Robert B. Noggle, Esq.
Nevada Bar No.: 11427
robert@nogglelaw.com
NOGGLE LAW, PLLC
376 East Warm Springs Road, Ste. 140
Las Vegas, Nevada 89119
(702) 450-6300/ (702) 642-9766 FAX
Attorney for plaintiff/appellant

SUPREME COURT

STATE OF NEVADA

KENNETH RENFROE,

Appellant,

vs.

LAKEVIEW LOAN SERVICING, LLC,

Respondent.

No. 68907

APPELLANT'S REPLY BRIEF

Robert B. Noggle, Esq.
NOGGLE LAW, PLLC
376 East Warm Springs Rd., Ste. 140
Las Vegas, Nevada 89119
(702) 450-6300/ (702) 642-9766 Fax

Attorney for plaintiff/appellant,
Kenneth Renfroe

NRAP 26.1 DISCLOSURE STATEMENT

Counsel for plaintiff/appellant certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Kenneth Renfroe is an individual who resides in San Bernardino, California.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

Nevada cases:

Federal and other cases:

STATUTES AND RULES:

OTHER AUTHORITIES:

SUMMARY OF THE ARGUMENT

The foreclosure of the HOA's superpriority lien extinguished defendant's deed of trust.

The record on appeal does not contain any evidence proving that the extinguishment of defendant's deed of trust extinguished a federal interest, interfered with a federal program, or frustrated FHA's foreclosure-avoidance efforts.

Neither the Property Clause nor the Supremacy Clause prevented the extinguishment of defendant's deed of trust because the record on appeal does not contain any evidence that defendant's deed of trust was insured by FHA on the date of the HOA foreclosure sale or that FHA or HUD held any interest in the deed of trust.

Defendant did not have prudential standing to argue that the Supremacy Clause prevented the extinguishment of defendant's deed of trust.

ARGUMENT

1. The HOA foreclosure sale held on April 18, 2014 extinguished defendant's subordinate deed of trust.

As discussed at pages 5 to 6 of Appellant's Opening Brief, Nevada law provides that the nonjudicial foreclosure of the HOA's superpriority lien extinguished the deed of trust assigned to defendant. SFR Investments Pool 1, LLC v. U.S. Bank,

N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408, 419 (2014).

In Respondent's Answering Brief, defendant cites no contrary authority. Defendant instead relies entirely on its unfounded claim that the extinguishment of defendant's deed of trust is preempted under the Supremacy Clause of the United States Constitution.

2. The record on appeal does not contain any evidence proving that the extinguishment of defendant's deed of trust extinguished a federal interest, interfered with a federal program, or frustrated FHA's foreclosure-avoidance efforts.

At pages 10 and 11 of Appellant's Opening Brief, plaintiff discussed how federal regulations expressly provide that insurance coverage for an FHA insured loan terminates where "[t]he property is bid in and acquired at a foreclosure sale by a party other than the mortgagee." 24 U.S.C. § 203.315. Defendant cites no contrary authority or any evidence in the record on appeal proving that insurance coverage was not terminated when defendant allowed the Property to be sold to plaintiff at the HOA foreclosure sale held on April 18, 2014.

The record on appeal also does not include any evidence that defendant's deed of trust was ever assigned to FHA, HUD, or any other agency of the federal government.

At page 5 of Respondent's Answering Brief, defendant cites Washington &

Sandhill Homeowners Ass'n v. Bank of America, N.A., 2014 WL 4798565 (D. Nev. Sept. 25, 2014), but the record on appeal contains no evidence proving that "HUD's ability to incentivize lenders to make mortgage loans to at-risk borrowers" is affected by requiring that a lender comply with federal regulations and make all HOA payments necessary to prevent its subordinate deed of trust from being extinguished. Furthermore, requiring defendant to accept responsibility for its failure does not have the "effect of limiting the effectiveness of the remedies available to the United States" because FHA and HUD have the simple remedy of denying any insurance claim submitted by defendant.

As noted by the court in Freedom Mortgage Corp. v. Las Vegas Development Group, LLC, 106 F. Supp. 3d 1174 (D. Nev. 2015), there is no conflict between federal law and NRS Chapter 116:

> Nothing prevents a lender from simultaneously complying with HUD's program and Nevada's HOA-foreclosure laws. Freedom Mortgage's argument that "[a]llowing HUD's interest to be extinguished pursuant to Nevada law would undermine—in fact, *eliminate*—HUD's ability to obtain title after foreclosure and resell the [p]roperty (or to receive an assignment of the mortgage and foreclose in its own name)" mischaracterizes the effect of NRS 116.3116 in this case by skipping a crucial step in the claim process. **The lender's interest is extinguished by the foreclosure, not HUD's. And the lender's inability to convey good and marketable title to HUD results in a loss to the lender, not to HUD**.
>
> The lender gets itself into this predicament only by ignoring HUD's directives. To ensure that it remains able to make a claim, a participating lender has an affirmative obligation to protects its security to it can convey good and marketable title to HUD along with its claim. **The lender must ensure that all taxes and all other assessments are**

> **paid to prevent liens from attaching to the property. The obligation specifically includes HOA fees and assessments**.

106 F. Supp. 3d at 1184.

In footnote 56, the court in Freedom Mortgage cited Mortgagee Letter 2013-18 (http://portal.hud.gov/hudportal/documents/huddoc?id=13-18ml.pdf) issued by HUD on May 31, 2013.

Mortgagee Letter 2013-18 states at page 2:

> While the payment of condominium and homeowners' association fees is a mortgagor's responsibility, **mortgagees are responsible for ensuring that properties conveyed to HUD have clear title**. (emphasis added)

Mortgagee Letter 2013-18 also states at page 5:

> In the "Comments" section of Form HUD-27011, mortgagees must document the payment of all final bills and liens (**including pre-foreclosure liens) for HOA/condominium fees**. (emphasis added)

Mortgagee Letter 2013-18 also states at page 7:

> **Mortgagees that fail to pay** taxes, **HOA/condominium fees**, or utilities bills **when payment is due** will be considered **in violation of HUD's requirements**. Therefore, HUD may refer mortgagees to the Mortgagee Review Board for administrative sanctions, including but not limited to civil money penalties, based on noncompliance with these requirements. (emphasis added)

Absolutely no language in Mortgagee Letter 2013-18 permits a mortgagee to

fail to pay HOA assessments when due, allow the HOA to complete the foreclosure of its superpriority lien and sell property to a third party, and then claim that insurance coverage was not terminated. 24 U.S.C. § 203.315 instead provides that insurance coverage is terminated.

Because federal regulations expressly provide that insurance coverage is terminated when a lender allows an HOA to foreclose its assessment lien and sell the property to a third party, and because the statutory remedy available to the United States in such a situation is termination of insurance coverage, it is impossible for an HOA foreclosure sale to have the "effect of limiting the effectiveness of remedies available to the United States" as quoted by defendant from Washington & Sandhill at pages 5 and 13 of Respondent's Answering Brief.

At page 5 of Respondent's Answering Brief, defendant quotes from an order entered in Saticoy Bay LLC, Series 7342 Tanglewood Park v. SRMOF II 2012-1 Trust, 2015 WL 1990076 (D. Nev. Apr. 30, 2015), but in that case, the court acknowledged that "Chase assigned the deed of trust to the Secretary of Housing and Urban Development ('HUD')" and that "HUD assigned the deed of trust to defendant." Id. at *2. In the present case, on the other hand, Bank of America assigned the deed of trust directly to defendant (JA1, pgs. 57-58), and defendant

never assigned the deed of trust to either FHA or HUD. Defendant did not produce any evidence that FHA or HUD will ever have any interest in the deed of trust that was extinguished by the foreclosure sale.

At the bottom of page 5 and top of page 6 of Respondent's Answering Brief, defendant quotes from an order entered in Nationstar Mortgage, LLC v. SFR Investments Pool 1, LLC, — F. Supp. 3d — , 2016 WL 1718374 (D. Nev. 2016). In that case (as in the present case), the deed of trust was not assigned to either FHA or HUD prior to the HOA foreclosure sale. The foreclosure sale also took place before the deed of trust was assigned to Nationstar. The court denied the lender's motion for summary judgment because "[t]here could be other reasons why the DOT refers to FHA and HUD, and the DOT also does not show that the loan remained FHA-insured at the time of the CHOA foreclosure." Id. at *6.

At the top of page 6 of Respondent's Answering Brief, defendant quotes from an order entered in Garcia v. Nationstar Mortgage, LLC, 2016 WL 3769340 (D. Nev. Jul. 14, 2016), but in that case, the court found that "the evidence supports a finding that HUD had an interest in the Property at the time of the HOA foreclosure sale, **which Plaintiffs do not dispute** . . . ." Id. at *3. (emphasis added) In the present case, the record on appeal contains no evidence that HUD held any interest in the

Property on the date of the HOA foreclosure sale.

At page 6 of Respondent's Answering Brief, defendant quotes from an order entered in Saticoy Bay LLC, Series 2714 Snapdragon v. Flagstar Bank, FSB, 2016 WL 1064463 (D. Nev. Mar. 17, 2016), but in that case, the court found that the "beneficial interest in the loan was transferred to the Federal National Mortgage Association" (Id. at *1) and that 12 U.S.C. § 4617(j)(3) precluded "an HOA foreclosure sale from extinguishing Fannie Mae's ownership interest in property without proper consent." (Id. at *3) In the present case, the record on appeal contains no evidence that any interest in the underlying loan or the deed of trust was purchased by FHA.

At page 7 of Respondent's Answering Brief, defendant quotes from Crosby v. National Foreign Trade Council, 530 U.S. 363, 373 (2000), that federal conflict preemption exists if a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." In the present case, the record on appeal contains no evidence that the extinguishment of defendant's deed of trust prevents the accomplishment of any purpose or objective of Congress. In particular, if it was the purpose of Congress to shield defendant from the consequences of failing to prevent its deed of trust from being extinguished, then the

provisions in 24 U.S.C. § 203.315 and Mortgagee Letter 2013-18 requiring that defendant prevent the Property from being sold to a third party for nonpayment of HOA assessments would not exist.

At page 7 of Respondent's Answering Brief, defendant cites Hines v. Davidowitz, 312 U.S. 52 (1941), where the Supreme Court held that when Congress passed the Alien Registration Act of 1940, it created one uniform national registration system for aliens that preempted the field, and a Pennsylvania system enacted in 1939 could no longer be enforced. Id. at 73-74. No such conflict between federal law and state law exists in the present case.

At page 7 of Respondent's Answering Brief, defendant cites Munoz v. Branch Banking and Trust Company, Inc., 131 Nev. Adv. Op. 23, 348 P.3d 689, 690 (2015), but in that case, "FDIC placed Colonial into receivership and assigned the Munozes' loan to respondent Branch Banking and Trust Company, Inc. (BB&T)." In the present case, there is no evidence of such an assignment of the deed of trust either to or by HUD.

Plaintiff also quotes from Geier v. American Honda Motor Co., Inc., 529 U.S. 861 (2000), where an automobile manufacturer argued that its compliance with the 1984 Federal Motor Vehicle Safety Standard promulgated by the Department of

Transportation preempted the state common-law tort action filed by the injured plaintiff. In the present case, on the other hand, defendant argues that its failure to comply with federal regulations shielded the Property from being sold to a third party and prevents defendant from facing the consequences of its failure to comply with federal law.

At the bottom of page 7 and top of page 8 of Respondent's Answering Brief, defendant again cites Washington & Sandhill and Saticoy Bay LLC, Series 7342 Tanglewood Park v. SRMOF II 2012-1 that were distinguished above.

At page 8 of Respondent's Answering Brief, defendant quotes from Rust v. Johnson, 597 F.2d 174 (9th Cir. 1979), but in that case, Fannie Mae completed its foreclosure and conveyed the tract to HUD in exchange for FHA insurance benefits before the City of Los Angeles completed its foreclosure sale on March 18, 1974. Id. at 176. In the present case, Fannie Mae has never held any interest in the deed of trust, and the Property has never been conveyed to HUD.

At pages 9 and 10 of Respondent's Answering Brief, defendant includes a general discussion of the FHA Insurance Program, but defendant does not discuss in any way the federal regulations (24 U.S.C. § 203.315) that provide that insurance coverage terminates when a lender allows the property to be sold to a third party.

At page 11 of Respondent's Answering Brief, defendant cites Munoz and claims that "[l]ike the Nevada statute in *Munoz*, the HOA Lien Statute undermines the incentives federal insurance provides to private parties . . . ." In Munoz, on the other hand, this Court removed the limits in NRS 40.459(1)(c) because they would directly impact FDIC's ability to liquidate the assets of a failed bank. In the present case, the extinguishment of defendant's subordinate deed of trust cannot possibly have any financial impact on FHA or HUD because federal law expressly contemplates that defendant lose any insurance coverage as a result of its failure to pay the HOA's superpriority lien and prevent the Property from being sold to a third party.

At pages 12 and 13 of Respondent's Answering Brief, defendant cites three cases where FHA or HUD held a recorded interest in the property being foreclosed. In United States v. Stadium Apartments, Inc., 425 F.2d 358 (9th Cir. 1970), the FHA insured a mortgage that was assigned to HUD, and the court held that the one year redemption period under state law did not apply to a foreclosure decree in favor of HUD. In United States v. View Crest Garden Apts., Inc., 268 F.2d 380 (9th Cir. 1959), the FHA insured a loan that was assigned to FNMA and then to FHA, and the court held that federal law controlled whether a receiver should be appointed for the

property. In United States v. Victory Highway Village, Inc., 662 F.2d 488 (8th Cir. 1981), the court stated that "state redemption statutes are not applicable to foreclosure of federally held or insured loan" in a case where a FNMA loan was assigned to HUD. In the present case, neither FHA nor HUD has ever held any recorded interest in the Property.

At page 14 of Respondent's Answering Brief, defendant claims that Mortgagee Letter 2013-18 only requires that a lender pay outstanding HOA fees prior to a conveyance, and defendant asserts: "There is no provision for paying an HOA lien prior foreclosure." As discussed at page 4 above, Mortgagee Letter 2013-18 expressly required that the HOA assessments be paid "when payment is due" and not after the foreclosure of a delinquent assessment lien extinguished the mortgage.

At page 14 of Respondent's Answering Brief, defendant quotes from Rust v. Johnson, 597 F.2d 174 (9th Cir. 1979), which was distinguished from the present case at page 9 above.

At page 15 of Respondent's Answering Brief, defendant argues that "allowing HOAs to foreclose on FHA-insured mortgages also threatens HUD's comprehensive regulations that seek to avoid foreclosure and keep at-risk borrowers in their homes." The HOA foreclosure sales do not "threaten" HUD's comprehensive regulations

because no such sales would occur if lenders like defendant would comply with "HUD's comprehensive regulations" and take all actions necessary to prevent the property from being sold to a third party as required by 24 U.S.C. § 203.315 and Mortgagee Letter 2013-18.

As noted by the court in Freedom Mortgage Corp. v. Las Vegas Development Group, LLC, 106 F. Supp. 3d 1174, 1184 (D. Nev. 2015), the FHA and HUD do not suffer any loss from defendant's failure to comply with federal regulations – defendant does. Under defendant's analysis, HOAs would be forced to subsidize the costs of maintaining defendant's collateral while defendant failed to timely pay HOA assessments as directed by HUD.

As proved by 24 U.S.C. § 203.315 and Mortgagee Letter 2013-18, federal regulations provide that a lender lose FHA insurance coverage if the lender fails to make the required HOA payments and allows its subordinate deed of trust to be extinguished. As also noted by the court in Freedom Mortgage Corp. v. Las Vegas Development Group, LLC, "[n]othing prevents a lender from simultaneously complying with HUD's program and Nevada's HOA-foreclosure laws." Id. at 1184.

At page 19 of Respondent's Answering Brief, defendant claims that in Fidelity Federal Savings & Loan Ass'n v. De la Cuesta, 484 U.S. 14 (1982), the United States

Supreme Court found preemption of state law "in much less compelling circumstances." In that case, however, the Federal Home Loan Bank Board adopted a federal regulation stating that federal savings and loan associations would not be bound by any conflicting state law limiting an association's right to enforce a due-on-sale clause in the association's deed of trust. In the present case, no federal regulation exempts a lender from its obligation to protect the lender's interest from being foreclosed by a prior lien.

At page 20 of Respondent's Answering Brief, defendant claims that "the preemptive effect here is modest" because HUD regulations "simply require that HOAs yield to the FHA-insured mortgagee with respect to the timing of their recovery out of foreclosure proceeds." The provisions in 24 U.S.C. § 203.315 and Mortgagee Letter 2013-18 directly contradict defendant's claim and instead prove that defendant was required to pay HOA assessments when due and prevent the Property from being sold to a third party.

In footnote 17 at page 20 of Respondent's Answering Brief, defendant cites Forest Park II v. Hadley, 336 F.3d 724 (8th Cir. 2003), but the present case does not involve a state statute that imposed "additional requirements and different time schedules for prepayment than those contained in the federal statute and regulations."

Id. at 730. In the present case, both the state statute and federal regulations required that in order to preserve its deed of trust, defendant had to timely make the payments necessary to prevent the HOA from foreclosing its assessment lien and selling the Property.

At the bottom of page 21 and top of page 22 of Respondent's Answering Brief, defendant challenges the findings in Freedom Mortgage Corp. v. Las Vegas Development Group, LLC by citing and quoting from cases where the federal government held a recorded interest in real property. As discussed above, none of the cases cited by defendant involved a lender attempting to assert conflict preemption to shield itself from the stated punishment (loss of insurance coverage) for its own failure to comply with federal regulations.

3. Defendant does not have prudential standing to make arguments based on rights held by FHA or HUD.

At pages 22 and 23 of Respondent's Answering Brief, defendant argues that the court's analysis of "prudential standing" in Freedom Mortgage Corp. v. Las Vegas Development Group, LLC, 106 F. Supp. 3d 1174 (D. Nev. 2015), applied only to the challenge under the Property Clause and that defendant is not making such a challenge in the present case. Defendant ignores, however, the court's statement that prudential standing "encompasses 'the general prohibition on a litigant's **raising**

another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in representative branches, and the requirement that a **plaintiff's complaint fall within the zone of interests protected** by the law invoked.'" Id. at 1179, quoting United States v. Lazarenko, 476 F.3d 642, 649-50 (9th Cir. 2007)(quoting Allen v. Wright, 468 U.S. 737, 751 (1984)). (emphasis added)

In the present case, defendant's challenge based on the Supremacy Clause depends entirely on rights held by FHA or HUD and not on any rights held by defendant. The record on appeal does not include any evidence that FHA or HUD granted to defendant the right to represent their interests or assert their rights.

At page 23 of Respondent's Answering Brief, defendant cites Munoz v. Branch Banking & Trust Company, Inc., 131 Nev. Adv. Op. No. 23, 348 P.3d 689 (2015), as proof that a Supremacy Clause argument can be raised by a party other than a federal agency, but in that case, the federal statute granted special status to the lender as an assignee of FDIC. In the present case, on the other hand, defendant has no such status because it is defendant's failure to comply with federal law that terminated the insurance coverage that defendant claims creates a conflict with federal law. No such conflict has been asserted by FHA or HUD.

In footnote 20 at page 24 of Respondent's Answering Brief, defendant cites

three cases that it claims are examples of where the United States Supreme Court applied the Supremacy Clause "to preempt state law even where the federal government did not have title to subject property." In Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000), the plaintiff was a nonprofit corporation representing companies engaged in foreign commerce that were directly affected by a Massachusetts state law barring state entities from buying goods and services from persons doing business with Burma. Id. at 370-371. In the present case, there is no conflict between the state foreclosure statute and federal law.

The decisions in Hines v. Davidowitz, 312 U.S. 52 (1941), and Geier v. American Honda Motor Co., Inc., 529 U.S. 861 (2000), have already been distinguished from the present case at pages 8 and 9 above.

At page 24 of Respondent's Answering Brief, defendant again quotes from Washington & Sandhill and Saticoy Bay LLC, Series 7342 Tanglewood Park v. SRMOF II 2012-1 Trust. As discussed at pages 3 to 5 above, in the present case, insurance coverage was terminated before any interest in the Property was conveyed to either FHA or HUD. No federal interest was affected in any way by the extinguishment of defendant's subordinate deed of trust. The federal regulations instead contemplate and provide for the termination of insurance coverage where a

lender fails to make the HOA payments necessary to protect its deed of trust from being extinguished.

CONCLUSION

By reason of the foregoing, plaintiff respectfully requests that this Court reverse the order by the district court granting defendant Lakeview's motion to dismiss and remand this case to the district court.

DATED this 30th day of November, 2016.

NOGGLE LAW, PLLC

By: / s / Robert B. Noggle, Esq. /
Robert B. Noggle, Esq.
376 East Warm Springs Road, Ste. 140
Las Vegas, Nevada 89119
Attorney for plaintiff/appellant

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect X6 14 point Times New Roman.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 37(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7) it is proportionately spaced and has a typeface of 14 points and contains 3,980 words.

3. 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 NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

DATED this 29th day of November, 2016.

NOGGLE LAW, PLLC
By: / s / Robert B. Noggle, Esq. /
Robert B. Noggle, Esq.
376 East Warm Springs Rd, Ste. 140
Las Vegas, Nevada 89119
Attorney for plaintiff/appellant

CERTIFICATE OF SERVICE

In accordance with N.R.A.P. 25, I hereby certify that I am an employee of the NOGGLE LAW, PLLC and that on the 30th day of November, 2016, a copy of the foregoing APPELLANT'S REPLY BRIEF was served electronically through the Court's electronic filing system to the following individuals:

Darren T. Brenner, Esq.
Natalie L. Winslow, Esq.
AKERMAN LLP
1160 Town Center Drive, Suite 330
Las Vegas, NV 89144

/s/ / *Anna Shurova /*
An Employee of NOGGLE LAW, PLLC