

**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

Electronically Filed  
Sep 14 2022 03:53 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**APPEAL**

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

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**APPELLANT'S APPENDIX, VOLUME V**

---

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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*

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DATED this 14<sup>th</sup> day of September, 2022.

**AKERMAN LLP**

*/s/ Lilith V. Xara*

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### **CERTIFICATE OF SERVICE**

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

IN THE SUPREME COURT OF THE STATE OF NEVADA

BANK OF AMERICA, N.A.; AND THE BANK  
OF NEW YORK MELLON, F/K/A 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,  
vs.  
NV EAGLES, LLC,  
Respondent.

Supreme Court No. 81239  
District Court Case No. A685203

FILED

DEC 16 2021

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.  
Receipt for Remittitur.

DATE: November 30, 2021

Elizabeth A. Brown, Clerk of Court

By: Rory Wunsch  
Deputy Clerk

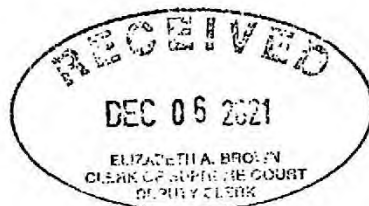
cc (without enclosures):  
Chief Judge, Eighth Judicial District Court  
Akerman LLP/Las Vegas  
The Wright Law Group

RECEIPT FOR REMITTITUR

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the  
REMITTITUR issued in the above-entitled cause, on DEC - 1, 2021.

*[Signature]*  
Deputy District Court Clerk

RECEIVED  
APPEALS  
DEC - 1 2021  
CLERK OF THE COURT



1

21-34054

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

BANK OF AMERICA, N.A.; AND THE BANK  
OF NEW YORK MELLON, F/K/A THE BANK  
OF NEW YORK, AS TRUSTEE FOR THE  
CERTIFICATEHOLDERS OF CWALT, INC.,  
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Appellants,  
vs.  
NV EAGLES, LLC,  
Respondent.

**Supreme Court No. 81239**  
District Court Case No. A685203

**CLERK'S CERTIFICATE**

STATE OF NEVADA, ss.

I, Elizabeth A. Brown, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

**JUDGMENT**

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"We vacate the district court's judgement and remand for the district court to consider the tender futility argument in light of Perla Trust."

Judgment, as quoted above, entered this 16th day of June, 2021.

**JUDGMENT**

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"Rehearing Denied"

Judgment, as quoted above, entered this 17th day of September, 2021.

### **JUDGMENT**

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

“Order Denying En Banc Reconsideration”

Judgment, as quoted above, entered this 28th day of October, 2021.

IN WITNESS WHEREOF, I have subscribed  
my name and affixed the seal of the Supreme  
Court at my Office in Carson City, Nevada this  
November 30, 2021.

Elizabeth A. Brown, Supreme Court Clerk

By: Rory Wunsch  
Deputy Clerk



**DISTRICT COURT  
CLARK COUNTY, NEVADA**

Melissa Lieberman, Plaintiff(s)  
vs.  
Mediera Canyon Community  
Association, Defendant(s)

CASE NO.: A-13-685203-C  
Department 29

Hearing Date: December 15, 2021  
Hearing Time: 9:00 a.m.

**ORDER SCHEDULING STATUS CHECK**

**YOU ARE HEREBY ORDERED TO APPEAR** in District Court, 200 Lewis Avenue, Department 29, on December 15, 2021, at 9:00 a.m., to give status regarding this matter. Appearances are mandatory.

DATED this 10th day of December, 2021.



David M Jones  
DISTRICT COURT JUDGE

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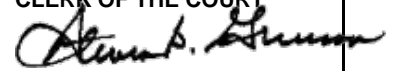
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*Attorney for Defendant/Counter-claimant  
NV EAGLES, LLC*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

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

Plaintiff,

vs.

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 I through X, inclusive; ROE  
CORPORATIONS, I through X, inclusive,

Defendants.

CASE NO. A-13-685203-C

DEPT. NO. XXXII

**Hearing: February 10, 2022**

**Time: 9:00 a.m.**

AND RELATED MATTERS

**DEFENDANT/COUNTERCLAIMANT NV EAGLES, LLC'S  
POST-REMANDPOINTS AND AUTHORITIES REGARDING FUTILITY DEFENSE**

COMES NOW Defendant/Counterclaimant, NV EAGLES, LLC, (hereinafter "EAGLES")  
by and through its counsel of record, JOHN HENRY WRIGHT, ESQ., of THE WRIGHT LAW  
GROUP, P.C., hereby submits its post-remand points and authorities regarding the Bak of  
America's futility of tender defense.

This brief is submitted in accordance with the order of the Court on December 15, 2021,  
wherein the Court directed both EAGLES and Bank of America, N.A., to contemporaneously

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





1 submit legal briefs regarding the bank's futility of tender defense and the effect, if any, that 7510  
2 *Perla Del Mar Ave. Tr. v. Bank of America, N.A.* ("Perla Del Mar"), 136 Nev. 62, 458 P.3d 348  
3 (2020) has on the facts of this case, and is based upon the points and authorities contained herein,  
4 the exhibits attached hereto, the records and files of this case and any argument adduced at hearing  
5 hereon.

6 Dated this 21<sup>st</sup> day of January, 2022.

7 **Respectfully submitted by:**  
8 THE WRIGHT LAW GROUP, P.C.

9 /s/ John Henry Wright  
10 JOHN HENRY WRIGHT, ESQ.  
11 Nevada Bar No. 6182  
12 THE WRIGHT LAW GROUP, P.C.  
13 2340 Paseo Del Prado, Suite D-305  
14 Las Vegas, Nevada 89102  
15 Telephone: (702) 405-0001  
16 Facsimile: (702) 405-8454

17 *Attorney for Defendant/Counter-claimant*  
18 NV EAGLES, LLC

### 19 MEMORANDUM OF POINTS AND AUTHORITIES

#### 20 **I. Pertinent Facts as Determined by Judge Bare:**

21 In the lead up to an HOA foreclosure auction authorized pursuant to NRS 116, on behalf  
22 of the first deed of trust holder, on or about April 1, 2011, Miles Bauer, its counsel, sent a check  
23 for \$486.00 to NAS enclosed with a cover letter explaining that the check was equal to "9 months  
24 worth of delinquent assessments" and intended to satisfy BANA's, as the predecessor to BNYM,  
25 "obligations to the HOA as holder of the deed of trust against the Property." *See Joint Trial Exhibit*  
26 *9, bates 137-139.*

27 However, Miles Bauer miscalculated the super-priority amount as the actual nine-month  
28 super-priority 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, bates 134; see also Joint Trial Exhibit*  
*11, bates 215.* Thus, the Miles Bauer check in the amount of \$486.00 did not satisfy the actual  
super-priority 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, bates 134; see also Joint Trial Exhibit 11,*



1 *bate 215. See also, Nevada Supreme Court Order of Remand at p.2, establishing tender was*  
2 *insufficient, attached hereto as **Exhibit 1**.*

3       Thereafter, neither Miles Bauer nor BANA nor BNYM did anything further to attempt to  
4 satisfy the super-priority portion of the HOA lien, and on April 1, 2013, NAS recorded a Notice  
5 of Foreclosure Sale in the Clark County Recorder's Office.

6       On June 7, 2013, NAS conducted the foreclosure sale wherein Underwood Partners, LLC  
7 ("Underwood"), as the highest bidder in the amount of \$30,000.00, purchased the Subject Property.

8       Underwood then conveyed its interest in the Subject Property to NV Eagles.

9       There was no valid tender of the super-priority portion of the HOA lien in the amount of  
10 \$540.00 by BANA, Miles Bauer, BNYM or any party prior to the HOA foreclosure sale conducted  
11 on June 7, 2013.

12       There was no evidence of any kind of fraud, unfairness or oppression that accounted for  
13 and/or brought about the purchase price of the Subject Property at the foreclosure sale and/or  
14 affecting the foreclosure sale of the Subject Property.

15       Furthermore, notwithstanding the fact that the Miles Bauer check was for an amount less  
16 than the super-priority amount, BANA and/or BNYM had adequate time and notice to correct this  
17 error prior to the foreclosure sale. BANA and/or BNYM did nothing.

18 (See Findings of Fact and Conclusions of Law at Finding of Fact #19, **Exhibit 2**.)

19 **II. Pertinent Conclusions of Law Reached by Judge Bare:**

20       The Nevada Supreme Court, in *Bank of America, N.A. v. SFR Investments Pool 1*, 427 P.3d  
21 113 (2018) ("*Diamond Spur*") established that a "lien may be lost by...payment or tender of the  
22 proper amount of the debt secured by the lien." *id.* Furthermore, as recently as January 23, 2020,  
23 the Nevada Supreme Court confirmed its holding in *Diamond Spur* in its published Order in  
24 *Nationstar v. 2016 Marathon Keys Trust*, case # 75967 (unpublished Order, January 23, 2020)  
25 ("Marathon"), that again confirmed that "[v]alid tender requires payment in full. *Id.*

26       In Nevada, "[t]he burden of demonstrating that the delinquency was cured pre-sale,  
27 rendering the sale void, [is] on the party challenging the foreclosure..." *Resources Group, LLC v.*  
28 *Nevada Association Services, Inc.*, 437 P.3d 154, 156 (Nev. 2019) ("*Resources Group*"). Further,



1 *Resources Group* established that the party contesting the validity of the HOA’s foreclosure of its  
2 super-priority lien bears the burden of demonstrating that it tendered its “delinquency-curing  
3 check,” and whether it met the burden by proving that it “paid the delinquency amount in full prior  
4 to the sale.” *Id.*, 437 P.3d at 159.

5 Here, BNYM failed to carry its burden as the check delivered to NAS by Miles Bauer did  
6 not satisfy the super-priority amount of the HOA lien. Thus, under Nevada law, the tender was  
7 invalid and insufficient to cure the super-priority portion of the HOA lien. *See Diamond Spur,*  
8 *Resources Group and Marathon.*  
9 (*See also*, Exhibit 2 at Conclusion of Law #19)

10 **III. Pertinent Portions of The Nevada Supreme Court’s Order of Reversal and Remand:**

11 On May 27, 2021, Bank of New York Mellon filed a Notice of Appeal. On appeal a three justice  
12 panel found and ruled as follows:

13  
14 Initially, we agree with the district court’s conclusion that appellants’  
15 check was insufficient to constitute a valid tender because it did not satisfy  
16 the full amount of the superpriority portion of the lien. *Bank of Am., N.A. v.*  
17 *SFR Invs. Pool I, LLC*, 134 Nev. 604, 606, 427 P.3d 113, 117 (2018) (“Valid  
18 tender requires payment in full.”). However, appellants also argued below  
19 that their failure to submit valid tender should be excused because any tender  
20 attempt would have been futile. In support of that argument, they presented  
21 evidence—including testimony from a NAS employee and evidence of  
22 NAS’s testimony from previous cases—to show NAS had a “known business  
23 practice to systematically reject any check tendered for less than full lien  
24 amount.” *7510 Perla Del Mar Ave. Tr. v. Bank of Am., N.A. (Perla Trust)*,  
25 136 Nev. 62, 67, 458 P.3d 348, 351 (2020). Appellants also presented  
26 evidence that its counsel was aware of this policy when it remitted its check  
27 to NAS in an attempt to cure the superpriority default and preserve  
28 appellants’ deed of trust. The district court, however, made no findings  
regarding appellants’ futility argument. And the parties and the district court  
did not have the benefit of our opinion in *Perla Trust*, which addressed  
tender futility and evidence similar to that presented below, albeit without the  
failed tender. *See id.* At 67, 458 P.3d at 352. In these circumstances, we  
decline to consider the parties’ arguments with respect to the futility issue.  
*See 9352 Cransbill Tr. V. Wells Fargo Bank, N.A.*, 136 Nev. 76, 82, 459 P.3d  
227, 232, (2020) (“[T]his court will not address issues that the district court  
did not directly resolve.”). Instead, we vacate the district court’s judgment  
and remand for the district court to consider the tender futility argument in  
light of *Perla Trust*.

(Exhibit 1, emphasis added).

The Nevada Supreme Court declined to consider any arguments with respect to futility of  
tender because it was not addressed by Judge Bare. However, the Supreme Court did take notice,



1 and in fact agreed with Judge Bare, that the bank's check was insufficient to constitute a valid  
2 tender because it was not sufficient to cure the super-priority default.

3 Based on the remand by the Supreme Court, this Court has directed the parties to file  
4 supplemental briefs concerning the bank's futility defense in light of a failed tender and the  
5 possible application of 7510 *Perla Del Mar Ave. Tr. v. Bank of Am., N.A. (Perla Trust)*, 136 Nev.  
6 62, 67, 458 P.3d 348, 351 (2020) to the facts of this case.

7 **V. Argument:**

8 **A. *Perla Del Mar* is Inapplicable and Does Not Resurrect a Failed Tender in Light  
9 of *Diamond Spur*:**

10 The uncontroverted evidence in this case reveals that BANA actually made an ineffective  
11 tender that was insufficient to cure the super-priority default. To apply *Perla Del Mar* to this case  
12 would have the effect of making the exception now the rule regardless of whether or not a tender  
13 was made. The facts of this case simply do not meet the criteria for the application of *Perla Del*  
14 *Mar*.

15 The Nevada Supreme Court remanded this case in order for this Court to consider whether  
16 *Perla Del Mar* fits this factual scenario where an insufficient amount was actually tendered and  
17 rejected. This is a completely new and unique fact pattern to which no case directly applies  
18 because the Supreme Court has not ever considered it. This case presents facts wherein the district  
19 court has the opportunity to consider the reasoning behind the futility defense and the  
20 impracticability of applying *Perla Del Mar* in a rubber stamp manner. Once the reasoning behind  
21 the futility defense is considered, the answer becomes clear. The futility defense has no  
22 application where the facts clearly establish that the bank's actions or lack thereof were never  
23 influenced by a known policy of rejection.

24 Here, the evidence establishes that BANA fully intended to tender, did in fact tender, but  
25 made an inadequate tender that NAS had every right to reject. Applying a blanket defense and  
26 excusing the duty to tender would eviscerate the creditor's right to reject insufficient tenders in  
27 contradiction to *Diamond Spur* and *Resources* and set an unruly precedent whereby a theory based  
28 on arguments formulated a decade after the events took place, that was never in the contemplation



1 of the parties at the time of those events, becomes the rule. Reliance on the knowledge that the  
2 tender would be futile, if made, is a necessary component of the futility defense.

3 1. The Trial Court Determined That Rejection Was Proper Because The Tender Was  
4 Insufficient to Cure The Super-priority Default and The Supreme Court Agreed.

5 When rendering his decision in open court at the end the trial, Judge Bare actually made  
6 a factual finding that the reason for rejection was that the tender did not satisfy the entirety of the  
7 super- priority portion of the lien:

8 So, the bottom line, Mr. Garner, the reason why I think Mr. Hong's client  
9 does not take the property subject to the bank's lien is because as I look at it,  
10 the -- I'll just say it because I always say it the way I think it, I think Mr.  
11 Jung made a mistake. That's what I really think. And he, on behalf of the  
12 bank, sent the wrong amount, it was off by not a lot of money, but it was  
13 below what it needed to be. And, I think that mainly *Diamond Spur* sends a  
14 clear message that it has to be at least up to the minimum.

15 (Trial Transcript, day 3, at 4:19-5:1, emphasis added)

16 And so, I end up agreeing and I make a Finding of Fact that I agree with the  
17 Plaintiff's side of it that the actual nine-month superpriority assessment  
18 amount was 540. So, Miles Bauer sent a check for 486, which was less than  
19 that and so that's what happened.

20 (Trial Transcript, day 3, at 4:14-17, emphasis added)

21 That's not determinative of the whole case, but I want to make a finding that  
22 that is solid evidence that a primary reason for rejecting was that it wasn't a  
23 sufficient payment. Although, the Court, of course, does accept and knows  
24 it to be true, that there was a general pattern of rejecting these, anyway. But,  
25 here we do have affirmative evidence that a primary reason was it wasn't the  
26 right amount.

27 (Trial Transcript, day 3, at 8:12-18, emphasis added)

28 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.

(Trial Transcript, day 3, at 10:9-16)

Thus, the trial court actually found that the tender was rejected because it was insufficient  
to cure the super-priority default. The Nevada Supreme Court agreed: "Initially, we agree with the  
district court's conclusion that appellant's check was insufficient to constitute a valid tender  
because it did not satisfy the full amount of the super-priority portion of the lien" Order of Remand



1 at p.2. Rejection, in this case, was NOT based upon some policy of rejecting every tender that  
2 failed to pay the entire lien.

3 While the trial court did not have the benefit of *Perla Del Mar* or *Jessup 2*- it did have  
4 *Jessup 1* and considered it. The trial court considered the futility arguments and rejected them  
5 because of the fact that the case law has two different fact patterns: 1) invalid tender and thus the  
6 DOT was extinguished; or, 2) failure to tender because of a known policy of rejection rendering  
7 duty to tender relieved. We have fact pattern one in this case, a failed tender. The analysis ends  
8 here unless the court wishes to address the missing element of the futility exception, which is,  
9 reliance on the policy of rejection in deciding not to tender. Because if the analysis does not  
10 require reliance on the known policy of rejection in failing to tender, knowledge of the policy - an  
11 required element of the defense, has no impact on the transaction and is a meaningless requirement.  
12 Sound logic dictates that this is an absurd result. Reliance must be required to 1) create  
13 consistency between *Resources Group* and *Jessup*, and 2) to avoid a policy that has no impact on  
14 the parties' action or contemplation, ending up ruling the day - the proverbial tail wagging the dog.

15 Simply put, in order to give meaning to the element of the futility defense that the policy  
16 of rejection is known to obligor, the obligor must have relied upon the policy in failing to make  
17 the tender. Otherwise, there is no reason to require the obligor to have knowledge of the policy.  
18 If the policy existed, the tender would be rejected whether or not the policy was known to the  
19 debtor or not. This is the broader question. However, in this case, we should not have to get that  
20 deep into analysis- simply because the tender was insufficient and rightfully rejected. .

21 **B. *Perla Del Mar* Does Not Apply To The Facts of this Case - Diamond Spur**  
22 **Applies:**

23 As provided in *Resources Group*, the party contesting the validity of the HOA's foreclosure  
24 of its super-priority lien bears the burden of demonstrating that it tendered its "delinquency-curing  
25 checks" and that it paid the correct delinquency amount in full prior to the sale. *Resources Group*,  
26 437 P.3d 154, 159 (2019). *Resources Group* clearly and unequivocally sets forth that it is the  
27 bank's burden to show that the super-priority component of the HOA lien, was paid in full. Thus,  
28 the trial court made the correct finding.





1           *Perla Del Mar* confirms *Resources Group*, “[w]e conclude that an offer to pay the super-  
2 priority amount in the future once that amount is determined, does not constitute tender sufficient  
3 to preserve the first deed of trust...” *Perla Del Mar*, 136 Nev. Adv. Op. 6 at page 2. (emphasis  
4 added). What *Perla Del Mar* actually does is create a very fact specific carve out: “[w]e further  
5 conclude, however, that formal tender is excused when evidence shows that the party entitled to  
6 payment had a known policy of rejecting such payments.” *Id.* The Supreme Court expressly points  
7 out that “excused tender” is based on the specific facts and specific evidence. *Id.* The facts in  
8 *Perla Del Mar* and the instant case are far from similar.

9           Reliance on the “futility” defense, an affirmative defense, requires the bank to establish  
10 that futility is the reason Miles Bauer did not tender. There must be a nexus between the  
11 “knowing” and the inaction on the part of Miles Bauer. Thus, futility cannot be applicable if Miles  
12 Bauer actually tendered. *Perla Del Mar* simply does not apply here.

13           1.       There Can Be No Futility Defense Without a Showing of Reliance on a  
14                   Policy of Rejection:

15           The bank must demonstrate a “known” policy, upon which the tendering party was aware  
16 before tender will be excused. Inherent in the requirement that the creditor “had a known policy”  
17 of rejection are two elements that must be proven by the bank. The use of the word “had” means  
18 that the policy was in existence at the time that the tender was due. “Known” means that the policy  
19 was understood by person withholding tender. Why does the Court require that the person  
20 withholding tender to have known that the creditor had a policy of rejecting tender? The only  
21 logical explanation is to require the person withholding tender to prove that the *reason* it withheld  
22 tender was *because* it knew tendering payment would be rejected and thus the act was futile. The  
23 law does not make one engage in futile acts. The law also does not reward those who fail to protect  
24 themselves with windfalls by uncovering facts years later of which they never relied. To do so  
25 would be to relieve one party of its duty to act in good faith, encourage bad behaviour, breaches  
26 or tortious conduct in the hopes of later redeeming oneself through protracted litigation or chance.  
27 Clearly, the reason to require proof that the creditor “had a known policy” is to require the one  
28 claiming futility to prove *reliance* on the belief that making payment would be futile. This, the  
bank has failed to do in this case.



1           **C.     BANA Should Be Required to Show Reliance on a Rejection Policy to**  
2           **Establish Futility and Excused Tender.**

3           Applying *Perla Del Mar* to cases where tender was actually made, is making the exception  
4           the rule. While the Supreme Court states the policy has to be known by the obligor, the Supreme  
5           Court has never explained why that “knowledge” is an element. The only logical reason is because  
6           the obligor would have to had relied on that knowledge in not tendering. .

7           It is implicit when establishing a rule which requires knowledge of a policy that in fact that  
8           knowledge had some role in why the tender was not made. Otherwise, the knowledge element has  
9           no useful purpose in the analysis and it should be removed from same.

10           Therefore the circumstances must be such as to show that the party was ready  
11           to make actual payment, and that he would have done so **but for** such refusal.  
12           "Actual tender of money is dispensed with if the debtor is willing and ready  
13           to pay, and about to produce it, **but is prevented by the creditor declaring**  
14           **he will not receive it.**" *McCalley v. Otey*, (Ala.) 42 Am. St. Rep. 87 (s. c. 12  
15           So 406).

16           *Shank v. Groff*, 32 S.E. 248, 249 (1898) (emphasis added). The Nevada Supreme Court has  
17           followed the same principles. In *Jessup I* the authorities cited by the Supreme Court in defining  
18           the futility defense all acknowledged that the obligor was prevented from tendering by the words  
19           or conduct of the creditor. In *Jessup I*, the Supreme Court stated:

20           Alternatively, the Bank contends that its obligation to tender the superpriority  
21           amount was excused because ACS stated in its fax that it would reject any  
22           such tender if attempted. We agree with the Bank, as this is generally  
23           accepted exception to the above-mentioned rule. *Guthrie v. Curnutt*, 417  
24           F.2d 764, 765 (10<sup>th</sup> Cir. 1969) (“[W]hen a party, able and willing to do so,  
25           offers to pay another a sum of money and is told that it will not be accepted,  
26           the offer is a tender without the money being produced.”); *In re Pickel*, 493  
27           B.R. 258, 271 (Bankr. D.N.M. 2013) (“Tender is unnecessary if the other  
28           party has stated that the amount due would not be accepted.”); *Mark Turner*  
              *Props., Inc. v. Evans*, 554 S.E.2d 492, 495 (Ga. 2001) (“Tender of an amount  
              due is waived when the party entitled to payment, by declaration or by  
              conduct, proclaims that, if tender of the amount due is made, and acceptance  
              of it will be refused.” (Internal quotation marks and alterations omitted)); 74  
              Am. Jur. 2d Tender § 4 (2012) (“A tender of an amount due is waived when  
              the party entitled to payment, by declaration or by conduct, proclaims that,  
              if tender of the amount due is made, it will not be accepted.”); 86 C.J.S.  
              Tender § 5 (2017) (same); cf. *Cladianos v. Friedhoff*, 69 Nev. 41, 45, 240  
              P.2d 208, 210 (1952) (“The law is clear . . . that any affirmative tender of  
              performance is excused when performance has in effect been prevented by  
              the other party to the contract.”).

              135 Nev. Adv. Op., at 7 (March 7, 2019). In *every* instance cited above, the obligating party would  
              have tendered but for the words or conduct of the other party - the known policy. Thus, there must



1 be a nexus between the alleged policy and failure to tender. But, there was a tender in this case,  
2 just in an insufficient amount.

3 It has long been held that there must be evidence that there was reliance on the futility by  
4 the party who claims waiver or futility. See *Shoebe's Ex'rs v. Carr*, 17 Va. 10, 1812 Va. Lexus,  
5 3 Munf. 10 (Va. 1812) (citing *Shank v. Groff*, 45 W.Va. 543, 32 S.E. 248). Thus, there must be  
6 a nexus between the alleged policy and failure to tender. This issue is akin to repudiation or  
7 anticipatory breach, wherein there must be evidence that the reason a party fails to perform is the  
8 positive and unequivocal, or definite and final, expression of an intent to not perform on the part  
9 of the other party and that the refusal to perform constituted an anticipatory breach, thereby  
10 obviating a need for the plaintiff to tender performance. *Yutzgaju v. Sztaberek*, 831 N.Y.S.2d 267,  
11 269 (2<sup>nd</sup> Dept. 2007). Again, the non-tendering party is required to show that repudiation by the  
12 other party was the reason it failed to tender.

13 It is BANA's burden to establish that NAS's policy was the reason it failed to tender a  
14 sufficient amount in this case. Not by chance. Not by BANA benefiting from its own neglect.  
15 This necessarily involves a requirement that BANA provide evidence that it actually relied on the  
16 policy in order to satisfy what is being defined as the *Perla Del Mar* standard. BANA supplied  
17 no such evidence and cannot, because it tendered. Thus, the exception cannot apply in a case  
18 where a failed tender was made and rightfully rejected.

19 **D. BANA And Miles Bauer Have Never Believed Tendering Would Be Futile and**  
20 **Could Not Have Relied on a "Known Policy" of Rejection:**

21 BANA's futility claims are simply arguments of sheer convenience contrived more than  
22 a decade after the events in this case. While BANA suggests that any amount would have been  
23 futile, the facts reveal that neither BANA nor Miles Bauer ever relied on any NAS policy when  
24 determining whether and in what amount to tender. It was BANA's policy to retain Miles Bauer  
25 to pay the super-priority amount of the lien, and BANA did in fact hire Miles Bauer to pay the  
26 super-priority lien in this case. It is readily apparent that during all relevant times when these HOA  
27 foreclosures were occurring, (between 2010 and the 2015 amendment to NRS § 116.3116, et seq.)  
28 no bank was saying it did not tender because the collection agents would not accept their tender.  
Rather, despite any collection agents' interpretation of NRS 116.3116, BANA and Miles Bauer



1 were, in fact, making thousands of tenders based on their own interpretation of the law. The trial  
2 testimony by both BANA's representative and the attorney from Miles Bauer bares these truths  
3 out. Diane Deloney, the representative from BANA, when asked what BANA's policies and  
4 procedures were with respect to HOA foreclosures testified as follows:

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

9 A. Yes.

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

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

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

18 A. I have.

19 Q. And, to what extent did bank of America follow that policy, practice,  
20 and procedure here?

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

22 (Trial Transcript, day 1, at 23:2-18)

23 There is nothing in this testimony to remotely suggest that BANA relied in any manner on  
24 the policies of any HOA or their respective collection agents during the relative times between  
25 2010 and 2013. Rather, BANA's policy was to retain Miles Bauer to pay the super-priority portion  
26 of the HOA lien. And, Miles Bauer did exactly that. The testimony of Rock Jung reveals that even  
27 though they knew of the likelihood that NAS might decline to accept anything less than an amount  
28 it believed was properly due, Miles Bauer followed its own policies and tendered what it believed  
to be adequate to satisfy the bank's obligations.

Rock Jung testified that while employed by Miles Bauer he handled as many as five to six  
thousand HOA foreclosure cases, most of which were dealing with NAS as the collection agent  
for the HOA, and despite NAS typically rejecting anything less than the full amount, BANA and  
Miles Bauer nonetheless tendered as many as twenty-five hundred (2500) checks:

Q. Okay. Was NAS a collection agent with whom you dealt often  
during you 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.



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

4 A. Yes, I did.

5 (Trial Transcript, day 2, at 18:11-17)

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

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

15 (Trial Transcript, day 2, at 21:14-23)

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

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

20 Q. Wow, that you were handling?

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

23 (Trial Transcript, day 2, at 25:9-15)

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

27 A. Correct, but just to be clear, when I testified that I handled  
28 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's 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.

(Trial Transcript, day 2, at 27:9 - 28:9)



1 This testimony clearly reveals that it did not matter in the least to Miles Bauer or BANA  
2 what NAS's policy was. BANA and Miles Bauer, as reflected in their letters, interpreted NRS  
3 116.3116 as they saw appropriate and that was the only thing they considered in determining  
4 whether or not, and in what amount, to tender. And, as noted, when it was in BANA's best  
5 interest, in their opinion, to tender the full amount, they did, and NAS accepted those payments.

6 However, in this case, the amount tendered by Miles Bauer was simply insufficient to cure  
7 the super-priority default.

8 **E. It Was Not NAS' Policy of Rejecting Anything Less Than The Full Amount of**  
9 **the Lien:**

10 On remand the Supreme Court made reference that appellants (BANA) also argued that  
11 their failure to submit a valid tender should be excused because any tender attempt would have  
12 been futile. The Supreme Court stated that in support of that argument, they (BANA) presented  
13 evidence----including the testimony from a NAS employee and evidence of NAS's testimony from  
14 previous cases—to show NAS had a “known business practice to systematically reject any check  
15 tendered for less than full lien amount.” This is not an accurate account of the testimony from  
16 NAS at trial. Rather, Susan Moses testified that it was the conditions stating that the amount  
17 tendered was sufficient to satisfy the bank's obligations to the HOA in full:

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

19 A. Yes.

20 Q. And, how was – how did NAS typically handle those deliveries?

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

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

24 A. No.

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

27 A. No.

28 Q. Okay. Was it usually someone at reception who would analyse 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 has 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?



1           **A.     It's the fact that there were conditions, that's what would – that's**  
2           **what would cause NAS to reject the payment were the conditions.**

3 (Trial Transcript, day 2, at 7:19 - 8:19)

4 Thus, the only policy on the part of NAS that would trigger a rejection of the tender was the  
5 conditions that Miles Bauer put on the acceptance of the payment. Specifically, the following:

6           Our client has authorized us to make payment to you in the amount of  
7 \$486.00 to satisfy its obligations to the HOA as a holder of the first deed of  
8 trust against the property. Thus, enclosed you will find a cashier's check  
9 made out to NEVADA ASSOCIATION SERVICES in the sum of \$486,  
10 which represents the maximum 9 months worth of delinquent assessments  
11 recoverable by an HOA. This is a non-negotiable amount and any  
12 endorsement of said cashier's check on your part, whether express or  
13 implied, will be strictly construed as an unconditional acceptance on your  
14 part of the facts stated herein and express agreement that BAC's financial  
15 obligations toward the HOA in regards to the real property located at 2184  
16 Pont National Drive have now been "paid in full."

17 (BANA 000138, attached hereto as *Exhibit 3*).

18           While BANA can undoubtedly point to an opinion from the Supreme Court stating that  
19 these conditions were reasonable if the amount tendered was the full amount required to cure the  
20 super-priority default, that is not the case here and BANA would be very hard-pressed to find a  
21 case that says offering an amount that is *less than* the amount due is sufficient to satisfy the bank's  
22 financial obligation to the HOA or that the same has been "paid in full." There is no case that  
23 supports the proposition that an insufficient tender, offered, accepted or rejected, would be  
24 considered payment in full, and the Supreme Court's remand in this instance does not remotely  
25 suggest otherwise.

26           **F.     A Mistaken Interpretation of the Law Does Not Excuse a Proper Tender:**

27           To the extent that the bank argues that it somehow relied on NAS's misinterpretation of  
28 NRS 116.3116, et seq., the Supreme Court has already rejected that argument. One's "mistaken  
belief regarding the foreclosure sale's effect could not alter the sale's actual legal effect,  
particularly when the super-priority portion of the HOA's lien was still in default at the time of the  
sale." *see Jessup I*, citing *Wells Fargo Bank, N.A. v. Radecki*, 134 Nev. 619, 426 P.3d 593 (Nev.  
2018)("subjective beliefs as to the effect of the foreclosure sale are irrelevant"). Moreover, any  
reliance on NAS's interpretation is contrary to Miles Bauer's own interpretation of the same  
statute. Miles Bauer is a law firm that interpreted the statute before writing its letters and making





1 it inadequate tender. Miles Bauer's interpretation of the law was clearly contrary to any  
2 interpretation on the part of NAS. Moreover, the Supreme Court has addressed this exact same  
3 scenario in *Jessup II* wherein the Supreme Court stated:

4 [T]he district court found that "Mr Jung understood that failure to pay the  
5 superpriority portion of the lien would result in the loss of his client's interest  
6 in the property." The implication behind this factual finding is that the  
7 district court determined it was unreasonable for Mr. Jung to abandon Miles  
Bauer's legal position regarding NRS 116.3116(2) (2009) based solely on  
ACS's September 2011 letter, and we are not persuaded that this finding was  
clearly erroneous.

8 (*Id.* at 3). Rock Jung is the same attorney that authored the letter to NAS and testified at trial in  
9 this case. Thus, there can be no reliance on NAS's misinterpretation of NRS 116.3116 upon which  
10 any policy could have been based.

11 Further, in *Citimortgage, Inc. v. K&P Homes, LLC*, Case No. 71016, (July 20, 2018)(*Order*  
12 *of Affirmance*)(Unpublished), Citimortgage argued that the HOA agent would have rejected any  
13 effort to tender the super-priority portion of the lien. Again, the Supreme Court rejected this  
14 argument, stating:

15 Citimortgage suggests that it "could not tender the superpriority portion"  
16 because the HOA's agent would have rejected it, but we disagree.  
CitiMortgage's belief that the HOA's agent would reject a tender did not  
17 preclude it from making a tender. If CitiMortgage had attempted to pay the  
superpriority portion and the HOA or its agent rejected the tender without  
18 sufficient justification, the tender would have discharged the superpriority  
portion of the lien.

19 *Id.* at 2

20 Thus, the Supreme Court has made it clear that reliance on ones' mere belief that the tender  
21 will not be accepted is not a reasonable justification for not making the tender in the full amount  
22 due.

23 **G. BANA Should Have Taken Measures To Protect Itself and Failed To.**

24 Even if *Perla Del Mar* could be applied in this case, the trial court rightfully noted that  
25 once the tender was rejected for being insufficient to cure the super-priority default, BANA should  
26 have taken additional steps to protect itself. The trial court stated in open court:

27 They should have sent the right amount, but even if they didn't, I'm going to  
28 cover something else I found and I -- it's going to, I think, be in *Jessup*,  
actually.





(Trial Transcript, day 3, at 10:16-18)

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 an insufficient tender.

(Trial Transcript, day 3, at 11:16-21)

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.

(Trial Transcript, day 3, at 12:20-25)

The trial court's opinion is consistent with the Supreme Court's prior holdings in *U.S. Bank v. SFR Investments Pool 1*, 334 P.3d 408 (2014) and *Shadow Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc.* 366 P.3d 1105 (2016).

In *U.S. Bank v. SFR Investments Pool 1*, 334 P.3d 408 (2014), the Supreme Court held that a bank must do more to prevent the loss of its security:

[N]othing appears to have stopped the U.S. Bank from determining the precise superpriority amount in advance of the sale or paying the entire amount and requesting a refund of the balance. *Cf. In re Medaglia*, 52 F.3d 451 455 (2d Cir. 1995) ("**It is well established that due process is not offended by requiring a person with actual, timely knowledge of an event that may affect a right to exercise due diligence and take necessary steps to preserve that right.**")

(*SFR* at 418, emphasis added). This holding was reinforced two years later in *Shadow Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc.* 366 P.3d 1105 (2016) wherein the bank actually tendered the nine months of assessments, but the agent for the association demanded additional assessments, fees and costs and the bank refused and did nothing more to prevent the sale of the property. The Supreme Court in *Shadow Wood* held that the bank is required to do more to protect its security interest:

Against these inconsistencies, however, must be weighed NYCB's (in)actions. The NOS was recorded on January 27, 2012, and the sale did not occur until February 22, 2012. NYCB knew the sale had been scheduled and that it disputed the lien amount, yet it did not attend the sale, request arbitration to determine the amount owed, or seek to enjoin the sale pending judicial determination of the amount owed.



1 *Shadow Wood*. at 1114. When it is apparent, despite its attempted tender, that the foreclosure sale  
2 is going forward, the bank cannot simply sit back and do nothing. The Supreme Court said that  
3 if there is an active dispute, the bank must be proactive in protecting its security interests.

4 Thus, the Supreme Court has made it clear that a bank must take action to protect its  
5 interests. Today, however, if the lower courts are required to blindly apply *Perla del Mar*, a bank  
6 could take any position it wants at the time of the actual foreclosure by the HOA, but can later rely  
7 on a discovered misunderstanding of the law by the collection agency as an excuse for paying an  
8 insufficient amount, or in some instances, not even trying to pay the super-priority portion of the  
9 HOA lien.

#### 10 **VI. Conclusion:**

11 The Nevada Supreme Court and others having adopted a futility exception to the duty to  
12 tender payment, have all required that the non-tendering party establish that there was a policy of  
13 rejection, known by the non-tendering party, at the time of performance. Unless reliance upon the  
14 policy is required to be established, then whether the policy was known or unknown is irrelevant  
15 and the requirement of establishing same meaningless. Whether a policy was known to the party  
16 charged with tender, or unknown to him, the tender would still be rejected so long as the policy  
17 existed. Thus, the question is why must the policy be known by the party charged with tender- at  
18 the time of performance. Learning of the policy after the time to perform would still not change  
19 the fact that the policy existed and the tender was rejected. So, why then does the Nevada Supreme  
20 Court and all others adopting a futility exception require the non-tendering party to show it knew  
21 of this policy at the time, and did not learn about it later? The obvious reason is that the courts are  
22 attempting to narrow the rule to only those occasions where the knowledge of the policy had an  
23 impact on the outcome- meaning the policy is what caused the party not to tender. This has not  
24 been explicitly stated, by our Supreme Court, as it has by others, but for clarity's sake and to  
25 ensure the exception does not become the rule, *Perla Del Mar* needs to be narrowly applied so that  
26 the rule only applies to situations where the knowledge of the policy of rejection actually had an  
27 impact on the parties' conduct.  
28



Here, there is zero evidence that any policy on the part of NAS had any impact on the decision making process between BANA and Miles Bauer. To the contrary, the evidence clearly reveals that despite being aware of NAS's position, Miles Bauer and BANA nonetheless made thousands of tenders to NAS. This undoubtedly shows that at no time did BANA rely on, nor possibly believe that tendering a proper amount would be futile. But, even if BANA could show that it ever believed in futility, the tender made in this case was insufficient to cure the super-priority default and, as the Supreme Court noted on remand, "that appellants' check was insufficient to constitute a valid tender because it did not satisfy the full amount of the super-priority portion of the lien. *Bank of Am., N.A. v. SFR Invs. Pool I, LLC*, 134 Nev. 604, 606, 427 P.3d 113, 117 (2018) ("Valid tender requires payment in full.)."

Dated this 21st day of January, 2022.

**Respectfully submitted by:**  
THE WRIGHT LAW GROUP, P.C.

/s/ John Henry Wright  
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*Attorney for Defendant/Counter-claimant*  
*NV EAGLES, LLC*



**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **DEFENDANT/COUNTERCLAIMANT NV EAGLES, LLC'S POST-REMAND POINTS AND AUTHORITIES REGARDING FUTILITY DEFENSE** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 21<sup>st</sup> day of January 2022. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:<sup>1</sup>

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*Attorneys for Bank of America, N.A. and The Bank of New York Mellon*

I further certify that I served a copy of this document by Electronic mail a true and correct copy, addressed to:

NONE

/s/ Dayana Shakerian

An Employee of THE WRIGHT LAW GROUP, P.C.

<sup>1</sup> Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

# **EXHIBIT 1**

IN THE SUPREME COURT OF THE STATE OF NEVADA

BANK OF AMERICA, N.A.; AND THE  
BANK OF NEW YORK MELLON, F/K/A  
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,  
vs.  
NV EAGLES, LLC,  
Respondent.

No. 81239

**FILED**

JUN 16 2021

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

*ORDER VACATING AND REMANDING*

This is an appeal from a final judgment following a bench trial in a quiet title action. Eighth Judicial District Court, Clark County; Rob Bare, Judge.<sup>1</sup>

The original owner of the subject property failed to make periodic payments to her homeowners' association (HOA). The HOA recorded a notice of delinquent assessment lien and later, a notice of default and election to sell, to collect on the past due assessments and other fees pursuant to NRS Chapter 116. Before the sale, appellants—holders of the first deed of trust on the property—sent a payoff request to the HOA's foreclosure agent, Nevada Association Services, Inc. (NAS), asking for the amount of the lien entitled to superpriority status and offering to pay that amount upon proof of the same. NAS responded with a ledger that did not clearly identify the superpriority amount. Appellants guessed at the

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<sup>1</sup>Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted.

superpriority amount and sent a check to NAS with a letter indicating they intended the check to satisfy the superpriority portion of the lien. NAS returned the check to appellants because it was for an amount less than the HOA's full lien. After buying the property from the purchaser at the foreclosure sale, respondent instituted a quiet title action and the matter proceeded to a bench trial. The district court concluded that appellants' check was not effective tender because it did not pay the full amount of the superpriority portion of the lien, rejected their equitable arguments, and entered judgment in respondent's favor.

Initially, we agree with the district court's conclusion that appellants' check was insufficient to constitute a valid tender because it did not satisfy the full amount of the superpriority portion of the lien.<sup>2</sup> *Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 606, 427 P.3d 113, 117 (2018) ("Valid tender requires payment in full."). However, appellants also argued below that their failure to submit valid tender should be excused because any tender attempt would have been futile. In support of that argument, they presented evidence—including testimony from a NAS employee and evidence of NAS's testimony from previous cases—to show NAS had a "known business practice to systematically reject any check tendered for less than the full lien amount." *7510 Perla Del Mar Ave. Tr. v. Bank of Am., N.A. (Perla Trust)*, 136 Nev. 62, 67, 458 P.3d 348, 351 (2020). Appellants also presented evidence that its counsel was aware of this policy when it remitted its check to NAS in an attempt to cure the superpriority default and preserve appellants' deed of trust. The district court, however, made no findings regarding appellants' futility argument. And the parties

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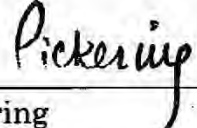
<sup>2</sup>The district court found, and the parties do not dispute, that appellants' check was \$54 short of the superpriority amount.



and the district court did not have the benefit of our opinion in *Perla Trust*, which addressed tender futility and evidence similar to that presented below, albeit without the failed tender. *See id.* at 67, 458 P.3d at 352. In these circumstances, we decline to consider the parties' arguments with respect to the futility issue. *See 9352 Cranesbill Tr. v. Wells Fargo Bank, N.A.*, 136 Nev. 76, 82, 459 P.3d 227, 232 (2020) ("[T]his court will not address issues that the district court did not directly resolve."). Instead, we vacate the district court's judgment and remand for the district court to consider the tender futility argument in light of *Perla Trust*.<sup>3</sup>

It is so ORDERED.

  
\_\_\_\_\_, J.  
Cadish

  
\_\_\_\_\_, J.  
Pickering

  
\_\_\_\_\_, J.  
Herndon

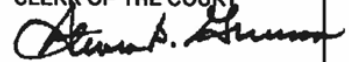
cc: Chief Judge, Eighth Judicial District Court  
Department 32, Eighth Judicial District Court  
Kristine M. Kuzemka, Settlement Judge  
Akerman LLP/Las Vegas  
Hong & Hong  
Eighth District Court Clerk

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<sup>3</sup>We reject appellants' argument that the foreclosure sale should be set aside on equitable grounds because the district court did not abuse its discretion denying relief on this basis. *See Res. Grp., LLC v. Nev. Ass'n Servs., Inc.*, 135 Nev. 48, 55, 437 P.3d 154, 160 (2019) (reviewing a district court's decision whether to set aside a foreclosure sale on equitable grounds for an abuse of discretion).



# **EXHIBIT 2**



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10 Attorney for NV Eagles, LLC

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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").

1           2.     The Subject Property is governed by the Declaration of Covenants, Conditions and  
2 Restrictions ("CC&Rs") of the Mediera Canyon Community Association *now known as Madeira*  
3 Canyon Homeowners Association ("HOA"), which were recorded in the Clark County Recorder's  
4 Office as Instrument No. 20050524-0002414.

5           3.     On or about November 20, 2006, Melissa Lieberman ("Borrower") executed a  
6 promissory note for \$511,576.00 ("Note") in favor of Pulte Mortgage, LLC.

7           4.     The Note was secured by a deed of trust recorded in the Clark County Recorder's  
8 Office as Instrument No. 20061127-0002922 ("DOT").

9           5.     On or about September 14, 2011, the DOT was assigned to The Bank of New York  
10 Mellon FKA The Bank of New York, as Trustee for the Certificate Holders of CWALT, Inc.,  
11 Alternative Loan Trust 2006 J-8, Mortgage Pass-Through Certificates, Series 2006-J8 ("BNYM"),  
12 via an Assignment of DOT recorded in the Clark County Recorder's Office as Instrument No.  
13 20110919-0000030.

14          6.     After the Borrower defaulted on her obligations to the HOA, the HOA retained  
15 Nevada Association Services, Inc. ("NAS") to collect the delinquency.

16          7.     On October 27, 2010, NAS, on behalf of the HOA, recorded a Notice of Delinquent  
17 Assessment Lien in the Clark County Recorder's Office as Instrument No. 20101027-0002037.

18          8.     On December 21, 2010, NAS, on behalf of the HOA, recorded a Notice of Default  
19 and Election to Sell Under Homeowners Association Lien ("NOD") in the Clark County Recorder's  
20 Office as Instrument No. 20101221-0000548.

21          9.     After it received the NOD, Bank of America, N.A. ("BANA"), who serviced the loan  
22 secured by the DOT and was the predecessor to BNYM, retained Miles, Bauer, Bergstrom &  
23 Winters LLP ("Miles Bauer") to obtain information from the HOA as to the association lien and the  
24 superpriority amount of same.

25

1           10.     On February 22, 2011, Rock Jung, Esq. ("Jung"), an attorney for Miles Bauer, sent a  
2 copy of its standard letter seeking to determine the nine-month super-priority lien amount (the  
3 "Miles Bauer Letter") to NAS.

4           11.     NAS responded on or about March 12, 2011, providing Jung an accounting ledger  
5 showing the total amount the Borrower owed the HOA broken down by categories, including  
6 amounts due for "monthly assessments." *See Joint Trial Exhibit 9, bates 134* (hereinafter "HOA  
7 Ledger").

8           12.     On or about April 1, 2011, Miles Bauer sent a check for \$486.00 to NAS enclosed  
9 with a cover letter explaining that the check was equal to "9 months worth of delinquent  
10 assessments" and intended to satisfy BANA's, as the predecessor to BNYM, "obligations to the  
11 HOA as holder of the deed of trust against the Property." *See Joint Trial Exhibit 9, bates 137-139.*

12           13.     However, Miles Bauer miscalculated the superpriority amount as the actual nine-  
13 month superpriority amount was \$540.00. *See Recorder's Transcript of Hearing Re: Bench Trial-*  
14 *Day 3 (Decision) Page 7, 14-16; see also Joint Trial Exhibit 9, bates 134; see also Joint Trial*  
15 *Exhibit 11, bates 215.* Thus, the Miles Bauer check in the amount of \$486.00 did not satisfy the  
16 actual superpriority amount of \$540.00. *See Recorder's Transcript of Hearing Re: Bench Trial-*  
17 *Day 3 (Decision) Page 8, 13-15; see also Joint Trial Exhibit 9, bates 134; see also Joint Trial*  
18 *Exhibit 11, bates 215.*

19           14.     Thereafter, neither Miles Bauer nor BANA nor BNYM did anything to satisfy the  
20 superpriority portion of the HOA lien, and on April 1, 2013, NAS recorded a Notice of Foreclosure  
21 Sale in the Clark County Recorder's Office.

22           15.     On June 7, 2013, NAS conducted the foreclosure sale wherein Underwood Partners,  
23 LLC ("Underwood"), as the highest bidder in the amount of \$30,000.00, purchased the Subject  
24 Property.

25           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

1 the pre-sale notices constituted prima facie evidence that a HOA was foreclosing on its  
2 superpriority lien comprised of monthly assessments pursuant to NRS Chapter 116.

3 5. In *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 134 Nev. Adv. Op. 72,  
4 427 P.3d 113 (Nev. 2018) ("*Diamond Spur*"), the Nevada Supreme Court expressly held that a  
5 "[v]alid tender requires payment in full." *Id.*

6 6. Under NRS 116.31162(b), the superpriority portion of the Association's lien is  
7 comprised of nine months of common assessments and charges for nuisance-abatement and  
8 maintenance under NRS 116.310312. In this case, the evidence absolutely and conclusively  
9 confirmed that the superpriority portion of the HOA lien was in the amount of \$540.00.

10 7. The Nevada Supreme Court, in *Diamond Spur* established that a "lien may be lost by  
11 ...payment or tender of the proper amount of the debt secured by the lien." *Id.* Additionally, the  
12 Nevada Supreme Court in *Diamond Spur* held that a "[v]alid tender requires payment in full." *Id.*  
13 Furthermore, as recently as January 23, 2020, the Nevada Supreme Court confirmed its holding in  
14 *Diamond Spur* in its unpublished Order in *Nationstar v. 2016 Marathon Keys Trust*, case # 75967  
15 (unpublished Order, January 23, 2020) ("*Marathon*"), that again confirmed that "[v]alid tender  
16 requires payment in full." *Id.*

17 8. In Nevada, "[t]he burden of demonstrating that the delinquency was cured presale,  
18 rendering the sale void, [is] on the party challenging the foreclosure..." *Resources Group, LLC v.*  
19 *Nevada Association Services, Inc.*, 437 P.3d 154, 156 (Nev. 2019) ("*Resources Group*"). Further,  
20 *Resources Group* established that the party contesting the validity of the HOA's foreclosure of its  
21 superpriority lien bears the burden of demonstrating that it tendered its "delinquency-curing check,"  
22 and whether it met the burden by proving that it "paid the delinquency amount in full prior to the  
23 sale." *Id.*, 437 P.3d at 159.

24 9. Here, BNYM failed to carry its burden as the check delivered to NAS by Miles  
25 Bauer did not satisfy the superpriority amount of the HOA lien. Thus, under Nevada law, the tender

1 was invalid and insufficient to cure the superpriority portion of the HOA lien. *See Diamond Spur,*  
2 *Resources Group and Marathon.*

3 10. The Nevada Supreme Court in the case of *Nationstar Mortgage, LLC. v. Saticoy Bay*  
4 *LLC Series 2227 Shadow Canyon*, 133 Nev. Adv. Op. 91 (November 22, 2017), held that the  
5 commercial reasonableness standard, which derives from Article 9 of the Uniform Commercial  
6 Code, has no applicability in the context of an HOA foreclosure involving the sale of real property.  
7 The Nevada Supreme Court, therefore, confirmed its holding in *Shadow Wood* as to the long-  
8 standing rule that “inadequacy of price, however, gross, is not in itself a sufficient ground for setting  
9 aside a trustee’s sale” absent additional “proof of some element of fraud, unfairness, or oppression  
10 as accounts for and brings about the inadequacy of price.” *Shadow Wood* at 1111 (quoting *Golden*  
11 *v. Tomiyasu*, 79 Nev. 503, 514, 387 P.2d 989, 995 (1963).

12 11. The evidence provided by BNYM at trial was insufficient to establish that the  
13 foreclosure sale of the property was commercially unreasonable under *Golden v. Tomiyasu*, 79 Nev.  
14 503, 387 P.2d 989 (1963), which requires some proof of some element of fraud, unfairness or  
15 oppression as accounts for/brings about a grossly inadequate price. Nevada law does not permit a  
16 Court to invalidate a sale solely on the basis of price. Thus, the HOA foreclosure sale of the Subject  
17 Property was commercially reasonable as a matter of law. BNYM provided no evidence of any  
18 kind to show a nexus between any alleged act of fraud, unfairness or oppression that accounted  
19 for/brought about the sale price of the Subject Property and/or affected the foreclosure sale.

20 **THEREFORE, PURSUANT TO THE ABOVE FINDINGS OF FACT AND**  
21 **CONCLUSIONS OF LAW, IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that  
22 the deed of trust and any assignments thereof, as liens on the Subject Property are hereby cancelled  
23 and without legal force or effect, and do not convey any right, title or interest in and to the Subject  
24 Property to BNYM and/or its predecessors in interest and/or its assignees.

1           **IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED** that BNYM  
2 and/or its predecessors in interest and/or assignees do not have any estate, right, title, lien or interest  
3 in or to the Subject Property or any part of the Subject Property.

4           **IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED** that there is no  
5 just reason for delay of entry of final judgment and final judgment is so entered pursuant to Rule 54  
6 of the Nevada Rules of Civil Procedure.

7           DONE and DATED this 30th day of April, 2020.

8  
9           

10           DISTRICT COURT JUDGE  
11           ROB BARE

HGL

11       Respectfully submitted by:  
12       HONG & HONG LAW OFFICE

13       /s/ Joseph Y. Hong  
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18       Attorney for NV Eagles, LLC  
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# **EXHIBIT 3**

ISSUED  
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April 1, 2011

6224 W. Desert Inn Road, Suite A  
Las Vegas, NV 89146

ACCT NO.: REDACTED  
LOAN # REDACTED  
MBBW File No. 11-H0279

Dear Sir/Madame:

As you may recall, this firm represents the interests of BAC Home Loans Servicing, LP aka 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 lot above referenced property. The Statement of Account provided by you in regards to the above referenced address shows a full payoff amount of \$1,852.46. BAC is the beneficiary/servicer of the first deed of trust loan secured by the property and wishes to satisfy its obligation to the HOA. Please bear in mind that:

HOA 116.316 governs liens against units for assessments. Pursuant to HOA 116.3116:

The association has a lien on a unit for:

any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraph (i) to (m), inclusive, of subsection (1) of HOA 116.3102 are enforceable as assessments under this section.

While the HOA may assert a lien under HOA 116.3102 Subsection (1), Paragraph (j) through (n) of this Subsection 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 HOA 116.3110, which states in pertinent part:

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

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

Based on Section 2(b), a portion of your HOA lien is arguably prior to BAC's first deed of trust, specifically the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessment. As stated above, the payoff amount stated by you includes many fees that are junior to our client's first deed of trust pursuant to the aforementioned NRS 116.3102 Subsection (1), Paragraphs (j) through (n).

Our client has authorized us to make payment to you in the amount of \$486.00 to satisfy its obligations to the HOA as a holder of the first deed of trust against the property. Thus, enclosed you will find a cashier's check made out to NEVADA ASSOCIATION SERVICES in the sum of \$486.00, which represents the maximum 9 months worth of delinquent assessments recoverable by an HOA. This is a non-negotiable amount and any endorsement of said cashier's check on your part, whether express or implied, will be strictly construed as an unconditional acceptance on your part of the facts stated herein and express agreement that BAC's financial obligations towards the HOA in regards to the real property located at 2184 Pont National Drive have now been "paid in full".

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

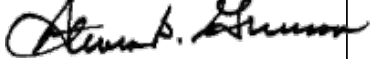
Sincerely,

*MILES, BAUER, BERGSTROM & WINTERS, LLP*

Rock K. Jung, Esq.

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SB

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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*

**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.: XXIX

*Consolidated with: A-13-690944-C*

**BANK OF AMERICA, N.A. AND THE  
BANK OF NEW YORK MELLON, AS  
TRUSTEE'S SUPPLEMENTAL BRIEF  
REGARDING PERLA TRUST**

Bank of America, N.A. (**BANA**) 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 (**BoNYM**) submit this supplemental brief  
regarding 7510 Perla Del Mar Ave. Trust v. Bank of America, N.A., 136 Nev. 62, 458 P.3d 348 (2020)  
(**Perla Trust**), and request that this Court enter a judgment that BoNYM's deed of trust encumbers NV  
Eagles, LLC's title to the subject property.

## I. INTRODUCTION

This is an NRS 116 dispute with three familiar players: BANA, its counsel at Miles, Bauer, Bergstrom & Winters, LLP (**Miles Bauer**), and Nevada Association Services, Inc. (**NAS**). *Perla Trust* settled the legal effect of BANA's attempts to tender superpriority payments to NAS through Miles Bauer. Because NAS systematically rejected thousands of Miles Bauer's superpriority payments, Miles Bauer was excused from futilely tendering them. *Perla Trust* also established that an excused Miles Bauer tender has the same effect as a formal tender – it cures the superpriority default such that the HOA's foreclosure conveys title subject to the senior deed of trust.

This is an easy case under *Perla Trust*. The material evidence regarding futility there and here is the same. Applying the same facts to the same law must yield the same result: the senior deed of trust survived the HOA's foreclosure.

## II. FACTS PROVEN AT TRIAL

## *The Deed of Trust*

This matter concerns title to real property located at 2184 Pont National Drive, Henderson, Nevada 89044 (**property**). **Exhibit A** (Stipulated Facts for Trial), at ¶ 1. Melissa Lieberman borrowed \$511,576.00 to finance her purchase of the property via a loan secured by a deed of trust executed in favor of Pulte Mortgage, LLC (**deed of trust**). *Id.*, at ¶ 3.

BoNYM is the deed of trust's current beneficiary. *Id.*, at ¶ 4. BANA serviced the loan secured by the deed of trust during the period relevant to this litigation. **Exhibit B** (Trial Transcript – Day 1), at 22:21–23:1.

### ***BANA and Miles Bauer's Tender Policies***

BANA had a well-established policy to protect its deeds of trust from Nevada HOA liens. *See id.*, at 23:2-12. Upon receiving an HOA's foreclosure notice, BANA would retain Miles Bauer to determine the lien's superpriority amount, and once that amount was determined, BANA would wire that amount to Miles Bauer, who would then tender a superpriority check to the HOA's collection agent. *See id.*; *see also* **Exhibit C** (Trial Transcript – Day 2), at 16:14–17:2.

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///

1 BANA and Miles Bauer used this policy frequently. One Miles Bauer attorney, Rock Jung,  
2 handled between 5,000 and 6,000 superpriority tender matters for BANA during a 4.5-year period,  
3 including the matter for the property here. **Ex. C**, at 25:9–26:4.

4 ***NAS's Tender Rejection Policies & Miles Bauer's Knowledge of Them***

5 With respect to Miles Bauer's tenders, NAS's policy was well-established: reject them all. *See*  
6 *id.*, at 7:19–8:19 (testimony of NAS's paralegal, Susan Moses); *see also id.*, at 21:1-23, 24:6-12,  
7 27:24–28:9, 33:14-22 (Jung testimony). NAS rejected Miles Bauer's superpriority tenders for two  
8 reasons: (1) NAS did not believe the foreclosure of an HOA's lien could extinguish a senior deed of  
9 trust because it did not believe a superpriority lien existed until the senior deed of trust encumbering  
10 the same property was foreclosed (**Exhibit D** (pleadings from global litigation involving BANA and  
11 NAS), at BANA 784–86); and (2) NAS believed the superpriority amount included not only nine  
12 months of assessments, but also nine months of interest, nine late fees, a transfer fee, and all collection  
13 costs (**Exhibit E** (briefs from global arbitration involving BANA and NAS), at BANA 910–12, 994).

14 NAS made these positions clear in global litigation between BANA and dozens of HOAs and  
15 collection agents, in which BANA sought a declaration regarding the priority and scope of HOA  
16 superpriority liens. *See Ex. D*. There, in its motion to dismiss BANA's complaint, NAS stated that  
17 "until such time as [BANA] actually forecloses on [a] property, there is and can be no priority dispute"  
18 between BANA and an HOA because an HOA's "Super Priority Lien is **triggered** by foreclosure of  
19 the first deed of trust." *Id.*, at BANA 786 (emphasis in original); *see also id.*, at BANA 791 ("Prior to  
20 [BANA]'s foreclosure, there is no application of NRS 116.3116[.]"); *id.*, at BANA 796 ("[U]nless and  
21 until it becomes the owner of a property subject to a Super Priority Lien, [BANA] is not liable for  
22 **any of the amounts owing under the Super Priority Lien.**") (emphasis added).

23 In its reply in support of its motion to dismiss, NAS declared that BANA's "pre-payment  
24 scheme" – that is, the "scheme" of tendering superpriority payments before an HOA's sale to protect  
25 its senior deeds of trust – "is, at its core, a hypothetical scenario void of sufficient definiteness to  
26 enable this Court to dispose of this controversy." *Id.*, at BANA 803. The "[r]eason being," NAS  
27 explained, is that "in the absence of foreclosure of a first deed of trust, there is no super-priority  
28 analysis under NRS 116.3116." *Id.* Leaving no doubt as to its intent to reject all of BANA's

1 superpriority tenders through Miles Bauer, NAS declared that "nothing in NRS 116.3116 prohibits  
2 [NAS] from rejecting [Miles Bauer]'s tender[s] prior to foreclosure." *Id.*, at BANA 806.

3 NAS's pleadings in this global litigation are consistent with the trial testimony of NAS's  
4 paralegal, Susan Moses, in this case. Moses confirmed that NAS rejected all Miles Bauer's  
5 superpriority tenders as a matter of course. **Ex. C**, at 8:9-19.

6 Jung was well aware of NAS's tender-rejection policies during the period relevant to this case.  
7 NAS rejected every superpriority tender that Jung sent on BANA's behalf. *Id.*, at 21:14-23. NAS's  
8 owner, David Stone, told Jung that NAS would not accept any of BANA's tenders. *Id.*, at 33:14-22.

9 ***Madeira's HOA Lien on the Property***

10 The typical interplay between BANA and Miles Bauer's tender policy and NAS's tender-  
11 rejection policy occurred with respect to Madeira Canyon Homeowners Association's (**Madeira**) lien  
12 here. On October 27, 2010, NAS recorded a notice of delinquent assessment lien against the property.  
13 **Ex. A**, at ¶ 6. On December 21, 2010, NAS recorded a notice of default and election to sell against  
14 the property. *Id.*, at ¶ 7.

15 After it received the notice of default, BANA retained Miles Bauer to satisfy the superpriority  
16 portion of Madeira's lien to protect the deed of trust. *Id.*, at ¶ 8. Miles Bauer assigned Jung to the file.  
17 *Id.*, at ¶ 9; *accord* **Exhibit F** (Miles Bauer Affidavit), at ¶ 6.<sup>1</sup> He followed Miles Bauer's standard  
18 policy by sending a letter to NAS on February 22, 2011, which sought to determine the superpriority  
19 amount of Madeira's lien and "offer[ed] to pay that sum upon presentation of adequate proof of the  
20 same by [NAS]." **Ex. F**, at BANA 131–32; *see also* **Ex. A**, at ¶ 9.

21 NAS responded on or about March 12, 2011, sending Jung a document showing the total  
22 amount the borrower owed the HOA broken down by categories, including amounts due for "monthly  
23 assessments." *See* **Ex. F**, at BANA 134–35; **Ex. A**, at ¶ 10. The document showed the "Present rate"  
24 of the "Quarterly Assessment Amount" as \$162.00. **Ex. F**, at BANA 134. The ledger listed three  
25 separate "Prior rate[s]" of the Quarterly Assessment Amount: (1) \$210.00; (2) \$180.00; (3) \$234.00.  
26 *Id.* It did not specify the dates for which each Prior Rate applied. *Id.*

27 ///

28 <sup>1</sup> The parties stipulated to admit **Exhibits D, E, and F** at trial. **Ex. A**, at 7.

1 On or about April 1, 2011, Jung sent a \$486.00 check to NAS, enclosed by a letter which  
2 explained that the check was equal to "9 months worth of delinquent assessments" and was intended  
3 to satisfy BoNYM's "obligations to the HOA as a holder of the first deed of trust against a property."  
4 **Ex. F**, at BANA 137–41.

5 NAS's receptionist rejected the \$486.00 check. *Id.*, at BANA 141. Under NAS's tender-  
6 rejection policies, NAS would have rejected any check for less than the full lien amount (**Ex. C**, at  
7 8:16-19), which was at least \$3,852.46 at the time (**Ex. F**, at BANA 134).

8 After it rejected Miles Bauer's tender, NAS foreclosed on Madeira's lien, selling the property  
9 to Underwood Partners, LLC for \$30,000.00. **Ex. A**, at ¶ 12. Underwood then conveyed the property  
10 to its affiliate, NV Eagles. *Id.*, at ¶ 15.

#### 11 *NV Eagles Wins at Trial*

12 Following a bench trial, this Court held that Underwood purchased the property free and clear.  
13 The Court found that the superpriority amount of Madeira's lien was \$540.00, and that Jung had  
14 "miscalculated the superpriority amount" to be \$486.00. **Exhibit G**, at Findings of Fact ¶¶ 12–13.  
15 The Court explained that under *Bank of Am., N.A. v. SFR Investments Pool 1, LLC*, 134 Nev. 72, 427  
16 P.3d 113 (2018) (*Diamond Spur*), a formal "tender requires payment in full." *Id.*, at Conclusions of  
17 Law ¶ 7. Because Miles Bauer's \$486.00 check was less than the \$540.00 superpriority amount, this  
18 Court held that the tender was insufficient under *Diamond Spur*. *Id.*, at Conclusions of Law ¶ 9.

19 At trial, defendants argued that a formal tender was excused because the evidence established  
20 that NAS rejected Miles Bauer's tenders as a matter of course, and that BANA and Miles Bauer were  
21 aware of that policy at the time. **Ex. C**, at 62:1–63:18. This Court did not make any findings of fact  
22 or conclusions of law regarding excused tender. *See generally*, **Ex. G**.

#### 23 *NV Eagles Loses on Appeal*

24 The Nevada Supreme Court reversed. **Exhibit H**. It agreed that Miles Bauer's \$486.00 check  
25 "was insufficient to constitute a valid tender because it did not satisfy the full amount of the  
26 superpriority portion of the lien." *Id.*, at 2. But the Supreme Court explained that defendants supported  
27 their excused tender argument with "evidence—including testimony from [Susan Moses] and evidence  
28 of NAS's testimony from previous cases—to show NAS had a 'known business practice to



1 systematically reject any check tendered for less than the full lien amount.'" *Id.* (quoting *Perla Trust*,  
2 136 Nev. at 67). The Supreme Court continued: "[Defendants] also presented evidence that [Miles  
3 Bauer] was aware of this policy when it remitted its check to NAS in an attempt to cure the  
4 superpriority default and preserve [BoNYM's] deed of trust." *Id.* But because this Court "made no  
5 findings regarding [defendants' tender] futility argument," and "did not have the benefit of [the]  
6 opinion in *Perla Trust*," the Supreme Court declined to reverse and render, and instead vacated and  
7 "remand[ed] for [this Court] to consider the tender futility argument in light of *Perla Trust*." *Id.*, at 3.

8 NV Eagles petitioned for *en banc* reconsideration. The Supreme Court denied the petition.

### 9 III. ARGUMENT

#### 10 A. The deed of trust survived under *Perla Trust* because Miles Bauer was excused from 11 making a futile tender to NAS.

12 BoNYM's deed of trust survived Madeira's foreclosure sale under *Perla Trust*. There, the  
13 Supreme Court held that a "formal [superpriority] tender is excused when evidence shows that the  
14 [HOA's agent] had a known policy of rejecting such" tenders. 136 Nev. at 63. The *Perla Trust* test  
15 for excused tender has two elements: (1) the collection agent's tender-rejection policy; and (2) the  
16 beneficiary, its servicer, or its servicer's attorneys' knowledge of that policy. *See id.*

17 The Supreme Court held that BANA satisfied this test in *Perla Trust* on a record nearly  
18 identical to the one here. *Perla Trust* and this case involve the same players: BANA and Miles Bauer  
19 on the one hand, and NAS and its HOA-client on the other. As in *Perla Trust*, testimony from a  
20 BANA employee and Jung established BANA and Miles Bauer's tender policy and the 1,000+ times  
21 that policy was put to use. *Compare id.*, at 64, with **Ex. B**, at 23:2-12, **Ex. C**, at 16:14-17:2, 25:9-15.  
22 As in *Perla Trust*, NAS's paralegal, Susan Moses, testified that NAS systematically rejected Miles  
23 Bauer's superpriority tenders. *Compare id.*, at 64-65, with **Ex. C**, at 7:19-8:19. Jung's knowledge of  
24 this policy was established in both cases by his testimony that NAS rejected every superpriority tender  
25 that he submitted on BANA's behalf. *Compare id.* at 64, with **Ex. C**, at 21:17-23, 33:14-22.

26 Both here and in *Perla Trust*, "the evidence at trial established that ... it was NAS's business  
27 policy to ... reject any check for less than the full lien amount, and ... further established that Miles  
28 Bauer and [BANA] had knowledge of this business practice[.]" *See Perla Trust*, 136 Nev. at 67. On

1 these facts, the *Perla Trust* Court held that Miles Bauer "was excused from making a formal tender ...  
2 because, pursuant to NAS's known policy, even if [Miles Bauer] had tendered a check for the  
3 superpriority portion of the lien, NAS would have rejected it." *Id.* This was a straightforward  
4 application of the "generally accepted [tender] exception" of futility,<sup>2</sup> under which "[a]n actual tender  
5 is unnecessary where it is apparent the other party will not accept it." *Id.* (quoting *Schmitt v. Sapp*,  
6 223 P.2d 403, 406-07 (Ariz. 1950)). Because Miles Bauer was "excused from making a formal  
7 tender," the Supreme Court held "that under [*Diamond Spur*], the ensuing foreclosure sale did not  
8 extinguish the first deed of trust." *See id.*, at 63.

9 Applying the same evidence<sup>3</sup> to the same law yields the same result here: BANA "was excused  
10 from making a formal tender ... because, pursuant to NAS's known policy, even if [Miles Bauer] had  
11 tendered a check for the superpriority portion of the lien, NAS would have rejected it." *See id.*, at 67.  
12 As a result, Madeira and NAS's "ensuing foreclosure sale did not extinguish [BoNYM's] first deed of  
13 trust." *See id.*, at 63.

14 **B. Miles Bauer's good-faith miscalculation of the superpriority amount is a red herring.**

15 There is one fact that distinguishes this case and *Perla Trust*, and it is one NV Eagles has  
16 harped on throughout this litigation – Jung did tender a check to NAS, but he miscalculated the  
17 superpriority amount from a ledger NAS provided that, in the Supreme Court's words, "did not clearly  
18 identify the superpriority amount." *See Ex. H*, at 1. This is irrelevant under *Perla Trust*.

19  
20 <sup>2</sup> The futility exception to tender is indeed widely accepted. *See, e.g., Telemark Dev. Grp., Inc. v. Mengelt*, 313 F.3d 972,  
21 978 (7th Cir. 2002) ("[T]ender may be excused when the conduct of the creditor makes it 'reasonably clear that such  
22 [tender] would be a vain, idle, or useless act.'" (quotations omitted); *Donnellan v. Rocks*, 22 Cal. App. 3d 925, 929 (1st  
23 Dist. 1972) ("[I]t is equally well established that the law does not require the performance of an idle act and a formal tender  
24 of performance is excused by the refusal in advance of the party to accept the performance."); *Fox Run Prop., LLC v. Murray*, 654 S.E. 2d 676 (Ga. App. 2007) ("[T]ender is excused or waived where the seller, by conduct or declaration,  
proclaims that if a tender should be made, acceptance would be refused" because "the law does not require a futile tender  
or other useless act."); *Roundville Partners, LLC v. Jones*, 118 S.W. 3d 73, 79 (Tex. App. 2003) ("[W]hen actual tender  
would have been a useless act, an idle ceremony, or wholly nugatory, constructive tender will suffice.").

25 <sup>3</sup> In fact, there is more evidence supporting futility here than in *Perla Trust*; specifically, NAS's pleadings from the global  
26 litigation and filings from the global arbitration between BANA and numerous HOAs and collection agents in which NAS  
27 referred to BANA and Miles Bauer's tender policies as a misguided "scheme" and explained that "nothing in NRS 116.3116  
28 prohibits [NAS] from rejecting [Miles Bauer's] tender[s] prior to foreclosure." *See Ex. D*, at BANA 803, 806. The  
Supreme Court has held that this evidence **alone** is "is sufficient to demonstrate that NAS had a 'known policy of reject[ion]'  
sufficient to excuse formal tender under [*Perla Trust*]." *U.S. Bank, N.A., as Trustee v. SFR Investments Pool 1, LLC*, 464  
P.3d 125 (table), 2020 WL 3003017, at \*1 (Nev. June 4, 2020) ("The necessary implication of [NAS's pleadings] is that  
NAS would not accept a superpriority tender before the first deed of trust was foreclosed.").

1 What is relevant under *Perla Trust* is that NAS had a policy of rejecting tenders, and Miles  
2 Bauer knew it. 136 Nev. at 63; *accord Bank of Am., N.A. v. Pacific Legends Green Valley Owners'*  
3 *Ass'n*, 849 Fed. Appx. 693, 694 (9th Cir. June 10, 2021) (The *Perla Trust* analysis "queries solely  
4 whether [the HOA's collection agent] had a known policy of rejecting tender."). There is substantial  
5 and uncontroverted evidence on both points. See **Ex. C**, at 7:19–8:19 (Moses testimony); see also *id.*,  
6 at 21:1–23, 24:6–12, 27:24–28:9, 33:14–22 (Jung testimony). Likewise, the evidence regarding what  
7 would have happened if Jung had tendered a check for the correct superpriority amount is  
8 uncontroverted – NAS would have rejected it just as it had rejected thousands of other checks for the  
9 correct superpriority amount based on its misguided beliefs as to when a superpriority lien arose and  
10 the amounts it secured. See *id.*, at 7:19–8:19.

11 As the Supreme Court explained in *Perla Trust*, "[t]he law does not require one to do a vain  
12 and futile thing." 136 Nev. at 66 (quoting *Schmitt*, 223 P.2d at 406–07). Jung's diligence in delivering  
13 a check even though he knew the check would be rejected was "not require[d]," and was indeed  
14 "futile." See *id.* But there is no logical, legal, or policy reason to hold that BoNYM is worse off  
15 because Jung made a futile attempt rather than no attempt at all. NAS had a tender-rejection policy,  
16 and Jung and BANA knew it. That is all that matters under *Perla Trust*.

#### 17 **IV. CONCLUSION**

18 For these reasons, this Court should enter a judgment in defendants' favor holding that  
19 BoNYM's deed of trust encumbers NV Eagles' title to the property.

20 DATED this 21<sup>st</sup> day of January, 2022.

21 **AKERMAN LLP**

22 /s/ Melanie D. Morgan

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25 Nevada Bar No. 13138

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27 *New York Mellon FKA The Bank of New York, as Trustee*  
28 *for the Certificateholders of CWALT, Inc., Alternative*  
*Loan Trust 2006 J-8, Mortgage Pass-Through*  
*Certificates, Series 2006-J8*

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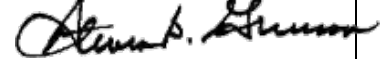
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# **EXHIBIT A**

# **EXHIBIT A**



**STIP**

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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*

**EIGHTH JUDICIAL 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  
Consolidated with: A-13-690944-C

Dept. No.: XXXII

**STIPULATED FACTS FOR TRIAL**

THE BANK OF NEW YORK MELLON FKA  
THE BANK OF NEW YORK, AS TRUSTEE  
FOR THE CERTIFICATEHOLDERS OF  
CWALT, INC., ALTERNATIVE LOAN TRUST  
2006-J8, MORTGAGE PASS-THROUGH  
CERTIFICATES, SERIES 2006-J8

Crossclaimant,

v.

NV EAGLES, LLC; DOES 1 THROUGH 10;  
AND ROE CORPORATIONS 1 THROUGH 10,

Crossdefendant,

NV EAGLES, LLC,

Crossclaimant,

v.

THE BANK OF NEW YORK MELLON FKA  
THE BANK OF NEW YORK, AS TRUSTEE  
FOR THE CERTIFICATEHOLDERS OF  
CWALT, INC., ALTERNATIVE LOAN TRUST  
2006-J8, MORTGAGE PASS-THROUGH  
CERTIFICATES, SERIES 2006-J8 and BANK  
OF AMERICA, N.A.,

Crossdefendants.

NV Eagles, LLC (**NV Eagles**), 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 (**BONY**), and Bank of America, N.A. (**BANA**) (collectively with BONY, **Bank Defendants**) stipulate as follows in advance of the upcoming bench trial:

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

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

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1           3.       Melissa Lieberman (**Borrower**) borrowed \$511,576.00 to finance her purchase of the  
2 Property in 2006, which loan was secured by a deed of trust recorded in the Clark County Recorder's  
3 Office as Instrument Number 20061127-0002922 (**Deed of Trust**). **Trial Ex. 1.**

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

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

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

11           7.       On December 21, 2010, NAS recorded a Notice of Default and Election to Sell Under  
12 Homeowners Association Lien in the Clark County Recorder's Office as Instrument Number  
13 20101221-0000548. **Trial Ex. 4.**

14           8.       After it received the Notice of Default, BANA, who serviced the loan secured by the  
15 Deed of Trust, retained Miles, Bauer, Bergstrom & Winters, LLP (**Miles Bauer**). **Trial Ex. 9.**

16           9.       On or about February 22, 2011, Rock Jung, an attorney at Miles Bauer, sent a letter to  
17 NAS. *Id.*, at BANA000131–32.

18           10.      On or about March 12, 2011, NAS sent Jung a payoff ledger showing the total amount  
19 the Borrower owed. *Id.*, at BANA000134–35.

20           11.      The ledger did not show the HOA had incurred any maintenance or nuisance-abatement  
21 charges. *Id.*

22           12.      On April 1, 2013, NAS recorded a Notice of Foreclosure Sale in the Clark County  
23 Recorder's Office as Instrument Number 20130401-0000723, which set the sale for April 26, 2013.  
24 **Trial Ex. 5.**

25           13.      No sale occurred on that date.

26           14.      On June 7, 2013, NAS conducted an auction and Underwood Partners, LLC  
27 (**Underwood**) was the highest bidder and paid \$30,000.00, as reflected in the Foreclosure Deed  
28



recorded in the Clark County Recorder's Office as Instrument Number 20130703-0002523. **Trial Ex. 6.**

15. On September 18, 2013, Underwood conveyed its interest in the Property to NV Eagles via a Grant, Bargain, and Sale Deed recorded in the Clark County Recorder's Office as Instrument Number 20131018-0001137. **Trial Ex. 7.**

16. BANA retained expert appraiser Matthew Lubawy to perform a retroactive Fair Market Value Appraisal of the Property at the time of the June 7, 2013 foreclosure sale, as defined in *Unruch v. Streight*, 96 Nev. 684, 615 P.2d 247 (1980) and the Restatement (third) of Property § 8.3. Mr. Lubawy is qualified to render an opinion regarding the fair market value of the Property on June 7, 2013. As Mr. Lubawy opines in the expert report, the Property's fair market value at the time of the HOA's sale was \$430,000.00. **Trial Ex. 12.**

17. For the purposes of this calculation, Mr. Lubawy did not consider the fair "forced sale" value of the real estate or the price of other comparable HOA non-judicial foreclosure sales, but the price which would result from negotiation and mutual agreement, after ample time to find a purchaser, between a vendor who is willing, but not compelled to sell, and a purchaser who is willing to buy, but not compelled to take a particular piece of real estate.

18. The Parties stipulate to admit Joint Exhibits 1–16. The Joint Exhibit List is attached as **Exhibit A.**

Dated this 27th day of December 2019.	Dated this 27th day of December, 2019.
<b>HONG &amp; HONG PLLC</b>	<b>AKERMAN LLP</b>
<u>/s/ Joseph Y. Hong</u>	<u>/s/ Rex D. Garner</u>
JOSEPH Y. HONG, ESQ. Nevada Bar No. 5995 1980 Festival Plaza Drive, Suite 650 Las Vegas, Nevada 89135	DARREN T. BRENNER, ESQ. Nevada Bar No. 8386 NATALIE L. WINSLOW, ESQ. Nevada Bar No. 12125 REX D. GARNER, ESQ. Nevada Bar No. 9401 1635 Village Center Circle, Suite 200 Las Vegas, Nevada 89134
<i>Attorney for NV Eagles, LLC</i>	<i>Attorneys for 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</i>

# EXHIBIT A

## EXHIBIT(S) LIST

Case No.: <b>A-13-685203-C</b> <hr/> Dept. No.: <b>XXXII</b> <hr/> Plaintiff:  <div style="text-align: center;"><b>NV EAGLES LLC</b></div> <div style="text-align: center;">vs.</div> Defendant:  <div style="text-align: center;"><b>MADEIRA CANYON HOMEOWNERS' ASSOCIATION et al</b></div>	Civil Trial Date: <u>January 14, 2020</u>  Judge: <u>Rob Bare</u>  Court Clerk: _____  Recorder: _____  Counsel for Plaintiff: _____ <u>Joseph Y Hong, Esq.</u>  Counsel for Defendant: <u>Bank of America, N.A.</u> <u>Bank of New York Mellon</u>  <u>Darren Brenner, Esq., Rex Garner, Esq.</u>
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<b>CIVIL TRIAL BEFORE THE COURT</b>
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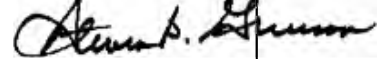
### JOINT EXHIBITS

Exhibit Number	Exhibit Description	Date Offered	Objection	Date Admitted
1	Deed of Trust BANA000001-000019			
2	Assignment of Deed of Trust BANA000023-000024			
3	Notice of Delinquent Assessment Lien BANA000020			
4	Notice of Default and Election to Sell BANA000021-000022			
5	Notice of Foreclosure Sale BANA000025-000026			
6	Foreclosure Deed BANA000027-000029			
7	Grant, Bargain Sale Deed BANA000030-000033			
8	Covenants, Conditions, and Restrictions BANA000037-0000108			
9	Miles Bauer Tender Affidavit BANA000127-000143			
10	Miles Bauer Letter Affidavit BANA000144-000149			
11	NAS Collection File BANA000150-000337			
12	Expert Report of Matthew Lubawy BANA001155-001184			

<b>Exhibit Number</b>	<b>Exhibit Description</b>	<b>Date Offered</b>	<b>Objection</b>	<b>Date Admitted</b>
13	Pleadings and Order from Case No. 2:11-cv-00167 BANA000715-000750; BANA000783-000819			
14	Briefing and Arbitration Award from NRED Case No. 12-58 BANA000910-000927; BANA000994; BANA001011-001015			
15	Payoff Statement BANA000109-000111			
16	Lis Pendens BANA000034-000036			

# EXHIBIT B

# EXHIBIT B



1 RTRAN

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5 DISTRICT COURT  
6 CLARK COUNTY, NEVADA

7 MELISSA LIEBERMAN,

8 Plaintiff,

9 vs.

10 MADEIRA CANYON  
11 COMMUNITY ASSOCIATION,

12 Defendant.

CASE NO: A-13-685203-C

DEPT. XXXII

13  
14 BEFORE THE HONORABLE ROB BARE, DISTRICT COURT JUDGE  
TUESDAY, JANUARY 14, 2020

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

17  
18 APPEARANCES:

19 For the Plaintiff:

JOSEPH Y. HONG, ESQ.

20  
21 For the Defendant:

22 REX D. GARNER, ESQ.

23  
24  
25 RECORDED BY: KAIHLA BERNDT, COURT RECORDER

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**WITNESSES**

**WITNESS:**

<b>DIANE DELONEY</b>	
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**EXHIBITS**

**TRIAL EXHIBITS ADMITTED:**

1-16	4
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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,



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

2 MR. GARNER: Correct.

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

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

5 **[EXHIBITS 1 THROUGH 16 ADMITTED]**

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

8 MR. HONG: Sure.

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

11 MR. HONG: Sure, Your Honor.

12 THE COURT: Okay.

13 **OPENING STATEMENT FOR THE PLAINTIFF**

14 BY MR. HONG:

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

22 So, as in the past --

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

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

1 THE COURT: Okay.

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

6 THE COURT: Yeah.

7 MR. HONG: -- there's never been a affirmative defense of  
8 tender. And, the cross-claim -- so the claim by the bank -- banks against  
9 NV Eagles, there is a tender in there. But, that was filed on 7/12 of  
10 2019, Your Honor. And --

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

13 MR. HONG: Right.

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

15 MR. HONG: 7/12 of 2019.

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

19 MR. HONG: Correct.

20 THE COURT: Okay.

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

1 THE COURT: Did we do anything on a -- any kind of written  
2 motions on this yet?  
3 MR. HONG: We haven't, Your Honor.  
4 THE COURT: Okay. And, this was not brought up until now?  
5 I'm just asking you a question in case --  
6 MR. HONG: That's correct.  
7 THE COURT: Okay, I just want to see if we missed it or  
8 anything so --  
9 MR. HONG: No. No, no, no, that's kind --  
10 THE COURT: Do you know about this, Mr. Garner, or is this  
11 the first you're hearing of it?  
12 MR. GARNER: Well, the -- I think probably what you have in  
13 front of you is a list of a lot of pleadings. This case started by the  
14 homeowner against the HOA and others and then, you know, we were  
15 brought in with --  
16 THE COURT: It was a pro per Plaintiff initially, I think.  
17 MR. GARNER: I'm sorry?  
18 THE COURT: Pro per Plaintiff initially.  
19 MR. GARNER: Right.  
20 THE COURT: Right.  
21 MR. GARNER: Right, and then through a handful of  
22 counterclaims, cross-claims, etcetera --  
23 THE COURT: Yeah.  
24 MR. GARNER: -- is when --  
25 THE COURT: It's a pretty good list of them here.

1 MR. GARNER: Yeah.

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

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

10 THE COURT: Yep.

11 MR. HONG: And, that's when the cross-claims -- well, the first  
12 cross-claim against NV Eagles, again Your Honor, was September 12<sup>th</sup>,  
13 2019 -- I mean, I'm sorry, July 12<sup>th</sup>, 2019.

14 THE COURT: Yeah.

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

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

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

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

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

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

1 MR. HONG: Yeah, yeah, I guess that's -- yeah.  
2 THE COURT: Yeah.  
3 MR. HONG: And, we can brief that and get that to the Court  
4 this afternoon even. But, I mean, Your Honor's heard our statute of  
5 limitations arguments before. As you know, it's -- it goes either three or  
6 four, the catch-all, or five.  
7 THE COURT: You know, I got to tell you though, that may be  
8 but I don't remember what I did on them --  
9 MR. HONG: Oh, okay.  
10 THE COURT: -- just because --  
11 MR. HONG: Sure.  
12 THE COURT: -- that's what happens when you have --  
13 MR. HONG: Right.  
14 THE COURT: -- 1400 cases --  
15 MR. HONG: Sure, sure, sure.  
16 THE COURT: -- you know and --  
17 MR. HONG: Sure.  
18 THE COURT: -- you know, thing after thing after thing all the  
19 time --  
20 MR. HONG: Sure.  
21 THE COURT: -- I just don't remember.  
22 MR. HONG: Sure.  
23 THE COURT: I mean, do you -- can you give -- can you  
24 represent to me what I did do in a similar case, because I would want to  
25 be consistent? Did I -- what statute did I apply?

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

4 THE COURT: Mm-hmm.

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

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

11 MR. HONG: Correct.

12 THE COURT: And, that's June 7<sup>th</sup> of '13?

13 MR. HONG: Right, so --

14 THE COURT: So, six years plus --

15 MR. HONG: Well --

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

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

23 THE COURT: Right.

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

25 THE COURT: Okay.

1 MR. HONG: -- outside, so --

2 THE COURT: All right.

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

6 THE COURT: Okay.

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

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

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

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

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

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

22 MR. HONG: If --

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

1 MR. GARNER: Correct.  
2 MR. HONG: Two witnesses, right.  
3 THE COURT: Okay. Okay.  
4 MR. HONG: So --  
5 THE COURT: What time are we supposed to start tomorrow?  
6 MR. HONG: 9:00.  
7 THE COURT: Can we start a little bit later than that? Does  
8 anybody have a problem with that?  
9 MR. GARNER: How much later, Your Honor?  
10 THE COURT: 10:00? 9:30?  
11 MR. GARNER: Definitely I think 9:30 would be fine.  
12 THE COURT: Okay.  
13 MR. GARNER: -- because -- yeah the NAS witness needs to  
14 go early and then we have Mr. Jung --  
15 THE COURT: Okay, so 9:30 is okay?  
16 MR. HONG: 9:30 is fine.  
17 MR. GARNER: 9:30 is fine with us.  
18 THE COURT: All right, let's just start at 9:30 tomorrow --  
19 MR. GARNER: Okay.  
20 THE COURT: -- not 9:00.  
21 MR. HONG: Okay.  
22 THE COURT: Okay?  
23 MR. HONG: Okay.  
24 THE COURT: And then -- okay, well I mean, you made a oral  
25 motion --



1 MR. HONG: Right.

2 THE COURT: -- to essentially dismiss the case.

3 MR. HONG: Correct.

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

5 MR. HONG: Well, not dismiss the case; dismiss the bank's

6 claims against my client.

7 THE COURT: Oh, okay. So --

8 MR. HONG: Right.

9 THE COURT: -- they -- so, wait a second. If you're trying to

10 get rid of the affirmative defense of tender --

11 MR. HONG: Right.

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

13 MR. HONG: Right.

14 THE COURT: -- in your -- in regard to your claim, they can't

15 likewise bring a tender affirmative defense?

16 MR. HONG: Well, the affirmative defense was never raised

17 so we submit that it was waived, and it's the only pleading that we have

18 in this case, or the other case, as to my client is a cross-claim. It's a

19 cross-claim. So --

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

21 MR. HONG: So, that's why I think a directed verdict would

22 probably be more appropriate.

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

24 MR. HONG: Right, which would then, in essence, support a

25 directed verdict, because there -- then there would be no claims against

1 my client.

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

4 MR. HONG: Correct.

5 THE COURT: -- against the bank, right?

6 MR. HONG: Correct.

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

9 MR. HONG: Correct.

10 THE COURT: -- case?

11 MR. HONG: Correct.

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

14 MR. HONG: Correct.

15 THE COURT: -- affirmative defense concerning your  
16 complaint?

17 MR. HONG: Correct.

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

20 MR. HONG: Enter.

21 THE COURT: -- preclude the tender defense?

22 MR. HONG: Correct.

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

25 MR. HONG: Correct --

1 THE COURT: Yeah.

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

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

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

12 THE COURT: Mm-hmm.

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

16 THE COURT: Okay.

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

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

22 MR. HONG: Well --

23 THE COURT: I mean really --

24 MR. HONG: -- right.

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

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

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

6 THE COURT: Okay, well --

7 MR. GARNER: And so --

8 THE COURT: -- yeah.

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

10 THE COURT: Okay.

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

12 THE COURT: Okay.

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

18 THE COURT: Mm-hmm.

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

20 MR. HONG: Right.

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

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

24 MR. GARNER: Yeah.

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

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

3 MR. GARNER: Mm-hmm.

4 [Colloquy between counsel and representative]

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

7 MR. HONG: Okay.

8 THE COURT: -- because she made the trip.

9 MR. HONG: Sure.

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

13 MR. HONG: Yeah.

14 THE COURT: -- all that?

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

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

20 MR. HONG: Okay.

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

23 MR. GARNER: Yeah.

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

1                                   **OPENING STATEMENT FOR THE DEFENSE**

2           BY MR. GARNER:

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

8                       THE COURT: Okay.

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

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

16                      THE COURT: Yep.

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

1 THE COURT: Mm-hmm.

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

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

12 THE COURT: They actually sent the ledger.

13 MR. GARNER: I'm sorry?

14 THE COURT: That they actually sent a payoff ledger.

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

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

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

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

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

17 Auction occurs in June 2013, the opening bid was roughly  
18 \$8,000. A company called Underwood Partners wins the bidding at  
19 \$30,000. BANA's expert appraiser estimates the fair market value at  
20 \$430,000 which means the auction price is roughly 7 percent of fair  
21 market value. Even the foreclosure deed has attached to it that  
22 declaration of value form that we see on all of these cases. That's an  
23 admitted exhibit as well, shows that the transfer tax value on that form  
24 was also significantly higher than the winning bid of \$30,000.

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



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

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

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

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

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

17 MR. HONG: No.

18 THE COURT: None?

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

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

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

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

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

1 THE COURT: Okay.

2 MR. HONG: Yeah.

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

6 MR. GARNER: Yes, defense calls Diane Deloney.

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

11 **DIANE DELONEY**

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

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

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

18 THE COURT CLERK: Thank you.

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

20 **DIRECT EXAMINATION**

21 BY MR. GARNER:

22 Q Thank you, Your Honor.

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

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

1 President Mortgage Resolution Associate.

2 Q How long have you been that?

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

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

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

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

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

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

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

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

20 A Many times, maybe 40, 50 times.

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

23 A Bank of America was the servicer of the loan until June of  
24 2013.

25 Q Okay. When did it start servicing?

1           A     Shortly after it originated.

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

6           A     Yes.

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

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

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

15          A     I have.

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

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

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

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

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

1 A Oh, we were willing and able.

2 Q Thank you very much for your time.

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

4 **CROSS-EXAMINATION**

5 Q Thank you, Your Honor.

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

9 A Yes.

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

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

14 Q Correct.

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

16 Q The --

17 A -- they did.

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

20 A Both.

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

24 A Yes.

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

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

2 A Not to my knowledge.

3 Q So, based strictly on any records or communications that

4 came from Miles Bauer, right?

5 A Yes.

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

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

8 MR. GARNER: Nothing further.

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

10 THE COURT: Okay, Ms. Deloney, thanks for your testimony,

11 you're excused. Any other witnesses or evidence from the defense?

12 MR. GARNER: None today, Your Honor.

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

14 MR. HONG: 9:30?

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

16 9:30 tomorrow then?

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

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

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

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

21 MR. GARNER: And then, right after Ms. Moses, presuming --

22 Mr. Jung said he had a hearing 9:00 tomorrow, presuming he's done

23 by --

24 THE COURT: Mr. --

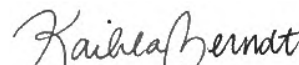
25 MR. GARNER: -- 10-ish, 10:15, we'll do him right afterwards.

1 And then, defense plans to rest.  
2 THE COURT: Okay.  
3 MR. HONG: And, Your Honor, by 5:00 o'clock today we'll get  
4 the written motion filed.  
5 THE COURT: Okay.  
6 MR. HONG: Okay.  
7 THE COURT: All right, we'll see you at 9:30 tomorrow.  
8 MR. HONG: Thank you, Your Honor.  
9 MR. GARNER: Thank you, Judge.  
10 MS. DELONEY: Thank you.

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

12 \* \* \* \* \*

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

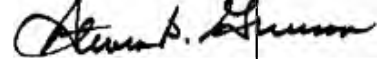
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25 Kaihla Berndt  
Court Recorder/Transcriber

# EXHIBIT C

# EXHIBIT C





1 RTRAN

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5 DISTRICT COURT  
6 CLARK COUNTY, NEVADA

7 MELISSA LIEBERMAN,

8 Plaintiff,

9 vs.

10 MADEIRA CANYON  
11 COMMUNITY ASSOCIATION,

12 Defendant.

CASE NO: A-13-685203-C

DEPT. XXXII

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

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

17  
18 APPEARANCES:

19 For the Plaintiff:

JOSEPH Y. HONG, ESQ.

20  
21 For the Defendant:

22 REX D. GARNER, ESQ.

23  
24  
25 RECORDED BY: KAIHLA BERNDT, COURT RECORDER

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1 Las Vegas, Nevada; Wednesday, January 15, 2020

2

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

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

9 MR. GARNER: Understood.

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

12 MR. GARNER: Mm-hmm.

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

15 MR. GARNER: Perfect.

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

17 MR. HONG: Right.

18 THE COURT: And, I appreciate that we started right around  
19 9:30 today. I needed the extra time today so that's great.

20 MR. GARNER: Very good.

21 THE COURT: Okay, ready to go?

22 MR. GARNER: Yes, defense calls --

23 THE COURT: Okay.

24 MR. GARNER: -- Susan Moses.

25 THE COURT: All right.

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[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?

1           A     I do.

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

3           A     We are a collection agent for HOAs.

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

6           A     No.

7           Q     Okay. Was Madeira Canyon HOA one of them?

8           A     Yes.

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

11          A     Okay.

12          Q     Can you tell us what this is?

13          A     This is the recorded Notice of Delinquent Assessment Lien.

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

16          A     There's no breakdown of the amounts due.

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

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

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

20          A     This is the recorded Notice of Default.

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

22          A     \$3,112.73.

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

25          A     There's no breakdown of the amounts due?

1 Q Okay. Any mention of super-priority?

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

3 Q Okay. Is the Notice of Default usually the first document in the

4 process that goes to the first deed of trust holder?

5 A Typically.

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

7 correct?

8 A Correct.

9 Q All right. Now, during the years, let's say 2010 to 2013, did

10 NAS have conversations with a law firm called Miles Bauer?

11 A We did.

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

13 A Yes.

14 Q All right. Did you ever get requests from Miles Bauer law firm

15 for account statements or ledgers?

16 A Yes.

17 Q Okay. If we look at Exhibit 11, which is the -- NAS's file, I'd

18 like you to turn to the Bates labels on the bottom right at page 202.

19 A Okay.

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

21 A This is correspondence from Miles Bauer, Bergstrom &

22 Winters to Nevada Association Services.

23 Q Okay. And, did you -- did NAS understand from this letter that

24 Miles Bauer law firm was seeking information about the account?

25 A Yes.

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

3 A Correct.

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

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

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

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

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

15 A I do.

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

18 A No.

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

21 A Yes.

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

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

1 Q Okay. And, was a copy made of the letters and checks?  
2 A No.  
3 Q Okay. Was notation made in the log that those things were  
4 delivered?  
5 A No.  
6 Q Okay. Was it usually someone at reception who would  
7 analyze it and return it?  
8 A I don't know how that process happened.  
9 Q Okay. And the typical Miles Bauer letter that you've probably  
10 seen in depositions and trials, I call it the second letter; are you familiar  
11 with that letter?  
12 A Yes.  
13 Q Okay. And that's the letter that NAS believed had  
14 impermissible conditions?  
15 A Correct.  
16 Q Okay. So, if a check came for any amount that was less than  
17 full payoff, with that letter, what was NAS's policy?  
18 A It's the fact that there were conditions, that's what would --  
19 that's what would cause NAS to reject the payment were the conditions.  
20 Q Okay. Let's look at 303 in that same Exhibit 11.  
21 A Okay.  
22 Q Can you tell us what this is?  
23 A This is NAS's sales script.  
24 Q So, the big paragraph on that page is what the crier or  
25 auctioneer would say at a sale?



1           A     Correct.

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

5           A     Correct.

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

8           A     I do.

9           Q     How was that calculated?

10          A     If you look at BANA 301 --

11          Q     Mm-hmm.

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

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

17          A     It looks like it.

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

19          A     Correct.

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

22          A     Yes.

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

24          A     No.

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

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

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

4 Q Just those parts, correct?

5 A Just those two.

6 Q Okay. Thank you, Ms. Moses.

7 A You're welcome.

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

10 **CROSS-EXAMINATION**

11 BY MR. HONG:

12 Q Thank you, Your Honor.

13 Good morning, Ms. Moses.

14 A Good morning.

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

16 A Okay.

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

18 A Correct.

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

21 A Correct.

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

23 A Correct.

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

1           A     Okay.

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

5           A     I do.

6           Q     And then, that's for January 2011 through July 31<sup>st</sup>, 2011,  
7 correct?

8           A     Correct.

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

11          A     It could be.

12          Q     Okay. But --

13          A     I don't know what it is.

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

16          A     Yes, I believe so.

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

20          A     Yes.

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

23          A     Yes.

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

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

3           A     Correct.

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

6           A     Okay.

7           Q     I believe. Okay.

8           A     My math skills are not great either --

9           Q     Right.

10          A     -- so --

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

13          A     540? Okay.

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

17          A     Yes.

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

19          A     Okay.

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

21          A     Okay.

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

24          A     Yes.

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

1 ledger or -- correct?

2 A A payoff.

3 Q Payoff. And then, if you turn to Bates stamp 134, that's a

4 ledger showing up to 4/11; do you see that?

5 A Yes.

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

7 A Yes.

8 Q Okay. And then, it shows a prior rate in the third column of

9 180; do you see that?

10 A Yes.

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

12 A Correct.

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

14 correct?

15 A I believe so.

16 Q Okay. Perfect. And now, if we keep turning to that same

17 Exhibit 9 and Bates stamp number 141 --

18 A Okay.

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

20 correct --

21 A Correct.

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

23 A I believe so.

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

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

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

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

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

7 A Okay.

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

9 A Yes.

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

11 A Correct.

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

13 THE COURT: Any redirect, Mr. Garner?

14 MR. GARNER: No, Your Honor.

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

17 THE WITNESS: Sure.

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

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

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

21 MR. GARNER: Defense calls Rock Jung.

22 [Colloquy between counsel and witness]

23 [Colloquy between counsel]

24 THE MARSHAL: I don't see anybody outside.

25 MR. GARNER: Oh, he's not?

1 THE MARSHAL: I'm not sure.  
2 [Colloquy between counsel and the Marshal]  
3 [Pause in proceedings]  
4 THE COURT: All right, we can go off the record.  
5 [Proceedings paused at 9:54 a.m.]  
6 [Proceedings resumed at 9:55 a.m.]  
7 MR. GARNER: I found him.  
8 THE COURT: All right, you called Mr. Jung. Mr. Jung --  
9 THE WITNESS: Your Honor.  
10 THE COURT: -- come on over to the witness box, if you could  
11 remain standing just for a moment please.  
12 THE WITNESS: Okay.  
13 THE COURT: There you go.  
14 **ROCK JUNG**  
15 [Having been called as a witness and being first duly sworn, testified as  
16 follows:]  
17 THE COURT CLERK: Thank you. Please be seated. If you  
18 could, please state and spell your first and last name for the record.  
19 THE WITNESS: Rock, R-O-C-K. Jung, J-U-N-G.  
20 THE COURT: Okay, Mr. Garner, go ahead.  
21 **DIRECT EXAMINATION**  
22 BY MR. GARNER:  
23 Q Thank you, Judge.  
24 Mr. Jung, good morning.  
25 A Good morning.

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

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

4 Q How long have you been a lawyer?

5 A Since 2008.

6 Q Okay. And, where were you working in the years, let's say  
7 2010 to 2013?

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

9 Q And, where was that located?

10 A Henderson, Nevada.

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

13 A I was there approximately October 2009 through March 2014.

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

16 A Yes.

17 Q Briefly summarize for the Judge what that work entailed.

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

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

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



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

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

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

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

10 A Okay.

11 Q And you're familiar with this document?

12 A Yes I am.

13 Q What is it?

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

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

23 A Yes.

24 Q How was that?

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

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

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

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

9 Q Okay.

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

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

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

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

17 A Yes I did.

18 Q Okay. And, if you turn to the same Exhibit 9, page 134 and  
19 135, can you tell us what that is?

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

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

25 A I do not.

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

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

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

9 A I do.

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

12 A I do.

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

15 A Just looking at those columns, I cannot.

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

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

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

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

1 or HOA trustee regarding a super-priority tender.

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

4 A Yes.

5 Q What was that?

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

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

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

13 Q Okay.

14 A -- for checks that were hand delivered.

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

17 A Correct.

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

20 A Yes.

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

23 A I do.

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

25 A I do, yes.

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

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

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

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

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

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

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

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

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

12          A     Yes.

13          Q     Tell us what those mean.

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

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

1 Q Okay. And, there's an entry -- well, there's two entries on April  
2 1<sup>st</sup>, 2011. I'm looking at the second one that says 4/1 check sent to  
3 HOA and then some more verbiage there; what does that mean?

4 A 4/1, that's April 1<sup>st</sup>, checks sent to HOA, that means on April  
5 1<sup>st</sup> we had the super-priority check sent, meaning a legal runner hand  
6 delivered it to the HOA, or more specifically the HOA's collection agent,  
7 in this case, Nevada Association Services. And then, comma FU,  
8 stands for follow-up, April 13<sup>th</sup>, see if check was and then it's cut off.  
9 But, I know from just entering literally thousands of these entries, it  
10 would have said see if check was accepted or rejected.

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

13 A No, it would not.

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

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

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

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

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

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

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

16 A They did not.

17 Q Do you recall them ever doing that?

18 A No.

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

20 A Thank you.

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

22 **CROSS-EXAMINATION**

23 BY MR. HONG:

24 Q Yes, thank you, Your Honor.

25 Hi Mr. Jung, how are you?



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

2 Q Good. I'm going to kind of go backwards just to be easier

3 from the last questions.

4 A Okay.

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

6 A Okay.

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

8 A That's correct.

9 Q And, as you -- I mean, how many -- roughly, how many do you

10 think, while you were there, that you handled these trying to pay off

11 super-priorities? A thousand, two thousand?

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

13 Q Wow, that you were handling?

14 A Correct, during the entire -- during the course of my entire

15 four-and-a-half-year employment there.

16 Q Okay. So, you don't have any independent knowledge of this

17 particular property, or frankly any property, other than looking at

18 documents, correct? Fair enough?

19 A Not of -- I don't -- fair enough as to any individual recollection

20 of this property. I mean, there were some instances where the names

21 sounded familiar to me or for some reason the name stood out, which I

22 would remember independently --

23 Q Sure.

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

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

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

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

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

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

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

11 A Okay.

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

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

16 Q Okay.

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

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

20 A Yes, correct.

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

24 A Correct.

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

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

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

5           A     Okay.

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

8           A     Yes.

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

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

15          Q     Mm-hmm.

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

18          Q     Right.

19          A     -- information --

20          Q     Right.

21          A     -- to calculate in the --

22          Q     Right.

23          A     -- first place.

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

1 handled?

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

4 Q So, like 2,000 you think?

5 A Sure, 2,000 to --

6 Q Okay.

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

8 Q Okay.

9 A -- is my best estimate.

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

12 A Correct.

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

14 A That's correct.

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

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

18 Q Right.

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

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

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

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

5 A Right, absent any nuisance abatement or maintenance --

6 Q Right, right.

7 A -- charges.

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

10 A Correct.

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

14 A Yes.

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

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

18 Q Right.

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

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

24 A Correct.

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

1           A     Correct.

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

5           A     Correct.

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

9           A     Yes.

10          Q     And then, immediately to the right, that's the column that 162  
11 quarterly and then basically you multiplied that by three to come up with  
12 486, correct?

13          A     Correct.

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

17          A     Other than what was in our first letter --

18          Q     Right.

19          A     -- that's correct.

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

21                MR. GARNER: Nothing further, Your Honor.

22                THE COURT: All right, I do have a few follow-up questions,  
23 Mr. Jung. I'd like for you, if you could please, to turn to Exhibit 9, page  
24 134.

25                THE WITNESS: Okay.

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

5 THE WITNESS: Yes, Your Honor.

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

7 THE WITNESS: That would have been myself.

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

12 THE WITNESS: That's correct, yes.

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

15 THE WITNESS: Correct.

16 THE COURT: Quarterly by three?

17 THE WITNESS: That is --

18 THE COURT: Okay.

19 THE WITNESS: -- correct.

20 THE COURT: So, you probably don't recall, because you've  
21 indicated that you're relying upon records only, what you did at the time,  
22 but maybe this'll either refresh your memory or you can help me, why  
23 didn't you use one of the other numbers? For example, the 210, the  
24 180, 234, these other numbers that seem to be on that same line with  
25 the 162.

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

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

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

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

23 THE WITNESS: Okay.

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



1 monthly assessments relevant to the super-priority lien?

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

8 THE COURT: Okay.

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

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

23 THE COURT: Okay, I understand that.

24 THE WITNESS: So --

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

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

3 THE WITNESS: Okay.

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

9 THE WITNESS: Yes, Your Honor.

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

14 MR. HONG: Yes.

15 MR. GARNER: Yes.

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

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

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

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

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

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

17 THE WITNESS: Yes, Your Honor --

18 THE COURT: Right?

19 THE WITNESS: -- I agree.

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

23 THE WITNESS: Yes.

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

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

6 THE WITNESS: Yes, Your Honor.

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

9 **FOLLOW-UP BY THE DEFENSE**

10 BY MR. GARNER:

11 Q Yeah, just as to the policy, practices, and procedure, that you  
12 did this thousands of times. If NAS had said, use the 210 or the 234 or  
13 180 number instead, what would Miles Bauer have done?

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

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

25 A There were instances during my employment at Miles Bauer

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

3 Q And, what did NAS do with those checks?

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

6 Q Thank you, Mr. Jung.

7 A Thank you.

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

12 THE WITNESS: Okay.

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

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

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

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

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

7 THE COURT: Right.

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

16 THE COURT: Okay.

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

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

23 THE WITNESS: Well, Your Honor --

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

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

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

3 THE COURT: Mm-hmm.

4 THE WITNESS: -- and the date of that first letter that I wrote  
5 and sent to NAS was dated February 22<sup>nd</sup>, 2011. So, the printed March  
6 12<sup>th</sup>, 2011 would track with that chronology.

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

12 THE WITNESS: Mm-hmm.

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

15 THE WITNESS: Mm-hmm.

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

19 THE WITNESS: Mm-hmm.

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

22 MR. GARNER: These are quarterly charges.

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

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

1 THE WITNESS: Mm-hmm.

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

4 THE WITNESS: So --

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

7 THE WITNESS: Right.

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

13 THE WITNESS: Sure.

14 THE COURT: -- but it could have been?

15 THE WITNESS: Right, I see what you're saying, Your Honor.  
16 Just to answer your question, my best recollection would have been the  
17 162, which was the quarterly amount, designated as the present rate  
18 for -- and it says number of months delinquent --

19 THE COURT: Two.

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

23 THE COURT: Okay.

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



1 THE COURT: Okay, so then you'd take the 162 times two --  
2 THE WITNESS: Mm-hmm.  
3 THE COURT: -- and then 210 times one, and that would give  
4 you the nine months amount using that formula; would -- do you agree?  
5 THE WITNESS: Yes, Your Honor. So, it looks like --  
6 THE COURT: So, in other words --  
7 THE WITNESS: -- it'd be an extra \$48.  
8 THE COURT: Yeah. So it'd be -- let me just do that math real  
9 quick.  
10 THE WITNESS: Mm-hmm.  
11 THE COURT: Looking at this thing, if we use that formula, so  
12 162 --  
13 MR. HONG: Or 58.  
14 THE COURT: -- where it has a two underneath the 162 --  
15 THE WITNESS: Mm-hmm.  
16 THE COURT: -- that two -- those are quarterly. So, that'd be  
17 six months, right?  
18 THE WITNESS: Yes, Your Honor.  
19 THE COURT: We take 162 and 162, that gives you six  
20 months?  
21 THE WITNESS: Correct.  
22 THE COURT: Okay, then you take 210, just one 210 because  
23 that's another three months, bringing it to nine months, so let's add that  
24 up.  
25 That'd be 534. 534 -- it could be that 534, it seems to me,

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

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

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

6 MR. GARNER: Nothing.

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

8 THE COURT: Okay. Go ahead.

9 **FOLLOW-UP BY THE PLAINTIFF**

10 BY MR. HONG:

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

13 A Yes.

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

16 A Okay.

17 Q And, this corresponds to that March 12<sup>th</sup>, 2011, do you see  
18 that from Yolanda [indiscernible], and this is from NAS to Alexander  
19 Baum?

20 A Yes.

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

22 A Correct.

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

1           A     Yes.

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

4           A     Correct.

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

7           A     Yes.

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

12          A     Correct.

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

16          A     Correct.

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

20          A     Right, that's my best estimate --

21          Q     Right.

22          A     -- for the number of checks.

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

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

1 Q 2-1-5, correct. So, why don't you like put a finger or  
2 something on 134 and then go to 215 and then that'll pretty much mirror  
3 those documents. Are you at 215?  
4 A Yes.  
5 Q Exhibit 11?  
6 A I am.  
7 Q Okay. So, if you look at 215, you see that first column on the  
8 left, that's the quarterly assessments, you see that, and that's from dates  
9 January of 2011 through July of 2011, correct?  
10 A Correct.  
11 Q And that's 162; you see that?  
12 A Yes.  
13 Q Okay, and if you drop two more -- next column, it's called the  
14 Videiras, which apparently is another HOA, but do you see that?  
15 A Yes.  
16 Q And then, if you look at the column immediately to the right of  
17 that, again, corresponding with that first column on the left, quarterly  
18 assessments from January 2010 through December of 2010 is 180; do  
19 you see that?  
20 A Yes.  
21 Q Okay, so now per your previous testimony we talked about  
22 nine months of assessments -- super-priority being nine months of  
23 assessments, that would be basically 180 times three, since it's  
24 quarterly, correct?  
25 A Correct.

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

4 A Yes.

5 Q Okay.

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

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

10 THE COURT: Okay.

11 BY MR. HONG:

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

13 THE COURT: 540.

14 BY MR. HONG:

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

18 A Correct.

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

20 MR. GARNER: Just a couple follow-up?

21 THE COURT: Sure, go ahead.

22 **FURTHER FOLLOW-UP BY THE DEFENSE**

23 BY MR. GARNER:

24 Q Have you seen page 215 before today?

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

1 not --

2 Q Okay.

3 A -- believe I have.

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

6 A That is correct.

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

9 A I did not.

10 Q Okay. Thank you, Mr. Jung.

11 A Thank you.

12 MR. HONG: Follow-up, Your Honor?

13 THE COURT: Sure, go ahead.

14 **FURTHER FOLLOW-UP BY THE PLAINTIFF**

15 BY MR. HONG:

16 Q Again -- but my previous question, again, the communication  
17 channels were there obviously, right, from March 12<sup>th</sup>, 2011 when NAS  
18 emailed the individual at Miles Bauer saying attached is the March 12<sup>th</sup>,  
19 2000 [sic] print-out of the ledger, right? So, again -- and you testified  
20 when I asked you, hey, someone from Miles Bauer, whether it's you or  
21 your paralegal or secretary, could have emailed back NAS saying, hey,  
22 can you give us something a little bit more specific and detailed because  
23 there's different numbers here, correct?

24 A Correct.

25 Q Okay. Nothing further, Your Honor.

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

3 THE WITNESS: Yes.

4 MR. GARNER: All right. Thank you.

5 MR. HONG: Nothing further, Your Honor.

6 MR. GARNER: Nothing further.

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

9 THE WITNESS: Thank you, Your Honor.

10 THE COURT: You're excused.

11 THE WITNESS: Thank you.

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

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

15 THE COURT: Any rebuttal?

16 MR. HONG: No, Your Honor.

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

18 MR. HONG: Sure, Your Honor.

19 MR. GARNER: Yes.

20 THE COURT: All right, Mr. Hong?

21 MR. HONG: Thanks Rock.

22 MR. GARNER: Thanks Rock.

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

25 MR. GARNER: Sounds great.

1 THE COURT: If you have just a few minutes -- so, you do?  
2 Okay, let's take a comfort break. Come back in --  
3 MR. GARNER: Sounds good.  
4 THE COURT: -- let's come back in like, you know, 12  
5 minutes, something like that.  
6 MR. GARNER: Sounds good.  
7 THE COURT: 12 to 15 minutes, something like that.  
8 MR. GARNER: Okay.  
9 THE COURT: Okay.  
10 [Recess began at 10:39 a.m.]  
11 [Recess concluded at 10:58 a.m.]  
12 MR. HONG: Oh yes, Your Honor, thank you.  
13 THE COURT: And now, wait, is there a counterclaim still, or  
14 no?  
15 MR. HONG: Well, there's a cross-claim.  
16 THE COURT: Yeah, that's right.  
17 MR. HONG: But, that's addressed --  
18 THE COURT: It's --  
19 MR. HONG: -- in the --  
20 THE COURT: So, sorry for the interruption, but something  
21 else just popped in my head, and that is, you get -- normally, on a  
22 complaint you get the closing argument and then you get a final rebuttal  
23 argument.  
24 MR. HONG: Right.  
25 THE COURT: But, when there's a cross-claim then they



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

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

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

8 MR. HONG: Yeah.

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

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

14 THE COURT: Okay.

15 MR. GARNER: So, I'd say, we either both get one or both get  
16 two.

17 THE COURT: Do you agree with that?

18 MR. HONG: Yeah, that's fine, we'll just both get one, Your  
19 Honor.

20 THE COURT: Both get one?

21 MR. GARNER: That's fine.

22 MR. HONG: Yeah.

23 THE COURT: Okay, go ahead then.

24 MR. HONG: Okay. Thank you, Your Honor.

25 **CLOSING ARGUMENT BY THE PLAINTIFF**

1 BY MR. HONG:

2 Your Honor -- and thank you for the time, and the NV Eagles  
3 motion for judgment as a matter of law, pursuant to NRCP Rule 50,  
4 that's already been briefed and Your Honor can look at that. I will make  
5 a couple of comments on that, Your Honor.

6 Just to remind Your Honor, this case deals with the cross-  
7 claim and an affirmative defense from the bank on tender, okay? And,  
8 Your Honor, on an identical, same HOA case, literally two weeks ago, on  
9 December 31<sup>st</sup>, 2019, issued a ruling addressing the statute of  
10 limitations on an affirmative defense. And in that case, Your Honor held,  
11 look, I'm going to -- on tender, I'm going to go with five years, we argued  
12 three years, but Your Honor said five years.

13 THE COURT: You know what case that was by any chance?

14 MR. HONG: Yes, Your Honor, and it's in the briefing.

15 THE COURT: Okay.

16 MR. HONG: It's in -- it's *TWT versus Nationstar*, and I can  
17 give a case number. And Your Honor issued a minute order, a very  
18 lengthy minute order, asking the bank's attorney to prepare the summary  
19 judgment in its favor, the reason being is, Your Honor felt there was a  
20 43-month stay in the case. And therefore, by applying the stay of 43  
21 months, the five years was tolled. So, in this case, there was no stay  
22 whatsoever, and I'm kind of mimicking real briefly what the motion  
23 stands -- what the motion is.

24 THE COURT: Sure.

25 BY MR. HONG:

1 And so, pursuant to the HOA sale back in 2013, even by  
2 applying the five years, there's no possible way the statute of limitations  
3 could be defeated by the bank here on tender; they just can't. The first  
4 and only time ever it was raised was July of 2019 via the bank's cross-  
5 claim. Okay, that was a cross-claim alleging tender, so that's out. And  
6 then, the affirmative defense, first time ever alleged, was in July 30 of  
7 2019 at -- in -- as an answer to my client's cross-claim against the bank.  
8 So, five years -- and it's all briefed and Your Honor can look at it, and we  
9 even attached the minute order on that.

10 But, notwithstanding all that, Your Honor, this case again, it's  
11 about tender. Aside from the statute of limitations, it's absolutely clear,  
12 and Mr. Jung confirmed it, he said look, it's the nine months before the  
13 Notice of Delinquent Assessment, which was October of 2010, or he  
14 even said, or the Notice of Default which was in December of 2010. So,  
15 we're dealing with 2010, but I will say, the Nevada Supreme Court in  
16 *Gray Eagle* made it very clear, it's the -- it's up to nine months preceding  
17 the Notice of Delinquent Assessment Lien where they called it the Notice  
18 of Delinquency. Okay so, regardless, we're in 2010.

19 Now, we know unequivocally Mr. Jung, Miles Bauer, used the  
20 quarterly of 162 times three to make it 486, we know that's -- that was  
21 the incorrect amount. Exhibit 11, Bates stamp number 215, very, very  
22 clear, for the period of January 1<sup>st</sup>, 2010 to December 31<sup>st</sup>, 2010, it was  
23 \$180 quarterly. We times that by four -- we times that by three for the  
24 nine months, that's \$540. It's just short and Ms. Susan Moses testified  
25 to that, that's the number, because the other columns say Videira and

1 that's another HOA, Your Honor.

2           So now, what's the effect of that? Well, it's very clear,  
3 *Diamond Spur* is that leading case where, involving situations like this,  
4 published -- that said look, if it's a tender and a rejection, we're going to  
5 call it a valid tender. The Supreme Court made it absolutely clear, it has  
6 to be for the full amount, which means the Supreme Court said --

7           THE COURT: In which case, again, I'm sorry?

8           MR. HONG: That's *Diamond Spur*.

9           THE COURT: That's *Diamond Spur*.

10 BY MR. HONG:

11           That's *Diamond Spur*. And, the Supreme Court said look, if  
12 it's for the full amount -- when we say the full amount, the super-priority  
13 amount, then -- and there's a rejection like there was here, then it's a  
14 valid tender. It has to be for the full amount, so there can be no valid  
15 tender if it's for less than the full amount, whether by error -- which was  
16 by error, and Mr. Jung, fair enough, he had 2,000 to 2,500 of these, Your  
17 Honor. I mean, goodness sake, they're going to make mistakes here  
18 and there and this was a mistake.

19           And, he also testified, they had open channels, via email even,  
20 to confirm with NAS saying, hey, we got this ledger in March of 2011, it  
21 doesn't really show -- and that's 134, it doesn't show like the dates or  
22 whatever, can you give us one that's more -- a little bit more -- with more  
23 information, which would have been Exhibit 11, 215. They did not do  
24 that. And again, that's probably because they had many files and so  
25 forth.

1 But, that's the legal effect. There cannot be a valid tender in  
2 this case, because the amount was deficient. It's just that simple. And,  
3 the Nevada Supreme Court just recently, last year, in *Resources Group*,  
4 again confirmed in these HOA cases with super-priority portions alleged  
5 to being satisfied or not, the burden is on the bank to show that it was  
6 satisfied, okay? They -- it just was not.

7 Now, I know what the bank's going to argue. They're going to  
8 say, okay, even if it was the wrong amount, *Jessup* should apply. And  
9 *Jessup*'s that case where it's futility, where the first letter is sent to the  
10 HOA trustee, an HOA trustee sends a letter saying, look, we believe the  
11 HOA lien is junior to the super -- to the bank's deed of trust, so any  
12 payments you're going to make, we're going to reject. That can't work  
13 because again, number one, that case is on reconsideration, and there  
14 was a oral argument, I believe, in October of last year on the  
15 reconsideration, so that is kind of out there. But notwithstanding, even if  
16 that case stands, that's based on futility, Your Honor.

17 And so, the bank can't bootstrap that case to cases where  
18 they've actually tendered an amount, okay, because *Jessup*, again, is  
19 based on, we didn't even attempt to physically tender because we  
20 thought it was futile. Where here, clearly there's no evidence that there  
21 was futility. It's the example -- the best example I can give is some -- a  
22 student taking an exam and then getting a D, and then saying, oh well, I  
23 shouldn't have showed up, then that test doesn't count. No, *Jessup* is  
24 when a student calls in sick and doesn't show up and argues I would  
25 have gotten an A. Here, the student showed up, which means the Miles

1 Bauer did the attempt at tender, it was short, the student got a C, that's  
2 the way it is. There's no A here.

3 So, that's pretty much it, and it's addressed in our motion also,  
4 just so Your Honor knows, any of these notices, there doesn't need to be  
5 a delineation or a specification on the super-priority amount. That's  
6 been well-settled by the Nevada Supreme Court in the seminal *SFR*  
7 case. The Nevada Supreme Court said no, no, no, just the total amount  
8 due is enough. So, any argument by the bank here saying, look, the  
9 notices didn't specify, delineate the super-priority portion, that's -- that's  
10 just contrary to Nevada law as to these HOA cases.

11 Finally, any argument of unfairness or oppression based on  
12 this ledger, that cannot stand per *Shadow Canyon* because again, there  
13 must be a showing that any act of unfairness, if it was unfair, if it was  
14 unfair, has to -- there has to be a nexus between that act of unfairness  
15 with the purchase price at the sale and/or affecting the sale. And the  
16 burden of proof on that is on the bank, where the bank has to say, hey,  
17 based on this unfairness -- act of unfairness, we didn't go to the sale or  
18 whatnot. But, they -- the bank knew, clearly, after the rejection, Your  
19 Honor, that the sale was going to go forward. And, the notices were all  
20 sent, there's no issue about that, the posting, and whatnot.

21 So, with that, this is a case where my client should get  
22 judgment for quiet title declaring that the deed of trust was extinguished  
23 at the time of the sale. It's just there's no ifs, and, or buts about it, really  
24 here. So again, I know the bank's going to argue *Jessup*, they're going  
25 to -- they can't get away from the amount being insufficient, so they're

1 going to concede, yeah, *Diamond Spur* doesn't fit, but they're going to  
2 say, well, *Jessup* applies. No, again, *Jessup* cannot apply because  
3 *Jessup* is in instances where no check was sent based on the belief that  
4 it would have been futile. Here, that can't be true because the check  
5 was sent, so they -- the Miles Bauer cannot have said that they believed  
6 it was futile, and Rock Jung would never have testified to that, nor did  
7 he.

8 So, with that, we rest. And again, Your Honor, we ask Your  
9 Honor review the motion itself because we believe the motion on the  
10 statute of limitations, that's -- that wipes it out. But, even if it was to go  
11 forward, based on the evidence, there's -- there was no tender -- there  
12 was no satisfaction of the super-priority amount, Your Honor.

13 THE COURT: Okay, thanks, Mr. Hong.

14 MR. HONG: Thank you.

15 THE COURT: And, Mr. Garner?

16 MR. GARNER: Thank you, Judge. I believe it just came  
17 through half an hour or so ago, we filed a trial brief; may I approach with  
18 a courtesy copy?

19 THE COURT: Sure. Thank you.

20 **CLOSING ARGUMENT BY THE DEFENSE**

21 BY MR. GARNER:

22 I will highlight a couple of the things in there during my closing,  
23 Your Honor. First, to address the statute of limitations motion.

24 THE COURT: You're going to file this, right, so it'll be part of  
25 the record?

1 MR. GARNER: It has been filed now.

2 MR. HONG: It's been filed.

3 THE COURT: Okay.

4 MR. GARNER: Yeah.

5 THE COURT: Okay.

6 MR. GARNER: It's been filed now, Your Honor.

7 THE COURT: Okay.

8 BY MR. GARNER:

9 Briefly address the Rule 50 motion, although I think in bench  
10 trials it's more probably dubbed a Rule 52(c) motion. Statute of  
11 limitations, Your Honor, is actually an affirmative defense. It's listed as  
12 an affirmative defense in the NRCPs and affirmative defenses are what?  
13 Waived, if not raised. When, if ever, was this raised? It was raised  
14 yesterday on the day of trial. Was it raised in pleadings, Your Honor?  
15 No. In fact, we don't even have an answer from NV Eagles to the bank's  
16 cross-claim. So, how could it have asserted it? There is no answer.

17 We are, essentially, Your Honor, the bank and NV Eagles, on  
18 equal footing with respect to our cross-claims, and here's why. Back in  
19 2013, within a few months of this HOA foreclosure sale, Melissa  
20 Lieberman, the former homeowner, filed suit, challenging the sale. She  
21 sued NV Eagles' predecessor, Underwood. Underwood bought at the  
22 HOA foreclosure sale, transferred the property to NV Eagles after they  
23 had been sued by Melissa Lieberman.

24 And then they, Underwood, files their own lawsuit. They do  
25 not name Bank of America, they do not name Bank of New York Mellon.



1 They named Pulte. Pulte was the original lender. If you look at Exhibit  
2 1, the Deed of Trust, Pulte was the original lender. It was not the record  
3 beneficiary ever. It was MERS and then Bank of New York Mellon. But,  
4 within a few months, NV Eagles dismissed Pulte.

5 So, until July of last year, Your Honor, NV Eagles had zero  
6 claims against Bank of New York Mellon or BANA. Just as BANA had  
7 zero claims against NV Eagles, and it was brought up at the calendar  
8 call in May. There's a minute order from that calendar call where this is  
9 raised, I think Mr. Brenner was here, Mr. Hong was here, and at that  
10 calendar call, you granted leave to the parties to fix this. File your cross-  
11 claims, which we did. However, we are the only ones who answered the  
12 cross-claims and in those cross-claims asserted tender. It -- that wasn't  
13 the first time it was raised though.

14 Back in 2016, when it was The Wright Law Group, who  
15 represented NV Eagles, there was summary judgment motion practice.  
16 And, that issue of tender was adequately briefed in 2016. And even in  
17 the -- 2016, nearly four years ago, NV Eagles did not raise statute of  
18 limitations at all.

19 And as -- we also cited to you the law in our opposition, Your  
20 Honor, that statute of limitations don't apply to affirmative defenses  
21 anyway. They only apply to claims. And so, if the cross-claims -- if  
22 we're tardy, so is Plaintiff, or so is NV Eagles here.

23 THE COURT: Okay.

24 BY MR. GARNER:

25 We're on equal footing.

1           And, Exhibit D to Mr. Hong's motion, the *TWT Investments*  
2 minute order, I read that. I didn't see in there, Your Honor, your  
3 application of a statute of limitations to a defense. That minute order  
4 discussed a statute of limitations as to the claim under HERA and the  
5 claim under tender, not to the defenses thereof.

6           So --

7           THE COURT: Okay.

8           BY MR. GARNER:

9           -- that's what I have to say about that.

10          Now, let's get to the tender. I don't think anybody in this room,  
11 including Mr. Hong, disputes that lenders have the right to pay the  
12 super-priority. Nobody disputes that. But, it seems like maybe there is a  
13 dispute as to whether or not we're entitled to know what that is. But,  
14 how can there be dispute? It's like saying -- I like basketball analogies.  
15 You get the right to a free throw, but you don't have the right to the ball.  
16 How are you supposed to do it then? If we have the right to pay the  
17 super-priority, we are entitled to know what it is.

18          In none of the recorded documents that you have, the Notice  
19 of Delinquent Assessment Lien, the Notice of Default, the Notice of Sale,  
20 not one of those even says super-priority, or says what the applicable  
21 amount is. So, we asked. We asked NAS, we'd like to pay this amount,  
22 please tell us what it is. Did it give us that number? No. Instead, it gave  
23 us some kind of a ledger. You used the word, when examining Mr.  
24 Jung, a vague one. I agree, it is vague.

25          They did not give us the fuller one that they have in their file,

1 that Mr. Hong examined Ms. Moses and Mr. Jung on, the one that  
2 identifies dates of applicability and HOAs. They didn't give that to us.  
3 They could have, and that would have been very helpful. And, we didn't  
4 choose what they gave to us. They chose to give us the vague ledger  
5 that only had present rate and a handful of prior rates.

6 So, Miles Bauer made a good faith estimate of what it was and  
7 delivered payment. And I don't even know that delivery of the payment  
8 is really an issue anymore in this case, Your Honor. It seems like the  
9 entire closing argument was about the amount. But, in any event, it was  
10 proven. The policies, practices, and procedures, the Legal Wings  
11 receipt, the ProLaw, all of it proved that that check was delivered.

12 Now, did NAS reject this check, Your Honor, because it was  
13 for \$486, as opposed to 534 or 540? Where is the evidence that they  
14 rejected it for that reason? You don't have it. In fact, you have the  
15 opposite. You have testimony from both Mr. Jung and from Ms. Moses  
16 who said what? We would have rejected any check that came with that  
17 letter, irrespective of the amount. If NAS had told us, hey, use this other  
18 number, Mr. Jung said, we would have delivered that. But, is there any  
19 doubt in your mind based on the testimony and the practices and  
20 procedures of NAS that they would have accepted it?

21 So, let's get to the amount. *Diamond Spur*, Your Honor, says  
22 that the bank was entitled to rely on the representations of the HOA as  
23 to what was owed. So, if the HOA through NAS tells us, here's what's  
24 owed, but they don't give us sufficient information, we are entitled to rely  
25 on the information given.

1           In addition, this is on the bottom of page eight of our trial brief,  
2 under the tender doctrine, Your Honor, and I'm quoting here from a case  
3 out of Utah, and there's string site to other cases in Minnesota and  
4 Montana, let me start with the first one. A person to whom a tender is  
5 made must at the time specify the objections to it or they are waived.  
6 They're waived. They can't -- what is this now, 2000 -- six and a half  
7 years later, resurrect those objections through trial and say, well really  
8 our objection to it was it -- was that it was \$48 off.

9           Those are waived, and you see that in the Utah case, the  
10 Minnesota case, and the Montana case we cited on pages eight and  
11 nine of our brief. So, not only are we entitled to rely on what NAS sent  
12 to us, NAS has to tell us the right amount at the time or it's waived. And  
13 NV Eagles doesn't get to resurrect that right.

14           In addition, Your Honor, there's often a debate over statutory  
15 compliance, whether it requires strict compliance or substantial  
16 compliance. Substantial compliance, Your Honor, was created to -- and  
17 I'm quoting from page nine of our brief, the *Leyva* case, that's a 2011  
18 Nevada Supreme Court case, the doctrine substantial compliance may  
19 be sufficient to avoid three things: harsh, unfair, or absurd  
20 consequences. That's the purpose of substantial compliance.

21           The Nevada Supreme Court has applied substantial  
22 compliance to NRS 116. That's also on page nine of our brief. They  
23 applied it, Your Honor, to the HOA's compliance with the notice  
24 provisions of NRS 116. Okay? There were -- there was a lot of litigation  
25 for years over whether or not NRS 116 was constitutional on its face.

1 Did it require notice? Did it not require notice? It was finally ended, I  
2 think, several years ago and the Nevada Supreme Court said, yes, NRS  
3 116 required the HOAs to send notice to the banks.

4 And then, in later opinions, they said, well actually, it only  
5 required the HOA to substantially comply. So, if there were errors in  
6 their actual compliance with the notice, so long as the bank got some  
7 notice, it's okay. Okay, you will not be defeating this HOA sale based on  
8 those types of errors. Shouldn't the same be true of the bank's  
9 compliance with its right to tender? The answer is yes.

10 As the Supreme Court said, as it related to a mechanic's lien,  
11 this is the *Fondren* case cited on page nine of our trial brief. There, the  
12 Nevada Supreme Court rejected an argument that a mechanic's lien was  
13 invalid due to some minor math miscalculations, saying this: it is not  
14 realistic to become so technical that such errors defeat an otherwise a  
15 valid lien for a large amount.

16 What was this lien for, Your Honor, that brings us here today?  
17 Ms. Lieberman borrowed nearly half-a-million dollars. And, with interest  
18 now, and it's a stipulated fact, it's over \$800,000. So, we're going to  
19 say, Bank of New York Mellon, you lose your lien for \$800,000 because  
20 of a difference of maybe \$48, which you would have paid if you had  
21 known it was inaccurate, and which you could have calculated if you had  
22 been given proper information.

23 This goes along, Your Honor, with the Latin phrase that's in  
24 *Black's Law Dictionary*, *de minimis non curat lex*, meaning the law does  
25 not concern itself with trifles. That's the substantial compliance doctrine.

1           Therefore, under *Jessup*, and applying these other doctrines,  
2 the tender was good. But, let's imagine, Your Honor, that we didn't  
3 deliver a check at all. How is it under facts like *Jessup* where we don't  
4 deliver a check, the bank wins, but in cases like this, where we actually  
5 deliver one, and no one tells us it's wrong, we lose? Under the facts of  
6 this case, and the law of tender, as articulated in *Jessup* -- and *Jessup*  
7 didn't create new law, Your Honor. *Jessup* just articulated it and applied  
8 it to NRS 116.

9           We didn't have to deliver a check at all under the facts in this  
10 case. Why? Because it would have been futile and because NAS really  
11 prevented us from knowing what it was.

12           The cases cited within *Jessup*, such as *Mark Turner*  
13 *Properties* and the Am. Jur., C.J.S., as we cite them on page ten, say  
14 that delivery of a check is excused. When? When the party entitled to  
15 payment by declaration or by conduct. So, you can do this by words or  
16 you can do this by actions. Proclaims that if a tender of the amount due  
17 is made, it will not be accepted. Do we have that conduct, Your Honor,  
18 the evidence of such conduct here? How could NAS have been more  
19 clear than in the 2,500 times that Mr. Jung said he sent checks to them,  
20 they rejected them?

21           And, if Mr. Jung had sent a check for 534, 540, or like he said  
22 he did many other times, for a full nine months plus some reasonable  
23 costs and fees, so more than the super-priority, even when they  
24 tendered more than the super-priority, NAS rejected it.

25           Delivering a check, Your Honor, can also be excused under

1 the law if the amount depends on information that is ascertainable only  
2 from accounts of the creditor. You'll see that on page 15 of our trial  
3 brief. This is black-letter law from the Am. Jur. and C.J.S. C.J.S. says,  
4 tender of an amount due is waived when the party entitled to payment  
5 obstructs or prevents a tender.

6 By not giving us the information, or just giving us the number,  
7 why play the games, just give us the number. If they prevent it or  
8 obstruct it, delivery is irrelevant. We didn't have to deliver a check at all.  
9 Footnote 6, on page 15 of our trial brief, Your Honor, also has a handful  
10 of other string cites about obstruction and not divulging information, and  
11 misrepresentations as to the amount.

12 So, whether you want to decide this case on *Jessup* and  
13 substantial compliance -- or sorry, *Diamond Spur* with substantial  
14 compliance, or *Jessup* with excuse and obstruction, either way it is the  
15 same. Bank of America, the servicer at the time, tried to exercise its  
16 right and did more than just try. They did a lot to exercise it. And, NAS,  
17 under any circumstances, would have rejected their payment. But, the  
18 law says it's good enough.

19 As a back-up, Your Honor, we have the *Shadow Canyon*  
20 analysis, requires two things, one, an inadequate price and then some  
21 element of unfairness. And, some times we refer to this as sliding the  
22 scale, or hydraulic, the more unfair the price, the less you have to show  
23 the unfairness. You only have evidence of the fair market value, that's  
24 the measuring stick that the law uses. You only have our evidence and  
25 it's part --

1 THE COURT: So, you're talking about commercial  
2 reasonability?

3 MR. GARNER: Correct, yes. Some people call it that, some  
4 people call it the equities --

5 THE COURT: Or un-reasonability.

6 MR. GARNER: I'm sorry?

7 THE COURT: Or un-reasonability, as it were.

8 MR. GARNER: Correct. I call it the equities or *Shadow*  
9 *Canyon*.

10 THE COURT: Okay.

11 BY MR. GARNER:

12 The fair market value, according to Exhibit 12, which is our  
13 expert appraiser, and stipulated fact number 16, it's \$430,000.  
14 Underwood picked this property up for 30. That's 7 percent. Pretty  
15 grossly inadequate, which means we only need slight additional  
16 evidence of unfairness.

17 Do we have it here? We do, because *Shadow Canyon* said,  
18 whether a senior lender tried to tender payment to the association is  
19 significant. Here, we tried, they didn't give us the number, we did our  
20 best estimate as to what it was, paid it, they rejected it. And as the  
21 evidence showed you, whatever amount we sent that was less than the  
22 3,800 and something other -- or other dollars, any amount we sent that  
23 was less than that, NAS would have rejected.

24 Plaintiff's status as a bona fide purchaser, Your Honor, is  
25 relevant under the *Shadow Canyon* equities analysis, but what evidence



1 did they present to you that they were that? None. The case we cite to  
2 you in our trial brief, *RLP-Ampus*, says if you claim that status, you got to  
3 prove it, you can't just say you are. Even if they had come here to try to  
4 claim that status, Your Honor, I think all the pre-sale warnings, the  
5 deeds, they leave no room for it.

6 When you go to one of these auctions, you know based on the  
7 publicly recorded statements, and as Ms. Moses said, the auctioneer  
8 said it. We're going to give you title with no guarantees, no warranties,  
9 no nothing. Good luck to you. How can you accept that and then come  
10 to court and say well, I thought I was getting more?

11 For any of these reasons, Your Honor, any of them are  
12 sufficient to rule in the bank's favor, but taken altogether, are more than  
13 sufficient. So, the Bank of New York Mellon, who is the record  
14 beneficiary, Your Honor, requests judgment against NV Eagles, and in  
15 its favor on all the cross-claims between them, and requests a  
16 declaratory judgment that Plaintiff owns this property subject to the  
17 deed. Bank of America was never the deed of trust beneficiary, it was  
18 only under servicer. So, I think with respect to its status as either Cross-  
19 Claimant or Cross-Defendant, it should be dismissed entirely. This  
20 really just is Bank of New York Mellon versus NV Eagles.

21 And then, as we discussed yesterday at the beginning of the  
22 trial, all other claims, counter-claims, cross-claims, that haven't  
23 sufficiently been dismissed, we'd ask that you dismiss those because no  
24 other party participated in pretrial or at trial, so.

25 THE COURT: Okay.

1 MR. GARNER: Thank you.

2 THE COURT: All right. Well, most lawyers that have bench  
3 trials here know that either contemporaneous with the end of the case or  
4 close to contemporaneous with the end, meaning some deliberation, I  
5 give a decision. And then the prevailing party submits the order.  
6 Typically, those decisions from me are involved. They reference exhibits  
7 and they're 30 minutes, 45-minute-type decisions. Here, what I'm  
8 inclined to do is call you back to court and actually afford an opportunity,  
9 not necessary, not required, but an opportunity for any kind of briefing on  
10 what I'm going to say right now.

11 MR. GARNER: Okay.

12 THE COURT: You don't have to do it, but you can.

13 So, my plan is to have both of you come back here live in  
14 court, and at that time, I'd give the decision on the motion that's pending  
15 and then also, the trial itself. And so, we'd have to schedule that. My  
16 guess is, taken as a whole, it'd be an hour long court session that we  
17 have -- I don't know if I'd take the whole hour, but I would like to explain  
18 it all to you once I figure it out.

19 The reason I, in this case, want to take that opportunity -- now  
20 there's -- no, actually multiple reasons. One is, obviously you filed a trial  
21 brief, that I just -- and you cited it a few times, Mr. Garner, in your  
22 closing, but I haven't seen it. So, I -- I'd like to look at that.

23 MR. GARNER: Okay.

24 THE COURT: Further, I'd like to look more intently, of course,  
25 at the motion paperwork. But on the trial itself, in addition to looking at

1 your trial brief, I also, of course, want to look at the cases that have been  
2 mentioned in support of the issue that seems to be the mainline issue for  
3 the Court. I mean, take a better look at *Diamond Spur*, look at *Jessup*,  
4 see if I could -- if I could even look at *Jessup*, presently. There's been, I  
5 think, some lawyers have come into court and said that Chief Justice  
6 Gibbons said something along the lines of nobody should look at this  
7 right now. But so I need -- you know -- and you could -- you know,  
8 there's that.

9 *Shadow Canyon*, on commercial reasonability, that was an  
10 interesting argument, one I haven't -- I hadn't thought of, and that's  
11 good, because lawyers are supposed to educate Courts and I hadn't  
12 thought about that. The 7 percent plus this idea that you did try and  
13 what have you, that's an interesting argument, one I haven't thought  
14 about, actually. But anyway, there's a lot of moving parts to it.

15 But, I do want to at least make some findings that could be  
16 relevant to any further briefing as between now and when I give the  
17 decision because I guess it would start with this. It's a question. Is there  
18 another case where this has happened, this being a clear, you know,  
19 personal delivery using a runner, of a tender amount, but it just  
20 happened to be short? Has this ever happened in all these thousands of  
21 HOA cases that then resulted in a decision where I know definitively the  
22 answer as to what an Appellate Court would say, just on that point?

23 I realize there's other points, I realize no two cases are ever  
24 going to be exactly the same in this arena, but just on the one issue  
25 where it goes like this. There is a super-priority amount. I'll make,

1 obviously, that finding. That super-priority amount in this case would  
2 have been from the year 2010, because I think Exhibits 3 and 4 start the  
3 process. Exhibit 3, being the Notice of Delinquent Assessment Lien,  
4 Exhibit 4 being the Notice of Default, Election to Sell, those respectively,  
5 are from October 2010 and December 2010. So, the super-priority  
6 amount would have had to pre-date those notices to be operational as  
7 a matter of law. So, we do know now, in hindsight, I know from an item  
8 that Mr. Jung didn't have -- let's see --

9 MR. HONG: Exhibit 11, Bates stamp 215, Your Honor.

10 THE COURT: 2-1-5?

11 MR. HONG: Yeah.

12 THE COURT: Yeah, 215 shows clearly that the assessments  
13 were for the year 2010, 180, for the entire year, from 1/1/2010 to  
14 12/31/2010. That is the whole year of 2010, clearly. It covers every day  
15 of that year, and it's 180. And then from January 1<sup>st</sup> of 2011 through  
16 July 31<sup>st</sup> of 2011, again, referencing page 215, it's 162. So, since the  
17 lien -- the super-priority lien, of course, would have had to pre-date the  
18 October 2010 notice or the December 2010 notice, it's all 2010, as fate  
19 would have it, because even if you used October, there's still nine  
20 months of that calendar year to represent a super-priority time period.

21 So, clearly, it seems to me, I'll make a finding, it seems pretty  
22 clear that the evidence now at trial is that the super-priority amount  
23 would have had to have been 180 times three, which is 540. So, I think  
24 Mr. Hong had it right that it's 540. The bank, through Miles Bauer,  
25 tendered 486. So, let's see, that is 50 -- what is that?

1 MR. GARNER: 54.

2 THE COURT: \$56 short?

3 MR. GARNER: I think it's \$54, but --

4 THE COURT: 54? Okay, yeah, why don't we figure that out?  
5 540 minus 486 is 4 -- 34? Is that right?

6 MR. GARNER: It should be 54 but --

7 THE COURT: Okay. Nobody's good at math? That's why -- I  
8 hear lawyers all the time say, that's why I went to law school. Could  
9 somebody please here figure out what 540 minus 486 is please and let  
10 me know?

11 THE COURT CLERK: Yeah.

12 THE COURT: Okay.

13 MR. HONG: 54

14 THE COURT: 54. Okay, so you're \$54 short.

15 Now -- so, I'm just saying, I don't know definitively what just  
16 the Court would say about that point. I get that there's all kinds of  
17 moving parts, that here there was a request, and you got this vague  
18 ledger.

19 It's -- does seem to me that Mr. Jung, I'll just say it, I mean  
20 we've all not necessarily danced around it, but we were very courteous  
21 and respectful towards him, and we acknowledged he's had thousands  
22 of cases. But you know, I'm just a Judge that doesn't do as much as  
23 you guys do in the trenches on HOA, although I do my fair share. And,  
24 you saw what happened even here live in court. I happened to see the  
25 little number two, little number two, the little number four, and a little

1 number four, and it did -- now it seems like Exhibit 134 should have led  
2 him to do something to not be so confident that 486 is the number,  
3 frankly. What that something would have been -- I mean, there certainly  
4 was time too, because if you look at this all happening, he gets the 134  
5 exhibit March of 2011 or so and the sale is June 7<sup>th</sup> of 2013.

6 So that does give, respectfully, a lawyer, who, like Ms.  
7 Deloney said and like he said, you know, their primary mission is to hire  
8 counsel to protect the lien, and you know, provide counsel with funds to  
9 pay it. And so, he got it wrong and -- so, with all the other moving parts  
10 in there, I appreciate the arguments and I -- I'll tell you right now, I bet  
11 you, we'll never know. But, I bet you out of 32 of us, half of us would  
12 agree with the Plaintiffs and half of us would agree with the defense on  
13 something like this because that's probably what would happen.

14 So, that means I need to spend some time to figure it out, look  
15 at *Diamond Spur*, look at, to the extent I can, *Jessup*, just on this point. I  
16 know *Shadow Canyon*, but that's another legal concept altogether that  
17 could separate and distinctly decide the case.

18 But -- so, I'll ask you to come back to court, but in the interim, I  
19 mean, I -- is there ever been a case, in the HOA arena, just on one  
20 limited thing -- and again, I've said it a few times, I realize there's a lot of  
21 moving parts, but just on this one point, where a tender was provided by  
22 runner or otherwise clearly undisputedly provided prior to the sale, and it  
23 just was short? It was not the amount of the super-priority amount. It  
24 was off by some dollars, whatever they may be. And, the Appellate  
25 Court has rendered a decision that I can now use to determine the legal

1 significance of that particular limited event. Does anybody know of one?  
2 MR. GARNER: Not off the top of my head, but --  
3 MR. HONG: Well, no, Your Honor, and we'll brief it, but again,  
4 *Diamond Spur* can't be any clearer. I mean, as you heard me say, I'm  
5 not being argumentative, but it --  
6 THE COURT: No, I understand your argument and I --  
7 MR. HONG: -- has to be for the --  
8 THE COURT: -- haven't re-read that case --  
9 MR. HONG: -- full amount.  
10 THE COURT: -- but I'm just --  
11 MR. HONG: Yeah.  
12 THE COURT: -- you know, *Diamond Spur*, I -- you  
13 represented stood for the proposition that, you know, they have to tender  
14 the full amount.  
15 MR. HONG: It has to be --  
16 THE COURT: Okay.  
17 MR. HONG: -- the full amount.  
18 THE COURT: But, what I'm --  
19 MR. HONG: Of the super-priority.  
20 THE COURT: I understand that.  
21 MR. HONG: Of the super-priority.  
22 THE COURT: Of the super-priority.  
23 MR. HONG: Right.  
24 THE COURT: But, what I'm saying is, do we have a case in  
25 Nevada yet, from an Appellate Court, where unfortunately for whatever

1 reason, or maybe fortunately, in your view, the tender amount was off, it  
2 was wrong, it was not the super-priority amount, it was less than that?  
3 Do we have anything where a Court at least gives some guidance as to  
4 what now the trial judges should do with something like that?

5 MR. HONG: I'll reach out to my colleagues, because if  
6 anything it would have to -- it would be an unpublished order, obviously.

7 THE COURT: Okay.

8 MR. HONG: It would -- yeah.

9 THE COURT: So, I'm going to ask you to come back to  
10 court --

11 MR. HONG: Right.

12 THE COURT: -- for the whole decision --

13 MR. HONG: Right.

14 THE COURT: -- but in that mix --

15 MR. HONG: We'll look for it.

16 THE COURT: -- I'd like to give you a little time to look at  
17 this --

18 MR. HONG: Okay.

19 THE COURT: -- because I'm making a finding right here, right  
20 now --

21 MR. HONG: Okay.

22 THE COURT: -- that it was the wrong amount.

23 MR. HONG: Okay.

24 THE COURT: That the right amount was something more  
25 than 486; I think the right amount was 540, but it was more than 486.



1 And so, the amount delivered was incorrect and then rejected. So, is  
2 there any law talking about just that, the significance as a matter of law,  
3 that type of an event?

4 MR. HONG: Okay.

5 THE COURT: All the while, of course, considering everything  
6 else here.

7 [Colloquy between counsel]

8 MR. GARNER: Can we have two weeks to get you those?

9 THE COURT: Yeah, of course.

10 MR. GARNER: Okay.

11 THE COURT: Two weeks from now is?

12 THE COURT CLERK: The 29<sup>th</sup> of January. Do you want that  
13 at 9:30, Judge?

14 THE COURT: 5:00 that day. What day of the week is that?

15 THE COURT CLERK: That's Wednesday.

16 MR. GARNER: Well, do you --

17 THE COURT: Okay.

18 MR. GARNER: -- want to set that as deadline for the briefs  
19 and then come --

20 THE COURT: No, that's the briefing schedule.

21 MR. GARNER: Okay.

22 THE COURT: So, by 5:00 o'clock --

23 MR. GARNER: Perfect.

24 THE COURT: -- it'll be a simultaneous briefing schedule. The  
25 best practice is for both of you, even if you get the brief done before that

1 day, you just send it over on the same day, that way nobody's  
2 responding to each other.

3 MR. HONG: Okay.

4 MR. GARNER: Okay.

5 THE COURT: So, what's that date again, please?

6 THE COURT CLERK: January 29<sup>th</sup>.

7 THE COURT: At 5:00 o'clock, that Wednesday; is that it?  
8 Wednesday?

9 THE COURT CLERK: Yes.

10 MR. GARNER: Perfect.

11 THE COURT: Okay, so that Wednesday, by 5:00, file it and  
12 then -- or just file it on that day --

13 MR. GARNER: Yeah.

14 THE COURT: -- and then also send over a courtesy copy,  
15 okay?

16 MR. HONG: Okay.

17 THE COURT: And then -- all right, then we're going to come  
18 back in for the decision, is what we'll do.

19 MR. GARNER: Do you want to set that today, as well, or no?

20 THE COURT: Yeah, I'd like to on your schedules. It -- I just  
21 need probably about a week from the time of the simultaneous due date  
22 for the briefing.

23 MR. GARNER: And, do you want to bring us back on a  
24 normal calendar or like on a --

25 THE COURT: No.

1 MR. GARNER: -- 1:00 p.m. time for --  
2 THE COURT: Yeah, time where I can talk for 45 minutes,  
3 probably.  
4 THE COURT CLERK: Do you want a Wednesday, again?  
5 THE COURT: I don't know, do you have the whole calendar  
6 there? Any day --  
7 THE COURT CLERK: Yeah.  
8 THE COURT: -- at least a week after the due date.  
9 THE COURT CLERK: Yeah, the following Wednesday's clear  
10 as of now, the 5<sup>th</sup>.  
11 THE COURT: It is?  
12 THE COURT CLERK: Mm-hmm.  
13 THE COURT: Okay, the 5<sup>th</sup> of February?  
14 THE COURT CLERK: Yes.  
15 MR. GARNER: That works.  
16 THE COURT: Okay. Does that work for everybody?  
17 MR. HONG: Yes.  
18 THE COURT: That afternoon is available --  
19 THE COURT CLERK: Yep.  
20 THE COURT: -- or the whole day is available?  
21 THE COURT CLERK: The whole day is available.  
22 THE COURT: Okay, is there a time that you'd like to do that?  
23 MR. GARNER: Morning --  
24 THE COURT: On that Wednesday?  
25 MR. GARNER: -- or afternoon is fine with me, Judge.

1 MR. HONG: How about 11:00?

2 THE COURT: Okay.

3 MR. HONG: Because that way we'll be done by lunch.

4 MR. GARNER: Just go to lunch right after?

5 MR. HONG: Yeah, we can go to lunch right after.

6 THE COURT: Okay, so 11:00 o'clock that day for the live  
7 decision, prevailing party to draft all orders, so if you win your motion,  
8 you --

9 MR. HONG: Okay.

10 THE COURT: -- draft the order. You lose the motion then he  
11 drafts the order, and then regarding the trial, same way.

12 MR. GARNER: Okay.

13 THE COURT: That'll help the Court, you know, I've  
14 gotten --

15 MR. HONG: Okay.

16 MR. GARNER: And --

17 THE COURT: -- I've gotten to that point because, I'll tell you,  
18 it is my view that in these all civil departments, there's just no way to do  
19 business any other way. It's just too many cases, too many motions, too  
20 many hearings, you've got to let lawyers draft orders for the most part.  
21 That just helps the Court. But, what you do get from me is a rather  
22 detailed, you know, bench order that you don't normally get, so that's  
23 good, I think.


24 MR. GARNER: Now, that -- for the defense would just be for  
25 the announcement of the decision, no further argument?

1 THE COURT: Right --  
2 MR. GARNER: Okay.  
3 THE COURT: -- no further argument.  
4 MR. GARNER: Perfect.  
5 THE COURT: I mean, your brief will do that.  
6 MR. HONG: Okay.  
7 MR. GARNER: Very good.  
8 THE COURT: Okay, so I'll just give the decision at that time --  
9 MR. HONG: Okay.  
10 THE COURT: -- with that schedule. And, thanks a lot.  
11 MR. HONG: Thank you, Your Honor.  
12 MR. GARNER: All right, Thank you, Judge.

13 [Proceeding concluded at 11:43 a.m.]

14 \* \* \* \* \*

15  
16  
17  
18  
19  
20  
21 ATTEST: I do hereby certify that I have truly and correctly transcribed  
22 the audio/video proceedings in the above-entitled case to the best of my  
23 ability.

24   
25 Kaihla Berndt  
Court Recorder/Transcriber

# EXHIBIT D

# EXHIBIT D

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7 *Attorneys for Plaintiff*  
8 *BAC Home Loans Servicing, LP*

9 **UNITED STATES DISTRICT COURT**

10 **DISTRICT OF NEVADA**

11 BAC HOME LOANS SERVICING, LP,

CASE NO.: 2:11-cv- 00167

12 Plaintiff,

**COMPLAINT**

13 v.

14 STONEFIELD II HOMEOWNERS  
15 ASSOCIATION; ANTHEM HIGHLANDS  
16 COMMUNITY ASSOCIATION; MONTECITO  
17 AT MOUNTAIN'S EDGE HOMEOWNERS  
18 ASSOCIATION; HERITAGE SQUARE SOUTH  
19 HOMEOWNERS' ASSOCIATION, INC.;  
20 SIERRA RANCH HOMEOWNERS  
21 ASSOCIATION; CORTEZ HEIGHTS  
22 HOMEOWNERS ASSOCIATION; SOUTHERN  
23 HIGHLANDS COMMUNITY ASSOCIATION;  
24 ELKHORN – CIMARRON ESTATES  
25 HOMEOWNERS ASSOCIATION; ELKHORN  
26 COMMUNITY ASSOCIATION, a Nevada non-  
27 profit corporation; CANYON CREST  
28 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,

{LV008657;1}

1

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BANA 000715

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  
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.

## INTRODUCTION

Nevada law gives homeowners' associations the power to impose and foreclose a lien for unpaid assessments. Nevada Revised Statute section 116.3116 makes this lien superior to a first security interest, but only in an amount equal to common assessments for the nine months preceding the action to enforce the lien. (The portion of a homeowners' association lien senior to a first deed of trust is referred-to as a "super-priority lien.") BAC Home Loans Servicing, LP ("BAC") services hundreds of residential loans secured by properties that are subject to these homeowners' association liens. To maintain clear and marketable title to these properties, BAC has tendered payments to the trustees of many homeowners' associations that, if accepted, would fully satisfy their super-priority liens. But the trustees of many homeowners associations – including Defendants – are rejecting these payments based on erroneous interpretations of Nev. Rev. Stat. § 116.3116 and other law. The trustees are also demanding BAC pay fees and costs excluded from the super-priority lien as a condition to accepting payment of the super-priority amount. BAC therefore seeks a declaration confirming (a) its right to tender payment of super-priority liens and (b) the amount entitled to super-priority status.

## PARTIES

### Plaintiff

1. BAC is a Texas limited partnership, but is a citizen of North Carolina.

### Defendant Homeowners' Associations (HOAs)

2. Stonefield II Homeowners Association ("Stonefield") is a Nevada non-profit corporation with its principal place of business in Nevada.
3. Anthem Highlands Community Association ("Anthem") is a Nevada non-profit



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corporation with its principal place of business in Nevada.

4. Montecito at Mountain's Edge Homeowners Association ("Montecito") is a Nevada non-profit corporation with its principal place of business in Nevada.

5. Heritage Square South Homeowners' Association, Inc. ("Heritage"), is a Nevada non-profit corporation with its principal place of business in Nevada.

6. Sierra Ranch Homeowners Association ("Sierra Ranch") is a Nevada non-profit corporation with its principal place of business in Nevada.

7. Cortez Heights Homeowners Association ("Cortez Heights") is a Nevada non-profit corporation with its principal place of business in Nevada.

8. Southern Highlands Community Association ("Southern Highlands") is a Nevada non-profit corporation with its principal place of business in Nevada.

9. Elkhorn – Cimarron Estates Homeowners Association ("Elkhorn-Cimarron") is a Nevada non-profit corporation with its principal place of business in Nevada.

10. Elkhorn Community Association, ("Elkhorn") is a Nevada non-profit corporation with its principal place of business in Nevada.

11. Canyon Crest Association ("Canyon Crest") is a Nevada non-profit corporation with its principal place of business in Nevada.

12. Las Brisas Homeowners Association ("Las Brisas") is a Nevada non-profit corporation with its principal place of business in Nevada.

13. Aliante Master Association ("Aliante") is a Nevada non-profit corporation with its principal place of business in Nevada.

14. Mountain's Edge Master Association ("Mountain's Edge") is a Nevada non-profit corporation with its principal place of business in Nevada.

**Defendant Trustees**

15. Alessi & Koenig, LLC ("Alessi"), is a Nevada limited liability company with its principal place of business in Nevada.

16. Upon information and belief, Alessi acts as trustee for Defendant Southern Highlands, as well as other homeowners' associations in Nevada.

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1 17. Allied Trustee Services, Inc. (“Allied”), is a Nevada foreign corporation with a  
2 qualifying state of California, with its principal place of business unknown.

3 18. Upon information and belief, Allied acts as trustee for Defendant Cortez Heights, as  
4 well as other homeowners’ associations in Nevada.

5 19. Angius & Terry Collections, LLC (“Angius”), is a Nevada limited liability company  
6 with its principal place of business in Nevada.

7 20. Upon information and belief, Angius acts as trustee for Defendant Elkhorn, as well as  
8 other homeowners’ associations in Nevada.

9 21. Assessment Management Group Inc. (“AMGI”) is a Nevada corporation with its  
10 principal place of business in Nevada.

11 22. Upon information and belief, AMGI acts as trustee for Defendant Elkhorn-Cimarron,  
12 as well as other homeowners’ associations in Nevada.

13 23. Asset Recovery Services, Inc. (“ARSI”), is a Nevada corporation with its principal  
14 place of business in Nevada.

15 24. Upon information and belief, ARSI acts as trustee for Defendant Canyon Crest, as well  
16 as other homeowners’ associations in Nevada.

17 25. LJS&G, Ltd., d/b/a Leach Johnson Song & Gruchow (“Gruchow”), is a Nevada  
18 corporation with its principal place of business in Nevada.

19 26. Upon information and belief, Gruchow acts as trustee for Defendant Sierra Ranch, as  
20 well as other homeowners’ associations in Nevada.

21 27. Homeowner Association Services, Inc. (“HOASI”), is a collection agency licensed in  
22 Clark County with its with its principal place of business in Nevada.

23 28. Upon information and belief, HOASI acts as trustee for Defendant Las Brisas, as well  
24 as other homeowners’ associations in Nevada.

25 29. Nevada Association Services, Inc. (“NASI”), is a Nevada corporation with its principal  
26 place of business in Nevada.

27 30. Upon information and belief, NASI acts as trustee for Defendant Aliante, as well as  
28 other homeowners’ associations in Nevada.

{LV008657;1}



1           43.     BAC is a citizen of North Carolina. None of the Defendants are North Carolina  
2 citizens. There is complete diversity between BAC and Defendants.

3           44.     The amount in controversy exceeds \$75,000 because, as shown below, the value of the  
4 object of this litigation – clear, marketable title for real property securing hundreds of mortgage loans  
5 – exceeds \$75,000.

6           45.     The court may exercise personal jurisdiction over each Defendant because each  
7 Defendant is a Nevada citizen or is actively doing business in Nevada.

8           46.     Venue is proper under 28 U.S.C. § 1391(b) because the acts or transactions complained  
9 of occurred in this District and the real property at issue is in this District.

10                               **FACTS**

11                               **Background**

12           47.     BAC services thousands of mortgage loans in Nevada on behalf of many holders of  
13 first deeds of trust, or “first security interests” for purposes of Nev. Rev. Stat. § 116.3116.

14           48.     Many of these deeds of trust are subject to the liens of homeowners’ associations.

15           49.     Under Nevada law, homeowners’ associations have the right to charge property owners  
16 residing within the community an assessment to cover the association’s expenses for maintaining or  
17 improving the community, among other things.

18           50.     When these assessments go unpaid, the association may impose and then foreclose on  
19 a lien if the assessments remain unpaid.

20           51.     Under Nev. Rev. Stat. § 116.3116, an association may impose a lien for “any penalties,  
21 fees, charges, late charges, fines and interest charged” under Nev. Rev. Stat. § 116.3102(1)(j)–(n).

22           52.     Nev. Rev. Stat. § 116.3116 makes an association’s lien for assessments junior to a first  
23 deed of trust, such as the deeds of trust securing BAC’s loans, with one exception: an association’s  
24 lien is senior to a first security interest “to the extent of the assessments for common expenses based  
25 on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have  
26 become due in the absence of acceleration during the 9 months immediately preceding institution of  
27 an action to enforce the lien[.]”

28           53.     As generally applied and interpreted by homeowners’ associations and their trustees

(including, without limitation, Defendants), the “super-priority” lien created by Nev. Rev. Stat. § 116.3116 attaches only after a first-priority deed of trust is foreclosed. If the amount secured by the super-priority lien is not paid at or prior to foreclosure of the first deed of trust, the super-priority lien continues to cloud title to the property. BAC must clear this cloud in order to deliver marketable title to its foreclosure purchaser.

54. To fulfill its obligation to protect the deeds of trust securing the loans it services, BAC tenders payment of the super-priority amount. On occasion, BAC makes this tender prior to foreclosing on the deed of trust.

55. Several trustees of homeowners’ associations, including the trustee Defendants, have wrongfully rejected BAC’s tender.

56. In some instances, Defendant Trustees have refused to communicate with BAC when BAC sought a pay-off amount for the association’s super-priority lien.

57. By refusing BAC’s tender of the super-priority amount, the HOA Defendants prevent BAC from clearing the super-priority lien from the title of the properties securing its loans.

#### Illustrative Examples

58. For example, on January 29, 2010, BAC tendered a check for \$180.00 to Defendant Trustee Frink in full satisfaction of Defendant Homeowners’ Association Stonefield’s lien against a property located at 9050 Alsandair Court.

59. On February 18, 2010, Stonefield, through its trustee Frink, returned BAC’s check. Frink rejected the check, claiming (1) “the Association has no relationship, and therefore no obligation to communicate with or negotiate with, [BAC] under any circumstance unless and until [BAC] is the owner of the property,” and (2) “the Association has no obligation or intention to accept a partial payment from [BAC] . . . .” Apparently, Frink regarded BAC’s payment as a “partial payment” because it did not include the attorney’s fees Stonefield allegedly incurred while attempting to enforce its lien or the full amount of assessments Stonefield asserted were due. A true and correct copy of the returned check with the accompanying letter, as well as BAC’s original letter to Stonefield, are attached as **Exhibit 1**.

60. BAC also tendered payments to Southern Highlands, through its trustee Alessi, only to

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1 have Alessi reject the payments and proceed with its foreclosure action.

2 61. On December 17, 2009, January 13, 2010, January 26, 2010, January 29, 2010 and  
3 February 12, 2010, BAC tendered five (5) separate checks to SHCA for full payment of five (5) liens  
4 on five (5) properties: 10865 Calcedonian Street, 11117 Deluna Street, 10792 Vineyard Pass Street,  
5 10930 Fintry Hills Street, and 6017 Lamotte Avenue.

6 62. Alessi rejected these five (5) payments based on its contention that the payments were  
7 not for the full lien amount because none of the five (5) payments included Southern Highlands'  
8 attorney's fees or "the reasonable costs of collection." A true and correct copy of the returned checks  
9 with the accompanying letter from Alessi are collectively attached as **Exhibit 2**.

10 63. Anthem, through Red Rock, also received and rejected payment in full from BAC.

11 64. As with Southern Highlands, BAC tendered five (5) checks to Red Rock for full  
12 payment of five (5) liens on five (5) properties: 2724 Mintlaw Avenue, 2855 Strathallan Avenue,  
13 2784 Drummoosie Drive, 2859 Strathallan Avenue, 2734 Craigmillar Street.

14 65. Red Rock returned each check, based on its contention that BAC had failed to tender  
15 the full amount due, meaning the full amount of Anthem's attorney's fees.

16 66. Similar to the illustrative examples above, each named Defendant Trustee has  
17 wrongfully rejected tender of payments by BAC that would have satisfied the full lien amount for the  
18 corresponding Defendant Homeowners' Association.

19 67. Defendant Trustees and Defendant Homeowners' Associations are intransigent in their  
20 position. They will continue to refuse BAC's payments and to release their liens because they believe  
21 – erroneously – that the law requires BAC to pay them more than the amount being tendered: nine (9)  
22 months' worth of common general assessments.

23 68. BAC therefore seeks declaratory relief to clarify and settle legal relations between it  
24 and Defendants, and to obtain relief from the uncertainty and controversy surrounding Defendants'  
25 refusal of BAC's payments.

26 **ACTION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

27 69. Based on the facts alleged above, BAC seeks declaratory relief under 28 U.S.C. § 2201  
28 and Nev. Rev. Stat. Ch. 30.

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1           70. Because the issues outlined above are principally questions of law and because the  
2 associations, including Defendants, will continue clouding the title of properties securing the loans  
3 BAC services under erroneous interpretations of the law, BAC requests “a speedy hearing” as  
4 provided by Federal Rule of Civil Procedure 57.

5           71. An actual controversy exists between BAC and Defendants because Defendants have,  
6 among other things, (a) refused to accept BAC’s tender to pay the amounts secured by the super-  
7 priority lien and (b) improperly demanded payment of attorneys’ fees and collection costs even  
8 though these expenses are not afforded super-priority status by Nev. Rev. Stat. § 116.3116.

9           72. BAC’s interests are adverse to Defendants’ because BAC cannot clear the title to the  
10 properties securing the loans it services unless it pays Defendants the amount secured by the super-  
11 priority lien, but Defendants refuse to accept payment unless BAC also pays funds not entitled to  
12 super-priority status.

13           73. BAC seeks two judicial declarations. These judicial declarations are necessary (a) to  
14 settle an actual and ripe dispute between BAC and Defendants concerning the parties’ rights and  
15 obligations under Nev. Rev. Stat. § 116.3116 and (b) to prevent the Defendants from unlawfully  
16 clouding title to real property with excessive and unlawful liens.

17           74. First, a judicial declaration is needed establishing BAC’s right to pay off or “redeem”  
18 the associations’ super-priority liens.

19           75. Many homeowners associations, including Defendants, refuse to provide BAC payoff  
20 information and reject BAC’s tender in part because they wrongfully contend BAC “has no  
21 relationship [with it], and therefore no obligation to communicate with or negotiate with [BAC] under  
22 any circumstance unless and until [BAC] is the owner of the property[.]” **Exhibit 1.**

23           76. BAC has both a common-law and a statutory right to pay off or redeem any lien that is  
24 senior to the deeds of trust securing the loans it services. This Court should judicially declare that  
25 BAC is entitled to pay off that portion of an association’s lien that is senior to BAC’s first deed of  
26 trust, even if payment is tendered before BAC forecloses on the deed of trust. This right necessarily  
27 includes the right to obtain information related to the exercise of those rights, including the amount  
28 due under Nev. Rev. Stat. § 116.3116.

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77. Second, the Court should issue a judicial declaration establishing an association's super-priority lien does not include attorneys' fees or collection costs. Under the plain language of Nev. Rev. Stat. § 116.3116, only nine (9) months of regular, budgeted common assessments are included in the super-priority amount.

78. Without these declarations, associations and trustees – including, without limitation, Defendants – will continue refusing tender from BAC unless BAC also pays amounts to which they are not entitled. Allowing Defendants to continue this practice would deprive BAC of the ability to protect its deeds of trust without paying excessive and unlawful fees to Defendants.

79. In addition to these judicial declarations, the Court should issue an injunction (a) prohibiting Defendants from wrongfully rejecting BAC's tender of the super-priority amount and (b) requiring Defendants to disclose and account for the super-priority amounts upon request by BAC. This injunction is required to give effect to the Court's declaratory judgments.

#### **PRAYER FOR RELIEF**

BAC respectfully prays that the Court grant the following:

- a. A declaration that (1) BAC has a right to pay off or redeem an association's super-priority lien, and (2) only budgeted common assessments, but not attorneys' fees or collection costs, are included within the super-priority amount under Nev. Rev. Stat. § 116.3116;
- b. Attorney's fees and costs of suit, as provided for in 28 U.S.C. § 2201 and Nev. Rev. Stat. Ch. 30.;
- c. An injunction as set forth in paragraph 79 of this Complaint; and
- d. For such other and further relief the Court deems proper.

DATED this 31st day of January, 2011.

**AKERMAN SENTERFITT LLP**

/s/ Ariel Stern  
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PHONE (714) 441-9100  
FACSIMILE (714) 441-9141

**OF COUNSEL**  
**JOHN W. LISH**  
Admitted in Utah

January 29, 2010

Phil Erink & Associates  
1895 Blumas Street, Suite 5  
Reno, NV 89509

Re: *Property Address:* 9050 Alсандair Court  
ACCT #: 12086  
LOAN #: 135318504  
*MBBW File No.* 09-L0454

Dear Sir/Madam:

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 \$4,371.38. 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...

BANA 000726

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 \$180.00 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 PHIL FRINK & ASSOCIATES, INC. in the sum of \$180.00, 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 9050 Alсандair Court have now been "paid in full".

Thank you for your prompt attention to this matter. If you have any questions or concerns, I may be reached by phone directly at (702) 942-0442.

Sincerely,

*MILES, BAUER, BERGSTROM & WINTERS, LLP*



Rock K. Jung, Esq.

Miles, Bauer, Bergstrom & Winters, LLP Trust Acct  
 Payee: Phil Frink & Associates  
 09-L0454  
 Initials: TLC  
 Date: 1/29/2010 Amount: 180.00  
 Check # 2576

Inv. Date	Reference #	Description	Inv. Amount	Case #	Matter Description	Cost Amount
1/29/2010	#12086	To Cure HOA Delinquency	180.00			

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  
 16-681220  
 1020

2576

Date: 1/29/2010

Amount \$180.00

09-L0454

Loan # 135318504

Pay \$\*\*\*\*\*One Hundred Eighty & No/100 Dollars

to the  
 order  
 of

Phil Frink & Associates

Check Valid After 90 Days



⑈ 2576 ⑈ ⑆ 122400724 ⑆ 501006876973 ⑈

**GAYLE A. KERN, LTD.**

ATTORNEYS AT LAW

GAYLE A. KERN, ESQ.  
MEMBER OF THE BARS OF NEVADA AND CALIFORNIA  
gaylekern@kernltd.com

SARAH V. CARRASCO, ESQ.  
MEMBER OF THE BARS OF NEVADA AND ARIZONA  
sarahcarrasco@kernltd.com

5421 KIETZKE LANE, SUITE 200  
RENO, NEVADA 89511

TELEPHONE: (775) 324-5930  
FACSIMILE: (775) 324-6173

February 18, 2010

Rock K. Jung, Esq.  
Miles, Bauer, Bergstrom & Winters, LLP  
2200 Paseo Verde Pkwy, Suite 250  
Henderson, NV 89052

Re: *Stonefield II Homeowners Association*  
9050 Alsandair Drive, Unit ID: 1-119-02

Dear Mr. Jung:

I represent the Stonefield II Homeowners Association. I am in receipt of your letter of January 29, 2010 to Phil Frink and Associates enclosing a cashier's check in the amount of \$180.00, with the statement that "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 9050 Alsandair Drive have now been "paid in full". This, as well as the other statements contained in your letter, are unenforceable, unlawful and without merit. Accordingly, I return your "tender" of payment. As noted below, we will deal solely with the record owner of the property.

The 9-month super priority is only triggered by a foreclosure by the first deed of trust holder. The Washoe County Recorder's website reflects that your client has not even recorded a Notice of Default at this time, so most certainly has not completed a foreclosure and therefore cannot claim the benefit of the super-priority write off. Second, the Association has no relationship, and therefore no obligation to communicate with or negotiate with, a first deed of trust holder under any circumstance unless and until that lender is the owner of the property. Having a deed of trust gives BAC no right to information regarding the account. Third, \$180.00 is a fraction of what is due the Association and is not sufficient, without a written payment plan from the record owner, to stop the pending foreclosure.

Sincerely,

BANA 000729

Page Two  
February 17, 2010

As noted, your check is being returned to you as the Association has no obligation or intention to accept a partial payment from a lien-holder, and most certainly will not accept a payment with conditions on the "expressed or implied" endorsement thereof. If BAC wishes to pay this account in full, please provide written authorization from the owner of record of the property that we may release account information to your firm, and we will provide a written breakdown of all amounts due.

We are collecting a debt for the above-referenced Association. Any information obtained will be used for this purpose.

Very truly yours,

GAYLE A. KERN, LTD.



Gayle A. Kern

Enclosure  
c: Client  
Phil Frink and Associates, Inc.

## **EXHIBIT “2”**

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



9500 West Flamingo Road, Suite 100  
Las Vegas, Nevada 89147  
Telephone: 702-222-4033  
Facsimile: 702-222-4043  
[www.alessikoenig.com](http://www.alessikoenig.com)

ADDITIONAL OFFICES

AGOURA HILLS, CA  
PHONE: 818-735-9600

RENO NV  
PHONE: 775-626-2323

\*  
DIAMOND BAR CA  
PHONE: 909-843-6590

Nevada Licensed Qualified Collection Manager  
AMANDA LOWER

February 4, 2010

Miles, Bauer, Bergstrom & Winters  
2200 Pasco Verde Parkway, Suite 250  
Henderson, NV 89052

Re: Rejection of Partial Payments

Gentlepersons,

This letter will serve to inform you that we are unable to accept the partial payments offered by your clients as payment in full. While we understand how you read NRS 116.3116 as providing a super priority lien only with respect to 9 months of assessments, case authority exists which provides that the association's lien also includes the reasonable cost of collection of those assessments. (see *Korbel Family Trust v. Spring Mountain Ranch Master Association*, Case No. 06-A-523959-C.)

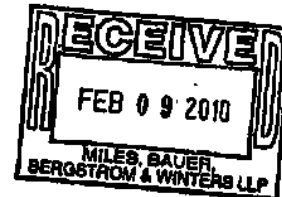
If the association were to accept your offer that only includes assessments, Alessi & Koenig would be left with a lien against the association for our substantial out-of-pocket expenses and fees generated. The association could end up having *lost* money in attempting to collect assessments from the delinquent homeowner.

It has come to my attention that our office inadvertently posted some of the checks sent from Miles Bauer that contained only partial payments. We are therefore refunding that money, as our clients have not authorized us to take payments that amount to a small fraction of their total liens. We apologize for an inconvenience this may cause you.

If you would like to discuss these matters further, please do not hesitate to call.

Sincerely,

Ryan Kerbow, Esq.





09-L1013

DAVID ALESSI\*

THOMAS BAYARD \*

ROBERT KOENIG\*\*

RYAN KERBOW\*\*\*\*

\* Admitted to the California Bar

\*\* Admitted to the California, Nevada  
and Colorado Bars

\*\*\* Admitted to the Nevada Bar

\*\*\*\* Admitted to the Nevada and California Bars



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

## ADDITIONAL OFFICES IN

AGUIRA HILLS, CA  
PHONE: 818-715-9600

RENO, NV  
PHONE: 775-628-2323  
&  
DIAMOND BAR, CA  
PHONE: 951-777-1111

Nevada Licensed Qualified Collection  
Manager

AMANDA LOWMYER

## FACSIMILE COVER LETTER

To:	Tari Cole	Re:	10865 Calcedonian St/HO #18971
From:	Aileen Ruiz	Pages:	1, including cover
Fax No.:	702-492-8558	HO #:	18971

Dear Tari Cole:

This cover will serve as an amended demand on behalf of Southern Highlands Community Association for the above referenced escrow; property located at 10865 Calcedonian St, Las Vegas, NV. The total amount due through December, 15, 2009 is \$1,455.95. The breakdown of fees, interest and costs is as follows:

11/9/2009 Notice of Delinquent Assessment Lien - Nevada	\$295.00
11/9/2009 Demand Fee	\$150.00
<b>Total</b>	<b>\$445.00</b>
1. Attorney and/or Trustees fees:	\$445.00
2. Costs (Notary, Recording, Copies, Mailings, Publication and Posting)	\$50.00
3. Interest Through November, 9, 2009	\$11.10
4. Title Research (10-Day Mailings per NRS 116.31163)	\$0.00
5. Management Document Processing & Transfer Fee	\$0.00
6. Late Fees Through November, 9, 2009	\$10.00
7. Fines Through November, 9, 2009	\$200.00
8. Assessments Through December, 15, 2009 @ \$55.00 per month	\$739.85
9. Progress Payments:	\$0.00
12. RPIR-GI Report	\$0.00
<b>Sub-Total:</b>	<b>\$1,455.95</b>
<b>Less Payments Received:</b>	<b>\$0.00</b>
<b>Total Amount Due:</b>	<b>\$1,455.95</b>

Please have a check in the amount of \$1,455.95 made payable to the Alessi & Koenig, LLC and mailed to the below listed NEVADA address. Upon receipt of payment a release of lien will be drafted and recorded. Please contact our office with any questions.

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

BANA 000733

**DOUGLAS E. MILES\***  
Also Admitted in Nevada and Illinois  
**RICHARD J. BAUER, JR.\***  
**JEREMY T. BERGSTROM**  
Also Admitted in Arizona  
**FRED TIMOTHY WINTERS\***  
**KEENAN E. MCLENAHAN\***  
**MARK T. DOMEYER\***  
Also Admitted in District of  
Columbia & Virginia  
**TAMI S. CROSBY\***  
**MATTHEW D. TOKARZ\***  
**L. BRYANT JACQUEZ\***  
**DANIEL L. CARTER\***  
**BRIAN H. TRAN\***  
**RYAN W. STICKING\***  
**DINA M. CORENA**  
**ROBIN L. LEWIS**  
Also Admitted in California  
**WAYNE A. RASH\***  
**ROCK K. JUNG**  
**VY T. PHAM\***  
**SCOTT B. OLIFANT**  
Also Admitted in California



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

2200 Paseo Verde Parkway, Suite 250  
Henderson, NV 89052  
Phone: (702) 369-5960  
Fax: (702) 369-4955

\* CALIFORNIA OFFICE  
1665 SCENIC AVENUE  
SUITE 200  
COSTA MESA, CA 92626  
PHONE (714) 481-9100  
FACSIMILE (714) 481-9141

OF Counsel  
**JOHN W. LISH**  
Admitted in Utah

January 29, 2010

Alessi & Koenig  
9500 W. Flamingo Road, Suite 100  
Las Vegas, NV 89147

Re: *Property Address:* 10865 Calcedonian St. #18971  
*HOA #:* 18971  
*LOAN #:* 60315529  
*MBBW File No.* 09-L1013

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 \$1,455.95. 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.

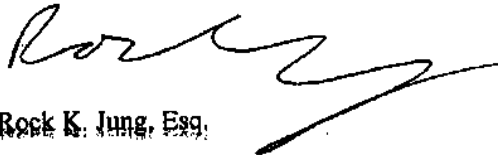
Based on Section 2(b), a portion of your HOA lien is arguably prior to BAC's first deed of trust, specifically the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessment. As stated above, the payoff amount stated by you includes many fees that 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 10865 Calcedonian St. #18971 have now been "paid in full".

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

Sincerely,

*MILES, BAUER, BERGSTROM & WINTERS, LLP*



Rock K. Jung, Esq.

Miles, Bauer, Bergstrom & Winters, LLP Trust Acct  
 Payee: Alessi & Koenig, LLC

Check #: 2565

09-L-1013 Initials: TLC  
 Date: 1/26/2010 Amount: 495.00

Inv. Date	Reference #	Description	Inv. Amount	Case #	Matter Description	Cost Amount
1/26/2010	#18971	To Cure HOA Delinquency	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

18-861220

1020

09-L-1013

Loan # 60316529

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

to the  
 order  
 of  
 Alessi & Koenig, LLC

2565

Date: 1/26/2010

Amount: \$\*\*\*\*495.00

Check Valid After 90 Days

⑈2565⑈ ⑆⑆22400724⑆ 501006876973⑈

Security Features Included.

Details on back.

09-L0936

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



A Multi-Jurisdictional Law Firm  
 9500 W. Flamingo Road, Suite 100  
 Las Vegas, Nevada 89147  
 Telephone: 702-222-4033  
 Facsimile: 702-222-4043  
 www.alessikoernig.com

## ADDITIONAL OFFICES IN

AGOURA HILLS, CA  
 PHONE: 818-735-9600

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

Nevada Licensed Qualified Collection  
 Manager

AMANDA LOWER

## FACSIMILE COVER LETTER

To:	Tari Cole	Re:	11117 Deluna St/HO #11882
From:	Alison Ruiz	Pages:	1, including cover
Fax No.:	702-462-8556	FIG #:	11882

Dear Tari Cole:

This cover will serve as an amended demand on behalf of Southern Highlands Community Association for the above referenced escrow, property located at 11117 Deluna St, Las Vegas, NV. The total amount due through December, 15, 2009 is \$16,150.77. The breakdown of fees, interest and costs is as follows:

Notice of Delinquent Assessment Lien - Nevada	\$345.00
Notice of Default	\$395.00
Notice of Violation Lien	\$500.00
Notice of Trustee's Sale	\$395.00
Payment Plan Letter (6)	\$150.00
Pre NOD	\$150.00
Payment Plan Breach Letter	\$125.00
Pre-Notice of Trustee's Sale	\$150.00
Trustees Fees	\$420.00
Demand Fee	\$150.00
11/4/2009 Update Demand Fee	\$95.00
<b>Total</b>	<b>\$2,875.00</b>
1. Attorney and/or Trustees fees:	\$2,875.00
2. Costs (Notary, Recording, Copies, Mailings, Publication and Posting)	\$510.00
3. Interest Through November, 4, 2009	\$22.40
4. Title Research (10-Day Mailings per NRS 116.31163)	\$240.00
5. Management Document Processing & Transfer Fee	\$0.00
6. Late Fees Through November, 4, 2009	\$10.00
7. Fines Through June, 30, 2009	\$11,000.00
8. Assessments Through December, 15, 2009 @ \$55.00 per month	\$1,493.37
9. Progress Payments:	\$0.00
12. RPIR-GI Report	\$0.00

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

DOUGLAS E. MILES \*  
Also Admitted in Nevada and Illinois  
RICHARD J. BAUER, JR.\*  
JEREMY T. BERGSTROM  
Also Admitted in Arizona  
FRED TIMOTHY WINTERS\*  
KEENAN E. McCLENAHAN\*  
MARK T. DOMEYER\*  
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Columbia & Virginia  
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L. BRYANT JAQUEZ \*  
DANIEL L. CARTER \*  
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GINA M. CORENA  
ROBIN L. LEWIS  
Also Admitted in California  
WAYNE A. RASHI \*  
ROCK K. JUNG  
VY T. PHAM \*



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

2200 Paseo Verde Parkway, Suite 250  
Henderson, NV 89052  
Phone: (702) 369-5960  
Fax: (702) 369-4955

\* CALIFORNIA OFFICE  
1655 SCENIC AVENUE  
SUITE 200  
COSTA MESA, CA 92626  
PHONE (714) 481-9100  
FACSIMILE (714) 481-9143

Of Counsel  
JOHN W. LISH  
Admitted in Utah

January 20, 2010

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

Re: *Property Address:* 11117 Deluna St.  
HO #: 11882  
LOAN #: 5710428  
*MBBW File No.* 09-L0936

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 \$16,150.77. 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...

BANA 000738

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.

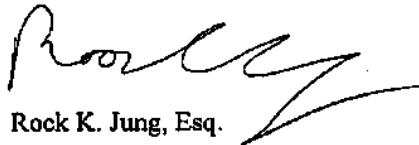
Based on Section 2(b), a portion of your HOA lien is arguably prior to BAC's first deed of trust, specifically the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessment. As stated above, the payoff amount stated by you includes many fees that 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 11117 Deluna St. 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-L0936

Initials: TLC

Payee: Alessi & Koenig, LLC

Check #: 2203

Date: 12/17/2009 Amount: 495.00

Inv. Date	Reference #	Description	Inv. Amount	Case #	Matter Description	Cost Amount
12/18/2009	HOA#11882	To Cure HOA Delinquency	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  
16-68/1220  
1020  
09-L0936  
Loan # 5710428

2203

Date: 12/17/2009

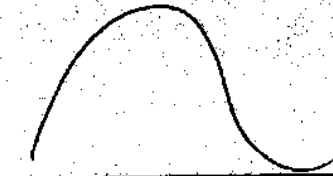
Amount \$\*\*\* 495.00

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

Check Void After 90 Days

to the  
order  
of

Alessi & Koenig, LLC



⑈ 2203 ⑆ 122400724 ⑆ 501006876973 ⑈

Security Features Included. Bank of America



Dec-17-09 10:23am From-Summeret

7023803786

T-806 P.005/006 F-501

16-H0012

**ALESSI  
&  
KOENIG**

*A Multi-Jurisdictional Law Firm*  
9500 W. Flamingo Road, Suite 100  
Las Vegas, Nevada 89147  
Telephone: 702-222-4033  
Facsimile: 702-222-4043  
www.alessikoenig.com

DAVID ALESSI\*

THOMAS BAYARD\*\*

ROBERT KOENIG\*\*\*

RYAN KERSHOW\*\*\*\*

\* Admitted to the California Bar

\*\* Admitted to the California, Nevada  
and Colorado Bars

\*\*\* Admitted to the Nevada Bar

\*\*\*\* Admitted to the Nevada and California Bars

## ADDITIONAL OFFICES IN

ACQUILA HILLS, CA  
PHONE 916-733-0689RENO, NV  
PHONE 775-696-3333DIAMOND BAR, CA  
PHONE 925-843-6598Nevada Licensed Qualified Collection  
Manager

AMANDA LOWER

## FACSIMILE COVER LETTER

To:	Tari Cole	Re:	10782 Vineyard Pass B/HO #11848
From:	Alessi & Koenig	Date:	Monday, December 14, 2009
Fax No.:	702-482-8888	Pages:	1, including cover
		HO #:	11343

Dear Tari Cole:

This cover will serve as an amended demand on behalf of Southern Highlands Community Association for the above referenced property, property located at 10782 Vineyard Pass St, Las Vegas, NV. The total amount due through January, 15, 2010 is \$4,369.43. The breakdown of fees, interest and costs is as follows:

Notice of Delinquent Assessment Lien -- Nevada	\$345.00
Notice of Default	\$395.00
Notice of Trustee's Sale	\$395.00
Trustees Fees	\$420.00
12/14/2009 Demand Fee	\$150.00
<b>Total</b>	<b>\$1,705.00</b>
1. Attorney and/or Trustees fees:	\$1,705.00
2. Costs (Notary, Recording, Copies, Mailings, Publication and Posting)	\$510.00
3. Interest Through December, 14, 2009	\$23.71
4. Title Research (10-Day Mailings per NRS 116.31163)	\$240.00
5. Management Document Processing & Transfer Fee	\$0.00
6. Late Fees Through December, 14, 2009	\$10.00
7. Fines Through December, 14, 2009	\$300.00
8. Assessments Through January, 15, 2010 @ \$55.00 per month	\$1,580.72
9. Progress Payments:	\$0.00
12. RPIR-GI Report	\$0.00
<b>Sub-Total:</b>	<b>\$4,369.43</b>
<b>Less Payments Received:</b>	<b>\$0.00</b>
<b>Total Amount Due:</b>	<b>\$4,369.43</b>

Please have a check in the amount of \$4,369.43 made payable to the Alessi & Koenig, LLC and mailed to the below listed NEVADA address. Upon receipt of payment a release of lien will be drafted and recorded. Please contact our office with any questions.

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

DOUGLAS E. MILES \*  
Also Admitted in Nevada and Illinois  
RICHARD J. BAUER, JR. \*  
JEREMY T. BERGSTROM  
Also Admitted in Arizona  
FRED TIMOTHY WINTERS \*  
KEENAN E. MCLENNAN \*  
MARK T. DOMEYER \*  
Also Admitted in District of  
Columbia & Virginia  
TAMI S. CROSBY \*  
MATTHEW D. TOKARZ \*  
L. BRYANT JAQUEZ \*  
DANIEL L. CARTER \*  
BRIAN H. TRAN \*  
RYAN W. STOCKING \*  
GINA M. COBENA  
ROBIN L. LEWIS  
Also Admitted in California  
WAYNE A. BASH \*  
ROCK K. JUNG  
VY T. PHAM \*  
SCOTT B. QLIFANT  
Also Admitted in California



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ATTORNEYS AT LAW SINCE 1985

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SUITE 100  
COSTA MESA, CA 92626  
PHONE (714) 481-9100  
FACSIMILE (714) 481-9141

Of Counsel  
JOHN W. LISH  
Admitted in Utah

January 29, 2010

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

Re: *Property Address:* 10792 Vineyard Pass St. #11343  
HOA #: 11343  
LOAN #: 93334722  
MBBW File No. 10-H0012

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 \$4,369.43. 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.

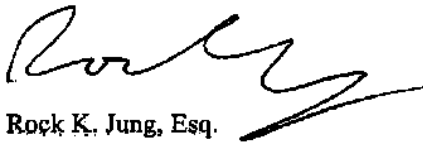
Based on Section 2(b), a portion of your HOA lien is arguably prior to BAC's first deed of trust, specifically the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessment. As stated above, the payoff amount stated by you includes many fees that 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 10792 Vineyard Pass St. #11343 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

10-H0012

Initials: TLC

Payee: Alessi & Koenig, LLC

Check #: 2577

Date: 1/29/2010 Amount: 495.00

Inv. Date	Reference #	Description	Inv. Amount	Case #	Matter Description	Cost Amount
1/29/2010	#11343	To Cure HOA Delinquency	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

10-H0012

Loan # 83334722

2577

Date: 1/29/2010

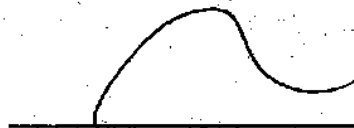
Amount \$\*\*\*\* 495.00

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

Check Void After 90 Days

to the  
order  
of

Alessi & Koenig, LLC



⑈ 2577⑈ ⑆ 122400724⑆ 501006676973⑈

Details on back  
Security Features Included

DOUGLAS E. MILES \*  
Also Admitted in Nevada and Illinois  
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PHONE (714) 481-9100  
FACSIMILE (714) 481-9111

Of Counsel  
JOHN W. LISH  
Admitted in Utah

January 15, 2010

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

Re: *Property Address:* 10930 Fintry Hills St. #18160  
HOA #: 18160  
LOAN #: 87667844  
MBBW File No. 09-L1545

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 \$2,254.50. 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.**

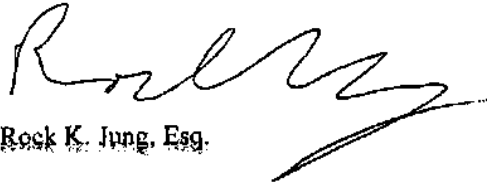
Based on Section 2(b), a portion of your HOA lien is arguably prior to BAC's first deed of trust, specifically the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessment. As stated above, the payoff amount stated by you includes many fees that 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 10930 Fintry Hills St. #18160 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.



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VY T. PHAM\*  
SCOTT B. OLIVANT  
Also Admitted in California



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SUITE 200  
COSTA MESA, CA 92626  
PHONE (714) 481-9100  
FACSIMILE (714) 481-9141

Of Counsel  
JOHN W. LISH  
Admitted in Utah

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 #: 189375753  
*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  
1865 Scenic Avenue - Suite 200  
Costa Mesa, CA 92626  
Phone: (714) 481-9100

Bank of America  
1100 N. Green Valley Parkway  
Henderson, NV 89074  
18-88/1220  
1020  
09-L0666  
Loan # 189375753

2488

Date: 1/14/2010

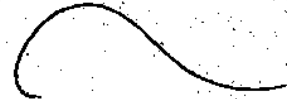
Amount \$\*\*\*\* 495.00

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

Check Void After 90 Days

to the  
order  
of

Alessi & Koenig, LLC



⑈ 2488 ⑈ ⑆ 122400724⑆ 501006876973⑈

Details on back  
Security Features Included

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sanderson@leachjohnson.com  
reed@leachjohnson.com

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

BAC HOME LOANS SERVICING, LP,

Plaintiffs,

vs.

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

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

**MOTION TO DISMISS**

BANA 000783

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 23<sup>rd</sup> day of March, 2011.

LEACH JOHNSON SONG & GRUCHOW

By: /s/ Sean Anderson  
SEAN L. ANDERSON  
Nevada Bar No. 7259  
RYAN W. REED  
Nevada Bar No. 11695  
8945 West Russell Road, Suite 330  
Las Vegas, Nevada 89148  
*Attorney for LJS&G*

## **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

LEACH JOHNSON SONG & GRUCHOW  
8945 West Russell Road, Suite 330, Las Vegas, Nevada 89148  
Telephone: (702) 538-9074 – Facsimile (702) 538-9113

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

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

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

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8945 West Russell Road, Suite 330, Las Vegas, Nevada 89148  
Telephone: (702) 538-9074 – Facsimile (702) 538-9113

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

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

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

## 19 II. FACTS

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

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

4 **2. Plaintiff’s Claims are Not Ripe for Judicial Determination.**

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

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

13 NRS § 116.3116 establishes a Super Priority Lien for delinquent assessments. N.R.S. §  
14 116.3116 provides, in relevant part, as follows:

15 1. The association has a lien on a unit for any construction penalty  
16 that is imposed against the unit’s owner pursuant to NRS  
17 116.310305, any assessment levied against that unit or any fines  
18 imposed against the unit’s owner from the time the construction  
19 penalty, assessment or fine becomes due. Unless the declaration  
20 otherwise provides, any penalties, fees, charges, late charges, fines  
21 and interest charged pursuant to paragraphs (j) to (n), inclusive, of  
22 subsection 1 of NRS 116.3102 are enforceable as assessments  
23 under this section. If an assessment is payable in installments, the  
24 full amount of the assessment is a lien from the time the first  
25 installment thereof becomes due.

26 Based on the forgoing, any fees, charges, fines and interest pursuant to N.R.S. §  
27 116.3102(j)-(n) are also enforceable as assessments under N.R.S. § 116.3116. Because these  
28 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



§ 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

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

3 The reason for this omission is clear—no such language exists. As stated above, if  
4 Plaintiff does not foreclose its interest then there is no cognizable reason to analyze NRS §  
5 116.3116(2)(c) because there is no priority analysis. Absent the foreclosure of a superior  
6 lienholder, there is nothing to wipe out any of the inferior liens on the property. Unless and until  
7 a foreclosure does wipe out any of the inferior liens, the property will continue to serve as  
8 security for the full debts owed.

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

11 NRS § 116.3116(2)(c) provides that the super-priority lien survives the foreclosure of  
12 Plaintiff's superior interest to the extent of 9 months' worth of common expense assessments  
13 which would have become due in the absence of acceleration during the 9 months immediately  
14 preceding institution of an action to enforce the lien. The only way to determine the pertinent 9  
15 month period is to determine the event that triggers the lien priority system provided for in NRS  
16 § 116.3116. In the absence of foreclosure there is no point of reference by which either the  
17 Plaintiff or the common-interest community could correctly identify the 9 months term at issue  
18 as numerous variables may impact the amount due under the Super Priority Lien. For example,  
19 the assessments frequently change annually and that budget may also include special assessments  
20 and reserve assessments levied periodically throughout the year, which is reflected in an  
21 association's budget.

22 In addition, amounts levied by an association that are entitled to lien priority under NRS  
23 § 116.3116(2)(c) may include amounts incurred by an association in abating a public nuisance or  
24 performing exterior maintenance on a property within the community. Under NRS §  
25 116.310312, an association may recover costs from an owner as follows:

26 The association may order that the costs of any maintenance or  
27 abatement conducted pursuant to subsection 2 or 3, including,  
28 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

1 against the unit and has a lien on the unit for any unpaid amount of  
2 the charges. The lien may be foreclosed under NRS 116.31162 to  
3 116.31168, inclusive.

4 . . .

5 **(6) Except as otherwise provided in this subsection, a lien**  
6 **described in subsection 4 is prior and superior to all liens,**  
7 **claims, encumbrances and titles other than the liens described**  
8 **in paragraphs (a) and (c) of subsection 2 of NRS 116.3116. . .”**

9 (Emphasis added.)

10 Based on the foregoing, an association has a lien for any costs that it incurs in the  
11 maintenance of a property or abatement of a public nuisance on a property. *Id.* NRS §  
12 116.310312 further provides that the lien is recoverable as part of the Super Priority Lien and  
13 that it includes collection costs and other charges. *Id.*

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

22 Furthermore, the amounts owed under the Super Priority Lien may, from time to time,  
23 include many more charges and other assessments based on a periodic budget than just the bare  
24 amount of regular assessments as determined conveniently by Plaintiff. Until a first security  
25 interest is foreclosed, there is no way to determine the specific charges and assessments that are  
26 entitled to protection under the Super Priority Lien. Accordingly, Plaintiff allegations that the  
27 Defendants, by and through their trustees, have incorrectly rejected Plaintiff’s tender of certain  
28 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.

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

3           BAC's proposed paradigm and Complaint are based on hypothetical suppositions that can  
4           never be known until the foreclosure sale. As set forth above, if the first deed of trust holder  
5           takes record title to a property at a foreclosure sale an association's lien claim is extinguished  
6           except for the nine-month super-priority amount. Pursuant to NRS § 116.3116, the 9 month  
7           super-priority amount survives the foreclosure sale and entitles an association to its superior 9  
8           month super-priority claim against the foreclosing lender. The 9 month super-priority claim is  
9           then governed by NRS 116.3116 as well as an association's governing documents. *See* NRS §  
10          116.3116(1)("Unless the declaration otherwise provides[.]")

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

19          Plaintiff's Complaint erroneously assumes that a HOA will never get more from a lender  
20          foreclosure than the "maximum 9 months worth of delinquent assessments recoverable by the  
21          HOA." Complaint, Exhibits 1 and 2. However, if there are sufficient sale proceeds an  
22          association may be entitled to an amount in excess of that which is prioritized pursuant NRS §  
23          116.3116. Accordingly, it is absurd for Plaintiff to assert that it is entitled to "prepay" an  
24          association's Super Priority Lien when, as here, Plaintiff has failed to initiate an action to enforce  
25          its lien as required by NRS § 116.3116, and the proceeds from the sale, in certain cases, have  
26          not come to fruition.

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

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

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

19          Alternatively, should this Court determine that Plaintiff may file the present action  
 20          without foreclosing on its first deed of trust, there remain additional grounds for dismissal of this  
 21          action. Under 28 U.S.C. §1332(a), the amount in controversy must exceed \$75,000.00. Whether  
 22          or not this monetary threshold is met is determined under the rule of law that holds if it appears  
 23          from the complaint to a legal certainty that the plaintiff is not entitled to that relief, then  
 24          jurisdiction is wanting under 28 U.S.C. §1332(a). *St. Paul Mercury Indemnity Co.*, 303 U.S. at  
 25          288-289.

26          In determining whether Plaintiff is entitled to any relief and thus able to satisfy 28 U.S.C.  
 27          §1332(a), the Court must look to the face of the Complaint and the allegations therein. *St. Paul*  
 28          *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

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1 of the pleading.”). In doing so, the Court must consult pertinent state law to determine if the  
 2 Plaintiff can lawfully recover what it is seeking. *See e.g., Duderwicz v. Sweetwater Sav. Ass’n. v.*  
 3 *595 F.2d 1008, 1012 (5th Cir. 1979)* (stating “[t]he determination of whether the requisite  
 4 amount in controversy exists is a federal question; however, ‘State law is relevant to this  
 5 determination insofar as it defines the nature and extent of the right plaintiff seeks to enforce.’”  
 6 (quoting *Johns-Manville Sales Corp. v. Mitchell Enterprises, Inc.*, 417 F.2d 129, 131 (5th Cir.  
 7 1969)).

8 If the state law upon which Plaintiff’s prayer for relief rests does not contain the rights  
 9 and obligations that Plaintiff claims it does, then it is with legal certainty that Plaintiff will fail at  
 10 recovering any of the amount of alleged damages as stated in its complaint. *See Pachinger v.*  
 11 *MGM Grand Hotel-Las Vegas, Inc.*, 802 F.2d 362, 364 (9th Cir. 1986) (ruling that the legal  
 12 certainty standard is met if a specific rule of law limits or does not otherwise allow the recovery  
 13 sought). Moreover, federal courts are required to exercise restraint in the reach of their  
 14 jurisdiction out of deference to state courts and limit otherwise frequent and unnecessary access  
 15 to the federal court system through diversity jurisdiction. *See Healy v. Ratta*, 292 U.S. 263, 270;  
 16 *54 S.Ct. 700, 703 (1934)* (stating of the amount in controversy requirement that Congress’ intent  
 17 was to limit narrow federal jurisdiction over cases otherwise heard by state courts and ruled,  
 18 “[t]he power reserved to the states, under the Constitution (Amendment 10), to provide for the  
 19 determination of controversies in their courts, may be restricted only the action of Congress in  
 20 conformity to the judiciary sections of the Constitution (article 3). Due regard for the rightful  
 21 independence of state governments, which should actuate federal courts, requires that they  
 22 scrupulously confine their own jurisdiction to the precise limits which the statute has defined.”  
 23 (internal citations omitted)); *see also Lorraine Motors, Inc., v. Aetna Casualty and Surety*  
 24 *Company, et. al.*, 166 F. Supp. 319, 321 and 322 (E.D.N.Y. 1958) (ruling, “[o]f course, the  
 25 purpose of making the amount in controversy in a case determinative of jurisdiction has always  
 26 been to prevent the dockets of the federal courts from being overcrowded with small cases which  
 27 should be brought in the State courts which are fully equipped to decide such cases.” Also  
 28 noting, “[i]t is known that ‘the dominant note in the successive enactments of Congress relating

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

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

17 Plaintiff’s Complaint fails to assert sufficiently any basis for the requisite recovery under  
18 28 U.S.C. § 1332(a). The only allegation in Plaintiff’s Complaint regarding the value of the  
19 damages incurred by Plaintiff is in paragraph 44, which states, “[t]he amount in controversy  
20 exceeds \$75,000.00 because, as shown below, the value of the object of this litigation—clear,  
21 marketable title for real property securing hundreds of mortgage loans—exceeds \$75,000.00.”  
22 This allegation serves as the only allegation in the complaint that purports to support any damage  
23 claim. Yet, this allegation is merely self serving for the purpose of giving the appearance of an  
24 actual amount in controversy without actually pleading that amount.

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

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

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

21 Finally, although not a 9th Circuit case, *Middle Tennessee News Co., Inc. v. Charnel of*  
22 *Cincinnati, Inc.*, 250 F.3d 1077 (7th Cir. 2001) holds that a Plaintiff normally cannot aggregate  
23 the amount owed by each defendant to satisfy the amount in controversy requirement. It states,  
24 "[i]n diversity cases, when there are two or more defendants, plaintiff may aggregate the amount  
25 against the defendants to satisfy the amount in controversy requirement only if the defendants are  
26 jointly liable; however, if the defendants are severally liable, plaintiff must satisfy the amount in  
27 controversy requirement against each individual defendant." Here, Plaintiff is unable to satisfy  
28 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.<sup>1</sup> 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.

<sup>1</sup> 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 23<sup>rd</sup> day of March, 2011.

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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.  
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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 23<sup>rd</sup> day of March, 2011, she served a true and correct copy of the foregoing, MOTION TO DISMISS by:

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

☒ Electronic Service via CM/ECF System

☐ Personal Delivery

☐ Facsimile

☐ Federal Express/Airborne Express/Other Overnight Delivery

☐ Las Vegas Messenger Service

addressed as follows:

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/s/Cindy Hoss

An Employee of LEACH JOHNSON SONG & GRUCHOW

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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

BAC HOME LOANS SERVICING, LP,

Plaintiffs,

vs.

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

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

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

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

Defendants.

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

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

18 DATED this 3<sup>rd</sup> day of June, 2011.

19 LEACH JOHNSON SONG & GRUCHOW

20 By: /s/ Sean L. Anderson

21 SEAN L. ANDERSON

22 Nevada Bar No. 7259

RYAN W. REED

23 Nevada Bar No. 11695

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24 Las Vegas, Nevada 89148

*Attorneys for LJS&G, Ltd. d/b/a*

*Leach Johnson Song & Gruchow*

**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



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

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

11 1. The association has a lien on a unit for any construction penalty  
 12 that is imposed against the unit’s owner pursuant to NRS  
 13 116.310305, any assessment levied against that unit or any fines  
 14 imposed against the unit’s owner from the time the construction  
 15 penalty, assessment or fine becomes due. Unless the declaration  
 16 otherwise provides, any penalties, fees, charges, late charges, fines  
 17 and interest charged pursuant to paragraphs (j) to (n), inclusive, of  
 18 subsection 1 of NRS 116.3102 are enforceable as assessments  
 19 under this section. If an assessment is payable in installments, the  
 20 full amount of the assessment is a lien from the time the first  
 21 installment thereof becomes due.

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

23 **A lien under this section is prior to all other liens and**  
 24 **encumbrances on a unit except:**

- 25 (a) Liens and encumbrances recorded before the recordation of
- 26 the declaration and, in a cooperative, liens and
- 27 encumbrances which the association creates, assumes or
- 28 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 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 (9<sup>th</sup> 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*<sup>1</sup> 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

<sup>1</sup> 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., 8<sup>th</sup> Ed. 2<sup>nd</sup> reprint 2007)

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

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

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

15 Plaintiff's argument that unmarketable title necessarily means damages in excess of  
 16 \$75,000.00 is based impliedly on Plaintiff's understanding of the value of marketability as  
 17 infinite for pleading purposes. It would stand to reason that if Plaintiff's damages are sustained  
 18 due to an inability to convey marketable title, then there must be some instance where Plaintiff  
 19 attempted to sell a property through foreclosure only to have such sale not result in the  
 20 conveyance of the property to a purchaser exclusively as the result of the Super Priority Lien *and*  
 21 some measure of money damage determined as a result thereof. Yet, nothing of the sort is  
 22 alleged by Plaintiff in its Complaint. If the money value of marketability has any limitation at all,  
 23 that limitation is neither determinable nor ascertainable from the face of Plaintiff's Complaint.

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

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

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

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

16 Plaintiff's assertion that no legal authority was provided by Defendants in support for  
 17 restraint in the exercise of federal jurisdiction over this matter is nonsense. Had Plaintiff read the  
 18 entire motion, Plaintiff would have read the discussion stating federal courts should restrain  
 19 exercise of their jurisdiction when such exercise may result in an unnecessary entanglement with  
 20 state issues or the offense of state sensitivity to those issues. Again, federal courts are required to  
 21 exercise restraint in the reach of their jurisdiction out of deference to state courts and limit  
 22 otherwise frequent and unnecessary access to the federal court system through diversity  
 23 jurisdiction. *See Healy v. Ratta*, 292 U.S. 263, 270; 54 S.Ct. 700, 703 (1934) (stating of the  
 24 amount in controversy requirement that Congress' intent was to limit narrow federal jurisdiction  
 25 over cases otherwise heard by state courts and ruled, "[t]he power reserved to the states, under  
 26 the Constitution (Amendment 10), to provide for the determination of controversies in their  
 27 courts, may be restricted only the action of Congress in conformity to the judiciary sections of  
 28 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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1 precise limits which the statute has defined.” (internal citations omitted)); *see also Lorraine*  
 2 *Motors, Inc., v. Aetna Casualty and Surety Company, et. al.*, 166 F. Supp. 319, 321 and 322  
 3 (E.D.N.Y. 1958) (ruling, “[o]f course, the purpose of making the amount in controversy in a case  
 4 determinative of jurisdiction has always been to prevent the dockets of the federal courts from  
 5 being overcrowded with small cases which should be brought in the State courts which are fully  
 6 equipped to decide such cases.” Also noting, “[i]t is known that ‘the dominant note in the  
 7 successive enactments of Congress relating to diversity jurisdiction is one of jealous restriction,  
 8 of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming  
 9 burden of ‘business that intrinsically belongs to the state courts in order to keep them free for  
 10 their distinctive federal business.’” (internal citations omitted)).

11 Furthermore, Plaintiff cites *Tucker v. First Maryland Sav. Loan, Inc.*, 942 F.2d 1401,  
 12 1403 (9<sup>th</sup> Cir. 1991), as authority for the rule that abstention be exercised only when “exceptional  
 13 circumstances are present.” *Id.* Yet, substantial state litigation of NRS 116.3116 and the Super  
 14 Priority Lien therein qualifies as an exceptional circumstance under rules of *Tucker*. In *Tucker*,  
 15 *supra*, the court sets forth three factors for consideration when determining if abstention should  
 16 be exercised, which are (1) that the state has concentrated suits involving the local issue in a  
 17 particular court; (2) the federal issues are not easily separable from complicated state law issues  
 18 with which the state courts may have special competence; and (3) that federal review might  
 19 disrupt state efforts to establish a coherent policy. *Id.* at 1405 (citing *Burford v. Sun Oil Co.*, 319  
 20 U.S. 315 (1943), which ruled that abstention may be appropriate “to avoid federal intrusion into  
 21 matters which are largely of local concern and which are within the special competence of local  
 22 courts.”).

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



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

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

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

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

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

### 3 III. CONCLUSION

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

6 DATED this 3rd day of June, 2011.

7 **LIPSON NEILSON COLE SELTZER &**  
8 **GARIN, P.C.**

9 /s/Kaleb D. Anderson

10 Kaleb D. Anderson, Esq.  
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15 *Attorney for Anthem Highlands Community*  
*Association and Homeowner Association*  
*Services, Inc.*

16 DATED: June 3, 2011.

**LJS&G, Ltd., d/b/a**  
**LEACH JOHNSON SONG & GRUCHOW**

9 /s/Sean Anderson

10 Sean Anderson  
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*Leach Johnson Song & Gruchow*

18 DATED: June 3, 2011.

16 **ALVERSON, TAYLOR, MORTENSEN &**  
17 **SANDERS**

18 /s/Kurt R. Bonds

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*Association and Elkhorn Community*  
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25 DATED: June 3, 2011.

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25 DATED: June 3, 2011.

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DATED: June 3, 2011.

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DATED: June 3, 2011.

**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*

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1  
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3  
4 **UNITED STATES DISTRICT COURT**  
5 **DISTRICT OF NEVADA**  
6

7  
8 BAC HOME LOANS SERVICING, LP,

9 Plaintiff,

10 v.

11 STONEFIELD II HOMEOWNERS  
12 ASSOCIATION, et al.,

13 Defendants.  
14

2:11-CV-167 JCM (RJJ)

15 **ORDER**

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

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

28  
James C. Mahan  
U.S. District Judge

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1 associations' fees go unpaid by the homeowner. *Id.* Pursuant to NRS § 116.3116, the associations  
 2 may impose a lien for "any penalties, fees, charges, late charges, fines and interest charged." NRS  
 3 § 116.3116(1)(j)-(n). BAC Home Loan contends that the associations' liens become senior to it only  
 4 "to the extent of the assessments for common expenses based on the periodic budget adopted by the  
 5 association pursuant to NRS 116.3116 which would have become due in the absence of acceleration  
 6 during the 9 months immediately preceding institution of an action to enforce the lien." *Id.*

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

#### 16 **Motion To Dismiss**

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

19 Under that section of the Nevada Revised Statute, "[a]ny civil action described in NRS  
 20 38.310 must be submitted for mediation or arbitration by filing a written claim with the [d]ivision."  
 21 Section 38.310 provides that "[n]o civil action based upon a claim relating to:...(b) [t]he procedures  
 22 used for increasing, decreasing or imposing additional assessments upon residential property, may  
 23 be commenced in any court in this [s]tate unless the action has been submitted to meditation or  
 24 arbitration pursuant to the provisions of NRS 38.300 to 38.360, inclusive, and, if the civil action  
 25 concerns real estate within a planned community subject to provisions of chapter 116 of NRS..."  
 26 NRS § 38.310(1)(b). Additionally, subsection 2 of that same statute states that the "court shall  
 27 dismiss any civil action which is commenced in violation of the provisions of subsection 1." NRS  
 28

1 § 38.310(2).

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

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

17 Plaintiff BAC Home Loan argues in its opposition (doc. #118), that arbitration is not required  
18 and defendants are interpreting the statutes incorrectly. Specifically, plaintiff asserts that (1) “§  
19 38.300(3)’s definition of a “civil action,” as that term is used in [NRS] § 38.310, includes a claim  
20 for monetary damages or equitable relief; the definition *excludes* claims for declaratory relief,” and  
21 (2) “[NRS] § 38.310’s legislative history shows that Nevada’s legislature never intended to compel  
22 a senior lien holder like BAC to arbitrate a dispute concerning the statutory interpretation of the  
23 Uniform Common Interest Ownership Act,” but was intended “to compel community residents and  
24 the board to resolve their disputes through arbitration or mediation.”

25 BAC Home Loan interprets NRS 38.300(3), the definition of “civil action,” as excluding  
26 actions for declaratory relief, such as this, simply because declaratory relief is not specifically listed  
27 in the definition. Further, it argues that a request for the remedy of injunctive relief, such as that  
28

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

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

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

20 Accordingly,

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

25 ...

26 ...

27 ...

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

4 DATED July 21, 2011.

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7 UNITED STATES DISTRICT JUDGE  
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James C. Mahan  
U.S. District Judge

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# EXHIBIT E

# EXHIBIT E



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6  
7 STATE OF NEVADA  
8 DEPARTMENT OF BUSINESS AND INDUSTRY  
9 REAL ESTATE DIVISION

10  
11 NRED No. 12-58

12 ALESSI & KOENIG, LLC'S  
13 ARBITRATION BRIEF  
14

15  
16 I. INTRODUCTION

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

23 In Korbel, the Honorable Judge Jackie Glass concluded the HOA was entitled to recover,  
24 as its SPL, assessments for common expenses; late fees imposed for non-payment of assessments  
25 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

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

5 There is substantial authority in Nevada that fees and costs of collection are a component  
6 of the SPL. In addition to the District Court opinion issued in Korbel, the Commission for  
7 Common Interest Communities and Condominium Hotels (the "CCIC") has issued an advisory  
8 opinion on the subject pursuant to its authority to issue advisory opinions on the interpretation of  
9 NRS chapter 116, authority found in NRS §116.623 (the "CCIC Advisory Opinion"). The CCIC  
10 Advisory Opinion, a copy of which is attached hereto as Exhibit 2, squarely rejected the notion  
11 that Section §116.3116 places a numerical cap on collection fees and costs, and held that  
12 "Nevada law authorizes the collection of 'charges for late payment of assessments' as a portion  
13 of the super[priority] lien amount." See Exhibit 2 at p. 12-13. Significantly, under Nevada law,  
14 this Court is required to give "great deference" to the CCIC's interpretation of NRS 116.3116.  
15 Imperial Palace v. State, 108 Nev. 1060, 1067, 843 P.2d 813, 818 (1992); see also Dep't of  
16 Taxation v. Daimler Chrysler Services N.A., LLC, 121 Nev. 541, 119 P.3d 135 (2005).  
17 In addition to Korbel (a case which has set the industry standard for years) and the CCIC  
18 Advisory Opinion (issued by the agency tasked with interpreting and enforcing NRS Chapter  
19 116), there is substantial case law holding that fees and costs of collection are included in the  
20 SPL in addition to other assessments that came due in the nine month period immediately  
21 preceding the first action to enforce the lien. Recently, in Elkhorn Community Association v.  
22 Mortgage Electronic Systems, Inc., Case No. A607051, the Honorable Judge Valerie Vega, held  
23 that collection fees and costs are included in the SPL in addition to other assessments that came  
24 due in the nine month period immediately preceding the first action to enforce the lien. See  
25 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

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

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

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

16 The goal of statutory interpretation is to ascertain the legislature's intent. Karcher  
17 Firestopping v. Meadow Valley Contractors, Inc., \_\_\_\_ Nev. \_\_\_\_, 204 P.3d. 1262, 1263  
18 (2009). The Court must give a clear and unambiguous statute its plain meaning, unless doing so  
19 violates the spirit of the act. D.R. Horton, Inc. v. Eighth Judicial Dist. Court ex rel. County of  
20 Clark, 123 Nev. 468, 476, 168 P.3d. 731, 737 (2007). It is well established in Nevada that the  
21 words in a statute, "should be given their plain meaning unless this violates the spirit of the act."  
22 State Dep't of Ins. v. Humana Health, Ins., 112 Nev. 356, 360 (1999) (quoting McKay v. Bd. Of  
23 Supervisors, 102 Nev. 644, 648 (1986)). When interpreting the plain language of a statute,  
24 Nevada courts "presume that the Legislature intended to use words in their usual and natural  
25 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.

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

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

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

20 Pursuant to NRS §116.3116, HOAs have a lien on real property to recover assessments  
21 owed by delinquent homeowners. A portion of this lien has a senior position over a first deed of  
22 trust, even if the deed of trust was recorded before the delinquency. Nevada law is clear that the  
23 component portions of the SPL include both common expenses and multiple other charges and  
24 fees that are also deemed to be "enforceable as assessments under this section [NRS §116.3116]"  
25 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           1.     The Association has a lien on a unit for any construction  
2     penalty that is imposed against the unit's owner pursuant to NRS  
3     116.310305, any assessments against that unit or any fines  
4     imposed against the unit's owner from the time the construction  
5     penalty, assessment or fine becomes due. *Unless the declaration*  
6     *provides otherwise, any penalties, fees, charges, late charges,*  
7     *finances and interest charged pursuant to paragraphs (j) to (n),*  
8     *inclusive, of subsection 1 of NRS 116.3102 are enforceable as*  
9     *assessments under this section.* If an assessment is payable in  
10    installments, the full amount of the assessment is a lien from the  
11    time the first installment thereof becomes due.

12           2.     A lien under this section . . . is also prior to all security  
13    interests described in paragraph (b) ["a first security interest on the  
14    unit recorded before the date on which the assessment sought to be  
15    enforced became delinquent . . ."] to the extent of any charges  
16    incurred by the Association on a unit pursuant to NRS 116.310312  
17    and to the extent of the assessments for common expenses based  
18    on the periodic budget adopted by the Association pursuant to NRS  
19    116.3115 which would have become due in the absence of  
20    acceleration during the 9 months immediately preceding institution  
21    of an action to enforce the lien . . . (Emphasis added)

22    Thus, the plain language describing a lien for assessments under the statute clearly incorporates  
23    each of the following component assessments into the lien amount "unless the declaration  
24    provides otherwise:" (1) any assessment levied against the unit from the time the assessment  
25    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."

1 Subsection (2) of NRS 116.3116 does not set a numeric cap on the SPL based upon any  
2 particular HOA's assessments charged to homeowners. The only material proviso placed on the  
3 amount of the Association's SPL is that any assessment for common expenses "based on the  
4 periodic budget adopted by the Association pursuant to NRS 116.3115" be limited to a period  
5 of "9 months preceding institution of an action to enforce the lien."<sup>1</sup> The portion of the HOA  
6 lien given super priority status is defined with regard to a particular time period only. There is  
7 no mention in the statute of any numerical limitation or simple mathematical calculation.  
8 Indeed, if the Legislature wanted to define the SPL by some simple mathematical calculation it  
9 could have done so simply by setting forth that mathematical calculation in the statute.

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

13 These categories include:

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

19 If an owner fails to pay his or her assessments, that failure constitutes misconduct. If the  
20 HOA incurs expenses in an effort to collect those unpaid assessments, under NRS §116.3115(6),  
21 those expenses are chargeable to the unit's owner as part of the association's periodic budget  
22 under NRS §116.3115. Because they are part of the HOA's periodic budget under NRS  
23 §116.3115, they are included in the super priority portion of the HOA's lien under NRS  
24 §116.3116(2).

25 2. NRS §116.3116 is Broader than the UCIOA.

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<sup>1</sup> There is one other limiting proviso found outside of NRS 116.3116. NRS 116.3116(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.

1  
2 "It is a well-known rule of statutory construction that words shall be given their plain  
3 meaning, unless to do so would clearly violate the evident spirit of the statute . . . unless from a  
4 consideration of the entire act it appears that some other intendment should be given to it. We  
5 cannot arbitrarily ignore plain language, but must be controlled by it, except in the instance  
6 mentioned." Ex parte Zwissig, 178 P. 20, 21 (Nev. 1919) (emphasis added). Thus, where the  
7 intent of the Legislature or the evident spirit of the statute would be violated under a plain  
8 language interpretation of the statute, effect must be given to the intent of the Legislature and the  
9 spirit of the statute. In order to fully understand the intent of the Legislature and the spirit of  
10 NRS Chapter 116, it is important to look first at the UCIOA. The UCIOA was originally  
11 promulgated in 1982 by the National Conference on Commissioners on Uniform State  
12 Laws ("Uniform Law Commissioners" or "ULC"). The UCIOA is a comprehensive act that  
13 governs the formation, management, and termination of common interest communities. In 1991,  
14 Nevada adopted the UCIOA, with some changes, by enacting NRS Chapter 116.

15 Notably, the SPL as provided for in the UCIOA is much more limited than the actual  
16 language adopted by Nevada. The SPL in all three (3) versions of the UCIOA (1982, 1994 and  
17 2008) is limited to the extent of "common expenses based on the periodic budget adopted by the  
18 Association pursuant to section 3-115(a)." Nevada, however, specifically removed the limitation  
19 to subsection (a) (which is Subsection 1 of NRS 116.3115 in Nevada's statutory format). Thus,  
20 common expenses for purposes of the SPL under the UCIOA are limited to 3-115(a), while  
21 common expenses for purposes of the SPL in Nevada includes all of NRS 116.3115. In other  
22 words, "common expenses" is much broader under the Nevada statute than it is under the  
23 UCIOA and includes amounts assessed against a specific unit. Such common expenses,  
24 including those costs and fees caused from a unit owner's misconduct, must be included in  
25 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.

1  
2 B. Public Policy Supports the Widely Accepted Interpretation of NRS §116.3116.

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

13 Claimant's interpretation also provides for an inherently inequitable result for HOAs with  
14 low monthly assessments. For example, where one HOA has monthly assessments of \$15.00  
15 (\$135 over nine months), the HOA would never be able to afford the cost of collecting from a  
16 delinquent homeowner. Indeed, no HOA could possibly hope to recover its collection fees and  
17 out of pocket costs for a mere \$135.00, as no rational HOA would spend more money on  
18 collection efforts than the amount of money owed. Clearly, Claimant's interpretation violates  
19 the spirit of the statute.

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

21 1. The CCIC Advisory Opinion.

22 On December 8, 2010, the CCIC issued the Advisory Opinion that concludes that the  
23 SPL includes reasonable costs of collection. The Advisory Opinion explicitly rejects a numerical  
24 maximum for the super-priority lien:  
25



1  
2 The argument has been advanced that limiting the super priority to  
3 a finite amount . . . is necessary in order to preserve this  
4 compromise and the willingness of lenders to continue to lend in  
5 common interest communities. The State of Connecticut, in 1991,  
6 NCCUSL, in 2008, as well as "Fannie Mae and local lenders" have  
7 all concluded otherwise.

8  
9 Accordingly, both a plain reading of the applicable provisions of  
10 NRS §116.3116 and the policy determinations of commentators,  
11 the state of Connecticut, and lenders themselves support the  
12 conclusion that associations should be able to include specified  
13 costs of collecting as part of the association's super priority lien."

14 Exhibit 2. The Nevada Supreme Court has made it clear that courts are to give "great deference"  
15 to administrative interpretation. Imperial Palace, 108 Nev. at 1067, 843 P.2d at 818  
16 DaimlerChrysler Services, 121 Nev. 541, 119 P.3d 135; Thomas v. City of N. Las Vegas, 122  
17 Nev. 82, 101 127 P.3d 1057 (1070) (2006) (citing Chevron U.S.A. v. Not. Res. Def. Council,  
18 467 U.S. 837 (1984). Indeed, particularly for pure questions of statutory interpretation, courts  
19 should defer to agency interpretations. See, e.g., Human Soc'y of U.S. v. Locke, \_\_\_ F.3d \_\_\_,  
20 2010 WL 4723195, at 9 (9<sup>th</sup> Cir. 2010) ("If a statute is ambiguous, and if the implementing  
21 agency's construction is reasonable, Chevron requires a federal court to accept the agency's  
22 construction of the statute, even if the agency's reading differs from what the court believes is  
23 the best statutory interpretation." (quoting Nat'l Cable & Telecomm. Ass'n v. Brand X Internet  
24 Servs., 545 U.S. 967, 980 (2005)).

25 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.

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

5  
6 2. The Korbel decision.

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

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

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

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

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

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

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

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

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

21  
22 4. The Court found that pursuant to NRS 116.3116(2) an  
23 association has a "super priority" position over a first security  
24 interest recorded against the property for nine (9) months of  
25 assessments immediately preceding institution of an action to  
enforce the lien.

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

8           6.     The Court further found that pursuant to NRS 116.3116(2)  
9     an association can recover as part of its "super priority" lien  
10    amount collection costs associated with enforcement of its  
11    assessment lien.

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

15  
16           D.     Case Authority from Sister Jurisdictions Supports A&K's Interpretation of NRS  
17                 116.3116.

18           Similarly, the Supreme Court of Connecticut analyzed Connecticut's own super priority  
19   lien statute, which at the time was substantially identical to the Nevada statute, specifically  
20   holding the super priority statute includes all collection costs. *Hudson House Condo. v. Brooks*  
21   611 A.2d 862 (Conn. 1992). In *Hudson House*, the super priority lien statute reads as follows:

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

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

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

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

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

22 Hudson House, 611 A.2d at 866 (emphases added). Although the court noted that the  
23 Connecticut Legislature later amended the statute to specifically include "the Association's costs  
24 and attorney's fees in enforcing its lien," the Court specifically noted that this merely "clarified  
25 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.