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 IV

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DATED this 14th day of September, 2022.

AKERMAN LLP

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CERTIFICATE OF SERVICE

I certify that I electronically filed on September 14, 2022, the foregoing **APPELLANT'S APPENDIX, VOLUME IV** 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

Miles, Bauer, Bergstrom & Winters, LLP Trust Acct 09-L1545 Initials: TLC

Payee: Alessi & Koenig, LLC Check #: 2462 Date: 1/13/2010 Amount: 495.00

Inv. Date	Reference #	Description	Inv. Amount	Case #	Matter Description	Cost Amount
1/13/2010	#18160	To Cure HOA Deficiency	495.00			

Miles, Bauer, Bergstrom & Winters, LLP
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1665 Scenic Avenue - Suite 200
Costa Mesa, CA 92626
Phone: (714) 481-9100

Bank of America
1100 N. Green Valley Parkway
Henderson, NV 89074
16-66/1220
1029
09-L1545
Loan # [redacted]7844

2462

Date: 1/13/2010

Amount $**** 495.00

Check Void After 90 Days

Pay $*****Four Hundred Ninety-Five & No/100 Dollars

to the order of Alessi & Koenig, LLC

[redacted]

Details on back. Security Features Included.

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January 21, 2010

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

Re: *Property Address:* 6017 Lamotte Avenue
HOA #: 4805
LOAN #: [redacted]5753
MBBW File No. 09-L0666

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 in regards to the above-referenced address shows a full payoff amount of $10,538.23. 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 $495.00 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 Alessi & Koenig, LLC in the sum of $495.00, 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 6017 Lamotte Avenue 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) 942-0442.

Sincerely,

MILES, BAUER, BERGSTROM & WINTERS, LLP

Rock K. Jung, Esq.

Miles, Bauer, Bergstrom & Winters, LLP Trust Acct 09-L0666 Initials: TLC

Payee: Alessi & Koenig, LLC Check #: 2488 Date: 1/14/2010 Amount: 495.00

Inv. Date	Reference #	Description	Inv. Amount	Case #	Matter Description	Cost Amount
1/14/2010	#4805	To Cure HOA Deficiency	495.00			

Miles, Bauer, Bergstrom & Winters, LLP
Trust Account
1665 Scenic Avenue - Suite 200
Costa Mesa, CA 92626
Phone: (714) 481-9100

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

2488

Date: 1/14/2010

09-L0666

Loan # [redacted]5753

Amount $**** 495.00

Pay $*****Four Hundred Ninety-Five & No/100 Dollars

Check Void After 90 Days

to the order of Alessi & Koenig, LLC

[redacted]

Details on back. Security Features Included.

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BAC HOME LOANS SERVICING, LP,

Plaintiffs,

vs.

STONEFIELD II HOMEOWNERS ASSOCIATION; ANTHEM HIGHLANDS COMMUNITY ASSOCIATION; MONECITO AT MOUNTAIN'S EDGE HOMEOWNERS ASSOCIATION; HERITAGE SQUARE SOUTH HOMEOWNERS' ASSOCIATION, INC.; SIERRA RANCH HOMEOWNERS ASSOCIATION; CORTEZ HEIGHTS HOMEOWNERS ASSOCIATION; SOUTHERN HIGHLANDS COMMUNITY ASSOCIATION; ELKHORN – CIMMARRON ESTATES HOMEOWNERS ASSOCIATION; ELKHORN COMMUNITY ASSOCIATION, a Nevada non-profit corporation; CANYON CREST ASSOCIATION; LAS BRISAS HOMEOWNERS ASSOCIATION; ALIANTE MASTER ASSOCIATION; MOUNTAIN'S EDGE MASTER ASSOCIATION; ALESSI & KOENIG, LLC; ALLIED TRUSTEE SERVICES, INC.; ANGIUS & TERRY COLLECTIONS, LLC; ASSESSMENT MANAGEMENT GROUP INC.; ASSET RECOVERY SERVICES, INC.; LJS&G,LTD., d/b/a Leach Johnson Song & Gruchow; HOMEOWNER ASSOCIATION SERVICES, INC; NEVADA ASSOCIATION SERVICES, INC.; PHIL FRINK & ASSOCIATES, INC.; G.J.L., INCORPORATED, d/b/a Pro Forma Lien & Foreclosure; K.G.D.O. HOLDING

Case No.: 2:11-cv-00167-JCM-RJJ

MOTION TO DISMISS

COMPANY, INC., d/b/a Terra West Property Management; RMI MANAGEMENT LLC, d/b/a Red Rock Financial Services; SILVER STATE TRUSTEE SERVICES, LLC,

Defendants.

Defendants Anthem Highlands Community Association, Homeowners Association Services, Inc., LJS&G, LTD., d/b/a Leach Johnson Song & Gruchow, Heritage Square South, Nevada Association Services, Inc., K.G.D.O. Holding Company, Inc., d/b/a Terra West Property Management, Sierra Ranch Homeowners Association, Cortez Heights Homeowners Association, Elkhorn Cimarron Estates Homeowners Association, Mountain's Edge Master Association, Montecito at Mountain's Edge Homeowners Association, RMI Management, L.L.C. d/b/a Red Rock Financial Services, Stonefield II Homeowners Association, Phil Frink & Associates, Inc., Heritage Square South Homeowners Association, Aliante Master Association, and Elkhorn Community Association. (collectively "Defendants"), by and through their undersigned attorneys, herby submit this Motion to Dismiss Plaintiff's Complaint ("Motion").

This Motion is based upon the attached Memorandum of Points and Authorities, the pleadings and papers on file herein, and any oral argument the Court may allow.

DATED this 23rd day of March, 2011.

LEACH JOHNSON SONG & GRUCHOW

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Ignoring the most basic tenets of lien and foreclosure law, Plaintiff asks this Court to issue a declaration permitting lenders to pay off statutorily superior liens for pennies on the

dollar without completing the requisite step of foreclosing on the property subject to the lien. This means that lenders obtain clear title to the asset subject to their security interest without ever owning the property. In this way, lenders insulate the asset from foreclosure by the homeowners' association and, at the same time, avoid all of the obligations of property ownership, including the payments of assessments prospectively and maintaining the property in accordance with the covenants, conditions and restrictions recorded against the property. Lenders, such as Bank of America, may then sit on the property without maintaining it or paying assessments to the homeowners' association for whatever period of time it takes for the real estate market to improve enough to enable Plaintiff to maximize its profit. Plaintiff's paradigm, if employed, would result in a tremendous windfall for lenders and bankruptcy or receivership for Nevada common-interest communities.

Pursuant to N.R.S. 116.3116, a homeowners' association ("HOA") has a statutory lien against a unit owner's real property for delinquent assessments. A delinquent assessment lien is afforded superiority over virtually every other lien or encumbrance against the property as to the full amount of the lien, including the first deed of trust, to the extent of assessments accrued in the 9 months preceding an action to enforce the lien. This delinquent assessment lien is referred to as the Super Priority Lien. Pursuant to Nevada law, late fees, interest and the costs associated with collection are included in the Super Priority Lien. Lenders and investors are required to satisfy the Super Priority Lien to secure marketable title and sell the home. In an attempt to avoid this obligation, BAC cooked up a scheme of refusing to foreclose on the property and demanding that HOAs release their Super Priority Liens for a payment of much less than the amount of the lien.

BAC now asks this Court to legitimize its scheme by issuing a declaration based entirely on an interpretation of a Nevada statute that is: (1) currently being litigated in virtually every available forum in the Nevada judicial and administrative system; (2) is the subject of several bills currently pending in the Nevada Legislature; and (3) has already been interpreted by the Commission for Common-Interest Communities and Condominium Hotels ("Commission"), the administrative body that the Nevada Legislature specifically empowered and directed to interpret

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the precise statute that Plaintiff asks this Court to interpret. It is well understood by all parties that this hotly debated state law issue will ultimately be determined by the Supreme Court of Nevada.

BAC's claims, in the meantime, are not ripe for adjudication in this Court. BAC seeks a declaration from the Court that it may "prepay" a Super Priority Lien by tendering payment of a reduced amount prior to foreclosing on the property and demanding the release of the entire lien. The Super Priority Lien is **triggered** by foreclosure by the first deed of trust. If the first trust deed holder takes title to the property at the foreclosure sale, the Association's lien is extinguished except for the Super Priority portion of the lien, which survives foreclosure and entitles the HOA to recover that amount from the lender. However, until such time as BAC actually forecloses on the property, there is and can be no priority dispute regarding the competing encumbrances and liens recorded against the property. Accordingly, BAC's claim for declaratory relief is not ripe for adjudication and should be dismissed.

Alternatively, should this Court find this matter ripe for judicial determination, the Plaintiff has failed to satisfy the amount in controversy requirement, and this Court's jurisdiction should be restrained to allow Nevada state courts to determine the merits, if any, of Plaintiff's arguments regarding the interpretation and application of NRS § 116.3116. On these alternative bases, the Complaint must be dismissed.

II. FACTS

In its Complaint, Plaintiff alleges that it services thousands of mortgage loans in Nevada on behalf of certain "first security interests." Complaint ¶ 47. Plaintiff acknowledges that HOAs are permitted to charge owners assessments for common expenses and, when owners fail to pay these assessments, HOAs have a lien against the property that can be foreclosed. *Id.* ¶¶ 48-50. Plaintiff further acknowledges that an HOA's lien for delinquent assessments is entitled to priority over the first deed of trust to the extent of assessments accruing in the 9 months preceding "an action to enforce the lien" (the "Super Priority Lien"). Plaintiff further alleges that HOAs and the entire collections industry generally believe that the Super Priority Lien "attaches only after a first-priority deed of trust is foreclosed." *Id.* ¶ 53.

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Plaintiff, sometimes before foreclosing on a property, tenders payment of the Super Priority Lien amount calculated as 9 times the monthly assessment amount, excluding interest, late fees and costs of collection. *Id.* ¶¶ 54, 65-67. Plaintiff alleges that Defendants sometimes refuse to communicate with Plaintiff regarding the pay-off amount of the Super Priority Lien. *Id.* ¶ 56. Plaintiff alleges that the trustees "wrongfully rejected tender of the payment by BAC that would have satisfied the full lien amount[.]" *Id.* ¶ 66. Plaintiff further alleges that Defendants "will continue to refuse BAC payments" and that Defendants sought to collect an amount in excess of that which is allowed pursuant to N.R.S. § 116.3116. *Id.* ¶¶ 67, 71. On this basis Plaintiff seeks a judicial declaration that "(1) BAC has a right to pay off or redeem an association's super-priority lien [and demand release of the entire lien], and (2) only budgeted common assessments, but not attorneys' fees or collection costs, are included within the super-priority lien amount under § Nev. Rev. Stat. 116.3116." *Id.* at p. 10.

III. ARGUMENTS

1. Legal Standard

Declaratory relief is available only if: (1) a justiciable controversy exists between parties with adverse interests; (2) the plaintiff has a legally protectable interest; and (3) the issue is ripe. *See Knittle v. Progressive Casualty Ins. Co.,* 908 P.2d 724, 725 (Nev. 1996). Further, a claim is fit for declaratory relief only if the issues raised involve a legally cognizable claim. *US West Commc'ns v. MFS Intelenet, Inc.,* 193 F.3d 1112, 1118 (9th Cir .1999). If a case is not ripe for review, then there is no case or controversy and the court cannot exercise subject-matter jurisdiction over the action. *See American States Ins. Co. v. Kearns,* 15 F.3d 142, 143 (9th Cir.1994). Declaratory judgments generally serve to resolve uncertainty faced by potential defendants who face threats of litigation and who may accrue legal liability while waiting for potential plaintiffs to initiate a suit. *See Societe de Conditionnement en Aluminum v. Hunter Engineering Co., Inc.,* 655 F.2d 938 (9th Cir. 1981).

The decision whether or not to hear a declaratory judgment action is left to the discretion of the federal court. *See Leadsinger, Inc. v. BMG Music Pub.,* 512 F.3d 522, 533 (9th Cir.2008). Thus, the federal court may decline to address a claim for declaratory relief "[w]here the

substantive suit would resolve the issues raised by the declaratory judgment action, ... because the controversy has 'ripened' and the uncertainty and anticipation of litigation are alleviated." *Tempco Elec. Heater Corp. v. Omega Eng'g, Inc.,* 819 F.2d 746, 749 (7th Cir.1987).

2. Plaintiff's Claims are Not Ripe for Judicial Determination.

Plaintiff's Complaint may be summarized as follows: (1) Plaintiff has a right to tender payment of the Super-Priority Lien, thereby implying a corresponding legal obligation of the Defendants to accept the payment as settlement in full on a property against which Plaintiff has a recorded deed of trust; and (2) that Defendants' super-priority lien amounts are in excess of those amounts allowed for pursuant to NRS § 116.3116. For the following reasons, Plaintiff's claims are not ripe for judicial determination.

a. Plaintiff Failed to Foreclose on the Property as Required Under NRS § 116.3116.

NRS § 116.3116 establishes a Super Priority Lien for delinquent assessments. N.R.S. § 116.3116 provides, in relevant part, as follows:

> 1. The association has a lien on a unit for any construction penalty that is imposed against the unit's owner pursuant to NRS 116.310305, any assessment levied against that unit or any fines imposed against the unit's owner from the time the construction penalty, assessment or fine becomes due. Unless the declaration otherwise provides, any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.

Based on the forgoing, any fees, charges, fines and interest pursuant to N.R.S. § 116.3102(j)-(n) are also enforceable as assessments under N.R.S. § 116.3116. Because these fees, charges, fines and interest are enforceable as assessments, they must be included in the Super Priority Lien amount described in N.R.S. § 116.3116(2)(c). Plaintiff incorrectly alleges that these and similar costs specifically accounted for by statute as part of a common-interest communities super-priority lien are "junior to [BAC's] first deed of trust." *See* Complaint, Exhibits 1 and 2.

The falsity of BAC's assertion is plainly shown by the very language of the statute. NRS

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§ 116.3116 (2), further provides as follows:

> **A lien under this section is prior to all other liens and encumbrances** on a unit except:
>
> (a) Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to;
>
> (b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent; and
>
> (c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.
>
> **The lien is also prior to all security interests** described in paragraph (b) to the extent of 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.**

(Emphasis added.)

BAC has ignored and continues to ignore the express language of N.R.S. § 116.3116 which provides that a common-interest community has a lien for all amounts due and owing and a 9 month super-priority interest which becomes due upon the "institution of an action to enforce the lien." *Id.* Instead of simply foreclosing, like virtually every other lender in Nevada, Plaintiff tendered payment of less than the Super Priority Lien and demanded that Defendants release the lien. *Id.* ¶¶ 58-62. BAC's attempt to prepay the Super Priority Lien is based upon a fundamental misunderstanding of NRS Chapter 116 and the foreclosure process.

Plaintiff is a "beneficiary/servicer of the first deed of trust loan secured by the property." *See* Complaint, Exhibits 1 and 2. Plaintiff is not the record owner of a property until it exercises its right to foreclose on the property and take title at the foreclosure sale. As a result, it is unclear how Plaintiff can pre-pay a super-priority lien amount prior to foreclosure of its interest when NRS § 116.3116 only has a liquidated existence upon the foreclosure of an otherwise superior lien holder. NRS § 116.3116 does not provide Plaintiff the right to settle the amounts owing under the Super Priority Lien in the absence of a foreclosure. Importantly, Plaintiff's Complaint

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failed to identify any statutory language within NRS § 116.3116 that would grant to Plaintiff this right or standing to assert this right.

The reason for this omission is clear—no such language exists. As stated above, if Plaintiff does not foreclose its interest then there is no cognizable reason to analyze NRS § 116.3116(2)(c) because there is no priority analysis. Absent the foreclosure of a superior lienholder, there is nothing to wipe out any of the inferior liens on the property. Unless and until a foreclosure does wipe out any of the inferior liens, the property will continue to serve as security for the full debts owed.

b. Absent Foreclosure of Its Lien, Neither the Plaintiff Nor Defendants can Properly Calculate the Super-Priority Lien Amount.

NRS § 116.3116(2)(c) provides that the super-priority lien survives the foreclosure of Plaintiff's superior interest to the extent of 9 months' worth of common expense 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. The only way to determine the pertinent 9 month period is to determine the event that triggers the lien priority system provided for in NRS § 116.3116. In the absence of foreclosure there is no point of reference by which either the Plaintiff or the common-interest community could correctly identify the 9 months term at issue as numerous variables may impact the amount due under the Super Priority Lien. For example, the assessments frequently change annually and that budget may also include special assessments and reserve assessments levied periodically throughout the year, which is reflected in an association's budget.

In addition, amounts levied by an association that are entitled to lien priority under NRS § 116.3116(2)(c) may include amounts incurred by an association in abating a public nuisance or performing exterior maintenance on a property within the community. Under NRS § 116.310312, an association may recover costs from an owner as follows:

> The association may order that the costs of any maintenance or abatement conducted pursuant to subsection 2 or 3, including, without limitation, reasonable inspection fees, notification and collection costs and interest, be charged against the unit. The association shall keep a record of such costs and interest charged

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> against the unit and has a lien on the unit for any unpaid amount of the charges. The lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive.
>
> . . .
>
> (6) **Except as otherwise provided in this subsection, a lien described in subsection 4 is prior and superior to all liens, claims, encumbrances and titles other than the liens described in paragraphs (a) and (c) of subsection 2 of NRS 116.3116.** . ."

(Emphasis added.)

Based on the foregoing, an association has a lien for any costs that it incurs in the maintenance of a property or abatement of a public nuisance on a property. *Id.* NRS § 116.310312 further provides that the lien is recoverable as part of the Super Priority Lien and that it includes collection costs and other charges. *Id.*

Simply stated, the Super Priority Lien cannot be calculated unless a first security interest is foreclosed and the relevant 9 month period determined. If the Defendants were to accept a payment from Plaintiff for the Super Priority Lien, any assessments levied or charges levied pursuant to NRS § 116.310312 after that acceptance would not be secured by those statutory liens. If Plaintiff were correct in its position on NRS § 116.3116 in that it has a right to pay the Super Priority Lien, the tender of payment to Defendants would arbitrarily cut off the Defendants' right to secure other assessments that may come due after that payment but would also cut off their lien rights as provided in NRS § 116.310312.

Furthermore, the amounts owed under the Super Priority Lien may, from time to time, include many more charges and other assessments based on a periodic budget than just the bare amount of regular assessments as determined conveniently by Plaintiff. Until a first security interest is foreclosed, there is no way to determine the specific charges and assessments that are entitled to protection under the Super Priority Lien. Accordingly, Plaintiff allegations that the Defendants, by and through their trustees, have incorrectly rejected Plaintiff's tender of certain payments are simply incorrect. *Id.* ¶¶ 58-65. Prior to Plaintiff's foreclosure, there is no application of NRS § 116.3116, as the event triggering Plaintiff's interest in a property has not yet taken place and the calculation of the Super Priority Lien is not yet possible.

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c. BAC's Paradigm Incorrectly assumes that it will take Record Title to a Property at a Foreclosure Sale.

BAC's proposed paradigm and Complaint are based on hypothetical suppositions that can never be known until the foreclosure sale. As set forth above, if the first deed of trust holder takes record title to a property at a foreclosure sale an association's lien claim is extinguished except for the nine-month super-priority amount. Pursuant to NRS § 116.3116, the 9 month super-priority amount survives the foreclosure sale and entitles an association to its superior 9 month super-priority claim against the foreclosing lender. The 9 month super-priority claim is then governed by NRS 116.3116 as well as an association's governing documents. *See* NRS § 116.3116(1)("Unless the declaration otherwise provides[.]")

However, the foregoing assumes that the first deed of trust takes record title to the property at the foreclosure sale. This supposition fails to account for the possibility that there are bidders at the lender's foreclosure sale and that the property is transferred to someone other than the holder of first deed of trust. In such cases, an association still has a 9 month super-priority claim to the foreclosure sale proceeds, however, an association also has an additional claim to any remaining balance it is owed in the event that the first deed of trust holder is paid in full from the foreclosure sale proceeds. A HOA's remaining balance claim takes precedence over all lenders except for the first deed of trust holder's claim.

Plaintiff's Complaint erroneously assumes that a HOA will never get more from a lender foreclosure than the "maximum 9 months worth of delinquent assessments recoverable by the HOA." Complaint, Exhibits 1 and 2. However, if there are sufficient sale proceeds an association may be entitled to an amount in excess of that which is prioritized pursuant NRS § 116.3116. Accordingly, it is absurd for Plaintiff to assert that it is entitled to "prepay" an association's Super Priority Lien when, as here, Plaintiff has failed to initiate an action to enforce its lien as required by NRS § 116.3116, and the proceeds from the sale, in certain cases, have not come to fruition.

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d. Plaintiff's Hypothetical Injuries are Insufficient to Raise an Actionable Case or Controversy, And, As Such, Are Not Ripe.

Here, Plaintiff's claim for declaratory relief rests on an assortment of arguments, demand letters and hypothetical actions wherein BAC alleged a "right to pay off or 'redeem' the associations' super-priority liens" on the basis that BAC is the holder of a first deed of trust. Complaint ¶¶ 47, 74. There are no allegations in the Complaint that BAC took any action against or asserted its interest over the properties in any recognizable way: BAC is not the record owner of the property by virtue of the first deed of trust and BAC did not foreclose on a property or participate in filing any documents against a given property. BAC's Complaint is based solely on possible, hypothetical actions that could be taken by BAC. Hypothetical injuries are insufficient to raise an actionable case or controversy and invoke the court's subject-matter jurisdiction. *See e.g., Coast Range Conifers v. Board of Forestry,* 83 P.3d 966 (Or. 2004). If a case is not ripe for review, then there is no case or controversy and the court cannot exercise subject-matter jurisdiction over the action. *See American States Ins. Co. v. Kearns,* 15 F.3d 142, 143 (9th Cir.1994). Thus, BAC's Complaint fails to establish the existence of a case or controversy as it is not ripe for review and, therefore, should be dismissed.

3. Plaintiff's Complaint as Pled does not call for a Recovery or Relief in an Amount Valued at more than $75,000.00.

Alternatively, should this Court determine that Plaintiff may file the present action without foreclosing on its first deed of trust, there remain additional grounds for dismissal of this action. Under 28 U.S.C. §1332(a), the amount in controversy must exceed $75,000.00. Whether or not this monetary threshold is met is determined under the rule of law that holds if it appears from the complaint to a legal certainty that the plaintiff is not entitled to that relief, then jurisdiction is wanting under 28 U.S.C. §1332(a). *St. Paul Mercury Indemnity Co.,* 303 U.S. at 288-289.

In determining whether Plaintiff is entitled to any relief and thus able to satisfy 28 U.S.C. §1332(a), the Court must look to the face of the Complaint and the allegations therein. *St. Paul Mercury Indemnity Co.*, 303 U.S. at 292; *see e.g., Crum v. Circus Circus Enterprises,* 231 F.3d. 1129, 1131 (9th Cir. 2000) (stating that the "amount in controversy is determined from the face

of the pleading."). In doing so, the Court must consult pertinent state law to determine if the Plaintiff can lawfully recover what it is seeking. *See e.g., Duderwicz v. Sweetwater Sav. Ass'n. v.* 595 F.2d 1008, 1012 (5th Cir. 1979) (stating "[t]he determination of whether the requisite amount in controversy exists is a federal question; however, 'State law is relevant to this determination insofar as it defines the nature and extent of the right plaintiff seeks to enforce.'" (quoting *Johns-Manville Sales Corp. v. Mitchell Enterprises, Inc.,* 417 F.2d 129, 131 (5th Cir. 1969)).

If the state law upon which Plaintiff's prayer for relief rests does not contain the rights and obligations that Plaintiff claims it does, then it is with legal certainty that Plaintiff will fail at recovering any of the amount of alleged damages as stated in its complaint. *See Pachinger v. MGM Grand Hotel-Las Vegas, Inc.,* 802 F.2d 362, 364 (9th Cir. 1986) (ruling that the legal certainty standard is met if a specific rule of law limits or does not otherwise allow the recovery sought). Moreover, federal courts are required to exercise restraint in the reach of their jurisdiction out of deference to state courts and limit otherwise frequent and unnecessary access to the federal court system through diversity jurisdiction. *See Healy v. Ratta,* 292 U.S. 263, 270; 54 S.Ct. 700, 703 (1934) (stating of the amount in controversy requirement that Congress' intent was to limit narrow federal jurisdiction over cases otherwise heard by state courts and ruled, "[t]he power reserved to the states, under the Constitution (Amendment 10), to provide for the determination of controversies in their courts, may be restricted only the action of Congress in conformity to the judiciary sections of the Constitution (article 3). Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." (internal citations omitted)); *see also Lorraine Motors, Inc., v. Aetna Casualty and Surety Company, et. al.,* 166 F. Supp. 319, 321 and 322 (E.D.N.Y. 1958) (ruling, "[o]f course, the purpose of making the amount in controversy in a case determinative of jurisdiction has always been to prevent the dockets of the federal courts from being overcrowded with small cases which should be brought in the State courts which are fully equipped to decide such cases." Also noting, "[i]t is known that 'the dominant note in the successive enactments of Congress relating

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to diversity jurisdiction is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts in order to keep them free for their distinctive federal business.'" (internal citations omitted)).

For the amount in controversy to be sufficient to satisfy the jurisdictional requirements under 28 U.S.C. § 1332(a), there must at least be a valid legal basis on the face of the complaint supporting that amount alleged. Plaintiff's position under NRS § 116.3116 is wholly misplaced and evidences a clear misunderstanding of its application. Second, at least some prospect of Plaintiff recovering more than $75,000.00 must appear in the allegations in the Complaint. Yet, Plaintiff's Complaint actually acknowledges that it has not yet incurred any such damages and provides no other factual basis that would support a recovery of more than $75,000.00. Lastly, the amount of assessments that constitute the super-priority lien under NRS 116.3116 cannot be determined until an otherwise superior lienholder forecloses its interest in a property subject to the super-priority lien. Therefore, any argument by Plaintiff that it has a right to redeem the super-priority lien amount prior to foreclosure is not ripe until a foreclosing event triggers the super-priority lien.

Plaintiff's Complaint fails to assert sufficiently any basis for the requisite recovery under 28 U.S.C. § 1332(a). The only allegation in Plaintiff's Complaint regarding the value of the damages incurred by Plaintiff is in paragraph 44, which states, "[t]he amount in controversy exceeds $75,000.00 because, as shown below, the value of the object of this litigation—clear, marketable title for real property securing hundreds of mortgage loans—exceeds $75,000.00." This allegation serves as the only allegation in the complaint that purports to support any damage claim. Yet, this allegation is merely self serving for the purpose of giving the appearance of an actual amount in controversy without actually pleading that amount.

If marketable title to all of the properties that Plaintiff services is the object of the litigation, then Plaintiff has at least a minimal responsibility to provide some factual background or basis as to how marketable value is determined and to what extent marketable title is devalued as a result of the Super Priority Lien. There is no methodology provided as to how the value of

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marketability is calculated. There is nothing in the Complaint that suggests that Plaintiff has lost a sale as a result of the Super Priority Lien. There are no facts that allege that one foreclosure of a deed of trust it services would have sold for more than another in the absence of the super-priority lien nor is there any factual allegation that Plaintiff as the servicer of any deeds of trust has been prevented from carrying out its duties or responsibilities as the servicer. In fact, on the issue of amount in controversy, Plaintiff's Complaint contains nothing more than an all too convenient statement that marketability is worth more than $75,000.00. A complaint invoking jurisdiction under 28 U.S.C. § 1332(a) that is based exclusively on state law must be accountable to some standard of pleading beyond what Plaintiff has displayed in this case. A mere statement as to an unsupported value of marketability does not pass even the legal certainty test as set forth above.

In addition, Plaintiff did not allege any actual damages. Plaintiff argues that the amounts that the Defendants are charging under the super-priority lien exceed the amounts permitted under NRS § 116.3116. However, Plaintiff has not actually paid any of these amounts. As Plaintiff states in its Complaint, the trustees "rejected tender of the payment by BAC that would have satisfied the full lien amount[.]" Complaint ¶ 66. Furthermore, unless and until it becomes the owner of a property subject to a Super Priority Lien, Plaintiff is not liable for any of the amounts owing under the Super Priority Lien. As such, there is no way that Plaintiff can recover any amounts close to more than $75,000.00 in actual damages based on the allegations as pled by Plaintiff.

Finally, although not a 9th Circuit case, *Middle Tennessee News Co., Inc. v. Charnel of Cincinnati, Inc*., 250 F.3d 1077 (7th Cir. 2001) holds that a Plaintiff normally cannot aggregate the amount owed by each defendant to satisfy the amount in controversy requirement. It states, "[i]n diversity cases, when there are two or more defendants, plaintiff may aggregate the amount against the defendants to satisfy the amount in controversy requirement only if the defendants are jointly liable; however, if the defendants are severally liable, plaintiff must satisfy the amount in controversy requirement against each individual defendant." Here, Plaintiff is unable to satisfy the amount in controversy as Plaintiff cannot aggregate the amounts against the Defendants.

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For the reasons above, this Court should dismiss Plaintiff's Complaint for lack of jurisdiction under 28 U.S.C § 1332(a).

4. This Court should allow Nevada State Courts and other State Proceedings to Decide the Scope and Application of NRS 116.3116.

As stated in *Healy, supra*, this Court's jurisdiction should be restrained and allow Nevada state courts to determine the merits of any arguments under NRS § 116.3116. The extent and scope of NRS § 116.3116 is currently the basis of numerous Nevada state court actions and arbitration proceedings and will undoubtedly be decided by the Nevada Supreme Court. A few of those currently pending cases or arbitration proceedings include: *Higher Ground, et al. v. Nevada Association Services*, *et al*., Clark County Case No. A609031, *Higher Ground, et al. v. Aliante Master Association, et al.,* Clark County Case No. A-10-608741-C, *Edgewater Equities, LLC v. Alessi & Koenig, LLC, et. al*., Clark County Case No. A607221, *Prem Deferred Trust, et al. v. Nevada Association Services, et al.,* Clark County Case No. A608112, and *Elkhorn Community Association v. Valenzuela, et al.,* Clark County Case No. A-10-607051-C.[1] To resolve these cases, it is paramount that Nevada state courts be allowed to speak as to the application and scope of NRS § 116.3116 without concern of conflicting rulings from the federal courts. NRS § 116.3116 is an act of the Nevada legislature and any ambiguity as to its meaning or basis for its application should be left to the courts of Nevada. In conjunction with the discussion above, this Court should exercise the restraint as pronounced by the United States Supreme Court in *Healy*, and dismiss the Plaintiff's Complaint.

1 At this time, all of these cases have been dismissed by the District Court pursuant to NRS 38.310 and are proceeding through arbitration, except *Elkhorn Community Association*.

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IV. CONCLUSION

For the foregoing reasons, the Defendants respectfully request that this Court dismiss the Complaint as this matter is not ripe for judicial determination. Alternatively, Defendants request dismissal of the Complaint on the basis that Plaintiff failed to adequately plead or satisfy the amount in controversy and, as set forth in *Healy,* this Court's jurisdiction should be restrained and allow Nevada state courts to determine the merits, if any, of any arguments regarding the interpretation and application of NRS § 116.3116.

DATED this 23rd day of March, 2011.

LIPSON NEILSON COLE SELTZER & GARIN, P.C. /s/Kaleb Anderson Kaleb Anderson, Esq. Nevada Bar No. 007582 9080 W. Post Rd. #100 Las Vegas, Nevada 89148 Phone: (702)382-1500 *Attorneys for Anthem Highlands Community Association and Homeowner Association Services, Inc.* DATED: March 23, 2011.	**LEACH JOHNSON SONG & GRUCHOW** /s/Sean Anderson Sean Anderson Nevada Bar No.7259 Ryan Reed Nevada Bar No.11695 8945 West Russell Road, Suite 330 Las Vegas, Nevada 89148 Phone: (702) 538-9074 *Attorneys for LJS&G* DATED: March 23, 2011.
ALVERSON, TAYLOR, MORTENSEN & SANDERS /s/Kurt Bonds, Esq. Kurt Bonds, Esq. Nevada Bar No. 006228 7401 West Charleston Blvd Las Vegas, Nevada 89117 Phone: (702) 384-7000 *Attorney for Heritage Square South HOA, Aliante Master Association & Elkhorn Community Association* DATED: March 23, 2011.	**LAW OFFICES OF RICHARD VILKIN P.C.** /s/Richard Vilkin Richard Vilkin, Esq. Nevada Bar No. 008301 1286 Crimson Sage Avenue Henderson, Nevada 89012 Phone: (702)476-3211 *Attorney for Nevada Association Services, Inc.* DATED: March 23, 2011.

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KERN & ASSOCIATES, LTD. /s/Gayle A, Kern, Esq. Gayle A. Kern, Esq. Nevada Bar No. 1620 Kern & Associates, Ltd. 5421 Kietzke Lane Suite 200 Reno, Nevada 89511 (775) 324-6173 fax gaylekern@kernltd.com *Attorney for Stonefield II Homeowners Association and Phil Frink & Associates, Inc.* DATED: March 23, 2011.	**WOLF RIFKIN SHAPIRO SCHULMAN & RABKIN, LLP** /s/Don Springmeyer Don Springmeyer, Esq. Nevada Bar No. 001021 3556 E. Russell Road, 2nd Floor Las Vegas, Nevada 89120 Phone: (702)341-5200 *Attorney for Sierra Ranch Homeowners Association, Cortez Heights HOA, Elkhorn Cimarron Estates, Mountain's Edge Master Association and Montecito at Mountain's Edge, and K.G.D.O. Holding Company, Inc., d/b/a Terra West Property Management* DATED: March 23, 2011.
RMI MANAGEMENT, INC. d/b/a RED ROCK FINANCIAL SERVICES /s/Christopher V. Yergensen, Esq. Christopher V. Yergensen, Esq. Nevada Bar No. 6183 1797 Mezza Court Henderson, Nevada 89012 Phone: (702)940-7110 *Attorney for RMI d/b/a Red Rock Financial Services* DATED: March 23, 2011.	

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), the undersigned, an employee of LEACH JOHNSON SONG & GRUCHOW, hereby certified that on the 23rd day of March, 2011, she served a true and correct copy of the foregoing, MOTION TO DISMISS by:

X ____ Depositing for mailing, in a sealed envelope, U.S. postage prepaid, at Las Vegas, Nevada

X ____ Electronic Service via CM/ECF System

_____ Personal Delivery

_____ Facsimile

_____ Federal Express/Airborne Express/Other Overnight Delivery

_____ Las Vegas Messenger Service

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BAC HOME LOANS SERVICING, LP,

Plaintiffs,

vs.

STONEFIELD II HOMEOWNERS ASSOCIATION; ANTHEM HIGHLANDS COMMUNITY ASSOCIATION; MONECITO AT MOUNTAIN'S EDGE HOMEOWNERS ASSOCIATION; HERITAGE SQUARE SOUTH HOMEOWNERS' ASSOCIATION, INC.; SIERRA RANCH HOMEOWNERS ASSOCIATION; CORTEZ HEIGHTS HOMEOWNERS ASSOCIATION; SOUTHERN HIGHLANDS COMMUNITY ASSOCIATION; ELKHORN – CIMMARRON ESTATES HOMEOWNERS ASSOCIATION; ELKHORN COMMUNITY ASSOCIATION, a Nevada non-profit corporation; CANYON CREST ASSOCIATION; LAS BRISAS HOMEOWNERS ASSOCIATION; ALIANTE MASTER ASSOCIATION; MOUNTAIN'S EDGE MASTER ASSOCIATION; ALESSI & KOENIG, LLC; ALLIED TRUSTEE SERVICES, INC.; ANGIUS & TERRY COLLECTIONS, LLC; ASSESSMENT MANAGEMENT GROUP INC.; ASSET RECOVERY SERVICES, INC.; LJS&G,LTD., d/b/a Leach Johnson Song & Gruchow; HOMEOWNER ASSOCIATION SERVICES, INC; NEVADA ASSOCIATION SERVICES, INC.; PHIL FRINK & ASSOCIATES, INC.; G.J.L., INCORPORATED, d/b/a Pro Forma Lien & Foreclosure; K.G.D.O. HOLDING

Case No.: 2:11-cv-00167-JCM-RJJ

DEFENDANTS' REPLY TO BAC HOME LOANS SERVICING, LP'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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COMPANY, INC., d/b/a Terra West Property Management; RMI MANAGEMENT LLC, d/b/a Red Rock Financial Services; SILVER STATE TRUSTEE SERVICES, LLC,

Defendants.

Defendants Anthem Highlands Community Association, Homeowners Association Services, Inc., LJS&G, LTD., d/b/a Leach Johnson Song & Gruchow, Nevada Association Services, Inc., K.G.D.O. Holding Company, Inc., d/b/a Terra West Property Management, Sierra Ranch Homeowners Association, Cortez Heights Homeowners Association, Elkhorn Cimarron Estates Homeowners Association, Mountain's Edge Master Association, Montecito at Mountain's Edge Homeowners Association, RMI Management, L.L.C. d/b/a Red Rock Financial Services, Stonefield II Homeowners Association, Phil Frink & Associates, Inc., Heritage Square South Homeowners Association, Aliante Master Association, and Elkhorn Community Association (collectively "Defendants"), by and through their undersigned attorneys, herby submit this Reply to BAC Home Loans Servicing, LP's Opposition To Defendants' Motion To Dismiss ("Reply").

This Reply is based upon the attached Memorandum of Points and Authorities, the pleadings and papers on file herein, and any oral argument the Court may allow.

DATED this 3rd day of June, 2011.

LEACH JOHNSON SONG & GRUCHOW

By: /s/ Sean L. Anderson
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Opposition filed by Plaintiff BAC Home Loans Servicing, LP ("Plaintiff" or "BAC") is completely devoid of citation to any case or statutory authority relevant to the key issues of this litigation, which is whether this action is ripe for judicial determination, whether Plaintiff met the amount in controversy requirement, and whether this Court should refrain from exercising federal jurisdiction over this heavily litigated state law issue.

BAC's Opposition to Defendants' Motion to Dismiss ("Opposition") seeks to discount clear statutory mechanisms intended to protect common-interest communities from predatory actions by banks, lenders, real estate investors and entities, like BAC, who are engaged in the servicing of loans and maximization of profits. It is apparent from the Complaint, Motion and Opposition that, between the parties, there remain strong disagreements on the source, scope and priority of association liens as it relates to Plaintiff and the application of NRS Chapter 116. However, these and similar requests by Plaintiff, which seek a declaration permitting lenders to "prepay" statutorily superior liens without requiring these lenders to first initiate foreclosure procedures to establish its interest in a given property, violate the most basic tenant of American jurisprudence -- that a case and controversy be ripe for judicial determination.

The doctrine of ripeness is rooted in the fundamental concept that the role of the judiciary is not to extend to the resolution of abstract differences of legal opinion. Plaintiff's "pre-payment" scheme is, at its core, a hypothetical scenario void of sufficient definiteness to enable this Court to dispose of this controversy. Reason being, in the absence of foreclosure of the first deed of trust, there is no super-priority analysis under NRS § 116.3116. An analysis of NRS § 116.3116 is best conducted in the context of actual facts, not Plaintiff's hypothetical hyperbole which seeks to place the cart before the horse. As such, the parties remain free to consternate regarding the source, scope and priority of association liens—which is a matter of state law currently being decided appropriately in Nevada state court—however, unless and until Plaintiff institutes "an action to enforce the lien," this action remains unripe for judicial review.

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II. ARGUMENTS

The court's "role is neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution." *Thomas v. Anchorage Equal Rights Comm'n,* 220 F.3d 1134, 1138 (9th Cir. 2000). Article III's "case and controversy" requirement has given rise to the threshold requirements of standing and ripeness. The "irreducible constitutional minimum of standing" consists of three elements: (1) an injury in fact; (2) a causal connection between the injury and the defendant's conduct; and (3) a likelihood that a favorable decision will redress the injury. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992).

"Ripeness has two components: constitutional ripeness and prudential ripeness." *In re Coleman,* 560 F.3d 1000, 1004 (9th Cir. 2009). Constitutional ripeness is a related doctrine designed to avoid "premature adjudication" of "abstract disagreements." *Abbott Labs. v. Gardner,* 387 U.S. 136, 148 (1967), *abrogated on other grounds by Califano v. Sanders,* 430 U.S. 99 (1977). The ripeness requirement assures that a plaintiff has "asserted an injury that is real and concrete rather than speculative and hypothetical," and, "in many cases, [ripeness] coincides squarely with standing's injury in fact prong." *Thomas,* 220 F.3d at 1138-39. Prudential ripeness evaluates the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. *Abbott Labs. v. Gardner,* 387 U.S. 136, 149 (1967), *abrogated on other grounds by Califano v. Sanders,* 430 U.S. 99 (1977).

A. Plaintiff's Claims are not Ripe for Judicial Determination.

In its Opposition, Plaintiff openly seeks a judicial determination regarding purely hypothetical and speculative scenarios as each relates to Plaintiff's alleged interests as the servicer of mortgage loans in Nevada. *See* Plaintiff's Opposition at 8:21-22. As such, Plaintiff "seeks judicial declarations confirming (a) its right to tender payment of super-priority lines and (b) the amount entitled to super-priority status. *Id.* at 6: 25-26. Plaintiff further alleges that "BAC has an obligation to protect the collateral, and must clear all liens – including Defendants' liens. The fact that **the lien is inchoate until BAC forecloses** the deed of trust does not render this obligation remote or hypothetical." *Id.* at 7:6-9 (emphasis added). BAC further alleges that

"[a]n unpaid assessment prevents BAC from protecting its collateral prior to foreclosure: **the super-priority lien attaches as soon as the foreclosure sale occurs.**" *Id.* at 7:9-10 (emphasis added).

The foregoing averments by Plaintiff comport remarkably well with the arguments for dismissal set forth in Defendants' Motion to Dismiss Plaintiff's Complaint ("Defendants' Motion"). Defendants agree with Plaintiff that the Super Priority Lien attaches as soon as the foreclosure sale takes place. However, absent foreclosure of its interest in a property, Plaintiff is neither the record owner of a given property nor does NRS § 116.3116 bestow upon Plaintiff the right or authority to settle any amount owed to a common-interest community prior to foreclosure. NRS § 116.3116 provides, in relevant part, as follows:

> 1. The association has a lien on a unit for any construction penalty that is imposed against the unit's owner pursuant to NRS 116.310305, any assessment levied against that unit or any fines imposed against the unit's owner from the time the construction penalty, assessment or fine becomes due. Unless the declaration otherwise provides, any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.

NRS § 116.3116 (2), further provides as follows:

> **A lien under this section is prior to all other liens and encumbrances** on a unit except:
>
> (a) Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to;
>
> (b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent; and
>
> (c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.
>
> **The lien is also prior to all security interests** described in paragraph (b) to the extent of 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**

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months immediately preceding institution of an action to enforce the lien.

(Emphasis added.)

BAC has ignored and continues to ignore the express language of NRS. § 116.3116, which provides that a common-interest community has a lien for all amounts due and owing and a 9 month super-priority interest which becomes due upon the "**institution of an action to enforce the lien.**" *Id.* Instead of initiating an action to enforce its lien as required by statute, BAC has asserted that "nothing in [NRS 116.3116] prohibits BAC from tendering the amount owed at any time." *See* Plaintiff Opposition at 8:12. By this same logic, nothing in the NRS § 116.3116 prohibits Defendants from rejecting BAC's tender prior to foreclosure. Fortunately, the starting point for statutory interpretation is the language of the statute itself. *U.S. v. Poly-Carb, Inc.*, 951 F. Supp. 1518, 1525 (D. Nev. 1996) (*citing U.S. v. Gomez–Rodriguez,* 96 F.3d 1262, 1264 (9th Cir.1996)). If the plain meaning of a statute is clear, we must give effect to the unambiguously expressed intent of Congress. *Id.* (*citing U.S. v. Gomez–Rodriguez,* 96 F.3d 1262, 1264 (9th Cir.1996). Unless otherwise defined, statutory words should be interpreted as taking their ordinary, contemporary, common meaning. *Id.* (*citing Wilshire Westwood Assoc. v. Atlantic Richfield,* 881 F.2d 801, 803-04 (9th Cir.1989)(*citing Perrin v. U.S.,* 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979)).

Here, the language of NRS § 116.3116 is clear and unambiguous in providing that a common-interest community has a lien for all amounts due and owing and a 9 month super-priority interest which becomes due upon the "**institution of an action to enforce the lien.**" *See* NRS § 116.3116. Based upon the plain language of the statute, institution of an action is a condition precedent to analyzing the amount of the Super Priory Lien due a common-interest community under NRS § 116.3116. In the present action, Plaintiff has failed to institute an action to enforce its lien. Accordingly, for these reasons, as well as those set forth below, this Court should decline Plaintiff's request, which seeks a premature declaration of a matter not ripe for adjudication.

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B. Plaintiff's Complaint Does Not Meet The Minimal Pleading Requirements to Establish the Requisite Amount in Controversy for this Court to Exercise Jurisdiction.

In order for this Court to have diversity jurisdiction over the Plaintiff's claims, the Complaint must, among other things, involve a matter where the amount in controversy exceeds $75,000.00. 28 U.S.C. §1332(a). Where it is a legal certainty that the Plaintiff is not entitled to the relief it is seeking, then the amount in controversy cannot be satisfied and jurisdiction under 28 U.S.C. §1332(a) does not exist. *St. Paul Mercury Indemnity Co., v. Red Cab Co.*, 303 U.S. 283, 288-289; 58 S.Ct. 586, 590 (1938). As stated in Defendants' Motion to Dismiss, the face of the complaint itself must show to a legal certainty that more than $75,000.00 can be recovered assuming the truth of the allegations in that complaint. *St. Paul Mercury Indemnity Co.*, 303 U.S. at 292; *see e.g., Crum v. Circus Circus Enterprises,* 231 F.3d. 1129, 1131 (9th Cir. 2000) (stating that the "amount in controversy is determined from the face of the pleading.").

The above pleading standard requires that a plaintiff draft its complaint in such a way that the amount stated as damages can be *determined*[1] or *ascertained* from the allegations of wrongdoing in the complaint. In other words, there must be something particularly informative about the allegations of wrongdoing that necessarily leads the reader to a determination of an amount of damages in excess of $75,000.00. This is a responsibility of the plaintiff, not any named defendant, as the plaintiff is solely responsible for the content of its complaint. Yet, in this case, Plaintiff's amount-in-controversy in its Complaint is based on bare allegations that "marketable title" is somehow necessarily valued at more than $75,000.00.

Plaintiff's "marketable title" argument fails to meet the pleading standard set forth in the case law above and as cited by Plaintiff. Plaintiff's position in its Opposition is essentially that, due to the Super Priority Lien, marketable title cannot be conveyed and therefore it has sustained more than $75,000.00 in damages. However, there is no logical connection between these two. Even assuming for sake of argument that marketable title cannot be conveyed in light of the Super Priority Lien, there is nothing about that assumption that necessarily leads to a conclusion

[1] The term "Determinable" is defined in Black's Law Dictionary as "(2) Able to be determined or ascertained." BLACK'S LAW DICTIONARY 480 (Bryan, ed., 8th Ed. 2nd reprint 2007)

that more than $75,000.00 in damages have been sustained.

First, Plaintiff never alleges why the mere existence of a statutorily created lien priority automatically renders title to property unmarketable. There is nothing about the Super Priority Lien under NRS § 116.3116 that renders a property subject to it immune from purchase or leveraging. If Plaintiff were to foreclose its interest—as it must necessarily do in order for NRS § 116.3116 to apply—a foreclosure purchaser would simply have to pay the amount owing under the Super Priority Lien (which may simply be an amount of zero dollars) or take the property subject to the Super Priority Lien. There is nothing inherently unmarketable about a property that is subject to a statutory lien with lien priority over the foreclosing party's secured interest.

Second, even if the existence of the Super Priority Lien somehow renders title to a property "unmarketable," there is absolutely nothing alleged by Plaintiff that states it has any right to convey perfect or marketable title to anyone at a trustee's sale. In fact, a trustee's deed contains no representations as to deed warranties and covenants of title.

Plaintiff's argument that unmarketable title necessarily means damages in excess of $75,000.00 is based impliedly on Plaintiff's understanding of the value of marketability as infinite for pleading purposes. It would stand to reason that if Plaintiff's damages are sustained due to an inability to convey marketable title, then there must be some instance where Plaintiff attempted to sell a property through foreclosure only to have such sale not result in the conveyance of the property to a purchaser exclusively as the result of the Super Priority Lien *and* some measure of money damage determined as a result thereof. Yet, nothing of the sort is alleged by Plaintiff in its Complaint. If the money value of marketability has any limitation at all, that limitation is neither determinable nor ascertainable from the face of Plaintiff's Complaint.

Additionally, Plaintiff seems to indicate a second, albeit confusing, basis for establishing the requisite damage amount in its Opposition. Plaintiff states that Defendants' 'admission' in their Motion to Dismiss that common-interest communities may face bankruptcy or receivership if Plaintiff's interpretation of NRS § 116.3116 holds true somehow is an admission that Plaintiff's damages exceed $75,000.00. *See* Plaintiff's Opposition at 9: 10-15. First, however, it

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remains entirely unclear how Defendants' bankruptcies or receiverships establish *Plaintiff's* damages and, second, the alleged 'admission' is not pled on the face of Plaintiff's Complaint. This 'admission' does nothing to meet the Plaintiff's obligation to sufficiently plead damages that invoke diversity jurisdiction. Alternatively, Plaintiff's reliance upon Defendants' 'admission' only adds to the confusion of what the actual basis is for Plaintiff's bare statement that marketable title exceeds $75,000.00. *See* Plaintiff's Complaint ¶ 44.

Despite Plaintiff's claim in its Opposition that Defendants are shifting a burden of pleading to Plaintiff (*See* Plaintiff's Opposition at 9: 20), no such shift is at issue here. The deficiency is simply that the Plaintiff's own complaint provides no legally certain way at which to arrive at the claim that it has sustained more than $75,000.00 in damages. As such, diversity jurisdiction is wanting due to the amount in controversy not being determinable or ascertainable from the face of the complaint.

C. This Court Should Abstain From Exercising Jurisdiction as Questions of the Scope and Applicability of the Super Priority Lien is a Heavily Litigated Issue in Nevada State Courts and Other Nevada-Based Legal Venues.

Plaintiff's assertion that no legal authority was provided by Defendants in support for restraint in the exercise of federal jurisdiction over this matter is nonsense. Had Plaintiff read the entire motion, Plaintiff would have read the discussion stating federal courts should restrain exercise of their jurisdiction when such exercise may result in an unnecessary entanglement with state issues or the offense of state sensitivity to those issues. Again, federal courts are required to exercise restraint in the reach of their jurisdiction out of deference to state courts and limit otherwise frequent and unnecessary access to the federal court system through diversity jurisdiction. *See Healy v. Ratta,* 292 U.S. 263, 270; 54 S.Ct. 700, 703 (1934) (stating of the amount in controversy requirement that Congress' intent was to limit narrow federal jurisdiction over cases otherwise heard by state courts and ruled, "[t]he power reserved to the states, under the Constitution (Amendment 10), to provide for the determination of controversies in their courts, may be restricted only the action of Congress in conformity to the judiciary sections of the Constitution (article 3). Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the

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precise limits which the statute has defined." (internal citations omitted)); *see also Lorraine Motors, Inc., v. Aetna Casualty and Surety Company, et. al.,* 166 F. Supp. 319, 321 and 322 (E.D.N.Y. 1958) (ruling, "[o]f course, the purpose of making the amount in controversy in a case determinative of jurisdiction has always been to prevent the dockets of the federal courts from being overcrowded with small cases which should be brought in the State courts which are fully equipped to decide such cases." Also noting, "[i]t is known that 'the dominant note in the successive enactments of Congress relating to diversity jurisdiction is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts in order to keep them free for their distinctive federal business.'" (internal citations omitted)).

Furthermore, Plaintiff cites *Tucker v. First Maryland Sav. Loan, Inc.,* 942 F.2d 1401, 1403 (9th Cir. 1991), as authority for the rule that abstention be exercised only when "exceptional circumstances are present." *Id.* Yet, substantial state litigation of NRS 116.3116 and the Super Priority Lien therein qualifies as an exceptional circumstance under rules of *Tucker*. In *Tucker, supra,* the court sets forth three factors for consideration when determining if abstention should be exercised, which are (1) that the state has concentrated suits involving the local issue in a particular court; (2) the federal issues are not easily separable from complicated state law issues with which the state courts may have special competence; and (3) that federal review might disrupt state efforts to establish a coherent policy. *Id.* at 1405 (citing *Burford v. Sun Oil Co.*,319 U.S. 315 (1943), which ruled that abstention may be appropriate "to avoid federal intrusion into matters which are largely of local concern and which are within the special competence of local courts.").

In recognition of the emphasis on state deference and sensitivity pursuant to the rules of law above and consideration of the three factors in *Tucker, supra,* this Court should decline to exercise its diversity jurisdiction, even assuming for argument sake that Plaintiff has pled such jurisdiction. First, as set forth in Defendants' Motion to Dismiss, the Nevada state courts and arbitration venues through the Nevada Real Estate Division ("Division") have been bombarded with recent cases heavily involving the scope and application of the Super Priority Lien. There is

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very little doubt among those involved in these cases that the issues regarding the Super Priority Lien will most certainly have to be resolved by the Nevada Supreme Court. Furthermore, just as in the legislative session of 2009, the 2011 Nevada Legislature is again taking review of NRS § 116.3116, which may likely result in changes to the Super Priority Lien.

Despite Plaintiff's faulty representations in its Opposition that the competence of this Court is somehow questioned by the Defendants, the Defendants do not challenge this Court's competency. Rather, the Defendants challenge the sensibility of this Court making a ruling on an issue exclusively related to state law that will ultimately be answered by Nevada's highest court, if not, by the Nevada legislature first. For this Court to exercise only diversity jurisdiction over a state law that it has no particular stake in at the risk of competing and inconsistent rulings does not serve the interest the parties involved here nor does it assist Nevada courts generally. It is precisely because of these considerations that the rules of law have been set forth by federal courts as referenced above that argue strongly in favor of abstention here.

The second factor under *Tucker, supra,* is easily satisfied in favor of abstention. If there were an entanglement of both state and federal issues in this case, thereby making it difficult to separate those state and federal issues, there would be an argument for abstention under *Tucker*. Here, there are simply no federal question issues at all, which only makes Defendants' position of deference to the state courts even stronger.

The third factor, which is similar in nature to the first, favors abstention to avoid disruption of state efforts to come to a coherent policy or position on the state issue—here, the amount of the Super Priority Lien. As stated above, the Super Priority Lien is currently being litigated in state courts, arbitrations through the Division, which may likely be re-filed trial *de novo* in state courts, and is receiving the attention of the Nevada Legislature and the Commission for Common-Interest Communities and Condominium Hotels. This Court choosing to exercise diversity jurisdiction presents an unnecessary risk for disruption of other state efforts that are at critical junctions in addressing the scope and applicability of the Super Priority Lien. As the *Tucker* court states clearly about the rule of law set forth in *Burford*, "*[b]urford* abstention is designed to limit federal interference with the development of state policy. It is justified where

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the issues sought to be adjudicated in federal court are primarily questions regarding that state's laws." *Tucker*, 942 F.2d at 1407.

III. CONCLUSION

For the foregoing reasons, the Defendants respectfully request that this Court dismiss Plaintiff's Complaint in its entirety.

DATED this 3rd day of June, 2011.

LIPSON NEILSON COLE SELTZER & GARIN, P.C. /s/Kaleb D. Anderson Kaleb D. Anderson, Esq. Nevada Bar No. 007582 9080 W. Post Rd. #100 Las Vegas, Nevada 89148 Phone: (702)382-1500 *Attorney for Anthem Highlands Community Association and Homeowner Association Services, Inc.* DATED: June 3, 2011.	**LJS&G, Ltd., d/b/a LEACH JOHNSON SONG & GRUCHOW** /s/Sean Anderson Sean Anderson Nevada Bar No.7259 Ryan W. Reed Nevada Bar No.11695 8945 West Russell Road, Suite 330 Las Vegas, Nevada 89148 Phone: (702) 538-9074 *Attorneys for LJS&G, Ltd., d/b/a Leach Johnson Song & Gruchow* DATED: June 3, 2011.
ALVERSON, TAYLOR, MORTENSEN & SANDERS /s/Kurt R. Bonds Kurt R. Bonds, Esq. Nevada Bar No. 006228 7401 West Charleston Blvd Las Vegas, Nevada 89117 Phone: (702) 384-7000 *Attorney for Heritage Square South Homeowners' Association, Aliante Master Association and Elkhorn Community Association* DATED: June 3, 2011.	**LAW OFFICES OF RICHARD VILKIN P.C.** /s/Richard J. Vilkin Richard J. Vilkin, Esq. Nevada Bar No. 008301 1286 Crimson Sage Avenue Henderson, Nevada 89012 Phone: (702)476-3211 *Attorney for Nevada Association Services, Inc.* DATED: June 3, 2011.

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RMI MANAGEMENT, INC. d/b/a RED ROCK FINANCIAL SERVICES /s/Christopher V. Yergensen Christopher V. Yergensen, Esq. Nevada Bar No. 6183 1797 Mezza Court Henderson, Nevada 89012 Phone: (702)940-7110 *Attorney for RMI Management, Inc. d/b/a Red Rock Financial Services* DATED: June 3, 2011.	**ROBINSON & WOOD, INC.** /s/Keith D. Kaufman Keith D. Kaufman, Esq. Robinson & Wood, Inc. 5556 S. Fort Apache Road, Suite 100 Las Vegas, NV 89148 Telephone: (702) 363-5100 *Co-counsel for Stonefield II Homeowners Association* DATED: June 3, 2011.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), the undersigned, an employee of LEACH JOHNSON SONG & GRUCHOW, hereby certified that on the 3rd day of June, 2011, she served a true and correct copy of the foregoing, **DEFENDANTS' REPLY TO BAC HOME LOANS SERVICING, LP'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** by:

X____ Depositing for mailing, in a sealed envelope, U.S. postage prepaid, at Las Vegas, Nevada

X____ Electronic Service via CM/ECF System

_____ Personal Delivery

_____ Facsimile

_____ Federal Express/Airborne Express/Other Overnight Delivery

_____ Las Vegas Messenger Service

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Plaintiff BAC Home Loans Servicing, LP

/s/ Danielle M. Cybul
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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BAC HOME LOANS SERVICING, LP,

Plaintiff,

v.

STONEFIELD II HOMEOWNERS ASSOCIATION, et al.,

Defendants.

2:11-CV-167 JCM (RJJ)

ORDER

Presently before the court is defendants Southern Highlands Community Association and Alessi & Koenig, LLC's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) under Nevada Revised Statute § 38.310, or in the alternative, motion to compel arbitration. (Doc. #56). Defendants Canyon Crest Association and Las Brisas Homeowners Association filed limited joinders to the motion. (Doc. #68 and #104). Plaintiff BAC Home Loan Servicing, LP filed an opposition. (Doc. #118). Defendants Southern Highlands Community Association and Alessi & Koenig, LLC, filed a reply in support of the motion. (Doc. #120).

Plaintiff BAC Home Loan filed its complaint on January 31, 2011, requesting declaratory and injunctive relief. (Doc. #1). According to the complaint, BAC Home Loan services thousands of mortgage loans in Nevada on behalf of many holders of first deeds of trust, or "first security interests" for purposes of NRS § 116.3116. *Id.* It asserts that many of the properties it services are subject to the liens of homeowners' associations. *Id.* Such liens arise when the homeowners'

associations' fees go unpaid by the homeowner. *Id.* Pursuant to NRS § 116.3116, the associations may impose a lien for "any penalties, fees, charges, late charges, fines and interest charged." NRS § 116.3116(1)(j)-(n). BAC Home Loan contends that the associations' liens become senior to it only "to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3116 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien." *Id.*

BAC Home Loan contends that if the amount owed for association assessment fees is not paid before the foreclosure sale, it tenders payments to the associations to "clear the cloud" on the title. Here, it asserts that it attempted to tender the amounts owed, but that "[s]everal trustees of homeowners' associations, including the trustee [d]efendants, have wrongfully rejected [its] tender." It asks the court to declare that (1) it has the right to pay-off or redeem an association's super-priority lien, and (2) that only budgeted common assessments, but not attorneys' fees or collections costs, are included within the super-priority lien amount under NRS 11.3116. Further, plaintiff asks this court for an injunction forcing the defendants to accept payment for only the super-priority amount, excluding any additional fees or costs.

Motion To Dismiss

In the present motion to dismiss (doc. #56), defendants contend that this court lacks subject matter jurisdiction because this action should be submitted to arbitration pursuant to NRS 38.320.

Under that section of the Nevada Revised Statute, "[a]ny civil action described in NRS 38.310 must be submitted for mediation or arbitration by filing a written claim with the [d]ivision." Section 38.310 provides that "[n]o civil action based upon a claim relating to:...(b) [t]he procedures used for increasing, decreasing or imposing additional assessments upon residential property, may be commenced in any court in this [s]tate unless the action has been submitted to meditation or arbitration pursuant to the provisions of NRS 38.300 to 38.360, inclusive, and, if the civil action concerns real estate within a planned community subject to provisions of chapter 116 of NRS..." NRS § 38.310(1)(b). Additionally, subsection 2 of that same statute states that the "court shall dismiss any civil action which is commenced in violation of the provisions of subsection 1." NRS

§ 38.310(2).

According to the definitions provided in NRS 38.300(1), "assessments" means "(a) [a]ny charge which an association may impose against an owner of residential property pursuant to a declaration of covenants, conditions and restrictions, including any late charges, interest and costs of collecting the charges; and (b) [a]ny penalties, fines, fees and other charges which may be imposed by an association..." Further, in section (3), "civil action" is defined as including "an action for money damages or equitable relief...," but excluding "an action in equity for injunctive relief in which there is an immediate threat of irreparable harm, or an action relating to the title to residential property." NRS § 38.300(3).

Here, as discussed above, the case stems from the plaintiff attempting to pay-off the association "assessment" fees owed to the association prior to the foreclosure sale. However, defendants have refused to accept tender, because they allege that they are entitled to "additional assessments" in the form of attorney's "fees" and the "costs of collecting" the association fees. Defendants contend that this action fits squarely within the definitions provided in NRS 38.300(1)(a) and (b) and (2) and § 38.310(1)(b), warranting dismissal. In the alternative, defendants suggest that the court should stay the proceedings and compel arbitration.

Plaintiff BAC Home Loan argues in its opposition (doc. #118), that arbitration is not required and defendants are interpreting the statutes incorrectly. Specifically, plaintiff asserts that (1) "§ 38.300(3)'s definition of a "civil action," as that term is used in [NRS] § 38.310, includes a claim for monetary damages or equitable relief; the definition *excludes* claims for declaratory relief," and (2) "[NRS] § 38.310's legislative history shows that Nevada's legislature never intended to compel a senior lien holder like BAC to arbitrate a dispute concerning the statutory interpretation of the Uniform Common Interest Ownership Act," but was intended "to compel community residents and the board to resolve their disputes through arbitration or mediation."

BAC Home Loan interprets NRS 38.300(3), the definition of "civil action," as excluding actions for declaratory relief, such as this, simply because declaratory relief is not specifically listed in the definition. Further, it argues that a request for the remedy of injunctive relief, such as that

sought here, is not encompassed in the definition either. To rebut this, defendants contend that the statute specifically set out what actions, i.e. injunctive relief with irreparable injury or those relating to the title of the property, were *excluded,* and did not list declaratory relief. Defendants argue that had it been the intention of the statute to exclude declaratory relief actions, it would have clearly been listed.

Plaintiff BAC Home Loan asserts that if the court finds the language of the statute is unclear or ambiguous, the legislative history demonstrates the intention of the statute was to settle disputes between *homeowners* and *association*s through arbitration and mediation. The court, however, need not look at the legislative history or read into the intent of the drafters, the statutes are clear.

The relevant statutes demonstrate that (1) "claims relating to" "increasing, decreasing or imposing additional assessments upon residential property" must be submitted to arbitration first, (2) "costs of collecting the charges" and "[a]ny penalties, fines, fees and other charges which may be imposed by an association..." are within the definition of "assessment," and (3) civil actions for "monetary damages or equitable relief" must be dismissed. NRS § 38.320(1), § 38.310(1)(b) and (2), and § 38.300(1)(a) and (b) and (3). As the complaint here arises from the defendants' increasing the amount of the assessments due to attorneys' fees and the costs in collecting the fees, the plaintiff was required to submit the claim to arbitration or mediation first. *Id.* Therefore, the court is inclined to dismiss the action without prejudice to allow the plaintiff to submit its claims to arbitration or mediation.

Accordingly,

IT IS HEREBY ORDERED ADJUDGED AND DECREED that defendants Southern Highlands Community Association and Alessi & Koenig, LLC's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) under Nevada Revised Statute § 38.310, or in the alternative, motion to compel arbitration (doc. #56) be, and the same hereby is, GRANTED.

. . .

. . .

. . .

IT IS THEREFORE ORDERED that the case of *BAC Home Loans Servicing LP v. Stonefield II Homeowners Association et al* (Case No. 2:11-cv-00167-JCM -RJJ) be, and the same hereby is, DISMISSED without prejudice.

DATED July 21, 2011.

UNITED STATES DISTRICT JUDGE

Ryan Kerbow, Esq., (State Bar #261512)
Alessi & Koenig, LLC
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Las Vegas, NV 89147
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STATE OF NEVADA

DEPARTMENT OF BUSINESS AND INDUSTRY

REAL ESTATE DIVISION

	NRED No. 12-58 ALESSI & KOENIG, LLC'S ARBITRATION BRIEF

I. INTRODUCTION

Alessi & Koenig, LLC ("A&K") is a law firm that represents several homeowners associations ("HOA"s). A&K's HOA clients retain A&K to collect delinquent assessments and enforce HOA liens, including HOA super priority liens ("SPL"s). For many years A&K and others in the HOA industry have relied on the interpretation of NRS §116.3116 set forth in Korbel Family Living Trust v. Spring Mountain Ranch Master Ass'n, Eighth Judicial District Court Case No. A-06-523959-C.

In Korbel, the Honorable Judge Jackie Glass concluded the HOA was entitled to recover, as its SPL, assessments for common expenses; late fees imposed for non-payment of assessments for common expenses; interest on the principal amount of unpaid assessments for common expenses; the HOA's costs of collection, which may include legal fees and costs; and the transfer

fee for conveyance and change of ownership of the property. Id. A copy of the Order issued by this Court in Korbel is attached hereto as Exhibit 1. Claimant disagrees with the interpretation of NRS §116.3116 set forth in Korbel. Claimant argues that, contrary to Korbel, there is a pre-determined numerical cap on the amount of the SPL.

There is substantial authority in Nevada that fees and costs of collection are a component of the SPL. In addition to the District Court opinion issued in Korbel, the Commission for Common Interest Communities and Condominium Hotels (the "CCIC") has issued an advisory opinion on the subject pursuant to its authority to issue advisory opinions on the interpretation of NRS chapter 116, authority found in NRS §116.623 (the "CCIC Advisory Opinion"). The CCIC Advisory Opinion, a copy of which is attached hereto as Exhibit 2, squarely rejected the notion that Section §116.3116 places a numerical cap on collection fees and costs, and held that "Nevada law authorizes the collection of 'charges for late payment of assessments' as a portion of the super[priority] lien amount." See Exhibit 2 at p. 12-13. Significantly, under Nevada law, this Court is required to give "great deference" to the CCIC's interpretation of NRS 116.3116. Imperial Palace v. State, 108 Nev. 1060, 1067, 843 P.2d 813, 818 (1992); see also Dep't of Taxation v. Daimler Chrysler Services N.A., LLC, 121 Nev. 541, 119 P.3d 135 (2005).

In addition to Korbel (a case which has set the industry standard for years) and the CCIC Advisory Opinion (issued by the agency tasked with interpreting and enforcing NRS Chapter 116), there is substantial case law holding that fees and costs of collection are included in the SPL in addition to other assessments that came due in the nine month period immediately preceding the first action to enforce the lien. Recently, in Elkhorn Community Association v. Mortgage Electronic Systems, Inc., Case No. A607051, the Honorable Judge Valerie Vega, held that collection fees and costs are included in the SPL in addition to other assessments that came due in the nine month period immediately preceding the first action to enforce the lien. See Order attached hereto as Exhibit 3. Also, in JPMorgan Chase Bank vs Countrywide Home Loans Inc, Countrywide Warehouse Lending, et al., Case No. A562678, the Honorable Judge Timothy Williams, held that collection fees and costs are included in the SPL in addition to other assessments that came due in the nine month period immediately preceding the first action to

enforce the lien. See Order attached hereto as Exhibit 4. As a result, A&K agrees with the longstanding view of District Court Judges and the view of the CCIC as to the proper interpretation of NRS §116.3116.

Claimant further argues that a mortgage lender, such as itself, has the right to satisfy an HOA lien by paying the HOA the super-priority amount prior to conducting a foreclosure of the first security interest. However, under NRS 116.3116, an HOA has a lien against a unit for all delinquent assessments and related charges up until the first security interest on the unit is foreclosed. The HOA assessment lien is only eliminated, save for the super priority amount, when the mortgage lender forecloses on the unit. Therefore, where, as in most cases, the full HOA lien amount exceeds the super priority amount, the mortgage lender's payment of the super priority amount would constitute only a partial payment. Further, there exists no statutory or other authority that would compel an HOA to accept payment of any amount from a mortgage lender.

A. The Plain Language of NRS §116.3116 / Nevada Law Does Not Permit Illogical Interpretation of NRS §116.3116.

The goal of statutory interpretation is to ascertain the legislature's intent. Karcher Firestopping v. Meadow Valley Contractors, Inc., ____ Nev. ____, 204 P.3d. 1262, 1263 (2009). The Court must give a clear and unambiguous statute its plain meaning, unless doing so violates the spirit of the act. D.R. Horton, Inc. v. Eighth Judicial Dist. Court ex rel. County of Clark, 123 Nev. 468, 476, 168 P.3d. 731, 737 (2007). It is well established in Nevada that the words in a statute, "should be given their plain meaning unless this violates the spirit of the act." State Dep't of Ins. v. Humana Health, Ins., 112 Nev. 356, 360 (1999) (quoting McKay v. Bd. Of Supervisors, 102 Nev. 644, 648 (1986)). When interpreting the plain language of a statute, Nevada courts "presume that the Legislature intended to use words in their usual and natural meaning." McGrath v. Dep't of Public Safety, 123 Nev. 120, 123, 159 P.3d 239, 241 (2007). In doing so, the Court must consider a statute's provisions as a whole, reading them "in a way that would not render words or phrases superfluous or make a provision nugatory." S. Nev.

Homebuilders Ass'n v. Clark County, 121 Nev. 446, 339, 117 P.3d 171, 173 (2005) (quotation omitted). Meaningless or unreasonable results should be avoided by courts when interpreting statutes. Matter of Petition of Phillip A.C., 122 Nev. 1284, 1293 (2006). As such, "where a statute is susceptible to more than one interpretation it should be construed in line with what reason and public policy would indicate the legislature intended." County of Clark, ex rel. Univ. Med. Ctr. V. Upchurch, 114 Nev. 749, 753, 961 P.2d 754, 757 (1998) (quotation omitted). Moreover, "when the legislature has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded." Coast Hotels & Casinos, Inc. v. Nev. State Labor Comm'n, 117 Nev. 835, 841, 34 P.3d 546, 550 (2001).

Here, in light of the language of NRS Chapter 116 and the important policy considerations behind these statutes, Claimant's proposed interpretation of NRS 116.3116 is without merit. While the SPL authorized by NRS 116.3116 has one material temporal limitation of nine months, there is simply no other specific numerical limit capping the lien. Moreover, fees and costs of collection are clearly intended to be considered as part of the SPL. Accordingly, Respondents are entitled to collect fees and costs of collection as a portion of the SPL.

1. Assessments Enforceable Under NRS §116.3116 and Given Super Priority Status Include All Reasonable Collection Costs and Fees Relating to the Relevant Nine Month Period.

Pursuant to NRS §116.3116, HOAs have a lien on real property to recover assessments owed by delinquent homeowners. A portion of this lien has a senior position over a first deed of trust, even if the deed of trust was recorded before the delinquency. Nevada law is clear that the component portions of the SPL include both common expenses and multiple other charges and fees that are also deemed to be "enforceable as assessments under this section [NRS §116.3116]" unless said charges are restricted by a community HOA's governing documents.

NRS §116.3116 is titled "Liens against units for assessments" and states that:

> 1. The Association has a lien on a unit for any construction penalty that is imposed against the unit's owner pursuant to NRS 116.310305, any assessments against that unit or any fines imposed against the unit's owner from the time the construction penalty, assessment or fine becomes due. ***Unless the declaration provides otherwise, any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section.*** If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.
>
> 2. A lien under this section . . . is also prior to all security interests described in paragraph (b) ["a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent . . ."""] to the extent of any charges incurred by the Association on a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the Association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien . . . (Emphasis added)

Thus, the plain language describing a lien for assessments under the statute clearly incorporates each of the following component assessments into the lien amount "unless the declaration provides otherwise:" (1) any assessment levied against the unit from the time the assessment comes due, (2) penalties, (3) fees, (4) charges, (5) late charges, (6) fines, and (7) interest. All charges itemized in NRS 116.3116(1) are meant to be a part of an HOA's lien for assessments, as the statute clearly denotes that said charges are "enforceable as assessments under this section" – a section aptly titled "Liens against units for assessments" by the Nevada Legislature in the Nevada Revised Statutes. (NRS 116.3116 (see statute section title)). NRS 116.3116(7) goes on to state that collection costs and attorney's fees are recoverable as part of the lien. Thus, not only does NRS 116.3116 grant an association an enforceable lien for assessments, which includes assessments for common expenses, penalties, fees, charges, interest, attorney's fees, and costs of suit, but Nevada law additionally deems the super priority portion of the lien to be "prior to all security interests."

Subsection (2) of NRS 116.3116 does not set a numeric cap on the SPL based upon any particular HOA's assessments charged to homeowners. The only material proviso placed on the amount of the Association's SPL is that any assessment for common expenses "based on the periodic budget adopted by the Association pursuant to NRS 1116.3115" be limited to a period of "9 months preceding institution of an action to enforce the lien."[1] The portion of the HOA lien given super priority status is defined with regard to a particular time period only. There is no mention in the statute of any numerical limitation or simple mathematical calculation. Indeed, if the Legislature wanted to define the SPL by some simple mathematical calculation it could have done so simply by setting forth that mathematical calculation in the statute.

In addition, NRS §116.3115 defines assessments for common expenses as those "made at least annually." NRS §116.3115 sets forth several different categories of common expenses that are to be included in the assessments, many of which do not apply equally to all owners. These categories include:

1. Common expenses for repair of limited common elements, Subsection 4(a);
2. Common expenses benefitting fewer than all of the units, Subsection 4(b);
3. Common expenses to pay the cost of insurance, Subsection 4(c);
4. Common expenses to pay a judgment, Subsection 5; and, most importantly,
5. Common expenses caused by the misconduct of any unit's owner, Subsection 6.

If an owner fails to pay his or her assessments, that failure constitutes misconduct. If the HOA incurs expenses in an effort to collect those unpaid assessments, under NRS §116.3115(6), those expenses are chargeable to the unit's owner as part of the association's periodic budget under NRS §116.3115. Because they are part of the HOA's periodic budget under NRS §116.3115, they are included in the super priority portion of the HOA's lien under NRS §116.3116(2).

2. NRS §116.3116 is Broader than the UCIOA.

[1] There is one other limiting proviso found outside of NRS 116.3116. NRS 116.31162(4) states that "[t]he association may not foreclose a lien by sale based on a fine or penalty for a violation of the governing documents of the Association . . . ." Thus, any portion of assessments for violation fines cannot, by definition (with some limiting exceptions), be incorporated into a super priority lien for assessments that could be the impetus for foreclosure.

"It is a well-known rule of statutory construction that words shall be given their plain meaning, unless to do so would clearly violate the evident spirit of the statute . . . unless from a consideration of the entire act it appears that some other intendment should be given to it. We cannot arbitrarily ignore plain language, but must be controlled by it, except in the instance mentioned." Ex parte Zwissig, 178 P. 20, 21 (Nev. 1919) (emphasis added). Thus, where the intent of the Legislature or the evident spirit of the statute would be violated under a plain language interpretation of the statute, effect must be given to the intent of the Legislature and the spirit of the statute. In order to fully understand the intent of the Legislature and the spirit of NRS Chapter 116, it is important to look first at the UCIOA. The UCIOA was originally promulgated in 1982 by the National Conference on Commissioners on Uniform State Laws ("Uniform Law Commissioners" or "ULC"). The UCIOA is a comprehensive act that governs the formation, management, and termination of common interest communities. In 1991, Nevada adopted the UCIOA, with some changes, by enacting NRS Chapter 116.

Notably, the SPL as provided for in the UCIOA is much more limited than the actual language adopted by Nevada. The SPL in all three (3) versions of the UCIOA (1982, 1994 and 2008) is limited to the extent of "common expenses based on the periodic budget adopted by the Association pursuant to section 3-115(a)." Nevada, however, specifically removed the limitation to subsection (a) (which is Subsection 1 of NRS 116.3115 in Nevada's statutory format). Thus, common expenses for purposes of the SPL under the UCIOA are limited to 3-115(a), while common expenses for purposes of the SPL in Nevada includes all of NRS 116.3115. In other words, "common expenses" is much broader under the Nevada statute than it is under the UCIOA and includes amounts assessed against a specific unit. Such common expenses, including those costs and fees caused from a unit owner's misconduct, must be included in Nevada's SPL amount. Thus, by broadening the SPL to include common expenses under all subsections of NRS §116.3116, the Nevada Legislature clearly intended to allow Nevada HOA's and their attorneys or collection agencies to assess and recover as assessments the fees and costs of collection while enforcing the SPL.

B. Public Policy Supports the Widely Accepted Interpretation of NRS §116.3116.

This common sense statutory interpretation is consistent with the obvious purpose of the statutory scheme, which is to compensate HOAs for past due assessments even after foreclosure by the lender/deed of trust holder. It also makes good public policy sense. If collection fees and costs are not included as part of the assessments that survive foreclosure, it would be cost prohibitive for Nevada HOAs to enforce their own liens, as HOA's would no doubt spend more money on collections of amounts due than they would actually recover. The burden of this substantial lost revenue would then fall upon the homeowners who do pay their mortgages and HOA fees on time. The result would be an increase in monthly association fees for the rule-abiding homeowners who pay their bills. Further, if HOAs have no effective means of lien enforcement, this will incentivize additional home owners to stop paying their HOAs.

Claimant's interpretation also provides for an inherently inequitable result for HOAs with low monthly assessments. For example, where one HOA has monthly assessments of $15.00 ($135 over nine months), the HOA would never be able to afford the cost of collecting from a delinquent homeowner. Indeed, no HOA could possibly hope to recover its collection fees and out of pocket costs for a mere $135.00, as no rational HOA would spend more money on collection efforts than the amount of money owed. Clearly, Claimant's interpretation violates the spirit of the statute.

C. Nevada Authority Supports Respondents' Interpretation of NRS §116.3116.

1. The CCIC Advisory Opinion.

On December 8, 2010, the CCIC issued the Advisory Opinion that concludes that the SPL includes reasonable costs of collection. The Advisory Opinion explicitly rejects a numerical maximum for the super-priority lien:

> The argument has been advanced that limiting the super priority to a finite amount . . . is necessary in order to preserve this compromise and the willingness of lenders to continue to lend in common interest communities. The State of Connecticut, in 1991, NCCUSL, in 2008, as well as "Fannie Mae and local lenders" have all concluded otherwise.
>
> Accordingly, both a plain reading of the applicable provisions of NRS §116.3116 and the policy determinations of commentators, the state of Connecticut, and lenders themselves support the conclusion that associations should be able to include specified costs of collecting as part of the association's super priority lien."

Exhibit 2. The Nevada Supreme Court has made it clear that courts are to give "great deference" to administrative interpretation. Imperial Palace, 108 Nev. at 1067, 843 P.2d at 818 DaimlerChrysler Services, 121 Nev. 541, 119 P.3d 135; Thomas v. City of N. Las Vegas, 122 Nev. 82, 101 127 P.3d 1057 (1070) (2006) (citing Chevron U.S.A. v. Not. Res. Def. Council, 467 U.S. 837 (1984). Indeed, particularly for pure questions of statutory interpretation, courts should defer to agency interpretations. See, e.g., Human Soc'y of U.S. v. Locke, ___ F.3d ___, 2010 WL 4723195, at 9 (9th Cir. 2010) ("'If a statute is ambiguous, and if the implementing agency's construction is reasonable, Chevron requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.'" (quoting Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005)).

Because there is a reasonable opinion as to the statutory interpretation of NRS §116.3116(2) that was issued by the agency tasked with enforcing NRS Chapter 116, the Nevada Real Estate Division, this opinion should be considered highly persuasive authority. Indeed, the Nevada Supreme Court has explicitly stated deference must be given to agency interpretations.

Finally, the Nevada Real Estate Division's Winter 2010 Publication referenced AB 204 which became effective 2009 and increased the time period of the SPL from six months to nine months. See Nevada Real Estate Division Winter 2010 Publication attached hereto as Exhibit 5.

In that publication, the division specifically characterized AB 204 as allowing for the collection of "related costs" in addition to assessments. Id. at 2. While not binding, it is instructive that the agency's own characterization of NRS §116.3116 indicates that collection costs are part of the SPL.

2. The Korbel decision.

In Korbel, the District Court specifically ruled that the SPL includes, and an HOA is entitled to recover, the following:

- Assessments for common expenses;
- Late fees imposed for non-payment of assessments for common expenses;
- Interest on principal amount of unpaid assessments for common expenses;
- The HOA's "costs of collection, which may include legal fees and costs incurred during the nine months preceding an action to enforce the lien; and
- The transfer fee for conveyance and change of ownership of the property foreclosed upon pursuant to the first deed of trust.

Exhibit 1. While the Order itself does not go into detail regarding the Court's analysis, the legal issues were briefed in great detail by the parties and necessarily decided in that case. (See Korbel Minutes of Proceedings attached hereto as Exhibit 6; see also Korbel parties' briefs attached hereto as Exhibit 7 and Exhibit 8.) The issues presented in Korbel were identical to the issues presented here. The Defendant in Korbel apparently did not appeal the Korbel decision.

3. Elkhorn Community Association v. Mortgage Electronic Registration Systems, Inc. ("MERS")

In Elkhorn, the Honorable Judge Valerie Vega granted Elkhorn Community Association's Motion for Declaratory Relief and held that collection fees and costs are included in the SPL in addition to other assessments that came due in the nine month period immediately preceding the first action to enforce the lien. Specifically, the Court found:

> [N]on-attorney fees and costs of collection accrued by the Association to bring a judicial foreclosure action in Nevada to satisfy its SPL are a component part of the Association's SPL. Moreover, the Court concludes that attorney's fees accrued by the Association to bring a judicial foreclosure action in Nevada to satisfy its SPL are also considered to be a component part of the Association's SPL. Any attorney's fees considered to be part of the Association's SPL must be "reasonable" . . .

Exhibit 3. Although the Court in Elkhorn notes that attorney's fees are limited to a "reasonable" amount, the Court makes no mention of a numeric cap placed upon the attorney's fees or a numerical cap on "[n]on attorneys fees and costs of collection" that are a "component part" of the SPL.

4. JPMorgan Chase Bank vs Countrywide Home Loans Inc, Countrywide Warehouse Lending, et al

Similar to the Court's decision in Elkhorn, in JPMorgan Chase Bank, the honorable Judge Timothy Williams stated as follows:

> 4. The Court found that pursuant to NRS 116.3116(2) an association has a "super priority" position over a first security interest recorded against the property for nine (9) months of assessments immediately preceding institution of an action to enforce the lien.

> 5. The Court further found that pursuant to NRS 116.310313 an association can recover as part of its collection costs reasonable attorney's fees and costs associated with enforcement of its assessment lien. The Court noted, however, that an analysis must be performed by the Court to determine the reasonableness of the attorney's fees using the factors articulated in Brunzell v. Gold Gate National Bank, 85 Nev. 345, 349 (1969).
>
> 6. The Court further found that pursuant to NRS 116.3116(2) an association can recover as part of its "super priority" lien amount collection costs associated with enforcement of its assessment lien.

Exhibit 4. Notably, in both Elkhorn and JPMorgan Chase Bank, the Court specifically mentioned the limitation that collection costs must be reasonable – but neither decision imposed a specific predetermined numeric cap of any kind whatsoever.

D. Case Authority from Sister Jurisdictions Supports A&K's Interpretation of NRS 116.3116.

Similarly, the Supreme Court of Connecticut analyzed Connecticut's own super priority lien statute, which at the time was substantially identical to the Nevada statute, specifically holding the super priority statute includes all collection costs. Hudson House Condo. v. Brooks 611 A.2d 862 (Conn. 1992). In Hudson House, the super priority lien statute reads as follows:

> This lien is also prior to all security interests described in subdivision (2) of this subsection to the extent of the common expense assessments based on the periodic budget adopted by the Association pursuant to subsection (a) of section 47-257 which would have become due in the absence of acceleration during the

> six months immediately preceding institution of an action to enforce either the Association's lien or a security interest described in subdivision (2) of this subsection.

Id. at 863, n. 1 (quoting Conn. Gen. Stat. § 47-258 (1989)). There, the court relied specifically upon language in the statute that stated a "judgment or decree in any action brought under this section shall include costs and reasonable attorney's fees for the prevailing party." Id. at 866 (internal quotation omitted). The court held this language "specifically authorizes the inclusion of the costs of collection as part of the [super-priority] lien." Id. This language mirrors the language contained in the Nevada statute, which states, "A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party." NRS 116.3116(7).

Moreover, the court in Hudson House held the legislature logically must have meant to include collection costs in the lien:

> Since the amount of monthly assessments are, in most instances, small and since the statute limits the priority status to only a six month period, and since in most instances, it is going to be only the priority debt that in fact is collectible, it seems highly unlikely that the legislature would have authorized such foreclosure proceedings without including the costs of collection in the sum entitled to priority. To conclude that the legislature intended otherwise would have that body fashioning a bow without a string or arrows.

Hudson House, 611 A.2d at 866 (emphases added). Although the court noted that the Connecticut Legislature later amended the statute to specifically include "the Association's costs and attorney's fees in enforcing its lien," the Court specifically noted that this merely "clarified that attorney's fees and costs are included in the priority debt." Id. at 866 n.4.

The court did not limit the recovery to only the amount of regular monthly assessment payments over the super-priority period. To the contrary, as the court noted, the legislature must have permitted all collection costs accrued over the super priority period to be recoverable. Indeed, to read the statute otherwise would make no practical sense at all, as it would fashion a proverbial "bow" with no "arrow." Likewise, as the Connecticut statute is substantively identical to Nevada's statute, Nevada courts must "consider the policy and spirit of the law and will seek to avoid an interpretation that leads to an absurd result." Fierle v. Perez, ____ Nev. ____, 219 P.3d 906, 911 (2009) (quotation omitted).

VI. CONCLUSION

For the foregoing reasons, Respondent respectfully request an arbitration award in their favor.

DATED this 7th day of September, 2012.

ALESSI & KOENIG, LLC

By: _____

RYAN KERBOW, ESQ.

Exhibit "1"

ORD
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Attorneys for Spring Mountain Ranch Master Association

FILED
Dec 22 8 33 AM '06
Cindy Glover
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

KORBEL FAMILY TRUST

Plaintiff,

v.

SPRING MOUNTAIN RANCH MASTER ASSOCIATION; BAY CAPITAL CORP.,

Defendants.

Case No.: 06-A-523959-C
Dept. No.: V

ORDER

Hearing Date: November 20, 2006
Time: 9:00 A.M.

ORDER

The above-referenced matter having come before this Court, the Plaintiff being represented by Marty G. Baker, Esq. of The Cooper Castle Law Firm, and Defendant Spring Mountain Ranch Master Association (the "Association") being represented by John B. Leach, Esq. of the law firm of Santoro, Driggs, Walch, Kearney, Johnson & Thompson, each party having briefed the issue, good cause appearing therefore and thereby no just reason for delay;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, pursuant to Nevada Revised Statutes 116.3116(2), a portion of the Association's assessment lien has priority over the first deed of trust. This portion of the Association's assessment lien comprises the super-priority portion of the lien. The Association's assessment lien, with the exception of the super-priority portion of the lien, is extinguished by a foreclosure of the first deed of trust.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the amount of the Association's super-priority claim shall include the following amounts:

(a) Six (6) months of the assessments for common expenses;

(b) Six (6) months of late fees imposed for non-payment of the assessments for common expenses;

(c) Interest on the principal amount of six (6) months of the unpaid assessments for common expenses, as set forth in the Association's governing documents;

(d) The Association's costs of collection, which may include legal fees and costs, that accrue prior to the date of foreclosure of the first deed of trust; and

(e) The transfer fee for conveyance and change of ownership of the property foreclosed pursuant to the first deed of trust.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant Association's assessment lien has priority over the second deed of trust and any claims originating from the second deed of trust. *See* NRS 116.3116(2).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Association's super-priority claim, in the case at hand, to be paid by the Plaintiff to the Defendant Association is $1,963.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the remaining balance of the Association's claim is $5,565.07, and that said claim has priority over all other claimants in this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Clerk of the Court shall [illegible] Reconstrust Company, N.A.

Dated this 20 day of December, 2006

DISTRICT COURT JUDGE

Submitted by:

SANTORO, DRIGGS, WALCH, KEARNEY, JOHNSON & THOMPSON

JOHN B. LEACH, ESQ.
Nevada Bar No. 1225
TRACY A. GALLEGOS, ESQ.
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Las Vegas, Nevada 89101

Attorneys for Defendant Spring Mountain Ranch Master Association

Approved as to Form and Content:

THE COOPER CASTLE LAW FIRM

Anita K. McPartland, Esq.
Matty G. Baker, Esq.
820 S. Valley View Blvd.
Las Vegas, NV 89107

Attorneys for Korbel Family Trust

CERTIFIED COPY
DOCUMENT ATTACHED IS A
TRUE AND CORRECT COPY
OF THE ORIGINAL ON FILE

CLERK OF THE COURT

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Attorneys for defendant Nevada Association Services, Inc.

STATE OF NEVADA
DEPARTMENT OF BUSINESS & INDUSTRY
REAL ESTATE DIVISION

OFFICE OF THE OMBUDSMAN FOR OWNERS IN COMMON INTEREST COMMUNITIES AND CONDOMINIUM HOTELS

BAC HOME LOANS SERVICING, LP, Plaintiff, v. STONEFIELD HOMEOWNERS ASSOCIATION, ET AL. Defendants.	ADR CLAIM NO. 12-58 JOINDER OF DEFENDANT NEVADA ASSOCIATION SERVICES IN BRIEF SUBMITTED BY DEFENDANTS L,J.S&G DBA LEACH, JOHNSON, SONG & GRUCHOW AND FIRST LIGHT

TO ALL PARTIES:

Defendant Nevada Association Services, Inc. hereby joins in the brief in this matter submitted by defendants L,J,S&G dba Leach, Johnson, Song & Gruchow and First Light.

Date: September 10, 2012

LAW OFFICES OF RICHARD VILKIN, P.C.
By: _____
Richard Vilkin, Esq.
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1286 Crimson Sage Ave.
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Attorneys for defendant Nevada Association Services, Inc.

ARBA
Ara H. Shirinian, NSB #6124
Ara Shirinian Mediation
10651 Capesthorne Way
Las Vegas, NV 89135
(702) 496-4985

Arbitrator

NEVADA DEPARTMENT OF BUSINESS & INDUSTRY

REAL ESTATE DIVISION

Bank of America, N. A., Claimant, vs. Stonefield Homeowners Association, et. al. Respondents	NRED Control No.: 12-58 **NON-BINDING ARBITRATION AWARD**

On or about June 13, 2012 the Arbitrator in this action ruled this matter would be decided upon the briefing of the parties, without hearing, unless objection to this procedure was made by a party. With no party objecting to the matter being decided upon the briefs of the parties, and the hearing being waived by the parties, this arbitration award follows. The Arbitrator rules that all parties participated in good faith in this matter.

Having considered the extensive pleadings submitted by the parties to this matter, the Arbitrator finds as follows:

1. Claims Presented

This arbitration involves two primary claims for relief. Firstly, the Claimant seeks a declaration establishing whether it has a right to pay-off or redeem a Homeowners Association

("HOA") super-priority lien before it forecloses under a senior deed of trust. Secondly, the Claimant seeks a declaration establishing that a HOA's super-priority lien does not include attorneys' fees and costs when such costs increase the amount of the lien to a sum greater than nine months of monthly assessments. These requests for declaration are ruled upon below in reverse order.

2. Assessments Enforceable Under NRS 116.3116 Include all Reasonable Collection Costs and Fees Relating to the Nine Month Period

In a departure from traditional lien property law, and to *expand* the rights of homeowners associations, Nevada has adopted the Uniform Common Interest Ownership Act. This act is codified in NRS 116. The instant matter involves the interpretation of NRS 116. As is relevant herein, NRS 116.3116 generally provides that, upon a foreclosure, an association's lien to a new owner of property for moneys due the association by a prior owner is superior to all other liens, including those filed earlier, such as the first mortgagee's interest. It is the *nature and extent* of this "priority" lien which is the subject of this suit.

The Arbitrator appreciates that there has been differing decisions made by different administrative bodies, judges and arbitrators regarding the interpretation of NRS 116.3116. See CCIC Opinion No.2010-11; Korbel Family Trust v. Spring Mountain Ranch Master Ass'n, Clark County District Court Case No.: 06-AO523959-C; Elkhorn Community Assoc. v. MERS, Clark County District Court No. A607051; JP Morgan v. Countrywide Home Loans, Clark County District Court Case No. A562678. See differing opinions found in the November 18, 2010 advisory opinion of the Nevada Financial Institution Division, and by the Court in Wingbrook Capital v. Peppertree HOA, Clark County District Court Case No. A-11-636948-B. The Arbitrator also appreciates the fact that the issues raised in this matter will ultimately be heard by the Nevada Supreme Court. However, as of this date, the Nevada Supreme Court has not published a decision interpreting NRS 116.3116. Thus, this action is being reviewed by this Arbitrator as a case of first impression.

It is not disputed that interest, late fees, and third party costs of collection are considered a part of the assessments under NRS 116.3116, and are subject to inclusion into a HOA priority lien. Claimant argues nevertheless that 116.3116 1.(C) limits the priority lien to a gross figure not to exceed an amount equal to 9 months of *normal homeowners assessments or monthly dues.* The Arbitrator disagrees.

NRS 116.3116 states that the homeowners association priority lien is limited to "what ***would have become due*** ... in the 9 months immediately preceding institution of the action to enforce the lien." The plain reading of the *entirety* of this statute and the *entirety* of Chapter 116 indicates that what is meant by the words "would have become due" was to allow homeowners associations a priority lien to the extent of, and in a gross amount equal to, what these associations would have been able to be awarded for a nine month period had lien priority not been an issue. This gross amount would include all association dues in arrears, as well as all other costs and fees the association might be entitled to. For example, in a *non-foreclosure setting*, if a property owner was delinquent for 9 months in paying his $200 per month hypothetical homeowner's dues, there could not be a dispute that the homeowners association could sue for, obtain a lien for, and be awarded the sum of $1,800, *plus* all costs associated with collection. In this example, let us assume that collection costs and other charges equal $2,000. In this hypothetical, the homeowners association could obtain a lien for, and be awarded the total sum of $3,800.

Again, NRS 116.3116 states that the homeowners association priority lien is limited to "what ***would have become due*** ... in the 9 months immediately preceding institution of the action to enforce the lien." In the hypothetical noted above had action been taken prior to foreclosure, what "would have become due" to the homeowners association by the home owner would be $3,800. Thus, using the figures in our example, in a foreclosure setting, the homeowners association would be limited to a priority lien in the sum of $3,800, or an amount equal to what "***would have become due*** ... in the 9 months immediately preceding institution of the lien."

The lien limitation set forth in NRS 116.3116 requires the trier of fact to look-back and to the limit a lien to what "would have become due" had an action been filed at the end of a nine month period. That amount would include delinquent homeowners' dues, attorneys' fees, interest, penalties, interest and all other charges which a homeowners association legally could seek in a non-foreclosure setting. While the 9 month limitation is a cap, it is cap which includes collection costs and fees, because those costs "would have become due" had a matter been filed outside foreclosure. See Hudson House Condo. V. Brooks, 611 A.2d 862 (Conn. 1992) in support. [1] The Claimant's request for relief in this regard is denied.

3. Absent Foreclosure of a Lien Respondents Are Not Obligated to Resolve Lien Disputes

All parties to this matter seem to agree that a super-priority lien attaches or is "triggered" when the first deed of trust holder forecloses upon its deed of trust. The Claimant nevertheless seeks a declaration establishing that it has an absolute right to pay-off or redeem a Homeowners Association ("HOA") super-priority lien before it is triggered or attaches, or before it forecloses under a senior deed of trust. Claimant argues that the respondent homeowners associations must, in effect, pre-determine the likely amount of the super-priority lien, and do so before collection costs and other charges are incurred, so that entities such as the Claimant can avoid the imposition of these fees and costs.[2]

---

[1] The Respondents make several additional arguments in support of the proposition that the super priority lien includes costs of collection. The merits of those additional arguments are not ruled upon herein.

[2] The Respondents have set forth many reasons why it would be difficult, if not impossible, to determine exact lien amounts prior to foreclosure, so that an appropriate demand can be made upon a pending or potential super-priority lien. The Respondents also point out the several pitfalls of accepting a lien pay-off prior to attachment of the lien. The Arbitrator finds the Respondents arguments in this regard to be persuasive. However, these arguments are not necessary to support the Arbitrator's decision herein.

While the Claimant certainly has the *right* to *negotiate a settlement* with homeowners associations regarding liens prior to foreclosure, there is nothing in the law which requires or sets forth an *obligation* of homeowners associations to either negotiate with the Claimant, or to enter into a settlement or resolution. There is simply no provision in the law which requires Respondents to pre-determine likely lien amounts before those liens are triggered or attach. There is simply no provision in the law which requires Respondents to then accept that amount in lieu of going forward with the procedures now followed by the Respondents. The Claimant's request for relief in this regard is denied.

4. Conclusion

Based upon the foregoing, non-binding arbitration award is herewith granted in **favor of the Respondents**, and each of them, and against the Claimant on all claims for relief.

Dated: September 18, 2012

Ara H. Shirinian

Arbitrator

Shellpoint
Mortgage Servicing

MONDAY - FRIDAY: 8AM - 10PM ET
SATURDAY: 8AM - 3PM ET

PHONE NUMBER: (800) 365-7107
FAX NUMBER: (866) 467-1187
E-MAIL LOANSERVICING@SHELLPOINTMTG.COM

September 29, 2017

Melissa N Lieberman
2184 Pont National Dr

REDACTED

REDACTED

Total Payoff **$845,088.76**

REDACTED

REDACTED

PO1.rpt
9/29/2017

MONDAY - FRIDAY: 8AM - 10PM ET
SATURDAY: 8AM - 3PM ET

PHONE NUMBER: (800) 365-7107
FAX NUMBER: (866) 467-1187
E-MAIL:LOANSERVICING@SHELLPOINTMTG.COM

REDACTED

MONDAY - FRIDAY: 8AM - 10PM ET
SATURDAY: 8AM - 3PM ET

PHONE NUMBER: (800) 365-7107
FAX NUMBER: (866) 467-1187
E-MAIL:LOANSERVICING@SHELLPOINTMTG.COM

Melissa N Lieberman - Loan ID REDACTED

REDACTED

(3)

Inst #: 201312270002917
Fees: $18.00
N/C Fee: $0.00
12/27/2013 03:49:32 PM
Receipt #: 1885181
Requestor:
THE WRIGHT LAW GROUP P.C.
Recorded By: RYUD Pgs: 3
DEBBIE CONWAY
CLARK COUNTY RECORDER

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APN# 190-20-311-033

(11 digit Assessor's Parcel Number may be obtained at: http://redrock.co.clark.nv.us/assrealprop/ownr.aspx)

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(DO NOT Abbreviate)

Notice of Lis Pendens

Case No. A-13-690944-C

Document Title on cover page must appear EXACTLY as the first page of the document to be recorded.

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THE WRIGHT LAW GROUP, P.C.

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JOHN HENRY WRIGHT
Nevada Bar No. 6182
THE WRIGHT LAW GROUP, P.C.
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
Telephone: (702) 405-0001
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Email: john@wrightlawgroupnv.com
Attorney for NV EAGLES, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

NV EAGLES LLC, a Nevada Limited Liability Company, Plaintiff, vs. PULTE MORTGAGE, LLC, a New York Corporation, MELISSA N. LIEBERMAN, an individual and DOES I through X, inclusive; ROE ENTITIES XI through XX, Defendants.	CASE NO. A-13-690944-C DEPT. NO. X

THE WRIGHT LAW GROUP P.C.
2340 Paseo Del Prado Suite D-305
Las Vegas, Nevada 89102
Tel. (702) 405-0001 Fax (702) 405-8454

NOTICE OF LIS PENDENS

NOTICE IS HEREBY GIVEN that the above-entitled action was filed in the Eighth Judicial District Court of Clark County, Nevada on October 30, 2013 by Plaintiff, NV EAGLES, LLC, a Nevada Limited Liability Company, by and through its counsel of record, JOHN HENRY WRIGHT, ESQ., of THE WRIGHT LAW GROUP, PC and is now pending in said court.

That the action prays for Quiet Title and Declaratory and Injunctive Relief, and other relief concerning the real property commonly know as: 2184 Port National Drive, Henderson, NV 89044, APN # 190-20-311-033 (hereinafter the "*Property*."). The Plaintiff in said action requests of the Court, *inter alia*, a determination pursuant to NRS 40.010, that title in the Property is vested in

///

Plaintiff free and clear of all liens and encumbrances and that the Defendants therein have no estate, right, title or interest in the Property adverse to Plaintiff.

Dated this 30th day of October, 2013.

THE WRIGHT LAW GROUP, P.C.

JOHN HENRY WRIGHT, ESQ.
Nevada Bar Number 6182
THE WRIGHT LAW GROUP, P.C.

THE WRIGHT LAW GROUP P.C.
2340 Paseo De Prado, Suite D-306
Las Vegas, Nevada 89102
Tel: (702) 405-0001 Fax: (7021 405-0454

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Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

MELISSA LIEBERMAN, Plaintiff, vs. MADEIRA CANYON COMMUNITY ASSOCIATION, Defendant.	CASE NO: A-13-685203-C DEPT. XXXII

BEFORE THE HONORABLE ROB BARE, DISTRICT COURT JUDGE
TUESDAY, JANUARY 14, 2020

RECORDER'S TRANSCRIPT OF PROCEEDINGS RE:
BENCH TRIAL - DAY 1

APPEARANCES:

For the Plaintiff: JOSEPH Y. HONG, ESQ.

For the Defendant: REX D. GARNER, ESQ.

RECORDED BY: KAIHLA BERNDT, COURT RECORDER

Case Number: A-13-685203-C

INDEX

WITNESSES

WITNESS:

DIANE DELONEY

EXHIBITS

TRIAL EXHIBITS ADMITTED:

Las Vegas, Nevada; Tuesday, January 14, 2020

[Proceeding commenced at 1:00 p.m.]

THE COURT CLERK: Case A685203 Melissa Lieberman versus Madeira Canyon Community Association.

THE COURT: All right. And of course, Counsel, if you can make your appearances.

MR. HONG: Yes, good afternoon, Your Honor, Joseph Hong for NV Eagles.

MR. GARNER: Good afternoon, Your Honor, Rex Garner on behalf of Bank of New York Mellon and Bank of America and with me is Ms. Diane Deloney from Bank of America.

THE COURT: All right, welcome. What's your last name again, please?

MS. DELONEY: Deloney, it's D-E-L-O-N-E-Y.

THE COURT: Deloney, okay. Okay, I did receive and I've read through the stipulated facts for trial. I didn't see any trial briefs, not of course that there should have been, but sometimes there are, sometimes there's not. I just wanted to make sure, we didn't get any trial briefs on this one, but we did get the stipulated facts, right?

MR. HONG: Correct, Your Honor.

MR. GARNER: That's correct.

THE COURT: And, the stipulated facts indicate on page four -- or paragraph 18, the parties stipulate to admit exhibits 1 through 16. So, let me see what I have here. Oh look at that, 1 through 16. So,

that means this binder would be admitted by stipulation; is that it?

MR. GARNER: Correct.

MR. HONG: That's correct, Your Honor.

THE COURT: Okay, 1 through 16 are admitted by agreement.

[EXHIBITS 1 THROUGH 16 ADMITTED]

THE COURT: And, do you all want to do little miniature openings to identify the remaining parties, remaining claims --

MR. HONG: Sure.

THE COURT: -- and any sort of overview of what your case is about?

MR. HONG: Sure, Your Honor.

THE COURT: Okay.

OPENING STATEMENT FOR THE PLAINTIFF

BY MR. HONG:

So, Your Honor, the remaining claims are between NV Eagles LLC, the owner of the subject property, against Bank of America and Bank of New York Mellon, who held the deed of trust at the time of the HOA foreclosure sale. And, the issue in this case is the claim by Bank of America, Bank of New York Mellon, that there was an attempt at tender of the super-priority amount prior to the sale and rejection of same. That's really the issue.

So, as in the past --

THE COURT: Is that an affirmative defense or is that a -- do they have a counterclaim?

MR. HONG: Well, this is where it gets interesting and --

THE COURT: Okay.

MR. HONG: -- I -- we're going to be just making a oral motion or a written, whatever Your Honor prefers, for a directed verdict based on there's never -- this is kind of an unusual case where the cases got consolidated. Two cases got consolidated into this, but --

THE COURT: Yeah.

MR. HONG: -- there's never been a affirmative defense of tender. And, the cross-claim -- so the claim by the bank -- banks against NV Eagles, there is a tender in there. But, that was filed on 7/12 of 2019, Your Honor. And --

THE COURT: Okay, hold on just a second. I have a whole chronology of these pleadings here, so let me find that one.

MR. HONG: Right.

THE COURT: What date did you say that was again, please?

MR. HONG: 7/12 of 2019.

THE COURT: Okay, there's a cross-claim against NV Eagles July 12th of '19 bringing cross-claims for quiet title declaratory relief. You say that's the one where the tender first appears?

MR. HONG: Correct.

THE COURT: Okay.

MR. HONG: And so, our argument, my client's argument, is the claim is barred by the statute of limitations because the HOA sale occurred on 6/7/2013. So, even if we took the longest of the potential statute of limitations of five years, which again, we believe it's three years, but if it's five years, it's still --

THE COURT: Did we do anything on a -- any kind of written motions on this yet?

MR. HONG: We haven't, Your Honor.

THE COURT: Okay. And, this was not brought up until now? I'm just asking you a question in case --

MR. HONG: That's correct.

THE COURT: Okay, I just want to see if we missed it or anything so --

MR. HONG: No. No, no, no, that's kind --

THE COURT: Do you know about this, Mr. Garner, or is this the first you're hearing of it?

MR. GARNER: Well, the -- I think probably what you have in front of you is a list of a lot of pleadings. This case started by the homeowner against the HOA and others and then, you know, we were brought in with --

THE COURT: It was a pro per Plaintiff initially, I think.

MR. GARNER: I'm sorry?

THE COURT: Pro per Plaintiff initially.

MR. GARNER: Right.

THE COURT: Right.

MR. GARNER: Right, and then through a handful of counterclaims, cross-claims, etcetera --

THE COURT: Yeah.

MR. GARNER: -- is when --

THE COURT: It's a pretty good list of them here.

MR. GARNER: Yeah.

MR. HONG: Yeah. So, to make it simple, Your Honor, what happened was this present case initiated by Melissa Lieberman was brought and then subsequent to that NV Eagles brought a separate action against the banks. That separate action got consolidated into this. But, that separate action, the pleadings are very minimal, very minimal, I mean, I think maybe six or seven pleadings there.

So, the history of this case stands with this current case number that we're here now on.

THE COURT: Yep.

MR. HONG: And, that's when the cross-claims -- well, the first cross-claim against NV Eagles, again Your Honor, was September 12th, 2019 -- I mean, I'm sorry, July 12th, 2019.

THE COURT: Yeah.

MR. HONG: That's -- I mean, the record is the record.

THE COURT: Yeah, that's the bank against your client.

MR. HONG: Correct, and that's the first time the tender claim was raised.

THE COURT: Okay, so that's a -- what is that, a motion to, you said, directed verdict or --

MR. HONG: It's a -- yeah, I guess, yeah it'd be a oral motion for a directed verdict based on the statute of limitations and that there's no possible relief the bank could --

THE COURT: Well, it'd be a motion to dismiss based on statute of limitations, wouldn't it?

MR. HONG: Yeah, yeah, I guess that's -- yeah.

THE COURT: Yeah.

MR. HONG: And, we can brief that and get that to the Court this afternoon even. But, I mean, Your Honor's heard our statute of limitations arguments before. As you know, it's -- it goes either three or four, the catch-all, or five.

THE COURT: You know, I got to tell you though, that may be but I don't remember what I did on them --

MR. HONG: Oh, okay.

THE COURT: -- just because --

MR. HONG: Sure.

THE COURT: -- that's what happens when you have --

MR. HONG: Right.

THE COURT: -- 1400 cases --

MR. HONG: Sure, sure, sure.

THE COURT: -- you know and --

MR. HONG: Sure.

THE COURT: -- you know, thing after thing after thing all the time --

MR. HONG: Sure.

THE COURT: -- I just don't remember.

MR. HONG: Sure.

THE COURT: I mean, do you -- can you give -- can you represent to me what I did do in a similar case, because I would want to be consistent? Did I -- what statute did I apply?

MR. HONG: I -- well, the statute that I believe that you applied regarding HERA was not the three, I believe it was -- no, no, no, I'm sorry, in the most recent ruling on a case like this --

THE COURT: Mm-hmm.

MR. HONG: -- Your Honor, I believe, held the three-year, potentially four, but that statute of limitations was stayed because the case was stayed. It was tolled because the underlying case was stayed for a period of I believe like a year and a half, two years, or whatnot.

THE COURT: Okay, you think the triggering event is the HOA sale?

MR. HONG: Correct.

THE COURT: And, that's June 7th of '13?

MR. HONG: Right, so --

THE COURT: So, six years plus --

MR. HONG: Well --

THE COURT: -- a few months -- plus a month and a half go by before the cross-claim.

MR. HONG: Correct. And so, there's three potential statute of limitations. Three being, when you challenge a statute like NRS 116, saying hey, that did not wipe away our deed of trust. There's a four-year catch-all, kind of just a generic one. And then, there's a five-year quiet title. So, even if we went with the longest of those three, five --

THE COURT: Right.

MR. HONG: -- it's still --

THE COURT: Okay.

MR. HONG: -- outside, so --

THE COURT: All right.

MR. HONG: But again, we can brief that within two hours because I think today is going to be really short even, because tomorrow, for housekeeping, Your Honor --

THE COURT: Okay.

MR. HONG: -- I think today, Counsel wanted to call the Bank of America representative. And then tomorrow, there's Rock Jung, and then the representative for NAS. But, for sake of judicial economy, I think we can possibly shortcut that based on Your Honor's decision on the -- on however we want to couch the motion to dismiss or a directed verdict or however. I don't -- I'm not --

THE COURT: Well, yeah, it would be short-circuited if I granted it, but I don't think Mr. Garner's just going to say go ahead and grant it. So --

MR. HONG: No, of course not. Of course not, so --

THE COURT: -- there's no short-circuiting that I see there.

MR. HONG: Yeah, so I don't know how we'd like to proceed on that one.

THE COURT: Short-circuiting would be if you stipulated anything for tomorrow, but --

MR. HONG: If --

THE COURT: -- we're going to -- so, our schedule's going to be today with the bank witness and then tomorrow you have a couple live witnesses?

MR. GARNER: Correct.

MR. HONG: Two witnesses, right.

THE COURT: Okay. Okay.

MR. HONG: So --

THE COURT: What time are we supposed to start tomorrow?

MR. HONG: 9:00.

THE COURT: Can we start a little bit later than that? Does anybody have a problem with that?

MR. GARNER: How much later, Your Honor?

THE COURT: 10:00? 9:30?

MR. GARNER: Definitely I think 9:30 would be fine.

THE COURT: Okay.

MR. GARNER: -- because -- yeah the NAS witness needs to go early and then we have Mr. Jung --

THE COURT: Okay, so 9:30 is okay?

MR. HONG: 9:30 is fine.

MR. GARNER: 9:30 is fine with us.

THE COURT: All right, let's just start at 9:30 tomorrow --

MR. GARNER: Okay.

THE COURT: -- not 9:00.

MR. HONG: Okay.

THE COURT: Okay?

MR. HONG: Okay.

THE COURT: And then -- okay, well I mean, you made a oral motion --

MR. HONG: Right.

THE COURT: -- to essentially dismiss the case.

MR. HONG: Correct.

THE COURT: Anything else you want to add to that?

MR. HONG: Well, not dismiss the case; dismiss the bank's claims against my client.

THE COURT: Oh, okay. So --

MR. HONG: Right.

THE COURT: -- they -- so, wait a second. If you're trying to get rid of the affirmative defense of tender --

MR. HONG: Right.

THE COURT: -- why wouldn't it be that --

MR. HONG: Right.

THE COURT: -- in your -- in regard to your claim, they can't likewise bring a tender affirmative defense?

MR. HONG: Well, the affirmative defense was never raised so we submit that it was waived, and it's the only pleading that we have in this case, or the other case, as to my client is a cross-claim. It's a cross-claim. So --

THE COURT: Okay, so what relief are you asking for then?

MR. HONG: So, that's why I think a directed verdict would probably be more appropriate.

THE COURT: Well, you want to dismiss the cross-claim?

MR. HONG: Right, which would then, in essence, support a directed verdict, because there -- then there would be no claims against

my client.

THE COURT: Okay. But, you have your own complaint asking for quiet title --

MR. HONG: Correct.

THE COURT: -- against the bank, right?

MR. HONG: Correct.

THE COURT: So, in that, I guess what you're saying is, there's no affirmative defense of tender in that --

MR. HONG: Correct.

THE COURT: -- case?

MR. HONG: Correct.

THE COURT: So, likewise, they would be precluded from bringing that --

MR. HONG: Correct.

THE COURT: -- affirmative defense concerning your complaint?

MR. HONG: Correct.

THE COURT: So, what you're asking me to do is dismiss the cross-claim and --

MR. HONG: Enter.

THE COURT: -- preclude the tender defense?

MR. HONG: Correct.

THE COURT: And, you're -- as a affirmative defense on your complaint?

MR. HONG: Correct --

THE COURT: Yeah.

MR. HONG: -- because there's never been an affirmative defense in this case.

THE COURT: Okay. All right, so Mr. Garner, you want to -- do you want to say anything about that now, or do you want this to be in writing, or how are we going to do this? It's a case dispositive-style motion with a -- on the first day of trial.

MR. GARNER: I have some suggestions. I can address it now. I would like to see it in writing because I think we have several different statutes of limitations in Mr. Hong's arguing. And then, I don't have all of the pleadings in front of me.

THE COURT: Mm-hmm.

MR. GARNER: So, I can't tell you with any confidence what we did or did not assert as an affirmative defense. I know it's in our individual pretrial memo --

THE COURT: Okay.

MR. GARNER: -- that we did assert the affirmative defense of tender. But, I don't know when we did that and to what pleading, so.

THE COURT: Okay, I mean, you know, a thought comes to mind, it's just a thought, and that is, if you have a case dispositive motion, why are we doing the case until that's reconciled?

MR. HONG: Well --

THE COURT: I mean really --

MR. HONG: -- right.

THE COURT: -- why don't we just do the motion and then

depending on the result do the case? I mean, why call three witnesses over two days and then bring a case dispositive motion? Why not do the motion first? Does that present a hardship to anybody?

MR. GARNER: It -- it would because we have Ms. Deloney here came from Texas.

THE COURT: Okay, well --

MR. GARNER: And so --

THE COURT: -- yeah.

MR. GARNER: -- we'd like to put her on and then --

THE COURT: Okay.

MR. GARNER: -- Mr. Jung's availability is pretty limited --

THE COURT: Okay.

MR. GARNER: -- by these cases, and so, you know I -- plus, I don't even know if statute of limitations was raised as affirmative defense to our claim. So, I don't even know if that is appropriate to be brought here today. But, I think we can have some of it figured out, you know, by tomorrow, but all of these witnesses combined, Your Honor --

THE COURT: Mm-hmm.

MR. GARNER: -- will maybe take an hour, an hour and a half.

MR. HONG: Right.

MR. GARNER: So, to not waste their time, since we've already lined them up --

THE COURT: Okay, I'm just asking that question.

MR. GARNER: Yeah.

THE COURT: And, lawyers could say, you know what, fine,

let's go ahead and do the motion and come back another day. I didn't know Ms. Deloney was here from Texas.

MR. GARNER: Mm-hmm.

[Colloquy between counsel and representative]

THE COURT: But, okay. So, we're going to definitely have Ms. Deloney testify today --

MR. HONG: Okay.

THE COURT: -- because she made the trip.

MR. HONG: Sure.

THE COURT: Anything you want to say about the case, separate from the motion that you now brought up that's going to have to be in writing and --

MR. HONG: Yeah.

THE COURT: -- all that?

MR. HONG: No, Your Honor. That's -- it's a very standard HOA foreclosure case and the claim by the bank as to why the deed of trust was not extinguished is based on the attempt to tender.

THE COURT: Okay, I'm making a note here about the motion in writing to look for it and all that, so --

MR. HONG: Okay.

THE COURT: Okay, Mr. Garner, you want to give an opening or --

MR. GARNER: Yeah.

THE COURT: -- give your view as to, you know, where we're at, again, separate and distinct from any motion to dismiss concepts?

OPENING STATEMENT FOR THE DEFENSE

BY MR. GARNER:

Right, your guess probably is as good as mine as to, you know, what's left. I went through a lot of orders and it looked like all of them is Lieberman's case has been dismissed, looked like just about everything else, other than the claims between my client and Mr. Hong's are left.

THE COURT: Okay.

MR. GARNER: So, whatever happens at the end of this case, I think whatever FFCL's or order's entered, we should probably clean that up for her, you know, at least to make a clear record.

But, what's left, Your Honor, is I think a pretty straightforward HOA foreclosure case involving tender by the bank. The original loan for this house, which is at 2184 Pont National Drive, in the Madeira Canyon HOA, I believe that's in Henderson --

THE COURT: Yep.

MR. GARNER: -- 2006, Melissa Lieberman, who was a party initially to this case, no longer around, borrowed roughly half a million dollars to buy that house in 2006. Bank of America serviced that loan, you'll hear from Ms. Deloney today, throughout the time period that is relevant to us today. And around 2010, four or so years after Ms. Lieberman bought this house, she fell behind on HOA dues, so the HOA records -- hires NAS, starts the whole process with a notice of delinquent assessment lien, then a notice of default, those are admitted exhibits.

THE COURT: Mm-hmm.

MR. GARNER: The first notice that gets sent to the servicer, Bank of America, is the notice of default. But, as you've probably seen in other cases, and as you will see in this case, nothing in the notice of default says anything about super-priority, provides a number, or even a method by which it could be calculated. So, Bank of America, per its policy, practice and procedure, hires Miles Bauer to find out what the super-priority is and to pay it. Exhibit 9, Your Honor, is the usual Miles Bauer affidavit that has been admitted, and you'll also hear from Mr. Jung in the morning.

This is one of the rare instances, Your Honor, where --

THE COURT: They actually sent the ledger.

MR. GARNER: I'm sorry?

THE COURT: That they actually sent a payoff ledger.

MR. GARNER: Well, even before that, this is one of the rare instances, Your Honor, where the first letter -- because Miles Bauer would send two, the first letter introducing themselves saying give us a payoff, and then a second letter with the check. The first letter's actually in NAS's file. So, and like you pointed out, this is one of the rare instances, where at least was during a time when NAS was providing some information.

So, what they gave to us was their own ledger that showed a handful of quarterly assessments. Miles Bauer used this -- of course, this ledger that NAS sends to us, Your Honor, doesn't say here's all the amounts owed and here's the super-priority portion. It doesn't say that

anywhere. So, Miles Bauer calculates the super-priority, has Bank of America wire the funds, and cuts a check, and delivers it per its policy and practice by runner.

And, as you will hear from both Mr. Jung and Ms. Moses, the usual practice at the NAS office, when these checks would come in by runner, is the receptionist would look at the number on the check, if it's not the total amount due, and it came with that normal Miles Bauer letter, send it back. We're not going to keep a copy, we're not going to note it in a log that it was even delivered, it's just go back. So the -- and, it doesn't go back with any sort of instructions like, pay this amount instead, other than the entire amount, which is not the super-priority.

Foreclosure moves forward. Couple years later, the notice of sale is recorded. That is also an admitted exhibit. And, this notice of sale, like all the others in these types of cases, promises the bidder nothing. You are going to purchase this property without covenant or warranty whatsoever, that you're going to get clear title.

Auction occurs in June 2013, the opening bid was roughly $8,000. A company called Underwood Partners wins the bidding at $30,000. BANA's expert appraiser estimates the fair market value at $430,000 which means the auction price is roughly 7 percent of fair market value. Even the foreclosure deed has attached to it that declaration of value form that we see on all of these cases. That's an admitted exhibit as well, shows that the transfer tax value on that form was also significantly higher than the winning bid of $30,000.

And then, eventually -- well, and the deed that transfers title to

Underwood, the winning bidder, comes with no guarantees, no covenants, no warranties, no assurances that their title is clear. Later, Underwood transfers to the current owner, NV Eagles. But, I don't think you will hear from anyone from Underwood or from NV Eagles.

And at the end of the case, Your Honor, Bank of New York Mellon, who is the record beneficiary, will ask you to find in its favor, that the HOA sale did not affect the first deed of trust, and that Plaintiff, both Underwood, and then by extension, NV Eagles, purchased that property subject to the deed of trust.

THE COURT: All right, thank you. And, as far as witnesses and all, do you want to defer or allow for the calling of a witness out of order? Are you going to call her as a witness or --

MR. HONG: No, no, no, Your Honor, well we're -- I'm fine with however Counsel wants to call their witnesses.

THE COURT: Okay, so you have -- you do have witnesses then?

MR. HONG: No.

THE COURT: None?

MR. HONG: No, just rest on the stip.

THE COURT: Oh, so the Plaintiff rests? Okay.

MR. HONG: Right, based on the admitted -- stipulated, admitted documents specifically --

THE COURT: Right, the Plaintiff can rest based upon the admitted exhibits and what have you.

MR. HONG: Yeah, specifically, 3, 4, 5, and 6.

THE COURT: Okay.

MR. HONG: Yeah.

THE COURT: All right, so the Plaintiff, based upon the admission of the 16 exhibits has rested. Defense, any witnesses or evidence?

MR. GARNER: Yes, defense calls Diane Deloney.

THE COURT: Okay, Ms. Deloney, come on up to the witness box area, please. When you arrive there, if you could remain standing momentarily, turn your attention to Shannon, our Clerk, she'll swear you in.

DIANE DELONEY

[Having been called as a witness and being first duly sworn, testified as follows:]

THE COURT CLERK: Thank you, please be seated. If you could, please state and spell your first and last name for the record.

THE WITNESS: It's Diane Deloney. It's D-I-A-N-E, D-E-L-O-N-E-Y.

THE COURT CLERK: Thank you.

THE COURT: Okay, Mr. Garner, go ahead.

DIRECT EXAMINATION

BY MR. GARNER:

Q Thank you, Your Honor.

Ms. Deloney, good afternoon. Why don't you start by telling Judge what you do for a living?

A I am an employee of Bank of America. I'm Assistant Vice

President Mortgage Resolution Associate.

Q How long have you been that?

A I've done that now for ten, 11 years.

Q Okay, and generally speaking, what are your job duties?

A Well, I appear on behalf of the bank at trials, mediations, and depositions. I am -- also handle portfolio of loans that are in litigation, doing research, document preparation, things like that.

Q Very good. And, as it relates to residential mortgages, generally speaking, what is the business of Bank of America?

A Residential mortgages, we originate loans and we also service loans.

Q Okay. And, when Bank of America services a loan, what are its general duties?

A Generally servicing entails the first contact with the borrower, accept payments, pay taxes, pay insurance, any phone calls or correspondence the borrower sent to the bank to handle, just the -- basically daily duties like that.

Q Okay. And, as it relates to Nevada HOA cases, approximately how many times have you testified?

A Many times, maybe 40, 50 times.

Q Okay. And, what is Bank of America's relationship to the loan that brings us here today?

A Bank of America was the servicer of the loan until June of 2013.

Q Okay. When did it start servicing?

A Shortly after it originated.

Q Okay. As a consequence of testifying on behalf of Bank of America in roughly 40 Nevada HOA cases, have you become familiar with the policies, practices, and procedure of Bank of America as it relates to HOA foreclosure notices in roughly 2010 to 2013?

A Yes.

Q Briefly tell the Judge what that policy and practice was.

A Basically, we would receive the notice of sale, it would be routed to what we call our litigation group, who then would hire local counsel to reach out to the HOA, or their collection agency, to obtain the super-priority portion to protect our lien. We would then wire funds to counsel in order for them to pay that lien amount.

Q And, have you reviewed documents related to the HOA's foreclosure in this case?

A I have.

Q And, to what extent did Bank of America follow that policy, practice, and procedure here?

A According to my review of the documents, we followed it as normal.

Q And, what documents did you review to confirm that?

A I reviewed our servicing records, I reviewed our image documents, the loan payment history, the -- I saw the notices of sale and the notices of default, and the Miles Bauer documents.

Q Okay. And based on that review, how would you describe Bank of America's willingness to pay the super-priority in this case?

A Oh, we were willing and able.

Q Thank you very much for your time.

THE COURT: All right, Mr. Hong, questions for Ms. Deloney?

CROSS-EXAMINATION

Q Thank you, Your Honor.

Hi, Ms. Deloney. I understand your testimony as to Bank of America sending funds to its counsel Miles Bauer, to protect the deed of trust, correct?

A Yes.

Q Okay, but you have no independent recollection or knowledge that Miles Bauer actually followed through, correct?

A What do you mean? That they actually remitted the funds to the collection agency?

Q Correct.

A According to my review of the records, yes, that --

Q The --

A -- they did.

Q -- the records being Miles Bauer's records or Bank of America records?

A Both.

Q So, and is it fair to say the Bank of America records would be the records that was received, some kind of communications or something received from Miles Bauer?

A Yes.

Q Okay, so there's no -- other than that, there's no independent

Bank of America records that can confirm the remittance, correct?

A Not to my knowledge.

Q So, based strictly on any records or communications that came from Miles Bauer, right?

A Yes.

Q Okay, thank you. I don't have anything further, Your Honor.

THE COURT: All right, Mr. Garner, any follow-up?

MR. GARNER: Nothing further.

MR. HONG: That's it, Your Honor.

THE COURT: Okay, Ms. Deloney, thanks for your testimony, you're excused. Any other witnesses or evidence from the defense?

MR. GARNER: None today, Your Honor.

THE COURT: Okay, so we're going to resume tomorrow at --

MR. HONG: 9:30?

THE COURT: -- 9:30. And, what are we going to have at 9:30 tomorrow then?

MR. GARNER: 9:30 we begin with Susan Moses from NAS.

THE COURT: Okay, 9:30 -- you got this right, Mr. Hong?

MR. HONG: Yeah, oh yeah, Your Honor.

THE COURT: Okay, 9:30, Ms. Moses.

MR. GARNER: And then, right after Ms. Moses, presuming -- Mr. Jung said he had a hearing 9:00 tomorrow, presuming he's done by --

THE COURT: Mr. --

MR. GARNER: -- 10-ish, 10:15, we'll do him right afterwards.

And then, defense plans to rest.

THE COURT: Okay.

MR. HONG: And, Your Honor, by 5:00 o'clock today we'll get the written motion filed.

THE COURT: Okay.

MR. HONG: Okay.

THE COURT: All right, we'll see you at 9:30 tomorrow.

MR. HONG: Thank you, Your Honor.

MR. GARNER: Thank you, Judge.

MS. DELONEY: Thank you.

[Proceeding concluded at 1:27 p.m.]

* * * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Kaihla Berndt

Kaihla Berndt
Court Recorder/Transcriber

Electronically Filed
3/24/2020 1:55 PM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

MELISSA LIEBERMAN, Plaintiff, vs. MADEIRA CANYON COMMUNITY ASSOCIATION, Defendant.	CASE NO: A-13-685203-C DEPT. XXXII

BEFORE THE HONORABLE ROB BARE, DISTRICT COURT JUDGE
WEDNESDAY, JANUARY 15, 2020

RECORDER'S TRANSCRIPT OF PROCEEDINGS RE:
BENCH TRIAL - DAY 2

APPEARANCES:

For the Plaintiff: JOSEPH Y. HONG, ESQ.

For the Defendant: REX D. GARNER, ESQ.

RECORDED BY: KAIHLA BERNDT, COURT RECORDER

INDEX

WITNESSES

WITNESS:

Las Vegas, Nevada; Wednesday, January 15, 2020

[Proceeding commenced at 9:37 a.m.]

THE COURT: All right, let's see. Okay, we're on the record and I did receive a pleading from Mr. Hong's side here. It's motion for judgment as a matter of law under Rule 50. And then, there's an opposition too. I have to say, I haven't had a lot of chance to read it all or look at it all --

MR. GARNER: Understood.

THE COURT: -- but we have to figure out when I'm going to do that.

MR. GARNER: Mm-hmm.

THE COURT: But, we're going to have all the witnesses and then go from there anyway --

MR. GARNER: Perfect.

THE COURT: -- because people are on timelines now.

MR. HONG: Right.

THE COURT: And, I appreciate that we started right around 9:30 today. I needed the extra time today so that's great.

MR. GARNER: Very good.

THE COURT: Okay, ready to go?

MR. GARNER: Yes, defense calls --

THE COURT: Okay.

MR. GARNER: -- Susan Moses.

THE COURT: All right.

[Colloquy between the Court and the Court Clerk]

THE COURT: Ms. Moses.

SUSAN MOSES

[Having been called as a witness and being first duly sworn, testified as follows:]

THE COURT CLERK: Thank you, please be seated. If you could, please state and spell your first and last name for the record.

THE WITNESS: Susan Moses, S-U-S-A-N, M-O-S-E-S.

THE COURT CLERK: Thank you.

THE COURT: All right, Mr. Garner.

DIRECT EXAMINATION

BY MR. GARNER:

Q Thank you, Judge.

Ms. Moses, good morning.

A Good morning.

Q I know we've done this before, probably in front of this Judge, among others, but we'll be as efficient as we can without compromising completeness. Why don't you start by telling the Judge what you do for work?

A I am the Paralegal and Custodian of Records for Nevada Association Services.

Q How long have you been doing that?

A Since June of 2015.

Q Okay. And do you also appear for depositions and trials on behalf of NAS?

A I do.

Q Okay. Back in -- and the business of NAS is what?

A We are a collection agent for HOAs.

Q Okay. Back in 2010, do you have an estimate for how many HOAs NAS was doing collection work for?

A No.

Q Okay. Was Madeira Canyon HOA one of them?

A Yes.

Q Okay. The exhibit binder should be right in front of you, and I want to start with Exhibit 3.

A Okay.

Q Can you tell us what this is?

A This is the recorded Notice of Delinquent Assessment Lien.

Q Okay. And, can you tell by looking at that how -- what the monthly or quarterly assessments were at the time?

A There's no breakdown of the amounts due.

Q Okay. Does it list any sort of super-priority amount?

A There's nothing on the document that discusses super-priority.

Q All right. Flip to Exhibit 4 and tell us what that is.

A This is the recorded Notice of Default.

Q Okay. And, how much was owed on the account at that point?

A $3,112.73.

Q Can you tell from looking at this what portion of that was assessments?

A There's no breakdown of the amounts due?

Q Okay. Any mention of super-priority?

A There's nothing in the document that discusses super-priority.

Q Okay. Is the Notice of Default usually the first document in the process that goes to the first deed of trust holder?

A Typically.

Q Okay. And, the contact information in this notice is for NAS, correct?

A Correct.

Q All right. Now, during the years, let's say 2010 to 2013, did NAS have conversations with a law firm called Miles Bauer?

A We did.

Q Okay. And, was it related to HOA liens?

A Yes.

Q All right. Did you ever get requests from Miles Bauer law firm for account statements or ledgers?

A Yes.

Q Okay. If we look at Exhibit 11, which is the -- NAS's file, I'd like you to turn to the Bates labels on the bottom right at page 202.

A Okay.

Q Can you tell us what this and page 203 is?

A This is correspondence from Miles Bauer, Bergstrom & Winters to Nevada Association Services.

Q Okay. And, did you -- did NAS understand from this letter that Miles Bauer law firm was seeking information about the account?

A Yes.

Q Okay. And then, if you look one more page at 204 we also see an email request from the Miles Bauer law firm?

A Correct.

Q Okay. And at this time in March of 2000 -- February and March of 2011, how was NAS handling or responding to such requests?

A NAS would provide an email such as the one on 205 with a copy of the ledger on 206 and 207.

Q Okay. And, if we look at the ledger at 206 to 207, do you see on there where it -- does it list at all a super-priority number?

A There's nothing in the ledger that discusses super-priority.

Q Okay. And then, on the first page, 206, there're a handful of columns under -- they're all listed as amount and then underneath them they have present rate and then the rest are prior rates; do you see those columns?

A I do.

Q Can you tell by looking at this what dates those prior rates apply to?

A No.

Q Okay. And, during that same timeframe, 2010 to 2013, did Miles Bauer ever through runners deliver checks with letters?

A Yes.

Q And, how was -- how did NAS typically handle those deliveries?

A If there were conditions on the checks, then NAS would not accept them.

Q Okay. And, was a copy made of the letters and checks?

A No.

Q Okay. Was notation made in the log that those things were delivered?

A No.

Q Okay. Was it usually someone at reception who would analyze it and return it?

A I don't know how that process happened.

Q Okay. And the typical Miles Bauer letter that you've probably seen in depositions and trials, I call it the second letter; are you familiar with that letter?

A Yes.

Q Okay. And that's the letter that NAS believed had impermissible conditions?

A Correct.

Q Okay. So, if a check came for any amount that was less than full payoff, with that letter, what was NAS's policy?

A It's the fact that there were conditions, that's what would -- that's what would cause NAS to reject the payment were the conditions.

Q Okay. Let's look at 303 in that same Exhibit 11.

A Okay.

Q Can you tell us what this is?

A This is NAS's sales script.

Q So, the big paragraph on that page is what the crier or auctioneer would say at a sale?

A Correct.

Q Okay. Including this second-to-last -- or these last few sentences, this property's being sold on an as-is basis and the sale would remain without covenant, or warranty, express or implied?

A Correct.

Q And then, there's an opening bid for roughly $8,600; you see that?

A I do.

Q How was that calculated?

A If you look at BANA 301 --

Q Mm-hmm.

A -- that's NAS's updated accounting ledger that corresponds with the day of the sale.

Q Okay. And my copy's not super great, but it appears that on the bottom right of 301, in the grand total box, that's the same number that appears as the opening bid on 303?

A It looks like it.

Q Okay. And then, the winning bid was $30,000?

A Correct.

Q All right. And, what -- does page 317 show us how those funds were distributed?

A Yes.

Q Okay. Was any amount sent to the first deed of trust holder?

A No.

Q Okay. And when setting the opening bid, was any

consideration given to setting it at an amount that would cover the first deed of trust?

A It would have been the amounts due to the HOA and NAS.

Q Just those parts, correct?

A Just those two.

Q Okay. Thank you, Ms. Moses.

A You're welcome.

THE COURT: All right, Mr. Hong, of course, any questions for Ms. Moses?

CROSS-EXAMINATION

BY MR. HONG:

Q Thank you, Your Honor.

Good morning, Ms. Moses.

A Good morning.

Q Okay. Let's first turn to Exhibit 3.

A Okay.

Q That's the Notice of Delinquent Assessment Lien, correct?

A Correct.

Q That's what began the process and that was recorded on October 27, 2010, correct?

A Correct.

Q Okay. And this is for the Madeira HOA, correct?

A Correct.

Q Okay. Now, I want you to turn to Exhibit 11, Bates stamp number 215.

A Okay.

Q So, if we look at this, we see in the -- so, let's start from the left, the column on the left, amount quarterly assessment; do you see that?

A I do.

Q And then, that's for January 2011 through July 31st, 2011, correct?

A Correct.

Q Okay. Now, if we turn to the very right column, that's the [indiscernible] Areas; that's another HOA right?

A It could be.

Q Okay. But --

A I don't know what it is.

Q But that first -- the column that we just talked about, that's for Madeira, correct?

A Yes, I believe so.

Q Okay, if we look at the third column, again, for Madeira, that's from January 2010 through 1 -- through 12 to -- basically the whole year of 2010; do you see that?

A Yes.

Q And then, do you see if you drop there, the quarterly assessment is 180?

A Yes.

Q So, if we times that by three, that comes out to 574, correct? Or whatever the math is.

In order to determine what the -- what each month, the nine months would be, we would times the 180 by three, correct?

A Correct.

Q Okay. So, and I will represent to you, my math skills aren't great, but it is 524.

A Okay.

Q I believe. Okay.

A My math skills are not great either --

Q Right.

A -- so --

Q But, hang on, let me just -- just want to be absolutely correct on this one. It's 540.

A 540? Okay.

Q Yeah. And then, that makes sense, you agree with me, how we multiply the quarterly by three to come up with the nine months, correct?

A Yes.

Q Okay. Now, if we turn to Exhibit 9 --

A Okay.

Q -- Exhibit 9 and if we turn to Bates stamp number 131 --

A Okay.

Q -- I think Counsel already asked you about the seller. This is a February -- letter dated February 22nd, 2011; do you see that?

A Yes.

Q That's from Miles Bauer to basically NAS asking for like a

ledger or -- correct?

A A payoff.

Q Payoff. And then, if you turn to Bates stamp 134, that's a ledger showing up to 4/11; do you see that?

A Yes.

Q And, it says the present rate, and do you see 162?

A Yes.

Q Okay. And then, it shows a prior rate in the third column of 180; do you see that?

A Yes.

Q But, it doesn't have the dates though?

A Correct.

Q Right, but this was provided pursuant to that request in 2011, correct?

A I believe so.

Q Okay. Perfect. And now, if we keep turning to that same Exhibit 9 and Bates stamp number 141 --

A Okay.

Q -- and you've seen these kind of receipt sheets before, correct --

A Correct.

Q -- on top? And, NAS at times would sign off on it, correct?

A I believe so.

Q Okay, this one obviously, there's no sign-off on this?

A I don't see a signature on the page, no.

Q Right, so you have no idea if this check was actually delivered to you, to NAS?

A I'm -- there's no way for me to tell if there's no signature or name or something on there.

Q Right. And then, let's look at the -- if we go back two pages, Bates stamp number 139 --

A Okay.

Q -- that check is for 486; do you see that?

A Yes.

Q And, do you agree that's not 540, correct?

A Correct.

Q Okay. I don't have anything further, Your Honor. Thank you.

THE COURT: Any redirect, Mr. Garner?

MR. GARNER: No, Your Honor.

THE COURT: All right, Ms. Moses, thanks a lot for your time and your testimony, you're excused.

THE WITNESS: Sure.

THE COURT: What's the status on Mr. --

MR. GARNER: I'm told Mr. Jung's here.

THE COURT: -- Jung? Okay, let's go ahead and call him.

MR. GARNER: Defense calls Rock Jung.

[Colloquy between counsel and witness]

[Colloquy between counsel]

THE MARSHAL: I don't see anybody outside.

MR. GARNER: Oh, he's not?

THE MARSHAL: I'm not sure.

[Colloquy between counsel and the Marshal]

[Pause in proceedings]

THE COURT: All right, we can go off the record.

[Proceedings paused at 9:54 a.m.]

[Proceedings resumed at 9:55 a.m.]

MR. GARNER: I found him.

THE COURT: All right, you called Mr. Jung. Mr. Jung --

THE WITNESS: Your Honor.

THE COURT: -- come on over to the witness box, if you could remain standing just for a moment please.

THE WITNESS: Okay.

THE COURT: There you go.

ROCK JUNG

[Having been called as a witness and being first duly sworn, testified as follows:]

THE COURT CLERK: Thank you. Please be seated. If you could, please state and spell your first and last name for the record.

THE WITNESS: Rock, R-O-C-K. Jung, J-U-N-G.

THE COURT: Okay, Mr. Garner, go ahead.

DIRECT EXAMINATION

BY MR. GARNER:

Q Thank you, Judge.

Mr. Jung, good morning.

A Good morning.

Q I know we've done this before, but let's do it again for the record. What -- tell the Judge what you do for a living.

A I am an attorney licensed to practice in the State of Nevada.

Q How long have you been a lawyer?

A Since 2008.

Q Okay. And, where were you working in the years, let's say 2010 to 2013?

A That was with the law firm Miles Bauer, Bergstrom & Winters.

Q And, where was that located?

A Henderson, Nevada.

Q Okay. And, during those years that you were with -- tell us about the years you were at Miles Bauer.

A I was there approximately October 2009 through March 2014.

Q Okay, and during your time at Miles Bauer did you do any work related to HOA foreclosure sales in Nevada?

A Yes.

Q Briefly summarize for the Judge what that work entailed.

A In a nutshell, it was to reach out to the HOA or the collection agent to let them know that we were representing the beneficiary or servicer of the first deed of trust lien, and that we wish to protect that lien, and tender any super-priority amount that might have existed. But, we needed information and that amount.

Q Okay. And, if you were given information, what'd you do next?

A If we were given information that allowed us to calculate the super-priority amount, we would go ahead and calculate that amount

and have a check issued in that amount and then hand delivered to the HOA's collection agent.

Q Okay. And approximately how many times during your years at Miles Bauer were you retained for that purpose?

A Me, personally, my best estimate is five to six thousand separate times.

Q Okay. Now, the exhibit binder in front of you, I'd like you to turn to Exhibit 9. And specifically, within Exhibit 9, look at what we've labeled on the bottom right, 131 and 132.

A Okay.

Q And you're familiar with this document?

A Yes I am.

Q What is it?

A Bates stamped, BANA 131 and 132, it appears to be a copy of a letter that I wrote to Nevada Association Services, which was the HOA's designated collection agent or HOA trustee, just introducing myself and who we represented -- who my firm represented and that we sought to protect our client's first deed of trust lien and tender any super-priority amount that might exist. But, we needed more information as to what that amount was.

Q Okay. And was there a standard way that you would send this first letter?

A Yes.

Q How was that?

A We would send it via First-Class Mail. But, in addition,

depending on the HOA trustee or collection agent, we might have also faxed it to them or emailed them a copy of this first letter pursuant to their instructions.

Q Okay. And do you recall during your time at Miles Bauer whether or not you ever had trouble getting mail to NAS, for example, was it returned undeliverable?

A To NAS, no. I don't recall ever having any trouble sending our first letter to NAS --

Q Okay.

A -- or the -- or NAS receiving our first letter.

Q Okay. Was NAS a collection agent with whom you dealt often during your time at Miles Bauer?

A Yes they were. If I had to say -- if I had to estimate, I believe they were the HOA trustee or collection agent I dealt with the most.

Q Okay. And through your dealings with them, did you become familiar with NAS's policies and practices for handling your requests?

A Yes I did.

Q Okay. And, if you turn to the same Exhibit 9, page 134 and 135, can you tell us what that is?

A Yes. 134 is a copy of a NAS payoff statement, or account ledger, on a property regarding HOA assessments and any other fees associated with that homeowner's HOA account.

Q Okay. And on pages 134 and 135, do you see anywhere listed a super-priority number?

A I do not.

Q Okay. Do you ever recall a time when NAS provided to you a specific super-priority number?

A They might have towards the end of my employment with Miles Bauer, so sometime in 2014 is my best estimate, but I definitely remember in the year 2011, they did not.

Q Okay. And if you look on page 134, there's a handful of columns. The first one says amount and present rate and then under that you see $162 for quarterly assessments; do you see that column?

A I do.

Q And then all the other columns next to it are called prior rates and they have different numbers in them; do you see that?

A I do.

Q All right, can you tell from looking at this what period of time any of these rates applied to the property?

A Just looking at those columns, I cannot.

Q Okay. So, what did you do with this ledger at the time for your client?

A We went ahead -- we would have gone ahead and, per our custom and practice, since we did have assessment information as to the amount, we would have calculated a nine-month super-priority amount based on the amount given in this payoff statement or ledger.

Q Okay. And, if you look at 137, 138, and 139, tell us what that is.

A 137, 138, and 139 was the standard correspondence and copy of a check that Miles Bauer would have sent to a collection agent

or HOA trustee regarding a super-priority tender.

Q Okay. And was there a standard practice and procedure for how those things would be delivered?

A Yes.

Q What was that?

A That was delivery via a legal runner. So, this super-priority cover letter and check would have been hand delivered to Nevada Association Services pursuant to Miles Bauer's custom and practice.

Q Okay. And tell us what we see on page 141.

A Bates stamp 141, this is a copy of a what I call just the run -- copy -- receipt of copy from that -- the HOA trustee or collection agent would sign along with a copy of the Legal Wings run slip --

Q Okay.

A -- for checks that were hand delivered.

Q All right. Legal Wings was a -- the runner service you used most often?

A Correct.

Q All right. Now, the top portion, this what -- I think we call the receipt of copy --

A Yes.

Q -- lists a handful of checks and properties, including the one at Pont National; do you see that?

A I do.

Q And it has a signature block for NAS; do you see that?

A I do, yes.

Q Was a receipt of copy like this always sent with letters and checks?

A Not always while I was employed from, once again, approximately October 2009 through March 2014. My recollection was originally, let's say the first year or so, we did not have this practice of sending a receipt of copy with our legal runner at the time. But, as the procedures protecting the client's first deed of trust lien and tendering the super-priority amount -- as it became more fleshed out by our firm, we then added this practice of having the legal runner bring a receipt of copy pertaining to the check or checks delivered for each property that day. So, I cannot say we always had this policy in place during my career or employment with Miles Bauer, but certainly, at some point we did.

Q Okay. And, do you recall during your years at Miles Bauer, or since, testifying in depositions and trial, ever seeing NAS sign one of these?

A 99 percent of the time, they did not sign it because they claimed it wasn't for the full amount. So, NAS, the powers that be, instructed their receptionist or front desk person to turn away our legal runner at the door. I say 99 percent because there were very few instances where we did pay the full amount, such as our client was -- had a junior or second deed of trust which they wished to protect. So, we would pay the full amount.

Q Okay. And then, the last page of this exhibit labeled 143, can you tell us what that is?

A Yes, 143 is a copy of the ProLaw screenshot and ProLaw was the case management system that I used at Miles Bauer.

Q Okay. And, these entries here have dates and then some words next to each of the dates, who were the people, generally, would be making entries like this at Miles Bauer?

A Generally, it'd be the handling attorney or the handling attorney's paralegal/legal assistant at the direction of the handling attorney. There could also be administrative entries made by admin of Miles Bauer.

Q Okay. And then, if you look at -- there's a couple entries on February 22nd, 2011; do you see those entries?

A Yes.

Q Tell us what those mean.

A So, February 22nd, 2011, the bottom entry of the two, it states EMF, that stands for email from, RKJ, those are my initials, regarding initial letters to borrower and HOA. That's just documenting that I sent the initial letters or what I had testified earlier as the first letter to both the borrower, or the homeowner, and the HOA, or more specifically the HOA's collection agent.

And then the second entry dated the same date that says 2/22 EMT, that's email to, client with initial letters attached, comma FU, that's just stating that I would have emailed our client copies of the initial letter or the first letters that were sent to the borrower and the HOA or HOA's collection agent. And then, FU just stands for follow-up. And then, the rest is cut off.

Q Okay. And, there's an entry -- well, there's two entries on April 1st, 2011. I'm looking at the second one that says 4/1 check sent to HOA and then some more verbiage there; what does that mean?

A 4/1, that's April 1st, checks sent to HOA, that means on April 1st we had the super-priority check sent, meaning a legal runner hand delivered it to the HOA, or more specifically the HOA's collection agent, in this case, Nevada Association Services. And then, comma FU, stands for follow-up, April 13th, see if check was and then it's cut off. But, I know from just entering literally thousands of these entries, it would have said see if check was accepted or rejected.

Q Okay. Would that entry exist if you -- your office had not sent the check to NAS?

A No, it would not.

Q Okay. And then, we see an entry on 4/13/2011; what does that mean, that entry there?

A It states 4/13, which stands for April 13th, check returned, meaning the check was returned. But, it doesn't mean that it literally was returned on that date. It's just that when we delivered the check, when we first started off this process in late 2009, we gave ourselves a two-week cushion to get a reaction or a response from the HOA's collection agent because at the very beginning, we were not getting an immediate response. It -- so, we gave ourself [sic] a two-week cushion to see if we had since then received a response within that two-week cushion. But, most likely by 2011, we would have gotten the response immediately, meaning it would have been rejected and returned to our

runner to bring back to us that same day or the following business day.

So, check returned, and then comma FU, which once again stands for follow-up, 11/20, November 20th, monitor ex parte. And so, it looks like we were just monitoring the file to see if there was any sales activities.

Q Okay. And based on your years dealing with NAS, how was -- in 2011, how was NAS treating the deliveries of your letters and checks during that timeframe?

A During that timeframe, NAS would treat it as just a -- they would treat it as not a payment in satisfaction of the super-priority amount because it did not include fees and costs, it'd only include assessments and that was it. So, they would reject it.

Q Okay. And, do you recall a time -- well, let's talk about this check. When they returned this check, did NAS suggest to you or anyone at Miles Bauer a different number to pay as the super-priority?

A They did not.

Q Do you recall them ever doing that?

A No.

Q Okay. Mr. Jung, thank you for your time.

A Thank you.

THE COURT: Mr. Hong, any questions for Mr. Jung?

CROSS-EXAMINATION

BY MR. HONG:

Q Yes, thank you, Your Honor.

Hi Mr. Jung, how are you?

A Good. Good morning, I'm well, thank you.

Q Good. I'm going to kind of go backwards just to be easier from the last questions.

A Okay.

Q So, let's turn to Exhibit 9, Bates stamp number 143.

A Okay.

Q That's the ProLaw case management for Miles Bauer?

A That's correct.

Q And, as you -- I mean, how many -- roughly, how many do you think, while you were there, that you handled these trying to pay off super-priorities? A thousand, two thousand?

A Right, my best estimate was five to six thousand.

Q Wow, that you were handling?

A Correct, during the entire -- during the course of my entire four-and-a-half-year employment there.

Q Okay. So, you don't have any independent knowledge of this particular property, or frankly any property, other than looking at documents, correct? Fair enough?

A Not of -- I don't -- fair enough as to any individual recollection of this property. I mean, there were some instances where the names sounded familiar to me or for some reason the name stood out, which I would remember independently --

Q Sure.

A -- but this particular property, that's correct.

Q Yeah. So, if we look at the ProLaw, you don't know if you

inputted any of this information or your paralegal or someone else at the office, correct?

A I'm very confident that where it says -- where it has my initials, I would have inputted them.

Q Okay. But, the ones that don't have your initials, you don't know who inputted those?

A That's correct. It could have been me or it could have been my paralegal at my direction.

Q Okay. And then, if we turn back -- if we turn to -- let's go to Bates stamp 137.

A Okay.

Q And then the next page, that's the standard cover letter that you sent along with the check, correct?

A Correct. It did -- the cover letters or standard letters did change during the course of my employment at Miles Bauer --

Q Okay.

A -- but at this time, in 2011, this was the standard cover letter I believe.

Q And that was -- and you see the check there for 486, correct?

A Yes, correct.

Q Okay. Now, for 486, if we go back to 00134, that's based right there, that column to the left, the 162 quarterly and you times it by three, right?

A Correct.

Q And -- because -- for the nine months?

A Yes, the equivalent of nine months would have been the quarterly assessment multiplied by three.

Q Right, nine months, okay. And then, now if you turn forward to Bates stamp number 141 --

A Okay.

Q -- that's the receipt that obviously was not signed by anyone at NAS, and then that's the Legal Wings, correct?

A Yes.

Q Okay. So, in the course of your four years, if you did about five to six thousand of these, do you remember was it Legal Wings that would always do the delivery of the letters and checks?

A Correct, but just to be clear, when I testified I handled approximately five to six thousand during the course of four and a half years --

Q Mm-hmm.

A -- that doesn't translate to five or six thousand checks being delivered because there were a lot of times where we didn't have the --

Q Right.

A -- information --

Q Right.

A -- to calculate in the --

Q Right.

A -- first place.

Q But, any -- how many, roughly, do you think were when checks were delivered -- attempted to be delivered, roughly, that you

handled?

A My best estimate, it'd probably be around half the number of files I handled.

Q So, like 2,000 you think?

A Sure, 2,000 to --

Q Okay.

A -- 2,000 to 2,500 --

Q Okay.

A -- is my best estimate.

Q So, for those that you handled, the best estimate 2,000, 2,500, Legal Wings would be the company that was trying to deliver it, correct?

A Correct.

Q And you have no affiliation with Legal Wings, correct?

A That's correct.

Q Okay. And you don't know, looking at this Legal Wings receipt, who wrote this little note in the bottom, correct?

A That's correct. I don't know the individual's name, but --

Q Right.

A -- it would have been someone employed by Legal Wings.

Q Right. So, you don't have any independent knowledge or even looking at this if this check and letter was actually taken to Legal Wings -- I mean, to Nevada Association, correct?

A I know pursuant to our custom and practice that it would have been delivered by Legal Wings, that they did pick it up from our checks, and they did deliver it per their job duties that they were paid for.

Q Okay. And then, let's turn to your first letter, 131, the second page, and that'll correspond with what you just testified to and what we all know. Your understanding of the super-priority of an HOA lien is nine months preceding the enforcement, correct?

A Right, absent any nuisance abatement or maintenance --

Q Right, right.

A -- charges.

Q So, just nine months and then nine months preceding the Notice of Delinquency?

A Correct.

Q Okay. And, in this case, if you turn to tab three, you will see the Notice of Delinquent Assessment Lien was recorded on 10/27/2010; do you see that?

A Yes.

Q So, you agree with me, it'd be nine months preceding that?

A It'd be nine months preceding that, that's correct, or even the Notice of Default --

Q Right.

A -- which is when my client would have been first made aware of it.

Q Right, and that's Exhibit 4. And the Notice of Default was recorded on 12/21/2010, so even -- it would be nine months before that, right?

A Correct.

Q So, regardless, we're in the year of 2010, correct?

A Correct.

Q Okay. So, now if you turn to Exhibit 9 again, Bates stamp number 134 -- well actually, let's go back to 131. That's that first letter dated February 22nd, 2011, correct?

A Correct.

Q And then, in response to that, you received the ledger here, Bates stamp 134, that says dates of delinquency 1/10 through 4/11; do you see that?

A Yes.

Q And then, immediately to the right, that's the column that 162 quarterly and then basically you multiplied that by three to come up with 486, correct?

A Correct.

Q And then, you see the prior rates, prior rates, prior rates and there was no communication between you or NAS asking for what those may be, correct?

A Other than what was in our first letter --

Q Right.

A -- that's correct.

Q Okay. I don't have anything further, Your Honor. Thank you.

MR. GARNER: Nothing further, Your Honor.

THE COURT: All right, I do have a few follow-up questions, Mr. Jung. I'd like for you, if you could please, to turn to Exhibit 9, page 134.

THE WITNESS: Okay.

THE COURT: All right. It's a conclusion, or otherwise apparent to me, that you used this document to arrive at the amount of the check that was sent that you've testified would represent the super-priority tender amount. Is that accurate?

THE WITNESS: Yes, Your Honor.

THE COURT: Who did that? Was that you or someone else?

THE WITNESS: That would have been myself.

THE COURT: All right so, you have, again, at the relevant time, page -- what we have here as page 134, and you're working on this case along with the other thousands, and you come up with this idea that 486 would represent the super-priority amount; is that it?

THE WITNESS: That's correct, yes.

THE COURT: And, I see that you did that by multiplying, of course, the 162 that you see in the first column by three?

THE WITNESS: Correct.

THE COURT: Quarterly by three?

THE WITNESS: That is --

THE COURT: Okay.

THE WITNESS: -- correct.

THE COURT: So, you probably don't recall, because you've indicated that you're relying upon records only, what you did at the time, but maybe this'll either refresh your memory or you can help me, why didn't you use one of the other numbers? For example, the 210, the 180, 234, these other numbers that seem to be on that same line with the 162.

THE WITNESS: My best recollection, Your Honor, is that those other prior rates there were no corresponding dates, meaning months and years that corresponded with those prior rates. However, the present rate, it noted the dates of delinquency was January 10th through April 11th, so the understanding was that the 162 was the current rate or present rate, but it also -- was also back since 2010. So, I don't know where those prior rates came from or how far back they went, if they were back ten years ago, or two years ago, so I just went with the 162.

However, having said that, Your Honor, when we -- when I had that check delivered, the 162 multiplied by three to get the nine months' worth, I never had any correspondence back from Nevada Association Services saying well, you should have used the $210 quarterly rate to calculate your nine month or any indication what they thought was the correct super-priority amount.

THE COURT: Okay, I understand from the testimony that on behalf of the bank, essentially, that you didn't get anything back from the agent of the HOA saying well, you know, you sent us this 486, but you got it wrong, even though it's apparent they took the position you got it wrong from -- clearly from the little note on page 141, where they say won't accept per Carly or Carrie or somebody like that.

But anyway, go -- let's go -- let's look at 134 again, please.

THE WITNESS: Okay.

THE COURT: Could it be, as you look at these documents now, that the 210, 180, or 234, that any of those could have been

monthly assessments relevant to the super-priority lien?

THE WITNESS: It is possible, Your Honor, I mean, anything is possible in the sense that it could have been -- the 210 could have been the rate as of December 2009 and then starting January 2010 it changed to 162. So, if you went nine months before the Notice of Delinquent Assessment Lien, there might have been some overlap of a month or two with the prior assessment amount.

THE COURT: Okay.

THE WITNESS: But, based on the information we had, we made the good faith estimate that 162 was the correct number to use to calculate the super-priority amount. And it -- there's clearly no charges for nuisance abatement or maintenance so we're just focused on assessment amount.

And having spoken to -- I -- part of the custom and practice, Your Honor, is we did reach out also to the HOA's collection agent and some cases they reached out to me, and at the -- at that time, it was Mr. David Stone, I remember specifically, it was David Stone who was the owner of Nevada Association Services at the time I was working at Miles Bauer. And that he had indicated to me, they weren't going to accept just nine months of assessments and I had asked them why. And he says, well, because the super-priority amount, in his belief, also included their fees and costs.

THE COURT: Okay, I understand that.

THE WITNESS: So --

THE COURT: I do understand that. All right so, as a Court,

I'm concluding something about this and I want to see if you'd agree with the conclusion while you're here as a witness, okay?

THE WITNESS: Okay.

THE COURT: I'm concluding that when you had this document, and you're trying to fashion, of course, the specific dollar amount to represent the super-priority, you used the 162 because it's there in the present rate. We covered that and I'm sure you agree with that.

THE WITNESS: Yes, Your Honor.

THE COURT: But, I will also conclude that it's possible that given that, for reasons unbeknownst to me still, but probably consistent with the way HOAs conduct business, the quarterly HOA assessment out at Madeira Canyon -- is that what this is --

MR. HONG: Yes.

MR. GARNER: Yes.

THE COURT: -- changed over time. I mean, if you lived over there, or if you were Melissa Lieberman or someone over there, you'd [sic] at times would have paid 234, at times paid 180, at times paid 210, and then 162, and -- I mean, God only knows what, on from there. But during this relevant time, it seems like there's been a change in the monthly assessment -- or sorry -- well, maybe monthly, but certainly quarterly assessments changed over time, right?

THE WITNESS: That's correct, Your Honor. And, I just -- just to point out too that this is very unusual out of the thousands of payoff statements that I've seen and that the assessments actually appear to

have decreased. The ones I've seen where there were different numbers, it's always -- have increased in amount.

THE COURT: Yeah. They might have decreased and then increased and then decreased, even, because the numbers are sort of that way. Do you agree with that? I mean --

THE WITNESS: Yes, Your Honor. And, assuming that the prior rates it's going from most recent to oldest, left to right, but it's hard to say, because once again, you just don't see any corresponding dates with -- associated with each of the other columns for prior rates.

THE COURT: And, that's the conclusion I think I have to draw, and tell me if you disagree with that. But, this document is a little vague in that it does not talk -- there's no way to tell from this document over the dates of delinquency, say from January '10 through April of '11, so that's a year and four months, there's no way to tell what the monthly assessments were during that timeframe, or before that even. We don't know specifically what the assessments were during that time.

THE WITNESS: Yes, Your Honor --

THE COURT: Right?

THE WITNESS: -- I agree.

THE COURT: Okay. So, it could be, it seems to me, that when you sent the 486, and you know hindsight 20/20 is always a little better than when you're doing anything, right --

THE WITNESS: Yes.

THE COURT: -- but you could have got it wrong. I mean, as far as the actual super-priority monthly assessment amount, and that

alone, it could -- the 486 could have been incorrect. It could have been not enough because the 210 is higher, the 180 is higher, and the 234 is higher. So, if any of those numbers are actually part of the nine months, that being again the 210, 180, or 234, then you'd be a few dollars off on the 486; you agree with that?

THE WITNESS: Yes, Your Honor.

THE COURT: Okay. All right. Okay, any follow-up based upon my questions now?

FOLLOW-UP BY THE DEFENSE

BY MR. GARNER:

Q Yeah, just as to the policy, practices, and procedure, that you did this thousands of times. If NAS had said, use the 210 or the 234 or 180 number instead, what would Miles Bauer have done?

A Well, Miles Bauer would have, pursuant to our custom and practice, would have been happy to use that rate. I mean, and at -- our client wants to protect the first deed of trust based on their interpretation of the super-priority amount, which absent nuisance abatement or maintenance would have been nine months, and if we were to -- we would have been informed by NAS clarifying their vague statement what exactly were the nine months in question, we would have happy -- happily have calculated and paid the extra 25 bucks, 30 bucks, whatever the case might be.

Q Mm-hmm. And, were there instances where Miles Bauer would pay nine months plus some costs and fees?

A There were instances during my employment at Miles Bauer

where we did -- temporarily did include fees and -- reasonable fees and costs along with the nine months of assessments.

Q And, what did NAS do with those checks?

A They also, true with their policy, they would reject it, unless it was for the full amount listed in their payoff statement.

Q Thank you, Mr. Jung.

A Thank you.

THE COURT: You know, I'm not trying to overdo this, but as a Court I'd -- I do try to get stuff right. It's important to people so I put my effort in to try to get it right. And, so I'm not trying to be too Perry Mason on the thing, but let's take another look at this 134.

THE WITNESS: Okay.

THE COURT: Right underneath quarterly assessment amount, do you see that -- of course, we've been talking about that line that's entitled quarterly assessment amounts as 162, 210, 180, 234. It even says zero on the end, but you see that line.

But, right underneath that one, there's a line that says number of months delinquent and under 162 it says two, under 210 it says two, under 180 it says four, and under 234 it says four. You think those numbers are evidence of the fact that, as part of the super-priority lien, the 210, and 180, and 234 have to be included somehow, given those numbers of months delinquent amounts, two, two, four, and four?

You see what I'm saying? It -- that's what it looks like to me. It looks like the -- that there's a combination of various past assessments that could be evident from this line item number of months delinquent. I

don't -- again, I don't know if I have that right, but it looks like it's evidence of that to me, but you tell me. Would you think that's evidence of that?

THE WITNESS: I do see that, Your Honor, and I agree that it appears to say that there's two months delinquent under the present rate, two months delinquent under the prior rate of 210, and so forth.

THE COURT: Right.

THE WITNESS: But, looking at that, I'm still -- and I'm sure that was -- this was also the case when I first reviewed it several years ago, that's the -- I still am not clear as to the corresponding dates of those two months of delinquency under the prior rate or the four months of alleged delinquency under the prior rate of 180, and also, four months delinquency under the prior rate of 234. I don't know. At that point, if you're getting beyond the nine months prior to the recording of the lien, I'm not -- I'm --

THE COURT: Okay.

THE WITNESS: -- that's just not clear to me.

THE COURT: Do you have an understanding, based upon looking at this record -- and I know it takes the record to refresh memory or otherwise, you know, bring it back to your attention. What's the date of this Exhibit 134? I mean, when do you -- what's the date that it's generated? Is it -- do you think you know that?

THE WITNESS: Well, Your Honor --

THE COURT: It says printed 3/12/2011 on the bottom.

THE WITNESS: Right, and that -- to me, that would be

consistent with the date that was on the Miles Bauer first letter, which was Bates stamped BANA 131, 132 --

THE COURT: Mm-hmm.

THE WITNESS: -- and the date of that first letter that I wrote and sent to NAS was dated February 22nd, 2011. So, the printed March 12th, 2011 would track with that chronology.

THE COURT: Okay. If this is printed out on or about March of 2011, let's say, and it says that there's two months delinquent at 162, two months delinquent at 210, four at 180, and four at 234 -- let's see, so two, four, and then another four is eight. I mean, I'm not trying to be critical of you --

THE WITNESS: Mm-hmm.

THE COURT: -- but I'm just trying to figure out what might have happened here, okay?

THE WITNESS: Mm-hmm.

THE COURT: Why wouldn't you just, you know -- trying to come to the super-priority amount, why not say okay, two at 162, whatever two times 162 is, and two at 210 --

THE WITNESS: Mm-hmm.

THE COURT: -- add that up, take four at 180 and throw that in, because now we're at two, four, eight months --

MR. GARNER: These are quarterly charges.

THE WITNESS: Well, Your Honor, you're right, those are quarterly too, so --

THE COURT: Okay. So, let me try that again then.

THE WITNESS: Mm-hmm.

THE COURT: So, quarterly you take -- I don't know how you do the math --

THE WITNESS: So --

THE COURT: -- I -- it's too much for me to figure out quarterly --

THE WITNESS: Right.

THE COURT: -- and then that little two, two, four, eight -- two, two, four, four numbers. I guess what I'm really trying to ask you is why wouldn't you note the months of delinquency and try to figure out an amount other than the 486, because it could be that it was a higher number, just by dollars, a few dollars --

THE WITNESS: Sure.

THE COURT: -- but it could have been?

THE WITNESS: Right, I see what you're saying, Your Honor. Just to answer your question, my best recollection would have been the 162, which was the quarterly amount, designated as the present rate for -- and it says number of months delinquent --

THE COURT: Two.

THE WITNESS: -- which is two, which is really in reality six months because they're assessed quarterly. So, two quarterly months would be six months.

THE COURT: Okay.

THE WITNESS: So, the 162 would apply to six out of the nine months.

THE COURT: Okay, so then you'd take the 162 times two --

THE WITNESS: Mm-hmm.

THE COURT: -- and then 210 times one, and that would give you the nine months amount using that formula; would -- do you agree?

THE WITNESS: Yes, Your Honor. So, it looks like --

THE COURT: So, in other words --

THE WITNESS: -- it'd be an extra $48.

THE COURT: Yeah. So it'd be -- let me just do that math real quick.

THE WITNESS: Mm-hmm.

THE COURT: Looking at this thing, if we use that formula, so 162 --

MR. HONG: Or 58.

THE COURT: -- where it has a two underneath the 162 --

THE WITNESS: Mm-hmm.

THE COURT: -- that two -- those are quarterly. So, that'd be six months, right?

THE WITNESS: Yes, Your Honor.

THE COURT: We take 162 and 162, that gives you six months?

THE WITNESS: Correct.

THE COURT: Okay, then you take 210, just one 210 because that's another three months, bringing it to nine months, so let's add that up.

That'd be 534. 534 -- it could be that 534, it seems to me,

would be the better number than 486 to actually capture the nine months; do you think that's a fair conclusion?

THE WITNESS: That is -- that seems fair, Your Honor.

THE COURT: Okay. All right, any other questions based upon mine now?

MR. GARNER: Nothing.

MR. HONG: I do, Your Honor. I do, Your Honor.

THE COURT: Okay. Go ahead.

FOLLOW-UP BY THE PLAINTIFF

BY MR. HONG:

Q Based on the Judge's questions, Mr. Jung, which is the -- on -- based on 134, it's printed on 3/12/2011; do you see that?

A Yes.

Q And then, if you turn to Exhibit 11, Bates stamp number 205, please.

A Okay.

Q And, this corresponds to that March 12th, 2011, do you see that from Yolanda [indiscernible], and this is from NAS to Alexander Baum?

A Yes.

Q Okay, and Alexander Baum was with Miles Bauer, correct?

A Correct.

Q Okay. So, this is the email that is sending the Bates stamp number 134 to Miles Bauer pursuant to your first letter, correct? As best as you can see in terms of the corresponding dates.

A Yes.

Q Right. And as well as the email saying, hey, attached hereto is the payoff, right?

A Correct.

Q Okay. So, you agree with me that there was email correspondence from NAS to Miles Bauer, right?

A Yes.

Q Okay, and you agree with me that in receiving 134 -- Bates stamp number 134, if there was some confusion or not knowing exactly, someone at Miles Bauer, including Alexander Baum, could have emailed NAS, correct?

A Correct.

Q Right, could have just done a reply saying, hey, we got this, the dates are clearly from January of 2010 through April of 2011, can you kind of clarify, correct?

A Correct.

Q Okay. Now -- and you handled -- and like you said, you handled about two to -- 2,000 to 2,500 of these where you're trying to payoff, right, from your four years you were there?

A Right, that's my best estimate --

Q Right.

A -- for the number of checks.

Q Fair enough. So, let's just cut to the chase and let's just get to it then. Let's go to Exhibit 11, Bates stamp number 215. And, that's --

A I'm sorry, you said 215, 2-1-5?

Q 2-1-5, correct. So, why don't you like put a finger or something on 134 and then go to 215 and then that'll pretty much mirror those documents. Are you at 215?

A Yes.

Q Exhibit 11?

A I am.

Q Okay. So, if you look at 215, you see that first column on the left, that's the quarterly assessments, you see that, and that's from dates January of 2011 through July of 2011, correct?

A Correct.

Q And that's 162; you see that?

A Yes.

Q Okay, and if you drop two more -- next column, it's called the Videiras, which apparently is another HOA, but do you see that?

A Yes.

Q And then, if you look at the column immediately to the right of that, again, corresponding with that first column on the left, quarterly assessments from January 2010 through December of 2010 is 180; do you see that?

A Yes.

Q Okay, so now per your previous testimony we talked about nine months of assessments -- super-priority being nine months of assessments, that would be basically 180 times three, since it's quarterly, correct?

A Correct.

Q So -- which would be $540, correct? I mean, my math isn't great, but I mean, that's -- I've already pre-calculated it, that's why I can say that.

A Yes.

Q Okay.

THE COURT: Well, one thing we can all do is multiply 180 times three. We can probably figure out a way --

MR. HONG: I couldn't, I needed a calculator, honestly, Your Honor.

THE COURT: Okay.

BY MR. HONG:

Q So -- and again -- it's -- I'm not --

THE COURT: 540.

BY MR. HONG:

Q -- blaming you or anything, there's no fault here, it's just -- we're just getting to the facts of this and we agree that 486 is obviously not 540, correct?

A Correct.

Q Okay. No further questions, Your Honor. Thank you.

MR. GARNER: Just a couple follow-up?

THE COURT: Sure, go ahead.

FURTHER FOLLOW-UP BY THE DEFENSE

BY MR. GARNER:

Q Have you seen page 215 before today?

A I have not. I mean, if I have, I certainly don't recall, but I do

not --

Q Okay.

A -- believe I have.

Q And it's different from what NAS sent you, which we were looking at in Exhibit 9 at 134, correct?

A That is correct.

Q All right. Did you control which version of the NAS ledger NAS sent to you?

A I did not.

Q Okay. Thank you, Mr. Jung.

A Thank you.

MR. HONG: Follow-up, Your Honor?

THE COURT: Sure, go ahead.

FURTHER FOLLOW-UP BY THE PLAINTIFF

BY MR. HONG:

Q Again -- but my previous question, again, the communication channels were there obviously, right, from March 12th, 2011 when NAS emailed the individual at Miles Bauer saying attached is the March 12th, 2000 [sic] print-out of the ledger, right? So, again -- and you testified when I asked you, hey, someone from Miles Bauer, whether it's you or your paralegal or secretary, could have emailed back NAS saying, hey, can you give us something a little bit more specific and detailed because there's different numbers here, correct?

A Correct.

Q Okay. Nothing further, Your Honor.

MR. GARNER: And, Mr. Jung, communication goes both ways, doesn't it?

THE WITNESS: Yes.

MR. GARNER: All right. Thank you.

MR. HONG: Nothing further, Your Honor.

MR. GARNER: Nothing further.

THE COURT: And with that, we thank you for your communication.

THE WITNESS: Thank you, Your Honor.

THE COURT: You're excused.

THE WITNESS: Thank you.

THE COURT: All right, any other witness or evidence from the defense?

MR. GARNER: No, Your Honor, defense rests.

THE COURT: Any rebuttal?

MR. HONG: No, Your Honor.

THE COURT: Okay, time for closing argument, then?

MR. HONG: Sure, Your Honor.

MR. GARNER: Yes.

THE COURT: All right, Mr. Hong?

MR. HONG: Thanks Rock.

MR. GARNER: Thanks Rock.

THE COURT: Let me ask you, if you both have, say a half hour, let's take a comfort break.

MR. GARNER: Sounds great.

THE COURT: If you have just a few minutes -- so, you do? Okay, let's take a comfort break. Come back in --

MR. GARNER: Sounds good.

THE COURT: -- let's come back in like, you know, 12 minutes, something like that.

MR. GARNER: Sounds good.

THE COURT: 12 to 15 minutes, something like that.

MR. GARNER: Okay.

THE COURT: Okay.

[Recess began at 10:39 a.m.]

[Recess concluded at 10:58 a.m.]

MR. HONG: Oh yes, Your Honor, thank you.

THE COURT: And now, wait, is there a counterclaim still, or no?

MR. HONG: Well, there's a cross-claim.

THE COURT: Yeah, that's right.

MR. HONG: But, that's addressed --

THE COURT: It's --

MR. HONG: -- in the --

THE COURT: So, sorry for the interruption, but something else just popped in my head, and that is, you get -- normally, on a complaint you get the closing argument and then you get a final rebuttal argument.

MR. HONG: Right.

THE COURT: But, when there's a cross-claim then they

essentially get two, as well. They get to support their cross-claim or counterclaim, if the bank has a claim, they get to give a final argument regarding that claim -- counterclaim, cross-claim, if they have one that's relevant to the case. In other words, they have a burden to prove their counterclaim or cross-claim, right?

MR. GARNER: Technically all we have left are cross-claims.

THE COURT: Okay, do you think -- let's talk about it then.

MR. HONG: Yeah.

THE COURT: Do you think you get a final rebuttal argument regarding any of your claims?

MR. GARNER: I would think, since there's only cross-claims, there's no -- there's not really a Plaintiff or Defendant here anymore, it's just cross-claims based on the procedural history.

THE COURT: Okay.

MR. GARNER: So, I'd say, we either both get one or both get two.

THE COURT: Do you agree with that?

MR. HONG: Yeah, that's fine, we'll just both get one, Your Honor.

THE COURT: Both get one?

MR. GARNER: That's fine.

MR. HONG: Yeah.

THE COURT: Okay, go ahead then.

MR. HONG: Okay. Thank you, Your Honor.

CLOSING ARGUMENT BY THE PLAINTIFF

BY MR. HONG:

Your Honor -- and thank you for the time, and the NV Eagles motion for judgment as a matter of law, pursuant to NRCP Rule 50, that's already been briefed and Your Honor can look at that. I will make a couple of comments on that, Your Honor.

Just to remind Your Honor, this case deals with the cross-claim and an affirmative defense from the bank on tender, okay? And, Your Honor, on an identical, same HOA case, literally two weeks ago, on December 31st, 2019, issued a ruling addressing the statute of limitations on an affirmative defense. And in that case, Your Honor held, look, I'm going to -- on tender, I'm going to go with five years, we argued three years, but Your Honor said five years.

THE COURT: You know what case that was by any chance?

MR. HONG: Yes, Your Honor, and it's in the briefing.

THE COURT: Okay.

MR. HONG: It's in -- it's *TWT versus Nationstar*, and I can give a case number. And Your Honor issued a minute order, a very lengthy minute order, asking the bank's attorney to prepare the summary judgment in its favor, the reason being is, Your Honor felt there was a 43-month stay in the case. And therefore, by applying the stay of 43 months, the five years was tolled. So, in this case, there was no stay whatsoever, and I'm kind of mimicking real briefly what the motion stands -- what the motion is.

THE COURT: Sure.

BY MR. HONG:

And so, pursuant to the HOA sale back in 2013, even by applying the five years, there's no possible way the statute of limitations could be defeated by the bank here on tender; they just can't. The first and only time ever it was raised was July of 2019 via the bank's cross-claim. Okay, that was a cross-claim alleging tender, so that's out. And then, the affirmative defense, first time ever alleged, was in July 30 of 2019 at -- in -- as an answer to my client's cross-claim against the bank. So, five years -- and it's all briefed and Your Honor can look at it, and we even attached the minute order on that.

But, notwithstanding all that, Your Honor, this case again, it's about tender. Aside from the statute of limitations, it's absolutely clear, and Mr. Jung confirmed it, he said look, it's the nine months before the Notice of Delinquent Assessment, which was October of 2010, or he even said, or the Notice of Default which was in December of 2010. So, we're dealing with 2010, but I will say, the Nevada Supreme Court in *Gray Eagle* made it very clear, it's the -- it's up to nine months preceding the Notice of Delinquent Assessment Lien where they called it the Notice of Delinquency. Okay so, regardless, we're in 2010.

Now, we know unequivocally Mr. Jung, Miles Bauer, used the quarterly of 162 times three to make it 486, we know that's -- that was the incorrect amount. Exhibit 11, Bates stamp number 215, very, very clear, for the period of January 1st, 2010 to December 31st, 2010, it was $180 quarterly. We times that by four -- we times that by three for the nine months, that's $540. It's just short and Ms. Susan Moses testified to that, that's the number, because the other columns say Videira and

that's another HOA, Your Honor.

So now, what's the effect of that? Well, it's very clear, *Diamond Spur* is that leading case where, involving situations like this, published -- that said look, if it's a tender and a rejection, we're going to call it a valid tender. The Supreme Court made it absolutely clear, it has to be for the full amount, which means the Supreme Court said --

THE COURT: In which case, again, I'm sorry?

MR. HONG: That's *Diamond Spur*.

THE COURT: That's *Diamond Spur.*

BY MR. HONG:

That's *Diamond Spur*. And, the Supreme Court said look, if it's for the full amount -- when we say the full amount, the super-priority amount, then -- and there's a rejection like there was here, then it's a valid tender. It has to be for the full amount, so there can be no valid tender if it's for less than the full amount, whether by error -- which was by error, and Mr. Jung, fair enough, he had 2,000 to 2,500 of these, Your Honor. I mean, goodness sake, they're going to make mistakes here and there and this was a mistake.

And, he also testified, they had open channels, via email even, to confirm with NAS saying, hey, we got this ledger in March of 2011, it doesn't really show -- and that's 134, it doesn't show like the dates or whatever, can you give us one that's more -- a little bit more -- with more information, which would have been Exhibit 11, 215. They did not do that. And again, that's probably because they had many files and so forth.

But, that's the legal effect. There cannot be a valid tender in this case, because the amount was deficient. It's just that simple. And, the Nevada Supreme Court just recently, last year, in *Resources Group*, again confirmed in these HOA cases with super-priority portions alleged to being satisfied or not, the burden is on the bank to show that it was satisfied, okay? They -- it just was not.

Now, I know what the bank's going to argue. They're going to say, okay, even if it was the wrong amount, *Jessup* should apply. And *Jessup*'s that case where it's futility, where the first letter is sent to the HOA trustee, an HOA trustee sends a letter saying, look, we believe the HOA lien is junior to the super -- to the bank's deed of trust, so any payments you're going to make, we're going to reject. That can't work because again, number one, that case is on reconsideration, and there was a oral argument, I believe, in October of last year on the reconsideration, so that is kind of out there. But notwithstanding, even if that case stands, that's based on futility, Your Honor.

And so, the bank can't bootstrap that case to cases where they've actually tendered an amount, okay, because *Jessup*, again, is based on, we didn't even attempt to physically tender because we thought it was futile. Where here, clearly there's no evidence that there was futility. It's the example -- the best example I can give is some -- a student taking an exam and then getting a D, and then saying, oh well, I shouldn't have showed up, then that test doesn't count. No, *Jessup* is when a student calls in sick and doesn't show up and argues I would have gotten an A. Here, the student showed up, which means the Miles

Bauer did the attempt at tender, it was short, the student got a C, that's the way it is. There's no A here.

So, that's pretty much it, and it's addressed in our motion also, just so Your Honor knows, any of these notices, there doesn't need to be a delineation or a specification on the super-priority amount. That's been well-settled by the Nevada Supreme Court in the seminal *SFR* case. The Nevada Supreme Court said no, no, no, just the total amount due is enough. So, any argument by the bank here saying, look, the notices didn't specify, delineate the super-priority portion, that's -- that's just contrary to Nevada law as to these HOA cases.

Finally, any argument of unfairness or oppression based on this ledger, that cannot stand per *Shadow Canyon* because again, there must be a showing that any act of unfairness, if it was unfair, if it was unfair, has to -- there has to be a nexus between that act of unfairness with the purchase price at the sale and/or affecting the sale. And the burden of proof on that is on the bank, where the bank has to say, hey, based on this unfairness -- act of unfairness, we didn't go to the sale or whatnot. But, they -- the bank knew, clearly, after the rejection, Your Honor, that the sale was going to go forward. And, the notices were all sent, there's no issue about that, the posting, and whatnot.

So, with that, this is a case where my client should get judgment for quiet title declaring that the deed of trust was extinguished at the time of the sale. It's just there's no ifs, and, or buts about it, really here. So again, I know the bank's going to argue *Jessup*, they're going to -- they can't get away from the amount being insufficient, so they're

going to concede, yeah, *Diamond Spur* doesn't fit, but they're going to say, well, *Jessup* applies. No, again, *Jessup* cannot apply because *Jessup* is in instances where no check was sent based on the belief that it would have been futile. Here, that can't be true because the check was sent, so they -- the Miles Bauer cannot have said that they believed it was futile, and Rock Jung would never have testified to that, nor did he.

So, with that, we rest. And again, Your Honor, we ask Your Honor review the motion itself because we believe the motion on the statute of limitations, that's -- that wipes it out. But, even if it was to go forward, based on the evidence, there's -- there was no tender -- there was no satisfaction of the super-priority amount, Your Honor.

THE COURT: Okay, thanks, Mr. Hong.

MR. HONG: Thank you.

THE COURT: And, Mr. Garner?

MR. GARNER: Thank you, Judge. I believe it just came through half an hour or so ago, we filed a trial brief; may I approach with a courtesy copy?

THE COURT: Sure. Thank you.

CLOSING ARGUMENT BY THE DEFENSE

BY MR. GARNER:

I will highlight a couple of the things in there during my closing, Your Honor. First, to address the statute of limitations motion.

THE COURT: You're going to file this, right, so it'll be part of the record?

MR. GARNER: It has been filed now.

MR. HONG: It's been filed.

THE COURT: Okay.

MR. GARNER: Yeah.

THE COURT: Okay.

MR. GARNER: It's been filed now, Your Honor.

THE COURT: Okay.

BY MR. GARNER:

Briefly address the Rule 50 motion, although I think in bench trials it's more probably dubbed a Rule 52(c) motion. Statute of limitations, Your Honor, is actually an affirmative defense. It's listed as an affirmative defense in the NRCPs and affirmative defenses are what? Waived, if not raised. When, if ever, was this raised? It was raised yesterday on the day of trial. Was it raised in pleadings, Your Honor? No. In fact, we don't even have an answer from NV Eagles to the bank's cross-claim. So, how could it have asserted it? There is no answer.

We are, essentially, Your Honor, the bank and NV Eagles, on equal footing with respect to our cross-claims, and here's why. Back in 2013, within a few months of this HOA foreclosure sale, Melissa Lieberman, the former homeowner, filed suit, challenging the sale. She sued NV Eagles' predecessor, Underwood. Underwood bought at the HOA foreclosure sale, transferred the property to NV Eagles after they had been sued by Melissa Lieberman.

And then they, Underwood, files their own lawsuit. They do not name Bank of America, they do not name Bank of New York Mellon.

They named Pulte. Pulte was the original lender. If you look at Exhibit 1, the Deed of Trust, Pulte was the original lender. It was not the record beneficiary ever. It was MERS and then Bank of New York Mellon. But, within a few months, NV Eagles dismissed Pulte.

So, until July of last year, Your Honor, NV Eagles had zero claims against Bank of New York Mellon or BANA. Just as BANA had zero claims against NV Eagles, and it was brought up at the calendar call in May. There's a minute order from that calendar call where this is raised, I think Mr. Brenner was here, Mr. Hong was here, and at that calendar call, you granted leave to the parties to fix this. File your cross-claims, which we did. However, we are the only ones who answered the cross-claims and in those cross-claims asserted tender. It -- that wasn't the first time it was raised though.

Back in 2016, when it was The Wright Law Group, who represented NV Eagles, there was summary judgment motion practice. And, that issue of tender was adequately briefed in 2016. And even in the -- 2016, nearly four years ago, NV Eagles did not raise statute of limitations at all.

And as -- we also cited to you the law in our opposition, Your Honor, that statute of limitations don't apply to affirmative defenses anyway. They only apply to claims. And so, if the cross-claims -- if we're tardy, so is Plaintiff, or so is NV Eagles here.

THE COURT: Okay.

BY MR. GARNER:

We're on equal footing.

And, Exhibit D to Mr. Hong's motion, the *TWT Investments* minute order, I read that. I didn't see in there, Your Honor, your application of a statute of limitations to a defense. That minute order discussed a statute of limitations as to the claim under HERA and the claim under tender, not to the defenses thereof.

So --

THE COURT: Okay.

BY MR. GARNER:

-- that's what I have to say about that.

Now, let's get to the tender. I don't think anybody in this room, including Mr. Hong, disputes that lenders have the right to pay the super-priority. Nobody disputes that. But, it seems like maybe there is a dispute as to whether or not we're entitled to know what that is. But, how can there be dispute? It's like saying -- I like basketball analogies. You get the right to a free throw, but you don't have the right to the ball. How are you supposed to do it then? If we have the right to pay the super-priority, we are entitled to know what it is.

In none of the recorded documents that you have, the Notice of Delinquent Assessment Lien, the Notice of Default, the Notice of Sale, not one of those even says super-priority, or says what the applicable amount is. So, we asked. We asked NAS, we'd like to pay this amount, please tell us what it is. Did it give us that number? No. Instead, it gave us some kind of a ledger. You used the word, when examining Mr. Jung, a vague one. I agree, it is vague.

They did not give us the fuller one that they have in their file,

that Mr. Hong examined Ms. Moses and Mr. Jung on, the one that identifies dates of applicability and HOAs. They didn't give that to us. They could have, and that would have been very helpful. And, we didn't choose what they gave to us. They chose to give us the vague ledger that only had present rate and a handful of prior rates.

So, Miles Bauer made a good faith estimate of what it was and delivered payment. And I don't even know that delivery of the payment is really an issue anymore in this case, Your Honor. It seems like the entire closing argument was about the amount. But, in any event, it was proven. The policies, practices, and procedures, the Legal Wings receipt, the ProLaw, all of it proved that that check was delivered.

Now, did NAS reject this check, Your Honor, because it was for $486, as opposed to 534 or 540? Where is the evidence that they rejected it for that reason? You don't have it. In fact, you have the opposite. You have testimony from both Mr. Jung and from Ms. Moses who said what? We would have rejected any check that came with that letter, irrespective of the amount. If NAS had told us, hey, use this other number, Mr. Jung said, we would have delivered that. But, is there any doubt in your mind based on the testimony and the practices and procedures of NAS that they would have accepted it?

So, let's get to the amount. *Diamond Spur*, Your Honor, says that the bank was entitled to rely on the representations of the HOA as to what was owed. So, if the HOA through NAS tells us, here's what's owed, but they don't give us sufficient information, we are entitled to rely on the information given.

In addition, this is on the bottom of page eight of our trial brief, under the tender doctrine, Your Honor, and I'm quoting here from a case out of Utah, and there's string site to other cases in Minnesota and Montana, let me start with the first one. A person to whom a tender is made must at the time specify the objections to it or they are waived. They're waived. They can't -- what is this now, 2000 -- six and a half years later, resurrect those objections through trial and say, well really our objection to it was it -- was that it was $48 off.

Those are waived, and you see that in the Utah case, the Minnesota case, and the Montana case we cited on pages eight and nine of our brief. So, not only are we entitled to rely on what NAS sent to us, NAS has to tell us the right amount at the time or it's waived. And NV Eagles doesn't get to resurrect that right.

In addition, Your Honor, there's often a debate over statutory compliance, whether it requires strict compliance or substantial compliance. Substantial compliance, Your Honor, was created to -- and I'm quoting from page nine of our brief, the *Leyva* case, that's a 2011 Nevada Supreme Court case, the doctrine substantial compliance may be sufficient to avoid three things: harsh, unfair, or absurd consequences. That's the purpose of substantial compliance.

The Nevada Supreme Court has applied substantial compliance to NRS 116. That's also on page nine of our brief. They applied it, Your Honor, to the HOA's compliance with the notice provisions of NRS 116. Okay? There were -- there was a lot of litigation for years over whether or not NRS 116 was constitutional on its face.

Did it require notice? Did it not require notice? It was finally ended, I think, several years ago and the Nevada Supreme Court said, yes, NRS 116 required the HOAs to send notice to the banks.

And then, in later opinions, they said, well actually, it only required the HOA to substantially comply. So, if there were errors in their actual compliance with the notice, so long as the bank got some notice, it's okay. Okay, you will not be defeating this HOA sale based on those types of errors. Shouldn't the same be true of the bank's compliance with its right to tender? The answer is yes.

As the Supreme Court said, as it related to a mechanic's lien, this is the *Fondren* case cited on page nine of our trial brief. There, the Nevada Supreme Court rejected an argument that a mechanic's lien was invalid due to some minor math miscalculations, saying this: it is not realistic to become so technical that such errors defeat an otherwise a valid lien for a large amount.

What was this lien for, Your Honor, that brings us here today? Ms. Lieberman borrowed nearly half-a-million dollars. And, with interest now, and it's a stipulated fact, it's over $800,000. So, we're going to say, Bank of New York Mellon, you lose your lien for $800,000 because of a difference of maybe $48, which you would have paid if you had known it was inaccurate, and which you could have calculated if you had been given proper information.

This goes along, Your Honor, with the Latin phrase that's in *Black's Law Dictionary, de minimis non curat lex*, meaning the law does not concern itself with trifles. That's the substantial compliance doctrine.

Therefore, under *Jessup*, and applying these other doctrines, the tender was good. But, let's imagine, Your Honor, that we didn't deliver a check at all. How is it under facts like *Jessup* where we don't deliver a check, the bank wins, but in cases like this, where we actually deliver one, and no one tells us its wrong, we lose? Under the facts of this case, and the law of tender, as articulated in *Jessup* -- and *Jessup* didn't create new law, Your Honor. *Jessup* just articulated it and applied it to NRS 116.

We didn't have to deliver a check at all under the facts in this case. Why? Because it would have been futile and because NAS really prevented us from knowing what it was.

The cases cited within *Jessup*, such as *Mark Turner Properties* and the Am. Jur., C.J.S., as we cite them on page ten, say that delivery of a check is excused. When? When the party entitled to payment by declaration or by conduct. So, you can do this by words or you can do this by actions. Proclaims that if a tender of the amount due is made, it will not be accepted. Do we have that conduct, Your Honor, the evidence of such conduct here? How could NAS have been more clear than in the 2,500 times that Mr. Jung said he sent checks to them, they rejected them?

And, if Mr. Jung had sent a check for 534, 540, or like he said he did many other times, for a full nine months plus some reasonable costs and fees, so more than the super-priority, even when they tendered more than the super-priority, NAS rejected it.

Delivering a check, Your Honor, can also be excused under

the law if the amount depends on information that is ascertainable only from accounts of the creditor. You'll see that on page 15 of our trial brief. This is black-letter law from the Am. Jur. and C.J.S. C.J.S. says, tender of an amount due is waived when the party entitled to payment obstructs or prevents a tender.

By not giving us the information, or just giving us the number, why play the games, just give us the number. If they prevent it or obstruct it, delivery is irrelevant. We didn't have to deliver a check at all. Footnote 6, on page 15 of our trial brief, Your Honor, also has a handful of other string cites about obstruction and not divulging information, and misrepresentations as to the amount.

So, whether you want to decide this case on *Jessup* and substantial compliance -- or sorry, *Diamond Spur* with substantial compliance, or *Jessup* with excuse and obstruction, either way it is the same. Bank of America, the servicer at the time, tried to exercise its right and did more than just try. They did a lot to exercise it. And, NAS, under any circumstances, would have rejected their payment. But, the law says it's good enough.

As a back-up, Your Honor, we have the *Shadow Canyon* analysis, requires two things, one, an inadequate price and then some element of unfairness. And, some times we refer to this as sliding the scale, or hydraulic, the more unfair the price, the less you have to show the unfairness. You only have evidence of the fair market value, that's the measuring stick that the law uses. You only have our evidence and it's part --

THE COURT: So, you're talking about commercial reasonability?

MR. GARNER: Correct, yes. Some people call it that, some people call it the equities --

THE COURT: Or un-reasonability.

MR. GARNER: I'm sorry?

THE COURT: Or un-reasonability, as it were.

MR. GARNER: Correct. I call it the equities or *Shadow Canyon*.

THE COURT: Okay.

BY MR. GARNER:

The fair market value, according to Exhibit 12, which is our expert appraiser, and stipulated fact number 16, it's $430,000. Underwood picked this property up for 30. That's 7 percent. Pretty grossly inadequate, which means we only need slight additional evidence of unfairness.

Do we have it here? We do, because *Shadow Canyon* said, whether a senior lender tried to tender payment to the association is significant. Here, we tried, they didn't give us the number, we did our best estimate as to what it was, paid it, they rejected it. And as the evidence showed you, whatever amount we sent that was less than the 3,800 and something other -- or other dollars, any amount we sent that was less than that, NAS would have rejected.

Plaintiff's status as a bona fide purchaser, Your Honor, is relevant under the *Shadow Canyon* equities analysis, but what evidence

did they present to you that they were that? None. The case we cite to you in our trial brief, *RLP-Ampus*, says if you claim that status, you got to prove it, you can't just say you are. Even if they had come here to try to claim that status, Your Honor, I think all the pre-sale warnings, the deeds, they leave no room for it.

When you go to one of these auctions, you know based on the publicly recorded statements, and as Ms. Moses said, the auctioneer said it. We're going to give you title with no guarantees, no warranties, no nothing. Good luck to you. How can you accept that and then come to court and say well, I thought I was getting more?

For any of these reasons, Your Honor, any of them are sufficient to rule in the bank's favor, but taken altogether, are more than sufficient. So, the Bank of New York Mellon, who is the record beneficiary, Your Honor, requests judgment against NV Eagles, and in its favor on all the cross-claims between them, and requests a declaratory judgment that Plaintiff owns this property subject to the deed. Bank of America was never the deed of trust beneficiary, it was only under servicer. So, I think with respect to its status as either Cross-Claimant or Cross-Defendant, it should be dismissed entirely. This really just is Bank of New York Mellon versus NV Eagles.

And then, as we discussed yesterday at the beginning of the trial, all other claims, counter-claims, cross-claims, that haven't sufficiently been dismissed, we'd ask that you dismiss those because no other party participated in pretrial or at trial, so.

THE COURT: Okay.

MR. GARNER: Thank you.

THE COURT: All right. Well, most lawyers that have bench trials here know that either contemporaneous with the end of the case or close to contemporaneous with the end, meaning some deliberation, I give a decision. And then the prevailing party submits the order. Typically, those decisions from me are involved. They reference exhibits and they're 30 minutes, 45-minute-type decisions. Here, what I'm inclined to do is call you back to court and actually afford an opportunity, not necessary, not required, but an opportunity for any kind of briefing on what I'm going to say right now.

MR. GARNER: Okay.

THE COURT: You don't have to do it, but you can.

So, my plan is to have both of you come back here live in court, and at that time, I'd give the decision on the motion that's pending and then also, the trial itself. And so, we'd have to schedule that. My guess is, taken as a whole, it'd be an hour long court session that we have -- I don't know if I'd take the whole hour, but I would like to explain it all to you once I figure it out.

The reason I, in this case, want to take that opportunity -- now there's -- no, actually multiple reasons. One is, obviously you filed a trial brief, that I just -- and you cited it a few times, Mr. Garner, in your closing, but I haven't seen it. So, I -- I'd like to look at that.

MR. GARNER: Okay.

THE COURT: Further, I'd like to look more intently, of course, at the motion paperwork. But on the trial itself, in addition to looking at

your trial brief, I also, of course, want to look at the cases that have been mentioned in support of the issue that seems to be the mainline issue for the Court. I mean, take a better look at *Diamond Spur*, look at *Jessup*, see if I could -- if I could even look at *Jessup*, presently. There's been, I think, some lawyers have come into court and said that Chief Justice Gibbons said something along the lines of nobody should look at this right now. But so I need -- you know -- and you could -- you know, there's that.

Shadow Canyon, on commercial reasonability, that was an interesting argument, one I haven't -- I hadn't thought of, and that's good, because lawyers are supposed to educate Courts and I hadn't thought about that. The 7 percent plus this idea that you did try and what have you, that's an interesting argument, one I haven't thought about, actually. But anyway, there's a lot of moving parts to it.

But, I do want to at least make some findings that could be relevant to any further briefing as between now and when I give the decision because I guess it would start with this. It's a question. Is there another case where this has happened, this being a clear, you know, personal delivery using a runner, of a tender amount, but it just happened to be short? Has this ever happened in all these thousands of HOA cases that then resulted in a decision where I know definitively the answer as to what an Appellate Court would say, just on that point?

I realize there's other points, I realize no two cases are ever going to be exactly the same in this arena, but just on the one issue where it goes like this. There is a super-priority amount. I'll make,

obviously, that finding. That super-priority amount in this case would have been from the year 2010, because I think Exhibits 3 and 4 start the process. Exhibit 3, being the Notice of Delinquent Assessment Lien, Exhibit 4 being the Notice of Default, Election to Sell, those respectively, are from October 2010 and December 2010. So, the super-priority amount would have had to pre-dated those notices to be operational as a matter of law. So, we do know now, in hindsight, I know from an item that Mr. Jung didn't have -- let's see --

MR. HONG: Exhibit 11, Bates stamp 215, Your Honor.

THE COURT: 2-1-5?

MR. HONG: Yeah.

THE COURT: Yeah, 215 shows clearly that the assessments were for the year 2010, 180, for the entire year, from 1/1/2010 to 12/31/2010. That is the whole year of 2010, clearly. It covers every day of that year, and it's 180. And then from January 1st of 2011 through July 31st of 2011, again, referencing page 215, it's 162. So, since the lien -- the super-priority lien, of course, would have had to pre-date the October 2010 notice or the December 2010 notice, it's all 2010, as fate would have it, because even if you used October, there's still nine months of that calendar year to represent a super-priority time period.

So, clearly, it seems to me, I'll make a finding, it seems pretty clear that the evidence now at trial is that the super-priority amount would have had to have been 180 times three, which is 540. So, I think Mr. Hong had it right that it's 540. The bank, through Miles Bauer, tendered 486. So, let's see, that is 50 -- what is that?

MR. GARNER: 54.

THE COURT: $56 short?

MR. GARNER: I think it's $54, but --

THE COURT: 54? Okay, yeah, why don't we figure that out? 540 minus 486 is 4 -- 34? Is that right?

MR. GARNER: It should be 54 but --

THE COURT: Okay. Nobody's good at math? That's why -- I hear lawyers all the time say, that's why I went to law school. Could somebody please here figure out what 540 minus 486 is please and let me know?

THE COURT CLERK: Yeah.

THE COURT: Okay.

MR. HONG: 54

THE COURT: 54. Okay, so you're $54 short.

Now -- so, I'm just saying, I don't know definitively what just the Court would say about that point. I get that there's all kinds of moving parts, that here there was a request, and you got this vague ledger.

It's -- does seem to me that Mr. Jung, I'll just say it, I mean we've all not necessarily danced around it, but we were very courteous and respectful towards him, and we acknowledged he's had thousands of cases. But you know, I'm just a Judge that doesn't do as much as you guys do in the trenches on HOA, although I do my fair share. And, you saw what happened even here live in court. I happened to see the little number two, little number two, the little number four, and a little

number four, and it did -- now it seems like Exhibit 134 should have led him to do something to not be so confident that 486 is the number, frankly. What that something would have been -- I mean, there certainly was time too, because if you look at this all happening, he gets the 134 exhibit March of 2011 or so and the sale is June 7th of 2013.

So that does give, respectfully, a lawyer, who, like Ms. Deloney said and like he said, you know, their primary mission is to hire counsel to protect the lien, and you know, provide counsel with funds to pay it. And so, he got it wrong and -- so, with all the other moving parts in there, I appreciate the arguments and I -- I'll tell you right now, I bet you, we'll never know. But, I bet you out of 32 of us, half of us would agree with the Plaintiffs and half of us would agree with the defense on something like this because that's probably what would happen.

So, that means I need to spend some time to figure it out, look at *Diamond Spur*, look at, to the extent I can, *Jessup*, just on this point. I know *Shadow Canyon*, but that's another legal concept altogether that could separate and distinctly decide the case.

But -- so, I'll ask you to come back to court, but in the interim, I mean, I -- is there ever been a case, in the HOA arena, just on one limited thing -- and again, I've said it a few times, I realize there's a lot of moving parts, but just on this one point, where a tender was provided by runner or otherwise clearly undisputedly provided prior to the sale, and it just was short? It was not the amount of the super-priority amount. It was off by some dollars, whatever they may be. And, the Appellate Court has rendered a decision that I can now use to determine the legal

significance of that particular limited event. Does anybody know of one?

MR. GARNER: Not off the top of my head, but --

MR. HONG: Well, no, Your Honor, and we'll brief it, but again, *Diamond Spur* can't be any clearer. I mean, as you heard me say, I'm not being argumentative, but it --

THE COURT: No, I understand your argument and I --

MR. HONG: -- has to be for the --

THE COURT: -- haven't re-read that case --

MR. HONG: -- full amount.

THE COURT: -- but I'm just --

MR. HONG: Yeah.

THE COURT: -- you know, *Diamond Spur*, I -- you represented stood for the proposition that, you know, they have to tender the full amount.

MR. HONG: It has to be --

THE COURT: Okay.

MR. HONG: -- the full amount.

THE COURT: But, what I'm --

MR. HONG: Of the super-priority.

THE COURT: I understand that.

MR. HONG: Of the super-priority.

THE COURT: Of the super-priority.

MR. HONG: Right.

THE COURT: But, what I'm saying is, do we have a case in Nevada yet, from an Appellate Court, where unfortunately for whatever

reason, or maybe fortunately, in your view, the tender amount was off, it was wrong, it was not the super-priority amount, it was less than that? Do we have anything where a Court at least gives some guidance as to what now the trial judges should do with something like that?

MR. HONG: I'll reach out to my colleagues, because if anything it would have to -- it would be an unpublished order, obviously.

THE COURT: Okay.

MR. HONG: It would -- yeah.

THE COURT: So, I'm going to ask you to come back to court --

MR. HONG: Right.

THE COURT: -- for the whole decision --

MR. HONG: Right.

THE COURT: -- but in that mix --

MR. HONG: We'll look for it.

THE COURT: -- I'd like to give you a little time to look at this --

MR. HONG: Okay.

THE COURT: -- because I'm making a finding right here, right now --

MR. HONG: Okay.

THE COURT: -- that it was the wrong amount.

MR. HONG: Okay.

THE COURT: That the right amount was something more than 486; I think the right amount was 540, but it was more than 486.

And so, the amount delivered was incorrect and then rejected. So, is there any law talking about just that, the significance as a matter of law, that type of an event?

MR. HONG: Okay.

THE COURT: All the while, of course, considering everything else here.

[Colloquy between counsel]

MR. GARNER: Can we have two weeks to get you those?

THE COURT: Yeah, of course.

MR. GARNER: Okay.

THE COURT: Two weeks from now is?

THE COURT CLERK: The 29th of January. Do you want that at 9:30, Judge?

THE COURT: 5:00 that day. What day of the week is that?

THE COURT CLERK: That's Wednesday.

MR. GARNER: Well, do you --

THE COURT: Okay.

MR. GARNER: -- want to set that as deadline for the briefs and then come --

THE COURT: No, that's the briefing schedule.

MR. GARNER: Okay.

THE COURT: So, by 5:00 o'clock --

MR. GARNER: Perfect.

THE COURT: -- it'll be a simultaneous briefing schedule. The best practice is for both of you, even if you get the brief done before that

day, you just send it over on the same day, that way nobody's responding to each other.

MR. HONG: Okay.

MR. GARNER: Okay.

THE COURT: So, what's that date again, please?

THE COURT CLERK: January 29th.

THE COURT: At 5:00 o'clock, that Wednesday; is that it? Wednesday?

THE COURT CLERK: Yes.

MR. GARNER: Perfect.

THE COURT: Okay, so that Wednesday, by 5:00, file it and then -- or just file it on that day --

MR. GARNER: Yeah.

THE COURT: -- and then also send over a courtesy copy, okay?

MR. HONG: Okay.

THE COURT: And then -- all right, then we're going to come back in for the decision, is what we'll do.

MR. GARNER: Do you want to set that today, as well, or no?

THE COURT: Yeah, I'd like to on your schedules. It -- I just need probably about a week from the time of the simultaneous due date for the briefing.

MR. GARNER: And, do you want to bring us back on a normal calendar or like on a --

THE COURT: No.

MR. GARNER: -- 1:00 p.m. time for --

THE COURT: Yeah, time where I can talk for 45 minutes, probably.

THE COURT CLERK: Do you want a Wednesday, again?

THE COURT: I don't know, do you have the whole calendar there? Any day --

THE COURT CLERK: Yeah.

THE COURT: -- at least a week after the due date.

THE COURT CLERK: Yeah, the following Wednesday's clear as of now, the 5th.

THE COURT: It is?

THE COURT CLERK: Mm-hmm.

THE COURT: Okay, the 5th of February?

THE COURT CLERK: Yes.

MR. GARNER: That works.

THE COURT: Okay. Does that work for everybody?

MR. HONG: Yes.

THE COURT: That afternoon is available --

THE COURT CLERK: Yep.

THE COURT: -- or the whole day is available?

THE COURT CLERK: The whole day is available.

THE COURT: Okay, is there a time that you'd like to do that?

MR. GARNER: Morning --

THE COURT: On that Wednesday?

MR. GARNER: -- or afternoon is fine with me, Judge.

MR. HONG: How about 11:00?

THE COURT: Okay.

MR. HONG: Because that way we'll be done by lunch.

MR. GARNER: Just go to lunch right after?

MR. HONG: Yeah, we can go to lunch right after.

THE COURT: Okay, so 11:00 o'clock that day for the live decision, prevailing party to draft all orders, so if you win your motion, you --

MR. HONG: Okay.

THE COURT: -- draft the order. You lose the motion then he drafts the order, and then regarding the trial, same way.

MR. GARNER: Okay.

THE COURT: That'll help the Court, you know, I've gotten --

MR. HONG: Okay.

MR. GARNER: And --

THE COURT: -- I've gotten to that point because, I'll tell you, it is my view that in these all civil departments, there's just no way to do business any other way. It's just too many cases, too many motions, too many hearings, you've got to let lawyers draft orders for the most part. That just helps the Court. But, what you do get from me is a rather detailed, you know, bench order that you don't normally get, so that's good, I think.

MR. GARNER: Now, that -- for the defense would just be for the announcement of the decision, no further argument?

THE COURT: Right --

MR. GARNER: Okay.

THE COURT: -- no further argument.

MR. GARNER: Perfect.

THE COURT: I mean, your brief will do that.

MR. HONG: Okay.

MR. GARNER: Very good.

THE COURT: Okay, so I'll just give the decision at that time --

MR. HONG: Okay.

THE COURT: -- with that schedule. And, thanks a lot.

MR. HONG: Thank you, Your Honor.

MR. GARNER: All right, Thank you, Judge.

[Proceeding concluded at 11:43 a.m.]

* * * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Kaihla Berndt
Court Recorder/Transcriber

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2/26/2020 1:15 PM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

MELISSA LIEBERMAN, Plaintiff, vs. MEDIERA CANYON COMMUNITY ASSOCIATION, Defendant.	CASE NO: A-13-685203-C DEPT. XXXII

BEFORE THE HONORABLE ROB BARE, DISTRICT COURT JUDGE

WEDNESDAY, FEBRUARY 5, 2020

RECORDER'S TRANSCRIPT OF HEARING RE:
BENCH TRIAL - DAY 3 (DECISION)

APPEARANCES:

For the Plaintiff: JOSEPH Y. HONG, ESQ.

For the Defendant: REX D. GARNER, ESQ.

RECORDED BY: KAIHLA BERNDT, COURT RECORDER

Las Vegas, Nevada; Wednesday, February 5, 2020

[Proceeding commenced at 11:23 a.m.]

THE CLERK: Case A685203 Melissa Lieberman versus Mediera Canyon Community Association.

THE COURT: Make appearances, please.

MR. HONG: Yes, good morning, Your Honor, Joseph Hong for I believe NV Eagles. Yeah.

THE COURT: All right.

MR. GARNER: Yep, and Rex Garner on behalf of Bank of America and Bank of New York Mellon.

THE COURT: All right, let me start by saying, sincerely, it truly is always nice to have either one of you guys in here. I think your clients ought to be happy with you and a reason for that is because, you know, lawyers are supposed to zealously represent clients and you guys do that, but they're not required to actually care, truly. But, you guys have demonstrated to me over and over again that you really care. That's reflected in the briefing that is in this situation, during the trial, after the trial, and just the way that you conduct yourselves. You help the Court by agreeing to things that there's no sense in fighting over, but the arguments you make are impassioned and I could tell you really care, so I appreciate that. I know when I have either one of you in here it's going to be interesting and done the way that it should be. So, I wanted you now both to know that.

In addition to that, you know, another thing I think for a trial

lawyer that's being done here, that's a wonderful thing to do, of course, is to perfect your issues and you've both done that, whatever issues they may be, commercial reasonableness, unreasonableness, if you will, the tender scenario, and everything else about this that came up. I mean, you've done what you need to do in my view to perfect issues that we oftentimes, of course, now see or have seen for some time, that the Appellate Courts involve themselves with in the HOA arena. In fact, I'm going to talk about *Diamond Spur* and *Jessup*, to some extent, in this decision. So, we know that in the HOA area these cases pretty much regularly percolate up there. I don't know how many HOA cases there have been in the District Court that have made their way to the Appellate Courts, but I bet you that number's a lot, probably even more than criminal cases, it's -- I don't know, but it's a lot of cases.

All right so, with all that, in this case there was and I think there still is a motion that the Plaintiffs brought asking me to provide a summary judgment based upon the tender defense being precluded. I'm going to deny that motion, as I do think the bank could bring, under these circumstances, the tender defense. And, I think the best argument for that really is spelled out in the opposition that was filed by Mr. Garner. And, page three of that, I -- I'll just incorporate by reference and agree with pretty much what you said on page three of your opposition.

In other words, I think there was plenty of notice, even in the summary judgment activity, there's plenty of notice that you had a tender defense. And, I agree with everything else you said in there, as well. So, I'll just incorporate that by reference, that means there is a tender

defense in the case.

All right so, pretty much without further delaying it, I am going to tell you that under the circumstances here, after reviewing all the items after we left court last time, again, last night and this morning, reading over both of the post-trial briefs that you provided -- again, I think all -- both of you did what you need to do to perfect all your issues, but it's time for me to make a decision. You know, it's not one I'd bet my life on, as oftentimes is the case when you're making decisions as a Judge, but I think it's the right decision, I think it's a solid decision, and so, in this situation, Mr. Hong, I'm going to tell you that you're going to prevail. And so, let me give you all the reasons for that.

The primary reason for it -- or two primary reasons will be -- and I'll cover it more in depth, but let me give you an overview on it. I think that the tender itself, mainly, has to be for the correct amount, and if it's below the correct amount, I think that renders it fatal, or I think it makes it such that if you have time and notice that it was rejected because it was too low, you should cure it. And, I'm going to talk about that and cite some things from these two cases having to do with that.

So, the bottom line, Mr. Garner, the reason why I think Mr. Hong's client does not take the property subject to the bank's lien is because as I look at it, the -- I'll just say it because I always say it the way I think it, I think Mr. Jung made a mistake. That's what I really think. And he, on behalf of the bank, sent the wrong amount, it was off by not a lot of money, but it was below what it needed to be. And, I think that mainly *Diamond Spur* sends a clear message that it has to be at least up

to the minimum. If it's an overpayment, the bank's in good shape, but it has to at least be the correct payment. And, I think that's primarily what happened on that as I'll explain more in detail.

And then, the other mainline item that you brought up really is an area of equity having to do with commercial reasonableness, and while it's true that the 7 percent amount meets a threshold requirement that the bank would have to meet, it's you know, below 20 percent, it's 7 percent, below 10 percent. I think that the test to be applied to that is a conjunctive test, meaning there has -- and it's well-spelled out by the way in Mr. Hong's brief, in fact, I'm going to steal from it in my decision, here. Mr. Hong's post-trial brief I think accurately shows what the legal standard is and the bank knows it too, of course. But, I just think the other prong of the commercial reasonability, un-reasonability test is not met, in that there's not some kind of unfairness or you know, something bad, fraud, unfairness, or whatever -- you know, the -- I'll talk about the standard more specifically. I'm just giving you a preview that I don't think the second part of the test is met to where something -- I didn't see any real evidence in the case that now made it such that the price was low for some reason consistent with the test.

So, because the tender was too low, because there was time to fix it and notice to fix it, and it wasn't, and because though 7 percent of the market value was what the $30,000 payment was, the second prong of that test is not met and so it's not commercially unreasonable. And whatever other issues in here, you know, I find for the Plaintiffs in this case. So, let me give you the main analysis as to why that is.

Maybe I'll just go through highlighting both of your post-trial briefs because they were helpful to me.

The bank's brief, of course, indicates that the loan servicer, Bank of America, tendered payment in good faith after calculating the superpriority amount. I agree that Mr. Jung, or counsel for the bank, now attributable to the bank, it's their agent -- so, the bank, in good faith, made a tender, I'll give you that. It's just that they got it wrong by way of the amount as Court's going to cover.

So, Mr. Jung sends over the correspondence, NAS responds, and what we have by way of response is trial exhibit number nine, page 134, which I did think was very relevant during the trial. Just to let you know, I haven't touched it since the trial, and this is what that exhibit looks like. So, I thought it was a significant exhibit, spending a lot of time trying to figure it out. And, it is that exhibit more than anything else that I think clearly shows the error, if you will, of Counsel Jung's ways, because to generally describe this exhibit, it does include differing rates. And, this led to what I think was the fatal problem.

If you look at 134, Exhibit 9, it gives certain quarterly assessment amounts and right underneath that talks about number of months delinquent. And, there's a column where it's 162 with a number two under it, then 210 with a number two under it, and so on along that line. And you know, if you look at the whole record here, you can see that of course even at times, I struggled with trying to figure out from this document what would be the nine-month superpriority.

And, Mr. Hong's brief is correct that at the last -- at the ending

of the last court session, I did more definitively say that the lien was 540. And so, I agree with that being the actual amount of the nine-month lien and the 486 was sent by Miles Bauer on behalf of the bank. That 486 was arrived upon by virtue of the fact this is a quarterly assessment, so a quarter of a year is three months, so in order to get nine months, you have to multiply that number by three. And so, one -- Mr. Jung multiplied 162 by three and got 486 and sent over that check.

The problem is, it's clear from the document that he had that the 162 covered two months -- or two three-month periods, or six months total is what it would be. So, you have to go and get another number, and it turns out as it -- all the other numbers are higher than 162; they're either 210, 180, 234. I think it's reasonable to use the higher number next door to the 162 and come up with the 540, is what it is. And so, I end up agreeing and I make a Finding of Fact that I agree with the Plaintiff's side of it that the actual nine-month superpriority assessment amount was 540. So, Miles Bauer sent a check for 486, which was less than that and so that's what happened.

Now, going back to the Bank's brief, you do say in there and it's an argument made that well, there's -- there was this clear evidence, which I agree there was evidence, that the standard practice during the relevant time was to, in any event, reject these tender attempts because of this language saying look, this essentially dispenses with any and all claims, and covers the lien, and all that. And so, part of the argument the bank had in the case was look, yeah -- and this is my way of paraphrasing it, you know, yeah, we see that we might have sent less

than what was required, we sent 486 instead of 540, but that's insignificant because the practice was to reject anyway, so basically they were going to reject it even if it was the right amount. I see that. But, I'm going to tell you there's evidence in the case to suggest something different than that and that is at 141.

There is an exhibit in here that I think tells a bit of a story on this and that is Exhibit 9, page 141, and if you look at that exhibit you can see that there's a notation on this slip that gives us insight as to why the item was rejected. And, what it says there, again on page 141 of Exhibit 9 at the bottom, on this little slip: won't accept, not paid in full, per Carly. So, that's evidence that the reason the 486 is not accepted is because it's not enough. And, that's -- that is evidence of that. That's not determinative of the whole case, but I want to make a finding that that is solid evidence that a primary reason for rejecting was that it wasn't a sufficient payment. Although, the Court, of course, does accept and knows it to be true, that there was a general pattern of rejecting these, anyway. But, here we do have affirmative evidence that a primary reason was it wasn't the right amount.

All right. All right, so now I'm going to get to Mr. Hong's brief and I said I would talk about it because it -- I think it says I -- you know, it's -- it spells out what I think was in my mind anyway as to what I ought to do with this case. Because Mr. Hong, in this brief, I -- rightly so or correctly, outlines the reason for the break between the last court session and this one when he says on the first page, the Court directed the parties to submit post-trial briefs outlining if there were any cases

from Nevada Supreme Court or Nevada Appellate Court to the effect of the bank having attempted tender in incorrect amount and what does that really mean. And, that's true, that's you know -- I do try to the best of my ability to get things right around here. I don't think anybody's going to get everything right, but I try.

And, I have to say after the last session, I wondered as a matter of law, what was the real effect of this 486 when it's supposed to be 540, issue? So, that's the passage and Mr. Hong, in your brief, I appreciated it because that's exactly what I tried to do. And then, in looking at what you came up with, you say the answer to this question is, yes. In other words, is there case law that addresses this situation? And, you provide *Diamond Spur* and I think there's also this idea of *Jessup* that comes up from both briefs.

But, I really think *Diamond Spur* is the case that gives me the definitive answer and it sort of was mentioned, I think, last time around, but you know, the break and then the briefing gave me an opportunity, of course, to look at it more specifically. So, I have that case here, that's what's in my hand right now. I have the *Diamond Spur* case from the Nevada Supreme Court and I've outlined it consistent with our case and the issues presented here.

If you look at *Diamond Spur*, in that case the bank tendered $720 which was accurate. The letter included with the tender stated, the HOA's acceptance would be an express agreement. All right, but in the *Diamond Spur* case, the -- it was not a lesser amount, it was the correct amount submitted. But, the guidance as to our issue does come later in

the decision, where on page five of the decision, the Supreme Court says in reviewing the *Diamond Spur* case, the record establishes that Bank of America tendered the correct amount to satisfy the superpriority portion of the lien on the property, nine months' worth of assessment fees, totaled 720. Going down on -- going down further on page five, a new paragraph, in addition to payment in full, valid tender must be unconditional or with conditions on which the tendering party has a right to insist.

So, there's a passage that I think gives the best guidance. And that is, again, the Supreme Court answers this question, does it have to be payment in full, or could it be close, or could it be less? I think *Diamond Spur* does stand for the proposition that it has to be payment in full in order to be a valid tender, and that's not what we have here. And so, that's what wins the day for Mr. Hong's client in this spot, because it's clear to me it wasn't payment in full, and I said the bank's lawyer made a mistake, because I think they did. They should have sent the right amount, but even if they didn't, I'm going to cover something else I found and I -- it's going to, I think, be in *Jessup*, actually.

Now, I think *Jessup* is not supposed to be cited for controlling authority, given that the en banc Court is going to look at it. But, the briefing, the post-trial briefing, did mention that I could nonetheless look at it as it might provide some guidance. So, I -- I'm going to do that. I mean, I think it could provide some guidance, although not authoritative, given that it's being reconsidered or under consideration.

But, looking at the *Jessup* case -- all right, we have the Rock

Jung scenario, the key to our situation, again, not using *Jessup* as controlling authority but getting some, you know, message from the Court. On page four of *Jessup*, it gets into something I want to make a finding on, separate and distinct from even this guidance that I get from *Jessup.* But, *Jessup* does say on page four, that following the facts, neither Miles Bauer nor the bank took any actions to protect the first deed of trust.

So, that -- just by way of some guidance, does say that here Mr. Jung sent the letter, he gets back the rejection, and we look at all the evidence in the case and it's clear that there was plenty of time now to deal with that rejection to, you know, maybe re-look at the page -- what we have in here as page 134 of Exhibit 9, or to do something to further inquire or otherwise deal with the fact that the thing got rejected, at least as I said, primarily because it wasn't the right amount.

And, I think that's important. I think it's important to say that there was plenty of opportunity to cure any problems with the defective tender. And, for whatever reason in addition to making the initial mistake they, I think, compounded it by not doing anything further once they knew the thing got rejected. And so, it becomes a insufficient tender.

So, I think when Mr. Hong says in his -- and I always enjoy when people say things that are just, you know, common-sense, flat-out, he says a couple times in his brief, there are no ifs, ands, or buts about it. I agree. I think there's no ifs, ands, or buts about the idea from

Diamond Spur, mainly, that they -- if it's not -- if the amount tendered is not the correct amount, but it's less than the superpriority amount, it's a invalid tender. If it's more than that, then it's a valid tender, because it would include, of course, the correct amount. We know that from other cases that evolved in the HOA arena.

But, Mr. Hong's brief goes further than just giving us *Diamond Spur* and I appreciated that. You bring up this *Marathon Keys Trust* case where there's a reference in there about *Diamond Spur*, holding valid tender requires payment in full. I see that, that was helpful. You bring up this *Resources Group* case in your brief. Again, the party consenting -- contesting the validity of HOA foreclosure bears the burden demonstrating that its tender is a delinquency-curing check -- okay, and whether it met the burden by proving that it paid the delinquency amount in full. And, you give me again, that *Resources Group* case from March of '19 at 135 Nevada Advanced Opinion 8.

So, it seems clear from these cases that, again, I think I said it enough, you got to tender the -- at least the right amount and if you don't it's a -- unless there's something done notorious to try to fool you or hide it, which wasn't the case here, it's an invalid tender. But, even if there's an argument that I'm wrong about that, I am specifically finding that there was -- again, there was plenty of time to cure that problem and send over the right amount or otherwise deal with it, which the bank didn't do. So they made -- I think the bank made two mistakes that now equate to invalid tender, one: wrong amount, two: never fixed it once they knew it was rejected and had plenty of opportunity to do that. I

think I said that enough.

All right, that takes us to the commercial reasonability issue; I'd like to say a few things about that. Oh, before I move to that, I know it came up in the brief, the bank's brief, and then Mr. Hong responded to it as well, even though I think it was a simultaneous filing of briefs, this idea of substantial compliance. I agree with the bank that in some of these areas, substantial -- in HOA law, substantial compliance, of course, is Nevada law. Some of the notice requirements and all that, some of the procedural requirements leading to the foreclosure sale itself, and what have you, I'm aware of the fact that some of that does involve substantial compliance law.

And, I'm sure there's other areas in the HOA world and of course, plenty of areas, you know, mechanic's liens and everything else, that we -- I know there's a substantial compliance body of law that comes into play depending on what part of factual predicate you're dealing with and whatever legal scenario you're dealing with. But, I think that's a nice argument and who knows, maybe the higher Court will ultimately agree with that in this context, but I -- my thought is, given the cases that came up here that I've mentioned, I think the higher Court has determined that when it comes to the tender amount itself, substantial compliance is not enough.

All right, that takes us to the commercial reasonability or un-reasonability, whichever way you want to look at that. Again, it's more than just inadequacy of price by way of a percentage comparing the market value to the amount paid and coming up with a percentage;

that's one factor. I think the other part of it is well-spelled out on page seven of Mr. Hong's brief and it's in the bank's brief too, but I'm looking at Mr. Hong's brief here where he says, there must be a nexus between the act of unfairness and the inadequacy of price, where the act of unfairness does something to affect the price. And, I agree. I didn't see evidence in this case that counted for and brought about the inadequacy of price issue and so I don't think that prong -- I think it's a two-prong sort of test on commercial reasonability, un-reasonability, it -- that's not met.

And, I've said in a lot of these cases, and I think it's true, that in the HOA foreclosure realm, I mean, one of the reasons, of course, that you can get a property that's worth hundreds of thousands of dollars for 7 percent, or 10 percent, or sometimes even less than all that, is because of the risk that people take. You know, whether it's listening to the adventures of Eddie Haddad, or whether it's listening to the adventures of Mr. Hardin, it's pretty clear to me that, you know, it's the other adult casino. The stock market's one and going around bidding on these places is another. If you want to be in the adult casino, there's risk, just like in the stock market. I mean, you know, sometimes I think it'd be easier just to go down and do red or black. At least it's over with and you don't have to go through years with lawyers and trials and tribulations and everything else.

But, I mean, I think it's the risk inherent in this that makes it such that the low price is warranted. You know, I've had people -- because I'm a Judge, you know, you run around, you do stuff, I've had

people say to me, you know, I wish I'd have gotten into the HOA arena and these people are getting all these properties for pennies on the dollar. And I say, well, there would be some that would tell you, you know, you don't exactly just get them for pennies on the dollar so easily.

Mr. Hong, you got this one for all the reasons that I've said --

MR. HONG: Okay.

THE COURT: -- and that means you can draft the order. And, that's it.

MR. HONG: Thanks.

MR. GARNER: Okay.

MR. HONG: Thank you, Your Honor. And, couple of weeks because I'm going to go off the transcript of today, if that's okay?

THE COURT: Yeah, whatever you need to do, it's --

MR. HONG: Okay.

THE COURT: -- you're going to draft the order and --

MR. HONG: Okay, right.

THE COURT: -- circulate it and all that, okay?

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MR. HONG: Thank you, Judge.

THE COURT: All right.

[Proceeding concluded at 11:49 a.m.]

* * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Kaihla Berndt

Kaihla Berndt
Court Recorder/Transcriber

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

MELISSA LIEBERMAN, an individual, on behalf of herself and all others similarly situated; Plaintiff, vs. MADEIRA CANYON COMMUNITY ASSOCIATION, *et al.*, Defendants. And related claims.	Case No.: A-13-685203-C Dept. No.: XXXII

FINDINGS OF FACTS, CONCLUSIONS OF LAW AND JUDGMENT

This matter having come on for Bench Trial on January 14 and 15, 2020, and for the Court's Decision hearing on February 5, 2020; the Court having considered the evidence; and good cause appearing therefor, enters the following Findings of Facts, Conclusions of Law and Judgment.

FINDINGS OF FACTS

1. This case involves a real property commonly known as 2184 Pont National Drive, Henderson, Nevada 89044, APN 190-20-311-033 ("Subject Property").

2. The Subject Property is governed by the Declaration of Covenants, Conditions and Restrictions ("CC&Rs") of the Mediera Canyon Community Association *now known as* Madeira Canyon Homeowners Association ("HOA"), which were recorded in the Clark County Recorder's Office as Instrument No. 20050524-0002414.

3. On or about November 20, 2006, Melissa Lieberman ("Borrower") executed a promissory note for $511,576.00 ("Note") in favor of Pulte Mortgage, LLC.

4. The Note was secured by a deed of trust recorded in the Clark County Recorder's Office as Instrument No. 20061127-0002922 ("DOT").

5. On or about September 14, 2011, the DOT was assigned to The Bank of New York Mellon FKA The Bank of New York, as Trustee for the Certificate Holders of CWALT, Inc., Alternative Loan Trust 2006 J-8, Mortgage Pass-Through Certificates, Series 2006-J8 ("BNYM"), via an Assignment of DOT recorded in the Clark County Recorder's Office as Instrument No. 20110919-0000030.

6. After the Borrower defaulted on her obligations to the HOA, the HOA retained Nevada Association Services, Inc. ("NAS") to collect the delinquency.

7. On October 27, 2010, NAS, on behalf of the HOA, recorded a Notice of Delinquent Assessment Lien in the Clark County Recorder's Office as Instrument No. 20101027-0002037.

8. On December 21, 2010, NAS, on behalf of the HOA, recorded a Notice of Default and Election to Sell Under Homeowners Association Lien ("NOD") in the Clark County Recorder's Office as Instrument No. 20101221-0000548.

9. After it received the NOD, Bank of America, N.A. ("BANA"), who serviced the loan secured by the DOT and was the predecessor to BNYM, retained Miles, Bauer, Bergstrom & Winters LLP ("Miles Bauer") to obtain information from the HOA as to the association lien and the superpriority amount of same.

10. On February 22, 2011, Rock Jung, Esq. ("Jung"), an attorney for Miles Bauer, sent a copy of its standard letter seeking to determine the nine-month super-priority lien amount (the "Miles Bauer Letter") to NAS.

11. NAS responded on or about March 12, 2011, providing Jung an accounting ledger showing the total amount the Borrower owed the HOA broken down by categories, including amounts due for "monthly assessments." *See Joint Trial Exhibit 9, bate 134* (hereinafter "HOA Ledger").

12. On or about April 1, 2011, Miles Bauer sent a check for $486.00 to NAS enclosed with a cover letter explaining that the check was equal to "9 months worth of delinquent assessments" and intended to satisfy BANA's, as the predecessor to BNYM, "obligations to the HOA as holder of the deed of trust against the Property." *See Joint Trial Exhibit 9, bates 137-139.*

13. However, Miles Bauer miscalculated the superpriority amount as the actual nine-month superpriority amount was $540.00. *See Recorder's Transcript of Hearing Re: Bench Trial-Day 3 (Decision) Page 7, 14-16; see also Joint Trial Exhibit 9, bate 134; see also Joint Trial Exhibit 11, bate 215.* Thus, the Miles Bauer check in the amount of $486.00 did not satisfy the actual superpriority amount of $540.00. See *Recorder's Transcript of Hearing Re: Bench Trial-Day 3 (Decision) Page 8, 13-15; see also Joint Trial Exhibit 9, bate 134; see also Joint Trial Exhibit 11, bate 215.*

14. Thereafter, neither Miles Bauer nor BANA nor BNYM did anything to satisfy the superpriority portion of the HOA lien, and on April 1, 2013, NAS recorded a Notice of Foreclosure Sale in the Clark County Recorder's Office.

15. On June 7, 2013, NAS conducted the foreclosure sale wherein Underwood Partners, LLC ("Underwood"), as the highest bidder in the amount of $30,000.00, purchased the Subject Property.

16. Underwood then conveyed its interest in the Subject Property to NV Eagles.

17. There was no valid tender of the superpriority portion of the HOA lien in the amount of $540.00 by BANA, Miles Bauer, BNYM or any party prior to the HOA foreclosure sale conducted on June 7, 2013.

18. There was no evidence of any kind of fraud, unfairness or oppression that accounted for and/or brought about the purchase price of the Subject Property at the foreclosure sale and/or affecting the foreclosure sale of the Subject Property.

19. Furthermore, notwithstanding the fact that the Miles Bauer check was for an amount less than the superpriority amount, BANA and/or BNYM had adequate time and notice to correct this error prior to the foreclosure sale. BANA and/or BNYM did nothing.

CONCLUSIONS OF LAW

1. As confirmed by the Nevada Supreme Court in its *SFR* Decision, a foreclosure sale that was conducted pursuant to NRS Chapter 116 extinguished BNYM and/or its predecessor's deed of trust encumbering the Subject Property as a matter of Nevada law.

2. The Nevada Supreme Court in its *SFR* and *Shadow Wood* Decisions held and confirmed that the recitals as contained in the Foreclosure Deed serve as conclusive proof that the statutory requirements have been complied with as to the notice provisions of NRS 116.31162 through 116.31168, which concern the occurrence of default, notice, and publication of the foreclosure sale. *See SFR* at 411-412.

3. Therefore, the conclusiveness of the recitals as contained in the Foreclosure Deed can only be challenged via post-sale equitable claims supported by a finding of unfairness of the sale. *See Shadow Wood* at 1110-1112.

4. The Nevada Supreme Court in its *PNC* Order in the case of *PNC Bank National Association v. Saticoy Bay LLC Series 9320 MT. Cash Ave. UT 103,* Nevada Supreme Court case no. 69595 (Nev. May 25, 2017 (unpublished Order of Affirmance) held that the amounts as stated in

the pre-sale notices constituted prima facie evidence that a HOA was foreclosing on its superpriority lien comprised of monthly assessments pursuant to NRS Chapter 116.

5. In *Bank of America, N.A. v. SFR Investments Pool 1, LLC.*, 134 Nev. Adv. Op. 72, 427 P.3d 113 (Nev. 2018) ("*Diamond Spur*"), the Nevada Supreme Court expressly held that a "[v]alid tender requires payment in full." *Id.*

6. Under NRS 116.31162(b), the superpriority portion of the Association's lien is comprised of nine months of common assessments and charges for nuisance-abatement and maintenance under NRS 116.310312. In this case, the evidence absolutely and conclusively confirmed that the superpriority portion of the HOA lien was in the amount of $540.00.

7. The Nevada Supreme Court, in *Diamond Spur* established that a "lien may be lost by …payment or tender of the proper amount of the debt secured by the lien." *Id.* Additionally, the Nevada Supreme Court in *Diamond Spur* held that a "[v]alid tender requires payment in full." *Id.* Furthermore, as recently as January 23, 2020, the Nevada Supreme Court confirmed its holding in *Diamond Spur* in its unpublished Order in *Nationstar v. 2016 Marathon Keys Trust*, case # 75967 (unpublished Order, January 23, 2020) ("*Marathon*"), that again confirmed that "[v]alid tender requires payment in full." *Id.*

8. In Nevada, "[t]he burden of demonstrating that the delinquency was cured presale, rendering the sale void, [is] on the party challenging the foreclosure…" *Resources Group, LLC v. Nevada Association Services, Inc.*, 437 P.3d 154, 156 (Nev. 2019) ("*Resources Group*"). Further, *Resources Group* established 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." *Id.*, 437 P.3d at 159.

9. Here, BNYM failed to carry its burden as the check delivered to NAS by Miles Bauer did not satisfy the superpriority amount of the HOA lien. Thus, under Nevada law, the tender

was invalid and insufficient to cure the superpriority portion of the HOA lien. *See Diamond Spur, Resources Group and Marathon.*

10. The Nevada Supreme Court in the case of *Nationstar Mortgage, LLC. v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. Adv. Op. 91 (November 22, 2017), held that the commercial reasonableness standard, which derives from Article 9 of the Uniform Commercial Code, has no applicability in the context of an HOA foreclosure involving the sale of real property. The Nevada Supreme Court, therefore, confirmed its holding in *Shadow Wood* as to the long-standing rule 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." *Shadow Wood* at 1111 (quoting *Golden v. Tomiyasu*, 79 Nev. 503, 514, 387 P.2d 989, 995 (1963).

11. The evidence provided by BNYM at trial was insufficient to establish that the foreclosure sale of the property was commercially unreasonable under *Golden v. Tomiyasu*, 79 Nev. 503, 387 P.2d 989 (1963), which requires some proof of some element of fraud, unfairness or oppression as accounts for/brings about a grossly inadequate price. Nevada law does not permit a Court to invalidate a sale solely on the basis of price. Thus, the HOA foreclosure sale of the Subject Property was commercially reasonable as a matter of law. BNYM provided no evidence of any kind to show a nexus between any alleged act of fraud, unfairness or oppression that accounted for/brought about the sale price of the Subject Property and/or affected the foreclosure sale.

THEREFORE, PURSUANT TO THE ABOVE FINDINGS OF FACT AND CONCLUSIONS OF LAW, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the deed of trust and any assignments thereof, as liens on the Subject Property are hereby cancelled and without legal force or effect, and do not convey any right, title or interest in and to the Subject Property to BNYM and/or its predecessors in interest and/or its assignees.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that BNYM and/or its predecessors in interest and/or assignees do not have any estate, right, title, lien or interest in or to the Subject Property or any part of the Subject Property.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that there is no just reason for delay of entry of final judgment and final judgment is so entered pursuant to Rule 54 of the Nevada Rules of Civil Procedure.

DONE and DATED this 30th day of April, 2020.

DISTRICT COURT JUDGE
ROB BARE

HGL

Respectfully submitted by:

HONG & HONG LAW OFFICE

/s/ Joseph Y. Hong
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

MELISSA LIEBERMAN, an individual, on behalf of herself and all others similarly situated; Plaintiff, vs. MADEIRA CANYON COMMUNITY ASSOCIATION, *et al.*, Defendants.	Case No.: A-13-685203-C Dept. No.: XXXII
And related claims.	

NOTICE OF ENTRY OF FINDINGS OF FACTS, CONCLUSIONS OF LAW AND JUDGMENT

TO: ALL PARTIES AND THEIR COUNSEL OF RECORD:

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YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that FINDINGS OF FACTS, CONCLUSIONS OF LAW AND JUDGMENT was entered in the above-entitled matter, and filed on the 30th day of April, 2020, a copy of which is attached hereto.

DATED this 30th day of April, 2020.

HONG & HONG LAW OFFICE

/s/ Joseph Y. Hong
JOSEPH Y. HONG, ESQ.
State Bar No. 005995
1980 Festival Plaza Drive, Suite 650
Las Vegas, Nevada 89135
Attorney for NV Eagles, LLC

CERTIFICATE OF ELECTRONIC SERVICE

Pursuant to NRCP 5(b)(2)(D), I certify that I am an employee of Joseph Y. Hong, Esq., and that on this 30th day of April, 2020, I served a true and correct copy of the foregoing **NOTICE OF ENTRY OF FINDINGS OF FACTS, CONCLUSIONS OF LAW AND JUDGMENT** by electronic transmission through the Eighth Judicial District Court EFP system (Odyssey eFileNV) pursuant to NEFCR 9 upon each party in this case who is registered as an electronic case filing user with the Clerk.

By */s/ Debra L. Batesel*
An employee of Joseph Y. Hong, Esq.

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

MELISSA LIEBERMAN, an individual, on behalf of herself and all others similarly situated; Plaintiff, vs. MADEIRA CANYON COMMUNITY ASSOCIATION, *et al.*, Defendants.	Case No.: A-13-685203-C Dept. No.: XXXII
And related claims.	

FINDINGS OF FACTS, CONCLUSIONS OF LAW AND JUDGMENT

This matter having come on for Bench Trial on January 14 and 15, 2020, and for the Court's Decision hearing on February 5, 2020; the Court having considered the evidence; and good cause appearing therefor, enters the following Findings of Facts, Conclusions of Law and Judgment.

FINDINGS OF FACTS

1. This case involves a real property commonly known as 2184 Pont National Drive, Henderson, Nevada 89044, APN 190-20-311-033 ("Subject Property").

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3. On or about November 20, 2006, Melissa Lieberman ("Borrower") executed a promissory note for $511,576.00 ("Note") in favor of Pulte Mortgage, LLC.

4. The Note was secured by a deed of trust recorded in the Clark County Recorder's Office as Instrument No. 20061127-0002922 ("DOT").

5. On or about September 14, 2011, the DOT was assigned to The Bank of New York Mellon FKA The Bank of New York, as Trustee for the Certificate Holders of CWALT, Inc., Alternative Loan Trust 2006 J-8, Mortgage Pass-Through Certificates, Series 2006-J8 ("BNYM"), via an Assignment of DOT recorded in the Clark County Recorder's Office as Instrument No. 20110919-0000030.

6. After the Borrower defaulted on her obligations to the HOA, the HOA retained Nevada Association Services, Inc. ("NAS") to collect the delinquency.

7. On October 27, 2010, NAS, on behalf of the HOA, recorded a Notice of Delinquent Assessment Lien in the Clark County Recorder's Office as Instrument No. 20101027-0002037.

8. On December 21, 2010, NAS, on behalf of the HOA, recorded a Notice of Default and Election to Sell Under Homeowners Association Lien ("NOD") in the Clark County Recorder's Office as Instrument No. 20101221-0000548.

9. After it received the NOD, Bank of America, N.A. ("BANA"), who serviced the loan secured by the DOT and was the predecessor to BNYM, retained Miles, Bauer, Bergstrom & Winters LLP ("Miles Bauer") to obtain information from the HOA as to the association lien and the superpriority amount of same.

10. On February 22, 2011, Rock Jung, Esq. ("Jung"), an attorney for Miles Bauer, sent a copy of its standard letter seeking to determine the nine-month super-priority lien amount (the "Miles Bauer Letter") to NAS.

11. NAS responded on or about March 12, 2011, providing Jung an accounting ledger showing the total amount the Borrower owed the HOA broken down by categories, including amounts due for "monthly assessments." *See Joint Trial Exhibit 9, bate 134* (hereinafter "HOA Ledger").

12. On or about April 1, 2011, Miles Bauer sent a check for $486.00 to NAS enclosed with a cover letter explaining that the check was equal to "9 months worth of delinquent assessments" and intended to satisfy BANA's, as the predecessor to BNYM, "obligations to the HOA as holder of the deed of trust against the Property." *See Joint Trial Exhibit 9, bates 137-139.*

13. However, Miles Bauer miscalculated the superpriority amount as the actual nine-month superpriority amount was $540.00. *See Recorder's Transcript of Hearing Re: Bench Trial-Day 3 (Decision) Page 7, 14-16; see also Joint Trial Exhibit 9, bate 134; see also Joint Trial Exhibit 11, bate 215.* Thus, the Miles Bauer check in the amount of $486.00 did not satisfy the actual superpriority amount of $540.00. See *Recorder's Transcript of Hearing Re: Bench Trial-Day 3 (Decision) Page 8, 13-15; see also Joint Trial Exhibit 9, bate 134; see also Joint Trial Exhibit 11, bate 215.*

14. Thereafter, neither Miles Bauer nor BANA nor BNYM did anything to satisfy the superpriority portion of the HOA lien, and on April 1, 2013, NAS recorded a Notice of Foreclosure Sale in the Clark County Recorder's Office.

15. On June 7, 2013, NAS conducted the foreclosure sale wherein Underwood Partners, LLC ("Underwood"), as the highest bidder in the amount of $30,000.00, purchased the Subject Property.

16. Underwood then conveyed its interest in the Subject Property to NV Eagles.

17. There was no valid tender of the superpriority portion of the HOA lien in the amount of $540.00 by BANA, Miles Bauer, BNYM or any party prior to the HOA foreclosure sale conducted on June 7, 2013.

18. There was no evidence of any kind of fraud, unfairness or oppression that accounted for and/or brought about the purchase price of the Subject Property at the foreclosure sale and/or affecting the foreclosure sale of the Subject Property.

19. Furthermore, notwithstanding the fact that the Miles Bauer check was for an amount less than the superpriority amount, BANA and/or BNYM had adequate time and notice to correct this error prior to the foreclosure sale. BANA and/or BNYM did nothing.

CONCLUSIONS OF LAW

1. As confirmed by the Nevada Supreme Court in its *SFR* Decision, a foreclosure sale that was conducted pursuant to NRS Chapter 116 extinguished BNYM and/or its predecessor's deed of trust encumbering the Subject Property as a matter of Nevada law.

2. The Nevada Supreme Court in its *SFR* and *Shadow Wood* Decisions held and confirmed that the recitals as contained in the Foreclosure Deed serve as conclusive proof that the statutory requirements have been complied with as to the notice provisions of NRS 116.31162 through 116.31168, which concern the occurrence of default, notice, and publication of the foreclosure sale. *See SFR* at 411-412.

3. Therefore, the conclusiveness of the recitals as contained in the Foreclosure Deed can only be challenged via post-sale equitable claims supported by a finding of unfairness of the sale. *See Shadow Wood* at 1110-1112.

4. The Nevada Supreme Court in its *PNC* Order in the case of *PNC Bank National Association v. Saticoy Bay LLC Series 9320 MT. Cash Ave. UT 103,* Nevada Supreme Court case no. 69595 (Nev. May 25, 2017 (unpublished Order of Affirmance) held that the amounts as stated in

the pre-sale notices constituted prima facie evidence that a HOA was foreclosing on its superpriority lien comprised of monthly assessments pursuant to NRS Chapter 116.

5. In *Bank of America, N.A. v. SFR Investments Pool 1, LLC.*, 134 Nev. Adv. Op. 72, 427 P.3d 113 (Nev. 2018) ("*Diamond Spur*"), the Nevada Supreme Court expressly held that a "[v]alid tender requires payment in full." *Id.*

6. Under NRS 116.31162(b), the superpriority portion of the Association's lien is comprised of nine months of common assessments and charges for nuisance-abatement and maintenance under NRS 116.310312. In this case, the evidence absolutely and conclusively confirmed that the superpriority portion of the HOA lien was in the amount of $540.00.

7. The Nevada Supreme Court, in *Diamond Spur* established that a "lien may be lost by ...payment or tender of the proper amount of the debt secured by the lien." *Id.* Additionally, the Nevada Supreme Court in *Diamond Spur* held that a "[v]alid tender requires payment in full." *Id.* Furthermore, as recently as January 23, 2020, the Nevada Supreme Court confirmed its holding in *Diamond Spur* in its unpublished Order in *Nationstar v. 2016 Marathon Keys Trust*, case # 75967 (unpublished Order, January 23, 2020) ("*Marathon*"), that again confirmed that "[v]alid tender requires payment in full." *Id.*

8. In Nevada, "[t]he burden of demonstrating that the delinquency was cured presale, rendering the sale void, [is] on the party challenging the foreclosure..." *Resources Group, LLC v. Nevada Association Services, Inc.*, 437 P.3d 154, 156 (Nev. 2019) ("*Resources Group*"). Further, *Resources Group* established 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." *Id.*, 437 P.3d at 159.

9. Here, BNYM failed to carry its burden as the check delivered to NAS by Miles Bauer did not satisfy the superpriority amount of the HOA lien. Thus, under Nevada law, the tender

was invalid and insufficient to cure the superpriority portion of the HOA lien. *See Diamond Spur, Resources Group and Marathon.*

10. The Nevada Supreme Court in the case of *Nationstar Mortgage, LLC. v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. Adv. Op. 91 (November 22, 2017), held that the commercial reasonableness standard, which derives from Article 9 of the Uniform Commercial Code, has no applicability in the context of an HOA foreclosure involving the sale of real property. The Nevada Supreme Court, therefore, confirmed its holding in *Shadow Wood* as to the long-standing rule 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." *Shadow Wood* at 1111 (quoting *Golden v. Tomiyasu*, 79 Nev. 503, 514, 387 P.2d 989, 995 (1963).

11. The evidence provided by BNYM at trial was insufficient to establish that the foreclosure sale of the property was commercially unreasonable under *Golden v. Tomiyasu*, 79 Nev. 503, 387 P.2d 989 (1963), which requires some proof of some element of fraud, unfairness or oppression as accounts for/brings about a grossly inadequate price. Nevada law does not permit a Court to invalidate a sale solely on the basis of price. Thus, the HOA foreclosure sale of the Subject Property was commercially reasonable as a matter of law. BNYM provided no evidence of any kind to show a nexus between any alleged act of fraud, unfairness or oppression that accounted for/brought about the sale price of the Subject Property and/or affected the foreclosure sale.

THEREFORE, PURSUANT TO THE ABOVE FINDINGS OF FACT AND CONCLUSIONS OF LAW, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the deed of trust and any assignments thereof, as liens on the Subject Property are hereby cancelled and without legal force or effect, and do not convey any right, title or interest in and to the Subject Property to BNYM and/or its predecessors in interest and/or its assignees.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that BNYM and/or its predecessors in interest and/or assignees do not have any estate, right, title, lien or interest in or to the Subject Property or any part of the Subject Property.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that there is no just reason for delay of entry of final judgment and final judgment is so entered pursuant to Rule 54 of the Nevada Rules of Civil Procedure.

DONE and DATED this 30th day of April, 2020.

DISTRICT COURT JUDGE
ROB BARE

HGL

Respectfully submitted by:

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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 NOTICE OF APPEAL

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Notice is hereby given that 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 and Bank of America, N.A. appeal to the Nevada Supreme Court from this Court's (1) findings of fact and conclusions of law and judgment entered on April 30, 2020, for which a notice of entry was entered on the same day; and (2) all interlocutory orders incorporated therein.

DATED this 27th day of May, 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 27th day of May, 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 NOTICE OF APPEAL**, 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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Debbie Batesel dbhonglaw@hotmail.com
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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,

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 CASE APPEAL STATEMENT

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**) (collectively **appellants**) submit their case appeal statement pursuant to NRAP 3(f)(3).

…

…

1. The appellants filing this case appeal statement are 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 and Bank of America, N.A..

2. The orders appealed are Judge Bare's (1) findings of fact and conclusions of law and judgment entered on April 30, 2020, for which a notice of entry was entered on the same day; and (2) all interlocutory orders incorporated therein.

3. Counsel for appellants are Darren T. Brenner, Esq. and Jamie K. Combs, Esq. of AKERMAN LLP, 1635 Village Center Circle, Suite 200, Las Vegas, Nevada 89134.

4. Trial counsel for respondent NV Eagles LLC is Joseph Y. Hong, Esq. of HONG & HONG LAW OFFICE, 1980 Festival Plaza Drive, Las Vegas, Nevada 89135. Appellants are not aware whether trial counsel for respondent will also act as its appellate counsel.

5. Counsel for appellants are licensed to practice in Nevada. Trial counsel for respondent is licensed to practice law in Nevada.

6. Appellants are represented by retained counsel in the district court.

7. Appellants are represented by retained counsel on appeal.

8. Appellants were not granted leave to proceed *in forma pauperis* by the district court.

9. The date proceedings commenced in the district court was June 16, 2013.

10. In this consolidated action, respondent asserted quiet title and cancellation of instruments claims against respondents, contending that it owns property located at 2184 Pont National Drive, Henderson, Nevada 89044 (**property**), free and clear of BoNYM's deed of trust after respondent's predecessor-in-interest, Underwood Partners, LLC, purchased the property at a foreclosure sale conducted by Nevada Association Services, Inc. (**NAS**) on behalf of Madeira Canyon Homeowners Association (the **HOA**). BoNYM asserted quiet title and declaratory relief cross-claims against respondent, contending the deed of trust survived because BANA's counsel at Miles, Bauer, Bergstrom & Winters, LLP tendered payment for what it calculated to be the superpriority amount of the HOA's lien, even though it knew NAS would reject the tender, before NAS's foreclosure sale. Respondent never answered BoNYM's cross-claims. Following a bench trial, the district court entered

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judgment, certified as final under NRCP 54(b), in respondent's favor, holding respondent took title to the property free and clear of BoNYM's deed of trust.

11. This case has not been the subject of a previous appeal.

12. This appeal does not involve child custody or visitation.

13. Appellants are willing to discuss settlement with respondent.

DATED this 27th day of May, 2020.

AKERMAN LLP

/s/ Jamie K. Combs
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on this 27th day of May, 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 CASE APPEAL STATEMENT**, 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