mortgages, deeds of trust, or liens which are senior to the deed of trust which is being foreclosed are unaffected by the foreclosure of the junior deed of trust.") As a result, SFR purchased the property subject to Bank of America's deed of trust. *See* UCIOA § 3-116 cmt. 2, illus. 3 (amended 2008), 7 pt. 1B U.L.A. 209 (Supp. 2018) (explaining that when a bank pays the superpriority portion of an HOA lien, the subsequent foreclosure sale "will not extinguish Bank's mortgage lien, and the buyer at the sale will take the unit subject to Bank's mortgage lien").

For these reasons, we reverse the district court's grant of summary judgment to SFR and remand this matter to the district court for further proceedings consistent with this opinion.

Pickering, J.

We concur:

Douglas, C.J.

Cherry, J.

Gibbons, J.

Hardesty, J.

Parraguirre, J.

Stiglich, J.

EXHIBIT "2"

135 Nev., Advance Opinion 8

IN THE SUPREME COURT OF THE STATE OF NEVADA

RESOURCES GROUP, LLC, AS TRUSTEE OF THE EAST SUNSET ROAD TRUST,
Appellant,
vs.
NEVADA ASSOCIATION SERVICES, INC.; AND HYDR-O-DYNAMIC CORPORATION, A REVOKED NEVADA CORPORATION,
Respondents.

No. 71268

FILED

MAR 14 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

Appeal from a district court judgment in an action to quiet title to real property. Eighth Judicial District Court, Clark County; Nancy Becker, Senior Judge.

Reversed and remanded.

Law Offices of Michael F. Bohn, Ltd., and Michael F. Bohn, Las Vegas, for Appellant.

Goold Patterson and Jeffrey D. Patterson, Las Vegas, for Respondent Hydr-O-Dynamic Corporation.

Christopher V. Yergensen, Las Vegas, for Respondent Nevada Association Services, Inc.

19-11364

BEFORE THE COURT EN BANC.[1]

OPINION

By the Court, HARDESTY, J.:

This case presents us with an opportunity to clarify whether a person conducting a sale under NRS Chapter 116, governing nonjudicial foreclosure sales by a unit-owners' association (UOA), has the discretion to refuse to issue a foreclosure deed to the highest bidder at a foreclosure sale after payment has been made, when it is later determined that the delinquency amount may have been paid by the property owner before the sale.[2] We first hold that each party in a quiet title action has the burden of demonstrating superior title in himself or herself. We further hold that once a bid is accepted and payment is made, the foreclosure sale is complete and title vests in the purchaser, and the person conducting the sale has no discretion to refuse to issue the foreclosure deed. Lastly, we reaffirm our prior holdings that the correct standard for determining whether to set aside a sale on equitable grounds is whether there has been some showing of fraud, unfairness, or oppression affecting the sale.

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[1]The Honorable Elissa F. Cadish and the Honorable Abbi Silver did not participate in the decision of this matter. The Honorable Michael L. Douglas, Senior Justice, was appointed by the court to participate in the decision of this matter.

[2]The 2015 Legislature substantially revised NRS Chapter 116. *See Shadow Wood Homeowners Ass'n, Inc. v. N.Y. Cmty. Bancorp, Inc.*, 132 Nev. 49, 56 n.2, 366 P.3d 1105, 1109 n.2 (2016). The references in this opinion to NRS Chapter 116 statutes are to the version of the statutes in effect when the events in this case occurred, which was before the effective date of the 2015 amendments.

Here, the purchaser demonstrated superior title by showing that it paid the sales price following a valid foreclosure sale. The burden of demonstrating that the delinquency was cured presale, rendering the sale void, was on the party challenging the foreclosure, who failed to meet its burden. Because we also conclude that the district court correctly found that there was no showing that fraud, unfairness, or oppression affected the sale, we hold that title vested in the purchaser's name and that the district court abused its discretion by setting aside the sale.

FACTS AND PROCEDURAL HISTORY

Respondent Hydr-O-Dynamic Corporation (HODC) was the legal owner and titleholder of real property located at 571 East Sunset Road in Henderson (the Property). The Property was located within a common-interest community comprised of commercial buildings overseen by Sunpac, a UOA formed under NRS Chapter 116. HODC became delinquent on the periodic assessments it was required to pay to the UOA, and respondent Nevada Association Services, Inc. (NAS), as the UOA's foreclosure agent, complied with all statutory presale requirements for a nonjudicial foreclosure sale of the Property pursuant to NRS 116.3116, including mailing default and sale notices certified with return receipt requested to HODC. The foreclosure sale was scheduled to take place on February 13, 2015, at 10 a.m.

On February 6, 2015, HODC's president mailed a check for the full amount of the delinquency ($6,554.09) to NAS via regular mail. At 10 a.m. on February 13, NAS, unaware that HODC had mailed a delinquency payment, began its property auctions, which included the subject Property. The auctions concluded at approximately 10:30 a.m. Appellant Resources Group, LLC, was the successful bidder on the Property, paying $350,000 in cashier's checks immediately following the conclusion of the auctions. That

same day, at some point between 9:30 a.m. and 11 a.m., NAS received the check from HODC. NAS did not inform its general counsel that it had received the check until February 17, however, due to an intervening three-day weekend. NAS's general counsel then contacted Resources Group, explained the situation, and offered to return Resources Group's cashier's checks, along with interest for the five days that had elapsed since the sale, in exchange for canceling the sale of the Property. Resources Group declined the offer, stating that it wanted either $1 million or the Property. Resources Group's agent informed NAS that he saw the mailman arrive on February 13 as he was leaving NAS's offices following the foreclosure sale, which would have been about 10:30 a.m., and thus, by the time NAS could have processed the payment, the foreclosure sale would have been completed. Despite this claim, NAS declined to issue a foreclosure deed to Resources Group.

Resources Group then filed a complaint against NAS, the UOA,[3] and HODC regarding title to the Property. After an unsuccessful summary judgment motion, the parties proceeded to trial. Ultimately, the district court entered judgment against Resources Group, finding that although HODC was delinquent in paying its assessments and the UOA's lien was perfected, Resources Group failed to demonstrate that the check curing the delinquency had not arrived before the foreclosure sale. The court discounted the testimony regarding the mailman as the agent had no specific memory distinguishing that day from any other. The court therefore concluded that Resources Group failed to meet its burden of showing that title should vest in its name.

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[3]Resource Group later voluntarily dismissed the UOA without prejudice pursuant to NRCP 41(a)(1)(i).

The district court also concluded that the equities weighed in favor of setting aside the sale, reasoning that nothing in this court's recent line of NRS Chapter 116 foreclosure opinions "limit[ed] the exercise of equity to only those instances where there is gross inadequacy of price and fraud, unfairness or oppression that accounts for [an] inadequacy of price," even though that is a more common ground for setting aside a sale than it being deemed void due to sale irregularities. In balancing the equities, the court found that Resources Group tendered payment for the Property not knowing of the possible arrival of HODC's check, such that Resources Group arguably held bona fide purchaser status, but that setting aside the sale would not result in any prejudice to Resources Group as it would only suffer a loss of interest. The court also found that HODC did nothing more than deposit its delinquency-curing check in regular mail without any follow-up that NAS had received the check, but that the statutory scheme evidenced a legislative intent to allow post-sale redemption and that HODC would be severely prejudiced if the sale was not set aside. Based on these facts, the court concluded that the equities weighed in favor of HODC and set the sale aside such that HODC retained title to the Property.

DISCUSSION

I.

Resources Group argues that completion of a foreclosure sale and tender of the bid amount vests title to the property in the bidder, that the burden then lies on HODC to show that the sale was invalid because it cured the delinquency, and that HODC failed to meet that burden. Thus, Resources Group asserts that title to the Property vested in its name when it delivered the cashier's checks upon conclusion of the foreclosure sale and that there is no basis to set the sale aside.

Conversely, HODC argues that title passes to a successful bidder only at the conclusion of a *valid* foreclosure sale and payment of the bid amount. On this foundation, HODC argues that if its payment of the delinquency was received prior to the sale, the sale was invalid, and Resources Group had the burden to show that the sale was valid by demonstrating that HODC's check arrived after the sale or otherwise failed to cure the delinquency.

A.

While the "burden of proof [in a quiet title action] rests with the plaintiff to prove good title in himself," *Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 669, 918 P.2d 314, 318 (1996), *abrogated on other grounds by Delgado v. Am. Family Ins. Grp.*, 125 Nev. 564, 570, 217 P.3d 563, 567 (2009), "a plaintiff's right to relief [ultimately] . . . depends on superiority of title," *W. Sunset 2050 Tr. v. Nationstar Mortg., LLC*, 134 Nev., Adv. Op. 47, 420 P.3d 1032, 1034 (2018) (internal quotation marks omitted). And because "[a] plea to quiet title does not require any particular elements, . . . each party must plead and prove his or her own claim to the property in question." *Chapman v. Deutsche Bank Nat'l Tr. Co.*, 129 Nev. 314, 318, 302 P.3d 1103, 1106 (2013) (internal quotation marks omitted). Thus, we analyze the parties' respective claims to the Property.

B.

A foreclosure sale generally terminates a party's legal title to the property. *See Bldg. Energetix Corp. v. EHE, LP*, 129 Nev. 78, 86, 294 P.3d 1228, 1234 (2013); *Charmicor, Inc. v. Bradshaw Fin. Co.*, 92 Nev. 310, 313, 550 P.2d 413, 415 (1976). This general rule is subject to certain limited exceptions, such as where the sale is void. *See Energetix*, 129 Nev. at 86, 294 P.3d at 1234 (noting that a lack of substantial compliance with the

relevant statutes and a lack of proper notice are exceptions to the general rule); *see also Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev., Adv. Op. 72, 427 P.3d 113, 121, *as amended on denial of reh'g* (2018) (holding that a foreclosure sale on a lien is void where that lien has been satisfied prior to the sale "as the lien is no longer in default"); *Henke v. First S. Props., Inc.*, 586 S.W.2d 617, 619-20 (Tex. Civ. App. 1979) (concluding that the payment of past-due installments cured a loan's default such that the subsequent foreclosure on the property was void); 1 Grant S. Nelson, Dale A. Whitman, Ann M. Burkhart & R. Wilson Freyermuth, *Real Estate Finance Law* § 7:21 (6th ed. 2014) (noting that a trustee's sale is void where there is no authorization to foreclose, and that there is no authorization to foreclose when the loan is not in default). To complete a valid foreclosure sale for unpaid assessments in Nevada, a UOA must comply with the provisions set forth in NRS Chapter 116. Relevant to the present case, the UOA must mail and record a notice of delinquent assessment, NRS 116.31162(1)(a), "a notice of default and election to sell," NRS 116.31162(1)(b), and a notice of foreclosure sale, NRS 116.311635(1)(a).[4] Moreover, a foreclosure sale is complete and title vests in the purchaser once payment has been made by the highest bidder. *See Dazet v. Landry*, 21 Nev. 291, 295, 30 P. 1064, 1066 (1892), *overruled on other grounds by Golden v. Tomiyasu*, 79 Nev. 503, 514-15, 387 P.2d 989, 995 (1963). After a sale is completed and payment is made, NRS 116.31164(3)(a) states that "the person conducting the sale *shall* . . . [m]ake, execute and . . . deliver to the purchaser" a deed conveying the property's title to the purchaser. (Emphasis added.)

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[4]The covenants, conditions, and restrictions (CC&Rs) governing the Property imposed the same requirements as those required by statute.

Here, the district court found that it was uncontested that the sale complied with the statutory requirements, and that Resources Group made payment of the full bid amount in cashier's checks immediately after the auction. The record further suggests that NAS accepted the checks and provided Resources Group with a receipt of funds and instructions. If this constitutes a valid sale, NRS 116.31164(3)(a) mandates that the person conducting the sale execute and deliver a deed of the Property to Resources Group.

II.

HODC argues, however, that it has superior title to the Property—despite the sale being properly conducted and Resources Group tendering payment of its bid—because it cured its default prior to the sale. In considering HODC's argument, we must address whether HODC has the burden of demonstrating that its delinquency-curing check arrived before the foreclosure sale, or whether this would be part of Resources Group's burden to prove that it has superior title to the Property. We conclude that the burden must lie with HODC. Payment of a debt is an affirmative defense, which the party asserting has the burden of proving. *See* NRCP 8(c) (listing payment as an affirmative defense); *Schwartz v. Schwartz*, 95 Nev. 202, 206 n.2, 591 P.2d 1137, 1140 n.2 (1979) ("Since the averments of an affirmative defense are taken as denied or avoided, each element of the defense must be affirmatively proved. The burden of proof clearly rests with the defendant." (citations omitted)). At least one court to address the issue agrees. *See Nguyen v. Calhoun*, 129 Cal. Rptr. 2d 436, 446 (Ct. App. 2003) ("The trustor-mortgagor or the person who alleges that a debt has been paid has the burden of proving payment." (internal quotation marks omitted)). Concluding that HODC bears the burden of proof on this issue, we now

address whether it met that burden by proving that it paid the delinquency amount in full prior to the sale.[5]

Although HODC does not argue on appeal that it met its burden of proof in this regard because it alleges that the burden was on Resources Group, it is clear from the record that HODC could not meet its burden. The evidence showed that, in its normal course of business, the mail would typically be delivered to NAS between 9:30 a.m. and 11:30 a.m., and that NAS would open and date-stamp its mail on the same day that it was delivered. HODC's check was date-stamped on February 13, 2015, the date of the sale, but no witness could credibly remember when the mail arrived that day.[6] The district court stated, and we agree, that this evidence could only support a finding "that HODC's check arrived between 9:30 a.m. and

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[5]Resources Group argues that HODC waived the issue of payment because it did not plead it in its responsive pleadings below. A party waives an affirmative defense where the "party fails to raise the affirmative defense in any pleadings or any other papers filed with the court, including its answer, pretrial statement, or post-trial brief." *City of Boulder City v. Boulder Excavating, Inc.*, 124 Nev. 749, 755 n.12, 191 P.3d 1175, 1179 n.12 (2008) (internal quotation marks omitted). Nevertheless, we have held "that an affirmative defense can be considered (if not pleaded) if fairness so dictates and prejudice will not follow." *Ivory Ranch, Inc. v. Quinn River Ranch, Inc.*, 101 Nev. 471, 473, 705 P.2d 673, 675 (1985). Here, fairness dictates that we consider HODC's arguments regarding payment, as those arguments are crucial for determining whether the sale was void. In addition, no prejudice would follow because "[o]ne who bids upon property at a foreclosure sale does so at his peril," *Henke*, 586 S.W.2d at 620, and thus, if a sale is void, a purchaser should not be entitled to reap a windfall.

[6]An agent of Resources Group testified he remembered seeing the mail being delivered after the foreclosure sale was completed, but the district court found that testimony not to be credible and we will not reassess witness credibility on appeal. *See Ellis v. Carucci*, 123 Nev. 145, 152, 161 P.3d 239, 244 (2007).

11:30 a.m. on February 13, 2015." Because the foreclosure sale ended at 10:30 a.m., this finding does not demonstrate that HODC paid the delinquency before the foreclosure sale. Thus, HODC failed to meet its burden and has therefore failed to demonstrate good title in itself.

III.

NRS 116.31164(3)(a) provides that, once payment has been made, the person that conducted "the sale shall . . . [m]ake, execute and . . . deliver to the purchaser . . . a deed . . . which conveys to the grantee all title" to the purchased property. The use of the word "shall" denotes a lack of discretion. *Markowitz v. Saxon Special Servicing*, 129 Nev. 660, 665, 310 P.3d 569, 572 (2013) ("The word 'shall' is generally regarded as mandatory."); *cf. In re Montierth*, 131 Nev. 543, 550, 354 P.3d 648, 652 (2015) ("A ministerial act is an act performed by an individual in a prescribed legal manner in accordance with the law, without regard to, or the exercise of, the judgment of the individual." (internal quotation marks omitted)); *see also In re Rugroden*, 481 B.R. 69, 78 (Bankr. N.D. Cal. 2012) ("When a statute clearly gives an official no choice but to act, then the act is ministerial."). NAS therefore lacked the discretion to refuse to deliver the deed based on information received after the sale was properly completed and after Resources Group tendered its bid. Having concluded that Resources Group has demonstrated good title and HODC failed to demonstrate it cured its default before the sale, we now address whether the sale should be set aside on equitable grounds.

The district court erred by setting the sale aside on equitable grounds

Resources Group argues that, under *Shadow Wood*, 132 Nev. 49, 366 P.3d 1105, HODC must demonstrate that the sales price was grossly inadequate and that there was fraud, unfairness, or oppression that resulted in the low sales price in order for the foreclosure sale to be set aside

on equitable grounds. Resources Group further argues that HODC is not entitled to equitable relief under *Shadow Wood* because the sale was conducted properly, lawfully, and fairly; because the sales price was not grossly inadequate; and because, even if the sales price was grossly inadequate, HODC failed to show that there was fraud, unfairness, or oppression that brought about that low price.[7]

Conversely, HODC contends that *Shadow Wood* should be read broadly to recognize a court's equitable power to set aside a foreclosure sale based on the entirety of the circumstances. HODC argues that the use of the court's equitable powers are warranted under the circumstances presented by this case because the delinquency-curing payment was made on the same day as the foreclosure sale.[8]

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[7]Resources Group also argues that HODC had no right to redemption under the CC&Rs or statutory law because the sale was conducted properly, and the UOA CC&Rs provide that a properly conducted sale vests title in the purchaser without the unit owner's equity or redemption. In *Shadow Wood*, however, this court held that "[h]istory and basic rules of statutory interpretation confirm our view that courts retain the power to grant equitable relief from a defective foreclosure sale when appropriate *despite NRS 116.31166*." 132 Nev. at 57, 366 P.3d at 1110-11 (emphasis added). Courts can also provide equitable relief despite the language in the CC&Rs. *See McKnight Family, LLP v. Adept Mgmt. Servs., Inc.*, 129 Nev. 610, 615, 310 P.3d 555, 558 (2013) (recognizing the contractual nature of CC&Rs); *Wainwright v. Dunseath*, 46 Nev. 361, 366, 211 P. 1104, 1106 (1923) (holding that "courts of equity have the power to order the reformation of deeds [or] contracts").

[8]HODC also argues that it should be granted equitable relief because Resources Group failed to demonstrate it had good title. Having already concluded that Resources Group demonstrated good title in itself, we do not address this argument further.

A district court's decision to set aside a foreclosure sale on equitable grounds is subject to an abuse of discretion standard of review. *See Arsali v. Chase Home Fin. LLC*, 121 So. 3d 511, 519 (Fla. 2013) ("Trial courts' judgments pertaining to set asides of judicial foreclosure sales are now, as they always have been, subject to review by way of an abuse of discretion standard."). The party seeking to set aside the sale on equitable grounds bears the burden to "produce[ ] evidence showing that the sale was affected by fraud, unfairness, or oppression that would justify setting aside the sale." *Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev., Adv. Op. 91, 405 P.3d 641, 643 (2017) (internal quotation marks omitted).

In *Shadow Wood* we held that "demonstrating that an association sold a property at its foreclosure sale for an inadequate price is not enough to set aside that sale [on equitable grounds]; there must also be a showing of fraud, unfairness, *or* oppression." 132 Nev. at 60, 366 P.3d at 1112. *Shadow Wood* also observed, however, that courts sitting in equity are required to analyze the totality of the circumstances when determining whether to set aside an HOA foreclosure sale on equitable grounds. *See id.* at 63, 366 P.3d at 1114 ("When sitting in equity, . . . courts must consider the entirety of the circumstances that bear upon the equities."). HODC interprets "totality of the circumstances" to mean that this court is to look broadly at all of the circumstances surrounding the sale and the parties in determining whether to set aside the sale and not just focus on whether there was a low sales price that was brought about by fraud, oppression, or unfairness.

As we subsequently clarified in *Nationstar*, this totality-of-the-circumstances analysis is tied to the traditional rule for determining

whether to set aside a sale on equitable grounds. 133 Nev., Adv. Op. 91, 405 P.3d at 648-49 ("[I]f the district court closely scrutinizes the circumstances of the sale and finds no evidence that the sale was affected by fraud, unfairness, or oppression, then the sale cannot be set aside, regardless of the inadequacy of price."). That is, if the totality of the circumstances demonstrates that *the sale itself* was affected by "fraud, unfairness, or oppression," then a court may set the sale aside. This has been the rule in Nevada since 1963. *See Golden*, 79 Nev. at 515, 387 P.2d at 995 ("[I]t is universally recognized that inadequacy of price is a circumstance of greater or less weight to be considered in connection with other circumstances impeaching *the fairness of the transaction* as a cause of vacating it . . . ." (emphasis added) (quoting *Odell v. Cox*, 90 P. 194, 196 (Cal. 1907))).

Here, the alleged equities in favor of setting aside the sale include those expressly stated by the district court: (1) "it was not unreasonable to assume that a check deposited in the main Las Vegas post office would be delivered within seven days to another Las Vegas address"; (2) Resources Group was not unduly prejudiced, as the only prejudice was a loss of interest on the money spent on the bid, "which could have been mitigated"; (3) HODC would suffer "extreme prejudice" if the sale were not set aside; and (4) "the Legislature intended to allow for the payment of community liens post sale by right of redemption."[9] In addition, the record suggests that there are possibly several other equities in favor of setting

[9]As noted earlier, the 2015 Legislature made substantial changes to NRS Chapter 116. As the revised version of NRS 116.3116 did not apply to the present case, and the 2014 version of the statute unambiguously did not allow for a right of redemption, the district court erred by gleaning an intent by the Legislature to provide for a post-sale right of redemption.

aside the sale. First, the district court found that, although unlikely, the check could have arrived earlier than February 13, 2015. Second, HODC's president testified that he was a small-business man and lacked the sophistication to know that he should follow up on his delinquency payment. Third, HODC did not have the keys to the mailbox for its property until late 2014, so it was unaware of any prior delinquency notices. Indeed, the first time that HODC allegedly received any notice of the delinquency or prior notices was when HODC's president was personally served with the notice of foreclosure in the parking lot of the Property on February 6, 2015.

The district court and HODC, however, fail to demonstrate that any of these equities constitute "fraud, unfairness, or oppression" that affected the sales price. Indeed, the district court acknowledged that the bid price was not inadequate and that there was no "evidence that the price was infected with unfairness, fraud or oppression." Even if we broadly interpreted the "unfairness" factor to include these additional equities, we conclude that the equities would still weigh against HODC. HODC asserted that it did not have access to its mail to receive the initial delinquent assessment notices regarding the Property,[10] but that was solely within HODC's control.[11] Additionally, with regard to the check, HODC only

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[10]HODC does not dispute the sufficiency of the notices.

[11]As HODC received, at least, the notice of foreclosure sale, it was aware that it needed to cure the deficiency *before* the date of the foreclosure sale as the notice provided as follows:

> WARNING! A SALE OF YOUR PROPERTY IS IMMINENT! UNLESS YOU PAY THE AMOUNT SPECIFIED IN THIS NOTICE *BEFORE THE SALE DATE*, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE.

mailed it in the regular course of mail, one week before the sale. At trial, HODC's president conceded that he failed to pursue other options, such as overnight delivery or certified mail. HODC's president also acknowledged that he could have delivered the check in person or called NAS to ensure that the check had arrived, but failed to do so. Based on these facts, we agree with the district court that "HODC did nothing [beyond putting the check in the mail] to ensure the check had arrived and there were certainly a number of alternatives."

The record reflects that HODC's lack of diligence—not "fraud, unfairness, or oppression"—is what led to the foreclosure sale. *See Moeller v. Lien*, 30 Cal. Rptr. 2d 777, 785 (Ct. App. 1994) (holding that a party was not entitled to equity in a foreclosure sale where the party's "delays, negligence and inattention were the sole cause of the sale"); *Chase Fin. Servs., LLC. v. Edelsberg*, 129 So. 3d 1139, 1142 (Fla. Dist. Ct. App. 2013) (holding that a party's lack of diligence is insufficient for setting aside a foreclosure sale on equitable grounds). Accordingly, we conclude that the district court abused its discretion by setting aside the sale on equitable grounds.

CONCLUSION

We hold that Resources Group demonstrated superior title because it made payment of the bid amount upon conclusion of a foreclosure sale that complied with the statutory requirements, and HODC failed to

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(Emphasis added.) *See* NRS 116.311635(3)(b). The notice also provided the date of the sale; thus, HODC was on notice that the Property could be lost if the amount specified was not paid by February 12, 2015, not the date of the foreclosure sale.

demonstrate that the sale was void due to the deficiency being cured. Thus, NAS did not have the discretion to refuse to issue the foreclosure deed. We further hold that HODC is not entitled to equitable relief, as it has failed to demonstrate "that the sale was affected by fraud, unfairness, or oppression." *Nationstar*, 133 Nev., Adv. Op. 91, 405 P.3d at 643 (internal quotation marks omitted). Accordingly, we reverse the judgment of the district court and conclude that Resources Group is entitled to the foreclosure deed upon remand.

_____, J.
Hardesty

We concur:

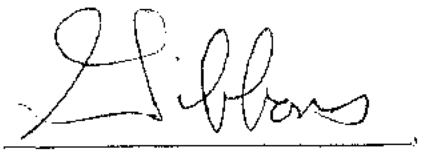
_____, J.
Parraguirre

_____, J.
Stiglich

_____, Sr. J.
Douglas

GIBBONS, C.J., concurring in part and dissenting in part:

Although I concur with the majority that the burden of proof of payment of the debit is upon HODC, I would remand this case for a new trial. The district court incorrectly concluded that HODC had a right of redemption by payment of this lien post sale. Regardless, further findings of fact must be done so that the district court can determine if HODC can meet its burden of proof.



_____, C.J.
Gibbons

PICKERING, J., dissenting:

There are three reasons I must dissent. First, the appellant waived the burden of proof issue by not raising it until it filed its reply brief in this court. Second, the district court did not rescind the sale or prevent delivery of the trustee's deed, the person charged with conducting the sale did because that person believed that it had conducted the sale in error—a determination the facts and the law support. And third, even accepting for purposes of argument that the owner had to prove pre-sale payment to win, NRS 47.250(13) presumes "[t]hat a letter duly directed and mailed was received in the regular course of the mail." The parties' stipulations and the evidence established that the owner mailed its cure check 7 days before the scheduled foreclosure sale and that a letter mailed from the main Las Vegas post office to a local address takes fewer than 7 days to arrive "in the regular course of the mail." Under NRS 47.200, this was evidence enough to establish timely payment or, at minimum, to make timely payment a question of fact for the trial court, not of law for this court, to decide.

I.

Appellant Resources Group, LLC was the plaintiff below. Its complaint asked the district court to do two things: (1) to compel the trustee who conducted the foreclosure sale, respondent Nevada Association Services (NAS), to deliver a deed to the commercial warehouse property in dispute (the property); and (2) to quiet title in its name and against respondent Hydr-O-Dynamic Corporation (HODC). HODC owned the property, which it acquired in 2009 for $2,250,000, free and clear. Since NAS rescinded the sale without delivering a trustee's deed to Resources Group, HODC was and remains the record titleholder of the property.

The first conclusion of law the district court stated was that, as the plaintiff seeking to quiet title in itself against the property's record titleholder, "Resources Group has the burden of proof to show title should be vested in its name." This is a correct statement of Nevada law:

> In a quiet title action, the burden of proof rests with the plaintiff to prove good title in himself. *Moreover, there is a presumption in favor of the record titleholder.*

Breliant v. Preferred Equities Corp., 112 Nev. 663, 669, 918 P.2d 314, 318 (1996) (emphasis added) (citations omitted), *abrogated on other grounds by Delgado v. Am. Family Ins. Grp.*, 125 Nev. 564, 570, 217 P.3d 563, 567 (2009); *accord W. Sunset 2050 Tr. v. Nationstar Mortg., LLC*, 134 Nev., Adv. Op. 47, 420 P.3d 1032, 1034-35 (2018) (quoting *Breliant*); 65 Am. Jur. 2d *Quieting Title* § 73 (2011) ("In a quiet title action, there is a presumption in favor of the record titleholder, and the evidence to overcome that presumption must be clear and convincing.") (footnotes omitted) (citing *Breliant*).

Against this mainstream law, the majority puts the burden of proof on HODC, the defendant and record titleholder. It does so based on arguments and authority, including NRCP 8, that Resources Group never raised until it filed its reply brief in this court. *Compare* NRAP 28(a)(6) (requiring an appellant to include in its opening brief "a statement of the issues presented for review"), *with Phillips v. Mercer*, 94 Nev. 279, 283, 579 P.2d 174, 176 (1978) (holding that issues "raised for the first time in appellant's reply brief[] will not be considered on appeal"). The rule against considering an issue not raised until an appellant's reply promotes sound decision-making because it ensures that, before weighing in on an issue, this court has input from the district court, the parties, and sometimes, even, amicus curiae. Since the majority's decision depends on assigning

HODC the burden of proof, since the law does not clearly assign this burden to HODC, and since Resources Group did not make the burden of proof argument on which the majority relies to decide this appeal until it filed its reply, I would leave the issue for another day and deem it waived.

II.

A foreclosure sale on an NRS Chapter 116 homeowners' association (HOA) lien is void if, before the sale, the owner or deed-of-trust beneficiary cures the default. *Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev., Adv. Op. 72, 427 P.3d 113, 121 (2018) ("A foreclosure sale on [an HOA] lien after valid tender satisfies that lien is void, as the lien is no longer in default.").[1] The equitable right to redeem by cure terminates when the foreclosure sale concludes and the person conducting the sale delivers a trustee's deed to a bona fide purchaser for value (BFP). *Compare* Restatement (Third) of Property: Mortgages § 6.4(a) (Am. Law Inst. 1997) (recognizing the equitable right to redeem property from a lien by performing the obligation secured by the lien terminates with foreclosure), *with Nguyen v. Calhoun*, 129 Cal. Rptr. 2d 436, 449 (Ct. App. 2003) (holding

[1]The foreclosure proceedings in this case predated the effective date of the 2015 amendments to NRS Chapter 116, which created a statutory right of redemption and imposed time limits on pre-sale lien-default cures. *See* NRS 116.31166(1), (3) (2017). The parties stipulated that if HODC's check arrived at the Las Vegas offices of respondent Nevada Association Services (NAS) before NAS proceeded with the foreclosure auction on February 13, 2015, this would void the sale. This stipulation comports with section 6.12 of the governing CC&Rs, which state: "In the event the delinquent assessments . . . are fully paid or otherwise satisfied prior to the completion of any sale held to foreclose the lien provided for in this Declaration, the Association shall record a further notice . . . stating the satisfaction and releasing of such lien." Of note, as a commercial property, the warehouse would not be subject to NRS Chapter 116 except the CC&Rs incorporate NRS 116.3116.

that payment that arrived by Federal Express three days after the foreclosure sale occurred and the trustee's deed was delivered came too late to avoid loss of the property). The high bidder does not acquire title—much less the right to a statutory trustee's deed—absent a *valid* foreclosure sale. *Cf. Las Vegas Dev. Grp., LLC v. Blaha*, 134 Nev., Adv. Op. 33, 416 P.3d 233, 237 n.7 (2018) (emphasizing that only "a *valid* trustee's foreclosure sale terminates [a record title holder's] legal and equitable interests in the property") (internal quotation omitted).

NRS 116.31166(1) (1993) describes the presumptions of validity that attach to a delivered trustee's deed. But those presumptions do not attach until the trustee (or in Chapter 116 parlance, "the person conducting the sale," *see* NRS 116.31164) executes and delivers the trustee's deed. *See Moeller v. Lien*, 30 Cal. Rptr. 2d 777, 783-84 (Ct. App. 1994). Because the statutory presumptions of validity do not attach "if there is a defect in the procedure which is discovered after the bid is accepted but prior to delivery of the trustee's deed, the trustee may abort a sale to a bona fide purchaser, return the purchase price and restart the foreclosure process." *Id.*; *accord Biancalana v. T.D. Serv. Co.*, 300 P.3d 518, 522 (Cal. 2013) (holding that a trustee who discovers a material defect in the foreclosure sale process before delivering the deed may rescind the sale and restart the process; "the statutory foreclosure process aims to ensure that a properly conducted sale is final between the parties" but this "purpose is not served by enforcing the finality of a sale that was conducted improperly"); *Lee v. HSBC Bank, USA*, 218 P.3d 775, 776 (Haw. 2009) (holding that "where a mortgagor cures its default prior to a foreclosure proceeding . . . but an auction inadvertently goes forward, . . . [no] valid agreement [is] created entitling the high bidder at the auction to lost profits"); *Taylor v. Just*, 59 P.3d 308, 310-11 (Idaho

2002) (upholding the foreclosure trustee's authority to rescind the sale and refuse to deliver a deed without exposure to contract damages where the bank's email to the trustee advising it had promised the owner not to proceed with the sale went astray); *Udall v. T.D. Escrow Servs., Inc.*, 154 P.3d 882, 887 (Wash. 2007) (holding that a trustee may withhold a deed where there is a procedural irregularity that renders the sale void); 5 Miller & Starr, Cal. Real Est. § 13:250 (4th ed. 2018) ("[T]he trustee has the authority to rescind the sale upon discovery of an irregularity before the delivery of the deed. Prior to the delivery of the trustee's deed, there are no conclusive presumptions that the sale is valid."); 59A C.J.S. *Mortgages* § 819 (2009) ("Under statutory scheme, if there is a defect in the procedure which is discovered after the bid is accepted but prior to the delivery of the trustee's deed, the trustee may abort the sale to a bona fide purchaser, return the purchase price and restart the foreclosure process.").

Nevada law has long given courts "the power to grant equitable relief from a defective foreclosure sale when appropriate." *Shadow Wood Homeowners Assoc., Inc. v. N.Y. Cmty. Bancorp., Inc.*, 132 Nev. 49, 57-59, 366 P.3d 1105, 1110-11 (2016) (citing *Golden v. Tomiyasu*, 79 Nev. 503, 514, 387 P.2d 989, 995 (1963), and *Oller v. Sonoma Cty. Land Title Co.*, 290 P.2d 880, 882 (Cal. Ct. App. 1955)). Low price, alone, will not justify invalidating a properly conducted sale; there must also be a showing of irregularities affecting the sale. *Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev., Adv. Op. 91, 405 P.3d 641, 647-48 (2017). But the greater the disparity between price and value, the less in the way of unfairness or irregularity need be shown. *Golden*, 79 Nev. at 515-16, 387 P.2d at 995 ("[I]t is universally recognized that inadequacy of price is a circumstance of greater or less weight to be considered in connection with

other circumstances impeaching the fairness of the transaction as a cause of vacating it, and that, where the inadequacy is palpable and great, very slight additional evidence of unfairness or irregularity is sufficient to authorize the granting of the relief sought.") (quoting *Odell v. Cox*, 90 P. 194, 196 (Cal. 1907)), *quoted with approval in Nationstar Mortg.*, 133 Nev., Adv. Op. 91, 405 P.3d at 648.

While our cases authorize a *court* to set aside a foreclosure sale for invalidity—even after the trustee has delivered its deed—we have not had occasion to consider whether a *trustee* can rescind a sale and refuse to deliver a deed because the trustee discovers facts indicating the sale's invalidity. California law, on which *Golden*, *Shadow Wood*, and *Nationstar* all rely, draws on the courts' equitable authority to set aside a foreclosure sale in recognizing a trustee's authority to rescind a sale for procedural irregularity or unfairness, so long as the trustee does so before delivering the deed. *Biancalana*, 300 P.3d at 522-23 (reciting that "gross inadequacy of price coupled with even slight unfairness or irregularity is a sufficient basis for setting the sale aside" and applying it to a trustee's decision to rescind a sale prior to delivering the deed); *see Residential Capital LLC v. Cal-W. Reconveyance Corp.*, 134 Cal. Rptr. 2d 162, 173 (Ct. App. 2003) ("Only a properly conducted foreclosure sale, free of substantial defects in procedure, creates rights in the high bidder at the sale."). Allowing a trustee to rescind a defective or improperly conducted sale so long as the trustee acts before it issues the deed incentivizes the trustee "to exercise diligence in promptly reviewing the sale and identifying any irregularity." *Biancalana*, 300 P.3d at 527. While this "may create some uncertainty for bidders" and detract from the interest in finality, "if a procedural defect in the sale is detected before the trustee's deed is issued, the successful

foreclosure sale bidder has not been seriously prejudiced." *Id.* at 526 (internal quotation omitted).

Applying this law to the record facts, we should affirm, not reverse, the district court. NAS sent the notice of default in 2012 and the notice of sale in 2015. Although the notices were properly mailed, HODC did not learn about the foreclosure proceedings until February 6, 2015—7 days before the scheduled foreclosure sale—when an NAS agent delivered a copy of the notice of sale to HODC's principal, Juan Guzman. That same day, Guzman went inside the main U.S. Post Office on Sunset Road in Las Vegas and mailed NAS the $6554.09 check needed to cure its default. In Guzman's experience, mail sent from this Post Office to another local address normally takes a day or two to arrive. We know NAS received the check on or before the date of the sale because it stamped the check "received" on February 13, 2015, the date of the sale. (Although the majority suggests otherwise, the district court found it "possible" the check arrived *before* February 13, 2015.)

NAS scheduled and conducted the foreclosure sale at 10 a.m., despite that its mail normally arrived between 9:30 a.m. and 11:30 a.m., and despite not having in place protocols to establish the precise date and time a mailed check arrived. It is at this point that the procedural irregularities that led NAS to rescind the sale emerge: After discovering HODC's check and examining its records, NAS could not verify it had conducted a *valid* foreclosure sale. Given this uncertainty and the ambiguous February 13, 2015 "received" stamp on HODC's cure check, NAS declined to issue a trustee's deed and offered to return Resources Group's bid price payment, with interest. These are not disputed or inferred facts; the parties *stipulated* to them in district court. *See* July 6, 2016 Joint

Pretrial Memorandum (*stipulating* that NAS believed "(22) the check for payment in full had crossed paths with the foreclosure sale and that NAS did not have enough time to process the check on February 13, 2015, link it with the foreclosure sale set that morning, and stop the sale"; that NAS believed "(25) the sale was made in error because of the crossing of the owner's payment in full and the sale"; and "(27) that [b]ecause NAS believed the sale was conducted in error, it has never released nor recorded a Foreclosure Deed for the subject property.").

The rule allowing a trustee to rescind a sale when material irregularities emerge before delivery of a deed is consistent with *Golden*, *Shadow Wood*, and *Nationstar*—and with the judgment the district court entered, which denied Resources Group's requests that it direct NAS to deliver the trustee's deed and quiet title in Resources Group and against HODC. But this case does not require the court to adopt *Biancalana*, *Residential Capital*, and *Just*. It can also be resolved under *Golden*, *Shadow Wood*, and *Nationstar*.

The record establishes a substantial disparity between value and bid price. HODC acquired the property in 2009 for $2,250,000 and owned it free and clear, except for the HOA's $6554.09 lien. The property's value had declined substantially by 2015. Even so, the $350,000 bid Resources Group made for the property represented less than a third of what the district court found it was worth. This price/value disparity, combined with NAS's inability to verify a valid sale (not to mention its determination that it had conducted the sale in error, see Joint Pretrial Memorandum ¶27, *supra*) support the district court's judgment against Resources Group and in favor of NAS and HODC under existing Nevada law. As noted in my concurring and dissenting colleague's opinion, we

would need to reverse and remand to resolve this case purely under *Golden*, *Shadow Wood*, and *Nationstar*, because the district court may have relied in exercising its equitable authority, on a statutory right of redemption that did not enter NRS Chapter 116 until after the sale in this case was held.

III.

The majority holds, seemingly as a matter of law, that HODC failed to produce evidence from which the finder of fact could find its check arrived at NAS on or before the 10 a.m. February 13, 2015 sale date. This holding does not square with the record facts or with NRS 47.250(13) and NRS 47.200. As noted above, HODC mailed the check from the main U.S. Post Office in Las Vegas on February 6, 2015, to NAS's Las Vegas office. NAS received the check at least by February 13, 2015, when it stamped it received. Guzman testified that letters mailed locally from that post office usually take a day or two to arrive.

NRS 47.250(13) presumes that "a letter duly directed and mailed was received in the regular course of the mail." This presumption, combined with the date stamp and NAS's testimony that the check could have come even earlier than February 13, 2015, constitutes evidence of delivery to NAS on or after February 8, 2015 and before the 10 a.m. February 13, 2015 sale date and time. *See Henderson v. Carbondale Coal & Coke Co.*, 140 U.S. 25, 37 (1891) (noting that the presumption that mail is received within a normal delivery time is "not a presumption of law but one of fact"). The "basic facts" thus established, NRS 47.200 applies. NRS 47.200 does not demand 100% certainty or proof beyond a reasonable doubt. It deals in terms of "reasonable minds" and "probability." Under NRS 47.200, it cannot be said that, as a matter of law, the check did not arrive

on or before February 13, 2015 at 10 a.m. On the contrary, NRS 47.200 and NRS 47.250(13) mandate the opposite finding or, at minimum, a determination that the time of delivery is a question of fact for the district court to determine in the first instance.

I therefore respectfully dissent.

Pickering, J.

Pickering

EXHIBIT "3"

IN THE SUPREME COURT OF THE STATE OF NEVADA

NATIONSTAR MORTGAGE, LLC; AND U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE HOLDERS OF THE SPECIALTY UNDERWRITING AND RESIDENTIAL FINANCE TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2006-BC4,
Appellants,
vs.
2016 MARATHON KEYS TRUST,
Respondent.

No. 75967

FILED
JAN 23 2020
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting summary judgment in an action to quiet title. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge. Reviewing the summary judgment de novo, *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005), we affirm.[1]

Appellants contend that Miles Bauer's offer to pay the superpriority amount of the HOA's lien, once that amount was determined, was a valid tender that prevented the first deed of trust from being extinguished by the HOA's foreclosure sale. We disagree that the offer was a valid tender. *See Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 606, 427 P.3d 113, 117 (2018) ("Valid tender requires payment in full."). Alternatively, appellants contend that formal tender should be excused in light of the letter from the HOA's agent, Absolute Collection Services (ACS), declining to provide a superpriority payoff amount free of charge and

[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

suggesting that a superpriority tender, if made, would be rejected. We similarly disagree with this argument, as no evidence indicates that Miles Bauer decided not to make a payment because it could not calculate the superpriority amount or because it knew ACS would reject a superpriority tender. *See Nev. Ass'n Servs., Inc. v. Eighth Judicial Dist. Court*, 130 Nev. 949, 957, 338 P.3d 1250, 1255 (2014) ("Arguments of counsel are not evidence and do not establish the facts of the case." (internal quotation and alteration omitted)).

For similar reasons, we reject appellants' argument that the sale should have been set aside on equitable grounds. *Cf. Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. 740, 747-50, 405 P.3d 641, 647-49 (2017) (reaffirming that inadequate price alone is insufficient to set aside a foreclosure sale absent evidence of "fraud, unfairness, or oppression"). Although appellants contend that Article VII, Section 12 of the CC&Rs amounts to unfairness, there is no evidence that appellants, their predecessors, or potential bidders interpreted that provision as a representation that the superpriority portion of the HOA's lien was not being foreclosed such that bidding was chilled.[2] *Cf. id.* at 741, 405 P.3d at 643 (observing that there must be "'some element of fraud, unfairness, or oppression *as accounts for and brings about the inadequacy of price*'" to justify setting aside a foreclosure sale on equitable grounds (emphasis added) (quoting *Shadow Wood Homeowners' Ass'n v. N.Y. Cmty. Bancorp, Inc.*, 132 Nev. 49, 58-59, 366 P.3d 1105, 1111 (2016))). And, as

[2]We decline to consider appellants' argument that bidding was chilled in light of the opening bid amount, as that argument was not coherently raised in district court. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

indicated above, no evidence indicates that Miles Bauer was prevented from making a tender because it could not calculate the superpriority amount or because it knew ACS would reject a superpriority tender. *Nev. Ass'n Servs.*, 130 Nev. at 957, 338 P.3d at 1255. Similarly, there is no evidence that appellants or Miles Bauer were misled by ACS's letter into believing that the HOA's foreclosure sale would not extinguish the first deed of trust. *Id.*; *see Nationstar Mortg.*, 133 Nev. at 747-50, 405 P.3d at 647-49. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[3]

Pickering, C.J.
Pickering

Gibbons, J.
Gibbons

Douglas, Sr. J.
Douglas

cc: Hon. Jacqueline Bluth, District Judge
Janet Trost, Settlement Judge
Akerman LLP/Las Vegas
Ayon Law, PLLC
Eighth District Court Clerk

[3]The Honorable Michael Douglas, Senior Justice, participated in the decision of this matter under a general order of assignment.

EXHIBIT “4”

Yolaunda Erskine

From: Yolaunda Erskine
Sent: Saturday, March 12, 2011 2:12 PM
To: 'Alexander Bhame'
Subject: 2184 Pont National Drive
Attachments: N62616.pdf; image001.png; image002.png; image003.png; image004.jpg

Hello,

Per your request, attached is the information for the above mentioned property. Please note that NAS is due to proceed on this account on 04/15/2011, at that time this amount will increase. Please contact our office with any questions.

Please reference the property address when remitting payment. If complete address is not noted, payment will be returned and NAS will continue with collections.

Please note that if this is going to be paid through escrow, there will be additional fees owed. Please have the title company contact Nevada Association Services directly.

This demand may not include all management company transfer or document preparations fees, or other fees and costs. You must contact the management company directly for these additional amounts.

Thank you,

Yolaunda Erskine
Nevada Association Services, Inc.
6224 W. Desert Inn Rd.
Las Vegas, NV 89146
702-804-8885 Office
702-804-8887 Fax

MA

Lieberman, Melissa
2184 Pont National Dr

Madeira Canyon
Account No.: REDACTED
NAS #N 62616

Assessments, Late Fees, Interest, Attorneys Fees & Collection Costs *Dates of Delinquency:01/10-04/11*	Amount Present rate	Amount Prior Rate	Amount Prior rate	Amount Prior rate	Amount Prior rate
Balance forward	0.00	0.00	0.00	0.00	0.00
No. of Months Subject to interest	0	0	0	0	0
Interest due on Balance Forward	0.00	0.00	0.00	0.00	0.00
Quarterly Assessment Amount	162.00	210.00	180.00	234.00	0.00
No. of Months Delinquent	2	2	4	4	0
No. of Months Subject to Interest	0	0	0	0	0
Total Monthly Assessments due	324.00	420.00	720.00	936.00	0.00
Late fee amount	15.00	0.00	15.00	0.00	0.00
No. of Months Late Fees Incurred	1	0	4	0	0
Total Late Fees due	15.00	0.00	60.00	0.00	0.00
Interest Rate	0.12	0.12	0.12	0.12	0.12
Interest due	4.73	0.00	4.73	0.00	0.00
Special Assessment Due	0.00	0.00	0.00	0.00	0.00
Special Assessment Late Fee	0.00	0.00	0.00	0.00	0.00
Special Assessment Months Late	0	0	0	0	0
Special Assessment Interest Due	0.00	0.00	0.00	0.00	0.00
Transfer Fee	0.00	0.00	0.00	0.00	0.00
Mgmt Intent to Lien	0.00	0.00	0.00	0.00	0.00
Audit Fee	0.00	0.00	0.00	0.00	0.00
Management Co. Fee	0.00	0.00	0.00	0.00	0.00
Demand Letter	135.00	0.00	0.00	0.00	0.00
Lien Fees	325.00	0.00	0.00	0.00	0.00
Prepare Lien Release	30.00	0.00	0.00	0.00	0.00
Certified Mailing	56.00	0.00	0.00	0.00	0.00
Recording Costs	57.00	0.00	0.00	0.00	0.00
Pre NOD Ltr	75.00	0.00	0.00	0.00	0.00
Payment Plan Fee	0.00	0.00	0.00	0.00	0.00
Breach letters	0.00	0.00	0.00	0.00	0.00
Personal check returns	0.00	0.00	0.00	0.00	0.00
Escrow demand fee	0.00	0.00	0.00	0.00	0.00
Collection Costs on Violations	0.00	0.00	0.00	0.00	0.00
Subtotals	$1,021.73	$420.00	$784.73	$936.00	$0.00
Credit Date					
	(0.00)				
	(0.00)				
	(0.00)				
	(0.00)				
	(0.00)				
	(0.00)				
	(0.00)				
	(0.00)				
	(0.00)				
	(0.00)				
	(0.00)				
NAS fees & costs	(0.00)				
HOA TOTAL:	$3,852.46				

"Nevada Association Services Inc. is a debt collector. Nevada Association Services, Inc. is attempting to collect a debt. Any information obtained will be used for that purpose."

Printed: 3/12/2011

BANA 000206

Foreclosure Fees & Costs	Amount		Attorneys Cre	Date	
					(0.00)
Foreclosure Fees	400.00				(0.00)
Title Report	290.00		Collection Cre	Date	
Posting/Publication	0.00				(0.00)
Courier	0.00				(0.00)
Postponement of Sale	0.00				(0.00)
Conduct Sale	0.00				(0.00)
Prepare/Record Deed	0.00				(0.00)
(other)	0.00				(0.00)
(other)	0.00				(0.00)
(other)	0.00				(0.00)
					(0.00)
SUBTOTAL	$690.00				(0.00)
					(0.00)
					(0.00)
		$3,852.46			
FORECLOSURE TOTAL			Collection Credits Sub Total		$0.00

EXHIBIT "5"

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR STRUCTURED ASSET MORTGAGE INVESTMENTS II, INC., BEAR STEARNS MORTGAGE FUNDING TRUST 2006-AR4, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-AR4,
Appellant,
vs.
PREMIER ONE HOLDINGS, INC., A NEVADA CORPORATION,
Respondent.

No. 76988-COA

FILED
DEC 13 2019
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Wells Fargo Bank, National Association (Wells Fargo), appeals from a district court order granting summary judgment in a quiet title action. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

The original owner of the subject property failed to make periodic payments to the Silverado Court Landscape Maintenance Corporation (the HOA). The HOA's foreclosure agent recorded a series of notices of delinquent assessments and later a notice of default and election to sell to collect on the past due assessments and other fees pursuant to NRS Chapter 116. After recording the notice of default (but years before the resulting foreclosure sale), the HOA foreclosure agent sent a letter to the predecessor in interest to appellant Wells Fargo—the holder of the first deed of trust on the property—informing it that the HOA planned to nonjudicially foreclose on the property if its lien for delinquent assessments remained unsatisfied. The letter stated that "[t]he [HOA]'s Lien for

Delinquent Assessments is Junior only to the Senior Lender/Mortgage Holder," but it further stated that "[t]his Lien may affect your position."

Ultimately, the HOA conducted its foreclosure sale, where respondent Premier One Holdings, Inc. (Premier One), purchased the property. Premier One then filed the underlying action to quiet title to the property and seeking a declaration that it acquired the property free and clear of Wells Fargo's interest. The parties later filed dueling motions for summary judgment, and the district court ruled in favor of Premier One, finding that the foreclosure sale extinguished Wells Fargo's interest and that equity did not require the court to set aside the sale. This appeal followed.

This court reviews a district court's order granting summary judgment de novo. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.* When deciding a summary judgment motion, all evidence must be viewed in a light most favorable to the nonmoving party. *Id.* General allegations and conclusory statements do not create genuine issues of fact. *Id.* at 731, 121 P.3d at 1030-31.

On appeal, Wells Fargo argues that summary judgment was improper because no evidence in the record shows that the HOA possessed or foreclosed upon a superpriority interest. Assuming without deciding that an HOA can opt to foreclose only upon the subpriority portion of its lien, we conclude that the record contains prima facie evidence—unrebutted by Wells Fargo—that the HOA foreclosed on the superpriority portion of its lien. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602, 172

P.3d 131, 134 (2007) ("If the moving party will bear the burden of persuasion, that party must present evidence that would entitle it to a judgment as a matter of law in the absence of contrary evidence."). Most notably, the HOA foreclosure agent's account ledger indicates that the original owner of the property failed to pay assessments in the months prior to the latest notice of delinquent assessment lien. *See* NRS 116.3116(2) (2013) (stating that an HOA lien is prior to a first security interest "to the extent of the assessments . . . which would have become due in the absence of acceleration during the 9 months immediately preceding *institution of an action to enforce the lien*" (emphasis added)); *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan Chase Bank, N.A.*, 133 Nev. 21, 26, 388 P.3d 226, 231 (2017) (recognizing that under the pre-2015 version of NRS 116.3116, serving a notice of delinquent assessments constitutes institution of an action to enforce the lien). Moreover, the publicly recorded notices and foreclosure deed indicate that the HOA foreclosed upon the entirety of its lien, not just a portion. *See Cuzze*, 123 Nev. at 602, 172 P.3d at 134.

To the extent Wells Fargo relies upon the letter sent to its predecessor in interest stating that the HOA's lien was junior to the first deed of trust, we note that the subjective belief of the HOA foreclosure agent could not alter the legal effect of the sale. *See Wells Fargo Bank, N.A. v. Radecki*, 134 Nev. 619, 621-22, 426 P.3d 593, 596-97 (2018) (recognizing that a party's subjective belief as to the effect of a foreclosure sale cannot alter the sale's actual effect). Moreover, to the extent Wells Fargo points to the letter as evidence of fraud, unfairness, or oppression warranting setting the sale aside, we note that Wells Fargo failed to produce any evidence showing that either it or the original holder of the first deed of trust actually relied on the letter or that it had any impact on the sale. *See Nationstar*

Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon, 133 Nev. 740, 748, 405 P.3d 641, 647 (2017) (noting that "inadequacy of price, however gross, is not in itself a sufficient ground for setting aside a trustee's sale absent additional proof of some element of fraud, unfairness, or oppression *as accounts for and brings about* the inadequacy of price" (emphasis added) (internal quotation marks omitted)).

Thus, we conclude that Wells Fargo's arguments are without merit and that no genuine issue of material fact exists to prevent summary judgment in favor of Premier One. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029.

Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED.[1]

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

[1]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

cc: Hon. Eric Johnson, District Judge
Smith Larsen & Wixom
Hong & Hong
Morris Law Center
Eighth District Court Clerk

EXHIBIT "6"

135 Nev., Advance Opinion 45

IN THE SUPREME COURT OF THE STATE OF NEVADA

SFR INVESTMENTS POOL 1, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND COPPER RIDGE COMMUNITY ASSOCIATION,
Appellants,
vs.
U.S. BANK, N.A., A NATIONAL BANKING ASSOCIATION, AS TRUSTEE FOR THE CERTIFICATE HOLDERS OF WELLS FARGO ASSET SECURITIES CORPORATION, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-AR4; AND NV WEST SERVICING, LLC, A NEVADA LIMITED LIABILITY COMPANY, AS TRUSTEE FOR NASHVILLE TRUST 2270,
Respondents.

No. 74532

FILED

SEP 26 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

Appeal from a district court summary judgment in a quiet title action. Eighth Judicial District Court, Clark County; Joanna Kishner, Judge.

Reversed and remanded.

Kim Gilbert Ebron and Athanasios E. Agelakopoulos, Jacqueline A. Gilbert, Howard C. Kim, and Diana S. Ebron, Las Vegas,
for Appellant SFR Investments Pool 1, LLC.

Alverson, Taylor & Sanders and Kurt R. Bonds and Trevor R. Waite, Las Vegas,
for Appellant Copper Ridge Community Association.

Snell & Wilmer LLP and Andrew M. Jacobs, Kelly H. Dove, and Holly E. Cheong, Las Vegas,
for Respondent U.S. Bank, N.A.

Noggle Law PLLC and Robert B. Noggle, Las Vegas,
for Respondent NV West Servicing, LLC.

BEFORE THE COURT EN BANC.

OPINION

By the Court, HARDESTY, J.:

In this homeowners' association (HOA) foreclosure case, the homeowner filed for bankruptcy protection under Chapter 11, which imposed an automatic stay on actions against her real property. The HOA subsequently sold the property at a foreclosure sale in violation of the stay. The purchaser, appellant SFR Investments Pool 1, LLC, sought to quiet title and obtained a retroactive annulment of the stay, which has the legal effect of validating the sale. The district court nevertheless set aside the sale on equitable grounds and granted summary judgment in favor of respondent U.S. Bank, N.A., finding that the HOA's foreclosure sale being conducted in violation of the bankruptcy stay on the property was evidence of unfairness and the sale price was inadequate.

We conclude that, although the retroactive annulment means that the sale did not legally violate the bankruptcy stay, it was reasonable for the district court to consider the bankruptcy stay in determining whether there was unfairness in the HOA foreclosure sale at the time it was held. However, the mere fact that the foreclosure sale was held in violation of the bankruptcy stay is not by itself evidence of unfairness. Because U.S. Bank failed to produce any evidence showing how the sale's violation of the automatic stay constituted unfairness, we reverse the district court's grant of summary judgment to U.S. Bank. Furthermore, because SFR met its burden of showing that the HOA foreclosure sale complied with the

procedures in NRS Chapter 116, which is conclusive proof that title vests with SFR, we remand with instructions for the district court to grant summary judgment in favor of SFR.

FACTS AND PROCEDURAL HISTORY

The property at issue is located in a Nevada neighborhood governed by an HOA. The previous homeowner obtained a loan from Wells Fargo Bank for $331,500 and eventually defaulted on the loan. In 2010, Wells Fargo recorded a notice of default and election to sell under the deed of trust, and then assigned the beneficial interest in the deed of trust to U.S. Bank. In July 2010, a notice of trustee's sale was recorded but, before U.S. Bank could sell the property, the homeowner filed for Chapter 11 bankruptcy protection in California, which resulted in an automatic stay on actions impacting the property. With this knowledge, U.S. Bank filed a motion for relief from the automatic stay so that it could foreclose upon the property, and the bankruptcy court granted it.

In July 2012, shortly before U.S. Bank was granted relief from the bankruptcy stay, Nevada Association Services (NAS), as an agent for the HOA, recorded a notice of delinquent assessment lien and then recorded its own notice of default and election to sell under the HOA lien. NAS never requested relief from the automatic stay from the bankruptcy court. On March 1, 2013, NAS, on behalf of the HOA, held a foreclosure sale where SFR purchased the property for $14,000, in violation of the automatic stay. U.S. Bank did not attend the sale or attempt to stop it. A week after the HOA's foreclosure sale, U.S. Bank proceeded with its own foreclosure sale of the property by filing a notice of trustee's sale and, several months later, held a foreclosure sale and sold the property to respondent NV West Servicing, LLC.

SFR filed a complaint for quiet title and injunctive relief against U.S. Bank on March 22, 2013. U.S. Bank asserted counterclaims against SFR, seeking, amongst other things, declaratory relief and quiet title. It also brought a third-party complaint, bringing NAS and the HOA into the action.

The parties moved for summary judgment in January 2017. SFR argued that the HOA's foreclosure sale had extinguished U.S. Bank's deed of trust and that the trustee's deed to SFR was conclusive proof that the sale was conducted in compliance with NRS Chapter 116, so as to vest title in SFR. U.S. Bank argued, among other things, that the HOA's foreclosure sale was void for violating the bankruptcy stay, and, even if it was not void, it was voidable because the sale had been commercially unreasonable. U.S. Bank claimed that it had had no reason to believe that NAS or the HOA would, or could, foreclose on the HOA lien without first seeking leave of the bankruptcy court, and also that it did not know about the HOA sale because it did not receive notice until five days after the sale. In its opposition, SFR asserted that it had just filed a motion in the bankruptcy court for a retroactive annulment of the automatic stay, which was pending while the district court considered the summary judgment motions. It also argued that the HOA had provided notice of the foreclosure sale to U.S. Bank by way of Wells Fargo, who was the servicer for the loan on behalf of the trustee at that time, and there was no irregularity in the sale process.

On May 15, 2017, the bankruptcy court issued a limited order retroactively annulling the bankruptcy stay. The order specifically stated that any acts taken by SFR "to enforce its remedies regarding the [p]roperty do not constitute a violation of the stay," and provided the same relief "for

any and all actions in support of the foreclosure taken with respect to the [p]roperty by the [HOA and its agent]." After the district court received the bankruptcy court's order, it ordered supplemental briefing on the impact of the retroactive annulment on equitable relief. U.S. Bank supplemented its initial briefing by arguing that the bankruptcy court's decision to retroactively annul the automatic stay does not mean that the sale was fair, especially when the HOA clearly violated the stay whereas U.S. Bank delayed its own foreclosure proceedings to first obtain relief from the stay, in accordance with the law. It further argued that the sale price, which was just 6 percent of the property's fair market value, was grossly inadequate, and that the automatic stay dissuaded higher bidders from offering a commercially reasonable price based on knowledge that the sale could be declared void for violating the stay. SFR argued that it had not known about the bankruptcy stay at the time of the HOA sale, that U.S. Bank provided no evidence the bankruptcy stay was considered by SFR or any other potential bidder when SFR bid on the property, and that there was legally no violation of the stay because it was retroactively annulled.

The district court granted U.S. Bank's motion for summary judgment. It determined that, though SFR had purchased the property from the HOA in violation of an automatic stay, the sale was no longer void because the bankruptcy court had retroactively annulled the stay. The district court then applied *Golden v. Tomiyasu*, 79 Nev. 503, 387 P.2d 989 (1963), to determine that the sale should be set aside on equitable grounds. The court found that the sale price was inadequate in light of both the fair market value of the property and the initial amount originally loaned for the property, and that the HOA foreclosure sale conducted in violation of the bankruptcy stay constituted evidence of fraud, oppression, or unfairness

related to the sale. The district court explained that it was reasonable for U.S. Bank to expect that any party seeking to foreclose on the property would first need to seek relief from the automatic stay, and that U.S. Bank could not have reasonably foreseen at the time of the sale that years later SFR would obtain a retroactive annulment of the stay. The district court never made specific findings that the stay affected the sale price. Thus, the district court set aside the HOA foreclosure sale. SFR[1] appealed.

DISCUSSION

We review a district court's decision to grant summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if "the pleadings and other evidence on file demonstrate that no genuine issue as to any material fact remains and that the moving party is entitled to a judgment as a matter of law." *Id.* (alteration and internal quotation marks omitted). All evidence "must be viewed in a light most favorable to the nonmoving party." *Id.* The party opposing a properly presented and supported summary judgment motion must "show the existence of a genuine issue of material fact." *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007); *see also* NRCP 56(e). If the opposing party bears the burden of persuasion on the issue at trial, "the party moving for summary judgment may satisfy the burden . . . by . . . 'pointing out . . . that there is an absence of evidence to support the nonmoving party's case.'" *Cuzze*, 123 Nev. at 602-03, 172 P.3d at 134 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

[1]The HOA similarly appealed and joined in SFR's arguments on appeal.

The filing of a bankruptcy petition imposes an automatic stay against the debtor's property. 11 U.S.C. § 362(a) (2012). In *LN Management LLC Series 5105 Portraits Place v. Green Tree Loan Servicing LLC*, we recognized that "a sale conducted during an automatic stay in bankruptcy proceedings is invalid." 133 Nev. 394, 395, 399 P.3d 359, 359 (2017). However, we did not address the impact on a sale where the bankruptcy court later issues a retroactive annulment of the stay. This type of relief from a stay "ratif[ies] retroactively any violation of the automatic stay which would otherwise be void." *In re Schwartz*, 954 F.2d 569, 573 (9th Cir. 1992) (discussing the bankruptcy court's power under 11 U.S.C. § 362(d), and explaining that "[i]f a creditor obtains retroactive relief under section 362(d), there is no violation of the automatic stay"). Therefore, the effect of SFR obtaining a retroactive annulment of the stay is that the otherwise void HOA sale, which violated the stay at the time it was made, is now valid.

The district court recognized the legal effect of the annulment and the validity of the HOA foreclosure sale in light of the retroactive annulment, but nevertheless, it relied on the HOA's violation of the stay to set aside the foreclosure on equitable grounds. Specifically, the district court determined that equity lay in favor of U.S. Bank because the inadequate sale price, coupled with the HOA foreclosure sale being conducted in violation of the automatic stay, constituted evidence of fraud, oppression, or unfairness related to the sale.

SFR takes issue with the district court's consideration of the bankruptcy stay as part of its equity analysis after the stay had been retroactively annulled by the bankruptcy court. SFR further argues that the district court erred in setting aside the foreclosure sale because the sale

price was not inadequate and U.S. Bank provided no evidence that the sale was unfair or that any unfairness brought about the sale price.

A foreclosure sale may be set aside if the price obtained is greatly inadequate and the sale is affected by some irregularity, such as evidence of fraud, oppression, or unfairness. *Golden*, 79 Nev. at 514, 387 P.2d at 995; *see also Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon (Shadow Canyon)*, 133 Nev. 740, 748-49, 405 P.3d 641, 647-48 (2017) (reaffirming this rule from *Golden*). Before granting equitable relief, the court "must consider the entirety of the circumstances that bear upon the equities." *Shadow Wood Homeowners Ass'n v. N.Y. Cmty. Bancorp, Inc.*, 132 Nev. 49, 63, 366 P.3d 1105, 1114 (2016). "This includes considering the status and actions of all parties involved, including whether an innocent party may be harmed by granting the desired relief." *Id.* at 64, 366 P.3d at 1115.

SFR purchased the property for $14,000, which was 6.1 percent of its fair market value, $228,000. Despite this low purchase price, we will not set aside a sale unless the low price is "account[ed] for and br[ought] about" by fraud, oppression, or unfairness in the sales process. *Golden*, 79 Nev. at 514, 387 P.2d at 995 (internal quotation marks omitted). The district court found the sale during the stay was unfair because, at the time of the sale, it was reasonable of U.S. Bank to expect that the HOA would seek relief from the automatic stay before foreclosing, and it was not reasonably foreseeable that the HOA's sale would become valid years later by retroactive annulment.

First, we conclude that even though the sale did not legally violate the retroactively annulled stay, it was proper of the district court to consider the stay in balancing the equities, as the court must consider all of

the circumstances surrounding the sale. *See Shadow Wood*, 132 Nev. at 63-64, 366 P.3d at 1114-15. The fact that the sale was in violation of a bankruptcy stay at the time the sale was held may be relevant to U.S. Bank's failure to act and the sale price. *See, e.g.*, *Golden*, 79 Nev. at 516, 387 P.2d at 995 (accounting for a list of irregularities that could justify a district court setting aside a sale, including selling property in a manner that prevents it from selling for full value). For example, it would be reasonable for a lender not to attend a foreclosure sale if it believes that the sale is being conducted in violation of a bankruptcy stay. And, it is possible that selling a home in violation of a bankruptcy stay, even if the stay is later retroactively annulled, could prevent bidders from attending the auction or offering a fair price.

However, we conclude that though the violation of the bankruptcy stay could hypothetically have been an unfairness that resulted in an inadequate sale price, U.S. Bank provided no evidence to show that it constituted an unfairness in this case. As the party challenging the foreclosure, U.S. Bank had the burden of establishing that the sale should be set aside on equitable grounds. *See Res. Grp., LLC ex rel. E. Sunset Rd. Tr. v. Nev. Ass'n Servs., Inc.*, 135 Nev., Adv. Op. 8, 437 P.3d 154, 156 (2019) (explaining that where "the purchaser demonstrated superior title by showing that it paid the sales price following a valid foreclosure sale," the party challenging the foreclosure has the burden of showing that the sale should be set aside).

U.S. Bank provided no evidence in the record to demonstrate that it chose not to protect its security interest or to attend the HOA foreclosure sale because of the automatic stay. Even assuming that a bank would not reasonably attend a foreclosure sale that violated an automatic

stay, U.S. Bank failed to present a factual basis that the sale was unfair.[2] It is established bankruptcy law that a retroactive annulment of a bankruptcy stay validates an otherwise void sale; therefore, the lawful action itself was not evidence of unfairness. *See In re Schwartz*, 954 F.2d at 573. U.S. Bank's counsel advanced arguments in its pleadings and in the hearings before the district court, but there is no evidence that any irregularity in the foreclosure proceedings affected the sale price. *See Nev. Ass'n Servs., Inc. v. Eighth Judicial Dist. Court*, 130 Nev. 949, 957, 338 P.3d 1250, 1255 (2014) (stating that "[a]rguments of counsel[, however,] are not evidence and do not establish the facts of the case" (second alteration in original) (internal quotation marks omitted)); *see also Wood*, 121 Nev. at 732, 121 P.3d at 1031 (observing that a party opposing summary judgment must "do more than simply show that there is some metaphysical doubt as to the operative facts" (internal quotation marks omitted)). Thus, we conclude that summary judgment for U.S. Bank was not proper because U.S. Bank failed to meet its burden to show that no genuine issue of material fact remained. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029.[3] We

---

[2]While there may be information in the record demonstrating that the property's sale price at U.S. Bank's subsequent foreclosure sale a few months later was much higher, the district court did not make this finding, and the parties do not raise this point before the court. *Shuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 438, 245 P.3d 542, 545 (2010) ("[S]earch[ing] the entire record, even though the adverse party's response does not set out the specific facts or disclose where in the record the evidence for them can be found, is unfair." (quoting *Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001)).

[3]SFR argues for the first time in its reply brief that the bankruptcy court had sole jurisdiction to enforce and annul the stay, and the district court lacked the power and jurisdiction to grant relief in light of the

conclude further that summary judgment for SFR was proper[4] because the record supports that the sale was properly, lawfully, and fairly carried out in compliance with NRS Chapter 116 and nothing in the record demonstrates why U.S. Bank failed to attend the sale or otherwise protect its interest in the property or how the automatic stay affected the sale price. *See Shadow Canyon*, 133 Nev. at 746, 405 P.3d at 646 (noting statutory presumptions in favor of the record titleholder and that the HOA's foreclosure sale complied with NRS Chapter 116's provisions).

---

annulment order. We decline to entertain these arguments. *See Bongiovi v. Sullivan*, 122 Nev. 556, 569 n.5, 138 P.3d 433, 443 n.5 (2006) (declining to consider arguments raised for the first time in a reply brief); *see also* NRAP 28(c) (limiting a reply brief to answering any matter set forth in the opposing brief).

SFR also argues that it is a bona fide purchaser and would be harmed by setting aside the foreclosure. Because we reverse the district court's grant of summary judgment to U.S. Bank, we decline to reach this issue.

[4]U.S. Bank argued before the district court that it lacked notice as an independent reason it should have been granted summary judgment. The district court did not rely on this argument and it is not advanced on appeal. Because U.S. Bank has not advanced the notice argument on appeal, it is waived. *See* NRAP 28(b); NRAP 28(a)(10)(A)-(B) (requiring the respondent to state its contentions and reasons why it should succeed on appeal); *see also Hillman v. I.R.S.*, 263 F.3d 338, 345 (4th Cir. 2001) (Hamilton, J., dissenting) ("[C]ommon sense dictates that if the [respondents] waived their right to have this court consider their alternative argument on appeal, they have also waived their right to have the district court now, following resolution of the appeal, consider it in the first instance."); *United States v. Guillen-Cruz*, 853 F.3d 768, 777 (5th Cir. 2017) (considering appellees' argument forfeited when they failed to raise it in their brief and "the facts supporting the [appellees'] argument . . . were readily available prior to briefing").

Accordingly, we reverse the district court's grant of summary judgment to U.S. Bank and remand with instructions for the district court to grant summary judgment in favor of SFR.

_____, J.
Hardesty

We concur:

_____, C.J.
Gibbons

_____, J.
Pickering

_____, J.
Parraguirre

_____, J.
Stiglich

_____, J.
Cadish

_____, J.
Silver

ROC
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Email: Yosuphonglaw@gmail.com

Attorney for NV Eagles, LLC.

DISTRICT COURT

CLARK COUNTY, NEVADA

MELISSA LIEBERMAN, an individual, on behalf of itself and all others similarly situated, Plaintiff, vs. MADERA CANYON HOMEOWNERS' ASSOCIATION, et al., Defendants. And related claims.	CASE NO.: A-13-685203-C DEPT. NO.: XXXII

RECEIPT OF COPY

RECEIPT OF COPY of NV Eagles, LLC's Post Trial Brief is hereby acknowledged this 29th day of January, 2020.

By _____
An employee of Akerman LLP
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89134

(A)

20061127-0002922

Fee: $32.00
N/C Fee: $0.00

11/27/2006 14:20:45
T20060207694
Requestor:
LAWYERS TITLE OF NEVADA

Charles Harvey MSH
Clark County Recorder Pgs: 19

LF1
Assessor's Parcel Number:
190-20-311-033
Return To: Pulte Mortgage, LLC

7475 S. Joliet St.
Englewood, CO 80112
Attn: Sales & Acquisitions

Prepared By: Pulte Mortgage, LLC

7475 South Joliet Street Englewood, Co 80112

~~Recording Requested By~~: Pulte Mortgage, LLC

7475 South Joliet Street
Englewood, Co 80112

REDACTED

[Space Above This Line For Recording Data]

DEED OF TRUST

MIN 100057400002772178
VRU# 1-888-679-6377

DEFINITIONS
Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.
(A) "Security Instrument" means this document, which is dated November 20, 2006 , together with all Riders to this document.
(B) "Borrower" is Melissa N Lieberman A Married Woman

Borrower is the trustor under this Security Instrument.
(C) "Lender" is Pulte Mortgage LLC

Lender is a Limited Liability Company
organized and existing under the laws of Delaware
Lender's address is 7475 South Joliet Street Englewood, CO 80112

(D) "Trustee" is Lawyers Title of Nevada

(E) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. **MERS is the beneficiary under this Security Instrument.** MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.
(F) "Note" means the promissory note signed by Borrower and dated November 20, 2006 .
The Note states that Borrower owes Lender Five Hundred Eleven Thousand Five Hundred Seventy-six And 00/100 Dollars
(U.S. $511,576.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than December 1, 2036 .
(G) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."
(H) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.
(I) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

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

(J) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.
(K) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.
(L) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.
(M) "Escrow Items" means those items that are described in Section 3.
(N) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.
(O) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.
(P) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.
(Q) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. Section 2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to

time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

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

TRANSFER OF RIGHTS IN THE PROPERTY

The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS. This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in the County [Type of Recording Jurisdiction]
of Clark [Name of Recording Jurisdiction]:
See attached legal description

Parcel ID Number: 190-20-311-033 which currently has the address of
2184 Pont National Dr [Street]
Henderson [City], Nevada 89044 [Zip Code]
("Property Address"):

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

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances

of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

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

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

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

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

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

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

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

3. Funds for Escrow Items. Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives

Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

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

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

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

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

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

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the

lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

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

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

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

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

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with

the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

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

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

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

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

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

9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable

attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

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

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

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

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

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

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. Sale of Note; Change of Loan Servicer; Notice of Grievance. The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be

one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

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

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

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

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

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

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

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

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

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

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

25. Assumption Fee. If there is an assumption of this loan, Lender may charge an assumption fee of U.S. $ **currency which does not exceed the amount set by HUD.**

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

Witnesses:

_____

Melissa N. Lieberman (Seal)
Melissa N Lieberman -Borrower

_____

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

STATE OF NEVADA
COUNTY OF Clark

This instrument was acknowledged before me on November 20, 2006 by Melissa N Lieberman

LESLIE B. BALES
NOTARY PUBLIC
STATE OF NEVADA
Date Appointment Exp: 03-26-2008
Certificate No: 92-0125-1

Leslie B. Bales, Notary Public

Mail Tax Statements To:
Melissa N Lieberman
2184 Pont National Dr, Henderson, NV 89044

PLANNED UNIT DEVELOPMENT RIDER

VRU# 1-888-679-6377 MIN# 100057400002772178

THIS PLANNED UNIT DEVELOPMENT RIDER is made this 20th day of November, 2006, and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Security Deed (the "Security Instrument") of the same date, given by the undersigned (the "Borrower") to secure Borrower's Note to Pulte Mortgage LLC

(the "Lender") of the same date and covering the Property described in the Security Instrument and located at: 2184 Pont National Dr, Henderson, NV 89044

[Property Address]

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

(the "Declaration"). The Property is a part of a planned unit development known as Provence Subdivision 7

[Name of Planned Unit Development]

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

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

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

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

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

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

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

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

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

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

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

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

Melissa N. Lieberman (Seal)
Melissa N Lieberman -Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

EXHIBIT "A"

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

Lot Seventy-Five (75) in Block One (1), of PROVENCE SUBDIVISION 7 as shown by map thereof on file in Book 127 of Plats, Page 62 in the office of the County Recorder of Clark County, Nevada.

Assessor's Parcel Number: **190-20-311-033**

Inst #: 201109190000030
Fees: $15.00
N/C Fee: $0.00
09/19/2011 08:00:30 AM
Receipt #: 916646
Requestor:
CORELOGIC
Recorded By: MSH Pgs: 2
DEBBIE CONWAY
CLARK COUNTY RECORDER

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

DocID# REDACTED
Tax ID: **190-20-311-033**
Property Address:
2184 Pont National Dr
Henderson, NV 89044-2006
NV0-ADT 14317143 9/10/2011

This space for Recorder's use

MIN #: 100057400002772178 MERS Phone #: 888-679-6377

ASSIGNMENT OF DEED OF TRUST

For Value Received, the undersigned holder of a Deed of Trust (herein "Assignor") whose address is **3300 S.W. 34th Avenue, Suite 101 Ocala, FL 34474** does hereby grant, sell, assign, transfer and convey unto **THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF CWALT, INC., ALTERNATIVE LOAN TRUST 2006-J8, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-J8** whose address is **101 BARCLAY ST - 4W, NEW YORK ,NY 10286** all beneficial interest under that certain Deed of Trust described below together with the note(s) and obligations therein described and the money due and to become due thereon with interest and all rights accrued or to accrue under said Deed of Trust.

Original Lender: **PULTE MORTGAGE LLC**
Made By: **MELISSA N LIEBERMAN A MARRIED WOMAN**
Trustee: **LAWYERS TITLE OF NEVADA**
Date of Deed of Trust: **11/20/2006** Original Loan Amount: **$511,576.00**

Recorded in **Clark County,NV** on: **11/27/2006**, book **20061127**, page **0002922** and instrument number **N/A**

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

IN WITNESS WHEREOF, the undersigned has caused this Assignment of Deed of Trust to be executed on 9/14/11

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

By: _____
Beverly Brooks, Assistant Secretary

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

On 9/14/2011 before me, Jovida AlvarezDiaz, Notary Public, personally appeared **Beverly Brooks**, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/~~are~~ subscribed to the within instrument and acknowledged to me that ~~he~~/she/~~they~~ executed the same in ~~his~~/her/~~their~~ authorized capacity(~~ies~~), and that by ~~his~~/her/~~their~~ signature(~~s~~) on the instrument the person(s), or the entity upon behalf of which the person(~~s~~) acted, executed the instrument.

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

WITNESS my hand and official seal.

Notary Public: Jovida AlvarezDiaz (Seal)
My Commission Expires: 1.20.2014

JOVIDA ALVAREZ DIAZ
Commission # 1877678
Notary Public - California
Los Angeles County
My Comm. Expires Jan 20, 2014

DocID# REDACTED

Inst #: 201010270002037
Fees: $14.00
N/C Fee: $0.00
10/27/2010 11:18:28 AM
Receipt #: 556066
Requestor:
PASION TITLE SERVICES
Recorded By: DHG Pgs: 1
DEBBIE CONWAY
CLARK COUNTY RECORDER

APN # 190-20-311-033
N62616

NOTICE OF DELINQUENT ASSESSMENT LIEN

In accordance with Nevada Revised Statutes and the Association's declaration of Covenants Conditions and Restrictions (CC&Rs), recorded on May 24, 2005, as instrument number 0002414 BK 20050524, of the official records of Clark County, Nevada, the Madeira Canyon, a planned community has a lien on the following legally described property.

The property against which the lien is imposed is commonly referred to as 2184 Pont National Drive Henderson, NV 89044 and more particularly legally described as: Provence Sub 7, Plat book 127, Page 62, Lot 75, Block 1 in the County of Clark.

The owner(s) of record as reflected on the public record as of today's date is (are):
Melissa N Lieberman

Mailing address(es):
2184 Pont National Drive, Henderson, NV 89044

*Total amount due through today's date is $2,254.73.
This amount includes late fees, collection fees and interest in the amount of $598.73.
* Additional monies will accrue under this claim at the rate of the claimant's regular assessments or special assessments, plus permissible late charges, costs of collection and interest, accruing after the date of the notice.
Nevada Association Services, Inc. is a debt collector. Nevada Association Services, Inc. is attempting to collect a debt. Any information obtained will be used for that purpose.

Dated: October 25, 2010

Winter Henrie

By: Winter Henrie, of Nevada Association Services, Inc., as agent for Madeira Canyon, a planned community.

When Recorded Mail To:
Nevada Association Services, Inc.
TS #N62616
6224 W. Desert Inn Road, Suite A
Las Vegas, NV 89146
Phone: (702) 804-8885 Toll Free: (888) 627-554

Inst #: 201012210000548
Fees: $15.00
N/C Fee: $0.00
12/21/2010 09:32:31 AM
Receipt #: 619017
Requestor:
FIRST AMERICAN NATIONAL DEF
Recorded By: TAH Pgs: 2
DEBBIE CONWAY
CLARK COUNTY RECORDER

APN # 190-20-311-033
NAS # N62616
First American Title Nevada/NDTS # 4914500-AJ
PropertyAddress: 2184 Pont National Drive

NOTICE OF DEFAULT AND ELECTION TO SELL UNDER HOMEOWNERS ASSOCIATION LIEN

IMPORTANT NOTICE

WARNING! IF YOU FAIL TO PAY THE AMOUNT SPECIFIED IN THIS NOTICE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE!

IF YOUR PROPERTY IS IN FORECLOSURE BECAUSE YOU ARE BEHIND IN YOUR PAYMENTS IT MAY BE SOLD WITHOUT ANY COURT ACTION and you may have the legal right to bring your account in good standing by paying all your past due payments plus permitted costs and expenses within the time permitted by law for reinstatement of your account. No sale date may be set until ninety (90) days from the date this notice of default was mailed to you. The date this document was mailed to you appears on this notice.

This amount is $3,112.73 as of December 17, 2010 and will increase until your account becomes current.

While your property is in foreclosure, you still must pay other obligations (such as insurance and taxes) required by your note and deed of trust or mortgage, or as required under your Covenants Conditions and Restrictions. If you fail to make future payments on the loan, pay taxes on the property, provide insurance on the property or pay other obligations as required by your note and deed of trust or mortgage, or as required under your Covenants Conditions and Restrictions, the Madeira Canyon, a planned community (the Association) may insist that you do so in order to reinstate your account in good standing. In addition, the Association may require as a condition to reinstatement that you provide reliable written evidence that you paid all senior liens, property taxes and hazard insurance premiums.

Upon your request, this office will mail you a written itemization of the entire amount you must pay. You may not have to pay the entire unpaid portion of your account, even though full payment was demanded, but you must pay all amounts in default at the time payment is made. However, you and your Association may mutually agree in writing prior to the foreclosure sale to, among other things, 1) provide additional time in which to cure the default by transfer of the property or otherwise; 2) establish a schedule of payments in order to cure your default; or both (1) and (2).

Following the expiration of the time period referred to in the first paragraph of this notice, unless the obligation being foreclosed upon or a separate written agreement between you and your Association permits a longer period, you have only the legal right to stop the sale of your property by paying the entire amount demanded by your Association.

To find out about the amount you must pay, or arrange for payment to stop the foreclosure, or if your property is in foreclosure for any other reason, contact: Nevada Association Services, Inc. on behalf of Madeira Canyon, a planned community, 6224 W. Desert Inn Road, Suite A, Las Vegas, NV 89146. The phone number is (702) 804-8885 or toll free at (888) 627-5544.

If you have any questions, you should contact a lawyer or the Association which maintains the right of assessment on your property.

NAS # N62616

Notwithstanding the fact that your property is in foreclosure, you may offer your property for sale, provided the sale is concluded prior to the conclusion of the foreclosure.

REMEMBER, YOU MAY LOSE LEGAL RIGHTS IF YOU DO NOT TAKE PROMPT ACTION.

NOTICE IS HEREBY GIVEN THAT NEVADA ASSOCIATION SERVICES, INC.

is the duly appointed agent under the previously mentioned Notice of Delinquent Assessment Lien, with the owner(s) as reflected on said lien being Melissa N Lieberman, dated October 25, 2010, and recorded on October 27, 2010 as instrument number 0002037 Book 20101027 in the official records of Clark County, Nevada, executed by Madeira Canyon, a planned community, hereby declares that a breach of the obligation for which the Covenants Conditions and Restrictions, recorded on May 24, 2005, as instrument number 0002414 BK 20050524, as security has occurred in that the payments have not been made of homeowner's assessments due from January 01, 2010 and all subsequent homeowner's assessments, monthly or otherwise, less credits and offsets, plus late charges, interest, trustee's fees and costs, attorney's fees and costs and Association fees and costs.

That by reason thereof, the Association has deposited with said agent such documents as the Covenants Conditions and Restrictions and documents evidencing the obligations secured thereby, and declares all sums secured thereby due and payable and elects to cause the property to be sold to satisfy the obligations.

Nevada Association Services, Inc. is a debt collector. Nevada Association Services, Inc. is attempting to collect a debt. Any information obtained will be used for that purpose.

Nevada Associations Services, Inc., whose address is 6224 W. Desert Inn Road, Suite A, Las Vegas, NV 89146 is authorized by the association to enforce the lien by sale.

Legal_Description: Provence Sub 7, Plat book 127, Page 62, Lot 75, Block 1 in the County of Clark

Dated: December 17, 2010

Autumn Fesel

By: Autumn Fesel, of Nevada Association Services, Inc.
on behalf of Madeira Canyon, a planned community

When Recorded Mail To:
Nevada Association Services, Inc.
6224 W. Desert Inn Road, Suite A
Las Vegas, NV 89146
(702) 804-8885
(888) 627-5544

Inst #: 201304010000723
Fees: $18.00
N/C Fee: $0.00
04/01/2013 08:56:03 AM
Receipt #: 1556402
Requestor:
NORTH AMERICAN TITLE SUNSET
Recorded By: MJM Pgs: 2
DEBBIE CONWAY
CLARK COUNTY RECORDER

APN# 190-20-311-033
11 digit number may be obtained at:
http://sandgate.co.clark.nv.us/cicsAssessor/ownr.htm

NOTICE OF FORECLOSURE SALE

Type of Document
(Example: Declaration of Homestead, Quit Claim Deed, etc.)

Recording requested by:

NORTH AMERICAN TITLE COMPANY

Return to:

Name NORTH AMERICAN TITLE COMPANY

Address 8485 W. SUNSET, STE. 111

City/State/Zip LAS VEGAS, NV 89113

This page added to provide additional information required by NRS 111.312 Sections 1-2
(An additional recording fee of $1.00 will apply.)

This cover page must be typed or printed clearly in black ink only.

CS12/03

APN # 190-20-311-033
Madeira Canyon, a planned community

NAS # N62616

Accommodation **NOTICE OF FORECLOSURE SALE**

WARNING! A SALE OF YOUR PROPERTY IS IMMINENT! UNLESS YOU PAY THE AMOUNT SPECIFIED IN THIS NOTICE BEFORE THE SALE DATE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE. YOU MUST ACT BEFORE THE SALE DATE. IF YOU HAVE ANY QUESTIONS, PLEASE CALL NEVADA ASSOCIATION SERVICES, INC. AT (702) 804-8885. IF YOU NEED ASSISTANCE, PLEASE CALL THE FORECLOSURE SECTION OF THE OMBUDSMAN'S OFFICE, NEVADA REAL ESTATE DIVISION, AT 1-877-829-9907 IMMEDIATELY.

YOU ARE IN DEFAULT UNDER A DELINQUENT ASSESSMENT LIEN, October 25, 2010. UNLESS YOU TAKE ACTION TO PROTECT YOUR PROPERTY, IT MAY BE SOLD AT A PUBLIC SALE. IF YOU NEED AN EXPLANATION OF THE NATURE OF THE PROCEEDINGS AGAINST YOU, YOU SHOULD CONTACT A LAWYER.

NOTICE IS HEREBY GIVEN THAT on 4/26/2013 at 10:00 am at the front entrance to the Nevada Association Services, Inc. 6224 West Desert Inn Road, Las Vegas, Nevada, under the power of sale pursuant to the terms of those certain covenants conditions and restrictions recorded on May 24, 2005 as instrument number 0002414 BK 20050524 of official records of Clark County, Nevada Association Services, Inc., as duly appointed agent under that certain Delinquent Assessment Lien, recorded on October 27, 2010 as document number 0002037 Book 20101027 of the official records of said county, will sell at public auction to the highest bidder, for lawful money of the United States, all right, title, and interest in the following commonly known property known as: 2184 Pont National Drive, Henderson, NV 89044. Said property is legally described as: Provence Sub 7, Plat book 127, Page 62, Lot 75, Block 1, official records of Clark County, Nevada.

The owner(s) of said property as of the date of the recording of said lien is purported to be: Melissa N Lieberman

The undersigned agent disclaims any liability for incorrectness of the street address and other common designations, if any, shown herein. The sale will be made without covenant or warranty, expressed or implied regarding, but not limited to, title or possession, or encumbrances, or obligations to satisfy any secured or unsecured liens. The total amount of the unpaid balance of the obligation secured by the property to be sold and reasonable estimated costs, expenses and advances at the time of the initial publication of the Notice of Sale is $8,505.07. Payment must be in cash or a cashier's check drawn on a state or national bank, check drawn on a state or federal savings and loan association, savings association or savings bank and authorized to do business in the State of Nevada. The Notice of Default and Election to Sell the described property was recorded on 12/21/2010 as instrument number 0000548 Book 20101221 in the official records of Clark County.

Nevada Association Services, Inc. is a debt collector. Nevada Association Services, Inc. is attempting to collect a debt. Any information obtained will be used for that purpose.

March 28, 2013

Nevada Association Services, Inc.
6224 W. Desert Inn Road, Suite A
Las Vegas, NV 89146 (702) 804-8885, (888) 627-5544

By: Elissa Hollander, Agent for Association and employee of Nevada Association Services, Inc.

When Recorded Mail To:
Nevada Association Services, Inc.
6224 W. Desert Inn Road, Suite A
Las Vegas, NV 89146

Inst #: 201307030002523
Fees: $18.00 N/C Fee: $0.00
RPTT: $1945.65 Ex: #
07/03/2013 01:15:08 PM
Receipt #: 1680130
Requestor:
UNDERWOOD PARTNERS LLC
Recorded By: RYUD Pgs: 3
DEBBIE CONWAY
CLARK COUNTY RECORDER

(3-1)

Please mail tax statement and
when recorded mail to:
Underwood Partners, LLC
180 Newport Center Dr., #230
Newport Beach, CA 92660

FORECLOSURE DEED

APN # 190-20-311-033
First American Title Nevada/NDTS
#4914500

NAS # N62616

The undersigned declares:

Nevada Association Services, Inc., herein called agent (for the Madeira Canyon, a planned community), was the duly appointed agent under that certain Notice of Delinquent Assessment Lien, recorded October 27, 2010 as instrument number 0002037 Book 20101027, in Clark County. The previous owner as reflected on said lien is Melissa N Lieberman. Nevada Association Services, Inc. as agent for Madeira Canyon, a planned community does hereby grant and convey, but without warranty expressed or implied to: Underwood Partners, LLC (herein called grantee), pursuant to NRS 116.31162, 116.31163 and 116.31164, all its right, title and interest in and to that certain property legally described as: Provence Sub 7, Plat book 127, Page 62, Lot 75, Block 1 Clark County

AGENT STATES THAT:
This conveyance is made pursuant to the powers conferred upon agent by Nevada Revised Statutes, the Madeira Canyon, a planned community governing documents (CC&R's) and that certain Notice of Delinquent Assessment Lien, described herein. Default occurred as set forth in a Notice of Default and Election to Sell, recorded on 12/21/2010 as instrument # 0000548 Book 20101221 which was recorded in the office of the recorder of said county. Nevada Association Services, Inc. has complied with all requirements of law including, but not limited to, the elapsing of 90 days, mailing of copies of Notice of Delinquent Assessment and Notice of Default and the posting and publication of the Notice of Sale. Said property was sold by said agent, on behalf of Madeira Canyon, a planned community at public auction on 6/7/2013, at the place indicated on the Notice of Sale. Grantee being the highest bidder at such sale, became the purchaser of said property and paid therefore to said agent the amount bid $30,000.00 in lawful money of the United States, or by satisfaction, pro tanto, of the obligations then secured by the Delinquent Assessment Lien.

Dated: June 7, 2013

Elissa Hollander

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

STATE OF NEVADA)
COUNTY OF CLARK)

On June 7, 2013, before me, Debbie Kluska, personally appeared Elissa Hollander personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged that he/she executed the same in his/her authorized capacity, and that by signing his/her signature on the instrument, the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and seal.

(Seal)

(Signature)

STATE OF NEVADA
DECLARATION OF VALUE

1. Assessor Parcel Number(s)
   a. 190-20-311-033
   b. _____
   c. _____
   d. _____
2. Type of Property:
   a. ☐ Vacant Land b. ☑ Single Fam. Res.
   c. ☐ Condo/Twnhse d. ☐ 2-4 Plex
   e. ☐ Apt. Bldg f. ☐ Comm'l/Ind'l
   g. ☐ Agricultural h. ☐ Mobile Home
   ☐ Other

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

3.a. Total Value/Sales Price of Property $ 381,134
b. Deed in Lieu of Foreclosure Only (value of property) ( )
c. Transfer Tax Value: $
d. Real Property Transfer Tax Due $ 1,945.65

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

5. Partial Interest: Percentage being transferred: 100 %

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

Signature _____ Capacity: NAS Employee/Agent for HOA

Signature _____ Capacity: _____

SELLER (GRANTOR) INFORMATION (REQUIRED)	**BUYER (GRANTEE) INFORMATION (REQUIRED)**
Print Name: Nevada Association Services (Agent)	Print Name: Underwood Partners, LLC
Address: 6224 W. Desert Inn Road	Address: 180 Newport Center Dr., #230
City: Las Vegas	City: Newport Beach
State: NV Zip: 89146	State: CA Zip: 92660

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

Print Name: Rick Simmons Escrow #
Address: 7471 Dean Martin #105
City: Las Vegas State: NV Zip: 89103

AS A PUBLIC RECORD THIS FORM MAY BE RECORDED/MICROFILMED

Inst #: 201310180001137
Fees: $19.00 N/C Fee: $25.00
RPTT: $0.00 Ex: #001
10/18/2013 11:05:13 AM
Receipt #: 1814309
Requestor:
TICOR TITLE LAS VEGAS
Recorded By: ANI Pgs: 4
DEBBIE CONWAY
CLARK COUNTY RECORDER

RECORDING REQUESTED BY AND MAIL TAX STATEMENTS TO:

NAME: NV Eagles LLC, a Nevada limited liability company
ADDRESS: 180 Newport Center Dr. #230
CITY/ST/ZIP: Newport Beach, CA 92660

APN: 190-20-311-033

Exempt 1

Grant, Bargain, Sale Deed

THIS INDENTURE WITNESS that the GRANTOR: Underwood Partners LLC, a Delaware limited liability company, for and in consideration of Ten Dollars ($10.00) and other good and valuable consideration, does hereby GRANT, BARGAIN, SELL AND CONVEY to NV Eagles LLC, a Nevada limited liability company, all that real property situated in the City of Henderson, County of Clark, State of Nevada, described as follows:

See Exhibit "A" attached hereto and incorporated herein

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any way appertaining to.

Witness my/our hand(s) this 18th day of September, 2013.

Underwood Partners, LLC, a Delaware limited liability company

By: TRP Management III, LLC, a Delaware limited liability company
Its Manager

By: TwinRock Partners, LLC, a Delaware limited liability company
Its Manager

By: _____
Alexander Philips
Its Manager

Exhibit "A"

Legally described as: Provence Sub 7, Plat Book 127, Page 62, Lot 75, Block 1 Clark County

STATE OF CALIFORNIA)
) SS.
COUNTY OF ORANGE)

On September 23, 2013, before me, Darleen N. Faragalli, a Notary Public in and for the State of California, personally appeared Alexander Philips, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF CALIFORNIA THAT THE FOREGOING PARAGRAPH IS TRUE AND CORRECT.

WITNESS my hand and official seal.

Signature Darleen N Faragalli

DARLEEN N. FARAGALLI
Commission # 1924644
Notary Public - California
Orange County
My Comm. Expires Mar 5, 2015

(Seal)

OPTIONAL SECTION

CAPACITY CLAIMED BY SIGNER

Though statute does not require the Notary to fill in the data below, doing so may prove invaluable to persons relying on the document.

☐ INDIVIDUAL

☐ CORPORATE OFFICER(S)
(Titles) _____

☐ PARTNER(S) ☐ LIMITED
☐ GENERAL

☐ ATTORNEY-IN-FACT

☐ TRUSTEE(S)

☐ GUARDIAN/CONSERVATOR

☒ OTHER: _____

SIGNER IS REPRESENTING:
Name of Person(s) or entity(ies)
TwinRock Partners, LLC, Manager of TRP Management III, LLC, Manager of Underwood Partners, LLC

OPTIONAL SECTION

THIS CERTIFICATE MUST BE ATTACHED TO THE DOCUMENT DESCRIBED AT RIGHT:

TITLE OR TYPE OF DOCUMENT Grant, Bargain, Sale Deed
NUMBER OF PAGES 2 DATE OF DOCUMENT September 18, 2013
SIGNER(S) OTHER THAN NAMED ABOVE None

STATE OF NEVADA
DECLARATION OF VALUE

1. Assessor Parcel Number(s)
   a. 190 - 20 - 311 - 033
   b. _____
   c. _____
   d. _____
2. Type of Property:
   a. ☐ Vacant Land b. ☑ Single Fam. Res.
   c. ☐ Condo/Twnhse d. ☐ 2-4 Plex
   e. ☐ Apt. Bldg f. ☐ Comm'l/Ind'l
   g. ☐ Agricultural h. ☐ Mobile Home
   ☐ Other

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

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

4. **If Exemption Claimed:**
   a. Transfer Tax Exemption per NRS 375.090, Section 1
   b. Explain Reason for Exemption: Transfer between parent and direct subsidiary company
5. Partial Interest: Percentage being transferred: _____ %

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

Signature _____ Capacity: Manager/Grantor

Signature _____ Capacity: _____

SELLER (GRANTOR) INFORMATION (REQUIRED)	**BUYER (GRANTEE) INFORMATION (REQUIRED)**
Print Name: Underwood Partners, LLC	Print Name: NV Eagles, LLC
Address: 180 Newport Center Dr. Suite 230	Address: 180 Newport Center Dr. Suite 230
City: Newport Beach	City: Newport Beach
State: CA Zip: 92660	State: CA Zip: 92660

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

Print Name: Ticor Title	Escrow # Accommodation
Address: 410 S. Rampart #330	
City: Las Vegas	State: NV Zip: 89145

AS A PUBLIC RECORD THIS FORM MAY BE RECORDED/MICROFILMED

(72)

20050524-0002414

Fee: $85.00
N/C Fee: $0.00

05/24/2005 12:15:53
T20050096435
Requestor:
PULTE HOMES OF NEVADA

Frances Deane OSA
Clark County Recorder Pgs: 72

WHEN RECORDED, RETURN TO:

APN: 190-19-413-044 et.al

Pulte Homes of Nevada
8345 West Sunset Road
Las Vegas, Nevada 89113-2092
Attention: Jeremy Fritz

DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS

FOR

MADEIRA CANYON, a planned community

485582.5 [5/19/05 1:36 PM]
0174614

DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS

FOR

MADEIRA CANYON, a planned community

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DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS

FOR

MADEIRA CANYON, a planned community

THIS DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS FOR MADEIRA CANYON, a planned community (this "Declaration") is made as of this 19th day of May, 2005, by PN II, Inc., a Nevada corporation d/b/a Pulte Homes of Nevada (the "Declarant").

ARTICLE 1
DEFINITIONS

1.1 General Definitions. Capitalized terms not otherwise defined in this Declaration shall have the meanings specified for such terms in the Uniform Common-Interest Ownership Act, N.R.S. § 116.001, et seq., as amended from time to time.

1.2 Defined Terms. The following capitalized terms shall have the general meanings described in the Act and for purposes of this Declaration shall have the specific meanings set forth below:

1.2.1 "Act" means the Uniform Common-Interest Ownership Act, N.R.S. § 116.001, et seq., as amended from time to time.

1.2.2 "Additional Property" means the real property located in Clark County, Nevada, which is described on **Exhibit B** attached to this Declaration, together with all buildings and other Improvements located thereon.

1.2.3 "Architectural Review Committee" means the committee of the Association to be created pursuant to **Section 6.11** of this Declaration.

1.2.4 "Areas of Common Responsibility" means (i) all Common Elements; (ii) all real property, and the Improvements situated thereon, located within the boundaries of a Unit that the Association is obligated to maintain, repair and replace pursuant to the terms of this Declaration or the terms of another Recorded document executed by the Declarant or the Association; (iii) all real property, and the Improvements situated thereon, for which the Association is obligated to maintain, repair and replace pursuant to the terms of the Covenant to Share Costs; and (iv) all real property, and the Improvements situated thereon, within or adjacent to the Community located within dedicated rights-of-way with respect to which the State of Nevada or any county or municipality has not accepted responsibility for the maintenance thereof, but only until such time as the State of Nevada or any county or municipality has accepted all responsibility for the maintenance, repair and replacement of such areas.

1.2.5 "Articles" means the Articles of Incorporation of the Association, as amended from time to time.

1.2.6 "Assessments" means the Common Expense Assessments, Special Assessments and Neighborhood Assessments levied and assessed against each Unit pursuant to **Article 7** of this Declaration.

1.2.7 "Assessment Lien" means the lien granted to the Association by the Act to secure the payment of Assessments, fines and other charges owed to the Association.

1.2.8 "Association" means Madeira Canyon Homeowners' Association, a Nevada nonprofit corporation, its successors and assigns.

1.2.9 "Association Rules" means the rules and regulations adopted by the Association, as amended from time to time.

1.2.10 "Board of Directors" means the Board of Directors of the Association.

1.2.11 "Builder" means a Unit Owner, other than Declarant, who has acquired title to one or more Units from Declarant (or any successor to Declarant) to construct Dwellings thereon for later sale to Unit Owners, or who has acquired title to one or more parcels of land within the Community for further subdivision, development and/or resale in the ordinary course of such Unit Owner's business.

1.2.12 "Bylaws" means the Bylaws of the Association, as amended from time to time.

1.2.13 "Common Elements" means any real estate within the Community owned or leased or designated by Declarant to be maintained by the Association, other than the Units.

1.2.14 "Common Expenses" means expenditures made by or financial liabilities of the Association, Including (i) the cost of maintenance, management, operation, repair and replacement of the Common Elements and all Improvements thereon, Including clustered mailboxes, private streets, sidewalks and entry gates (if any), street lights and private utility lines and other facilities and equipment not maintained by a utility provider; (ii) the cost of centrally metered utilities that serve the Units and/or the Common Elements and the cost of trash removal for the Units if so elected by the Board of Directors; (iii) the cost of insurance premiums for fire, liability, workers' compensation, directors, officers and agents liability and fidelity and any other insurance deemed appropriate by the Board of Directors, and the cost of compensation, wages, services, supplies and other expenses required for the administration and operation of the Association and for the maintenance and repair of that portion of the Community for which the Association has responsibility, Including fees, charges and costs payable to any governmental entity pursuant to law; (iv) the cost of rendering to the Unit Owners all services required to be rendered by the Association under the Governing Documents; (v) such amount as is established by the Association as a reserve for the cost of repair and replacement for the major components of the Common Elements, which may be used only for Common Expenses that involve major repairs or replacement and that may not be used for daily maintenance, Including repairing and

replacing private roads and sidewalks (if any); (vi) the cost of all obligations of the Association pursuant to the Covenant to Share Costs; (vii) such other funds as may be necessary to provide general operating reserves and reserves for contingencies and replacements deemed appropriate by the Board of Directors; and (viii) the cost of any other item or items incurred by the Association, for any reason whatsoever in connection with the Community for the common benefit of the Unit Owners.

1.2.15 "Common Expense Assessment" means the assessment levied against the Units pursuant to **Section 7.2** of this Declaration.

1.2.16 "Common Expense Liability" means the liability for Common Expenses allocated to each Unit by this Declaration.

1.2.17 "Community" means the real property located in Clark County, Nevada, which is described in **Exhibit A** attached to this Declaration, together with all Improvements located thereon, and any portion of the Additional Property that is annexed by the Declarant pursuant to **Section 2.10** of this Declaration, together with all Improvements located thereon.

1.2.18 "Covenant to Share Costs" means the Covenant to Share Costs for the Communities of Madeira Canyon Recorded contemporaneously with this Declaration.

1.2.19 "Declarant" means PN II, Inc., a Nevada corporation d/b/a Pulte Homes of Nevada, and its successors and any person or entity to whom it may transfer any Special Declarant's Right.

1.2.20 "Declarant Party" or **"Declarant Parties"** means collectively Declarant, the shareholders of Declarant, parent, affiliates and subsidiaries of Declarant, the officers, directors and employees of all of the foregoing, and as to **Section 11.20** of this Declaration, to the extent such Persons agree to be bound by **Section 11.20**, any contractors, subcontractors, brokers, suppliers, architects, engineers and any other Person providing materials or services in connection with the construction of any Improvement upon or benefiting the Community.

1.2.21 "Declaration" means this Declaration of Covenants, Conditions and Restrictions, as amended from time to time.

1.2.22 "Design Guidelines" means the rules and guidelines adopted by the Architectural Review Committee pursuant to **Section 6.11** of this Declaration, as amended or supplemented from time to time.

1.2.23 "Development Covenants" means a Recorded agreement between Declarant and a Builder or a Recorded declaration executed by a Builder pursuant to an agreement with the Declarant creating covenants running with the land in addition to the

covenants in this Declaration pertaining to the construction of Improvements on a portion of the Community owned by such Builder.

1.2.24 "Developmental Rights" means any right or combination of rights reserved by the Declarant in this Declaration to do any of the following:

(i) Add real estate to the Community;

(ii) Create Units, Common Elements and Limited Common Elements within the Community;

(iii) Subdivide Units or convert Units into Common Elements; or

(iv) Withdraw real estate from the Community.

1.2.25 "Dwelling" means any building, or portion of a building, situated upon a Unit and designed and intended for independent ownership and for use and occupancy as a residence.

1.2.26 "First Mortgage" means any mortgage or deed of trust on a Unit with first priority over any other mortgage or deed of trust on the same Unit.

1.2.27 "First Mortgagee" means the holder of any First Mortgage.

1.2.28 "Governing Documents" means this Declaration together with all Supplemental Declarations, the Articles, Bylaws, Design Guidelines, Association Rules and Covenant to Share Costs.

1.2.29 "Identifying Numbers" means the number assigned to a particular Unit that identifies only that one Unit in the Community and that is shown on a Plat as a "Lot Number."

1.2.30 "Improvement" means any physical structure, fixture or facility existing or constructed, placed, erected or installed on the land included in the Community, Including buildings, basketball hoops and poles, play equipment, private drives, paving, fences, walls, hedges, plants, trees and shrubs of every type and kind.

1.2.31 "Include" or **"Including"** means include or including, without limitation.

1.2.32 "Limited Common Elements" means a portion of the Common Elements allocated by this Declaration or a Supplemental Declaration or as designated on a Plat or by operation of Subsection 2 or 4 of N.R.S. § 116.2102 for the exclusive use of the Unit Owners of one or more but fewer than all of the Units.

1.2.33 "Maintenance Standard" means the standard of maintenance of Improvements established from time to time by the Board of Directors or, in the absence of any standard established by the Board of Directors, the standard of maintenance of Improvements generally prevailing throughout the Community.

1.2.34 "Member" means any Person who is or becomes a member of the Association.

1.2.35 Neighborhood" means a portion of the Community designated in a Supplemental Declaration or a Neighborhood Declaration.

1.2.36 "Neighborhood Assessment" means an assessment levied against less than all of the Units in the Community pursuant to **Section 7.5** of this Declaration.

1.2.37 "Neighborhood Assessment Area" means a portion of the Community designated in a Supplemental Declaration as an area in which the Association will provide Neighborhood Services.

1.2.38 "Neighborhood Association" means a Nevada nonprofit corporation, its successors and assigns, formed as a condominium association or other owners association to have concurrent jurisdiction (subject to this Declaration) with the Association over any Neighborhood. Nothing in this Declaration shall require the creation of a Neighborhood Association for any Neighborhood.

1.2.39 "Neighborhood Common Elements" means any real estate within a Neighborhood owned or leased or designated by Declarant to be maintained by a Neighborhood Association, other than the Units.

1.2.40 "Neighborhood Declaration" means any declaration of covenants, conditions and restrictions, condominium declaration or similar instrument, other than this Declaration or a Supplemental Declaration, Recorded against any part of the Community.

1.2.41 "Neighborhood Expenses" means the actual or estimated expenses, Including allocations to reserves, incurred or anticipated to be incurred by the Association to provide Neighborhood Services to the Unit Owners and Residents in a Neighborhood Assessment Area.

1.2.42 "Neighborhood Services" means services designated in a Supplemental Declaration as being for the sole or primary benefit of the Unit Owners and Residents of a particular part of the Community, Including the maintenance, management, operation, repair and replacement of Limited Common Elements and all Improvements thereon within a Neighborhood Assessment Area.

1.2.43 "Period of Declarant Control" means the time period commencing on the date this Declaration is Recorded and ending on the earlier of:

(i) Sixty (60) days after the conveyance of seventy-five percent (75%) of the Units that may be created to Unit Owners other than the Declarant or a Builder; or

(ii) Five (5) years after all Declarants have ceased to offer Units for sale in the ordinary course of business; or

(iii) Five (5) years after any right to add new Units was last exercised.

1.2.44 "Person" means a natural person, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision or agency, or other legal or commercial entity.

1.2.45 "Plans" means the plans referred to in Subsection 5 of N.R.S. § 116.2109, Including drawings of Improvements that are filed with agencies that issue permits but do not need to be Recorded.

1.2.46 "Plat" means any subdivision plat Recorded against all or any part of the Community, and all amendments, replats, supplements and corrections thereto, and any subdivision plat that may be Recorded against any part of the Additional Property that is annexed by the Declarant pursuant to **Section 2.10** of this Declaration, and any amendments, replats, supplements or corrections thereto.

1.2.47 "Purchaser" means any Person, other than the Declarant or a Builder, who by means of a voluntary transfer becomes a Unit Owner, except for a Person who purchases a Unit and then leases it to the Declarant for use as a model in connection with the sale of other Units, or a Person who, in addition to purchasing a Unit, is assigned any Special Declarant's Right.

1.2.48 "Recording" means placing an instrument of public record in the office of the County Recorder of Clark County, Nevada, and **"Recorded"** means having been so placed of public record.

1.2.49 "Resident" means each individual occupying or residing in any Unit.

1.2.50 "Special Assessment" means any assessment levied against the Units pursuant to **Section 7.4** of this Declaration.

1.2.51 "Special Declarant's Rights" means rights reserved for the benefit of the Declarant in this Declaration or by the Act to do any of the following:

(i) Construct Improvements provided for in this Declaration or shown on the Plat or the Plans;

(ii) Exercise any Developmental Right;

(iii) Maintain sales offices, management offices, models, and signs advertising the Community and models;

(iv) Use easements through the Common Elements for the purpose of making Improvements within the Community or within the Additional Property;

(v) Make the Community subject to a master association;

(vi) Merge or consolidate the Community with another common-interest community of the same form of ownership; or

(vii) Appoint or remove any officer of the Association and any member of the Board of Directors during the Period of Declarant Control.

1.2.52 "Special Use Fees" means a special fee authorized by this Declaration that a Unit Owner, Resident or any other Person is obligated to pay to the Association over, above and in addition to any Common Expense Assessment, Neighborhood Assessment or Special Assessment imposed or payable hereunder. The amount of any Special Use Fee shall be determined in the sole discretion of the Board of Directors, provided all such fees shall be fair and reasonable.

1.2.53 "Supplemental Declaration" means a declaration Recorded pursuant to **Section 2.9** of this Declaration.

1.2.54 "Unit" means a physical portion of the Community designated for separate ownership or occupancy, the boundaries of which are described in **Section 2.5** of this Declaration.

1.2.55 "Unit Owner" means the Record owner (Including Declarant), whether one or more Persons, of beneficial or equitable title (and legal title if the same has merged with the beneficial or equitable title) to the fee simple interest of a Unit. Unit Owner shall not include Persons having an interest in a Unit merely as security for the performance of an obligation, or a lessee or tenant of a Unit. Unit Owner shall not include a purchaser under a purchase contract and receipt, escrow instructions or similar executory contracts that are intended to control the rights and obligations of the parties to executory contracts pending the closing of a sale or purchase transaction. In the case of a Unit, the fee simple title to which is vested in a trustee under a deed of trust, the Trustor shall be deemed to be the Unit Owner. In the case of a Unit, the fee simple title to which is vested in a trustee pursuant to a subdivision trust agreement or similar agreement, the beneficiary of any such trust who is entitled to possession of the Unit shall be deemed to be the Unit Owner.

1.2.56 "Visible From Neighboring Property" means, with respect to any given object, that such object is or would be visible to a person six (6) feet tall, standing at ground level on any part of a neighboring property, Including a Unit, Common Element, Neighborhood Common Element or street.

ARTICLE 2
SUBMISSION AND DEVELOPMENT OF PROPERTY; UNIT BOUNDARIES; ALLOCATION OF FRACTIONAL INTERESTS, VOTES AND COMMON EXPENSE LIABILITIES; EXPANSION OF COMMUNITY

2.1 Submission of Property. Declarant hereby submits the real property described on **Exhibit A** attached to this Declaration, together with all Improvements situated thereon and all easements, rights and appurtenances thereto, to the provisions of the Act for the purpose of creating a planned community in accordance with the provisions of the Act and hereby declares that the real property described on **Exhibit A** attached to this Declaration, together with all Improvements situated thereon, and all easements, rights and appurtenances thereto, and any part of the Additional Property annexed pursuant to **Section 2.10** of this Declaration, together with all Improvements situated thereon and easements, rights and appurtenances thereto, shall be held and conveyed subject to the terms, covenants, conditions and restrictions set forth in this Declaration.

2.2 Name of Planned Community. The name of the planned community created by this Declaration is Madeira Canyon.

2.3 Name of Association. The name of the Association is Madeira Canyon Homeowners' Association.

2.4 Identifying Numbers of Units. The Identifying Numbers of the Units are as set forth on **Exhibit A** and defined in **Subsection 1.2.29**.

2.5 Unit Boundaries.

2.5.1 The boundaries of each Unit are as shown on the Plat.

2.5.2 Declarant reserves the right to relocate the boundaries between adjoining Units owned by the Declarant, and between adjoining Units owned by Declarant and any Unit Owner with the written consent of such Unit Owner, and to reallocate each such Unit's votes in the Association and Common Expense Liabilities subject to and in accordance with the Act.

2.6 Allocation of Common Expense Liabilities. The liability for the Common Expenses of the Association shall be allocated equally among the Units. Accordingly, each Unit's fractional interest in the Common Expenses of the Association shall be 1/3. If the Community is expanded by the annexation of all or any part of the Additional Property pursuant to **Section 2.10** of this Declaration, the votes in the Association and the liability for the Common Expenses of the Association shall be reallocated in the manner set forth in **Subsection 2.10.1(iv)** of this Declaration. Nothing contained in this **Section 2.6** shall prohibit certain Common Expenses from being apportioned to particular Unit(s) under **Articles 5, 7** and other provisions of this Declaration.

2.7 Allocation of Votes in the Association. The total votes in the Association shall be equal to the number of Units in the Community. The votes in the Association shall be allocated equally among all the Units, with each Unit having one (1) vote.

2.8 Allocation of Limited Common Elements.

2.8.1 In addition to Limited Common Elements allocated by Declarant pursuant to a Supplemental Declaration, mailboxes will be Limited Common Elements allocated to the Units served.

2.8.2 A Limited Common Element may be reallocated by an amendment to this Declaration made in accordance with the provisions of N.R.S. § 116.2108.

2.8.3 The Board of Directors shall have the right, without a vote of the Members, to allocate as a Limited Common Element any portion of the Common Elements not previously allocated as a Limited Common Element. Any such allocation by the Board of Directors shall be made by an amendment to this Declaration.

2.9 Supplemental Declarations. Declarant reserves the right, but not the obligation, to Record one or more Supplemental Declarations against portions of the Community. A Supplemental Declaration may be Recorded as a part of an amendment annexing portions of the Additional Property to the Community or as a separate instrument and may (i) designate Limited Common Elements, (ii) designate Neighborhood Services for Neighborhood Assessment Areas, (iii) impose such additional covenants, conditions and restrictions as the Declarant determines to be appropriate for the Neighborhood Assessment Area, (iv) establish a Neighborhood Assessment pursuant to **Section 7.5** of this Declaration for a Neighborhood Assessment Area, and (v) impose any additional covenants, conditions and restrictions as Declarant deems reasonably necessary and appropriate, whether or not a Neighborhood Assessment Area is established. A Supplemental Declaration may be amended only by (a) the written approval or the affirmative vote, or any combination thereof, of the Unit Owners representing at least sixty-seven percent (67%) of the votes in the Association held by the Unit Owners of all of the Units subject to the Supplemental Declaration, (b) the written approval of the Board of Directors of the Association, and (c) the written approval of Declarant so long as Declarant owns any real property described on **Exhibit A** or **Exhibit B**. Such amendment shall certify that the amendment has been approved as required by this Section, shall be signed by the President or Vice President of the Association and Declarant, if Declarant then owns any real property described on **Exhibit A** or **Exhibit B**, and shall be Recorded.

2.10 Expansion of the Planned Community.

2.10.1 Declarant hereby expressly reserves the right, but not the obligation, to expand the planned community created by this Declaration, without the consent of the Association or any other Unit Owner, by annexing and submitting to this Declaration all or any portion of the Additional Property. The Declarant shall exercise its right to expand the planned

community by preparing and Recording an amendment or a Supplemental Declaration to this Declaration containing the following:

(i) a legal description of the portion of the Additional Property being annexed;

(ii) the number of Units being added by the annexation and the Identifying Number assigned to each new Unit;

(iii) a description of the Common Elements and Limited Common Elements created;

(iv) a reallocation to each Unit of a fractional undivided interest in the liability for Common Expenses of the Association and in the votes in the Association, all of which shall be allocated equally to each Unit; and

(v) a description of any Developmental Rights reserved by the Declarant within the Additional Property being annexed.

2.10.2 Unless otherwise provided in the amendment or Supplemental Declaration adding Additional Property, the effective date for reallocating to each Unit a fractional undivided interest in the liability for Common Expenses of the Association and in the votes in the Association shall be the date on which the amendment or Supplemental Declaration annexing additional Units is Recorded.

2.10.3 This option to expand the planned community shall expire fifteen (15) years from the date of the Recording of this Declaration.

2.10.4 The Additional Property may be added as a whole at one time or in one or more portions at different times, or it may never be added, and there are no limitations upon the order of addition or the boundaries thereof. The property submitted to the Community need not be contiguous, and the exercise of the option as to any portion of the Additional Property shall not bar the further exercise of the option as to any other portions of the Additional Property.

2.10.5 There are no limitations on the locations or dimensions of Improvements to be located on the Additional Property. No assurances are made as to what, if any, further Improvements will be made by Declarant on any portion of the Additional Property.

2.10.6 The Additional Property, when and if added to the Community, shall be subject to the use restrictions contained in this Declaration and shall be subject in all respect to the Governing Documents.

2.10.7 Any Improvements placed, constructed, replaced, or reconstructed on the Additional Property will be consistent with the existing Units in the Community as to quality of construction.

2.10.8 Declarant reserves the right to create and develop, directly or through Builders to which the various Units may be conveyed, up to an aggregate maximum of one thousand one hundred (1,100) improved Units in the Community to wit: three (3) Units on the real property described in **Exhibit A** and one thousand ninety-seven (1,097) Units on the Additional Property described in **Exhibit B**, in the event Declarant exercises its right of annexation pursuant to the terms of this Declaration. Declarant makes no representations, assurances or warranties whatsoever that: (i) all of such Units will be created or developed, nor that the Community will be completed in accordance with the plans for the Community as they exist on the date this Declaration is Recorded; (ii) any property subject to this Declaration will be committed to or developed for a particular use or for any use; (iii) the sequence, timing or location of further development; or (iv) the use of any property subject to this Declaration will not be changed in the future. Unless otherwise expressly provided elsewhere herein, any "Developmental Rights" or "Special Declarant's Rights" (as those terms are defined in the Act) reserved to Declarant in this Declaration may be exercised with respect to different portions of the Community or Additional Property at different times, and the exercise of such rights in a portion of the Community or Additional Property shall not necessitate the exercise of any such right in all or any portion of the remaining Community or Additional Property.

ARTICLE 3
EASEMENTS

3.1 Utility Easement. There is hereby created an easement upon, across, over and under the Common Elements for reasonable ingress, egress, installation, replacing, repairing or maintaining of all utilities, including gas, water, sewer, telephone, cable television and electricity. By virtue of this easement, it shall be expressly permissible for the providing utility company to erect and maintain the necessary equipment on the Common Elements, but no sewers, electrical lines, water lines, or other utility or service lines may be installed or located on the Common Elements except as initially designed, approved and constructed by the Declarant or as approved by the Board of Directors. The exercise of rights under this easement shall not unreasonably interfere with the rights granted under other Recorded easements on the Common Elements.

3.2 Easements for Ingress and Egress. There are hereby created easements for ingress and egress for pedestrian traffic over, through and across sidewalks, paths, walks, and lanes that from time to time may exist upon the Common Elements. There is also created an easement for ingress and egress for pedestrian and vehicular traffic over, through and across such driveways and parking areas upon the Common Elements as from time to time may be paved and intended for such purposes, except that such easements shall not extend to any Limited Common Elements. Such easements shall run in favor of and be for the benefit of the Unit Owners and Residents and their guests, families, tenants and invitees.

3.3 Unit Owners' Easements of Enjoyment.

3.3.1 Every Unit Owner shall have a right and easement of enjoyment in and to the Common Elements (Including the right to use any private streets necessary for ingress and egress to and from the Unit Owner's Unit), which right and easement shall be appurtenant to and shall pass with the title to every Unit, subject to the following provisions:

(i) The right of the Association to adopt reasonable rules and regulations governing the use of the Common Elements and to prohibit access to such portions of the Common Elements, such as landscaped areas, not intended for use by the Unit Owners and Residents;

(ii) The right of the Association to impose reasonable membership requirements and charge reasonable Special Use Fees for services to be rendered by the Association or for the use of any facility situated on the Common Elements;

(iii) The right of the Association to permit use of any recreational facility situated on the Common Elements by persons other than Unit Owners, Residents and their guests upon payment of Special Use Fees;

(iv) The right of the Association to convey the Common Elements or subject the Common Elements to a mortgage, deed of trust, or other security interest, in the manner and subject to the limitations set forth herein and in the Act;

(v) The right of the Association to change the use of a Common Element as provided in **Section 6.15**;

(vi) The right of the Association to delegate the rights of enjoyment to use Limited Common Elements exclusively to the Unit Owners within a Neighborhood Assessment Area who are paying Neighborhood Assessments to maintain such Limited Common Elements;

(vii) The right of the Association to organize and operate events and programs that utilize the recreational facilities for the purpose of generating funds for the Association, and the right of the Association to exclude Unit Owners from using such facilities during special events;

(viii) All rights and easements set forth in this Declaration, Including the rights and easements granted to the Declarant and Builders by **Sections 3.4 and 3.5** of this Declaration; and

(ix) The right of the Association to suspend the right of a Unit Owner and any Resident of the Unit to use the Common Elements for any period during which the Unit Owner or any Resident of the Unit is in violation of any provision of the Governing Documents; provided, however, that any such suspension shall not affect the easement granted pursuant to

Section 3.2 of this Declaration nor the right of a Unit Owner and such Unit Owner's family, Residents and guests to use any private streets necessary for ingress and egress to and from the Unit Owner's Unit, Including any area used for parking as permitted under this Declaration.

3.3.2 If a Unit is leased or rented, the lessee and the Residents residing with the lessee shall have the right to use the Common Elements during the term of the lease, and the Unit Owner shall have no right to use the Common Elements until the termination or expiration of the lease, except for the right to use any private streets necessary for ingress and egress to and from the Unit Owner's Unit.

3.3.3 The guests and invitees of any Unit Owner or other person entitled to use the Common Elements pursuant to **Subsection 3.3.1** of this Declaration or of any lessee who is entitled to use the Common Elements pursuant to **Subsection 3.3.2** of this Declaration may use the Common Elements provided they are accompanied by a Unit Owner, lessee or other person entitled to use the Common Elements pursuant to **Subsection 3.3.1 or 3.3.2** of this Declaration or as otherwise permitted by the Association Rules. The Board of Directors shall have the right to limit the number of guests and invitees who may use the Common Elements at any one time and may restrict the use of the Common Elements by guests and invitees to certain specified times.

3.3.4 A Unit Owner's right and easement of enjoyment in and to the Common Elements shall not be conveyed, transferred, alienated or encumbered separate and apart from a Unit. Such right and easement of enjoyment in and to the Common Elements shall be deemed to be conveyed, transferred, alienated or encumbered upon the sale of any Unit, notwithstanding that the description in the instrument of conveyance, transfer, alienation or encumbrance may not refer to such right and easement.

3.3.5 The provisions of this **Section 3.3** shall not apply to any of the Limited Common Elements that are allocated to one or more but less than all of the Units.

3.4 Declarant's and Builders' Use for Sales And Leasing Purposes.

3.4.1 Declarant and any Builder shall have the right and an easement to maintain sales and leasing offices, management offices, a design center, construction offices, model homes and parking areas (collectively, "Sales and Construction Facilities") throughout the Community and to maintain one or more advertising, identification or directional signs on the Common Elements or on the Units owned or leased respectively by Declarant and the applicable Builder. Declarant reserves the right, for itself and all Builders, to place Sales and Construction Facilities on any Units owned or leased respectively by Declarant and the applicable Builder and on any portion of the Common Elements in such number, of such size and in such locations as Declarant deems appropriate.

3.4.2 Declarant and Builders may from time to time relocate Sales and Construction Facilities to different locations within the Community. Upon the relocation of

Sales and Construction Facilities from a portion of the Community constituting a Common Element, Declarant and Builders may remove all personal property and fixtures therefrom.

3.4.3 Declarant shall have the right to restrict the use of the parking spaces on Common Elements, Including the right to reserve such spaces for use by prospective Unit purchasers, Declarant's employees and others engaged in sales, leasing, maintenance, construction and management activities.

3.4.4 The Declarant reserves the right, for itself and all Builders, to retain all personal property and equipment used in the sales, management, construction and maintenance of the Community that has not been represented to the Association as property of the Association. The Declarant reserves the right, for itself and all Builders, to remove from the Community any and all goods and Improvements used in development, marketing and construction, whether or not they have become fixtures.

3.4.5 The Declarant reserves the right, for itself and all Builders, to allow any gated entrances to remain open during business and construction hours for the period of time necessary to sell and construct all Units and other Improvements within the gated portion of the Community.

3.4.6 The Declarant reserves the right to erect temporary barriers on private streets to establish traffic patterns for the purpose of separating Sales and Construction Facilities between Declarant and Builders, or between Builders, or between Declarant, a Builder and/or occupied Dwellings.

3.4.7 Notwithstanding anything contained to the contrary in this **Section 3.4**, the rights of any Builder pursuant to this Section shall be subject to review and approval by the Declarant.

3.4.8 In the event of any conflict or inconsistency between this Section and any other provision of the Declaration, this Section shall control.

3.5 Declarant's Rights and Easements.

3.5.1 Declarant shall have the right and an easement on and over the Common Elements to construct the Common Elements and the Units shown on any Plat, the Plans and all other Improvements the Declarant may deem necessary and to use the Common Elements and any Units owned by Declarant for construction or renovation related purposes, Including the storage of tools, machinery, equipment, building materials, appliances, supplies and fixtures, and the performance of work in the Community. Any Builder shall have the right and an easement on and over the Common Elements and any Unit owned by such Builder for construction or renovation related purposes, Including the storage of tools, machinery, equipment, building materials, appliances, supplies and fixtures, as long as such activities have the prior written consent of the Declarant.

3.5.2 Declarant shall have the right and an easement on, over and under the Common Elements for the purpose of maintaining and correcting drainage of surface, roof or storm water. The easement created by this Subsection expressly includes the right to cut any trees, bushes, or shrubbery, to grade the soil or to take any other action reasonably necessary.

3.5.3 The Declarant and Builders shall have an easement through their respective Units for any access necessary to complete any renovations, warranty work or modifications to be performed by Declarant and Builders.

3.5.4 The Declarant shall have the right and an easement on, over, and through the Common Elements as may be reasonably necessary for the purpose of discharging its obligations and exercising Special Declarant's Rights whether arising under the Act or reserved in this Declaration.

3.5.5 In the event of any conflict or inconsistency between this Section and any other provision of the Declaration, this Section shall control.

3.6 Units' Easement in Favor of Association. In addition to any rights that the Association may have pursuant to Nevada Law, Including N.R.S. Chapter 40, the Units are hereby made subject to the following easements in favor of the Association and its directors, officers, agents, employees and independent contractors:

(i) For inspection of the Units and Limited Common Elements in order to verify the performance by Unit Owners of all items of maintenance and repair for which they are responsible;

(ii) For inspection, maintenance, repair and replacement of the Common Elements or Limited Common Elements situated in or accessible from such Units or Limited Common Elements;

(iii) For inspection, maintenance, repair and replacement of those portions of Units (if any) to be maintained by the Association as set forth in a Supplemental Declaration;

(iv) For correction of emergency conditions in one or more Units or Limited Common Elements or casualties to the Common Elements, the Limited Common Elements or the Units;

(v) For the purpose of enabling the Association, the Board of Directors or any other committees appointed by the Board of Directors to exercise and discharge their respective rights, powers and duties under the Governing Documents; and

(vi) For inspection, at reasonable times and upon reasonable notice to the Unit Owners, of the Units and the Limited Common Elements in order to verify that the

provisions of the Governing Documents are being complied with by the Unit Owners and Residents and their guests, tenants and invitees.

3.7 Easement Data. The Recording data required to be contained herein pursuant to N.R.S. § 116.2105(l)(m) for any easements or licenses appurtenant to or included in this common-interest community or to which any portion of this common-interest community is or may become subject by means of a reservation of this Declaration is as follows: The Recording data for all easements and licenses reserved pursuant to the terms of this Declaration is the same as the Recording data for this Declaration. The Recording data for any easements and licenses created by a Plat is the same as the Recording data for the Plat.

3.8 Easement for Unintended Encroachments. To the extent that any Unit or Common Element encroaches on any other Unit or Common Element as a result of the original construction shifting or settling, or alteration or restoration authorized by this Declaration or any other reason other than the intentional encroachment on the Common Elements or any Unit by a Unit Owner, a valid easement for the encroachment, and for the maintenance thereof, exists.

3.9 Wall Maintenance Easement. There is hereby created an easement on, over, under, through and across any Common Element that abuts a unit within the adjacent community known as Club at Madeira Canyon (the "Club Property") for reasonable ingress and egress for the purpose of maintaining, repairing and replacing any wall that is placed on the boundary line between such a unit and a Common Element. The easement granted herein shall be in favor of the Club at Madeira Canyon Unit Owner's Association, the Nevada nonprofit corporation that governs the Club Property (the "Club Association"), and the applicable owners of abutting units and shall be subject to the obligation of the Club Association and each applicable owner of a unit within the Club Property to restore any damage to the Common Element that occurs as a result of exercising its rights hereunder. If any wall described in this **Section 3.9** encroaches upon a Common Element, a valid easement for such encroachment does exist in favor of the applicable property owner.

ARTICLE 4
PERMITTED USES AND RESTRICTIONS

4.1 Architectural Control. Subject to the provisions of **Subsection 4.1.10** and **4.17.3** of this Declaration:

4.1.1 All Improvements constructed on Units shall be of new construction, and no buildings or other structures shall be removed from other locations on to any Unit.

4.1.2 No excavation or grading work shall be performed on any Unit without the prior written approval of the Architectural Review Committee.

4.1.3 No Improvement shall be constructed or installed on any Unit without the prior written approval of the Architectural Review Committee.

4.1.4 No addition, alteration, repair, change or other work that in any way alters the exterior appearance, Including the exterior color scheme of any Unit, or the Improvements located thereon, from their appearance on the date this Declaration is Recorded shall be made or done without the prior written approval of the Architectural Review Committee. No approval shall be required to repaint the exterior of a Dwelling in accordance with the originally approved color scheme.

4.1.5 Any Unit Owner desiring approval of the Architectural Review Committee for excavation or grading, or for the construction, installation, addition, alteration, repair, change or replacement of any Improvement that would alter the exterior appearance of a Unit, or the Improvements located thereon, shall submit to the Architectural Review Committee a written request for approval specifying in detail the nature and extent of the addition, alteration, repair, change or other work that the Unit Owner desires to perform. Any Unit Owner requesting the approval of the Architectural Review Committee shall also submit to the Architectural Review Committee any additional information, plans and specifications that the Architectural Review Committee may request. In the event that the Architectural Review Committee fails to approve or disapprove an application for approval within forty-five (45) days after the application, together with all supporting information, plans and specifications requested by the Architectural Review Committee have been submitted to it, the application shall be deemed to have been disapproved.

4.1.6 The approval by the Architectural Review Committee of any construction, installation, addition, alteration, repair, change or other work pursuant to this Section shall not be deemed a waiver of the Architectural Review Committee's right to withhold approval of any similar construction, installation, addition, alteration, repair, change or other work subsequently submitted for approval.

4.1.7 Upon receipt of approval from the Architectural Review Committee for any construction, installation, addition, alteration, repair, change or other work, the Unit Owner who had requested such approval shall proceed to perform, construct or make the addition, alteration, repair, change or other work approved by the Architectural Review Committee as soon as practicable and shall diligently pursue such work so that it is completed as soon as reasonably practicable unless the Architectural Review Committee establishes a schedule for the construction and completion of such work. A Unit Owner shall adhere to any schedule required by the Architectural Review Committee for (i) the completion of the design of a Unit or the design of an Improvement to a Unit; (ii) the commencement of the construction of a Unit or the construction of an Improvement to a Unit; (iii) the completion of the construction of a Unit or the construction of an Improvement to the Unit; or (iv) the issuance of a permit that is necessary for the occupancy of a Unit or for the use of an Improvement to a Unit. The Architectural Review Committee may impose and enforce a construction penalty against a Unit Owner who fails to adhere to a schedule as required pursuant to this Subsection if the maximum amount of the construction penalty and the schedule are set forth in a contract between the Unit Owner and the Association and the Unit Owner receives notice of the alleged violation that informs him that he has a right to a hearing on the alleged violation.

4.1.8 Any change, deletion or addition to the plans and specifications approved by the Architectural Review Committee must be approved in writing by the Architectural Review Committee.

4.1.9 The Architectural Review Committee shall have the right to charge a fee for reviewing requests for approval of any construction, installation, alteration, addition, repair, change or other work pursuant to this Section. The amount of the fee may include the reasonable costs incurred by the Architectural Review Committee for review of the request by architects, engineers or other professional persons deemed necessary by the Architectural Review Committee in its sole discretion.

4.1.10 The provisions of this Section do not apply to, and approval of the Architectural Review Committee shall not be required for, the construction, erection, installation, addition, alteration, repair, change or replacement of any Improvements made by, or on behalf of, the Declarant or any Builder, provided that each Builder has executed Development Covenants wherein all Improvements constructed by Builder are subject to the approval of the Declarant.

4.1.11 The approval required of the Architectural Review Committee pursuant to this Section shall be in addition to, and not in lieu of, any approvals or permits that may be required under any federal, state or local law, statute, ordinance, rule or regulation.

4.1.12 The approval by the Architectural Review Committee of any construction, installation, addition, alteration, repair, change or other work pursuant to this Section shall not be deemed a warranty or representation by the Architectural Review Committee as to the quality of such construction, installation, addition, alteration, repair, change or other work or that such construction, installation, addition, alteration, repair, change or other work conforms to any applicable building codes or other federal, state or local law, statute, ordinance, rule or regulation. Declarant, the Association, the Board of Directors, any party retained by the Architectural Review Committee as a consultant, any committee or member of any of the foregoing shall not be held liable for any claim whatsoever arising out of construction on or modifications to any Unit.

4.1.13 The Architectural Review Committee may condition its approval of plans and specifications upon the agreement by the Unit Owner submitting such plans and specifications to furnish to the Association a bond or other security acceptable to the Architectural Review Committee in an amount determined by the Architectural Review Committee to be reasonably sufficient to: (i) assure the completion of the proposed construction, installation, addition, alteration, repair, change or other work or the availability of funds adequate to remedy any nuisance or unsightly conditions occurring as a result of the partial completion of such construction, installation, addition, alteration, repair, change or other work, and (ii) to repair any damage that might be caused to any Area of Common Responsibility as a result of such work. Any such bond shall be released or security shall be fully refundable to the Unit Owner upon: (a) the completion of the construction, installation, addition, alteration, repair,

change or other work in accordance with the plans and specifications approved by the Architectural Review Committee; and (b) the Unit Owner's written request to the Architectural Review Committee, provided that there is no damage caused to any Area of Common Responsibility by the Unit Owner or its agents or contractors.

4.2 Residential Use. All Dwellings shall be used, improved and devoted exclusively to residential use. No trade or business may be conducted on any Unit or in or from any Dwelling, except that an Owner or other Resident of a Dwelling may conduct a business activity within a Dwelling so long as: (i) the existence or operation of the business activity is not apparent or detectable by sight, sound or smell from outside the Dwelling; (ii) the business activity conforms to all applicable zoning ordinances or requirements for the Community; (iii) the business activity does not involve regular visitation of the Unit by clients, customers, suppliers or other business invitees or the door-to-door solicitation of Unit Owners or other Residents in the Community and; (iv) the business activity is consistent with the residential character of the Community and does not constitute a nuisance or a hazardous or offensive use or threaten security or safety of other Residents in the Community, as may be determined from time to time in the sole discretion of the Board of Directors. The terms "business" and "trade" as used in this Section shall be construed to have ordinary, generally accepted meanings, and shall include any occupation, work or activity undertaken on an ongoing basis that involves the provision of goods or services to Persons other than the Residents of a provider's Unit and for which the provider receives a fee, compensation or other form of consideration, regardless of whether: (a) such activity is engaged in full or part time; (b) such activity is intended or does generate a profit; or (c) a license is required for such activity. The leasing of a Dwelling by the Unit Owner thereof shall not be considered a trade or business within the meaning of this Section, nor shall this Section apply to any activity conducted by or on behalf of the Association for the purpose of operating, maintaining or advancing the residential and recreational character of the Community.

4.3 Temporary Occupancy and Temporary Buildings. No trailer, basement of any incomplete building, tent, shack, garage or barn, and no temporary buildings or structures of any kind, shall be used at any time for a residence, either temporarily or permanently. Temporary buildings, trailers or other structures used during the construction of Improvements approved by the Architectural Review Committee shall be removed immediately after the completion of construction, and in no event shall any such buildings, trailer or other structures be maintained or kept on any property for a period in excess of twelve (12) months without the prior written approval of the Architectural Review Committee.

4.4 Nuisances; Construction Activities. No rubbish, clippings, refuse, scrap lumber or metal, grass, shrub or tree clippings, plant waste, compost, bulk materials or other debris of any kind (all collectively referred to hereinafter as "rubbish and debris") shall be kept, placed, stored or permitted to accumulate upon or adjacent to any Unit unless stored within an enclosed structure or container that has been approved by the Architectural Review Committee. No odors or loud noises shall be permitted to arise or emit from any Unit, and no other nuisance shall be permitted to exist or operate upon any Unit so as to be offensive or detrimental to any other

property in the vicinity thereof or to the residents of such property. Without limiting the generality of any of the foregoing provisions, no exterior speakers, horns, whistles, bells or other similar or unusually loud sound devices (other than devices used exclusively for safety, security or fire protection purposes), noisy or smoky vehicles, large power equipment or large power tools (excluding lawn mowers and other equipment utilized in connection with ordinary landscaping maintenance), inoperable vehicle, unlicensed off-road motor vehicles or other item that may unreasonably disturb other Unit Owners or Residents, or any equipment or item that may unreasonably interfere with television or radio reception within any Unit or the Area of Common Responsibility shall be located, used or placed on any portion of the Community without the prior written approval of the Architectural Review Committee. No loud motorcycles, dirt bikes or other loud mechanized vehicles may be operated on any portion of the Areas of Common Responsibility without the prior written approval of the Architectural Review Committee, which approval may be withheld for any reason whatsoever. Alarm devices used exclusively to protect the security of a Dwelling and its contents shall be permitted, provided that such devices do not produce annoying sounds or conditions as a result of frequently occurring false alarms. Each Unit Owner and Resident shall comply with all of the requirements of the local or state health authorities and with all other governmental authorities with respect to the occupancy and use of a Unit. Normal construction activities and parking in connection with the building of Improvements on a Unit or other property shall not be considered a nuisance or otherwise prohibited by this Declaration, but Units shall be kept in a neat and attractive condition during construction periods, trash and debris shall not be permitted to accumulate, and supplies of brick, block, lumber and other building materials will be piled only in such areas as may be approved in writing by the Architectural Review Committee. In addition, any construction equipment and building materials stored or kept on any Unit or other property during the construction of Improvements may be kept only in areas approved in writing by the Architectural Review Committee, which may also require screening of the storage areas. The Board of Directors, in its sole discretion, shall have the right to determine the existence of any such nuisance. The provisions of this Section shall not apply to construction activities of the Declarant.

4.5 Diseases and Insects. No person shall permit any thing or condition to exist upon any Unit or other property that will induce, breed or harbor infectious plant diseases or noxious insects.

4.6 Firearms. The discharge of firearms within the Community is prohibited. The term "firearms" Includes BB guns, pellet guns and other firearms of all types, regardless of size.

4.7 Repair of Building. No Dwelling, building or structure on any Unit shall be permitted to fall into disrepair and each such Dwelling, building and structure shall at all times be kept in good condition and repair and adequately painted or otherwise finished. In the event any Dwelling, building or structure is damaged or destroyed, then, subject to the approvals required by **Section 4.1** of this Declaration, such Dwelling, building or structure shall be immediately repaired or rebuilt or shall be demolished.

4.8 Antennas. No antenna, aerial, satellite television dish or other device for the transmission or reception of television or radio signals or any other form of electromagnetic radiation (a "Device") proposed to be erected, used or maintained outdoors on any portion of the Community, whether attached to a Dwelling or structure or otherwise, shall be erected or installed without the prior written consent of the Architectural Review Committee unless (i) applicable law prohibits the requirement for review and approval by the Architectural Review Committee, or (ii) the Design Guidelines and/or Association Rules permit installation of the Device without such review and approval. Even though a Unit Owner may not be required to obtain written approval from the Architectural Review Committee for a Device, a Unit Owner is required to comply with the Design Guidelines and/or the Association Rules to the extent that the Design Guidelines and/or Association Rules set forth guidelines, standards and procedures applicable to such Device. Failure by a Unit Owner to comply with the Design Guidelines and/or Association Rules with respect to a Device shall be deemed a violation of this Declaration in the same manner as if a Unit Owner had not obtained the prior written approval from the Architectural Review Committee for a Device that does require prior written approval.

4.9 Mineral Exploration. No Unit shall be used in any manner to explore for or to remove any water, oil or other hydrocarbons, minerals of any kind, gravel, earth or any earth substance of any kind.

4.10 Trash Containers and Collection. No garbage or trash shall be placed or kept on any Unit, except in covered containers of a type, size and style that are approved by the Architectural Review Committee or as required by the applicable governmental agency. In no event shall such containers be maintained so as to be Visible From Neighboring Property except to be made available for collection and then only for the shortest time reasonably necessary to effect such collection. All rubbish, trash, or garbage shall be removed from Units and other property and shall not be allowed to accumulate thereon. No incinerators shall be kept or maintained on any Unit. The Board of Directors shall have the right to contract with one or more third parties (Including a municipality) for the collection of garbage, trash or recyclable materials for the benefit of the Unit Owners and Residents, with any costs to be Common Expenses or billed separately to the Unit Owners at the sole discretion of the Board of Directors. The Board of Directors shall have the right to adopt rules and regulations regarding garbage, trash, trash containers and collection.

4.11 Clothes Drying Facilities. No outside clotheslines or other outside facilities for drying or airing clothes shall be erected, placed or maintained on any Unit so as to be Visible From Neighboring Property.

4.12 Utility Service. No lines, wires, or other devices for the communication or transmission of electric current or power, Including telephone, television, and radio signals, shall be erected, placed or maintained anywhere in or upon any Unit unless the same shall be contained in conduits or cables installed and maintained underground or concealed in, under or on buildings or other structures approved by the Architectural Review Committee. No provision of this Declaration shall be deemed to forbid the erection of temporary power or telephone

structures incident to the construction of buildings or structures approved by the Architectural Review Committee.

4.13 Overhead Encroachments. No tree, shrub, or planting of any kind on any Unit shall be allowed to overhang or otherwise to encroach upon any sidewalk, street, pedestrian way or other area from ground level to a height of eight (8) feet without the prior approval of the Architectural Review Committee.

4.14 Animals. No animal, bird, fowl, poultry, reptile or livestock may be kept on any Unit, except that a reasonable number of generally recognized house or yard pets ("Permitted Pets") may be kept on a Unit if they are kept, bred or raised thereon solely as domestic pets and not for commercial purposes. All Permitted Pets shall be confined to a Resident's Unit except that a dog or cat may be permitted to leave a Resident's Unit if such dog or cat is at all times kept on a leash and is not permitted to enter upon any other Unit. No Permitted Pet shall be allowed to make an unreasonable amount of noise or to become a nuisance. No structure for the care, housing or confinement of a Permitted Pet shall be maintained so as to be Visible From Neighboring Property. Upon the written request of any Unit Owner or Resident, the Board of Directors shall determine, in its sole and absolute discretion, whether, for the purposes of this Section, (i) the number of Permitted Pets being kept on a Unit is reasonable, (ii) a particular Permitted Pet is a nuisance or making an unreasonable amount of noise, or (iii) a particular pet is a Permitted Pet. Any decision rendered by the Board of Directors shall be enforceable in the same manner as other restrictions set forth in this Declaration. Any Unit Owner, Resident or other person who brings or permits an animal to be on the Common Elements or any Unit shall be responsible for immediately removing any feces deposited by such animal. The Board of Directors shall have the right to adopt, amend and repeal additional rules and regulations governing the keeping of Permitted Pets in the Community.

4.15 Machinery and Equipment. No machinery or equipment of any kind shall be placed, operated or maintained upon or adjacent to any Unit, except: (i) such machinery or equipment as is usual and customary in connection with the use, maintenance or construction (during the period of construction) of a building, appurtenant structures, or other Improvements; and (ii) that which Declarant or the Association may require for the operation and maintenance of the Community.

4.16 Signs.

4.16.1 Subject to the provisions of **Subsection 4.16.2**, no signs whatsoever (Including commercial, political, "for sale," "for rent," "for lease" and similar signs) that are Visible From Neighboring Property shall be erected or maintained on any Unit except:

(i) Signs required by legal proceedings;

(ii) Signs that, by law, cannot be prohibited, provided that the Architectural Review Committee reserves the right to disallow and/or regulate the size and number of any such signs to the extent permitted by law; and

(iii) Residence identification signs provided the size, color, content and location of such signs have been approved in writing by the Architectural Review Committee.

4.16.2 So long as the Declarant owns any property described on **Exhibit A** or **Exhibit B**, "for sale," "for rent," "for lease" and "open house" signs are prohibited. When Declarant no longer owns any property described on **Exhibit A** or **Exhibit B**, the Board of Directors shall have the authority, but not the obligation, to permit such signs, and if so permitted, the Architectural Review Committee shall have the right to prescribe within the Design Guidelines the size, materials, color and format of such signs.

4.17 Restriction on Further Subdivision, Property Restrictions and Rezoning.

4.17.1 No Unit shall be further subdivided or separated into smaller units or parcels by any Unit Owner, no portion less than all of any such Unit shall be conveyed or transferred by any Unit Owner and two or more Units shall not be combined into fewer Units than originally shown on a Plat without the prior written approval of the Architectural Review Committee. If two or more Units are combined into fewer Units than as originally shown on a Plat pursuant to the prior written approval of the Architectural Review Committee and the approval of any other governmental authority, the provisions of **Article 6** and **Article 7** of this Declaration shall apply to such Units as originally shown on the Plat, and no diminution of voting rights or decrease in Assessments shall be applicable to the Units so combined. No Unit shall be made subject to any type of timesharing, fraction-sharing or similar program whereby the right to exclusive use of the Unit rotates among members of the program on a fixed or floating time schedule over a period of time. No further covenants, conditions, restrictions or easements shall be Recorded by any Unit Owner or other Person against any Unit without the provisions thereof having been first approved in writing by the Architectural Review Committee. No application for rezoning, variances or use permits pertaining to any Unit shall be filed with any governmental authority by any Person unless the application has been approved by the Architectural Review Committee and the proposed use otherwise complies with this Declaration.

4.17.2 All proposed site plans and subdivision plats for any unsubdivided portion of the Community or Additional Property must be approved in writing by the Architectural Review Committee prior to the Recording thereof or commencement of construction thereon. No proposed site plan or subdivision plat, and no application for rezoning, variances or use permits for any unsubdivided portion of the Community or Additional Property shall be submitted to the City of Henderson or any other governmental authority or agency unless the same has first been approved in writing by the Architectural Review Committee. No Neighborhood Declaration or further covenants, conditions, restrictions or easements shall be Recorded against any portion of the Community or Additional Property without the prior written approval of the Architectural Review Committee. Further, no changes or modifications shall be

made in any documents or instruments described in this **Subsection 4.17.2** after such documents or instruments have been approved by the Architectural Review Committee hereunder unless such changes or modifications have first been approved in writing by the Architectural Review Committee.

4.17.3 The provisions of **Subsections 4.17.1 and 4.17.2** do not apply to, and approval of the Architectural Review Committee shall not be required for, any actions made by, or on behalf of, the Declarant or any Builder, provided that any such Builder has executed Development Covenants wherein all such actions by Builder are subject to the approval of Declarant.

4.18 Trucks, Trailers, Campers and Boats. No truck, mobile home, travel trailer, tent trailer, trailer, camper shell, detached camper, recreational vehicle, boat, boat trailer, or other similar equipment or vehicle may be parked, maintained, constructed, reconstructed or repaired on any Unit or Common Element or on any street so as to be Visible From Neighboring Property without the prior written approval of the Architectural Review Committee, except for (i) the temporary parking of a recreational vehicle, mobile home, travel trailer, tent trailer, trailer, camper shell, detached camper, boat, boat trailer or other similar recreational equipment on the concrete driveway of a Unit or on a street for a period of not more than twenty-four (24) hours within any seven (7) day period for the purpose of loading, unloading and cleaning; (ii) temporary construction trailers or facilities maintained during, and used exclusively in connection with, the construction of any Improvement approved by the Architectural Review Committee; (iii) boats and similar recreational vehicles parked in garages on Units so long as such vehicles are in good operating condition and appearance and are not under repair; (iv) contractor and delivery vehicles temporarily parked in the street for loading, unloading and performing work on Units; and (v) motor vehicles not exceeding seven (7) feet in height and twenty-two (22) feet in length that are not used for commercial purposes and that do not display any commercial name, phone number or message of any kind and that are parked in the garage or on the concrete driveway situated on a Unit, provided that such vehicles shall not be parked in such a manner as to block the sidewalks or impede pedestrian traffic in any way.

4.19 Motor Vehicles.

4.19.1 Except for emergency vehicle repairs, no automobile or other motor vehicle shall be constructed, reconstructed or repaired upon a Unit or other property in the Community, and no inoperable vehicle may be stored or parked on any such Unit so as to be Visible From Neighboring Property or to be visible from any Common Element or any street.

4.19.2 No motorcycle, motorbike, all-terrain vehicle, off-road vehicle, motor scooter or any similar vehicle shall be parked, maintained or operated on any portion of the Community except such vehicles may be parked in garages of Units.

4.19.3 No automobile or other motor vehicle shall be parked on any road or street in the Community, except for automobiles or motor vehicles of guests of Unit Owners and

Residents that may be parked on a street in the Community. Except as permitted in **Section 4.18**, the parking of any vehicle on any street in the Community by a Unit Owner or a Resident is prohibited. Parking on unpaved portions of Units is prohibited.

4.19.4 Any Unit Owner or Resident desiring to operate or maintain a golf cart within the Community shall obtain and maintain a valid permit from the State of Nevada for such golf cart. The Board of Directors shall be entitled to establish additional rules and regulations governing golf carts, Including equipment required to be installed on golf carts in addition to equipment required by law. A Unit Owner or Resident shall not park or store a golf cart on any portion of his Unit except in the garage.

4.19.5 The Board of Directors shall have the right to establish additional rules and regulations governing the parking and operation of motor vehicles within the Community.

4.20 Towing of Vehicles. Upon compliance with applicable law, the Board of Directors shall have the right to have any truck, mobile home, travel trailer, tent trailer, trailer, camper shell, detached camper, recreational vehicle, boat, boat trailer or similar equipment or vehicle or any automobile, motorcycle, motorbike, or other motor vehicle that is parked, kept, maintained, constructed, reconstructed or repaired in violation of the Governing Documents towed away at the sole cost and expense of the owner of the vehicle or equipment. Any expense incurred by the Association in connection with the towing of any vehicle or equipment shall be paid to the Association upon demand by the owner of the vehicle or equipment. If the vehicle or equipment is owned by a Unit Owner, any amounts payable to the Association shall be secured by the Assessment Lien, and the Association may enforce collection of such amounts in the same manner provided for in the Declaration for the collection of Assessments.

4.21 Drainage. No Dwelling, structure, building, landscaping, fence, wall or other Improvement shall be constructed, installed, placed or maintained in any manner that would obstruct, interfere with or change the direction or flow of water in accordance with the drainage plans for the Community, or any part thereof, or for any Unit as shown on the drainage plans on file with the county or municipality in which the Community is located.

4.22 Sight Visibility Restriction Areas. The maximum height of any and all Improvements (Including landscaping) within any "Sight Visibility Zone," as set forth on a Plat, shall be restricted to a maximum height as set forth on such Plat. If any Improvement located within a Sight Visibility Zone of a Unit exceeds the maximum height permitted by the applicable Plat, the Association shall have the right (but not the obligation) to enter upon the Unit and to bring such Improvement into compliance pursuant to **Section 5.4** of this Declaration.

4.23 Special Restrictions for Swimming Pools. No swimming pool or spa shall be constructed or installed without the prior written consent of the Architectural Review Committee. Any swimming pool or spa that is proposed to be constructed within a rear yard where retaining walls have been constructed by Declarant or a Builder on or adjacent to the Unit shall submit to the Architectural Review Committee a letter from a structural engineer licensed

in Nevada certifying that the proposed swimming pool or spa has been designed to maintain the structural integrity of the walls of the swimming pool or spa and that such design will not place any lateral loads onto the retaining walls constructed on or adjacent to the Unit. A Unit Owner shall be responsible for any damage resulting from the construction of a swimming pool or spa in the rear yard of such Unit Owner's Unit. Neither the Declarant Parties, the Association (Including the Architectural Review Committee), nor any director, officer, agent, member or employee of any of the foregoing, shall be liable to any Unit Owner or Resident for any claims or damages resulting, directly or indirectly, from the construction and existence of a swimming pool or spa in a rear yard.

4.24 Garages. Garages shall be used only for the parking of vehicles and shall not be used or converted for living or recreational activities without the prior written approval of the Architectural Review Committee. Except for detached garages that are a part of Declarant's initial construction of the Community, detached garages are prohibited. Garages may be used for the storage of material so long as the storage of material does not result in inadequate parking for the motor vehicles of the Residents of a Unit. Garage doors shall remain closed at all times except when entering and exiting the garage and for a reasonable length of time during daytime hours while performing regular home maintenance activities.

4.25 Outdoor Fires. Outdoor cooking and outdoor fires shall be permitted only in devices prescribed in the Design Guidelines or as otherwise approved by the Architectural Review Committee.

4.26 Window Coverings. No window that would be Visible From Neighboring Property shall at any time be covered with aluminum foil, bed sheets, newspapers or any other like materials. No reflective materials shall be installed or used on any Improvement without the prior written consent of the Architectural Review Committee.

4.27 Insurance Rates; Violation of Law. No Unit Owner or Resident shall permit anything to be done or kept in or upon a Unit that will result in the cancellation or increase in premium, or reduction in coverage, of insurance maintained by any Unit Owner or the Association or that would be in violation of any law.

4.28 Rooftop Air Conditioners and Evaporative Coolers Prohibited. No air conditioning units, evaporative coolers or appurtenant equipment may be mounted, installed or maintained in any window or on the roof of any Dwelling or other building so as to be Visible From Neighboring Property without the prior written consent of the Architectural Review Committee.

4.29 Storage Structures; Storage of Materials. Storage buildings, sheds and other structures for the purpose of storage are prohibited. Storage of furniture, fixtures, appliances, machinery, equipment or other similar items is prohibited on any portion of a Unit that is Visible From Neighboring Property.

4.30 Sports Equipment; Play Structures. No basketball hoop or backboard, jungle gym, play equipment, sports court or other sports apparatus, whether temporary or permanent, shall be constructed, erected or maintained on any Unit without the prior written approval of the Architectural Review Committee.

4.31 Exterior Lighting. Any lights installed on a Unit shall comply with the applicable governmental ordinances, provided that no spotlights, flood lights or other high intensity lighting shall be placed or utilized upon any Unit that in any manner will allow light to be directed or reflected unreasonably upon any other Unit or Common Element.

4.32 Flag Displays. No flags shall be displayed or maintained on any Unit without the prior written approval of the Architectural Review Committee unless (i) applicable law prohibits the requirement for review and approval by the Architectural Review Committee, or (ii) the Design Guidelines and/or Association Rules permit display of the flag without such review and approval. Even though a Unit Owner may not be required to obtain written approval from the Architectural Review Committee for the display of a flag, a Unit Owner is required to comply with the Design Guidelines and/or Association Rules to the extent that the Design Guidelines and/or Association Rules set forth guidelines, standards and procedures applicable to the display of flags. Failure by a Unit Owner to comply with the Design Guidelines and/or Association Rules with respect to flag display shall be deemed a violation of this Declaration in the same manner as if a Unit Owner had not obtained the prior written approval from the Architectural Review Committee for display of a flag that does require prior written approval.

4.33 Leasing.

4.33.1 A Unit may be leased to a lessee from time to time by a Unit Owner provided that each of the following conditions is satisfied:

(i) A Unit may be leased only in its entirety. No fraction or portion of a Unit or Dwelling may be leased.

(ii) The lease or rental agreement must be in writing and for a term not less than six (6) months.

(iii) The lease or rental agreement must contain a provision that the lease or rental agreement is subject to this Declaration and all other Governing Documents and that any violation of any of the foregoing shall be a default under the lease or rental agreement.

(iv) Within ten (10) days after execution of a lease or rental agreement, the Unit Owner shall provide the Association with (a) a fully executed copy of the lease, (b) the names of the lessees and each person who will reside in the Dwelling, (c) the address and telephone number of the Unit Owner, and (d) any additional information as may be required by the Board of Directors.

(v) The Unit Owner shall make available to the lessee copies of all Governing Documents.

4.33.2 Any Unit Owner that leases or rents a Unit shall keep the Association informed at all times of the Unit Owner's address and telephone number. Any lease or rental agreement shall be subject to the Governing Documents, and any breach of the Governing Documents shall constitute a default under the lease or rental agreement, regardless of whether it so provides in the lease or rental agreement. If any lessee breaches any restriction contained in the Governing Documents, the Unit Owner, upon demand by the Association, immediately shall take such actions as may be necessary to correct the breach, Including, if necessary, eviction of the lessee. Notwithstanding the foregoing, the Association shall have all rights and remedies provided for under this Declaration and all other Governing Documents. The Association may impose a reasonable fee for the administrative costs associated with lease or rental agreements.

4.34 Variances; Diminution of Restrictions. The Architectural Review Committee or Board of Directors, as applicable, may, at the respective option of each and in extenuating circumstances, grant variances from the restrictions set forth in this **Article 4** if the Architectural Review Committee or the Board of Directors, as applicable, determines in its discretion that: (i) a restriction would create an unreasonable hardship or burden on a Unit Owner or Resident or a change of circumstances since the Recordation of this Declaration has rendered such restriction obsolete; and (ii) the activity permitted under the variance will not have any substantial adverse effect on the Unit Owners and Residents and is consistent with the high quality of life intended for Residents of the Community. Notwithstanding the foregoing, the Architectural Review Committee and the Board of Directors shall not grant variances permitting uses that are not consistent with applicable law. If any restriction set forth in this **Article 4** is adjudged or deemed to be invalid or unenforceable as written by reason of any federal, state or local law, ordinance, rule or regulation, then a court or the Board of Directors, as applicable, may interpret, construe, rewrite or revise such restriction to the fullest extent allowed by law so as to make such restriction valid and enforceable. Such modification shall not serve to extinguish any restriction not adjudged or deemed to be unenforceable. Upon expiration of the Period of Declarant Control and for so long as the Declarant owns any property described on **Exhibit A** or **Exhibit B**, any variance granted by the Architectural Review Committee or the Board of Directors shall be subject to review and approval by the Declarant, to the extent permitted by Nevada law.

ARTICLE 5
MAINTENANCE AND REPAIR

5.1 Duties of the Association. Unless otherwise provided in a Supplemental Declaration, the Association shall maintain, repair and replace all Areas of Common Responsibility. The cost of all such maintenance, repairs and replacements shall be a Common Expense and shall be paid for by the Association. The Board of Directors shall be the sole judge as to the appropriate maintenance of the Areas of Common Responsibility, and all Unit Owners shall cooperate with the Board of Directors in any way required by the Board of Directors in order for the Board of Directors to fulfill its obligations under this Section.

5.2 Duties of Neighborhood Associations. Any Neighborhood Association shall maintain its Neighborhood Common Elements and any other property for which it has maintenance responsibility in a manner consistent with the Governing Documents and in accordance with the Maintenance Standard. The Association may assume responsibility for property within any Neighborhood Association either by agreement with the Neighborhood Association or because, in the opinion of the Board of Directors, the level and quality of service then being provided is not consistent with the Maintenance Standard. All costs of maintenance pursuant to this Section shall be assessed by the Neighborhood Association only against the Units encumbered by the Neighborhood Declaration.

5.3 Duties of Unit Owners.

5.3.1 Each Unit Owner shall maintain, repair and replace, at such Unit Owner's expense, (i) all portions of such Unit Owner's Unit, (ii) all Improvements situated on the Unit, and (iii) any landscaping located between the boundary of the Unit and the pavement of a street. The foregoing Improvements shall be maintained in good condition and repair and in accordance with the Maintenance Standard. All grass, hedges, shrubs, vines and plants shall be irrigated, mowed, trimmed and cut at regular intervals so as to be maintained in a neat and attractive manner. Trees, shrubs, vines, plants and grass that die shall be promptly replaced with living foliage of like kind, unless different foliage is approved by the Architectural Review Committee. No yard equipment, wood piles or storage areas may be maintained so as to be Visible From Neighboring Property.

5.3.2 Each Unit Owner shall be liable to the Association for any damage to the Areas of Common Responsibility or for any damage to the Improvements on Units for which the Association has responsibility to maintain, if any, that results from the negligence or willful conduct of the Unit Owner. The cost to the Association of any repair, maintenance or replacements caused by the act of a Unit Owner shall be paid by the Unit Owner, upon demand, to the Association. The Association may enforce collection of any such amounts in the same manner and to the same extent as provided for in this Declaration for the collection of Assessments.

5.4 Unit Owner's Failure to Maintain. If a Unit Owner fails to maintain his Unit in good condition and repair and in accordance with the Maintenance Standard as required by this Declaration; or if any portion of a Unit is so maintained as to present a nuisance or as to substantially detract from the appearance or quality of the surrounding Units or other areas of the Community that are substantially affected thereby or related thereto; or if any portion of a Unit is being used in a manner that violates this Declaration; or if a Unit Owner is failing to perform any of his obligations under the Governing Documents, the Association may make a finding to such effect, specifying the particular condition or conditions that exist, and give notice to the offending Unit Owner that corrective action is required to be taken within fifteen (15) days after such notice is sent to the Unit Owner. If the required maintenance, repair or replacement has not been performed within such fifteen-day period of time, the Board of Directors shall be authorized and empowered, but shall not be obligated, to cause such maintenance, repair or

replacement to be performed at the Unit Owner's cost. The cost of any such maintenance, repair or replacement shall be assessed against the nonperforming Unit Owner pursuant to **Subsection 7.2.3** of this Declaration, shall be payable upon demand by the Association and shall be secured by the Assessment Lien. The requirements of this Section shall apply to any Neighborhood Association responsible for Neighborhood Common Elements within the Neighborhood in the same manner as if the Neighborhood Association were a Unit Owner and the Neighborhood Common Elements were a Unit.

5.5 Common Walls. The rights and duties of Unit Owners of Units with respect to common walls shall be as provided in this **Section 5.5**, subject to any contrary or additional provisions contained in a Supplemental Declaration or a Neighborhood Declaration.

5.5.1 The Unit Owners of contiguous Units who have a common wall shall both equally have the right to use such wall provided that the use by one Unit Owner does not interfere with the use and enjoyment of the wall by the other Unit Owner.

5.5.2 The adjoining Unit Owners shall each have the right to perform any necessary maintenance, repair or replacement of the common wall and the cost of such maintenance, repair or replacement shall be shared equally by the adjoining Unit Owners except as otherwise provided in this Section; provided, however, that if a Unit Owner elects to paint and/or stucco the side of the wall that faces his Unit, the Unit Owner shall be solely responsible for the cost thereof.

5.5.3 If a common wall is damaged or destroyed through the act of a Unit Owner, his agents, tenants, licensees, guests or family, it shall be the obligation of such Unit Owner to rebuild and repair the common wall without cost to the adjoining Unit Owner(s).

5.5.4 If a common wall is damaged or destroyed by some cause other than the act of one of the adjoining Unit Owners, his agents, tenants, licensees, guests or family (Including ordinary wear and tear and deterioration from lapse of time), then all adjoining Unit Owners shall rebuild or repair the common wall at their joint and equal expense.

5.5.5 The right of any Unit Owner to contribution from any other Unit Owner under this Section shall be appurtenant to the land and shall pass to such Unit Owner's successors in title.

5.5.6 In addition to meeting the other requirements of this Declaration and of any other building code or similar regulations or ordinances, any Unit Owner proposing to modify, make additions to or rebuild a common wall shall first obtain the written consent of the adjoining Unit Owner(s).

5.5.7 If a common wall encroaches upon a Unit or the Common Elements, a valid easement for such encroachment and for the maintenance of the common wall shall and does exist in favor of the Unit Owners of the Units that share the common wall.

5.6 Maintenance of Walls other than Common Walls.

5.6.1 Except for common walls and walls covered by **Subsections 5.6.2 through 5.6.5** below, and unless otherwise provided for in a Supplemental Declaration, walls located on a Unit shall be maintained, repaired and replaced by the Unit Owner.

5.6.2 Any wall that is placed on the boundary line between a Unit and the Common Elements shall be maintained, repaired and replaced by the Unit Owner, except that the Association shall be responsible for the repair and maintenance of the surface of the wall that faces the Common Elements. The Association shall have no responsibility for any structural repair and maintenance that would require rebuilding all or a portion of any such wall. If any wall described in this **Subsection 5.6.2** encroaches upon a Unit or the Common Elements, a valid easement for such encroachment and for the maintenance of the wall shall and does exist in favor of the Unit Owner or the Association, as applicable.

5.6.3 Any wall that is placed on the boundary line between a Unit and Neighborhood Common Elements shall be maintained, repaired and replaced by the Unit's Owner, except that the Neighborhood Association shall be responsible for the repair and maintenance of the surface of the wall that faces the Neighborhood Common Elements. The Neighborhood Association shall have no responsibility for any structural repair and maintenance that would require rebuilding all or a portion of any such wall. If any wall described in this **Subsection 5.6.3** encroaches upon a Unit or Neighborhood Common Element, a valid easement for such encroachment and for the maintenance of the wall shall and does exist in favor of the Unit Owner or the Neighborhood Association, as applicable.

5.6.4 Any wall that is placed on the boundary line between a Unit and public right-of-way shall be maintained, repaired and replaced by the Unit Owner except that the Association shall be responsible for the repair and replacement of the surface of the wall that faces the public right-of-way. The Association shall have no responsibility for any structural repair and maintenance that would require rebuilding all or a portion of any such wall

5.6.5 Any wall that is placed on a corner Unit to separate a side or rear yard from the adjacent street, whether or not the wall is placed on the boundary line between the Unit and the street right-of-way or placed totally within the boundaries of a Unit, shall be maintained, repaired and replaced by the Unit Owner, except that the Association shall be responsible for the repair and maintenance of the surface of the wall that faces the street. The Association shall have no responsibility for any structural repair and maintenance that would require rebuilding all or a portion of any such wall.

5.7 Maintenance of Retaining Walls. Earth retaining walls are designed to support and retain dry earth. A Unit Owner shall not permit excess water to saturate the retained earth and shall maintain the Unit so that surface waters flow freely away from retaining walls. No grass or other heavily irrigated landscape materials may be installed within three (3) feet from retaining walls. Any landscaping within three (3) feet from a retaining wall shall be drip

irrigated. A Unit Owner shall take all corrective action necessary to immediately repair any leaking irrigation pipes and correct any excess irrigation of plant materials that may cause the retained earth to become saturated. Each Unit Owner shall be responsible for any damage to retaining walls resulting from the failure to comply with this **Section 5.7**.

5.8 Installation of Landscaping. Unless previously installed by the Declarant or a Builder, within ninety (90) days after acquiring a Unit from the Declarant or a Builder, each Unit Owner shall install trees, grass, plants or other landscaping Improvements (together with any sprinkler system or drip irrigation system sufficient to adequately water the trees, grass, plants or other landscaping Improvements) within the front, side and rear yards of the Unit. Prior to installing the landscaping, a Unit Owner shall maintain all such yard areas in a weed-free and attractive manner. Notwithstanding anything herein to the contrary, all landscaping installed pursuant to this **Section 5.8** shall be approved by the Architectural Review Committee prior to installation.

5.9 Covenant to Share Costs. Declarant, the Association and the Club Association (defined in **Section 3.9**) have entered into a Covenant to Share Costs that has been Recorded contemporaneously herewith. The Covenant to Share Costs provides for, among other matters, (i) the designation of the party responsible for maintaining certain Improvements within the public rights-of-way known as Democracy Drive and Provence Drive, (ii) the allocation of costs for such maintenance between the Association and the Club Association, and (iii) the payment and reimbursement of such allocated costs between the Association and the Club Association. The rights and obligations granted and imposed by the Covenant to Share Costs are incorporated herein and made a part hereof.

ARTICLE 6
THE ASSOCIATION

6.1 Rights, Powers and Duties of the Association. No later than the date on which the first Unit is conveyed to a Person other than the Declarant, the Association shall be organized as a Nevada nonprofit corporation. The Association shall be the entity through which the Unit Owners shall act. The Association shall have such rights, powers and duties as are prescribed by law and as are set forth in the Governing Documents, together with such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Act. The Association shall have the right to finance capital Improvements in the Community by encumbering future Assessments if such action is approved by the written consent or affirmative vote of Unit Owners representing more than fifty percent (50%) of the votes in the Association.

6.2 Directors and Officers.

6.2.1 During the Period of Declarant Control, the Declarant shall have the right to appoint and remove the members of the Board of Directors and the officers of the

Association. Members of the Board of Directors and officers of the Association appointed by the Declarant are not required to be Unit Owners.

6.2.2 Upon the termination of the Period of Declarant Control, the Unit Owners shall elect the Board of Directors, which must consist of at least three (3) members, all of whom must be Unit Owners. The Board of Directors elected by the Unit Owners shall then elect the officers of the Association.

6.2.3 The Declarant may voluntarily surrender its right to appoint and remove the members of the Board of Directors and the officers of the Association before termination of the Period of Declarant Control, and in that event the Declarant may require, for the duration of the Period of Declarant Control, that specified actions of the Association or the Board of Directors, as described in a Recorded instrument executed by the Declarant, be approved by the Declarant before they become effective.

6.2.4 No later than sixty (60) days after the conveyance of twenty-five percent (25%) of the Units that may be created to Unit Owners other than the Declarant, at least one (1) member and not less than twenty-five percent (25%) of the members of the Board of Directors must be elected by Unit Owners other than the Declarant. Not later than sixty (60) days after the conveyance of fifty percent (50%) of the Units that may be created to Unit Owners other than the Declarant, not less than thirty-three and one-third percent (33-1/3%) of the members of the Board of Directors must be elected by Unit Owners other than the Declarant. Any member of the Board of Directors elected by Unit Owners pursuant to this Subsection shall be (i) a Unit Owner, or (ii) an officer, employee, agent or director of a corporate Unit Owner, a trustee or designated beneficiary of a trust that owns a Unit, a partner of a partnership that owns a Unit, a member or manager of a limited liability company that owns a Unit or a fiduciary of an estate that owns a Unit. Prior to having a person's name placed on a ballot for election of directors, such person shall take all actions required by Nevada law to prove such person's eligibility to serve on the Board of Directors. A person shall not be eligible to serve on the Board of Directors if, at the time a person's name is proposed to be placed on a ballot for election of directors, such person (or the Unit Owner if such person is an officer, employee, agent or director of a corporate Unit Owner) is not in material compliance with the provisions of the Governing Documents, Including the current payment of all Assessments, charges and other fees required thereunder.

6.2.5 The affairs of the Association shall be conducted by the Board of Directors and such officers as the Board of Directors may elect or appoint in accordance with the Articles and the Bylaws. Unless the Governing Documents specifically require the vote or written consent of the Members, approvals or actions to be given or taken by the Association shall be valid if given and taken by the Board of Directors. The Board of Directors, from time to time and subject to the provisions of this Declaration and the Act, shall have the power to impose construction penalties when authorized pursuant to **Subsection 4.1.7** of this Declaration and levy reasonable fines against a Unit Owner for a violation of the Governing Documents by the Unit Owner, a guest of the Unit Owner, a lessee of the Unit Owner or by any Resident of the Unit

Owner's Unit, provided that a fine may not be levied for a violation that is the subject of a construction penalty.

6.3 Association Rules. The Board of Directors, from time to time and subject to the provisions of this Declaration and the Act, may adopt, amend, and repeal rules and regulations (collectively, the "Association Rules"). Except as otherwise provided in this Declaration or under the Act, the Association Rules may, among other things, restrict and govern the use of any area within the Community by any Unit Owner, by the family of such Unit Owner, or by any invitee, licensee or lessee of such Unit Owner. Upon expiration of the Period of Declarant Control and for so long as Declarant owns any property described on **Exhibit A** or **Exhibit B**, the adoption, amendment and repeal of any rules and regulations by the Board of Directors shall be subject to review and approval of the Declarant, to the extent permitted by Nevada law.

6.4 Composition of Members. Each Unit Owner shall be a Member of the Association. The membership of the Association at all times shall consist exclusively of all the Unit Owners. A Unit Owner (Including Declarant and all Builders) of a Unit shall automatically, upon becoming the Unit Owner thereof, be a Member of the Association and shall remain a Member of the Association until such time as his ownership of the Unit ceases for any reason, at which time the Unit Owner's membership in the Association shall automatically cease.

6.5 Personal Liability. Neither Declarant Parties nor any member of the Board of Directors or of any committee of the Association, any officer of the Association nor any manager or other employee of the Association shall be personally liable to any Member, or to any other Person, Including the Association, for any damage, loss or prejudice suffered or claimed on account of any act, omission, error or negligence of the Declarant Parties, the Association, the Board of Directors, the manager, any representative or employee of the Association, or any committee, committee member or officer of the Association; provided, however, the limitations set forth in this Section shall not apply to any Person who has failed to act in good faith or has engaged in willful or intentional misconduct.

6.6 Implied Rights. The Association may exercise any right or privilege given to the Association expressly by the Governing Documents and every other right or privilege reasonably to be implied from the existence of any right or privilege given to the Association by the Governing Documents or reasonably necessary to effectuate any such right or privilege.

6.7 Voting Rights. Subject to **Section 6.8** below, each Unit Owner, Including Declarant, shall be entitled to cast one (1) vote for each Unit owned by such Unit Owner on any Association matter that is put to a vote of the membership in accordance with this Declaration, the Articles and/or Bylaws.

6.8 Voting Procedures. No change in the ownership of a Unit shall be effective for voting purposes unless and until the Board of Directors is given actual written notice of such change and is provided satisfactory proof thereof. The vote for each such Unit must be cast as a unit, and fractional votes shall not be allowed. In the event that a Unit is owned by more than

one (1) Person and such Unit Owners are unable to agree among themselves as to how their vote or votes shall be cast, they shall lose their right to vote on the matter in question. If any Member casts a vote representing a certain Unit, it will thereafter be conclusively presumed for all purposes that such Unit Owner was acting with the authority and consent of all other Unit Owners of the same Unit unless objection thereto is made at the time the vote is cast. In the event more than one (1) vote is cast by a Member for a particular Unit, none of the votes shall be counted and all of the votes shall be deemed void.

6.9 Transfer of Membership. The rights and obligations of any Member other than the Declarant shall not be assigned, transferred, pledged, conveyed or alienated in any way except upon transfer of ownership of a Unit and then only to the transferee of ownership to the Unit. A transfer of ownership to a Unit may be effected by deed, intestate succession, testamentary disposition, foreclosure of a mortgage of Record, or such other legal process as now in effect or as may hereafter be established under or pursuant to the laws of the State of Nevada. Any attempt to make a prohibited transfer shall be void. Any transfer of ownership to a Unit shall operate to transfer the membership appurtenant to said Unit to the new Unit Owner thereof. Each purchaser of a Unit shall notify the Association of its purchase within ten (10) days after becoming a Unit Owner.

6.10 Suspension of Voting Rights. If any Unit Owner fails to pay any Assessment or other amounts due to the Association under the Governing Documents within fifteen (15) days after such payment is due or if any Unit Owner violates any other provision of the Governing Documents and such violation is not cured within fifteen (15) days after the Association notifies the Unit Owner of the violation, the Board of Directors shall have the right to suspend the Unit Owner's right to vote until such time as all payments, including interest and attorneys' fees, are brought current and until any other infractions or violations of the Governing Documents are corrected.

6.11 Architectural Review Committee. The Association may, in the discretion of the Board of Directors from time to time, have an Architectural Review Committee to perform the functions of the Architectural Review Committee set forth in this Declaration. In the event no Architectural Review Committee is formed, the Board of Directors shall perform all functions of the Architectural Review Committee except as provided herein to the contrary or as waived in writing by the Board of Directors. The Architectural Review Committee shall be a Committee of the Board of Directors. The Architectural Review Committee shall consist of such number of regular members and alternate members as may be provided for in the Bylaws. So long as the Declarant owns any property described on **Exhibit A** or **Exhibit B**, the Declarant shall have the sole right to appoint and remove the members of the Architectural Review Committee. At such time as the Declarant no longer owns any property described on **Exhibit A** or **Exhibit B**, the members of the Architectural Review Committee shall be appointed by the Board of Directors. The Declarant may at any time voluntarily surrender its right to appoint and remove the members of the Architectural Review Committee, and in that event the Declarant may require, for so long as the Declarant owns any property described on **Exhibit A** or **Exhibit B**, that specified actions of the Architectural Review Committee, as described in a Recorded instrument executed by the

Declarant, be approved by the Declarant before they become effective. The Architectural Review Committee may adopt, amend and repeal Design Guidelines to be used in rendering its decisions. The Design Guidelines may Include provisions regarding: (i) the size of Dwellings; (ii) architectural design, with particular regard to the harmony of the design with the surrounding structures and topography; (iii) placement of Dwellings and other buildings; (iv) landscaping design, content and conformance with the character of the Community and permitted and prohibited plants; (v) requirements concerning exterior color schemes, exterior finishes and materials; (vi) signage; (vii) perimeter and screen wall design and appearance; and (viii) procedures to be used in the architectural review process. The decision of the Architectural Review Committee shall be final on all matters submitted to it pursuant to this Declaration.

6.12 Conveyance or Encumbrance of Common Element. The Common Elements shall not be mortgaged, transferred, dedicated or encumbered without the prior written consent or affirmative vote of Unit Owners representing at least sixty-seven percent (67%) of the votes in the Association. Upon the expiration of the Period of Declarant Control and for so long as the Declarant owns any property described on **Exhibit A** or **Exhibit B**, the Common Elements shall not be mortgaged, transferred, dedicated or encumbered without the prior written consent of the Declarant, to the extent permitted by Nevada law.

6.13 Provision of Services. The Association shall be authorized, but not obligated, to enter into and terminate, in the discretion of the Board of Directors, contracts or agreements with other entities, including Declarant and its affiliates, to provide services to and facilities for the Members of the Association, their guests, lessees and invitees and to charge Special Use Fees for such services and facilities. For example, some services and facilities that might be offered include landscape maintenance, pest control service, cable television service, utilities and similar services and facilities.

6.14 Contracts with Others for Performance of Association's Duties. Subject to the restrictions and limitations contained herein, and subject to applicable law, the Association may enter into contracts and transactions with others, Including Declarant and its affiliates, and such contracts or transactions shall not be invalidated or in any way affected by the fact that one or more directors or officers of the Association or members of any committee are employed by or otherwise connected with Declarant or its affiliates, provided that the fact of such interest shall be disclosed or known to the other directors acting upon such contract or transaction, and provided further that the transaction or contract is fair and reasonable. Any such director, officer or committee member may be counted in determining the existence of a quorum at any meeting of the Board of Directors or committee of which such person is a member that shall authorize any contract or transaction described above or grant or deny any approval sought by Declarant, its affiliates or any competitor thereof and may vote at the meeting to authorize any such contract, transaction or approval with like force and effect as if he were not so interested.

6.15 Change of Use of Common Elements. Upon (i) adoption of a resolution by the Board of Directors stating that in the opinion of the Board of Directors the then present use of a designated part of the Common Elements is no longer in the best interests of the Unit Owners,

(ii) the approval of such resolution by Unit Owners casting at least sixty-seven percent (67%) of the votes entitled to be cast by Unit Owners who are present in person or by proxy at a meeting duly called for such purpose and who are entitled to use such part of the Common Elements under the terms of this Declaration, and (iii) the prior written consent of the Declarant after the expiration of the Period of Declarant Control and for so long as the Declarant owns any property described on **Exhibit A** or **Exhibit B,** to the extent permitted by Nevada law, the Board of Directors shall have the power and right to change the use of such property (and in connection therewith, construct, reconstruct, alter or change the buildings, structures and Improvements thereon in any manner deemed necessary by the Board of Directors to accommodate the new use), provided such new use shall be (a) for the benefit of the Members and Residents, as determined by the Board of Directors, and (b) consistent with any deed restrictions, zoning and other municipal regulations restricting or limiting the use of the land. Notwithstanding the foregoing, if the new use requires the expansion of an existing building or structure or construction of a new building or structure, the Board of Directors shall first obtain the written consent of a majority of the Unit Owners and Residents who own Units or reside within five hundred (500) feet of the proposed location of such building or structure.

6.16 Powers of the Association Relating to Neighborhood Associations. The Association shall have the power to veto any action taken or contemplated to be taken by any Neighborhood Association that the Board of Directors reasonably determines to be adverse to the interest of the Association or its Members or inconsistent with the Maintenance Standard. The Association also shall have the power to require specific action to be taken by any Neighborhood Association in connection with its obligations and responsibilities, such as requiring specific maintenance or repairs or aesthetic changes to be effectuated and requiring that a proposed budget include certain items and that expenditures be made therefor. A Neighborhood Association shall take appropriate action required by the Association in a written notice within the reasonable time frame set by the Association in the notice. If the Neighborhood Association fails to comply, the Association shall have the right to effect such action on behalf of the Neighborhood Association and the cost to the Association for any such action, Including any administrative charge, shall be paid by the Neighborhood Association, upon demand, to the Association.

6.17 Commencement of Civil Action. With respect to any disputes or claims not subject to the requirements of **Section 11.20** of this Declaration, the Association may not commence a civil action without the prior written consent or affirmative vote of Unit Owners to which at least a majority of the votes of the Members of the Association are allocated. In addition to the notice and meeting requirements set forth in N.R.S. § 116.3115(9), at least ten (10) days before the Association commences a civil action, the Association shall provide a written statement to all Unit Owners that includes a reasonable estimate of the costs of the civil action, Including reasonable attorneys' fees, an explanation of the potential benefits of the civil action and the potential adverse consequences if the Association does not commence the action or if the outcome of the action is not favorable to the Association, and all other disclosures required by law. The provisions of this Section do not apply to a civil action that is commenced to (i) enforce the payment of an Assessment, (ii) enforce the Governing Documents, (iii) proceed

with a counterclaim, or (iv) protect the health, safety and welfare of the Members of the Association.

ARTICLE 7
ASSESSMENTS

7.1 Preparation of Budgets.

7.1.1 At least sixty (60) days before the beginning of each fiscal year of the Association commencing with the fiscal year in which the first Unit is conveyed to a Purchaser, the Board of Directors shall adopt (i) a budget for the Association containing an estimate of the annual revenue of the Association and an estimate of the total amount of funds that the Board of Directors believes will be required during the ensuing fiscal year to pay all Common Expenses (other than Common Expenses relating to Neighborhood Assessment Areas and Neighborhood Services that are to be assessed as Neighborhood Assessments, and except for the Common Expenses that are to be assessed against less than all of the Units pursuant to **Subsections 7.2.3 and 7.2.4** of this Declaration), including contributions to be made to the reserve fund, and (ii) a budget to maintain a reserve fund for the repair, replacement and restoration of the major components of the Common Elements prepared in accordance with applicable law.

7.1.2 Within thirty (30) days after the adoption of the budgets, the Board of Directors shall send to each Unit Owner a summary of the budgets (with the complete budgets available for review and/or copying at the Association's office upon request) and a statement of the amount of the Common Expense Assessment assessed against each Unit in accordance with **Section 7.2** of this Declaration and shall set a date for the meeting of the Unit Owners to consider ratification of the budgets not less than fourteen (14) nor more than thirty (30) days after mailing of the summary. Unless at that meeting a majority of all Unit Owners reject the budgets, the budgets are ratified, whether or not a quorum is present. If the proposed budgets are rejected, the periodic budgets last ratified by the Unit Owners must be continued until such time as the Unit Owners ratify subsequent budgets proposed by the Board of Directors. The failure or delay of the Board of Directors to prepare or adopt budgets for any fiscal year shall not constitute a waiver or release in any manner of a Unit Owner's obligation to pay such Unit Owner's allocable share of the Common Expenses as provided in **Section 7.2** of this Declaration, and each Unit Owner shall continue to pay the Common Expense Assessment against his Unit as established for the previous fiscal year until notice of the Common Expense Assessment for the new fiscal year has been established by the Board of Directors.

7.2 Common Expense Assessment.

7.2.1 For each fiscal year of the Association commencing with the fiscal year in which the first Unit is conveyed to a Purchaser, the total amount of the estimated Common Expenses set forth in the budget adopted by the Board of Directors (except for the Common Expenses relating to Neighborhood Assessment Areas and Neighborhood Services that are to be assessed as Neighborhood Assessments, and except for the Common Expenses that are to be

assessed against less than all of the Units pursuant to **Subsections 7.2.3 and 7.2.4** of this Declaration) shall be assessed against each Unit in proportion to the Unit's Common Expense Liability as set forth in **Section 2.6** of this Declaration, for the purpose of providing funds for the Association to pay Common Expenses. The amount of the Common Expense Assessment assessed pursuant to this **Subsection 7.2.1** shall be in the sole discretion of the Board of Directors. If the Board of Directors determines during any fiscal year that its funds budgeted or available for that fiscal year are, or will, become inadequate to meet all Common Expenses for any reason, including nonpayment of Assessments by Members, it may increase the Common Expense Assessment for that fiscal year and the revised Common Expense Assessment shall commence on the date designated by the Board of Directors.

7.2.2 Except as otherwise expressly provided for in this Declaration, all Common Expenses shall be assessed against all of the Units in accordance with **Subsection 7.2.1** of this Declaration.

7.2.3 If any Common Expense is caused by the misconduct of any Unit Owner, the Association shall assess that Common Expense exclusively against such Unit Owner's Unit.

7.2.4 Assessments to pay a judgment against the Association may be made only against the Units in the Community at the time the judgment was entered, in proportion to their Common Expense Liabilities.

7.2.5 All Assessments, fines and other fees and charges levied against a Unit shall be the personal obligation of the Unit Owner of the Unit at the time the Assessments, fines or other fees and charges became due. The personal obligation of a Unit Owner for Assessments, fines and other fees and charges levied against such Unit shall not pass to the Unit Owner's successors in title unless expressly assumed by them.

7.3 Builder Assessments; Declarant Subsidy.

7.3.1 With respect to any portion of the Community owned by a Builder but not yet subdivided into Units (an "Unsubdivided Parcel"), the applicable Builder shall be assessed for the maximum number of Units permitted on the Unsubdivided Parcel as set forth in the Development Covenants or in any Recorded instrument executed by Declarant and affecting the Unsubdivided Parcel until such time as the Unsubdivided Parcel has been subdivided, whereupon the applicable Builder then shall be assessed for each Unit shown on the Plat.

7.3.2 Declarant may, but shall not be obligated to, reduce the Common Expense Assessment for any fiscal year by payment of a subsidy, which shall be in addition to the Assessments paid by Declarant pursuant to **Section 7.2** and may be either a contribution or a loan, in Declarant's discretion. Any such subsidy shall be disclosed as a line item in the income portion of the budget, and if Declarant elects to provide the subsidy as a loan to the Association, such loan also shall be disclosed on the financial statement of the Association. Payment of such

subsidy in any year shall not obligate Declarant to continue payment of such subsidy in future years, unless otherwise provided in a written agreement between the Association and Declarant.

7.4 Special Assessments. In addition to Common Expense Assessments, the Association may levy, in any fiscal year of the Association, a Special Assessment applicable to that fiscal year only for the purpose of defraying, in whole or in part, the cost of any construction, reconstruction, repair or replacement of a capital improvement of the Common Elements, Including fixtures and personal property related thereto, or for any other lawful Association purpose, provided that any Special Assessment shall have first been approved by Unit Owners representing at least sixty-seven percent (67%) of the votes in the Association who are voting in person or by proxy at a meeting duly called for such purpose, which meeting was noticed in compliance with the requirements set forth in N.R.S. § 116.3115(9), as amended from time to time. Unless otherwise specified by the Board of Directors, Special Assessments shall be due thirty (30) days after they are levied by the Association and notice of the Special Assessment is given to the Unit Owners. After the expiration of the Period of Declarant Control and for so long as the Declarant owns any property described on **Exhibit A** or **Exhibit B**, any Special Assessment may be levied only if consented to or approved by the Declarant, to the extent permitted by Nevada law.

7.5 Neighborhood Assessments.

7.5.1 The purpose of a Neighborhood Assessment is to provide for the payment of (i) the expenses of repair, maintenance, upkeep and replacement of any Limited Common Element within a Neighborhood Assessment Area; (ii) the expenses of special services provided by the Association to the Units within the Neighborhood Assessment Area and not to the Unit Owners as a whole, Including special maintenance of Units or any Improvements thereon; and (iii) the extra bookkeeping and accounting expenses created by the Neighborhood Assessment Area.

7.5.2 Each Neighborhood Area Budget (defined below) shall be ratified by the Members owning Units within the Neighborhood Assessment Area in the manner provided in **Section 7.5.4** below and shall Include estimated expenditures for the following purposes: (i) the cost of maintenance, management, operation, repair and replacement of the Limited Common Elements and all Improvements thereon within the Neighborhood Assessment Area, (ii) the cost of insurance premiums for fire, liability, workers' compensation, and the cost of compensation, wages, services, supplies and other expenses required for the administration and operation of the Limited Common Elements within the Neighborhood Assessment Area; (iii) the costs of rendering to the Unit Owners all services required to be rendered by the Association under the Supplemental Declaration creating the Neighborhood Assessment Area; (iv) such amount as is established by the Association as a reserve for the cost of repair and replacement for the major components of the Limited Common Elements within the Neighborhood Assessment Area, which may be used only for Neighborhood Expenses that involve major repairs or replacement, and that may not be used for daily maintenance, (v) such other funds as may be necessary to provide general operating reserves and reserves for contingencies and replacements deemed

appropriate by the Board of Directors; and (vi) the cost of any other item or items incurred by the Association for any reason whatsoever in connection with the Neighborhood Assessment Area for the common benefit of the Unit Owners within the Neighborhood Assessment Area.

7.5.3 Each of the Neighborhood Assessments shall be levied against the Unit Owners, jointly and severally, of each of the Units within the applicable Neighborhood Assessment Area at a uniform rate per membership.

7.5.4 At such time as the Board of Directors meets for the purpose of preparing the proposed budgets described in **Subsection 7.1.1** for the next succeeding fiscal year, the Board of Directors also shall establish (i) a budget for the expenses of each Neighborhood Assessment Area within the Community containing an estimate of the annual revenue of the Neighborhood Assessment Area and an estimate of the total amount of funds that the Board of Directors believes will be required during the ensuing fiscal year to pay all Neighborhood Expenses, Including contributions to be made to the reserve fund, and (ii) a budget to maintain a reserve fund for the repair, replacement and restoration of the major components of the Limited Common Elements within the Neighborhood Assessment Area prepared in accordance with applicable law (collectively, with respect to each Neighborhood, the "Neighborhood Area Budgets"). Within thirty days after adoption by the Board of Directors of the proposed Neighborhood Area Budgets for each Neighborhood Assessment Area, the Board of Directors shall provide a summary of the applicable proposed Neighborhood Area Budgets to all Unit Owners within the Neighborhood Assessment Area, and the ratification of the Neighborhood Area Budgets shall be considered by the Unit Owners within the Neighborhood Assessment Area as a separate agenda item at the same meeting of the Members where the budgets for Common Expenses are considered for ratification. Unless at such meeting at least a majority of all Unit Owners within the applicable Neighborhood Assessment Area reject the Neighborhood Assessment Budgets, the Neighborhood Assessment Budgets are ratified, whether or not a quorum of such Unit Owners is present. If the proposed Neighborhood Assessment Budgets are rejected, the periodic Neighborhood Assessment Budgets last ratified by the applicable Neighborhood Assessment Area Unit Owners must be continued until such time as such Unit Owners ratify subsequent Neighborhood Area Budgets proposed by the Board of Directors. The failure or delay of the Board of Directors to prepare or adopt Neighborhood Area Budgets for any fiscal year shall not constitute a waiver or release in any manner of a Unit Owner's obligation to pay such Unit Owner's allocable share of the Neighborhood Expenses as provided in this **Section 7.5**, and each Unit Owner shall continue to pay the Neighborhood Assessment against such Unit as established for the previous fiscal year until notice of the Neighborhood Assessment for the new fiscal year has been established by the Board of Directors.

7.5.5 Any additional or increased services for a Neighborhood Assessment Area that were not initially provided for in the Supplemental Declaration for such Neighborhood Assessment Area and any additional capital improvements to the Limited Common Elements within the Neighborhood Assessment Area ("Special Neighborhood Assessment") shall not be authorized unless such Special Neighborhood Assessment shall have first been approved by Unit Owners representing at least sixty-seven percent (67%) of the votes in the Neighborhood

Assessment Area who are voting in person or by proxy at a meeting duly called for such purpose, which meeting was noticed in compliance with the requirements set forth in N.R.S. § 116.3115(9), as amended from time to time. Unless otherwise specified by the Board of Directors, Special Neighborhood Assessments shall be due thirty (30) days after they are levied by the Association and notice of the Special Neighborhood Assessment is given to the Unit Owners within the applicable Neighborhood Assessment Area. After the expiration of the Period of Declarant Control and for so long as the Declarant owns any property described on **Exhibit A** or **Exhibit B**, any Special Neighborhood Assessment may be levied only if consented to or approved by the Declarant, to the extent permitted by Nevada law.

7.6 Assessment Period. The period for which the Common Expense Assessment is to be levied (the "Assessment Period") shall be the calendar year. The first Assessment Period, and the obligation of the Unit Owners to pay Common Expense Assessments, shall commence upon the conveyance of the first Unit to a Purchaser and shall be adjusted according to the number of months remaining in the fiscal year of the Association. The Board of Directors, in its sole discretion from time to time, may change the Assessment Period.

7.7 Commencement Date of Assessment Obligation. Until the conveyance of the first Unit to a Purchaser, the Declarant shall pay all Common Expenses. All Units described on **Exhibit A** to this Declaration shall be subject to Assessments upon the conveyance of the first Unit to a Purchaser. Units annexed pursuant to **Section 2.10** of this Declaration shall be subject to Assessments on the date that the amendment annexing the additional Units is Recorded or upon the conveyance of the first Unit to a Purchaser, whichever is later. Upon the annexation of any portion of the Additional Property, the amount of the Common Expense Assessments levied against each Unit shall be recalculated based upon a fraction, the numerator of which is one (1) and the denominator of which is the new number of Units then subject to Assessments.

7.8 Rules Regarding Billing and Collection Procedures. Common Expense Assessments and Neighborhood Assessments shall be collected on a monthly or quarterly basis or such other basis as may be selected by the Board of Directors. Special Assessments may be collected as specified by the Board of Directors. The Board of Directors shall have the right to adopt rules and regulations setting forth procedures for the purpose of making Assessments and for the billing and collection of the Assessments, provided that the procedures are not inconsistent with the provisions of this Declaration. The failure of the Association to send a bill to a Member shall not relieve any Member of his liability for any Assessment or charge under this Declaration. The Association shall be under no duty to refund any payments received by it even though the ownership of a Unit changes during an Assessment Period, but successor Unit Owners of Units shall be given credit for prepayments, on a prorated basis, made by prior Unit Owners. Any such credits shall be paid directly between the applicable Unit Owners upon conveyance of the Unit.

7.9 Effect of Nonpayment of Assessments; Remedies of the Association.

7.9.1 Any Assessment, or any installment of an Assessment, not paid within fifteen (15) days after the Assessment, or the installment of the Assessment, first became due shall bear interest from the due date at the maximum rate allowable under Nevada law. In addition, the Board of Directors may establish a late fee to be charged to any Unit Owner who has not paid any Assessment, or any installment of an Assessment, within fifteen (15) days after such payment was due.

7.9.2 The Association shall have a lien on each Unit for: (i) all Assessments and Special Use Fees levied against the Unit; (ii) all interest, lien fees, late charges and other fees and charges assessed against the Unit or payable by the Unit Owner of the Unit; (iii) all construction penalties and fines levied against the Unit Owner of the Unit; (iv) all attorneys' fees, court costs, title report fees, costs and fees charged by any collection agency either to the Association or to a Unit Owner and any other fees or costs incurred by the Association in attempting to collect Assessments or other amounts due to the Association by a Unit Owner; and (v) any amounts payable to the Association pursuant to **Section 5.3 or 5.4** or any other provision of this Declaration. The Recording of this Declaration constitutes Record notice and perfection of the Assessment Lien, and no further Recordation of any claim of lien shall be required. The Association may, at its option, Record a Notice of Lien setting forth the name of the delinquent Unit Owner as shown in the records of the Association, the legal description or street address of the Unit against which the Notice of Lien is Recorded and the amount claimed to be past due as of the date of the Recording of the Notice of Lien, Including interest, lien Recording fees and reasonable attorneys' fees. Before Recording any Notice of Lien against a Unit, the Association shall make a written demand to the delinquent Unit Owner for payment of the delinquent Assessments, together with interest, late charges and reasonable attorneys' fees, if any. The demand shall state the date and amount of the delinquency. Each default shall constitute a separate basis for a demand, but any number of defaults may be included within the single demand. If the delinquency is not paid within ten (10) days after delivery of the demand, the Association may proceed with Recording a Notice of Lien against the Unit.

7.9.3 The Assessment Lien shall have priority over all liens and encumbrances except for: (i) liens and encumbrances Recorded prior to the Recordation of this Declaration; (ii) tax liens for real property taxes; (iii) assessments in favor of any municipal or other governmental body; and (iv) the lien of any bona fide First Mortgage Recorded prior to the date the delinquent Assessment(s) first accrued; provided, however, that the Assessment Lien is also prior to any such First Mortgage to the extent of Common Expense Assessments that became due during the six (6) months immediately preceding the institution of an action to enforce the Assessment Lien. All Assessments and charges against the Unit, Including those that accrue before the six (6) month period prior to the institution of an action to enforce the Assessment Lien, shall remain the obligation of the defaulting Unit Owner; provided, however, that the Association shall credit such amount as it receives toward payment of any such delinquent Assessments from the First Mortgagee or any other Person acquiring title or coming into possession of the Unit through foreclosure of the First Mortgage, purchase at a foreclosure sale

or trustee's sale, or through any equivalent proceedings, such as, but not limited to, the taking of a deed in lieu of foreclosure. Any delinquent Assessments, fines and other fees and charges that are extinguished or otherwise uncollectible by the Association pursuant to this Section may be reallocated and assessed to all Units as a Common Expense.

7.9.4 Except as otherwise provided in the Act, the Association shall not be obligated to release the Assessment Lien as to any portion of past due Assessments until all such delinquent Assessments, interest, lien fees, fines, reasonable attorneys' fees, court costs, title report fees, collection costs and all other sums payable to the Association by the Unit Owner of the Unit have been paid in full. In no event shall such release of the Assessment Lien for past due Assessments release the lien of this Declaration as to all other Assessments to become due hereunder.

7.9.5 The Association shall have the right, at its option, to enforce collection of any delinquent Assessments, fees, charges, late charges, penalties and fines, together with interest, lien fees, reasonable attorneys' fees and any other sums due to the Association in any manner allowed by law Including (i) bringing an action at law against the Unit Owner personally obligated to pay the delinquent Assessments, and such action may be brought without waiving the Assessment Lien securing the delinquent Assessments, or (ii) bringing an action to foreclose the Assessment Lien against the Unit in the manner provided under the Act. The Association shall have the power to bid at any foreclosure sale and to purchase, acquire, hold, lease, mortgage and convey any and all Units purchased at such sale.

7.10 Notice of Delinquent Assessment. No action shall be brought to foreclose the Assessment Lien unless a "Notice of Delinquent Assessment" is deposited in the United States mail, certified or registered, postage prepaid with return receipt requested, to the delinquent Unit Owner. Such Notice of Delinquent Assessment must state (i) the amount of the Assessment and other sums that are due (Including interest, costs and attorneys' fees), (ii) a description of the Unit against which the Assessment was made, and (iii) the name of the Record Unit Owner. The Notice of Delinquent Assessment shall be signed and acknowledged by an officer of the Association. If a Unit Owner subject to the lien under this Article files a petition for relief under the United States Bankruptcy Code, the time period for instituting proceedings to enforce the Association's lien shall be tolled until thirty (30) days after the automatic stay of proceedings under Section 362 of the Bankruptcy Code is lifted.

7.11 Foreclosure Sale. The Association may enforce the lien by sale of the applicable Unit. In exercising its power of sale, the Association shall comply with such requirements and conditions and shall follow such procedure as may be established under the Act relative to the enforcement of such liens. Unless otherwise permitted by law, no sale to foreclose an Assessment Lien may be conducted until (i) the Association, its agent or attorney has first executed and Recorded a notice of default and election to sell the Unit to satisfy the Assessment Lien ("Notice of Default"), which contains the same information as the Notice of Delinquent Assessment, but must also describe the deficiency in payment and the name and address of the person authorized by the Association to enforce the lien by sale, and (ii) the delinquent Unit

Owner or such Unit Owner's successor in interest has failed to pay the amount of the delinquent Assessment and interest, costs (Including attorneys' fees) and expenses incident to its enforcement for a period of ninety (90) days. Such ninety (90) day period shall commence on the later of (a) the day on which the Notice of Default is Recorded, or (b) the day upon which a copy of the Notice of Default is mailed by certified mail with postage prepaid to the Unit Owner or such Unit Owner's successor in interest at his address, if the address is known, and otherwise to the address of the Unit. The Association, its agent or attorney shall, after the expiration of such ninety (90) day period and before the foreclosure sale, 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 first publication or posting, by certified or registered mail with postage prepaid and return receipt requested, to the Unit Owner or such Unit Owner's successor in interest at his address if known, and otherwise to the address of the Unit.

7.12 Curing of Default. Upon the timely curing of any default for which a Notice of Lien or a Notice of Delinquent Assessment was Recorded by the Association, the Association shall Record an appropriate release of the applicable Notice(s) upon payment by the defaulting Unit Owner of a reasonable fee to be determined by the Board of Directors to cover the cost of preparing and Recording such release.

7.13 Cumulative Remedies. The Assessment Liens and the rights of foreclosure and sale thereunder shall be in addition to and not in substitution for all other rights and remedies that the Association and its assigns may have hereunder and by law, Including a suit to recover a money judgment for unpaid Assessments, as above provided.

7.14 Exemption of Unit Owner. No Unit Owner may claim an exemption from liability for payment of Assessments, fines and other fees and charges levied pursuant to the Governing Documents by waiver and nonuse of any of the Common Elements and facilities or by the abandonment of his Unit.

7.15 Certificate of Payment. The Association on written request shall furnish to a lienholder, Unit Owner or person designated by a Unit Owner a Recordable statement setting forth the amount of unpaid Assessments against his Unit. The statement shall be furnished within ten (10) business days after receipt of the request and is binding on the Association, the Board of Directors, and every Unit Owner. The Association may charge a reasonable fee in an amount established by the Board of Directors for each such statement.

7.16 No Offsets. All Assessments, fines and other fees and charges shall be payable in accordance with the provisions of this Declaration, and no offsets against such Assessments, fines, other fees and charges shall be permitted for any reason, Including a claim that the Association is not properly exercising its duties and powers as provided in the Governing Documents or the Act.

7.17 Working Capital Fund. To ensure that the Association shall have adequate funds to meet its expenses or to purchase necessary equipment or services, each Person acquiring a Unit from the Declarant or a Builder shall pay to the Association immediately upon becoming a Unit Owner a sum equal to one-sixth (1/6) of the then current annual Common Expense Assessment attributable to the Unit. Funds paid to the Association pursuant to this Section may be used by the Association for payment of operating expenses or any other purpose permitted under the Governing Documents. Payments made pursuant to this Section shall be nonrefundable and shall not be considered as an advance payment of any Assessments levied by the Association pursuant to this Declaration. This Section shall not be applicable to Builders acquiring Units or Unsubdivided Parcels from the Declarant.

7.18 Surplus Funds. Surplus funds of the Association remaining after payment of or provisions for Common Expenses and any prepayment of reserves may, in the discretion of the Board of Directors and with the written approval of Declarant during the Period of Declarant Control, either be returned to the Unit Owners pro rata in accordance with each Unit Owner's Common Expense Liability or be credited on a pro rata basis to the Unit Owners to reduce each Unit Owner's future Common Expense Assessments.

7.19 Transfer Fee. Each Person acquiring a Unit shall pay to the Association, or to its community manager if directed to do so by the Board of Directors, immediately upon becoming a Unit Owner a transfer fee in such amount as is established from time to time by the Board of Directors. This Section shall not be applicable to Builders acquiring Units or Unsubdivided Parcels from the Declarant.

ARTICLE 8
INSURANCE

8.1 Scope of Coverage.

8.1.1 Commencing not later than the date of the first conveyance of a Unit to a Person other than Declarant, the Association shall maintain, to the extent reasonably available, the following insurance coverage:

(i) Property insurance on the Areas of Common Responsibility issued under a form that provides "All Risk of Direct Physical Loss" coverage in an amount equal to the maximum insurable replacement value of the Areas of Common Responsibility as determined by the Board of Directors; provided, however, that the total amount of insurance after application of any deductibles shall not be less than one hundred percent (100%) of the current replacement cost of the insured property at the time the insurance is purchased and at each renewal date, exclusive of land, excavations, foundations and other items normally excluded from a property insurance policy.

(ii) Commercial general liability insurance, for a limit to be determined by the Board of Directors, but not less than $2,000,000.00 for any single occurrence.

Such insurance shall cover all occurrences commonly insured against for death, bodily injury and property damage arising out of or relating to the use, ownership or maintenance of the Areas of Common Responsibility or arising out of or relating to the performance by the Association of its maintenance and other obligations under the Governing Documents, whether on the Common Elements, any Unit or any public or private right-of-way. Such policy shall include a cross liability clause to cover liabilities of the Unit Owners as a group to a Unit Owner.

(iii) Workmen's compensation insurance to the extent necessary to meet the requirements of the laws of Nevada.

(iv) Directors' and officers' liability and errors and omissions insurance covering all the directors, officers and committee members of the Association in such limits as the Board of Directors may determine from time to time.

(v) Such other insurance (Including employment practices liability insurance and fidelity insurance) as the Association shall determine from time to time to be appropriate to protect the Association, the members of the Board of Directors, the officers and the members of any committee of the Board of Directors or the Unit Owners.

8.1.2 The insurance policies purchased by the Association shall, to the extent reasonably available, contain the following provisions:

(i) Each Unit Owner shall be an insured under the policy with respect to liability arising out of his ownership of an undivided interest in the Common Elements or his membership in the Association.

(ii) There shall be no subrogation with respect to the Association, its agents, servants, and employees against Unit Owners and members of their household.

(iii) No act or omission by any Unit Owner, unless acting within the scope of his authority on behalf of the Association, shall void the policy or be a condition to recovery on the policy.

(iv) The coverage afforded by such policy shall be primary and shall not be brought into contribution or proration with any insurance that may be purchased by Unit Owners or their mortgagees or beneficiaries under deeds of trust.

(v) A "severability of interest" endorsement that shall preclude the insurer from denying the claim of a Unit Owner because of the negligent acts of the Association or other Unit Owners.

(vi) The Association shall be the insured for use and benefit of the individual Unit Owners (designated by name if required by the insurer).

(vii) For policies of hazard insurance, a standard mortgagee clause providing that the insurance carrier shall notify the Association and each First Mortgagee named in the policy at least thirty (30) days in advance of the effective date of any substantial change in coverage or cancellation of the policy.

(viii) Any insurance trust agreement will be recognized by the insurer.

(ix) "Agreed Amount" and "Inflation Guard" endorsements.

8.1.3 If, at the time of a loss insured under an insurance policy purchased by the Association, the loss is also insured under an insurance policy purchased by a Unit Owner, the Association's policy shall provide primary coverage.

8.1.4 If the insurance described in **Subsections 8.1.1(i) or 8.1.1(ii)** is not reasonably available, the Association promptly shall cause notice of that fact to be hand delivered or sent prepaid by United States mail to all Unit Owners.

8.2 Payment of Premiums. Premiums for all insurance obtained by the Association pursuant to this Article shall be Common Expenses and shall be included in the budget of the Association and shall be paid for by the Association.

8.3 Insurance Obtained by Unit Owners. The issuance of insurance policies to the Association pursuant to this Article shall not prevent a Unit Owner from obtaining insurance for his own benefit and at his own expense covering his Unit, his personal property and providing personal liability coverage.

8.4 Allocation of Insurance Deductible. The Association shall maintain in its reserve account an amount sufficient to pay the deductible amounts applicable to its insurance policies. If the Association submits a claim to an insurance carrier that is then or later determined by the Board of Directors to be the result of negligence or willful misconduct of a Unit Owner, the cost to the Association of any insurance deductible shall be paid by the Unit Owner, upon demand, to the Association. The Association may enforce collection of any such amounts in the same manner and to the same extent as provided for in this Declaration for the collection of Assessments.

8.5 Payment of Insurance Proceeds. Any loss covered by property insurance obtained by the Association in accordance with this Article shall be adjusted with the Association and the insurance proceeds shall be payable to the Association and not to any mortgagee or beneficiary under a deed of trust. The Association shall hold any insurance proceeds in trust for Unit Owners and lienholders as their interests may appear, and the proceeds shall be disbursed and applied as provided for in N.R.S. § 116.31135.

8.6 Certificate of Insurance. An insurer that has issued an insurance policy pursuant to **Section 8.1** of this Declaration shall issue certificates or memoranda of insurance to the Association and, on written request, to any Unit Owner, mortgagee, or beneficiary under a deed

of trust. The insurer issuing the policy shall not cancel or refuse to renew it until thirty (30) days after notice of the proposed cancellation or non-renewal has been mailed to the Association, each Unit Owner, and each mortgagee or beneficiary under a deed of trust to whom a certificate or memorandum of insurance has been issued at their respective last known addresses.

8.7 Annual Insurance Review. The Board of Directors shall annually determine whether the amounts and types of insurance it has obtained provide adequate coverage for the Areas of Common Responsibility in light of increased construction costs, inflation, practice in the area of which the Community is located or any other factor that tends to indicate that either additional insurance policies or increased coverage under existing policies are necessary or desirable to protect the interest of the Unit Owners and of the Association. If the Board of Directors determines that increased coverage or additional insurance is appropriate, it shall obtain the same.

8.8 Repair and Replacement of Damaged or Destroyed Property. Any portion of the Areas of Common Responsibility that are damaged or destroyed shall be repaired or replaced promptly by the Association unless (i) repair or replacement would be illegal under any state or local health or safety statute or ordinance, or (ii) Unit Owners representing at least eighty percent (80%) of the total authorized votes in the Association vote not to rebuild. The cost of repair or replacement in excess of insurance proceeds and reserves shall be paid by the Association, and the Board of Directors may, without the necessity of a vote of the Unit Owners, levy an equal assessment against all Unit Owners. Additional assessments may be made in a like manner at any time during or following the completion of any repair or reconstruction. Any assessment levied pursuant to this **Section 8.8** will be deemed to be a part of the Assessments and will be secured by the Assessment Lien. If all of the Common Elements are not repaired or replaced, insurance proceeds attributable to the damaged Common Elements shall be used to restore the damaged area to a condition compatible with the remainder of the Community and that is not in violation of any state or local health or safety statute or ordinance. The remainder of the proceeds shall either (a) be distributed to all Unit Owners or lien holders in proportion to the allocated interest of each Unit Owner as determined pursuant to **Section 2.6** of this Declaration, or (b) be retained by the Association as an additional capital reserve or used for payment of operating expenses of the Association if such action is approved by the affirmative vote or written consent, or any combination thereof, of Members representing more than fifty percent (50%) of the votes in the Association.

ARTICLE 9
RIGHTS OF FIRST MORTGAGEES

9.1 First Mortgagee's Right of Inspection of Records. Any First Mortgagee will be entitled, upon written request, to: (i) inspect the books and records of the Association during normal business hours; (ii) receive within ninety (90) days following the end of any fiscal year of the Association, a financial statement of the Association for the immediately preceding fiscal year of the Association, free of charge to the requesting party; and (iii) receive written notice of

all meetings of the Members of the Association and be permitted to designate a representative to attend all such meetings.

9.2 No Priority over First Mortgagees. No provision of this Declaration gives or shall be construed as giving any Unit Owner or other Person priority over any rights of a First Mortgagee of a Unit in the case of the distribution to such Unit Owner of insurance proceeds or condemnation awards for losses to or taking of the Common Elements.

ARTICLE 10
RESERVATION OF DEVELOPMENTAL AND SPECIAL DECLARANT'S RIGHTS

Pursuant to N.R.S. § 116.2105(1)(h), Declarant reserves all of the developmental and special declarant's rights in the Community afforded under N.R.S. § 116.039 and N.R.S. § 116.089, subject to the expiration deadlines set forth below. Specifically, but without limitation, Declarant reserves the following rights:

10.1 Developmental Rights. Declarant hereby reserves, for a period of fifteen (15) years following the Recordation of this Declaration, all developmental rights under N.R.S. § 116.039. Declarant specifically reserves the right to withdraw real estate described on **Exhibit A** from the Community until the first Unit has been conveyed to a Person other than Declarant. If Declarant elects to add any portion of the Additional Property to the Community pursuant to **Section 2.10** of this Declaration, such portion of the Additional Property, when annexed, shall be deemed a "separate portion" of the Community (for purposes of N.R.S. § 116.211(4)), and Declarant hereby reserves the right to withdraw any real estate from such portion of the Additional Property so annexed until the first Unit thereof has been conveyed to a Person other than Declarant.

10.2 Right to Complete Improvements and Construction Easement. Declarant hereby reserves the right, for a period of fifteen (15) years following the Recordation of this Declaration, to complete the construction of Improvements in the Community and an easement over the Community for the purpose of doing so. Any damage caused to a Unit or the Common Elements by Declarant or its agents in the use or exercise of such right and/or easement shall be repaired by and at the expense of Declarant.

10.3 Exercise of Developmental Rights. Declarant reserves the right to exercise all developmental rights reserved pursuant to **Section 10.1** above for a period of fifteen (15) years following the Recordation of this Declaration.

10.4 Offices, Model Homes and Promotional Signs. Declarant reserves the right to maintain offices for sales and management and models as provided in **Section 3.4** above, and to maintain signs on the Common Elements for so long as Declarant owns any property described on **Exhibit A** or **Exhibit B**.

10.5 Use of Easements. Declarant reserves the right to use easements through the Common Elements for the purpose of making Improvements within the Community or within the Additional Property.

10.6 Master Association. Declarant reserves the right to make the Community subject to any master homeowners association.

10.7 Merger or Consolidation. Declarant reserves the right to merge or consolidate the Association with another common-interest community of the same form of ownership.

10.8 Appointment and Removal of Directors and Officers. Declarant reserves the right to appoint and remove a majority of the Board of Directors and the officers of the Association or any master association or any member of the Board of Directors as set forth in **Section 6.2** above, for the time period set forth therein.

ARTICLE 11
GENERAL PROVISIONS

11.1 Enforcement.

11.1.1 The Association or any Unit Owner shall have the right to enforce, by any proceeding at law or in equity, all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by the provisions of the Governing Documents. Failure by the Association or by any Unit Owner to enforce any covenant or restriction contained in the Governing Documents shall in no event be deemed a waiver of the right to do so thereafter.

11.1.2 All remedies set forth in this Declaration and the Bylaws shall be cumulative of any remedies available at law or in equity. In the event the Declarant, the Association or any Unit Owner employs an attorney or attorneys to enforce a lien or to collect any amounts due from a Unit Owner or to enforce compliance with or recover damages for any violation or noncompliance with the Governing Documents, the prevailing party in any such action (Including any such action maintained under **Section 11.20**) shall be entitled to recover from the other party its reasonable attorneys' fees and costs incurred in the action.

11.1.3 The Association shall be obligated to investigate allegations of violations of any covenant, restriction, or rule set forth in any of the Governing Documents; provided that the Association may, but shall not be obligated to, investigate anonymous allegations. Following such investigation, the decision to take or not take enforcement action shall, in each case, be in the discretion of the Board of Directors, in the exercise of its business judgment. Without limiting the generality of the Board of Directors' discretion, if the Board of Directors reasonably determines that a covenant, restriction, or rule is, or is likely to be construed as, inconsistent with the applicable law, or in any case in which the Board of Directors reasonably determines that the Association's position is not strong enough to justify taking enforcement action, the Board of Directors shall not be obligated to take such action. Any such determination shall not be construed a waiver of the right of the Association to enforce such

provision at a later time or under other circumstances, or estop the Association from enforcing any other covenant, restriction, or rule. Notwithstanding the above, if, in the discretion of the Declarant as long as Declarant owns any property described in **Exhibit A** or **Exhibit B**, the Association fails to take appropriate action to enforce any provision of the Governing Documents in accordance with its rights and responsibilities, the Declarant may take such enforcement action on behalf of the Association. Declarant shall not take such action without first providing the Association written notice and a reasonable opportunity to take such action on its own.

11.2 Severability. Invalidation of any one of these covenants or restrictions by judgment or court order shall in no way affect any other provisions that shall remain in full force and effect.

11.3 Duration. Unless amended in accordance with the provisions of **Section 11.5** below, the covenants and restrictions of this Declaration shall run with and bind the Community, for a term of twenty (20) years from the date this Declaration is Recorded, after which time they shall be automatically extended for successive periods of ten (10) years.

11.4 Termination of Community. The Community may be terminated only in the manner provided for in the Act.

11.5 Amendment.

11.5.1 Except in cases of amendments that may be executed by a Declarant under N.R.S. §§ 116.2109 or 116.211, by the Association under N.R.S. §§ 116.1107, 116.2106, Subsection 3 of N.R.S. § 116.2108 or N.R.S. § 116.2113 or by certain Unit Owners under Subsection 2 of N.R.S. §§ 116.2108, 116.2112 or 116.2118, and except as limited by **Section 11.5.2** of this Declaration, and subject to the provisions of **Subsection 11.20.9** of this Declaration, this Declaration, including the Plat and Plans, may be amended only by the affirmative vote or written consent, or any combination thereof, of the Unit Owners to which at least sixty-seven percent (67%) of the votes in the Association are allocated.

11.5.2 Except to the extent expressly permitted or required by the Act, an amendment to the Declaration shall not create or increase Special Declarant's Rights, increase the number of Units, change the boundaries of any Unit, change the allocated interests of a Unit, or change the use as to which any Unit is restricted, in the absence of unanimous consent of the Unit Owners affected and the consent of a majority of the Unit Owners of the remaining Units in the Community.

11.5.3 An amendment to the Declaration shall not terminate or decrease any unexpired Developmental Right, Special Declarant's Right or Period of Declarant Control unless the Declarant approves the amendment in writing.

11.5.4 During the Period of Declarant Control, the Declarant shall have the right to amend the Declaration, Including the Plat, to (i) comply with the Act or any other

applicable law if the amendment does not adversely affect the rights of any Unit Owner, (ii) correct any error or inconsistency in the Declaration if the amendment does not adversely affect the rights of any Unit Owner, (iii) comply with the rules or guidelines in effect from time to time of any governmental or quasi-governmental entity or federal corporation guaranteeing or insuring mortgage loans or governing transactions involving mortgage instruments, Including the Veterans Administration, the Federal Housing Administration, the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation, or (iv) comply with the rules or requirements of any federal, state or local governmental entity or agency whose approval of the Community, the Plat or the Governing Documents is required by law or requested by Declarant.

11.5.5 Any amendment adopted by the Unit Owners pursuant to **Subsection 11.5.1** of this Declaration shall be signed by the President or Vice President of the Association and shall be Recorded. Any such amendment shall certify that the amendment has been approved as required by this Section. Any amendment made by the Declarant pursuant to **Subsection 11.5.4** of this Declaration or the Act shall be executed by the Declarant and shall be Recorded. Any amendment shall be effective only upon Recordation.

11.6 Remedies Cumulative. Each remedy provided herein is cumulative and not exclusive.

11.7 Notices. All notices, demands, statements or other communications required to be given to or served on a Unit Owner under this Declaration shall be in writing and shall be deemed to have been duly given and served if delivered personally or sent by United States mail, postage prepaid, return receipt requested, addressed to the Unit Owner, at the address that the Unit Owner shall designate in writing and file with the Association or, if no such address is designated, at the address of the Unit of such Unit Owner. A Unit Owner may change his address on file with the Association for receipt of notices by delivering a written notice of change of address to the Association pursuant to this Section. A notice given by mail, whether regular, certified, or registered, shall be deemed to have been received by the person to whom the notice was addressed on the earlier of the date the notice is actually received or three (3) days after the notice is mailed. If a Unit is owned by more than one (1) person, notice to one (1) of the Unit Owners shall constitute notice to all Unit Owners of the same Unit. Each Unit Owner shall file his correct mailing address with the Association, and shall promptly notify the Association in writing of any subsequent change of address.

11.8 Binding Effect. By acceptance of a deed or by acquiring any ownership interest in any portion of the Community, each Person, for himself, his heirs, personal representatives, successors, transferees and assigns, binds himself, his heirs, personal representatives, successors, transferees and assigns, to all of the provisions, restrictions, covenants, conditions, rules, and regulations now or hereafter imposed by the Governing Documents and any amendments thereof. In addition, each such Person by so doing thereby acknowledges that the Governing Documents set forth a general scheme for the improvement and development of the real property covered thereby and hereby evidences his intent that all the restrictions, conditions, covenants, rules and regulations contained in the Governing Documents shall run with the land and be

binding on all subsequent and future Unit Owners, grantees, purchasers, assignees, and transferees thereof. Furthermore, each such Person fully understands and acknowledges that the Governing Documents shall be mutually beneficial, prohibitive and enforceable by the various subsequent and future Unit Owners. Declarant, its successors, assigns and grantees, covenants and agrees that the Units and the membership in the Association and the other rights created by the Governing Documents shall not be separated or separately conveyed, and each shall be deemed to be conveyed or encumbered with its respective Unit even though the description in the instrument of conveyance or encumbrance may refer only to the Unit.

11.9 Gender. The singular, wherever used in this Declaration, shall be construed to mean the plural when applicable, and the necessary grammatical changes required to make the provisions of this Declaration apply either to corporations or individuals, or men or women, shall in all cases be assumed as though in each case fully expressed.

11.10 Topic Headings. The marginal or topical headings of the sections contained in this Declaration are for convenience only and do not define, limit or construe the contents of the sections or of this Declaration.

11.11 Survival of Liability. The termination of membership in the Association shall not relieve or release any such former Unit Owner or Member from any liability or obligation arising out of or relating to the Association during the period of such ownership or membership, or impair any rights or remedies that the Association may have against such former Unit Owner or Member arising out of, or in any way connected with, such ownership or membership and the covenants and obligations incident thereto.

11.12 Joint and Several Liability. In the case of joint ownership of a Unit, the liabilities and obligations of each of the joint Unit Owners set forth in, or imposed by, the Governing Documents shall be joint and several.

11.13 Guests and Tenants. Each Unit Owner shall be responsible for compliance by his agents, tenants, guests, invitees, licensees and their respective servants, agents, and employees with the provisions of the Governing Documents. A Unit Owner's failure to insure compliance by such Persons shall be grounds for the same action available to the Association or any other Unit Owner by reason of such Unit Owner's own noncompliance.

11.14 Number of Days. In computing the number of days for purposes of any provision of the Governing Documents, all days shall be counted including Saturdays, Sundays and legal holidays; provided, however, that if the final day of any time period falls on a Saturday, Sunday or legal holiday, then the next day shall be deemed to be the final day that is not a Saturday, Sunday or legal holiday.

11.15 Notice of Violation. The Association shall have the right to Record a written notice of a violation by any Unit Owner of any restriction or provision of the Governing Documents. The notice shall be executed and acknowledged by an officer of the Association and

shall contain substantially the following information: (i) the name of the Unit Owner; (ii) the legal description of the Unit against which the notice is being Recorded; (iii) a brief description of the nature of the violation; (iv) a statement that the notice is being Recorded by the Association pursuant to this Declaration; and (v) a statement of the specific steps that must be taken by the Unit Owner to cure the violation. Recordation of a notice of violation shall serve as a notice to the Unit Owner and to any subsequent purchaser of the Unit that there is a violation of the provisions of the Governing Documents. If, after the Recordation of such notice, it is determined by the Association that the violation referred to in the notice does not exist or that the actual violation referred to in the notice has been cured, the Association shall Record a notice of compliance that shall state the legal description of the Unit against which the notice of violation was Recorded, the Recording data of the notice of violation, and shall state that the violation referred to in the notice of violation has been cured, or if such be the case, that it did not exist.

11.16 No Absolute Liability. No provision of the Governing Documents shall be interpreted or construed as imposing on any Unit Owner absolute liability for damage to the Common Elements or the Units. A Unit Owner shall only be responsible for damage to the Common Elements or Units caused by the Unit Owner's negligence or intentional acts.

11.17 Governing Law. The provisions of this Declaration shall be liberally construed to promote and effectuate the purpose of the Association as set forth in this Declaration. The provisions of this Declaration shall be construed and governed by the laws of the State of Nevada. This Declaration is intended to comply with the provisions of the Act. In the event any provision of this Declaration is held to be in violation of the Act, this Declaration shall be deemed amended to the extent necessary to comply with the Act.

11.18 Interpretation. Except for judicial construction, the Association shall have the exclusive right to construe and interpret the provisions of this Declaration. In the absence of any adjudication to the contrary by a court of competent jurisdiction, the Association's construction or interpretation of the provisions hereof shall be final, conclusive and binding as to all Persons and property benefited or bound by this Declaration. In the event of any conflict between this Declaration and the Articles, Bylaws, Association Rules or Design Guidelines, this Declaration shall control except to the extent the Declaration is inconsistent with the Act. In the event of any conflict between the Articles and the Bylaws, the Articles shall control. In the event of any conflict between the Bylaws and the Association Rules or the Design Guidelines, the Bylaws shall control. In the event of any conflict between this Declaration and a Supplemental Declaration, this Declaration shall control, although such documents shall be construed to be consistent with one another to the extent possible. The inclusion in any Supplemental Declaration of covenants, conditions and restrictions that are more restrictive or more inclusive than the provisions of this Declaration shall not be deemed to constitute a conflict with the provisions of this Declaration or the applicable Supplemental Declaration.

11.19 References to this Declaration in Deeds. Deeds to and instruments affecting any Unit or any other part of the Community may contain the covenants, conditions and restrictions herein set forth by reference to this Declaration; but regardless of whether any such

reference is made in any deed or instrument, each and all of the provisions of this Declaration shall be binding upon the grantee, Unit Owner or other Person claiming through any instrument and such grantee's, Unit Owner's or other Person's heirs, executors, administrators, successors and assigns.

11.20 Dispute Notification and Resolution Procedure. All actions or claims (i) by the Association against any one or more of the Declarant Parties, (ii) by any Unit Owner(s) against any one or more of the Declarant Parties (other than claims under the limited warranty provided by Declarant to a Purchaser (the "Limited Warranty") to the extent applicable), or (iii) by both the Association and any Unit Owner(s) (other than claims under the Limited Warranty to the extent applicable) against any one or more of the Declarant Parties, arising out of or relating to the Community, Including the Declaration or any other Governing Documents, the use or condition of the Community or the design or construction of or any condition on or affecting the Community, Including construction defects, surveys, soils conditions, grading, specifications, installation of Improvements (Including Dwellings) or disputes that allege negligence or other tortious conduct, fraud, misrepresentation, breach of contract or breach of implied or express warranties as to the condition of the Community or any Improvements (collectively, "Dispute(s)") shall be subject to the provisions of this **Section 11.20**. Declarant and each Unit Owner acknowledge that the provisions set forth in this **Section 11.20** shall be binding upon current and future Unit Owners of the Community and upon the Association, whether acting for itself or on behalf of any Unit Owner(s). Nothing in this Declaration is intended to limit, expand or otherwise modify the terms of the Limited Warranty, and claims under the Limited Warranty will, subject to the terms of the Limited Warranty, be arbitrated in accordance with the arbitration provisions set forth in the Limited Warranty (to the extent applicable).

11.20.1 Claim Notice. Any Person (Including the Association) with a Dispute claim shall notify the applicable Declarant Party (the "Notified Declarant Party") in writing within sixty (60) days after becoming aware of the Dispute by certified mail, return receipt requested, of the claim, which writing shall include (i) in reasonable detail, the defects or any damages or injuries to each Improvement that is the subject of the Dispute, (ii) in reasonable detail, the cause of the defects if the cause is known, the nature and extent that is known of the damage or injury resulting from the defects and the location of each defect within each Improvement, and (iii) an expert opinion concerning the cause of the defects and the nature and extent of the damage or injury resulting from the defects based on a representative sample of the components of the Improvements involved in the Dispute (the "Claim Notice").

11.20.2 Right to Inspect. Within forty-five (45) days after receipt of the Claim Notice, the Notified Declarant Party and the Notified Declarant Party's representatives, upon written request to the claimant, shall be entitled to inspect the property that is the subject of the Dispute to determine the nature and cause of the defect, damage or injury and the nature and extent of repairs necessary to remedy the defect. After reasonable notice to the claimant and at reasonable times, the Notified Declarant Party and the Notified Declarant Party's representatives shall have the right to conduct inspections, testing and/or destructive or invasive testing in a manner deemed appropriate by the Notified Declarant Party (provided the Notified Declarant

Party shall repair or replace any property damaged or destroyed during such inspection or testing), provided that all such activities are reasonably necessary to establish the existence of the defect, which right shall continue until such time as the Dispute is resolved as provided in **Subsection 11.20.3**.

11.20.3 Right to Corrective Action. Within a reasonable period after receipt of the Claim Notice, which period shall not exceed sixty (60) days, the Notified Declarant Party and the claimant shall meet at a mutually acceptable place within the Community or some other mutually acceptable place to discuss the Dispute. The parties shall negotiate in good faith in an attempt to resolve the Dispute. If the Notified Declarant Party elects to take any corrective action, the Notified Declarant Party and the Notified Declarant Party's representatives and agents shall be provided full access to the Community and the property that is the subject of the Dispute at reasonable times and upon reasonable notice to the claimant to take and complete corrective action.

11.20.4 No Additional Obligations; Irrevocability and Waiver of Right. Nothing set forth in **Subsections 11.20.2 and 11.20.3** shall be construed to impose any obligation on the Notified Declarant Party to inspect, test, repair or replace any item of the Community for which the Notified Declarant Party is not otherwise obligated under applicable law or the Limited Warranty. The right of the Notified Declarant Party to enter, inspect, test, repair and/or replace reserved hereby shall be irrevocable and may not be waived or otherwise terminated except by a writing executed and Recorded by the Notified Declarant Party.

11.20.5 Mediation. If the parties to the Dispute fail to resolve the Dispute pursuant to the procedures described in **Subsection 11.20.3** above within ninety (90) days after delivery of the Claim Notice, the Person who delivered the Claim Notice shall select a mediator within ten (10) days after such ninety (90) day period. The mediator shall be subject to the approval of the Notified Declarant Party. If the Notified Declarant Party and the claimant fail to agree upon a mediator within twenty (20) days after a mediator is first selected by the claimant, either party may petition the American Arbitration Association, the Nevada Arbitration Association, Nevada Dispute Resolution Services or any other mediation service acceptable to the parties for the appointment of a mediator qualified in the area pertaining to the Dispute. If the Person who delivered the Claim Notice fails to timely submit the Dispute to mediation, then the claim of the Person who delivered the Claim Notice shall be deemed waived and abandoned and all applicable Declarant Parties shall be relieved and released from any and all liability relating to the Dispute. No person shall serve as a mediator in the Dispute in which the person has any financial or personal interest in the result of the mediation, except by the written consent of all parties. Prior to accepting any appointment, the prospective mediator shall disclose any circumstances likely to create a presumption of bias or to prevent a prompt commencement of the mediation process. No litigation or other action shall be commenced against the Notified Declarant Party or any other Declarant Party without complying with the procedures described in this **Subsection 11.20.5**.

(i) Position Memoranda; Dispute Materials; Pre-Mediation Conference. Within fifteen (15) days after the selection of the mediator, each party shall (i) submit a brief memorandum setting forth its position with regard to the issues that need to be resolved, and (ii) provide the other party, or shall make a reasonable effort to assist the other party to obtain, all relevant reports, photos, correspondence, plans, specifications, warranties, contracts, subcontracts, work orders for repair, videotapes, technical reports, soil and other engineering reports and other documents or materials relating to the Dispute that are not privileged. The mediator shall have the right to schedule a pre-mediation conference and all parties shall attend unless otherwise agreed. The mediation shall be commenced within thirty (30) days following the submittal of the memoranda and shall be concluded within forty-five (45) days following the submittal of the memoranda unless the parties mutually agree to extend the mediation period. The mediation shall be held in the county in which the Community is located or such other place as is mutually acceptable by the parties.

(ii) Conduct of Mediation. The mediator has discretion to conduct the mediation in the manner in which the mediator believes is most appropriate for reaching a settlement of the Dispute. The mediator is authorized to conduct joint and separate meetings with the parties and to make oral and written recommendations for settlement. Whenever necessary, the mediator may also obtain expert advice concerning technical aspects of the Dispute, provided the parties agree and assume the expenses of obtaining such advice. The mediator does not have the authority to impose a settlement on the parties.

(iii) Exclusion Agreement. Any admissions, offers of compromise or settlement negotiations or communications at the mediation shall be excluded in any subsequent dispute resolution forum.

(iv) Parties Permitted at Sessions. Persons other than the parties, the representatives and the mediator may attend mediation sessions only with the permission of both parties and the consent of the mediator. Notwithstanding the foregoing, applicable contractors, subcontractors, brokers, suppliers, architects, engineers and any other Persons providing materials or services in connection with the construction of any Improvement upon or benefiting the Community designated by a Notified Declarant Party may attend mediation sessions and may be made parties to the mediation. Confidential information disclosed to a mediator by the parties or by witnesses in the course of the mediation shall be confidential. There shall be no stenographic record of the mediation process.

(v) Expenses. Before the mediation begins, the Person who delivered the Claim Notice shall deposit $50.00 with the mediation service, and each other party to the mediation shall deposit with the mediation service, in equal shares, the remaining amount estimated by the mediation service as necessary to pay the fees and expenses of the mediator for the first session of mediation and shall deposit additional amounts demanded by the mediation service as incurred for that purpose. Unless otherwise agreed, the total fees for each day of mediation and the mediator must not exceed $750.00 per day. The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the

mediation, Including the expenses of any witnesses or the cost of any proof or expert advice produced at the direct request of the mediator, shall be borne equally by the parties unless they agree otherwise. Each party to the mediation shall bear its own attorneys' fees and costs in connection with such mediation.

11.20.6 Arbitration. Should mediation pursuant to **Subsection 11.20.5** above not be successful in resolving the Dispute, then the Person who delivered the Claim Notice shall have ninety (90) days after the date of termination of the mediation to submit the Dispute to binding arbitration. If timely submitted, such Dispute shall be resolved by binding arbitration through the American Arbitration Association in accordance with the Construction Industry AAA Rules, as modified or as otherwise provided in this **Subsection 11.20.6**. If the Person who delivered the Claim Notice fails to timely submit the Dispute to arbitration within the ninety (90) day period, then the claim of the Person who delivered the Claim Notice shall be deemed waived and abandoned and all applicable Declarant Parties shall be relieved and released from any and all liability relating to the Dispute. A Person with any Dispute may only submit such Dispute in arbitration on such Person's own behalf. No Person may submit a Dispute in arbitration as a representative or member of a class, and no Dispute may be arbitrated as a class action. All Declarant Parties and any Person(s) with a Dispute and/or submitting a Claim Notice, together with any additional Persons who agree to be bound by this **Section 11.20.6**, such as contractors, subcontractors, brokers, suppliers, architects, engineers and any other Person providing materials or services in connection with the construction of any Improvement upon or benefiting the Community (collectively, the "Bound Parties"), agree that all Disputes that are not resolved by negotiation or mediation shall be resolved exclusively by arbitration conducted in accordance with this **Subsection 11.20.6**, and waive the right to have the Dispute resolved by a court, including the right to file a legal action as the representative or member of a class or in any other representative capacity. The parties shall cooperate in good faith to attempt to cause any Person who may be liable to any other Bound Party to be included in the arbitration proceeding. Subject to the limitations imposed in this **Subsection 11.20.6**, the arbitrator shall have the authority to try all issues, whether of fact or law.

(i) Place. The proceedings shall be heard in the county in which the Community is located.

(ii) Arbitrator. A single arbitrator shall be selected in accordance with the rules of the American Arbitration Association from panels maintained by the American Arbitration Association with experience in relevant real estate matters or construction. The arbitrator shall not have any relationship to the parties or interest in the Community. The parties to the Dispute shall meet to select the arbitrator within ten (10) days after service of the demand for arbitration on all respondents named therein or in the manner prescribed by the American Arbitration Association.

(iii) Commencement and Timing of Proceeding. The arbitrator shall promptly commence the proceeding at the earliest convenient date in light of all of the facts and circumstances and shall conduct the proceeding without undue delay.

(iv) Pre-hearing Conferences. The arbitrator may require one or more pre-hearing conferences.

(v) Discovery. The parties shall be entitled only to limited discovery, consisting of the exchange between the parties of only the following matters: (i) witness lists; (ii) expert witness designations; (iii) expert witness reports; (iv) exhibits; (v) reports of testing or inspections of the property subject to the Dispute, Including destructive or invasive testing; and (vi) hearing briefs. The parties shall also be entitled to conduct further tests and inspections as provided in **Subsection 11.20.2** above. Any other discovery shall be permitted by the arbitrator upon a showing of good cause or based on the mutual agreement of the parties. The arbitrator shall oversee discovery and may enforce all discovery orders in the same manner as any trial court judge.

(vi) Motions. The arbitrator shall have the power to hear and dispose of motions, Including motions to dismiss, motions for judgment on the pleadings and summary judgment motions, in the same manner as a trial court judge, except the arbitrator shall also have the power to adjudicate summarily issues of fact or law Including the availability of remedies, whether or not the issue adjudicated could dispose of an entire cause of action or defense.

(vii) Arbitration Award. Unless otherwise agreed by the parties, the arbitrator shall render a written arbitration award within thirty (30) days after conclusion of the arbitration hearing. The arbitrator's award may be enforced as provided for in N.R.S. § 38.105 and Nevada Arbitration Rule 19, or such similar law governing enforcement of awards in a trial court as is applicable in the jurisdiction in which the arbitration is held, or, as applicable, pursuant to the Federal Arbitration Act (Title 9 of the United States Code).

11.20.7 WAIVERS.

NOTICE: BY ACCEPTANCE OF A DEED OR BY ACQUIRING ANY OWNERSHIP INTEREST IN ANY PORTION OF THE COMMUNITY, EACH PERSON, FOR HIMSELF, HIS HEIRS, PERSONAL REPRESENTATIVES, SUCCESSORS, TRANSFEREES AND ASSIGNS, AGREES TO HAVE ANY DISPUTE RESOLVED ACCORDING TO THE PROVISIONS OF THIS **SECTION 11.20** AND WAIVES THE RIGHT TO PURSUE ANY DISPUTE IN ANY MANNER OTHER THAN AS PROVIDED IN THIS **SECTION 11.20**. SPECIFICALLY, AND WITHOUT LIMITATION, EACH SUCH PERSON WAIVES THE RIGHT TO SUBMIT A DISPUTE IN ARBITRATION AS A REPRESENTATIVE OR MEMBER OF A CLASS AND TO HAVE SUCH DISPUTE ARBITRATED AS A CLASS ACTION AND ALSO WAIVES THE RIGHT TO HAVE THE DISPUTE RESOLVED BY A COURT, INCLUDING THE RIGHT TO FILE A LEGAL ACTION AS THE REPRESENTATIVE OR MEMBER OF A CLASS OR IN ANY OTHER REPRESENTATIVE CAPACITY. THE ASSOCIATION, EACH UNIT OWNER AND DECLARANT ACKNOWLEDGE THAT BY AGREEING TO RESOLVE ALL DISPUTES AS PROVIDED IN THIS **SECTION 11.20**, THEY ARE GIVING UP THEIR RESPECTIVE RIGHTS TO HAVE SUCH DISPUTES TRIED BEFORE A JURY. THE ASSOCIATION,

EACH UNIT OWNER AND DECLARANT FURTHER WAIVE THEIR RESPECTIVE RIGHTS TO AN AWARD OF PUNITIVE AND CONSEQUENTIAL DAMAGES RELATING TO A DISPUTE. BY ACCEPTANCE OF A DEED OR BY ACQUIRING ANY OWNERSHIP INTEREST IN ANY PORTION OF THE COMMUNITY, EACH UNIT OWNER HAS VOLUNTARILY ACKNOWLEDGED THAT HE IS GIVING UP ANY RIGHTS HE MAY POSSESS TO PUNITIVE AND CONSEQUENTIAL DAMAGES OR THE RIGHT TO A TRIAL BEFORE A JURY RELATING TO A DISPUTE.

11.20.8 Statutes of Limitation and Repose. Except as otherwise provided under N.R.S. § 40.695, nothing in this **Section 11.20** shall be considered to toll, stay, reduce or extend any applicable statute of limitation or repose.

11.20.9 Required Consent of Declarant to Modify. This **Section 11.20** shall not be amended except in accordance with **Subsection 11.5.1** of this Declaration and with the express written consent of the Declarant.

11.21 Gated Entrances; Release of Claims.

11.21.1 Gated entrances leading into portions of the Community may be constructed by Declarant and Builders in order to limit vehicular access and to provide some privacy for the Unit Owners and Residents within gated portions of the Community. Each Unit Owner and Resident, for himself and his family, invitees and licensees, acknowledges and agrees as follows:

(i) Declarant Parties make no representations or warranties that gated entrances will provide security and safety to the Unit Owners, Residents and their family, invitees and licensees.

(ii) The gated entrances may restrict or delay entry into the gated portions of the Community by the police, fire department, ambulances and other emergency vehicles or personnel.

Each Unit Owner and Resident, for himself and his family, invitees and licensees, assumes the risk that any such gated entrances may not provide security and safety and may restrict or delay entry into the gated portion of the Community by the police, fire department, ambulances and other emergency vehicles and personnel. Neither the Declarant Parties, the Association, nor any director, officer, agent or employee of any of the foregoing, shall be liable to any Unit Owner, Resident or his family, invitees or licensees for any claims or damages resulting, directly or indirectly, from the construction, operation, existence or maintenance of the gated entrances.

11.21.2 Each Unit Owner and Resident, for himself and his family, invitees and licensees, hereby releases the Declarant Parties and the Association from any and all claims, actions, suits, demands, causes of action, losses, damages or liabilities (Including strict liability)

arising out of or relating to any nuisance, inconvenience, disturbance, injury, death or damage to persons and property resulting from activities or occurrences described in this **Section 11.21**.

11.22 High Power Electric Transmission Lines; Release of Claims.

11.22.1 High power electric transmission lines and related towers, systems and other equipment are located in close proximity to the Community and may be upgraded and supplemented from time to time. Each Unit Owner and Resident, for himself and his family, invitees and licensees, acknowledges and agrees as follows:

(i) The Community may now or in the future be exposed to electromagnetic fields from the high power electric transmission lines and related towers, systems or equipment.

(ii) The Declarant Parties do not claim any expertise concerning such conditions and make no representations, warranties or statements, express or implied, regarding such high power electric transmission lines or related towers, systems or equipment (except to note their existence), or regarding any damage or injury which may occur as a result of the proximity of such lines and equipment to the Community.

Each Unit Owner and Resident, for himself and his family, invitees and licensees, assumes any and all risks as may now or hereafter be or become associated with such high power electric transmission lines, or similar systems or equipment, or any new or replacement equipment or systems. Neither the Declarant Parties, the Association, nor any director, officer, agent or employee of any of the foregoing, shall be liable to any Unit Owner or Resident or his family, invitees or licensees for any claims or damages to persons or property resulting, directly or indirectly, from the existence, operation or maintenance of the high power electric transmission lines or similar systems or equipment.

11.22.2 Each Unit Owner and Resident hereby releases the Declarant Parties and the Association from any and all claims, actions, suits, demands, causes of action, losses, damages or liabilities (Including strict liability) arising out of or relating to any nuisance, inconvenience, disturbance, injury, death or damage to persons and property resulting from activities or occurrences described in this **Section 11.22**.

11.23 Views Not Guaranteed. Although certain Units in the Community at any point in time may have particular views, no express or implied easements exist for views or for the passage of light and air to any Unit. Declarant Parties and the Association make no representations or warranties whatsoever, express or implied, concerning the view that any Unit will have whether at the date this Declaration is Recorded or thereafter. Further, the payment of any premium for any Unit does not constitute a guarantee of any view the Unit may have now or in the future. Any view that exists at any point in time for a Unit may be impaired or obstructed by further construction within the Community, Including by construction of Improvements (Including landscaping) by Declarant and Builders, construction of Improvements by third

parties and by the natural growth of landscaping. No third party, Including any broker or salesperson, has any right to bind Declarant or the Association with respect to the preservation of any view from any Unit or any view of a Unit from any other property.

11.24 Rule Against Perpetuities. If any interest purported to be created by this Declaration is challenged under the rule against perpetuities or any related rule, the interest shall be construed as becoming void and of no effect as of the end of the applicable period of perpetuities computed from the date when the period of perpetuities starts to run on the challenged interest. The "lives in being" for computing the period of perpetuities shall be (i) those that would be used in determining the validity of the challenged interest, plus (ii) those of the issue of the Board of Directors who are living at the time the period of perpetuities starts to run on the challenged interest.

11.25 Limitation of Liability. Notwithstanding anything to the contrary in this Declaration, each Unit Owner, by accepting any interest in any portion of the Community and becoming a Unit Owner, acknowledges and agrees that the Declarant Parties shall not have any personal liability to the Association or any Unit Owner, Member or any other Person, arising out of, relating to or resulting from (Including resulting from action or failure to act with respect to) this Declaration or the Association, except, in the case of Declarant (or its assignee) to the extent of its interest in the Community and, in the event of a judgment, no execution or other action shall be sought or brought thereon against any other assets or be a lien upon such other assets of the judgment debtor.

PN II, INC., a Nevada corporation d/b/a Pulte Homes of Nevada

By: _____

Its: Attorney-in-Fact Jeremy Fritz

STATE OF NEVADA)
) ss.
County of Clark)

The foregoing instrument was acknowledged before me this 23rd day of May, 2005 by Jeremy Fritz, the Attorney-in-Fact of PN II, Inc., a Nevada corporation d/b/a Pulte Homes of Nevada, on behalf of the corporation.

Brenda J. Johnson
Notary Public

My Commission Expires:

March 31, 2006

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
BRENDA J. JOHNSON
Appt. No. 98-1743-1
My Appt. Expires March 31, 2006

485582.5 [5/19/05 2:00 PM]
0174614

EXHIBIT A

PROPERTY SUBMITTED TO COMMUNITY

PARCEL 1

Lot 68 of Block 1, and Common Elements B through G, inclusive, of PROVENCE SUBDIVISION 1, according to the final map recorded in Book 121 of Plats, page 94, Official Records of Clark County, Nevada; and

PARCEL 2

Common Element AA of AMENDED PLAT OF A PORTION OF PROVENCE SUBDIVISION 1, according to the final map recorded in Book 123 of Plats, page 75, Official Records of Clark County, Nevada; and

PARCEL 3

Lot 27 of Block 1, and Common Elements A through I, inclusive, of PROVENCE SUBDIVISION 2, according to the final map recorded in Book 122 of Plats, page 1, Official Records of Clark County, Nevada; and

PARCEL 4

Lot 14 of Block 1, and Common Elements A through K, inclusive, of PROVENCE SUBDIVISION 4, according to the final map recorded in Book 122 of Plats, page 28, Official Records of Clark County, Nevada; and

PARCEL 5

Common Elements E, F and G of PROVENCE COUNTRY CLUB PARCEL 1, according to the final map recorded in Book 121 of Plats, page 93, Official Records of Clark County, Nevada.

EXHIBIT B
ADDITIONAL PROPERTY

PARCEL 1

Lots 1 through 57, inclusive, and Lots 63 through 67, inclusive, of Block 1; Lots 69 through 71, inclusive, of Block 2; Lots 72 through 102, inclusive, of Block 3; Lots 103 through 146, inclusive, of Block 4, of PROVENCE SUBDIVISION 1, according to the final map recorded in Book 121 of Plats, page 94, Official Records of Clark County, Nevada; and

PARCEL 2

Lots 58A through 62A, inclusive, of Block 1, AMENDED PLAT OF A PORTION OF PROVENCE SUBDIVISION 1, according to the final map recorded in Book 123 of Plats, page 75, Official Records of Clark County, Nevada; and

PARCEL 3

Lots 1 through 26, inclusive, and Lots 28 through 51, inclusive, of Block 1; Lots 52 through 66, inclusive, of Block 4; Lots 67 and 68 of Block 5; Lots 69 through 77, inclusive, of Block 6; Lots 78 through 93, inclusive, of Block 5; Lots 94 through 109, inclusive, of Block 3; and Lots 110 through 126, inclusive, of Block 2, of PROVENCE SUBDIVISION 2, according to the final map recorded in Book 122 of Plats, page 1, Official Records of Clark County, Nevada; and

PARCEL 4

Lots 1 through 53, inclusive, of Block 1; Lots 54 through 62, inclusive, of Block 2; Lots 63 through 83, inclusive, of Block 3; Lots 84 through 106, inclusive, of Block 4; Lots 107 through 130, inclusive, of Block 5; and Common Elements A through D, inclusive, of PROVENCE SUBDIVISION 3, according to the final map recorded in Book 122 of Plats, page 27, Official Records of Clark County, Nevada; and

PARCEL 5

Lots 1 through 13, inclusive, and Lots 15 through 57, inclusive, of Block 1; Lots 58 through 67, inclusive, of Block 4; Lots 68 through 100, inclusive, of Block 3; Lots 101 through 128, inclusive, of Block 2, of PROVENCE SUBDIVISION 4, according to the final map recorded in Book 122 of Plats, page 28, Official Records of Clark County, Nevada; and

PARCEL 6

Lots 1 through 41, inclusive, of Block 1; Lots 42 through 51, inclusive, of Block 4; Lots 52 through 62, inclusive, of Block 3; Lots 63 through 90, inclusive, of Block 2; and Common Elements A through D, inclusive, of PROVENCE SUBDIVISION 5, according to the final map recorded in Book 123 of Plats, page 89, Official Records of Clark County, Nevada; and

PARCEL 7

Lots 1 through 23, inclusive, of Block 1; Lots 24 through 57 of Block 2; Lots 58 through 99 of Block 3; and Common Elements A through F, inclusive, of PROVENCE SUBDIVISION 8, according to the final map recorded in Book 123 of Plats, page 90, Official Records of Clark County, Nevada; and

PARCEL 8

All property lying within Parcel 2, as shown by map thereof in File 108, page 24 of Parcel Maps in the Clark County Recorder's Office, Clark County, Nevada;

EXCEPT any portion thereof lying within Parcels 1, 2, 3, 4, 5, 6 and 7 of this Exhibit B; and

EXCEPT any portion thereof lying within the property described on Exhibit A of this Declaration.

MILES BAUER AFFIDAVIT

State of California }
}ss.
Orange County }

Affiant being first duly sworn, deposes and says:

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

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

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

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

Loan Number: REDACTED

Borrower(s): Melissa Lieberman

Property Address: 2184 Pont National Drive, Henderson, Nevada 89044

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

6. Based on Miles Bauer's business records, attached as **Exhibit 1** is a copy of a February 22, 2011 letter from Rock K. Jung, Esq., an attorney with Miles Bauer, to Madeira Canyon, A Planned Community, care of Nevada Association Services, Inc.

7. Based on Miles Bauer's business records, attached as **Exhibit 2** is a copy of Statement of Account from Nevada Association Services, Inc. received by Miles Bauer in response to the February 22, 2011 letter identified above.

8. Based on Miles Bauer's business records, attached as **Exhibit 3** is a copy of a April 1, 2011 letter from Mr. Jung to Nevada Association Services, Inc. enclosing a check for $486.00.

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9. Based on Miles Bauer's business records, on April 1, 2011, Nevada Association Services, Inc. refused delivery of the April 1, 2011 letter and the $486.00 check. A copy of the delivery receipt from Miles Bauer's business records is attached as **Exhibit 4**. A copy of a screenshot containing the relevant case management note confirming the check was returned is attached as **Exhibit 5.**

FURTHER DECLARANT SAYETH NOT.

Date: 2/20/15

Declarant Adam Kendis

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

State of California

County of Orange

Subscribed and sworn to (or affirmed) before me on this 20th day of February, 2015,

by Adam Kendis, proved to me on the basis of satisfactory evidence to be
(Name of Signer)

the person who appeared before me.

Signature _____ (Seal)
(Signature of Notary Public)

AMANDA MARIA MENDOZA
Commission # 2078315
Notary Public - California
Los Angeles County
My Comm. Expires Aug 17, 2018

EXHIBIT 1

DOUGLAS E. MILES *
Also Admitted in California and Illinois
RICHARD J. BAUER, JR.*
JEREMY T. BERGSTROM
Also Admitted in Arizona
FRED TIMOTHY WINTERS*
KEENAN E. McCLENAHAN*
MARK T. DOMEYER*
Also Admitted in District of Columbia & Virginia
TAMI S. CROSBY*
L. BRYANT JAQUEZ *
DANIEL L. CARTER *
GINA M. CORENA
WAYNE A. RASH *
ROCK K. JUNG
VY T. PHAM *
KRISTA J. NIELSON
HADI R. SEYED-ALI *
ROSEMARY NGUYEN *
JORY C. GARABEDIAN
THOMAS M. MORLAN
Admitted in California
KRISTIN S. WEBB *
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STEVEN E. STERN
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ANDREW H. PASTWICK
Also Admitted in Arizona and California

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

2200 Paseo Verde Parkway, Suite 250
Henderson, NV 89052
Phone: (702) 369-5960
Fax: (702) 369-4955

* CALIFORNIA OFFICE
1231 E. DYER ROAD
SUITE 100
SANTA ANA, CA 92705
PHONE (714) 481-9100
FACSIMILE (714) 481-9141

February 22, 2011

SENT VIA FIRST CLASS MAIL

Madeira Canyon, A Planned Community
Nevada Association Services, Inc.
6224 W. Desert Inn Road, Suite A
Las Vegas, NV 89146

Re: *Property Address: 2184 Pont National Drive, Henderson 89044*
MBBW File No. 11-H0279

Dear Sirs:

This letter is in response to your Notice of Default with regard to the HOA assessments purportedly owed on the above described real property. This firm represents the interests of MERS as nominee for BAC Home Loans Servicing, LP afka Countrywide Home Loans, Inc. (hereinafter "BAC") with regard to these issues. BAC is the beneficiary/servicer of the first deed of trust loan secured by the property.

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

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

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

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

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

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

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

Based on Section 2(b), a portion of your HOA lien is arguably senior to BAC's first deed of trust, specifically the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessment dated December 17, 2010. For purposes of calculating the nine-month period, the trigger date is the date the HOA sought to enforce its lien. It is unclear, based upon the information known to date, what amount the nine months' of common assessments pre-dating the NOD actually are. That amount, whatever it is, is the amount BAC should be required to rightfully pay to fully discharge its obligations to the HOA per NRS 116.3102 and my client hereby offers to pay that sum upon presentation of adequate proof of the same by the HOA.

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

Thank you for your time and assistance with this matter. I may be reached by phone directly at (702) 942-0412. Please fax the breakdown of the HOA arrears to my attention at (702) 942-0411. I will be in touch as soon as I've reviewed the same with BAC.

Sincerely,

MILES, BAUER, BERGSTROM & WINTERS, LLP

Rock K. Jung, Esq.

EXHIBIT 2

Lieberman, Melissa
2184 Pont National Dr

Madeira Canyon
Account No.: REDACTED
NAS #N 62616

Assessments, Late Fees, Interest, Attorneys Fees & Collection Costs *Dates of Delinquency:01/10-04/11*	**Amount** Present rate	**Amount** Prior Rate	**Amount** Prior rate	**Amount** Prior rate	**Amount** Prior rate
Balance forward	0.00	0.00	0.00	0.00	0.00
No. of Months Subject to Interest	0	0	0	0	0
Interest due on Balance Forward	0.00	0.00	0.00	0.00	0.00
Quarterly Assessment Amount	162.00	210.00	180.00	234.00	0.00
No. of Months Delinquent	2	2	4	4	0
No. of Months Subject to Interest	0	0	0	0	0
Total Monthly Assessments due	324.00	420.00	720.00	936.00	0.00
Late fee amount	15.00	0.00	15.00	0.00	0.00
No. of Months Late Fees Incurred	1	0	4	0	0
Total Late Fees due	15.00	0.00	60.00	0.00	0.00
Interest Rate	0.12	0.12	0.12	0.12	0.12
Interest due	4.73	0.00	4.73	0.00	0.00
Special Assessment Due	0.00	0.00	0.00	0.00	0.00
Special Assessment Late Fee	0.00	0.00	0.00	0.00	0.00
Special Assessment Months Late	0	0	0	0	0
Special Assessment Interest Due	0.00	0.00	0.00	0.00	0.00
Transfer Fee	0.00	0.00	0.00	0.00	0.00
Mgmt Intent to Lien	0.00	0.00	0.00	0.00	0.00
Audit Fee	0.00	0.00	0.00	0.00	0.00
Management Co. Fee	0.00	0.00	0.00	0.00	0.00
Demand Letter	135.00	0.00	0.00	0.00	0.00
Lien Fees	325.00	0.00	0.00	0.00	0.00
Prepare Lien Release	30.00	0.00	0.00	0.00	0.00
Certified Mailing	56.00	0.00	0.00	0.00	0.00
Recording Costs	57.00	0.00	0.00	0.00	0.00
Pre NOD Ltr	75.00	0.00	0.00	0.00	0.00
Payment Plan Fee	0.00	0.00	0.00	0.00	0.00
Breach letters	0.00	0.00	0.00	0.00	0.00
Personal check returns	0.00	0.00	0.00	0.00	0.00
Escrow demand fee	0.00	0.00	0.00	0.00	0.00
Collection Costs on Violations	**0.00**	0.00	0.00	0.00	0.00
Subtotals	$1,021.73	$420.00	$784.73	$936.00	$0.00

Credit	**Date**	
		(0.00)
		(0.00)
		(0.00)
		(0.00)
		(0.00)
		(0.00)
		(0.00)
		(0.00)
		(0.00)
		(0.00)
		(0.00)
NAS fees & costs		(0.00)

HOA TOTAL **$3,852.46**

"Nevada Association Services Inc. is a debt collector. Nevada Association Services, Inc. is attempting to collect a debt. Any information obtained will be used for that purpose."

Foreclosure Fees & Costs	Amount		Attorneys Cre	Date	
					(0.00)
Foreclosure Fees	400.00				(0.00)
Title Report	290.00		Collection Cre	Date	
Posting/Publication	0.00				(0.00)
Courier	0.00				(0.00)
Postponement of Sale	0.00				(0.00)
Conduct Sale	0.00				(0.00)
Prepare/Record Deed	0.00				(0.00)
(other)	0.00				(0.00)
(other)	0.00				(0.00)
(other)	0.00				(0.00)
					(0.00)
SUBTOTAL	$690.00				(0.00)
					(0.00)
					(0.00)
		$3,852.46			
FORECLOSURE TOTAL			Collection Credits SubTotal		$0.00

EXHIBIT 3

DOUGLAS E. MILES *
Also Admitted in California and Illinois
RICHARD J. BAUER, JR.*
JEREMY T. BERGSTROM
Also Admitted in Arizona
FRED TIMOTHY WINTERS*
KEENAN E. McCLENAHAN*
MARK T. DOMEYER*
Also Admitted in District of Columbia & Virginia
TAMI S. CROSBY*
L. BRYANT JAQUEZ *
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* CALIFORNIA OFFICE
1231 E. DYER ROAD
SUITE 100
SANTA ANA, CA 92705
PHONE (714) 481-9100
FACSIMILE (714) 481-9141

April 1, 2011

Nevada Association Services, Inc.
6224 W. Desert Inn Road, Suite A
Las Vegas, NV 89146

Re: *Property Address:* 2184 Pont National Drive
ACCT NO.: REDACTED
LOAN #: REDACTED
MBBW File No. 11-H0279

Dear Sir/Madame:

As you may recall, this firm represents the interests of BAC Home Loans Servicing, LP fka Countrywide Home Loans, Inc. (hereinafter "BAC") with regard to the issues set forth herein. We have received correspondence from your firm regarding our inquiry into the "Super Priority Demand Payoff" for the above referenced property. The Statement of Account provided by you in regards to the above-referenced address shows a full payoff amount of $3,852.46. BAC is the beneficiary/servicer of the first deed of trust loan secured by the property and wishes to satisfy its obligations to the HOA. Please bear in mind that:

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

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

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

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

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

Based on Section 2(b), a portion of your HOA lien is arguably prior to BAC's first deed of trust, specifically the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessment. As stated above, the payoff amount stated by you includes many fees that are junior to our client's first deed of trust pursuant to the aforementioned NRS 116.3102 Subsection (1), Paragraphs (j) through (n).

Our client has authorized us to make payment to you in the amount of $486.00 to satisfy its obligations to the HOA as a holder of the first deed of trust against the property. Thus, enclosed you will find a cashier's check made out to NEVADA ASSOCIATION SERVICES in the sum of $486.00, which represents the maximum 9 months worth of delinquent assessments recoverable by an HOA. This is a non-negotiable amount and any endorsement of said cashier's check on your part, whether express or implied, will be strictly construed as an unconditional acceptance on your part of the facts stated herein and express agreement that BAC's financial obligations towards the HOA in regards to the real property located at 2184 Pont National Drive have now been "paid in full".

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

Sincerely,

MILES, BAUER, BERGSTROM & WINTERS, LLP

Rock K. Jung, Esq.

Miles, Bauer, Bergstrom & Winters, LLP Trust Acct 11-H0279 Initials: SRN

Payee: NEVADA ASSOCIATION SERVICES, Check #: 8684 Date: 3/28/2011 Amount: 486.00

Inv. Date	Reference #	Description	Inv. Amount	Case #	Matter Description	Cost Amount
3/28/2011	0309-01	To Cure HOA Deficiency	486.00			

0463

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

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

REDACTED
Loan # REDACTED

8684

Date: 3/28/2011

Amount $**** 486.00

Check Void After 90 Days

Pay $*****Four Hundred Eighty-Six & No/100 Dollars
to the order of

NEVADA ASSOCIATION SERVICES, INC.
6224 W. Desert Inn Rd.,Ste. A
Las Vegas, NV 89146

Security features. Details on back.

REDACTED

EXHIBIT 4

On this day, April 1, 2011, Nevada Association Services, Inc. received: (1) letters accompanying each of the checks listed below that address the purpose of the tender and the effect of accepting said checks *and* (2) the following checks for the following addresses:

Amount	Address	Ref#	MBBW#
486.00	2184 Pont National Dr.	REDACTED	11-H0279
123.75	9451 Baltinglass St.		11-H0296
1,332.00	10550 W. Alexander Rd. #1209		11-H0282
2,250.00	2122 Pine Breeze Lane		11-H0101
468.00	2617 Star Manor St.		11-H0341

By signing below you acknowledge and confirm receipt of said checks.

Signature:_____ Date_____

An Employee of Nevada Association Services, Inc.

RUN. # 907
FIRM MILES, BAUER, BERGSTROM, WINTERS, LLC
ADDR 2200 PASEO VERDE PKWY. * STE.#250
PH # 702-369-5960

384-0305 • Fax 384-8638
1118 Fremont St.
Las Vegas, NV 89101

0117578 8

ATTN: _____ DATE: _____ AM PM

CASE NAME _____ NO. _____
DOCUMENTS _____ CK # _____ $_____
REF # _____ Limit of Liability: $100.00 per form

☐ Return Copy ☐ Return Original ☐ Call When Completed/Problem *(Extra Fee)*

1.

2.

3.

☐NEXT DAY ☐REGULAR ☐SPECIAL *(4 HRS)* ☐EXPEDITED *(2 HRS)*

Statute Expires _____

May be subject to an additional charge
LAST DATE ___/___/___ *(SPECIFY DATE/TIME)*
RETURN DATE ___/___/___

Received by _____
Date _____ *Time* _____

☒NOT COMPLETE DUE TO (4) CR 4/1/11 3RD WONT ACCEPT, NOT PAID IN FULL PER CARLY.

☐DISTRICT
☐ARB ☐DISC.
☐M/C ☐D.A.
☐JUDGE ☐INDEX

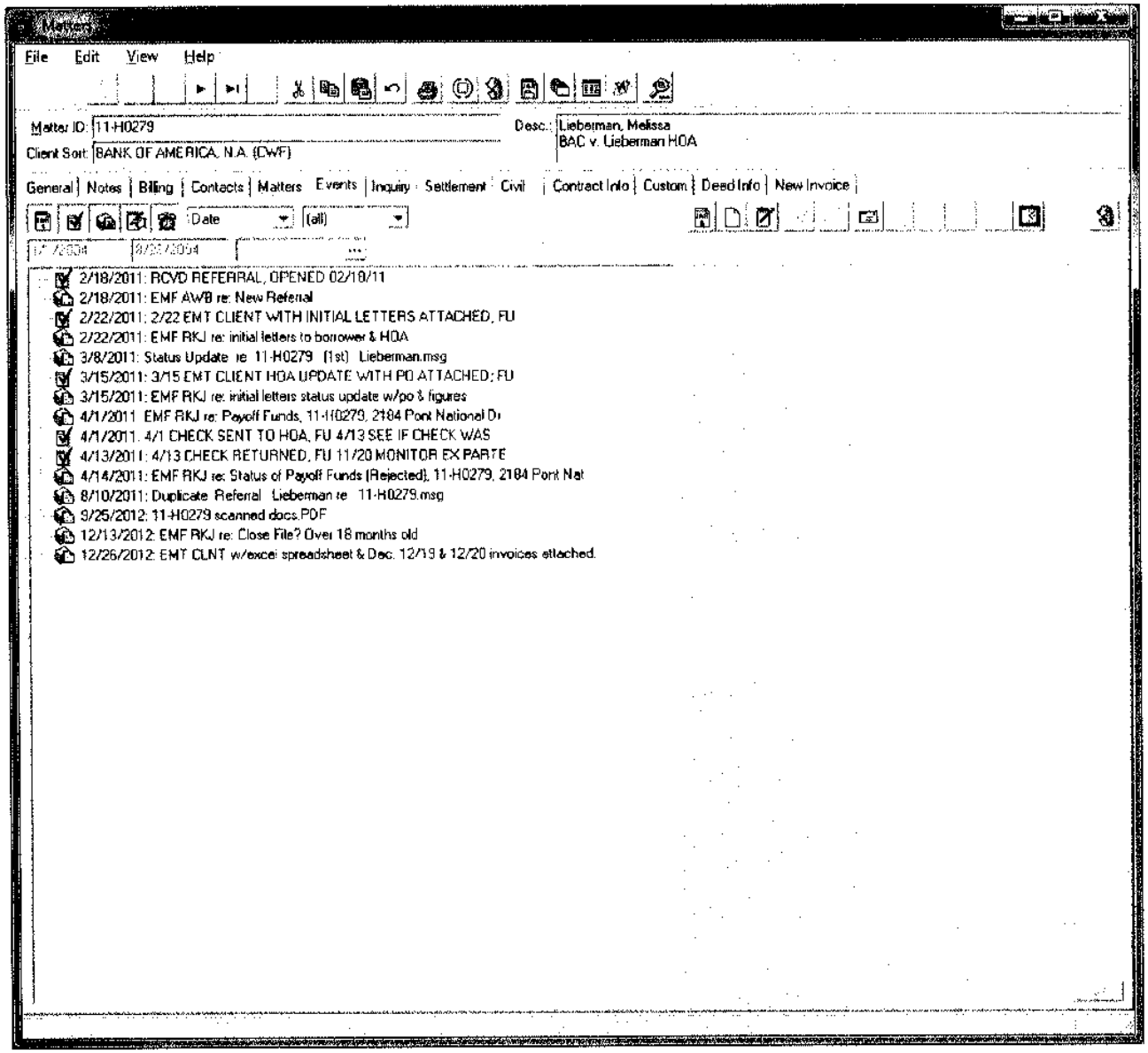
☐FAMILY
☐M/C ☐D.A.
☐JUDGE ☐INDEX

☐JUSTICE _____
☐CIVIL ☐EVICT
☐CRIM ☐S.C.
☐TRAF ☐D.A.

☐MUNI CT _____
☐RECORDER
☐CONSTABLE
☐SHERIFF
☐FEDERAL
☐BANKRUPTCY
☐SECTRY OF STATE
☐HEARINGS OFFICER
☐APPEALS OFFICER

BANA 000141

EXHIBIT 5


Matters
File Edit View Help
Matter ID: 11-H0279
Client Sort: BANK OF AMERICA, N.A. (DWF)
Desc.: Lieberman, Melissa
BAC v. Lieberman HOA
General | Notes | Billing | Contacts | Matters | Events | Inquiry | Settlement | Civil | Contract Info | Custom | Deed Info | New Invoice
Date
(all)
2/18/2011: RCVD REFERRAL, OPENED 02/18/11
2/18/2011: EMF AWB re: New Referral
2/22/2011: 2/22 EMT CLIENT WITH INITIAL LETTERS ATTACHED, FU
2/22/2011: EMF RKJ re: initial letters to borrower & HOA
3/8/2011: Status Update re 11-H0279 (1st) Lieberman.msg
3/15/2011: 3/15 EMT CLIENT HOA UPDATE WITH PO ATTACHED; FU
3/15/2011: EMF RKJ re: initial letters status update w/po & figures
4/1/2011 EMF RKJ re: Payoff Funds, 11-H0279, 2184 Pont National Dr
4/1/2011. 4/1 CHECK SENT TO HOA, FU 4/13 SEE IF CHECK WAS
4/13/2011: 4/13 CHECK RETURNED, FU 11/20 MONITOR EX PARTE
4/14/2011: EMF RKJ re: Status of Payoff Funds (Rejected), 11-H0279, 2184 Pont Nat
8/10/2011: Duplicate Referral Lieberman re 11-H0279.msg
9/25/2012: 11-H0279 scanned docs.PDF
12/13/2012: EMF RKJ re: Close File? Over 18 months old
12/26/2012: EMT CLNT w/excel spreadsheet & Dec. 12/19 & 12/20 invoices attached.

MILES BAUER BORROWER LETTER AFFIDAVIT

State of California }
}ss.
Orange County }

Affiant being first duly sworn, deposes and says:

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

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

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

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

Loan Number: REDACTED

Borrower(s): Melissa Lieberman

Property Address: 2184 Pont National Drive, Henderson, Nevada 89044

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

6. Based on Miles Bauer's business records, attached as **Exhibit 1** is a copy of a February 22, 2011 letter from Rock K. Jung, Esq., an attorney with Miles Bauer, to Melissa Lieberman.

FURTHER DECLARANT SAYETH NOT.

Date: 2/20/15

Declarant Adam Kendis

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

State of California

County of Orange

Subscribed and sworn to (or affirmed) before me on this 20th day of February, 2015, by Adam Kendis (Name of Signer), proved to me on the basis of satisfactory evidence to be the person who appeared before me.

Signature (Signature of Notary Public) (Seal)

AMANDA MARIA MENDOZA
Commission # 2078315
Notary Public - California
Los Angeles County
My Comm. Expires Aug 17, 2018

DOUGLAS E. MILES *
Also Admitted in California and Illinois
RICHARD J. BAUER, JR.*
JEREMY T. BERGSTROM
Also Admitted in Arizona
FRED TIMOTHY WINTERS*
KEENAN E. McCLENAHAN*
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MILES, BAUER, BERGSTROM & WINTERS, LLP
ATTORNEYS AT LAW SINCE 1985

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Fax: (702) 369-4955

* CALIFORNIA OFFICE
1231 E. DYER ROAD
SUITE 100
SANTA ANA, CA 92705
PHONE (714) 481-9100
FACSIMILE (714) 481-9141

February 22, 2011

SENT VIA FIRST CLASS MAIL

Melissa Lieberman
2184 Pont National Drive
Henderson, NV 89044

Re: *Property Address: 2184 Pont National Drive, Henderson 89044*
MBBW File No. 11-H0279

Ms. Lieberman:

This letter is written in response to the attached Notice of Default your HOA caused to be issued and recorded as a result of you allegedly neglecting to timely pay your required HOA assessments on the above described real property. This firm represents the interests of MERS as nominee for BAC Home Loans Servicing, LP afka Countrywide Home Loans, Inc. (hereinafter "BAC") with regard to these issues. As you know, BAC is the beneficiary/servicer of the first deed of trust loan secured by the property.

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

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

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

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

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

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

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

Please be advised that, in the event you do not immediately bring your HOA account current by paying all sums past due, BAC *may* advance the sums necessary to protect *its lien interest* on the property. If BAC does in fact advance said sums, those sums may be added on to the balance you owe on the first position note and deed in trust you executed. BAC may do this per Nevada law and per the express terms of the note and deed of trust you executed. Further, BAC may add the attorney's fees and costs that are being incurred as a result of this matter to your loan. BAC may also do this per Nevada law and per the express terms of the note and deed of trust you executed. Please note that the HOA foreclosure sale may still occur despite any advancement of sums made by BAC in order to protect its lien interest on the property. Thus, we strongly advise that you contact your HOA and/or Nevada Association Services immediately and make the necessary arrangements to bring your HOA account current. If you have already brought your HOA account current or are currently working with Nevada Association Services to do so, then please disregard this letter.

Sincerely,

MILES, BAUER, BERGSTROM & WINTERS, LLP

Rock K. Jung, Esq.

MERS *10089276*

APN # 190-20-311-033
NAS # N62616
First American Title Nevada/NDTS # 4914500
PropertyAddress: 2184 Pont National Drive

DOCUMENT RECORDED ON 12/21/2010
DOCUMENT # 0000548 Book 20101221
Clark COUNTY
DATE MAILED 12/28/2010

NOTICE OF DEFAULT AND ELECTION TO SELL UNDER HOMEOWNERS ASSOCIATION LIEN

IMPORTANT NOTICE

WARNING! IF YOU FAIL TO PAY THE AMOUNT SPECIFIED IN THIS NOTICE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE!

IF YOUR PROPERTY IS IN FORECLOSURE BECAUSE YOU ARE BEHIND IN YOUR PAYMENTS IT MAY BE SOLD WITHOUT ANY COURT ACTION and you may have the legal right to bring your account in good standing by paying all your past due payments plus permitted costs and expenses within the time permitted by law for reinstatement of your account. No sale date may be set until ninety (90) days from the date this notice of default was mailed to you. The date this document was mailed to you appears on this notice.

This amount is $3,112.73 as of December 17, 2010 and will increase until your account becomes current.

While your property is in foreclosure, you still must pay other obligations (such as insurance and taxes) required by your note and deed of trust or mortgage, or as required under your Covenants Conditions and Restrictions. If you fail to make future payments on the loan, pay taxes on the property, provide insurance on the property or pay other obligations as required by your note and deed of trust or mortgage, or as required under your Covenants Conditions and Restrictions, the Madeira Canyon, a planned community (the Association) may insist that you do so in order to reinstate your account in good standing. In addition, the Association may require as a condition to reinstatement that you provide reliable written evidence that you paid all senior liens, property taxes and hazard insurance premiums.

Upon your request, this office will mail you a written itemization of the entire amount you must pay. You may not have to pay the entire unpaid portion of your account, even though full payment was demanded, but you must pay all amounts in default at the time payment is made. However, you and your Association may mutually agree in writing prior to the foreclosure sale to, among other things, 1) provide additional time in which to cure the default by transfer of the property or otherwise; 2) establish a schedule of payments in order to cure your default; or both (1) and (2).

Following the expiration of the time period referred to in the first paragraph of this notice, unless the obligation being foreclosed upon or a separate written agreement between you and your Association permits a longer period, you have only the legal right to stop the sale of your property by paying the entire amount demanded by your Association.

To find out about the amount you must pay, or arrange for payment to stop the foreclosure, or if your property is in foreclosure for any other reason, contact: Nevada Association Services, Inc. on behalf of Madeira Canyon, a planned community, 6224 W. Desert Inn Road, Suite A, Las Vegas, NV 89146. The phone number is (702) 804-8885 or toll free at (888) 627-5544.

If you have any questions, you should contact a lawyer or the Association which maintains the right of assessment on your property.

NAS # N62616

Notwithstanding the fact that your property is in foreclosure, you may offer your property for sale, provided the sale is concluded prior to the conclusion of the foreclosure.

REMEMBER, YOU MAY LOSE LEGAL RIGHTS IF YOU DO NOT TAKE PROMPT ACTION.

NOTICE IS HEREBY GIVEN THAT NEVADA ASSOCIATION SERVICES, INC.

is the duly appointed agent under the previously mentioned Notice of Delinquent Assessment Lien, with the owner(s) as reflected on said lien being Melissa N Lieberman, dated October 25, 2010, and recorded on October 27, 2010 as instrument number 0002037 Book 20101027 in the official records of Clark County, Nevada, executed by Madeira Canyon, a planned community, hereby declares that a breach of the obligation for which the Covenants Conditions and Restrictions, recorded on May 24, 2005, as instrument number 0002414 BK 20050524, as security has occurred in that the payments have not been made of homeowner's assessments due from January 01, 2010 and all subsequent homeowner's assessments, monthly or otherwise, less credits and offsets, plus late charges, interest, trustee's fees and costs, attorney's fees and costs and Association fees and costs.

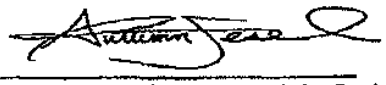
That by reason thereof, the Association has deposited with said agent such documents as the Covenants Conditions and Restrictions and documents evidencing the obligations secured thereby, and declares all sums secured thereby due and payable and elects to cause the property to be sold to satisfy the obligations.

Nevada Association Services, Inc. is a debt collector. Nevada Association Services, Inc. is attempting to collect a debt. Any information obtained will be used for that purpose.

Nevada Associations Services, Inc., whose address is 6224 W. Desert Inn Road, Suite A, Las Vegas, NV 89146 is authorized by the association to enforce the lien by sale.

Legal_Description: Provence Sub 7, Plat book 127, Page 62, Lot 75, Block 1 in the County of Clark

Dated: December 17, 2010



By: Autumn Fesel, of Nevada Association Services, Inc.
on behalf of Madeira Canyon, a planned community

When Recorded Mail To:
Nevada Association Services, Inc.
6224 W. Desert Inn Road, Suite A
Las Vegas, NV 89146
(702) 804-8885
(888) 627-5544