Case No. 69400

IN THE SUPREME COURT OF NEVADA

NATIONSTAR MORTGAGE, LLC

Appellant,

vs.

SFR INVESTMENTS POOL 1, LLC,

Respondent.

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APPEAL

From the Eighth Judicial District Court, Clark County
The Honorable MICHAEL P. VILLANI, District Judge
District Court Case No. A-13-684715-C

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made so the judges of this court may evaluate possible disqualification or recusal.

Plaintiff-Respondent SFR Investments Pool 1, LLC is a privately held limited liability company and there is no publicly held company that owns 10% or more of SFR Investments Pool 1, LLC's stock.

In district court, Plaintiff-Respondent SFR Investments Pool 1, LLC was represented by Howard C. Kim, Esq., Jacqueline A. Gilbert, Esq., Diana Cline Ebron, Esq., Karen L. Hanks, Esq., and Katherine C.S. Carstensen, Esq. of Kim Gilbert Ebron fka Howard Kim & Associates. Ms. Gilbert, Mr. Kim, Ms. Ebron, and Zachary D. Clayton, Esq., of Kim Gilbert Ebron represent Respondent on appeal.

DATED this 24th day of August, 2016.

KIM GILBERT EBRON

/s/Jacqueline A. Gilbert
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INTRODUCTION

Mortgage lenders and their agents, like Nationstar Mortgage, LLC ("the Bank"),[1] bet on their interpretation of NRS 116.3116(2) and refused to accept that their first deed of trust ("FDOT") could be extinguished by a homeowners association's superpriority lien—something unanimously decided by this Court in *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. ___, 334 P.3d 408, 419 (2014). After mortgage borrowers had defaulted on their loans, lenders delayed their own foreclosures at the expense of the associations, who went years without being paid any money for the services they provided. As such, the associations were forced to foreclose on their liens for unpaid assessments. It was the lenders' arrogance and (in)action that led to the loss of their collateral, not the state's actions, and certainly not the actions of third-party purchasers like SFR Investments Pool 1, LLC ("SFR").

Now, many years after the foreclosure sale, the Bank argues that they were merely a servicer of a loan held by Federal Home Loan Mortgage Corporation ("Freddie"). Yet, as articulated *Armstrong v. Exceptional Child Care Ctr., Inc,* private litigants cannot use the Supremacy Clause to displace state law. *See Armstrong v. Exceptional Child Care Ctr., Inc,* 575 U.S. ___, 135 S.Ct. 1378, 1383-

[1] Unless otherwise stated, the "Bank" includes Nationstar Mortgage, LLC and its predecessors in interest, such as KB Home Mortgage Company and MERS.

85 (2015). The Bank is a private litigant.

The District Court understood this when it granted SFR's Motion for Summary Judgment and denied the Bank's Motion for Summary Judgment. When the beneficiary of an FDOT, like the Bank, allows an association to foreclose on a lien for delinquent assessments pursuant to NRS 116.3116, and the property is sold at a publicly noticed and publicly held foreclosure sale, its remedies are not against a purchaser who subsequently purchased without any knowledge of a defect in the sale. If the first secured is injured due to some secret or undisclosed irregularity with the sale, its remedy is money damages against the association or its agent that conducted the sale, not unwinding the sale or causing the innocent third-party purchaser to take subject to a first deed of trust. The only way for the sale to be unwound against a third-party purchaser after the an association foreclosure sale is if the first secured has a **good-faith**, reasonable belief that the purchaser had, in some way, caused the irregularity in the sale or colluded with the association or its agent to cause an inadequate price at the auction. Taking subject to the first deed of trust is not an option where the sale was invalid or where the pre-sale irregularities or disputes, if any, are unknown to the purchaser. Here, the Bank did not allege that SFR's actions caused any irregularity in the sale, that SFR, or any other potential purchaser, colluded in any way with Horizon Heights ("the Association") or its agent, Nevada Association Services, Inc. ("NAS" or Association's Agent"), or did

anything else to negatively affect the price received at the public auction. Nor did it allege or prove any presale disputes of which the purchaser had knowledge. The District Court rightly granted SFR's Motion for Summary Judgment. This Court should affirm.

FACTUAL AND PROCEDURAL BACKGROUND

SFR sets forth the following chart with important undisputed dates and events:

DATE	FACTS
1991	Nevada adopted Uniform Common Interest Ownership Act as NRS 116, including NRS 116.3116(2).
March 30, 2003	Association perfected and gave notice of its lien by recording its Declaration of CC&Rs as Instrument No. 20030630002850.[2]
July 20, 2005	Ignacio Gutierrez obtained title to the Property through a Grant Bargain Sale Deed recorded as Instrument No. 200507200004599.[3]
July 20, 2005	First Deed of Trust recorded as Instrument No. 200507200004600. KB Home Mortgage Company was listed as the lender and Mortgage Electronic Registration System ("MERS") as the beneficiary.[4] Nothing in this document names any interest held by Freddie Mac.

[2] *See* first page of CC&Rs at 1JA_114-115.
[3] *See* Grant Bargain Sale Deed at 1JA_116-126**.**
[4] *See* First Deed of Trust at 1JA_127-150.

July 10, 2012	Association recorded Notice of Delinquent Assessments as Instrument No. 201207100001296[5]
August 30, 2012	Association recorded Notice of Default.[6]
November 28, 2012	Assignment of First Deed of Trust (Instrument No. 200507200004600) to Nationstar recorded as Instrument No. 201211280003539.[7] Nothing in this document names any interest held by Freddie Mac.
February 20, 2013	Association recorded a Notice of Foreclosure Sale.[8] The Bank's attorney-in-fact received the Notice of Foreclosure Sale.[9]
April 5, 2013	Association foreclosure sale took place and SFR placed winning bid of $11,000.00.[10]
April 8, 2013	Association foreclosure deed vesting title in SFR recorded as Instrument No. 201304080001036.[11] As recited in the Association Foreclosure Deed, the Association foreclosure sale complied with all requirements of law, including but not limited to, the elapsing of 90 days, recording and mailing of copies of Notice of Delinquent Assessment and Notice of Default, and the recording, posting and publication of the Notice of Sale.

[5] *See* Notice of Delinquent Assessments at 1JA_151-152.
[6] *See* Notice of Default at 1JA_153-155.
[7] *See* Assignment of First Deed of Trust at 1JA_156-157.
[8] *See* Notice of Foreclosure Sale at 1JA_158-160.
[9] 1JA_197-202
[10] *See* Foreclosure Deed at 1JA_161-164.
[11] *Id*.

	SFR has no reason to doubt the recitals in the Foreclosure Deed — if there were any issues with delinquency or noticing, none of these were communicated to SFR.[12] Further, neither SFR, nor its manager, have any relationship with the Association besides owning property within the community and bidding on properties at auction.[13] Similarly, neither SFR, nor its manager, have any relationship with the Association's agent beyond attending auctions and bidding on properties.[14]
Prior to April 8, 2013	No release of the super-priority lien was recorded.[15] No lis pendens was recorded by Nationstar.[16]
August 2, 2013	SFR filed its Answer, Counterclaim, Cross-Claim and Third Party Complaint.

SUMMARY OF ARGUMENT

The subject property in the case herein was subject to an NRS 116.3116 foreclosure. This foreclosure was properly noticed and conducted, and resulted in the extinguishment of The Bank's FDOT. As such, the District Court in reviewing all the circumstances and evidence was proper to grant SFR's Motion for Summary Judgment quieting title to SFR.

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[12] 1JA_165-166, ¶ 7.
[13] *Id.* at ¶ 8.
[14] *Id.* at ¶ 9.
[15] *Id.* at ¶ 10.
[16] *Id.* at ¶ 6.

The foreclosure sale of the property was commercially reasonable. The burden is on the Bank to prove it was not or that some material question of fact remained. To do that the Bank must prove inadequacy of price plus some sort of fraud, unfairness or oppression that brings about the alleged inadequate price. *Shadow Wood Homeowners Assc., Inc., v. New York Cmty. Bancorp, Inc.*, 132 Nev. ___, 366 P.3d 1105, 1100 (2016). While this case was decided before *Shadow Wood*, the Bank presented no evidence that would support a consideration of equities or provide the Court with any reason to unwind the sale. The Bank has only made unsupported arguments that the price paid by SFR was low and did not even attempt to show that any fraud, unfairness or oppression shrouded this sale. As such, the Bank's commercial reasonableness argument fails.

The District Court properly rejected the Bank's Supremacy Clause argument because that constitutional provision does not authorize private litigants to displace state law. Thus, the Bank lacks standing to assert the alleged rights, if any, of a federal agency, namely, Federal Housing Finance Agency ("FHFA"). That is because Congress gave that right exclusively to the FHFA.

In regards to the Bank's due process argument, the Bank seems to forget that all seven of the Nevada Supreme Court Justices found that an association's foreclosure of its super-priority lien pursuant to NRS 116 extinguishes an FDOT. *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. ___, 334 P.3d 419 (2014)

(majority opinion and Gibbons, C.J., concurring in part and dissenting in part). Moreover, all seven of the Nevada Supreme Court Justices found that NRS 116 provides a mandate for associations to mail notices to the first security holders pursuant to NRS 116.31168(1), which incorporates the whole of NRS 107.090. *Id*. at 410, 422. The three Justices in dissent only disagreed as to the manner of foreclosure—believing that the foreclosure must be done judicially to trigger the super-priority portion of the lien. *Id.* As such the Bank's due process argument must fail.

The Bank brings to this Court no evidence raising a question of material fact, no new arguments, and no reason to overturn the legal and fair association foreclosure sale. As such the Court should Affirm.

ARGUMENT

I. THE DISTRICT COURT WAS CORRECT IN GRANTING SFR'S MOTION FOR SUMMARY JUDGMENT AND DENYING THE BANK'S COUNTERMOTION FOR SUMMARY JUDGMENT.

While a party seeking quiet title must prove "his or her own claim to the property in question"[17] the District Court must make an evaluation of the arguments and evidence presented through the lens of the presumption and burden-shifting provisions contained within Nevada law.

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[17] *Breliant v. Preferred Equities Corp.,* 112 Nev. 663, 669, 918 P.2d 314, 318 (1996).

The District Court in granting Summary Judgment relied on a combination of the conclusive recitals contained in the Foreclosure Deed (1JA_161-164), rebuttable presumptions pursuant to NRS 47.250, and a plethora of recorded documents, which were presented in SFR's Motion for Summary Judgment. (1JA_094-166). The Bank could not present any evidence that would have raised a material question of facts as to overcome the overwhelming evidence presented by SFR and as such this Court can comfortably affirm the District Court's Order.

A. SFR Can Rely on the Recitals in the Association Foreclosure Deed as Conclusive Proof that the Sale was Properly, Lawfully and Fairly Carried Out.

This Court in *Shadow Wood* affirmed that deed recitals are conclusive to the matters recited pursuant to NRS 116.31166(1). *Shadow Wood Homeowners Assc., Inc., v. New York Comm. Bancrop, Inc.*, 132 Nev. ___, ___, 366 P.3d 1105, 1100 (Nev. 2016)(The [appellant's] trustee's deed contains recitals that NRS 116.31166 deems "conclusive," to wit: "Default" occurred; and, "All requirements of law regarding the mailing of copies of notices and the posting and publication of the copies of the Notice of Sale have been complied with.") This Court did not abridge the conclusive effects of these recitals, *Shadow Wood* merely allowed competing evidence to be introduced *if the action was in equity*, at least in regards to proof of a default by the borrower. *Id.* This is in complete support of the plain language of NRS 116.31166(1) which reads:

The conclusive nature of the recitals are supported by NRS 116.31166(1):

> 1. The recitals in a deed made pursuant to NRS 116.31164 of:
> (a) Default, the mailing of the notice of delinquent assessment, and the recording of the notice of default and election to sell;
> (b) The elapsing of the 90 days; and
> (c) The giving of notice of sale,
> **are conclusive proof of the matters recited**.

NRS 116.31166(1) (emphasis added).

Given the conclusive nature of the recitals, the Bank had the burden to overcome the conclusive presumptions of the foreclosure deed recitals. The Hon. Philip Pro predicted this outcome, concluding in *Bourne Valley Court Trust v. Wells Fargo Bank, N.A.*, where he granted summary judgment in favor of a purchaser at an association sale. *Bourne Valley Court Trust v. Wells Fargo Bank, N.A*, 80 F.Supp.3d 1131, 1137 (D. Nev. 2015) *rev'd on other grounds by Bourne Valley Court Trust v. Wells Fargo Bank, N.A.*, Case No. 15-15233, 2016 WL 4854983 (9th Cir. August 12, 2016). When faced with almost identical recitals as those in this case, the *Bourne Valley* court recognized the recitals in the foreclosure deed, i.e. "that there was a default, the proper notices were given, the appropriate amount of time ha[d] elapsed ... and notice of the sale was given," met the burden of showing the required notices were sent to the lender. *Id*. at 1135. The court continued that the lender was then "required to come forward with evidence that a genuine issue of material fact remains for trial as to notice." *Id*.

In regards to the contents of the recitals, under Nevada law, a foreclosure deed that is "*reciting* compliance with notice provisions of NRS 116.31162 through NRS 116.31168 'is conclusive' as to the recitals 'against the unit's former owner, his or her heirs and assigns and all other persons.'" *SFR*, 334 P.3d at 411-412 (*quoting* NRS 116.31166(2))(emphasis added).

A factual restatement with such specificity suggested by the Bank has never been required by Nevada law making the Bank's reliance on foreign law unpersuasive. In particular, the Bank's relies on *Rosenberg v. Smidt*, 727 P.2d 778, 785 (Alaska 1986). AOB p. 33-34. The Oregon statute *Rosenberg* analyzed required "**a recital of the facts** concerning the default, the notice given, the conduct of the sale and the receipt of the purchase money from the purchaser." Or. Rev. Stat. § 86.800 (emphasis added). But, even the *Rosenberg* court recognized that its statute, requiring the deed "recite . . . the mailing or delivery of the copies of notice of default" is less clear than Oregon's and could be conclusory, as the dissent in that case opined. *Id*. at 785, 786-789. However, the *Rosenberg* court noted that the burden of any defects in noticing should be placed on the person conducting the sale, not the purchaser, who has no duty or responsibility of noticing. *Id*. at 783-784 (holding that "[o]nly substantial defections, such as the lack of a substantive basis to foreclose in the first place will make a sale void"). Bottom-line, NRS 116.31166 does not include such language.

Furthermore, the Bank's reliance on UCIOA is faulty because, unlike Nevada law, the model laws in UCIOA directly state that "a recital of *facts* …are sufficient proof of the facts recited." UCIOA § 3-116(1)(4)(emphasis added). "[A] recital of facts" is something that Nevada law does not require.

The contents of the recitals comply with Nevada law. **The Bank has failed to present *any* admissible evidence** to challenge the deed recitals. Thus even if the recitals carried less than conclusive weight, the Bank has not presented any evidence to suggest that any of the NRS 116.31166 events did not take place in either foreclosure sales.

B. <u>SFR Can Rely on Presumptions Found in NRS 47.250.</u>

In addition to the conclusive recitals described above, SFR is entitled to the presumptions contained in NRS 47.250: The relevant provisions are as follows:

> 12. That a writing is truly dated.
> 13. That a letter duly directed and mailed was received in the regular course of the mail.
> …
> 16. That the law has been obeyed.
> 17. That a trustee or other person, whose duty it was to convey real property to a particular person, has actually conveyed to that person, when such presumption is necessary to perfect the title of such person or a successor in interest.
> 18. In situations not governed by the Uniform Commercial Code:
> (a) That an obligation delivered up to the debtor has been paid.
> (b) That private transactions have been fair and regular.
> (c) That the ordinary course of business has been followed.

(d) That there was good and sufficient consideration for a written contract.

NRS 42.750(12),(13),(16)-(18). Furthermore, this Court has held that the recorded title is presumed valid. *Breliant v. Preferred Equities Corp*., 112 Nev. 663, 669, 918 P.2d 314, 319 (1996).

"A presumption not only fixes the burden of going forward with evidence, but it also shifts the burden of proof." *Yeager v. Harrah's Club, Inc.*, 111 Nev. 830, 834, 897 P.2d 1093, 1095 (1995) (citing *Vancheri v. GNLV Corp.*, 105 Nev. 417, 421, 777 P.2d 366, 368 (1989)). "These presumptions impose on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence." *Id*. (*citing* NRS 47.180.).

Thus, if the Bank wished to dispute these presumptions, the Bank was required to come forward with the evidence to rebut the following presumptions pursuant to NRS 47.250:

1) That all writings in the record are truly dated. *See* NRS 47.250(12);
2) That all applicable law was followed. *See* NRS 47.250(16);
3) That the foreclosing agent for the association actually conveyed real property to the purchasers. *See* NRS 47.250(17);
4) That the foreclosure auctions held by the foreclosing agent was fair and regular. *See* NRS 47.250(18)(b); and

5) That the association and their foreclosing agent were operating within the ordinary course of business. *See* NRS 47.250(18)(c).

The Bank has failed to provide any evidence that would defeat any of the presumptions listed above. As will be demonstrated below, the inability to defeat these presumptions renders the Bank's arguments meritless and support affirmance.

C. The District Court Reviewed a Substantial Amount of Real Evidence as Contained in the Record.

SFR did not ask the lower court to merely rely on presumptions, SFR presented the District Court with a complete record that proves a default, notice was sent to the appropriate parties, and that all statutory requirements were followed by law. While SFR has laid out much in its Fact Section of the brief, in summary, it is undisputed that SFR has presented evidence of, but not limited to the following:

- There is a Declaration of CC&Rs recorded for the Association. 1JA_114-115;
- The FDOT was recorded after the declaration. 1JA_127-150;
- A default by the borrower of assessments. 1JA_151-152;
- A Notice of Delinquent Assessments was recorded. *Id.*;
- A Notice of Default and Election to Sell was recorded. 1JA_153-155;
- A Notice of Trustee's Sale was recorded. 1JA_158-160;
- The Bank's Attorney in Fact received the Notice of Sale. 1JA_197-202;

- More than ninety (90) days passed between the recording of the notice of default and the notice of sale. *See* 1JA_153-155and 1JA_158-160;
- More than three weeks passed between the recording of the notice of sale and the date of the sale. *See* 1JA_161-164;
- SFR placed the winning bid at a publicly noticed and public held auction for the subject property. 1JA_165-166;
- SFR paid valuable consideration of $11,000.00 for its interest in the property. *Id*;
- SFR was not aware of any defect in either sale. 1JA_165-166.

This evidence alone was enough to establish that the provisions of NRS 116 were met when the association foreclosed on its valid super-priority lien.

D. No Defect Occurred in the Mailing of the Notice of Foreclosure Sale because the Bank's Attorney-in-Fact received the Notice of Foreclosure Sale.

The Bank has no reasonable grounds to challenge that the Notice of Sale was delivered to its agent. That is because the SFR can rely on the deed recitals contained within the foreclosure deed. 1JA_162-164. And, the evidence herein supports that the Notice of Sale was delivered to the Bank's Attorney-in-Fact, Bank of America, National Association ("BANA").

This Court in *Shadow Wood* affirmed that deed recitals are conclusive to the

matters recited pursuant to NRS 116.31166(1). *See Shadow Wood* 366 P.3d at1100.

This Court did not abridge the conclusive effects of these recitals, *Shadow Wood* merely allowed competing evidence to be introduced *if the action was in equity*, at least in regards to proof of a default by the borrower. *Id.* at 1110-1111.

While SFR can rely on the deed recitals regarding the mailing of notices, it need not do so. On November 11, 2012, the Castle Law Firm recorded an Assignment of Deed of Trust transferring all beneficial interest to the Bank. *See* 1JA_156-157. In this recording, the Bank listed its Attorney-in-Fact as BANA. *Id.* In fact, this document was signed by BANA. *Id.* Additionally, this document is devoid of any addresses or other contact information. Despite the lack of contact information-NAS mailed the Notice of Sale to BANA. JA_198-202.

The Bank did not alleged lack of actual notice of the foreclosure sale. The Bank merely argues strict compliance with the statute. *See* AOB p.20. But ultimately, this entire argument fails as when the Bank's Attorney-in-Fact received the Notice of Sale, NAS had complied with the Noticing provision of NRS 116.

E. SFR is a Bona Fide Purchaser for Value; Equity Lies in SFR's Favor.

If this Court finds a defect in the sale, including the mailing of the Notice of Sale, SFR is entitled to the protections of being a bona fide purchaser ("BFP"). A BFP is one who "takes the property 'for a valuable consideration and without notice

of the prior equity. . .'" *Shadow Wood*, 366 P.3d at 1115 (internal citations omitted). The fact that SFR "paid 'valuable consideration' cannot be contested.'" *Id*. Furthermore, when, as here, it is uncontested that "the foreclosure sale complie[d] with the statutory foreclosure rules, as evidenced by the recorded notices,…, and without any facts to the contrary," then the mere knowledge that a former homeowner could bring a suit in equity does not defeat SFR's BFP status. *Id*. at 1115-1116.

If this Court finds a defect in the sale, then it must consider the "entirety of the circumstances that bear upon the equities." *Shadow Wood* at 1115. This is counter to the Bank's proposition that this Court must void any sale that did not strictly comply with the noticing requirements. AOB p. 21. "This includes considering the status and actions of all parties involved, including whether an innocent party may be harmed by granting the desired relief." *Shadow Wood at 1115, citing Riganti v. McElhinney,* 248 Cal.App.2d 116, 56 Cal.Rptr. 195, 199 (1967) ("[E]quitable relief should not be granted where it would work a gross injustice upon innocent third parties."). Such consideration of harm is particularly important where the lender has failed to avail itself of the legal remedies available to it to prevent the foreclosure sale. *Shadow Wood*, at 1115, n.7.

This is also consistent with the Restatement approach which states:

If the real estate is unavailable because tittle has been acquired by a

> bona fide purchaser, the issue of price inadequacy may be raised by the mortgagor or a junior interest holder in a suit against the foreclosing mortgage for damages for wrongful foreclosure.

Restatement (Third) of Property: Mortgages § 8.3, cmt. b; *see Melendrez v. D & I Investment, Inc.*, 26 Cal.Rptr. 3d 413, 428 (Cal. Ct. App. 2005) (absent fraud, the sale to a BFP cannot be set aside "based on irregularities in the foreclosure sale"). The policy underlying this is to give finality to foreclosure sales so as to protect the sanctity of title to BFPs so they are not charged with the misdeeds of their predecessors. *Id.*

Unless the Bank could demonstrate actual fraud, unfairness, or oppression **by the purchaser** at the publically advertised and held auction, the purchaser should not be subject to any acts that would set aside its interest in the property. *Id.*

The Bank has provided no evidence that SFR had any knowledge of a superior interest or any purported irregularities of the foreclosure sales. SFR has no relationship with the Association, the foreclosure agent or the purchaser that would preclude it from being a BFP. JA_166 at ¶ 8-9. SFR did not communicate with the foreclosure agent prior to the sale. *Id.*at ¶ 7. In sum, the Bank has provided no evidence that SFR was anything other than a BFP.

In weighing equities, the Court must consider that (i) the Bank did not attend either sale to ensure that the price bid was adequate (to its standards); (ii) the Bank did nothing to put a third-party purchaser on notice that it had any dispute with the Association; and (iii) the Bank did not exercise any legal remedies to stop the

Association's sale. Thus, **the Bank chose to do nothing to actually stop the sale**, and because SFR would be harmed by any belated claim by the Bank to set aside the sale on equitable grounds, the district court properly quieted title in SFR's favor.

F. The Foreclosure Sale Was Commercially Reasonable.

1. This Court adopted the California Rule requiring a showing of fraud, unfairness or oppression as accounts for and bring about the inadequacy of price alleged.

Shadow Wood reaffirmed that Nevada adopted the California rule that "inadequacy of price, **however gross**, is not in itself a sufficient ground for setting aside a trustee's sale legally made; there must be in addition proof of some element of fraud, unfairness or oppression **as accounts for and brings about the inadequacy of price**[.]" *Shadow Wood*, 366 P.3d at 1110 (quoting *Golden v. Tomiyasu*, 79 Nev. 503, 514, 387 P.2d 989, 995 (Nev. 1964) (internal citations omitted) (emphasis added). While the Bank wishes it were so, *Shadow Wood* **did not adopt** the Restatement (Third) of Property: Mortgages § 8.3, which was simply mentioned in dicta. This Court reaffirmed that to set aside an association foreclosure sale there must be "a showing of grossly inadequate price **plus** 'fraud, unfairness, or

oppression.""[18] *Id*. (citing *Long v. Towne*, 98 Nev. 11, 13, 639 P.2d 528, 530 (1982))(emphasis added).

More recently, a panel of this Court, in an unpublished order, recognized this reaffirmance in *Shadow Wood* "that a low sales price is not a basis for voiding a foreclosure sale absent 'fraud, unfairness, oppression . . . ." *Centeno v. J.P. Morgan Chase Bank, N.A.*, Nevada Supreme Court Case No. 67365 (Mar. 18, 2016) (unpublished Order Vacating and Remanding).[19] Furthermore, *Golden* went on to say that even when the inadequacy was so great as to "shock the conscience" the California rule as stated above would still apply. *See Golden* 79 Nev. at 514-15, 386 P.2d at 955. ("**In approving the rule thus stated, we necessarily reject the dictum in *Dazet v. Landry, … ,* implying that the rule requiring more than mere inadequacy of price will not be applied if 'the inadequacy be so great as to shock**

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[18] In fact, other than referencing an argument made by the bank, this Court, in *Shadow Wood*, never used the words "commercially unreasonable" or "commercially reasonable." *Shadow Wood*, 366 P.3d at 1109. It referenced adequacy of price. *Id.* at 1112-1113.

[19] In *Centeno*, the price paid at the homeowners association's auction was $5,950.00. While the district court did not establish a value for the property, on appeal the Bank argued that that the deed of trust secured a loan for $160,001.00 and the property later reverted to the Bank at its own auction for $145,550.00. *See* Case No. 67365, Response to Appellant's Pro se Appeal Statement, filed Feb. 17, 2016 (Doc. No. 16-04982), available at http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=35567). Thus, the price paid at the association's foreclosure sale in *Centeno* was approximately 4% of the credit bid by the Bank at its subsequent auction.

the conscience.'")(emphasis added)). In applying the rule even when price "shocks the conscience," it abundantly clear that the standard to prove that a sale was not commercially reasonable requires more than just an alleged low price.

Further, any deviation from rules as outlined in *Golden* and reaffirmed in *Shadow Wood,* and the adoption of the Restatement, would be an announcing of a brand new rule of law, which would have to have been done expressly to abrogate *Golden* and *Long*. Furthermore, such an action by this Court could only be applied prospectively.[20] For these reasons, the Bank's arguments fail.

2. ***The Bank Has Not Provided any Evidence of Fraud, Unfairness or Oppression.***

The Bank has offered no evidence of any fraud, unfairness or oppression in the sale process that would justify setting aside the sale with the exception of the Notice of Sale that was mailed to the Bank's Attorney-in-Fact. However, if the sale was conducted according to statute, the Association needed only to sell the Property to the highest bidder. *See Bourne Valley*, 80 F.Supp. at 1136. The Association's sale was publically noticed, as required by statute, multiple bidders attended the auctions, and

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[20] Unlike *SFR*, which dealt with statutory interpretation of an existing law, adopting the Restatement § 8.3 would be creating a new rule of law to which *Chevron Oil* analysis would apply and potentially prevent application this new rule of law retroactively. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971).

neither the homeowner nor the Bank paid any amount to cure the lien before the foreclosure sale. *See* 1JA_165-166. Here, viewing the transaction as a whole, the sale was commercially reasonable. As a matter of law, the Bank cannot exclusively rely on SFR's bid as the evidence that it was not. *See id.* (citing *Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1028-31 (9th Cir. 2001) ("a court need not 'comb the record' looking for a genuine issue of material fact if the party has not brought the evidence to the court's attention")).

Additionally, nothing in the Restatement contemplates the facts and conditions surrounding association foreclosure sales in Nevada at the time of this sale. Purchasers such as SFR were constantly forced to litigate to defend against lenders like the Bank attempting to foreclose on their extinguished deeds of trust following association foreclosure sales. *See Bourne Valley*, 80 F.Supp.3d at 1136. This was not the typical mortgage foreclosure sale where the junior lienholder accepts that his interest will be extinguished by a prior lienholder's foreclosure. Here, the statute and every sale was under attack by lenders, and remains so to this day. The Bank cannot create and perpetuate the situation that bidders have to consider the high cost of litigation into their bidding, thereby keeping prices lower than at NRS 107 sales, and then complain that the prices are too low. Nothing in the Restatement or in *Shadow Wood* that would contemplate allowing such an outcome. The Restatement is not the rule of law in Nevada, and the Bank must show something more than price. It has not.

Finally, any reliance on *ZYZZX2 v. Dizon*, by the Bank is faulty. AOB p. 29 *citing ZYZZX2 v. Dizon* No. 2:13-cv-01307-JCM-PAL, 2016 WL 1181666 (D.Nev. Mar. 25, 2016). First, in *ZYZZX2* the association had "sent a letter to the lender and other interested parties stating that its foreclosure would not affect the senior lender/mortgage holder's lien." *Id.* at *4. Here, there is no such letter in the evidence. The *ZYZZX2* court also found that there was misrepresentation about the title that would be conveyed, due to the CC&Rs having a mortgage protection clause, and that since the CC&Rs were publically available, high bidders would be dissuaded from offering a higher price due to the fact that NRS 116 had been on the books since 1991. *Id*. However, the *ZYZZYX2* court failed to point to any **evidence** that supported its supposition that this clause actually affected the price paid at auction. Finally, such an argument would be meritless because, as this Court noted in *SFR*, that such mortgage savings clauses, which contradict NRS 116, are unenforceable. *SFR*, 334 P.3d at 419; NRS 116.1104. As is demonstrated above, the Bank has proven absolutely no fraud, oppression or unfairness which accounted for and brought about the price paid by SFR.

3. The Price Paid at Auction was not "Grossly Inadequate."

The price paid by SFR was adequate. When purchasing a property at a forced sale, fair market value has no applicability to this situation. *Bourne Valley*, 80

F.Supp.3d at 1136; *BFP v. Resolution Trust Corporation*, 511 U.S. 531 (1994). As the *Bourne Valley* Court recognized, when assessing commercial reasonableness of an association sale, the material facts affecting the specific market at that time must be considered, including the split in the courts as to the interpretation of NRS 116.3116(2), and whether there was evidence of fraud, oppression or unfairness:

> The commercial reasonableness here must be assessed as of the time the sale occurred. Wells Fargo's argument that the HOA foreclosure sale was commercially unreasonable due to the discrepancy between the sale price and the assessed value of the property ignores the practical reality that confronted the purchaser at the sale. Before the Nevada Supreme Court issued *SFR Investments*, purchasing property at an HOA foreclosure sale was a risky investment, akin to purchasing a lawsuit. Nevada state trial courts and decisions from the United States District Court for the District of Nevada were divided on the issue of whether HOA liens are true priority liens such that their foreclosure extinguishes the first deed of trust on the property. *SFR Investments,* 334 P.3d at 412. Thus, a purchaser at an HOA foreclosure sale risked purchasing merely a possessory interest in the property subject to the first deed of trust. This risk is illustrated by the fact that title insurance companies refused to issue title insurance policies on titles received from foreclosures of HOA super priority liens absent a court order quieting title. (Mot. to Remand to State Court (Doc. #6, Decl. of Ron Bloecker.) **Given these risks, a large discrepancy between the purchase price a buyer would be willing to pay and the assessed value of the property is to be expected.**

Bourne Valley, 80 F.Supp.3d at 1136 (emphasis added).

Likewise, in *BFP*, the United States Supreme Court was analyzing whether the price received at a mortgage foreclosure sale was less than "reasonably equivalent value" under the bankruptcy code. Just like the Bank in this case, the Chapter 11

debtor argued that because the property sold for a fraction of its fair market value, the price paid was not reasonable. The Court held that "a 'reasonably equivalent value' for foreclosed real property is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with." *BFP*, 511 U.S. at 545. The Court explained that in a forced sale situation, "fair market value cannot—or at least cannot always—be the benchmark[]' used to determine reasonably equivalent value. *Id*. at 537. This is so because the market conditions that generally lead to "fair market value" do not exist in the forced sale context, where sales take place with significant restrictions:

> **[M]arket value, as it is commonly understood, has no applicability in the forced-sale context; indeed, it is the very antithesis of forced-sale value.** 'The market value of ... a piece of property is the price which it might be expected to bring if offered for sale in a fair market; not the price which might be obtained on a sale at public auction or a sale forced by the necessities of the owner, but such a price as would be fixed by negotiation and mutual agreement, after ample time to find a purchaser, as between a vendor who is willing (but not compelled) to sell and a purchaser who desires to buy but is not compelled to take the particular ... piece of property.' In short, 'fair market value' presumes market conditions that, by definition, simply do not obtain in the context of a forced sale.

Id. at 537-538 (quoting Black's Law Dictionary 971 (6th ed. 1990)(emphasis added)). The Court recognized that property sold in a forced sale context, i.e. a foreclosure, "is simply worthless [because] [n]o one would pay as much to own such property as he would pay to own real estate that could be sold at leisure and pursuant to normal

marketing techniques." *Id*. at 539. As the Court further noted:

> **Unlike** most other legal restrictions, however, foreclosure has the effect of completely redefining the market in which the property is offered for sale; normal free-market rules of exchange are replaced by the far more restrictive rules governing forced sales. Given this altered reality, and the concomitant inutility of the normal tool for determining what property is worth (fair market value), the only legitimate evidence of the property's value at the time it is sold is the foreclosure-sale price itself.

Id. at 548-549 (emphasis in original).

While the *BFP* holding related to a mortgage foreclosure sale, other Courts have extended the *BFP* analysis to tax-defaulted sales of real property with adherence to requirements of state law where the statutes include requirements for public noticing of the auction and provisions for competitive bidding. *See In re Tracht Gut, LLC*, 503 B.R. 804, 815-818 (9th Cir. B.A.P. 2014); *T.F. Stone v. Harper*, 72 F.3d 466 (5th Cir. 1995); *Kojima v. Grandote Int'l Ltd. Co.*, 252 F.3d 1146 (10th Cir. 2001). Regardless of the type of sale, however, the analysis still aptly explains how market value cannot be compared to a forced sale transaction and why this Court should affirm.

The Bank's assertions that the Restatement accounted for a foreclosure and forced sale is disingenuous. *See* AOB p. 16-27 *citing* Restatement (Third) of Property: Mortgages § 8.3, cmt. a. The Bank's only cited authority for this assertion is a comment, from the Restatement, that Nevada has not adopted. Furthermore, it is clear from the comment that the Restatement was speaking of is something more akin to an

NRS 107 sale and never predicted the results and challenges faced by purchasers from the Bank regarding NRS 116 sales. This is apparent because the Restatement (Third) of Property: Mortgages § 8.3, cmt. a *cites* to *BFP*, the Supreme Court case analyzed above that dealt with a mortgage foreclosure sale. Even if this Court were to accept that the comparison is to "fair market value" on the date of the sale, the restatement requires adjustments for potential clouds to title. *Id.*

It is for the above-stated reasons that the Bank's expert's, Mr. Lubawy, market value analysis of the property should be disregarded by the Court. Mr. Lubawy made the assumption is that "the title is good and marketable." 1JA-219-220. In other words, Mr. Lubawy assumed the exact opposite of what is true in this case. In reality, title to the Property is not "good and marketable." This very issue has engendered countless litigation costing thousands of dollars, led to many Nevada Supreme Court decisions, and is still driving litigation because no buyer at an Association foreclosure sale can obtain title insurance without proceeding through costly quiet title litigation. The fact that Mr. Lubawy had to assume the exact opposite of the position adopted by Nationstar to formulate his opinion is unequivocal proof that his Appraisal Report is based upon an erroneous assumption.

Finally, as set forth above, the Restatement provides that the Bank's remedy for "inadequate price" paid by a bona fide purchaser is damages against the foreclosing agent, not to unwind the sale. Restatement (Third) of Property: Mortgages § 8.3, cmt.

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In sum, because (1) there is no requirement that NRS 116 sales be commercially reasonable, (2) the price paid by SFR was not "grossly inadequate," and (3) the Bank failed to demonstrate any fraud, oppression or unfairness which brought about and accounted for the price paid by SFR, the Bank's commercial unreasonableness argument fails.

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE BANK LACKS STANDING TO INVOKE THE SUPREMACY CLAUSE OR HERA.

A. The Bank cannot use the Supremacy Clause or HERA

The Bank is not the FHFA and, therefore, cannot enforce 12 U.S.C. §4617(j)(3). The United States Supreme Court recently determined that private litigants cannot use the Supremacy Clause to displace state law. *Armstrong v. Exceptional Child Care Ctr., Inc.,* 575 U.S. ___, 135 S.Ct. 1378, 1383-85 (2015). Only Congress through a law's text that determines who can enforce a federal statute. *Id.* at 1383-84.

Here, the Housing and Economic Recovery Act of 2008 ("HERA") demonstrates that Congress exclusively authorized FHFA, as conservator, to enforce HERA and to protect Freddie's alleged "assets." Specifically, 12 U.S.C. § 4617(b)(2)(D)(ii) provides that, "the Agency may, as conservator, take such action as may be appropriate to carry on the business of the regulated entity and preserve

and conserve the assets and property of the regulated entity [Freddie]" 12 U.S.C. § 4617(b)(2)(D)(ii)(emphasis added). Notably absent in this law is any ability for the Bank to exercise the authority provided to the conservator under 4617(b)(2)(D)(ii).

FHFA's own regulations reinforce this authorization by stressing FHFA has "the **exclusive authority** to investigate and prosecute claims of any type **on behalf of [Freddie]**, or to **delegate to management of [Freddie] the authority** to investigate and prosecute claims." 12 C.F.R. § 1237.3(a)(7) (emphasis added). This acknowledgment by the FHFA proves that Congress gave this authority to the FHFA. Thus, if direct delegation of this authority was not necessary, than it begs the question to why 12 C.F.R §1237.3(a)(7) needed to be promulgated in the first place.

Lastly, 12 U.S.C. § 4617(j)(1) states "provisions of this subsection [4617(j)] shall apply with respect to the Agency **in any case in which the Agency is acting as a conservator** or a receiver." 12 U.S.C. § 4617(j)(1) (emphasis added).

Here, the FHFA is not a party to this case and has not taken any action. Thus, the fundamental requirement in §4617(b)(2)(D)(ii) & (j)(1), that the conservator must "act," to have the statutory scheme apply, has not been fulfilled.

Additionally, the Bank has not even provided any evidence that FHFA "delegate[d]" its "authority to investigate and prosecute claims" to the management of Freddie. *See* 12 U.S.C. § 4617(b)(2)(D)(ii). The Bank asks this Court to take them

on their word alone that the FHFA delegated the appropriate authority to Freddie.[21] However, such a fact was never proved nor did the District Court make such a finding. *See* 2JA_458-464.

Even if the FHFA had delegated appropriate authority to Freddie, the Bank is not Freddie and cannot raise claims entitled to Freddie or the FHFA. While many jurisdictions have allowed a servicer to enforce matters of payment, default of a loan and bankruptcy of the borrower in situations where both the servicer and principle were private entities, *Armstrong* prevents private litigants from using the Supremacy Clause to displace state law. *Armstrong,* 135 S.Ct. 1383-85. [22]

In regards to the Bank's argument that it has standing to enforce the Federal Foreclosure Bar, many of the cases relied on by the Bank pre-date the *Armstrong* decision. *See* AOB p. 13 *citing Beal Bank, SSB v. Nassau Cty*., 973 F. Supp. 130,

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[21] The Bank asks this Court to take Notice of Freddie Guides available for viewing at Freddie's web page. AOB p. 17 fn. 3. These webpages are not apart of the record and thus should be disregarded by this Court.

[22] *See* AOB at 13-14 *Greer v. O'Dell*, 305 F.3d 1297, 1299 (11th Cir. 2002)(Max Flow Corporation servicing an account belonging to MBNA American Bank, N.A. in regards to the Bankruptcy of debtor.); BAC Home Loans Servicing, LP v. Texas Realty Holdings, LLC, 901 F. Supp. 2d 884, 905 (S.D. Tex. 2012)(" The court has already determined that BAC, as the mortgage servicer on the three loans in this action, is an agent for the owners of the notes and deeds of trust pursuant to the terms of the three PSAs."); *Sprint Comm 'ns Co., L.P. v. APCC Servs., Inc*., 554 U.S. 269, 271-72 (2008)(Addressing whether an assignee of a legal claim for money owed has standing to pursue that claim in federal court.).

133 (E.D.N.Y. 1997); citing also *Cambridge Capital Corp. v. Halcon Enterprises, Inc*., 842 F. Supp. 499, 499 (S.D. Fla. 1993); citing also *Grimsley v. Bd. of Cty. Comm'rs of Atoka Cty*., *Okla*., 9 F. App'x 970, 971 (10th Cir. 2001).

What the Bank forgets is that "Article I vests Congress with broad discretion over the manner of implementing its enumerated powers, giving it authority to 'make all Laws which shall be necessary and proper for carrying [them] into Execution.'" *Armstrong,* 135 S.Ct. at 1383 *citing* U.S. Const. Art. I, § 8. The *Armstrong* Court went on to say "[i]t is unlikely that the Constitution gave Congress such broad discretion with regard to the enactment of laws, while simultaneously limiting Congress's power over the manner of their implementation, making it impossible to leave the enforcement of federal law to federal actors." *Armstrong,* 135 S.Ct. at 1383-84. "If the Supremacy Clause includes a private right of action, *then the Constitution requires Congress to permit the enforcement of its laws by private actors*, significantly curtailing its ability to guide the implementation of federal law. *Id.*., 135 S. Ct. at 1384 (emphasis added)." Thus, if possible at all, a private actor would need the express intent of Congress to enforce federal law as anything less would strip away the right from Congress to implement its own laws. *See Id.*

Furthermore, the Bank's reliance on *Munoz v. Branch Banking* is misplaced. Nowhere in the *Munoz* decision does it indicate that this Court considered *Armstrong. Munoz v. Branch Banking* 131 Nev. Adv. Op. 23, 348 P.3d 689, 690

(2015). But if it had, this Court would have reached the same conclusion. *Munoz,* dealt with whether NRS 40.459(1)(c), which placed limits on deficiency judgments, was preempted by the Federal Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA). *See id.* In coming to this holding, this Court wrote that "[t]o assist the FDIC in carrying out this duty, federal law provides special status to the FDIC's assignees so as to maintain the value of the assets they receive from the FDIC." *Munoz*, 348 P.3d at 692 (2015) *citing FDIC v. Bledsoe*, 989 F.2d 805, 809–11 (5th Cir.1993) (providing that FDIC assignees share the FDIC's statutory "super" holder-in-due-course status and are entitled to the benefit of a six-year statute of limitations under FIRREA rather than any shorter state statute of limitations). Ultimately, this Court found that Congress intended to allow a private actor to enforce FIRREA. But unlike *Munoz,* the Bank cannot point to a single authority showing the express intent of Congress to allow the Banks to invoke HERA.

B. The FHFA's Policy Arguments are in Contradiction to Federal Law.

In the Brief of Amicus Curiae FHFA, the FHFA failed to provide a single supporting authority that would allow for the Bank to enforce 12 U.S.C. 4617(b)(2)(D). As stated earlier, the United States Supreme Court recently determined that private litigants cannot use the Supremacy Clause to displace state

law. *Armstrong* at 1383-85. To allow the Bank to enforce federal law, including 12 U.S.C. §4617(j), would strip away a right entitled to Congress. *Armstrong,* 135 S.Ct. at 1383-84. Therefore, when the FHFA argues that "no condition precedent" exist in 12 U.S.C. §4617(j)(3), they have completely reversed the standard set forth in *Armstrong*. *See* FHFA's Amicus Brief p. 7. If a private right to enforce federal law can exist, "then the Constitution requires Congress to permit the enforcement of its laws by private actors." *Id.*

Just because FHFA's enterprises allegedly own millions of loans nationwide and because FHFA would prefer for private entities such as the Bank to invoke the Federal Foreclosure Bar, does not allow them to circumvent the law and the United States Constitution. After all it is Congress not the FHFA, Freddie or the Bank that has the power to implement federal law. *Id.* at 1384.

The fact that the Bank's defending Freddie's interest is an "integral duty" of a servicer of the loan, does not make these duties anymore true or valid under the law. Clearly, the FHFA could have appeared to defend its purported interest in the property. Additionally, the net expenditure of litigation in hiring counsel would have been the same whether the FHFA was an actual party to this case or if the Bank participated. Thus, any argument regarding the costs of litigation that would need to be absorbed by taxpayers is simply sleight of hand. If litigations are being fronted by the taxpayers, then the taxpayer is no better off if FHFA retains counsel directly

or if its pays a servicing fee to the Bank which covers litigation expenses. Regardless, for the FHFA policy concerns, nothing that has been presented justifies giving up Congress' right to implement its own laws by allowing private parties to invoke the Supremacy Clause.

C. The Bank has not provided admissible evidence of a Contract between Freddie and the Bank.

The Bank lacks any standings to raises defenses and claims under HERA. This should conclude the Court's analysis on this topic. However, to the extent the Court in inclined to investigate the record further, it is apparent from the evidence contained in the record, that the Bank cannot establish any interest owned by Freddie.

First, the Bank has not introduced any admissible evidence to suggest that Freddie owns the deed of trust in question. The District Court did not come to a definite conclusion as to the owner of the FDOT. JA_111. On April 23, 2012, KB Home Mortgage Company recorded an assignment that transferred its interest in the DOT and the promissory note to BANA, not to Freddie. 1JA_194-196. On November 28, 2012, BANA recorded an assignment that transferred its interest in the FDOT to the Bank, not to Freddie. 1JA_156-157. In fact, BANA was the

Attorney-in-Fact for the Bank, not Freddie. *Id*. Freddie is not mentioned in either assignment. As such, there is a dispute as to whether Freddie owns the deed of trust as the Bank has not introduced admissible evidence to support such a notion.

Next, even if the evidence establishes an interest by Freddie, no evidence has been provided to establish that the Bank is a servicer to this Freddie loan. Neither *In re Montierth*, 131 Nev. ___, ___, 354 P.3d 648, 650-51 (2015) nor *Edelstein v. Bank of New York Mellon*, 128 Nev. ___, ___, 286 P.3d 249, 257-58 (2012) addresses the extent to which the Bank can make Supremacy Clause or 4617(j)(3) arguments. Specifically, nothing in *Montierth, Edelstein* or the Restatement circumvents the fact that Congress did not expressly allow the Bank to enforce HERA.

Furthermore, the Bank lacks evidence to establish that the Bank was an authorized servicer to the FDOT. Instead, the Bank asks this Court to take Judicial Notice of the Freddie Mac web page. AOB p.17 at fn. 3. This Court can only take judicial notice of this document if the fact is "(a) Generally known within the territorial jurisdiction of the trial court; or (b) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to dispute." NRS 47.130(2). To the extent the Bank relies on the guidelines to establish that a contractual relationship exists between the Bank and Freddie, SFR challenges this fact.

First, the guidelines were never disclosed to SFR, meaning that SFR has never had a chance to confront any party regarding the context of the documentation nor has the Trial Court had a chance to consider such documentation. Further, upon an inspection of the website listed at AOB p.17 n.3—http://www.freddiemac.com/singlefamily/guide/bulletins/snapshot.html —it is near impossible to tell how anything in this web page creates a contractual relation between the Bank and Freddie. The web page does not even mention this specific property nor does it identify the Bank as a servicer for Freddie properties. Even to the extent this guide allows for the Bank to act on behalf of Freddie, it violates 12 C.F.R. § 1237.3(a)(7) promulgated by the FHFA, in which it was "…to **delegate[d] to management of [Freddie] the authority** to investigate and prosecute claims" *Id.* The Bank's arguments about the Servicing Guide are irrelevant as standing is a matter of statutory grant from Congress.

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III. NRS 116 NOTICING PROVISIONS ARE CONSTITUTIONAL.

A. The Bank Cannot Raise a Facial or an As Applied Challenge because it Received Actual Notice.

The Bank claims that the failure of NRS 116 is that it did not require actual notice to Lenders.[23] Here, SFR has presented evidence that the Bank's Attorney-in-Fact received the Notice of Sale.[24] Thus, the Bank lacks standing to assert a facial challenge. *Wiren v. Eide*, 542 F.2d 757, 762 (9th Cir. 1976) ("receipt of actual notice deprives [appellant] of standing to raise the claim" that the statutory notice scheme violated due process); *Green Tree Servicing, LLC v. Random Antics, LLC*, 869 N.E.2d 464, 470-71 (Ind. Ct. App. 2007) (where one receives actual notice cannot claim that the noticing provisions of the statute are unconstitutional). Any irregularity in notices do not violate due process where one has actual notice of the action to be taken. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 272 (2010) (debtor's failure to serve a summons and complaint does not violate due process where creditor received "actual notice of the filing and contents of [debtor's

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[23] The Bank's reference to other states is misleading because most of these are judicial foreclosure states, which necessarily involves a state actor and implicates due process. However, the Bank leaves out the District of Columbia, which not only allows for the foreclosure by sale, but also results in extinguishment of a first security interest. *See Chase Plaza Condominium Ass'n, Inc. v. JPMorgan Chase Bank, N.A.*, 98 A.3d 166, 178 (D.C. Ct. App. 2014) (interpreting D.C. Code § 42-1903.13).

[24] *See* 1JA_198-202.

Chapter 13] plan."); *see also In re Medaglia*, 52 F.3d 451, 455-56 (2d Cir. 1995) ("[D]ue process is not offended by requiring a person with actual, timely knowledge of an event that may affect a right to exercise due diligence and take necessary steps to preserve that right.") (cited with favor in *SFR*, 334 P.3d at 418). Here, the Bank received the notices and chose to allow the Association sale to proceed. It cannot claim injury as a result of the noticing provisions of the statute.

The Bank argues the *Mennonite* and *Mullane* decisions to support its position that any party must receive actual notice to satisfy due process. This misstates United States Supreme Court precedent. To be clear, due process, if it were required here, does not require actual notice: "our cases have never required actual notice." *Dusenbery v. United States*, 534 U.S. 161, 171 (2002). Due process requires only that the notice be "reasonably calculated . . . to apprise interested parties of the pendency of the action[.]" *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). If a notice identifies an event that will impact an individual's property interest, then due process is satisfied. *Espinosa*, 559 U.S. at 272 (bankruptcy plan's filing and contents); *Jones v. Flowers*, 547 U.S. 220, 239 (2006) (tax sale); *Dusenbery*, 534 U.S. at 168 (cash forfeiture); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1983) (tax sale).

Here, the notice the Bank received satisfied due process because it was "reasonably calculated . . . apprise [the Bank] of" the pendency of the Association's

foreclosure. *Mullane*, 339 U.S. at 314. The statutes worked just as recognized by the Nevada Supreme Court in the *SFR* decision, where both the majority and dissent recognized that notices of default and sale were required to be sent to junior lienholders like the Bank. *SFR*, 334 P.3d at 411, 417, 418, 422 (noting the incorporation of NRS 107.090(3)(b) and (4) through NRS 116.31168). The Bank's (in)action caused its loss, not the statute, the Association, and certainly not SFR. The Bank's motion should be denied.

B. Regarding *Bourne Valley Court Trust v. Wells Fargo Bank, N.A.*, Case No. 15-15233 (9th Cir. August 12, 2016).

SFR is mindful of the recent Ninth Circuit Opinion in *Bourne Valley Court Trust v. Wells Fargo Bank*, Case No. 15-15233, 2016 WL 4254983 (9th Cir. Aug. 12, 2016). However, that opinion is not binding on this Court. With respect to federal law, the federal circuit courts of appeals and state supreme courts are subject to the decisions and jurisdiction of the Supreme Court of the United States. *Iowa Nat. Bank v. Stewart,* 232 N.W. 445, 454 (Iowa 1930). The United States Supreme Court has final appellate jurisdiction over federal questions. *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075 (7th Cir. 1970) (decisions of Supreme Court on national law have a binding effect on all lower courts, whether state or federal). "Until the Supreme Court of the United States has spoken, state courts are not precluded from exercising their own judgment upon questions of federal law."

Stewart, 232 N.W. at 454 (finality regarding federal law rests with the United States Supreme Court).

Lower federal courts, including the circuit courts of appeal, "exercise no appellate jurisdiction over state tribunals, [and] decisions of lower federal courts are not conclusive on state courts." *Lawrence v. Woods,* 432 F.2d at 1076. "In passing on federal constitutional questions, the state courts and the lower federal courts have the same responsibility and occupy the same position; there is a parallelism but not paramountcy for both sets of courts are governed by the same reviewing authority of the [United States] Supreme Court." *State v. Coleman,* 214 A.2d 393, 402-403 (N.J. 1965); *Stewart,* 232 N.W. at 454. A federal court of appeals holding is not binding on a state court. *Coleman,* 214 A.2d at 402-403 (declining to follow Third Circuit decision involving the identical question of law, and recognizing "that the United States Supreme Court 'is the final arbiter on all questions of federal constitutional law'"). *See also Bromley v. Crisp,* 561 F.2d 1351, 1354 (10th Cir. 1977) (cert. denied, 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 499 (1978); *Thompson v. Village of Hales Corners,* 115 Wis.2d 289, 307, 340 N.W.2d 704 (1983); *City of Chicago v. Groffman,* 368 Ill.2d 112, 368 N.E.2d 891 (1977); *People v. Brisbon*, 129 Ill.2d 200, 544 N.E.2d 297, 135 Ill. Dec. 801 (Ill. 1989); *Breckline v. Metropolitan Life Ins. Co.,* 406 Pa. 573, 178 A.2d 748 (1962); *see generally* Note, *Authority in*

State Courts of Lower Federal Court Decisions on National Law, 48 COLUM. L. REV. 943 (1948).

As such, this Court is free to enforce its own precedent and should not be bound by holdings of lower federal courts, including the Federal Circuit Court of Appeals. This is especially so when the Ninth Circuit failed to acknowledge this Court's construction of NRS 116.31163-116.31168 to require notice to lenders.[25]

C. <u>The Bank Fails to Do the Analysis Required to find a State Actor.</u>

In order for due process to be implicated, there must be a state actor. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). A state action requires *both* an alleged constitutional deprivation "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," *and* that "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Am. Mfr. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999). If a state actor is not involved, then due process─including concerns about "notice"─is inapplicable. *Id.*; *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) ("If the action of the respondent school is not state action, our inquiry ends.").

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[25] For this reason, among others, many of which are discussed in text below, a petition for rehearing or hearing en banc is being prepared and a motion to unpublish pending the mandate has been filed.

The burden of proving a state actor is on the party claiming a deprivation of a constitutionally protected interest. *Flagg Bros., Inc. v. Lefkowitz*, 436 U.S. 149, 156 (1978). Such a burden is steep, hinging on a "necessarily fact-bound inquiry[.]" *Brentwood*, 531 U.S. at 298.

Here, the Bank has offered no evidence that Association is a state actor. In fact, the Bank does not engage in this analysis at all. Yet, if an analysis was done, pursuant to the public function test, a private entity can be treated as a state actor if the entity performed a function that has been traditionally the **exclusive** function of the state. *Flagg Bros.*, 436 U.S. at 158 ("While many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'") (emphasis added). Exclusivity is the test's *sine qua non*. *Rendell-Baker*, 457 U.S. at 842.

The minute the Bank obtained their FDOT in the property, the Bank and the Association had an agreement regarding the CC&Rs. *See* 1JA_114-115. As one federal district court noted, "the power to impose fines or enforce liens are not traditional and exclusive governmental functions." *Snowdon*, 2:08-cv-01094-RCJ-PAL, at 14:14-15 ("[Association] did not perform the traditional and exclusive public function of municipal governance." (internal citation omitted)).

Furthermore, the United States Supreme Court has never held that the enactment of a remedy transforms a private entity into a state actor. *American Mfrs.*

Mut Ins. Co. v. Sullivan, 526 U.S. 40, 53 (1999). ("We have never held that the mere availability of a remedy for wrongful conduct, even when the private use of that remedy serves important public interests, so significantly encourages the private activity as to make the State responsible for it."). Indeed, the United State Supreme Court held in *Flagg Bros*. that New York's enactment of UCC 7-210 did not significantly encourage a warehouse owner's decision to send a letter threatening to sell belongings. *Flagg Bros*., 436 U.S. at 165. Instead, the Court recognized that a State's mere acquiescence in private conduct does not constitute state action and enacting a statute to permit such action does not constitute "encouragement" or compulsion. *Id.*

All told, nothing requires or compels an association to foreclose. That decision is purely private. 116.3102(3) (granting the executive board the authority to determine whether to take enforcement action to collect unpaid assessments).

D. <u>The Noticing Statutes are Constitutional.</u>

1. <u>Standard for a Constitutional Challenge.</u>

Even if this Court gets to a Due Process challenge, the Bank cannot meet the high standard of showing that NRS 116's noticing provisions are unconstitutional. Whether a statute is constitutional is a question of law. *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 508, 217 P.3d 546, 551 (Nev. 2009). "'Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute

is unconstitutional.'" *Id.* (quoting *Silvar v. Dist. Ct.*, 122 Nev. 289, 294, 129 P.3d 682, 684 (Nev. 2006)).

The Bank must show there is "no set of circumstances under which the statute would be valid." *Déjà vu Showgirls v. State, Dept. of Tax.*, 130 Nev. ___, ___, 334 P.3d 392, 398 (2014); *see Flamingo Paradise Gaming*, 217 P.3d at 552 (citing *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) (noting reaffirmance of the requirement that a statute be void in all its applications to be successful, when civil statutes are at issue)). Courts disfavor facial challenges because they rest on speculation, and "run contrary to the fundamental principle of judicial restraint that courts should neither "'anticipate a question of constitutional law in advance of the necessity of deciding it'" nor "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Washington State Grange*, 552 U.S. at 450-51.

"The most fundamental principle of constitutional adjudication" is the constitutional avoidance doctrine. *United States v. Lovett*, 328 U.S. 303, 320 (1946) (Frankfurter, J., concurring); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341, 346-48 (1936) (Brandeis, J., concurring). Courts "will not decide the constitutionality of a statute based upon a supposed or hypothetical case which might arise thereunder." *Carlisle v. State*, 98 Nev. 128, 130, 642 P.2d 596, 598 (Nev. 1982). Thus, courts must "avoid considering the constitutionality of a statute unless

it is absolutely necessary to do so." *Sheriff v. Andrews*, 128 Nev. ___, ___, 286 P.3d 262, 263 (Nev. 2012). Furthermore, "when 'a statute may be given conflicting interpretations, one rendering it constitutional and the other unconstitutional, the constitutional interpretation is favored.'" *State v. Kopp*, 118 Nev. 199, 203, 43 P.3d 340, 342 (2002) (*quoting Sheriff v. Wu*, 101 Nev. 687, 689–90, 708 P.2d 305, 306 (1985)).

2. This Court Already Decided the Issue.

The Bank acts as if this Court never issued the *SFR* opinion. They are wrong in limiting what that case decided. *SFR* demonstrated at least one circumstance in which the statute was valid, and therefore, its facial challenge cannot stand. *Washington State Grange*, 552 U.S. at 449. The inquiry should stop here.

Second, this Court did both a facial and as-applied analysis, rejecting both. Both the majority and dissent recognized that notice must be sent to all junior lienholders, noting the incorporation of NRS 107.090(3)(b),(4) which, in the case of a bank foreclosure sale, requires notice of default and notice of sale to "[e]ach other person with an interest whose interest or claimed interest is subordinate to the deed of trust." *SFR*, 334 P.3d at 411, 422. In an association foreclosure sale those words must be read as notice to those with liens subordinate to the association's lien.

To the extent that the Bank argues that the notices do not directly identify the super priority amount nor were they directed to the Bank's predecessors in interest,

this was the exact same argument brought by U.S. Bank in *SFR*.[26] There, this Court stated that individual named notices were not necessary and giving the total amount of the lien was acceptable especially in light that these notices went to all junior interest holders and not just to the first deed of trust holder. *Id.* (quoting *In re Medaglia*, 52 F.3d 451, 455 (2d Cir. 1995) ("[I]t is well established that due process is not offended by requiring a person with actual, timely knowledge of an event that may affect a right to exercise due diligence and take necessary steps to preserve that right.")).

Further, the majority rejected the lender's due process arguments as "protean," and non-starters, noting that since Chapter 116 was adopted in 1991, the lender "was on notice that by operation of the statute, the [earlier recorded] CC&R's might entitle the HOA to a super priority lien at some future date which would take priority over a [later recorded] first deed of trust." *Id*. at 418 (quoting with approval *Limbwood* 979 F. Supp. 2d at 1152 (rejecting a due process challenge to a non-judicial foreclosure of a super priority lien)).[27] "To the extent U.S. Bank argues that

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[26] "U.S. Bank further complains about the content of the notice it received. It argues that due process requires specific notice indicating the amount of the superpriority piece of the lien and explaining how the beneficiary of the first deed of trust can prevent the superpriority foreclosure sale." *Id*.

[27] *Limbwood* recognized the notices as "statutorily required" to be sent to the lender. 979 F. Supp. 2d at 1152 ("To the extent [the Bank] contends [the Association] failed to provide the required notices. . . .").

a statutory scheme that gives an HOA a super priority lien that can be foreclosed nonjudicially thereby extinguishing an earlier filed deed of trust, offends due process, the argument is a nonstarter." *Id.* at 418. The Bank's appeal on these grounds has already been decided by this Court.

3. The Statutes Require Notice to All Junior Lienholders of Record.

Due process, if it applied here, would require only that the noticing provisions be "reasonably calculated . . . apprise interested parties of the pendency of the action[.]" *Mullane v. Central Hanover Tr. Co.*, 339 U.S. at 306, 314 (1950). If a notice identifies an event that will impact an individual's property interest, then due process is satisfied. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 272 (2010) (bankruptcy plan's filing and contents); *Jones v. Flowers*, 547 U.S. 220, 239 (2006) (tax sale); *Dusenbery v. United States*, 534 U.S. 160, 168 (2002) (cash forfeiture); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1983) (tax sale). Here, the Association's notices satisfied due process because, as set forth fully above, they were "reasonably calculated . . . to apprise [the Bank] of" the pendency of the Association's foreclosure.

The Bank's attempt to have this Court construe the statute as "opt-in" is unavailing. First, as discussed above, this Court has already recognized that NRS 116.31168(1) incorporates the whole of NRS 107.090 and states that "[t]he provisions of 107.090 apply to the foreclosure as if a deed of trust were being

foreclosed." *SFR*, 334 P.3d at 411, 422.This includes NRS 107.090(3)(b), which requires notice of default be sent to "[e]ach other person with an interest whose interest or claimed interest is subordinate to the [association's lien]." It also includes NRS 107.090(4) which requires the notice of sale be sent to "each person described in subsection 3." Furthermore, the provisions of NRS 116.31163(2) and 116.311635(1)(b)(2) which require notices be sent to those holders of a security interest who "has notified the association" includes those who have notified through recording. *See* NRS 111.320 (every conveyance of real property "recorded in the manner prescribed in this chapter . . . must from the time of filing . . . with the . . . recorder for record, impart notice to all persons of the contents thereof. . . ."). Thus, between 116.31163, 116.311635, and 107.090, an association is required to look at the county recorder's records and send the notices to all interest holders of record.

Additionally, the Bank's reading of the statutes requires this Court to ignore the constitutional avoidance doctrine and limit the meaning of the plain words. While the Bank claims that the statutes require notice only to the unit owner and those other persons who request it, the Bank is wrong. the Bank attempts to limit the provisions of NRS 107.090 to only the persons who request notice belies the Legislature's incorporation of the statute as a whole and to limit the language of subsection 3(b) to those with interests subordinate to the deed of trust. It ignores that the Legislature incorporated 107.090 as if a deed of trust was being foreclosed. Thus,

to properly read the statute, one must change the words "subordinate to the deed of trust" to subordinate to the association's lien. Since a portion of the Association's lien is prior to the first deed of trust, then the first deed of trust is subordinate and the beneficiary must be noticed.

Furthermore, the Bank may argue that the "request notice" provisions of NRS 116.31163 and NRS 116.311635 apply only to junior lienholders, making the incorporation of NRS 107.090 would make those provisions nugatory. However, NRS 107.090(3)-(4) refer to junior lienholders only. The other provisions allow any holder of a recorded security interest to request notice. In other words, it is an "add-on" provision. For example, due process, if it applies, would not require notice to a senior lienholder whose interest was unaffected to be noticed, for example the government taxing authority for property taxes which is senior to an association lien. NRS 116.3116(2)(c). Yet, under NRS 116.31163 and 116.311635, the government can request notice even if not required to be otherwise sent. Additionally, as was the case here, the Deed of Trust may name MERS as the beneficiary. 1JA_127-150. Thus, the holder of the recorded security instrument may be transferred any number of times without changing the named beneficiary, and the servicer of the loan may want notice as the holder but not the recorded holder. The request notice provisions allow these "shadow owners" to receive notice where they might not otherwise be

known to the association – to add onto the required notices. This Court interpretation of the statutes did not contemplate such construction.

Even assuming *arguendo* the Bank provides a reasonable alternative reading of NRS 116.31168, which it does not, then its interpretation must be rejected in favor of SFR's constitutional interpretation. This is precisely why the Bank's reliance on *Small Engine* to support its "opt-in" argument is misplaced. The Bank ignores the actual holding of the case. The *Small Engine* court, out of adherence to the constitutional avoidance doctrine, articulated a way for courts to read "request-notice" statutes constitutionally.[28] *Small Engine Shop, Inc. v. Cascio*, 878 F.2d 883, 890 (5th Cir. 1980). And the Louisiana statutes lacked a provision similar to NRS 107.090. *See* La. Code Civ. P. Art. 2721; La. Rev. Stat. 13:3886. Here, under *Small Engine*, NRS 116's request-notice provisions are constitutional, especially when construed in conjunction with Nevada's recording laws, (NRS Chapter 111),[29] and

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[28] Furthermore, the Fifth Circuit also recognized that under Louisiana's statute, the state doing the deprivation through statute and the use of the sheriff. *Small Engine*, 878 F.2d at 893 ("The provision gives property owners, whose identities a reasonably diligent, responsible **state actor** could not reasonably ascertain. . . .") (emphasis added)).

[29] The Bank insists that *Small Engine* struck down a "request-notice" statute as unconstitutional; this disregards that case's admonition that "[b]ecause *Small Engine* did not request notice under La.Rev.Stat.Ann. 13:3886, we do not decide whether the provisions of the statute are constitutional in their entirety." *Small Engine*, 878 F.2d at 893 n.9.

with the requirements of NRS 116.31168 and NRS 107.090. Furthermore, the request notice portion of the statutes are for persons like the Bank (if it actually had an interest transferred to it), to whom the assignment of the FDOT was executed long before it was recorded. Thus, if the Bank itself wanted to know what was going on with its purported interest in the FDOT and protect its lien priority, it could have asked the Association to send it notices, without having recorded the assignment.

In sum, the non-judicial noticing requirements of NRS 116 require notice to lenders of record. The Bank simply refuses to acknowledge that its predecessor in interest caused this, not those of the Association, its agent, those of this Court, and certainly not those of SFR. This is especially so in light of the fact that the recitals in the Association foreclosure deed are conclusive as to the noticing and that the Bank failed to provide any admissible evidence to rebut that conclusion. This Court should affirm.

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CONCLUSION

In granting SFR's Motion for Summary Judgment, the district court took into consideration all of the evidence to include the conclusive presumption, the disputable presumptions and the real evidence in the case. The Bank has not presented this Court any reason to disrupt the District Court's holding. As such, this Court should affirm.

DATED this 24th day of August, 2016.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14 point, double-spaced Times New Roman font.
2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the pages of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, is 51 pages long, and contains 12,330 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), 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.

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4. I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 24th day of August, 2016.

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I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 24th day of August, 2016. Electronic service of the foregoing **Respondent's Answering Brief** shall be made in accordance with the Master Service List as follows:

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