IN THE SUPREME COURT OF THE STATE OF NEVADA

SFR INVESTMENTS POOL I, LLC, a Nevada Limited Liability Company, SFR

v.

U.S. BANK, N.A., a national banking association as Trustee for the Certificate Holders of U.S. Bank Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2006-AR4, U.S. Banks

CASE NO.: 63614

District Court Case No.: A-13-678814-C

Appeal from the Eighth Judicial District Court
of the State of Nevada
In and For the County of Clark

U.S. BANK, N.A.'S ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

(N.R.A.P. RULE 26.1)

U.S. Bancorp is the parent company of U.S. Bank, N.A. (hereinafter "U.S. Bank"). There is no publicly held company that owns 10% or more of U.S. Bank's stock.

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1. Does a first deed of trust recorded in accordance with NRS 116.3116(2)(b) survive a foreclosure sale of "super-priority" lien under NRS 116.3116(2)?
2. Does a first deed of trust retain its priority status after a non-judicial foreclosure sale by an HOA for delinquent assessments?
3. Did the District Court properly dismiss SFR's Complaint with Prejudice?
4. Did the District Court properly grant the Motion to Expunge Lis Pendens?
5. Did the District Court properly deny SFR's Motion for Preliminary Injunction?

STATEMENT OF CASE

This quiet title action arises out of the efforts of SFR Investments Pool I, LLC, ("SFR") to obtain a judicial determination that the HOA foreclosure sale on a lien for delinquent assessments on the property located at 2270 Nashville Avenue, Henderson, Nevada 89052 (hereinafter "Property"), extinguished U.S. Bank's first position Deed of Trust, which met the requirements of NRS 116.3116(2)(b). The Deed of Trust was recorded over six years prior to the date upon which the assessments became delinquent in this case. The district court found that the Deed of Trust retained its first position status after the sale and the HOA Lien created at most a payment priority for nine months of assessments. As any interest SFR acquired at the sale was subject to the first Deed of Trust, it could not prevail on any of its claims, and dismissal was granted.

STATEMENT OF FACTS

U.S. Bank's title to the Property dates back to a Deed of Trust securing a Note for $331,500.00, executed by Lucia Parks (hereinafter "Parks") and recorded on January 5, 2006.[1] On July 12, 2010, a Corporation Assignment of Deed of Trust transferred all beneficial interest in the 2006 Note and Deed of Trust to U.S. Bank.[2]

Over six years after the Deed of Trust was recorded, a Notice of Delinquent Assessment Lien was recorded on May 24, 2012, by Copper Ridge (hereinafter "Copper Ridge").[3] A foreclosure sale went forward on the HOA Lien and SFR purchased the Property for $14,000.00.[4] SFR now claims title by virtue of a Foreclosure Deed recorded on March 6, 2013.[5]

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[1] 1 JA 099-124.
[2] 1 JA 130, 1 JA 148.
[3] 1 JA 146.
[4] A JA 156-157.
[5] Id.

LEGAL ARGUMENTS

A. PLAINTIFF'S COMPLAINT WAS PROPERLY DISMISSED AND ITS MOTION FOR PRELIMINARY INJUNCTION PROPERLY DENIED BECAUSE U.S. BANK'S DEED OF TRUST IS SUPERIOR TO COPPER RIDGE'S ASSESSMENT LIEN.

SFR misconstrues the language in NRS 116.3116(2)(b) to conclude that the foreclosure by Copper Ridge extinguished U.S. Bank's first Deed of Trust. This Court has made clear that when a statute "is clear on its face, a court may not go beyond the language of the statute in determining the legislature's intent." Diaz v. Eighth Judicial District Court ex rel. County of Clark, 116 Nev. 88, 94, 993 P.2d 50, 54-55 (2000). The language in NRS 116.3116(2)(b) unambiguously makes liens like the Copper Ridge Lien junior to first deeds of trust like U.S. Bank's. The specific language states that the HOA liens are prior to all other liens and encumbrances secured by the Property, **except** a first security interest on the property recorded before the date on which the assessment became delinquent in the case. NRS 116.3116(2)(b) expressly makes the date upon which to determine the priority of the liens the date the assessments became delinquent and not the date the CC&Rs are recorded. The recording of the CC&Rs is not notification of the recording and perfection of an HOA lien, but simply notice of the fact that the property is located in and governed by the rules of an HOA.

U.S. Bank's Deed of Trust was recorded on January 5, 2006[6], six years prior to the date on which Copper Ridge's assessment became delinquent in this case, per the Notice of Delinquent Assessment Lien recorded May 24, 2012.[7] Therefore, pursuant to NRS 116.3116(2)(b) and case law, the Deed of Trust has priority over Copper Ridge's Lien, so SFR cannot state a valid claim.

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[6] 1 JA 099-124.

[7] 1 JA 146.

B. PLAINTIFF'S COMPLAINT WAS PROPERLY DISMISSED AND ITS MOTION FOR PRELIMINARY INJUNCTION PROPERLY DENIED BECAUSE SFR MISCONSTRUES NRS 116.3116(2).

1. The Plain Language Of NRS 116.3116 And Rules Of Statutory Construction Preclude Extinguishment Of U.S. Bank's Deed Of Trust.

SFR asserts, pursuant to NRS 116.3116(2), that the foreclosure sale by Copper Ridge extinguished U.S. Bank's first Deed of Trust secured against the Property. The language in NRS 116.3116(2) carves out a limited exception to NRS 116.3116(2)(b), in which an HOA is entitled to only nine months of HOA charges and assessments upon the foreclosure of the first deed of trust or upon the initiation of a judicial action by the HOA. It does not state that the nine month "super-priority lien" or a foreclosure of the lien extinguishes a first deed of trust. NRS 116.3116(2) is a mechanism by which the Legislature ensured that an HOA will be paid *some* of the assessments due on a property upon the foreclosure by a first deed of trust. The "super-priority lien" should be **treated as a payment priority only** – not a stand-alone lien – by which the lien remains after a foreclosure on a first deed of trust to ensure that the HOA is paid some of its assessment dues. Moreover, since the language in NRS 116.3116(2) clearly states that the HOA must initiate an action to enforce the "super-priority lien," the "super-priority" does not exist because U.S. Bank has not foreclosed on the Property and Copper Ridge did not institute a judicial action to collect or enforce the "Super-Priority Lien."

This Court construes statutes "to give meaning to all of their parts and language," and will "read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation."[8] The statute's multiple legislative provisions are considered as a whole.[9] In order to give meaning to each

[8] See Harris Assocs. v. Clark County Sch. Dist., 119 Nev. 638, 642, 81 P. 3d 532, 534 (2003).

[9] See Leven v. Frey, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007).

part of the statutes, the Court must read the subsections together to mean that the super-priority rule affects the priority of payment, but does not effect an extinguishment of the first deed of trust. Taking SFR's theory to its logical conclusion, if the "super-priority" lien could extinguish a first deed of trust, then the Legislature would not have included NRS 116.3116(2)(b) because it would be rendered meaningless by the exercise of the "super-priority" lien. Because the Legislature included (2)(b), this Court must give significance to it. The point was made quite well by the court in Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC et al., 2:13-cv-RCJ-NJK[10]:

> The first mortgage rule (subsection (2)(b)) is an exception to the rule, for the super-priority rule (2)(c) is an exception to an exception. Since ... there can no [NRS 166.3116] subsection (1) lien that does not include some super-priority amounts because that amount includes every kind of assessment that could be delinquent... – the exception under subsection (2)(b) would be totally subsumed by the exception to the exception, rendering it meaningless....

SFR offered no substantive arguments why NRS 116.3116(2)(b) was necessary if the assessment lien could extinguish a first deed of trust. Therefore, the inclusion of NRS 116.3116(2)(b) must be read as a clear intention that a first deed of trust like U.S. Bank's is not extinguished by an HOA foreclosure sale.

Another "fundamental rule" when interpreting an ambiguous statute is that "the unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another that would produce a reasonable result.[11] Statutes in derogation of the common law must be strictly construed[12] and exceptions to general statutory rules

[10] See Respondent's Appendix at WF ****.
[11] See Hughes Props. v. State, 100 Nev. 295, 298, 680 P.2d 970, 971 (1984).
[12] Holliday v. McMullen, 104 Nev. 294, 296, 56 P.2d 1179, 1180 (1988).

should also be strictly construed.[13] When applying these principles to NRS 116.3116, the statute clearly confers a payment priority only.

When applying the strict construction and common law treatment of lien, U.S. Bank's Deed of Trust retains its priority over the HOA Lien after the HOA Sale. General real property law in Nevada focuses on race-notice: the prior in time recorded lien has priority over later "junior" liens – "first in time, first in right." Under common law, HOA liens did not afford any priority over previously recorded deeds of trust.[14] The Legislature created a statutory provision that directly conflicts with real property law; NRS 116.3116(2) departed from this common law norm by affording a *limited* priority to certain HOA liens over a prior recorded deed of trust. The priority extends only to nine months of assessments (upon a foreclosure of the prior recorded deed of trust), but the balance of the assessments, if any, remain junior to the prior recorded deed of trust. That sub-priority portion would be extinguished upon foreclosure on the prior recorded deed of trust unless there were excess proceeds after the deed of trust was satisfied.

Since the general rules regarding real property do not appear in NRS 116.3116 et seq., the Court *can* look at the legislative intent behind the divergent nature of the super-priority lien but must strictly construe the statutes as they are in derogation of the common law. The Legislative History shows the intent to establish a lien that creates solely a payment priority for the HOA.[15] Neither the Legislative History nor NRS 116.3116 et seq. ever discussed extinguishment of a first deed of trust. Unless the statutes expressly provided the first priority deed of trust would be extinguished by a foreclosure of the *subsequently recorded* HOA lien, the common law must prevail; the first deed of trust remains in first position

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[13] Braunstein v. Nev., 118 Nev. 68, 81, 40 P.3d 413, 422 (2002).
[14] See Daniel Goldmintz, Note, Lien Priorities: The Defects of Limiting the "Super-Priority" for Common Interest Communities, 33 Cardozo L. Rev. 267, 270-271 (2011).
[15] See Respondent's Appendix at WF ****.

and only the rights of *other* "interested persons" are affected by the foreclosure of the HOA lien.

The analysis by SFR is illogical because it maintains that the statute makes a first mortgage superior to an assessment lien yet allows an HOA's sale to eliminate that first deed of trust. Both cannot be true. SFR knowingly purchased the Property from an HOA sale that was governed by *all* of NRS 116.3116. SFR had knowledge of the eventual loss of title to the Property upon the foreclosure by U.S. Bank. A reasonably prudent purchaser at an HOA foreclosure sale would assume that any HOA foreclosure sale would be subject to a potential loss of the Property through a foreclosure by U.S. Bank – hence the purchase price of only $14,000.00. SFR's interpretation of NRS 116.3116(2) is illogical because the purchase at an HOA sale for such a minimal amount cannot equitably eliminate a Deed of Trust securing a Note for $331,500.00 executed years prior to the deficiency or the foreclosure sale.

2. SFR Is Not A Bona Fide Purchaser Because It Had Notice Of U.S. Bank's First Deed of Trust and Had Record Notice of the Mortgage Protection Clause in the CC&Rs.

SFR is not a bona fide purchaser if it purchased property with notice of another party's interest in the property. See Hewitt v. Glaser Land & Livestock Co., 97 Nev. 207, 208, 626 P.2d 268, 268-269 (1981). As a matter of law, SFR purchased the Property with knowledge of U.S. Bank's senior Deed of Trust. First, the recording statutes provide "constructive notice" of the existence of an outstanding interest in land, thereby putting a prospective purchaser on notice that he may not be getting all he expected. "'Constructive notice is that which is imparted to a person upon strictly legal inference of matters which he necessarily ought to know, or which, by the exercise of ordinary diligence, he might know.'" Allison Steel Mfg. Co. v. Bentonite, Inc., 86 Nev. 494, 497, 471 P.2d 666, 668 (1970) (quoting, 8 Thompson on Real Property, § 4293). Nevada's recording statute provides, "Every such conveyance or instrument of writing, acknowledged

or proved and certified, and recorded in the manner prescribed in this chapter or in NRS 105.010 to 105.080, inclusive, must from the time of filing the same with the Secretary of State or recorder for record...." SFR bought the Property after the CC&Rs and after the U.S. Bank's Deed of Trust were recorded. SFR therefore purchased the property with record notice of both the mortgage protection clause and U.S. Bank's senior Deed of Trust.

Second, Chapter 116 also deems SFR to have purchased the property subject to the CC&Rs. NRS 116.310312(7) provides, "A person who purchases or acquires a unit at a foreclosure sale pursuant to NRS 40.430 or a trustee's sale pursuant to NRS 107.080 is bound by the governing documents of the association...." A person who buys property at a foreclosure sale cannot pick and choose which parts of the CC&Rs are applicable to it. SFR is bound by the provisions of the CC&Rs, which include the mortgage protection clause.

Third, SFR is deemed to have knowledge of the CC&Rs and the mortgage protection clause under the common law. "The authorities are unanimous in holding that [the purchaser] has notice of whatever the search would disclose." Berger v. Fredericks, 95 Nev. 183, 189, 591 P.2d 246, 249 (1979). In addition to record notice, SFR was also on inquiry notice because the foreclosure documents themselves stated it the sale was being conducted pursuant to the CC&Rs.[16]

Therefore, SFR only holds a possessory title interest in the Property, subject to an eventual sale by the first Deed of Trust.

3. The CC&Rs Attests To The Preservation Of U.S. Bank's Deed of Trust after the HOA Sale.

The Declaration of Covenants, Condition, Restrictions, Reservations, and Easements for Copper Ridge (the "CC&Rs") establishes that an HOA foreclosure sale does not extinguish a first deed of trust and that title to the property is sold

[16] 1 JA 153-154.

subject to the first deed of trust. The CC&Rs clearly state, at Section 9.13. Mortgage Protection:

> Notwithstanding all other provision hereof, no lien created under this Article . . . shall defect or render invalid the rights of the Beneficiary under any Recorded First Deed of Trust encumbering a Lot or Condominiums, made in good faith and for value; provided (i) such Deed of Trust or Mortgage is Recorded prior to any notice of lien or notice of noncompliance Recorded pursuant to this Declaration. . . .[17]

Section 9.14 Priority of Lien, states, "The lien of any of the assessments, including default interest, costs, expenses and attorneys' fees as provided for herein, shall be subordinate to the lien of any First Mortgage."[18] Sections 9.13 and 9.14 clearly establish that the HOA's intended the sale of the Property, pursuant to N.R.S. 116.3116, is subject to the First Mortgage secured against the Property,[19] and clearly mean that an HOA Lien is subordinate to and does not extinguish U.S. Bank's Deed of Trust.[20]

SFR is bound by the CC&Rs for Copper Ridge, which govern the manner and method of the sale under which title was purchased by SFR. The CC&Rs clearly mean SFR acquired title to the Property, subject to U.S. Bank's Deed of Trust,[21] prevent extinguishment of that Deed of Trust and clearly anticipate and allow a "second" foreclosure by U.S. Bank. The CC&Rs also make the subsequent foreclosure by U.S. Bank is a valid sale.

4. The Legislative History Of NRS 116.3116 Precludes Extinguishment Of A First Deed Of Trust.

At that time NRS 116.3116 was adopted in 1991, the Uniform Common Interest Ownership Act (1982) (hereinafter "UCIOA" or "the Act") required that the HOA lien foreclosures be done in accordance with the traditional foreclosures

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[17] See Respondent's Appendix at WF ****.
[18] Id.
[19] Id.
[20] Id.
[21] Id.

in the state, and so did NRS 116.3116.[22] But the current version follows from the radical revision passed by the 1993 Legislature that removed the notice requirements and the ability to cure found in non-judicial foreclosures under NRS 107.080 and created the variant foreclosure scheme under NRS 116.31163, discussed in depth below. Unlike under UCIOA (1982) § 3-116(j)(4), in Nevada, the HOA can bring a judicial foreclosure action, it can assert its super-priority lien on a foreclosure under the first deed of trust, or it can non-judicially foreclose under the unique procedure in NRS 116.3116 et seq., particularly NRS 116.31163, whereby the buyer takes subject to the first deed of trust. Contrary to SFR's belief how the Act should work, **no UCIOA state has concluded that a non-judicial HOA foreclosure sale can eliminate a senior deed of trust.** Colorado, Connecticut, Delaware, Vermont, Alaska, and West Virginia, six of the other seven UCIOA jurisdictions, do not allow a non-judicial HOA foreclosure sale to eliminate a senior deed of trust, and only allow an HOA to foreclose its super priority lien judicially or "like a mortgage on real estate."[23] When the lienholder is no longer required to get notice of the sale, and is no longer expressly permitted to cure the deficiency, SFR's reasoning fails.

The Legislature clearly intended to allow assessments to have a secured lien and be entitled to payment upon the foreclosure by the first deed of trust. SFR knowingly purchased a Property from an HOA Sale that was governed by NRS

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[22] UCIOA (1982) provided at § 3-116(j)(4): "The association's lien may be foreclosed as provided in this subsection: ... (4) In the case of foreclosure under [insert reference to state power of sale statute], **the association shall give reasonable notice of its action to all lien holders of the unit whose interest would be affected.**" (Emphasis added.)

[23] See Colo. Rev. Stat. § 38-33.3-316 (11)(b); Conn. Gen. Stat. § 47-258 (j); Del. Code Ann. Tit. 25, § 81-316(j); Vt. Stat. Ann. Tit. 27A, § 3-116(j); Alaska Stat. § 34.08.470 (j); W. Va. Code § 36B-3-116 (f). Minnesota, the seventh state, does not give HOA assessment liens a super priority unless a senior lienholder forecloses. See Minn. Stat. § 515B.3-116.

116.3116. A reasonably prudent purchaser at such a sale would expect that any purchase would be subject to the first position Deed of Trust encumbering the Property. The purchase for the minimal price of only $14,000.00 serves as an acknowledgment of that expectation.

NRS 116.3116(2)(c) was amended by Assembly Bill 204 in 2009.[24] In its original form, AB 204 extended the period of priority from six months to two years, but this period was reduced to nine months. Assemblyperson Ellen Spiegel testified about the legislature's purpose in extending the priority period on March 6, 2009[25]:

> A.B. 204 extends the existing superpriority from six months to two years. ...In a nutshell, this bill makes it possible for common-interest communities to collect dues that are in arrears for up to two years at the time of foreclosure. This is necessary now because foreclosures are now taking up to two years. At the time the original law was written, they were taking about six months. So, as the time frames moved on, the need has moved up.

The "super-priority" treatment of the dues thus goes hand in hand with the foreclosure of the first deed of trust. Differing treatment of six or nine or 24 months of delinquent dues only makes sense if the first deed of trust remains in first position. *All* the delinquent dues would be protected if the first deed of trust could be displaced from its first position and extinguished. Extending the priority period to protect the HOAs would have been unnecessary if HOAs could simply foreclose on their super priority lien before a senior deed of trust beneficiary foreclosed and extinguish the deed of trust.[26]

In 2011, Nevada's legislature again considered amending NRS 116.3116(2)(c) with Senate Bill 174. Mr. Buckley testified regarding the 2009

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[24] See 2009 Nev. Stat., Page 1207.

[25] See Hearing on AB 204 Before Assemb. Comm. on the Judiciary, 75th Legislature, p. 34 (2009) (Statement of Assemblyperson Ellen Spiegel) attached to Respondent's Appendix at WF ****.

[26] Id.

amendment to NRS 116.3116(2)(c), and explained the meaning of a super priority lien:

> Nevada Revised Statute 116.310312 addresses the fact homes were abandoned, foreclosed upon and falling into disrepair. This section allows the association to maintain an abandoned or foreclosed property. The costs expended by the association are a superpriority lien against the property. The Uniform Common Interest Ownership Act was adopted wherein, if a first mortgage holder forecloses on a common-interest community (CIC) unit, the association can be paid six months of the dues owed, which is called superpriority. This was expanded to nine months, except for condominiums.[27]

He again explained the meaning of an HOA "super priority lien" on May 17, 2011:

> We are not changing the super priority lien. It will be six to nine months, which is what the law states now. **Once an HOA gets paid the super priority lien, it no longer has a lien against the unit. That is existing law.** When an investor buys a unit and resells it, it is great for the association who gets new owners because they start paying the dues on the unit that was foreclosed. ... We are not changing the law or the super priority lien. What we are trying to do is to clear up the title once the association has been paid its super priority lien. **The association can only get the super priority lien if there is a foreclosure by the first mortgage.** If there is no foreclosure by the first mortgage, the HOA could foreclose. **Super priority lien deals only with the foreclosure by the first mortgage.** (Emphasis added.)

Similarly, Senator Allison Copening testified, on June 4, 2011,[28] regarding the existing state of the law, and the meaning of "super priority":

> **The HOAs are currently made whole when the home is foreclosed upon and lending institutions have paid collection costs and other fees as the first lien holder, otherwise known as super-priority.** ... When a bank forecloses, the super-priority letter from an HOA, asking for up to nine months of the assessments and collection costs for the association, goes to the first security lien holder. The lender complies and then pays the association. (Emphasis added.)
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> In 2013, Nevada's Legislature again considered amending NRS 116.3116

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[27] See Respondent's Appendix at WF ****.
[28] Id.

with Senate Bill 280, part of which was enacted and did go into effect October 1, 2013.[29] NRS 116.31162 was amended to add subsection 6, which provided that the HOA could not foreclose its lien on owner-occupied housing if the holder of the first deed of trust or its successors or agents had recorded a notice of default and election to sell, proceeded through the Foreclosure Mediation Program and recorded the certificate permitting it to foreclose under NRS 107.086(2)(d)(1) or (2). It makes no sense to expressly preclude the HOA from foreclosing just because the lienholder was foreclosing if the HOA foreclosure could extinguish the deed of trust. This amendment supports a finding that, in the Legislature's view, the first deed of trust has priority over the HOA lien and would not be extinguished by the HOA foreclosure sale.

Therefore, the Legislative History of NRS 116.3116(2)(c) demonstrates that the "super priority lien" merely allows HOAs a payment priority *after* a senior deed of trust holder forecloses and an HOA foreclosure sale does not eliminate a first deed of trust. The equitable balance between the two statutes requires construing NRS 116.3116(2) as a payment priority lien, so SFR took title subject to U.S. Bank's Deed of Trust, under NRS 116.3116(2)(b).

5. Key Differences Between Non-Judicial Foreclosures Under NRS 107 And An HOA Lien Foreclosure Under NRS 116.3116 Preclude Extension Of The Rules Of Extinguishment From NRS 107 To NRS 116.3116.

While there are many similarities between non-judicial foreclosures under Chapter 107 and HOA lien foreclosures, they are different in several key areas that make application of the results of the former inappropriate to the latter. The biggest differences between Chapter 107 and the current Chapter 116 relate to notice. While both chapters require that the foreclosing entity record a notice of default and election to sell,[30] Chapter 107 also expressly requires recording and

[29] See Respondent's Appendix at WF ****.
[30] See NRS 107.080(2)(c) and NRS 116.31162(1)(a).

mailing the notice of default and election to sell and the notice of the foreclosure sale[31] to any "person with an interest"[32] – that is, to the unit owner and all lienholders – but Chapter 116 only requires the Notice of Default and Election to Sell[33] and the Notice of the Foreclosure Sale[34] be recorded and mailed to the unit owner (or anyone who has formally requested notice). When Nevada adopted the UCIOA in 1991, the Act required that the HOA lien foreclosures be done in accordance with the traditional foreclosures in the state.[35] When the Legislature adopted the Act in 1991, it did just that and required that the foreclosure of HOA liens follow all the requirements of NRS 107.090.[36] It required notice of sale be given to all lienholders and the unit owner. Under those circumstances, it made some sense that the foreclosure sale could extinguish all liens because all lienholders got notice. However, in 1993 the Legislature removed the requirement of notice of sale to all lienholders and only required notice to the unit owner and the lienholders subordinate to the first deed of trust.[37] If the right to receive notice

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[31] See NRS 107.090(3).

[32] NRS 107.090(1) provides, "As used in this section, 'person with an interest' means **any person who has or claims any right, title or interest in, or lien** or charge upon, the real property described in the deed of trust...." (Emphasis added.)

[33] See NRS 116.31163(1) and (2).

[34] See NRS 116.311635(1)(a)(1).

[35] UCIOA (1982), § 3-116(j)(4), set forth above in fn. 19.

[36] 1991 Statutes of Nevada, Page 569, Sec. 104, provided, "1. **The provisions of NRS 107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed. The association must also give reasonable notice of its intent to foreclose to all holders of liens in the unit who are known to it."** (Emphasis added.)
NRS 116.31168(1) was amended accordingly.

[37] 1993 Statutes of Nevada, Page 2373, Sec. 40, provided,

> NRS 116.31168 is hereby amended to read as follows:
> 116.31168 1. The provisions of NRS 107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed. The request must identify the lien by stating the names of the unit's owner and the common-interest community. [The association must also give reasonable

from the statute is removed, and the first priority secured interest can be extinguished by the HOA lien foreclosure sale, then the holder of that interest suffers a violation of its right to due process. **If the right to receive notice is removed but the first priority status is preserved, the due process rights are not threatened.**

The importance of notice to the persons of interest is so important under Chapter 107 that "the person who did not receive such proper notice may commence an action pursuant to subsection 5 within 120 days after the date on which the person received actual notice of the sale" for wrongful foreclosure in which damages and an "injunction enjoining the exercise of the power of sale until the beneficiary, the successor in interest of the beneficiary or the trustee complies with the [notice and ability to cure] requirements."[38] No such right to pursue wrongful foreclosure and enjoin the sale exists in Chapter 116.

Also, when the Act was adopted in Nevada in 1991, NRS 107 required that the unit owner and every person with an interest had the opportunity to cure the deficiency and avoid foreclosure.[39] When Chapter 116 was amended in 1993 and existing today, it changed the foreclosure procedure in ways peculiar to Chapter 116 and removed the express right of lienholders to cure by paying the amount specified in the notice; the notice then only provided for a warning that if *the unit owner* did not cure, *the unit owner* could lose its interest.[40]

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notice of its intent to foreclose to all holders of liens in the unit who are known to it.]

The brackets indicate the deleted provision.

[38] See NRS 107.080(7)(a) and (b).

[39] See NRS 107.080(2)(a)(2) ("The power of sale must not be exercised, however, until: ...the grantor, the person who holds the title of record, a beneficiary under a subordinate deed of trust or any other person who has a subordinate lien or encumbrance of record on the property has, for a period of 35 days ... failed to make good the deficiency in performance or payment."

[40] See NRS 116.311635(3)(a) and (b).

The procedures under Chapters 107 and 116 are materially different; they create variant forms of foreclosure. The requirements of notice and opportunity to cure under Chapter 107 provide the protection of constitutionally protected rights, absent under the Chapter 116 procedures if they are construed to permit extinguishment of first deeds of trust. As we have seen in increasing number of cases, the HOA's refuse to provide the lenders the amount of the deficiency and in particular the 9-month super priority amount and even refuse the lender's offer to cure. If the lienholder is not required to get notice and the HOA is not required to accept payment, then the lienholder cannot protect its interests.

SFR fails to consider that the holder of the first priority deed of trust would only be required under the Model Act to pay the super-priority portion of the deficiency – then six months and now nine months – leaving the sub-priority portion unpaid. In that circumstance, the third party buyer would still lose what it paid for that portion when the holder of the first foreclosed. Recall the Nevada Real Estate Division Advisory Opinion, p. 9, where it expressly contemplates "an imminent foreclosure of the first security interest" would wipe out the subordinate portion of the delinquency. Actually, SFR would have this Court ignore the fact that the third party buyer is not so innocent because it went into the sale knowing that the holder of the first deed of trust could foreclosure at any time because the deed of trust was already of record and gave them notice. If the third party buyer owned their interest in the property at the time the holder of the first deed of trust began its foreclosure, the holder would be required by NRS 107.090 to not only give the third party buyer notice of the default and the sale but also the express right to cure the default on the first – as it would be a "person of interest" – and avoid losing its interest. Notice the illogical disparity if SFR's view were accepted: the HOA would not have to give notice to the holder of the first deed of trust and would not have to accept payment to cure, but the third party buyer would have to get notice of the foreclosure of the first deed of trust and the holder would

have to accept payment to cure. Because the holder of the first deed of trust does not get notice of the default or of the sale on the HOA lien, under the current Chapter 116 procedure, it instead must be the innocent party and its rights, protected.

Because of these critical differences, the effect of a foreclosure under Chapter 116 cannot be compared to the effect of a foreclosure under Chapter 107.

6. SFR's interpretation of NRS 116 would result in a violation of the due process rights of U.S. Bank.

Nevada is a race-notice State, where a deed of trust has priority in a chain of title based on the date upon which it is recorded in the chain of title for the property. It would be a violation of U.S. Bank's contractual and due process rights to allow a later-in-time recorded Lien to extinguish its first Deed of Trust. The violation of due process is also based on the lack of notice to U.S. Bank of (i) whether the purported lien is claimed pursuant to NRS §116.3116(2)(c); (ii) if so, what is the amount of the "super-priority" portion of the lien; and (iii) that U.S. Bank's senior Deed of Trust could be extinguished. Here, the Notice of Delinquent Lien and other HOA foreclosure documents do not list even one month of assessments is outstanding and only state that the unit holder may lose its interest. This lack of mandatory notice makes sense only if U.S. Bank's interpretation of NRS 116.3116(2) is correct. If an HOA sale does not extinguish a senior deed of trust and the HOA is only entitled to a payment priority equal to nine months' worth of assessments, there is no reason for the HOA to give notice of its lien foreclosure sale to the senior lienholder. If the Nevada Legislature had intended for the foreclosure of an HOA lien to extinguish a first deed of trust, it would have required the HOA to notify the holder of the deed of trust *in every instance*.

Judge Jerome Tao has recently issued a decision on the interpretation of NRS 116 that overturns his prior analysis of NRS 116 in First 100, LLC v. Burns,

et al., (Eighth Judicial District Court Case No. A-13-677693-C), relied on by SFR. In Paradise Harbor Place Trust v. Deutsche Bank, National Trust Company, et al., (Clark County Case No. A-13-687846-C)[41], Judge Tao granted the motion to dismiss based on the potential violation of the constitutional protections afforded to lienholders. He stated that the procedures used in a non-judicial foreclosure by an HOA may violate the Due Process Clause of both the U.S. and Nevada Constitutions. He noted that

> the question of due process or lack thereof is a very serious flaw inherent in the plain language of the statute . . . because if a statute, as literally interpreted and applied by this Court, potentially (and in some cases actually) results in an unconstitutional deprivation of a party's property interest without even minimal notice or an opportunity to be heard, the one of two conclusions must logically follow: either the statute is unconstitutional and therefore void, or the statute has not been understood correctly by the parties and/or the Court.

Judge Tao concluded that regardless of whether a specific lienholder was afforded notice in a particular case, "the statute is unconstitutional because is facially permits some property rights to be extinguished in at least some cases without any notice or opportunity to be heard." (Of course, Judge Tao could have avoided the finding that NRS 116.3116 resulted in violations of due process rights if he had rejected the extinguishment theory.)

Similar to Paradise Trust, the Complaint in this case failed as a matter of law to allege that the due process rights of the lienholders were met by the HOA Sale (like a sale subject to the protections in Chapters 40 and 107), that U.S. Bank received any "notice" of the HOA Sale or that U.S. Bank received "notice" of the super-priority lien amount – or even that the HOA lien included *any* super-priority amounts. The failure to plead the basic facts necessary to a claim under NRS 116 to due process requirements requires the Court to affirm the Dismissal of the Complaint.

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[41] See Paradise Trust Order attached to Respondent's Appendix at WF ****.

SFR argues that there is no violation of U.S. Bank's due process rights because notice is in fact required by NRS 116.31168. This amounts to an impermissible attempt to shift the burden of proof that the sale comported with the notice requirements of due process from SFR to U.S. Bank. In any case, the words of the statutes themselves make this argument untenable. As discussed above, NRS 116.3116 (1991) required that the HOA lien foreclosures be done in accordance with the traditional foreclosures in the state, and NRS 116.31168(1) was enacted to provide, **"The provisions of NRS 107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed. ... The association must also give reasonable notice of its intent to foreclose to all holders of liens in the unit who are known to it."** (Emphasis added.) Under those circumstances, it made some sense that the foreclosure sale could extinguish all liens because all lienholders got notice. However, in 1993, the Legislature modified the requirement of notice of sale to all lienholders and only required notice to the unit owner and lienholders subordinate to the fist deed of trust,[42] removed the ability to cure found in non-judicial foreclosures under NRS 107.080 and created the variant foreclosure scheme under NRS 116.31163. These changes permitted Judge Tao to conclude that an interpretation of NRS Chapter 116 permitting a foreclosure conducted thereunder

> to extinguish all other existing encumbrances on the property, including any pre-existing first mortgage on the property whose holder did not participate in the foreclosure proceedings ... violates the requirements of due process in at least some cases, because NRS 116.11635(1)(b)(2) expressly does not require notice of the foreclosure to be given to all lienholders before their property interests are completely erased by operation of law.[43]

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[42] At the time of the 1993 amendment, Section 6 amended NRS 116.3116 et seq. regarding the notice provisions required of the HOA, and Section 37 specifically amended NRS 116.31162 regarding that requirement for *mailed* notice. See the Legislative History (1993) (AB 612), p. 30 *** .

[43] See Paradise Trust Order attached to Respondent's Appendix at WF ****. Judge Allf's Order in SFR Investments Pool 1, LLC v. U.S. Bank, N.A. et al., Case

When the lienholder is no longer required to get notice of the sale, and is no longer expressly permitted to cure the deficiency, the scheme is unconstitutional: "However, the simplified foreclosure mechanism set forth in NRS 116.31162 through 116.31168 is unconstitutional because it facially permits subordinate interests to be erased without proper notice or any opportunity to object. Therefore, any foreclosure conducted in accordance with solely these provisions is null and void."[44] In short, if the right to receive notice from the statute is removed, and the first priority secured interest can be extinguished by the HOA lien foreclosure sale, then the holder of that interest suffers a violation of its right to due process.[45]

Reference to the actual language of the statutes makes this clear. NRS 116.31168(1) states, "The provisions of NRS 107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed." NRS 107.090(3) and (4) require the HOA to record the notice of default and mail it and the notice of sale to: "(a) Each person who has recorded a request for a copy of the notice; and

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No. A-12-673671-C, and Judge Herndon's Order in Jason French v. Sweetwater Homeowners' Association, Inc. et al, Case No. A-12-667931-C, attached to Respondent's Appendix at WF ****:

> 5. Both State and Federal constitutional due process guarantees are offended if the first security mortgagee's interest may be voided by non-judicial foreclosure for an assessment lien, relatively nominal in value, without notice to the otherwise senior interest mortgagee, and if an opportunity is not provided to the mortgagee to argue its position, or to pay, the assessment amounts in order to avoid the risk of losing...[its] first security interest in Subject Property. **While the Court acknowledges that NRS 116.311635(1)(b)(2) does not absolutely require notice to the holder of a recorded security interest, failure to provide notice is a deprivation of due process.** Accordingly, NRS 116.3116(2)(c) must be construed to require a civil action to trigger and foreclose an HOA's super priority lien. (Emphasis added.)

[44] See Paradise Trust Order attached to Respondent's Appendix at WF ****.

[45] Of course, it is U.S. Bank's position that if the right to receive notice is removed but the first priority status is preserved, the due process rights are not threatened.

(b) Each other person with an interest **whose interest or claimed interest is subordinate to the deed of trust**." (Emphasis added.) By their very words, these sections require mailing the notices to persons with an interest whose interest or claimed interest is **subordinate to the deed of trust**. The first deed of trust is not subordinate to itself. The 1993 amendments to NRS 116.3116 et seq. took away the express requirement under NRS 116.3116 (1991) that "The association must also give reasonable notice of its intent to foreclose to all holders of liens in the unit who are known to it" – which would have of necessity included the holder of the first deed of trust. The addition of NRS 116.31168(1) replaced this express requirement with a requirement that the HOA only need mail the notices to the holders of liens junior to the first deed of trust.[46]

In addition, SFR asserts that the mortgage protection language stated in the CC&Rs should be disregarded because the CC&Rs contradict NRS 116.3116 et seq. The argument fails because the CC&Rs are a necessary component of the due process afforded U.S. Bank. SFR relies on the court's order in 7912 Limbwood v. Wells Fargo Bank, N.A. et al., 2013 WL 5780793 (D. Nev.)[47], where the court dismissed the importance of the CC&Rs because the banks had "notice" of the HOA and the potentiality of an HOA sale based on a super-priority lien due to the recording of the CC&Rs prior to the recording of a deed of trust. That court failed to consider the type of "notice" afforded banks by the recording of the CC&Rs – namely, even a sale based on a super-priority lien would not displace the secured status of U.S. Bank's Deed of Trust. That court failed to consider that nowhere in

[46] The comments in the Legislative History from the 1993 Legislature make clear removing the requirement of notice of sale to all lienholders and only requiring notice to the unit owner was done to make easier for the associations, but give "fairer notice to the delinquent unit owner" because the then-existing law did not "provide good notice [to the homeowner] and [did] not conform with Nevada practice in similar situations." See the Legislative History (1993) (AB 612), . . .

[47] See 7912 Limbwood Order attached to Respondent's Appendix at WF ****.

the CC&Rs does it state that the HOA Sale of a super-priority lien would extinguish a first deed of trust. This Court cannot disregard the CC&Rs and the "notice" it gave to banks yet conclude the banks are in a better position to pay the HOA liens. In addition, the HOA lien documents recorded in the chain of title, which formed the basis of the HOA Sale, do not contradict the "notice" provided to U.S. Bank in the CC&Rs, nor do they state that a first deed of trust would be extinguished or provide the super-priority lien amount. Disregarding the CC&Rs violates the due process rights of U.S. Bank. Therefore, the Court should read NRS 116 with the CC&R's mortgage protection clause and protect U.S. Bank's first Deed of Trust.

C. THE DUE PROCESS CLAIMS ARISE FROM STATE ACTION IN ENACTING FORECLOSURE PROCEDURES IN NRS 116.31162 THROUGH 116.31168, IF THEY PERMIT EXTINGUISHMENT OF THE FIRST DEED OF TRUST, NOT FROM THE ACT OF CONDUCTING THE SALE ITSELF.

SFR has argued that "Due process claims arise only if 'state action' is involved," citing Charmicor v. Deaner, 572 F.2d 694 (9th Cir. 1978). Charmicor v. Deaner is inapposite due to the facts of the instant case. There, the corporation had tried to support claims for violation of civil rights statutes alleging that its statutory and constitutional rights were violated by operation of Nevada's nonjudicial foreclosure statute (NRS 107.080). The complaint was dismissed for failure to state a claim for relief "because the record was utterly barren of any facts or allegations that could support a claim under the equal protection clause [rather than the due process clause], because there was no state action." The claim was **against the actors** who allegedly violated the constitutional rights. In this context, the court said, "The statutory source of the Nevada power of sale, however, does not necessarily transform a private, nonjudicial foreclosure into state action," explaining that "the statute creates only the right to act; it does not require that such action be taken." Here, the claim is not against the HOA or the trustee which

conducted its sale; U.S. Bank does not contend their actions were "state actions" which support a claim against them. Here, U.S. Bank claims that the very statute SFR claims is the source of its claim to title is unconstitutional, if it permits extinguishment of the first deed of trust without notice and an opportunity to cure.

More in line with the U.S. Banks' argument, the U.S. Supreme Court, in Lugar v. Edmonson Oil Co., Inc., 457 U.S. 922, 102 S.Ct. 2744, 2746 (1982), held that the state's creation of a procedural scheme that violates due process constitutes state action. The plaintiff sought damages from a private party who had attached the plaintiff's property at the outset of a state-court suit for debt. The plaintiff claimed that the state attachment statute itself was procedurally defective under the Fourteenth Amendment. Because "the procedural scheme created by the statute obviously is the product of state action," this could be addressed in a §1983 action if the private party could be regarded as "state actors." The Court held that "[w]hile private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action. This is subject to constitutional restraints...."

In Woodring v. Jennings State Bank, 603 F.Supp. 1060 (D.C. Neb. 1985), the court held that a bank's invocation of an attachment mechanism to attach jointly-held property to satisfy a husband's debts deprived the wife of property rights without due process of law, where the wife was not entitled to a hearing to challenge the grounds for attachment under the statutory scheme. The bank argued that case did not implicate due process because any deprivation of the wife's property was attributable to the bank and not to state action. The court, citing Lugar, explained that "[w]hile private misuse of a state statute does not describe conduct attributable to the state, the procedural scheme . . . is a product of state action, and the statutes may be challenged ... as violative of procedural due process." Id. at 1066-67.

Here, again, the state action giving rise to a due process violation is the

creation of an unconstitutional procedural scheme, and not the individual non-judicial foreclosures that arise from it. In other words, it is the procedural scheme that is challenged not the acts of the HOA and its foreclosure trustee. The "state action" argument fails to support SFR's extinguishment argument.

D. THE FORECLOSURE PROCEDURES IN NRS 116.31162 THROUGH 116.31168, IF THEY PERMIT EXTINGUISHMENT OF THE FIRST DEED OF TRUST, ARE UNCONSTITUTIONAL ON THEIR FACE.

SFR has argued that U.S. Bank lacked standing to raise a due process argument based lack of notice if it could not prove it did not receive notice. However, actual notice (or, more generally, a demonstration of actual harm) is irrelevant when challenging a procedural scheme. The U.S. Supreme Court has held that the denial of procedural due process is an injury in its own right, "does not depend on the merits of the claimant's substantive assertions," and is actionable even without proof of other injury. Carey v. Piphus, 435 U.S. 247, 266, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978); accord Vietnam Veterans of Am. v. C.I.A., 288 F.R.D. 192, 209-10 (N.D. Cal. 2012) (citing Carey). See also, Clements v. Airport Auth., 69 F.3d 321, 333 (9th Cir. 1995) ("[T]he absolute right to adequate procedures stands independent from the ultimate outcome of the hearing."); and Kuck v. Danaher, 600 F.3d 159, 165 (2nd Cir. 2010) ("The viability of [SFR's] due process claim does not turn on the merits of his initial challenge; rather, it concerns whether he received the process he was due.").

Even if U.S. Bank lacked standing to challenge the constitutionality of the statutory scheme, this Court could address it sua sponte. Nevada courts have the power to evaluate constitutional issues sua sponte. Ramirez v. State, 114 Nev. 550, 560, 958 P.2d 724, 730 (1998) (noting the Court's "willingness to address constitutional error sua sponte"); see also Desert Chrysler-Plymouth, Inc. v. Chrysler Corp., 95 Nev. 640, 643, 600 P.2d 1189, 1190-91 (1979) (clarifying that the Court's occasional refusal to address constitutional issues sua sponte did not arise from any jurisdictional limitation, but "merely as a matter of practice").

U.S. Bank had standing to challenge application of the foreclosure procedures in NRS 116.31162 through 116.31168, if they permit extinguishment of the first deed of trust, as unconstitutional on their face.

E. PLAINTIFF'S COMPLAINT WAS PROPERLY DISMISSED AND ITS MOTION FOR PRELIMINARY INJUNCTION PROPERLY DENIED BECAUSE THE HOA DID NOT INSTITUTE "AN ACTION" TO ASSERT ITS "SUPER-PRIORITY."

The language of the statute creating the super-priority interest in nine months of common assessments is clear; that interest is created upon the "institution of action to enforce the lien." See NRS 116.3116(2)(c). Statutory terms are generally interpreted according to their ordinary meaning unless otherwise defined in the statute. Perrin v. United States, 444 U.S. 37 42 (1979). The term "action" in the ordinary sense means to file or bring a lawsuit. See N.R.C.P. 3; see also Seaborn v. First Judicial Dist. Court, 29 P.2d 500, 505 (Nev. 1934) ("An 'action' is a judicial proceeding, either in law or equity, to obtain certain relief at hands of court"); BP Am. Prod. Co. v. Burton, 549 U.S. 84, 91 (2006) ("The key terms in this provision – 'action' and 'complaint' – are ordinarily used in connection with judicial, not administrative, proceedings"); Black's Law dictionary (8th ed. 2004) (the phrase "bring an action" is defined as "to sue; institute legal proceedings"). In addition, other portions of NRS 116.3116 refer to the term "action" as a judicial proceeding. Specifically, NRS 116.3116(7) states "[a] judgment or decree in any action under this section must include costs and reasonable attorney's fees for the prevailing party." Even further NRS 116.3116(10) provides that an HOA may institute an action to collect delinquent assessments and to foreclose a lien and the court may appoint a receiver to collect rents during the pendency of the action. The plain meaning and the context of the term "action" under NRS 116.3116 therefore means to commence or institute a lawsuit or judicial action. Since there was no action, there was no super-priority.

Court must construe NRS 116.3116(2)(c) to require a judicial action to be filed to establish an HOA super-priority lien. In this case, the HOA did not, so there was no super-priority lien.

Notably, the statutory provisions that address non-judicial foreclosure of an HOA lien do not even contemplate or provide procedures for dealing with the sub-priority portion of the lien under NRS 116.3116(2) – that is, the portion other than the super-priority nine months of assessments. Under NRS 116.31164, the proceeds of the non-judicial foreclosure sale are to be applied "in the following order: (1) The reasonable expenses of sale; (2) The reasonable expenses of securing possession before sale...; (3) Satisfaction of the association's lien; (4) Satisfaction in the order of priority of any subordinate claim of record; and (5) Remittance of any excess to the unit's owner." NRS 116.31164(3)(c). The statute simply does not account for the fact that the association's lien can be split into super-priority and sub-priority portions by NRS 116.3116(2), or provide instructions to pay the super-priority amount of the association's lien, then any subordinate claims of record like first security interests, then the remaining amount of the association's lien.[48]

[48] In contrast to NRS 116.31164(3)(c), which governs the distribution of non-judicial HOA foreclosure proceeds, NRS 40.462(2), which is generally applicable to judicial and non-judicial foreclosure sales, provides that proceeds "must be distributed in the following order of priority: (a) Payment of the reasonable expenses of taking possession, maintaining, protecting and leasing the property.... (b) Satisfaction of the obligation being enforced by the foreclosure sale. (c) Satisfaction of obligations secured by any junior mortgages or liens on the property, in their order of priority. (d) Payment of the balance of the proceeds, if any, to the debtor or the debtor's successor in interest." Applying this section would properly result in payment of the nine months' worth of assessments (the "obligation being enforced by the foreclosure sale" rather than the association's entire lien), the first security interest mortgage, and then the remainder of the HOA lien "in their order of priority."

By its terms, NRS 116.3116(2) requires that an HOA must "institute an action" in a court when it is seeking to achieve the super-priority of its own lien over a first security interest and thereby extinguish a first security interest. See Green Tree Servicing, LLC, Case No. A680704, at *4 (Nev. Dist. Ct. June 19, 2013) ("while NRS §116.3116(2) refers to an 'action' in the foreclosure context, this provision is not applicable when a homeowners' association forecloses pursuant to a claim of 'super priority' lien under NRS §116.31162 – NRS §116.31168, the non-judicial foreclosure statutes" and that "in order for a homeowners' association to trigger and/or enforce a 'super priority' lien claim, a judicial foreclosure civil lawsuit must first commence"). Indeed, it would make little sense for NRS 116.3116(8) to state "if a lien for the unpaid assessments may be foreclosed under NRS 116.31162 to 116.31168" if there were not at least some liens for assessments that could not be foreclosed under those sections.

If NRS 116.3116 were not clear enough on its own (which U.S. Bank submits it is), other statutory provisions erase any doubt that "institution of an action" refers to the commencement of judicial proceeding. See, e.g., NRS 17.440 (titled "Action' defined" and stating "Action' means a judicial proceeding or an arbitration. . . ."); NRS 40.430 (titled "Action for recovery of debt secured by mortgage or other lien; 'action' defined" and specifically stating that "an 'action' does not include . . . the exercise of a power of sale pursuant to [the non-judicial foreclosure provision] NRS 107.080") (emphasis added);[49] NRS 118A.040 (titled "Action' defined" and stating "Action' includes counterclaim, crossclaim, third-party claim or any other proceeding in which rights are determined.").[50] Notably,

[49] Where one statute is silent about an issue that another speaks to, courts seek to construe the statutes harmoniously so as to "give effect to both." See Cromer v. Wilson, 225 P.3d 788, 791 (Nev. 2010).

[50] Accord Black's Law Dictionary 33 (9th ed. 2009) ("Action' in the sense of a judicial proceeding includes recoupment, counterclaim, set-off, suit in equity, and any other proceedings in which rights are determined." (quoting UCC § 1-201(1))).

NRS 118A.040 is part of the same title – Title 10 governing property rights and transactions – as NRS 116.3116 and thereby further demonstrates that "action" has the commonplace meaning U.S. Banks are advocating. See MGM Mirage v. Nevada Ins. Guar. Ass 'n, 209 P.3d 766, 770 (Nev. 2009) ("[W]e determine that several other statutes falling within Title 57 further demonstrate that 'insurer' has the commonplace meaning that the Legislature prescribed in NRS 679A.100."); see also NRS 112.210 (titled "Rights of creditor in action for relief against transfer or obligation"); NRS 112.230 (titled "Limitation of actions"); NRS 120A.650 (titled "Action to establish claim"); NRS 120A.720 (titled "Interstate agreements and cooperation; joint and reciprocal actions with other states") (all within Title 10 and all supporting the fact that "action" has the "commonplace meaning" of a judicial proceeding).

Decisions of this Court and the United States Supreme Court further confirm that courts and legislatures use "action" to refer to judicial proceedings. See Holt v. Reg'l Tr. Servs. Corp., 266 P.3d 602, 605 (Nev. 2011) ("But as the name implies, non-judicial foreclosure is not a judicial 'action' . . . ."); Seaborn v. First Judicial Dist. Ct., 29 P.2d 500, 505 (Nev. 1934) ("An 'action' is a judicial proceeding, either in law or equity, to obtain certain relief hands of court." (internal quotation marks and citation omitted)); see also BP Am. Prod Co. v. Burton, 549 U.S. 84, 91 (2006) ("Unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning. Read in this way, the text . . . is quite clear. . . . The key terms in this provision – 'action' and 'complaint' – are ordinarily used in connection with judicial, not administrative, proceedings.").

The word "institute" coupled with the word "action" makes the legislative intent here unambiguous. See Benson v. Zoning Bd. of Appeals of Town of Westport, 873 A.2d 1017, 1022 (Conn. App. Ct. 2005) ("'[T]he institution of an action' has never been held to mean anything other than the filing of a civil action

in court," citing the parallel statute, Conn. Gen. Stat. § 47-258(b), as one example "employing phrase 'institution of an action to enforce' in context of condominium association lien, which requires civil action to enforce")); Costello v. Casler, 254 P.3d 631, 632 (Nev. 2011) (using "institution of an action" in discussing pleadings in a lawsuit); Scrimer v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark, 998 P.2d 1190, 1194 (2000) (using phrase when discussing service of process in a lawsuit); Madera v. State Indus. Ins. Sys., 956 P.2d 117, 121 (Nev. 1998) (using phrase when discussing whether a lawsuit can be maintained against worker's compensation system); Nat'l Mines Co. v. Dist. Ct., 116 P. 996, 998, 1000 (Nev. 1911) (using phrase synonymously with "institution of suit").[51] Indeed, as used in NRS 116.3116 itself, "action" is never used to mean anything other than a judicial suit. And U.S. Bank has not found anywhere in Chapter 116 language like

[51] See also, e.g., NRS 116.3102(d) (providing that the association "[m]ay institute, defend or intervene in litigation or in arbitration, mediation or administrative proceedings in its own name"); NRS 14.010(1) ("In an action for the foreclosure of a mortgage upon real property, or affecting the title or possession of real property, the plaintiff, at the time of filing the complaint, and the defendant , at the time of filing his or her answer, if affirmative relief is claimed in the answer, shall record ... a notice of the pendency of the action . . . ."); NRS 14.010(2) (extending NRS 14.010(1) to actions affecting real property, pending in any United States District Court for the District of Nevada); Crestline Inv. Grp., Inc. v. Lewis, 75 P.3d 363, 365 (Nev. 2003) ("In a separate lien foreclosure proceeding instituted ... against Crestline, the district court deemed Lewis' lien claim waived for failure to timely file a statement of facts as required by NRS 108.239(2)(b)."); Mahaffey v. Investor's Nat'l Sec. Co., 747 P.2d 890, 891 (Nev. 1987) ("Foreclosure proceedings were then instituted by Mortgage Finance Corp. to collect the money owed. The district court found . . . ."); First Nat'l Bank v. Fallon, 26 P.2d 232 (Nev. 1933) ("First National Bank in Reno instituted a suit in the district court for Mineral County to foreclose a mortgage"); State v. Fifth Judicial Dist. Court in & for Mineral Cnty., 9 P.2d 681, 681 (Nev. 1932) ("Grace v. Ward instituted an action in the Second Judicial District Court... to foreclose a certain chattel mortgage ...."); Segale v. Pagni, 250 P. 991, 991 (Nev. 1926) ("This action was instituted to foreclose a mortgage upon a certain ranch.").

"institution of an action" used to mean anything other than commencing a judicial lawsuit.

U.S. Bank submits that NRS 116.3116 is clear on its face and that "action" means judicial action, for that term has been used by the Nevada Legislature for decades. But in the event that the Court finds the statute ambiguous, U.S. Bank submits that legislative intent, policy considerations, and an effort to avoid absurd results all dictate that "institution of an action" be interpreted to mean commencement of a judicial action. The benefit of requiring a judicial action is that it would protect due process rights as notice and an opportunity to contest the HOA's purported priority are present. No state that has enacted an HOA foreclosure scheme or interpreted an already existing one in the manner SFR is advocating would permit that result.

F. THE UCIOA DOES NOT SUPPORT THE "EXTINGUISHMENT" THEORY.

Nevada's statutes governing HOAs – including NRS 116.3116 – were based on the UCIOA (1982). The 1991 Nevada Legislature adopted much of that version, though it has undergone several significant revisions in the years since. However, SFR's reliance on the language and comments of the UCIOA is flawed and fails to mandate an extinguishment of U.S. Bank's Deed of Trust.

The Official Comments to UCIOA § 3-116 (1982), explain the limited priority conferred on an HOA Lien, "A significant departure from existing practice, the 6 months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and *the obvious necessity for protecting the priority of the security interests of lenders.*" (Emphasis added.) NRS 116.3116 adopting UCIOA § 3-116 then implicitly recognized this equitable balance. SFR's approach would reject the Nevada Legislature's intent by inordinately damaging lenders while at the same conferring little actual benefit on HOAs.

The context of Section 1 of the Comments is a foreclosure by an HOA with a first deed of trust still encumbering the property. Section 1 states that mortgage lenders "will most likely pay" the assessments. It does not mandate that a first lienholder like U.S. Bank *must* pay the assessments, nor does it state that a first deed of trust will be extinguished upon an HOA foreclosure sale. It merely establishes a means to order payment priority if an HOA lien is not paid prior to the first lienholder's sale. Nevertheless, SFR continues to assert that an HOA will lose any right to secure payment and not be paid the nine months of assessments and dues if it does not have the power to non-judicially foreclose. SFR's arguments that the UCIOA mandates extinguishment are founded in the faulty premise that extinguishment upon non-judicial foreclosure is necessary to protect HOAs. However, judicial foreclosure, asserting payment priority at a foreclosure of the first deed of trust or **conducting a non-judicial foreclosure sale which preserves the first position status of the deed of trust**. Why is it that non-judicial foreclosure sales of HOA liens leaving the buyer subordinate to the first deed of trust have worked – as intended – for over 20 years since non-judicial foreclosures under NRS 116.3116 et seq. were created, but quiet title actions by the buyers have only flooded the courts in the last year? They worked because they **met the goals of the HOAs**, not those of the speculators and investors trying to create an ambiguity in the statutes where there was none and capitalize on it and receive a windfall. It is no more necessary to require extinguishment and let the buyer take subject to the first deed of trust than it would be let the buyer at any junior lienholder's non-judicial foreclosure sale.

The HOA sale is an atypical non-judicial foreclosure right because if a lien meets NRS 116.3116(2)(b), then the power of sale does not extinguish a first position lien. Therefore, the Comments in Section 1 of the Act fail to support SFR's "extinguishment" theory. The Court should only rely on the intent and comments in the Nevada Legislature regarding the enactment of NRS 116.3116.

This Court must maintain the priority status of the first deed of trust and recognize only a payment priority for the HOA upon a foreclosure of the Property.

G. NRS 116.310312 DOES NOT SUPPORT SFR'S THEORY REGARDING NRS 116.3116(2).

The language in N.R.S. 116.310312 (for maintenance or abatement expenses) mirrors N.R.S. 116.3116 and merely establishes a payment priority lien. Neither includes an extinguishment provision nor do they assert that a lien under either extinguishes a first deed of trust. The legislative intent of N.R.S. 116.310312 is premised on the same concern as the legislative intent of N.R.S. 116.3116: collection of money owed to the HOA prior to the foreclosure by a first deed of trust. The legislative comments for N.R.S. 116.310312, too, are consistent with the necessity to establish solely a **payment priority** lien to ensure that the HOA is compensated for any loss prior to or after the foreclosure by the first deed of trust.

A distinguishing feature of the abatement lien actually supports U.S. Bank's position: NRS 116.310312(6) expressly provides that "a lien described in subsection 4 is prior and superior to all liens, claims, encumbrances and titles other than the liens described in paragraphs (a) and (c) of subsection 2 of NRS 116.3116." In other words, it eliminates the priority of first deeds of trust over abatement liens, present with assessment liens under NRS 116.3116(2)(b). That the Legislature would expressly provide priority under NRS 116.3116(2)(b) is further evidence that the words of NRS 116.3116(2)(b) must be given meaning which can only be done by preserving the priority after the HOA sale and preventing extinguishment.

Based on the language in N.R.S. 116.310312(6) and the legislative history of N.R.S. 116.310312, an abatement lien does not have the power to extinguish all liens secured against the Property, which negates the arguments asserted by SFR.

But even if it did, NRS 116.3116(2)(b) differs because it expressly recognizes the priority of the first deed of trust over the lien, while NRS 116.310312(6) does not.

H. SFR'S INTERPRETATION OF NRS 116.3116(2) WOULD PRODUCE UNREASONABLE RESULTS.

As noted above, this Court has held that a "fundamental rule" of statutory construction is that "the unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another that would produce a reasonable result." Hughes Props., 100 Nev. at 298, 680 P.2d at 971. SFR's view of the statute would produce several unreasonable results.

First, lenders would be extremely reluctant to originate loans for properties which are part of an HOA, since they would face the risk of having their deeds of trust extinguished by a subsequent HOA Lien. SFR argues that a lender can prevent this extinguishment by paying any delinquent assessments incurred by the relevant homeowner. The problem is that an HOA is not expressly required to give notice of an HOA foreclosure sale to a holder of a first deed of trust. See NRS 116.31163 and NRS 116.311635. If the Nevada Legislature had intended for the foreclosure of an HOA lien to extinguish a first deed of trust, it would have required the HOA to notify the holder of the deed of trust *in every instance.*

Additionally, NRS Chapter 116 does not specifically allow a mortgage lender to pay the amount owed by a homeowner to an HOA. When the Nevada Legislature intends to confer a true senior priority on a particular type of lien, it typically provides fellow lienholders with a right to cure or a right of redemption. See, e.g. NRS 21.210 (providing for redemption of the property from the purchaser any time within one year after a sale, including a judicial foreclosure under NRS 40.430 et seq.); NRS 107.080(2)(a)(2) (providing power of sale must not be exercised until "any other person who has a subordinate lien or encumbrance of record on the property has … failed to make good the deficiency in performance or

payment"); NRS 361.585(3)-(4) (providing right to cure with regard to liens for unpaid property taxes); and NRS 271.595 (providing right of redemption with regard to liens for local improvement assessments). If the Nevada Legislature had intended to transform the priority amount of an HOA lien into a true senior lien, it would have created an explicit right to cure or right of redemption in favor of the holder of prior, first deed of trust. Since there is no express right to cure and no right of redemption under NRS Chapter 116, Nevada HOAs often refuse to allow mortgage lenders to pay off delinquent assessments, making it impossible for the lender to "protect" its security interest in the manner envisioned by SFR. If the Nevada Legislature had intended for an HOA foreclosure sale to extinguish a prior deed of trust, it would have required and the express right to cure.

Another unreasonable consequence of SFR's position would be the unearned and undeserved windfall to SFR. U.S. Bank lent hundreds of thousands of dollars to Parks, because its right to repayment was secured by the Deed of Trust. SFR would have that right extinguished by payment of only $14,000.00. If the third-party purchasers at the HOA foreclosure sale (and any other bidders who might have attended) had genuinely believed that the sale would extinguish U.S. Bank's Deed of Trust, the purchase price of the Property would have been dozens of times more. The facts of this sale require the conclusion that U.S. Bank's Deed of Trust survived the HOA Sale.

I. THE FORECLOSURE DEED AND NRS 116.31164(3) ONLY GRANTED SFR A TEMPORARY, POSSESSORY INTEREST SUBJECT TO U.S. BANK'S DEED OF TRUST.

SFR knowingly purchased a Property from an HOA Sale that was governed by NRS 116.3116 et seq. SFR could only receive the title that the prior owner, Parks, had possessed before the foreclosure sale. NRS 116.31166(3) provided that a foreclosure sale by an HOA "vests in the purchaser the title of the unit's owner without equity or right of redemption." NRS 116.31164(3) states that the person conducting the sale shall deliver to the buyer a deed which conveys to the grantee

all title of the unit's owner to the unit. The HOA can only have conveyed to SFR the unit owner's title, which was subject to the U.S. Bank's Deed of Trust. Parks merely had an interest in the Property subject to U.S. Bank's Deed of Trust; therefore, the HOA could only legally convey at the sale an interest subject to U.S. Bank's Deed of Trust. The specific language in NRS 116.31166(3) shows that SFR merely stepped-into-the shoes of Parks and extinguished Parks' rights associated with the title of the Property. This analysis makes sense as SFR does not have the same rights as a fee simple purchaser of the Property. SFR does not have a right to cure under NRS 107.080(2)(b). Under this analysis, the Legislature accomplishes the goal of having the HOA paid some of its costs and fees; the buyer gets a property right (title ownership); and U.S. Bank does not lose its rights or interest in the Property under the prior recorded deed of trust. Based on the above, SFR merely holds a possessory title interest in the Property, subject to an eventual sale by the first deed of trust.

J. SFR MISCONSTRUES THE NEVADA REAL ESTATE OPINION.

SFR misconstrues the language in the Nevada Real Estate Division Advisory Opinion. First, the Opinion specifically states that it is not a rule, regulation, or final legal determination and merely expresses the views of the Real Estate Division. Second, the Opinion focuses not on the interaction of "priorities" under NRS 116.3116(2)(b) and (2)(c), but rather on the amount of costs and fees that an HOA can assess against the Property. Third, the comments in the Opinion related to "extinguishment" are outside the bounds of the questions posed to the Real Estate Division and thus are "dicta."

Fourth, the Opinion, even if an applicable "rule, regulation, or final legal determination," actually reaffirms the language in NRS 116.3116 and the assertions by U.S. Bank as to the preservation of the first Deed of Trust to the Property subsequent to the foreclosure by SFR in this case. The Opinion states that an HOA merely has a "super-priority lien" against the property as to nine months

of assessments of expenses and charges incurred by an HOA which necessarily limits the "priority" status to a *portion* of an association's lien. This "priority" of nine months of assessments is premised on the potential loss by the HOA of unpaid assessments that would be eliminated by an imminent foreclosure of the first security interest. The Opinion specifically recognizes that payment to the HOA of the charges under NRS 116.3116(1) and NRS 116.310312 "relieves [the HOA's] super priority lien status." Consequently, the first deed of trust survives the HOA foreclosure, and the eventual second foreclosure by the first lender would extinguish the non-priority portion of the HOA lien. The Opinion thus identifies the very action that is or will be undertaken by U.S. Bank with a foreclosure of the first Deed of Trust and supports the view that the first deed of trust is not extinguished by the foreclosure of the HOA lien.

U.S. Bank's Deed of Trust thus maintained its first status in the chain of title of the Property and SFR took subject to that first status.

K. PLAINTIFF'S COMPLAINT WAS PROPERLY DISMISSED AND ITS MOTION FOR PRELIMINARY INJUNCTION PROPERLY DENIED BECAUSE SFR CANNOT STATE CLAIMS FOR QUIET TITLE/DECLARATORY RELIEF, INJUNCTIVE RELIEF, OR UNJUST ENRICHMENT CLAIMS.

The Complaint fails as a matter of law to state a claim for relief against U.S. Bank because its Deed of Trust retained its priority after the HOA sale. SFR cannot assert a superior interest against the Deed of Trust because the HOA sale cannot extinguish a first deed of trust under NRS 116.3116(2)(b). With no plausible basis to assert an "extinguishment" theory, SFR cannot sustain its quiet title cause of action. The quiet title cause of action was properly dismissed.

Since the equitable remedies of declaratory relief and injunctive relief are dependent on the quiet title cause of action, they were also properly dismissed. No public policy grounds permit them to stand. SFR knowingly purchased a Property from an HOA Sale that was governed by the CC&Rs and NRS 116.3116 and

subject to the eventual loss of title upon the foreclosure by U.S. Bank. Since SFR never purchased fee simple title, it cannot assert any "irreparable" or "unique" harm related to the real property. Any potential harm or loss of business pertaining to the rental of the Property is speculative and subjective at this point in the case because it has not been alleged that the Property has been rented or is generating any income. The sale of the Property will not cause public confusion or damage to the reputation of SFR because SFR in an investor who purchases multiple properties at HOA sales and the Property is not being rented. The loss of the Property will not destroy the entirety of SFR's business. SFR can easily be compensated with a monetary amount for any loss of "title." Therefore, SFR cannot state a claim for quiet title, declaratory relief, or injunctive relief against U.S. Bank.

Unjust enrichment is an equitable claim. All Direct Travel Services, Inc. v. Delta Air Lines, Inc., 120 Fed. Appx. 673,676, 2005 WL 23420, at *2 (9th Cir. (Cal.)). SFR cannot maintain an unjust enrichment cause of action against U.S. Bank without alleging that U.S. Bank has retained a benefit, which in equity and good conscious, belongs to another party. Ramanathan v. Saxon Mortg. Services, Inc., 2011 WL 6751373 *6 (D. Nev. 2011) (citing LeasePartners Corp. v. Robert L. Brooks Trust, 113 Nev. 747, 942 182, 187 (1997)). U.S. Bank has not retained the funds paid by SFR at the HOA sale nor does U.S. Bank retain a benefit belonging to SFR in this case. As stated above, SFR took title subject to U.S. Bank's Deed of Trust. SFR has been able to retain a temporary, possessory interest in the Property based on the funds expended at the HOA sale. In other words, it got what it paid for and did not convey any benefit on U.S. Bank. Based on these facts, U.S. Bank has not been unjustly enriched, and SFR cannot maintain its unjust enrichment claim for relief.

L. SFR'S INTERPRETATION OF NRS 116.3116 VIOLATES PUBLIC POLICY.

SFR's position violates several public policy goals, harming both the borrower and beneficiary under a deed of trust, and solely providing SFR a windfall. SFR is a real estate speculator which purchased the property at a price well below fair market value: the difference is a deficiency which will either be borne by the borrower or the beneficiary. Furthermore, by allowing an HOA this "express lane" to foreclose, avoiding the participation or impact of an agreement reached through the state Foreclosure Mediation Program ("FMP"), SFR's interpretation doubly impacts borrowers and completely frustrates the spirit of the FMP.

The FMP was established "to provide for the orderly, timely, and cost-effective mediation of owner-occupied residential foreclosures...." See Am. Foreclosure Mediation Rule 2. See also Einhorn v. BAC Home Loans Servicing, LP, 290 P.3d 249, 250 (Nev. 2012) ("The goal is to bring the trust-deed beneficiary and the borrower together to participate in a meaningful negotiation."); Holt v. Regional Trustee Servs. Corp., 266 P.3d 602, 607 (Nev. 2011) ("The goal of foreclosure mediation is to produce an agreed-upon loan modification."). Allowing an HOA sale to eliminate the borrower and the beneficiary of their interest in the property for pennies on the dollar is a complete contradiction to the purpose of the FMP. Neither the HOA nor SFR, as a buyer at the HOA foreclosure, is under an obligation to negotiate with the borrower. Furthermore, until the 2013 amendment, there was no requirement to delay the HOA sale or an eviction by the buyer, while the borrower attempts to negotiate with the holder of the first deed of trust. See NRS 116.31162(6). SFR could simply evict a borrower while a borrower is gathering documents, negotiating, or attempting a trial payment plan with the beneficiary. Upon the foreclosure by an HOA, neither the borrower nor the beneficiary have any impetus to negotiate, as a third party seeks to divest both of their interest in the property. **Moreover, interpreting the statutes as SFR maintains would permit the holder of the**

first deed of trust to let the HOA sale go forward, buy the property at the sale and **avoid the FMP altogether** – as well as the newly enacted Nevada Homeowner's Bill of Rights (S.B. 321).

M. SFR'S INTERPRETATION OF THE SCOPE OF THE HOA FORECLOSURE INFLATES THE DEFICIENCY AGAINST A BORROWER AND FRUSTRATES THE ONE-ACTION RULE.

SFR'S interpretation also conflicts with the "one-action" rule of Nevada (NRS 40.430), as both address the handling of a possible deficiency. If an HOA sells a property for pennies on the dollar, the excess proceeds that could be paid to the holder of the first deed of trust are *de minimus*, and the difference between the HOA foreclosure sale price and the true market value is added to the deficiency that the borrower would owe to the first deed of trust holder. Without the benefit of the sale of the property to defray some of the deficiency, the full brunt falls on the borrower and the beneficiary, yet gives a windfall to the buyer – a buyer that nothing in the UCIOA or Nevada Chapter 116 was intended to benefit or protect.

The Legislature previously acknowledged the inequity a foreclosure for a lower-than-market-value sale of the property followed by an inflated deficiency judgment action, and instituted the "one-action" rule. The "one-action" rule requires the holder of a secured note to first exhaust the security before action on the note and ancillary attachment is permissible." Nev. Wholesale Lumber Co. v. Myers Realty, Inc., 92 Nev. 24, 28, 544 P.2d 1204, 1207 (1976). In other words, the deed of trust beneficiary must seek to recover on the secured property through either the judicial or non-judicial foreclosure process before otherwise seeking recovery on the debt. See McDonald v. D.P. Alexander & Las Vegas Boulevard, LLC, 121 Nev. 812, 816, 123 P.3d 478, 750 (2005) ("Under the one-action rule, a debtor can require a creditor to foreclose on real estate security before suing on the note."). The Legislature found the interest in preventing an inflated deficiency judgment so significant that it expressly declared it "against public policy" for a document referencing the sale of real property to contain a waiver provision for

any right conferred by the state of Nevada, and "[no] court shall enforce any such provision." Keever v. Nicholas Beers Co., 96 Nev. 509, 512, 611 P.2d 1079, 1082 (1980).

Allowing an HOA foreclosure sale to completely eliminate a first deed of trust, such as held by U.S. Bank, likewise inflates the deficiency and forces the beneficiary to pursue an action against the borrower for a much greater deficiency then would otherwise be the case. SFR interpretation of the scope of the HOA foreclosure, creating a windfall for SFR, directly contradicts the Legislative intent behind the one-action rule.

N. THE DISTRICT COURT PROPERLY GRANTED THE MOTION TO EXPUNGE LIS PENDENS AND PROPERLY DENIED THE MOTION FOR PRELIMINARY INJUNCTION.

As stated above, SFR cannot meet the requirements entitling it to a preliminary injunction, for it does not have a likelihood of success on the merits of the Complaint and it will not suffer irreparable harm due to the denial of the injunction. SFR took title to the Property subject to U.S. Bank's Deed of Trust, so it is only entitled to compensatory damages for any loss of that interest in the Property. SFR had knowledge of the eventual loss of title to the Property upon the foreclosure by U.S. Bank. SFR has also not established that it meets the requirements under NRS 14.010-14.015, entitling to a preservation of the recorded Lis Pendens. Therefore, the District Court properly denied the injunction and properly granted the Lis Pendens to be expunged.

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CONCLUSION

The District Court correctly granted U.S. Bank's Motion to Dismiss the Complaint and Motion to Expunge Lis Pendens and properly denied SFR's Motion for Preliminary Injunction. Therefore, the Court should affirm the District Court's Orders.

DATED this 18TH day of February, 2014.

WRIGHT, FINLAY & ZAK, LLP

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of N.R.A.P. 32(a)(4), the typeface requirements of N.R.A.P. 32(a)(5) and the type style requirements of N.R.A.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point, Times New Roman style. I further certify that this brief complies with the page- or type-volume limitations of N.R.A.P. 32(a)(7) because, excluding the parts of the brief exempted by N.R.A.P. 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 13,996 words. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 18th day of February, 2014.

/s/ Chelsea A. Crowton, Esq.
Chelsea A. Crowton, Esq.

PROOF OF SERVICE

I certify that I electronically filed on the 18th day of February, 2014, the foregoing **ANSWERING BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the CM/ECF system. I further certify that all parties of record to this appeal either are registered with the CM/ECF or have consented to electronic service.

[X] By placing a true copy enclosed in sealed envelope(s) addressed as follows:

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[X] (By Electronic Service) Pursuant to CM/ECF System, registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. The Court's CM/ECF systems sends an e-mail notification of the filing to the parties and counsel of record listed above who are registered with the Court's CM/ECF system.

[X] (Nevada) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

/s/ Chelsea A. Crowton, Esq.
An Employee of Wright Finlay Zak, LLP