IN THE SUPREME COURT OF THE STATE OF NEVADA

K&P HOMES, A SERIS LLC OF DEK HOLDINGS, LLC, a Nevada Limited Liability Company, Appellant, vs. CHRISTIANA TRUST, A DIVISION OF WILMINGTON SAVINGS FUND SOCIETY, FSB NOT IN ITS INDIVIDUAL CAPACITY BUT AS TRUSTEE OF ARLP TRUST 3, Respondent.	SUP. CT. CASE NO. 69966 (Certified Question from the United States District Court for the District of Nevada, Case No. 2:15-cv-01534-RCJ-VCF)

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and/or entities as described in NRAP 26.1(a) and must be disclosed. the representations are made in order that the justices of this court may evaluate possible disqualifications or recusals.

1. Attorney John Henry Wright, Esq., and Appellant K & P HOMES, LLC state that K & P HOMES, A SERIES LLC OF DEK HOLDINGS, LLC is a Nevada Limited Liability Company, certify that there are no parent corporations or that no one holds more than 10% stock in a publicly held corporation.
2. The undersigned counsel is the only counsel expected to appear in this Court;
3. The Appellant is not using a pseudonym.

DATED this 25th day of April, 2016.

/s/ John Henry Wright
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JURISDICTIONAL STATEMENT

The Nevada Supreme Court may answer questions of law certified to it by a United States District Court upon the request of the certifying court. Crocket & Myers, Ltd. v. Napier, Fitzgerald & Kierby, LLP, 401 F. Supp.2d 1120, 1128 (D. Nev. 2005) Questions of law are certified to the Nevada Supreme Court pursuant to NRAP 5 and states in relevant part:

> (a) **Power to Answer.** The Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States or of the District of Columbia, a United States District Court, or a United States Bankruptcy Court when requested by the certifying courts, if there are involved in any proceeding before those courts questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of this state.
>
> (b) Method of Invoking. This Rule may be invoked by an order of any of the courts referred to in Rule 5(a) upon the court's own motion or upon the motion of any party to the cause.

The United States Supreme Court has recognized the wisdom of certification by stating certification of "novel or unsettled questions of state law for authoritative answers by a State's highest court . . . may save time, energy, and resources and help build a cooperative judicial federalism." Arizonans for Official English v. Arizona, 520 U.S. 43, 77 (1997). Questions regarding the interpretation of unresolved issues of state law are most appropriate for certification. Rivera v. Philip Morris, Inc., 209 P.3d 271 (Nev. 2009) (appropriate for federal district court to certify question of

whether Nevada law recognizes a heeding presumption in strict products liability failure-to-warn cases); Chaffee v. Roger, 311 F.Supp.2d 962 (D.Nev. 2004) (certifying question to Nevada Supreme Court as to the definitions of the terms "threat" and "intimidate" under NRS 199.300(1)(b); Life Ins. Co. of North America v. Wollett, 766 P.2d 893 (Nev. 1988) (appropriate for federal district court to certify question of whether state statute barring beneficiaries convicted of murder from recovering life policy benefits was exclusive basis under Nevada law for denying entitlement to insurance proceeds). Furthermore, certifying a question for law to the Supreme Court of Nevada is proper if one of the possible answers will conclude the federal case, or if the answer may resolve one of the pending claims, if not the entire case. Volvo Cars of North America, Inc., v. Ricci, 137 P.3d 1161, 1164 (Nev. 2006).

It has been long held that the district court's conclusions of law are reviewed de novo. Lopez v. Corral, 2010 Nevada LEXIS 69 at 5. Further, "when there is no dispute of fact, a contract's interpretation is a legal question subject to de novo review." Diaz v. Ferne, 120 Nev. 70, 73 (2004).

ROUTING STATEMENT

This matter is presumptively retained by the Supreme Court pursuant to NRAP 17(a)(7) as this is a question of law certified by the Federal District Court for the

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District of Nevada. The certification was accepted by the Supreme Court via its order filed on April 8, 2016.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issue presented to the Court for review is whether or not the Nevada Supreme Court's holding in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 334 P.3d 408 (Nev. 2014) that foreclosures under NRS 116.3116 extinguish first security interests applies retroactively to foreclosures occurring prior to the date of that decision.

I. STATEMENT OF THE CASE

This matter arises from the dismissal of a Counterclaim for Quiet Title initiated by Appellant K & P HOMES, LLC (hereinafter "K & P"). On May 31, 2013, K & P purchased certain real property commonly known as 7461 Glimmering Sun Avenue, Las Vegas, Nevada 889178, APN # 176-27-312-159 (hereinafter referred to as the "Property") at a properly noticed foreclosure sale in accordance with NRS 116.3116 through 11.31168, inclusive as reflected in the Foreclosure Deed conveying the Property to K&P and recorded on June 4, 2013 with the Clark County Recorder's Office in Book/Instrument Number 20130604:0000600.

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Plaintiff Christiana Trust, A Division of Wilmington Savings Fund Society, FSB, ("Christiana") filed a Complaint for Quiet Title and Declaratory Relief on August 21, 2015, naming K&P as the defendant.

On September 9, 2015, K&P filed an Answer to Complaint and Counterclaims against Christiana and the former owner, Rita Wiegand, requesting quiet title and declaratory relief.

On October 5, 2015 Christiana filed a Motion to Dismiss claiming, among other things, that this Court's decision in SFR Investment Pool I, LLC v. U.S. Bank, N.A., 334 P.3d 408 (Nev. 2014) should not be applied retroactively.

On October 13, 2015 K&P filed an Opposition to Christiana's Motion to Dismiss and also filed a Countermotion for Summary Judgment.

On November 9, 2015, the Court issued its Order granting Christiana Trust's Motion to Dismiss Counterclaim on the basis that this Court's decision in SFR is to only be applied prospectively.

In reaching its conclusion, the federal court determined that in SFR this Court did not address the issue of retroactive application because the matter was determined on different grounds and that this Court assumed that its ruling would be applied retroactively. Therefore, the federal court conducted an analysis under Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) and Breithaupt v. USAA Prop. &

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Cas. Ins. Co., 867 P.2d 405 (Nev. 1994) and concluded that under the federal common law of equity it would not be fair to apply SFR retroactively.

On November 20, 2015, K&P submitted a Motion for Reconsideration on the grounds that this Court was presented with arguments regarding the prospective versus retroactive application of SFR and rejected the arguments for only the prospective application.

On December 3, 2015, the federal court denied K&P's Motion for Reconsideration stating:

> The Court dismissed the Counterclaim under *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971) (recognizing limitations on the retroactive application of judicial rulings as a matter of common law equity), *abrogated in part by Harper v. Va. Dep't of Taxation,* 509 U.S. 86 (1993) (holding that when the Supreme Court interprets federal laws, inferior courts should as a default apply teat interpretation retroactively:. The Court ruled that in the present case, the Huson factors weighed against the retroactive application of *SFR Investments Pool I, LLC v. U.S. Bank, N.A.*, 334 P.3d 408 (Nev. 2014). The Court noted that *Huson* was a federal common law rule, but the Nevada Supreme Court did not need to address the federal due process issue beyond the scope of *Huson. See Breithaupt v. USAA Prop. & Cas. Ins. Co.*, 867 P.2d 405 (Nev. 1994). A closer look, however, showed both that *SFR Investments Pool I* was silent on retroactivity and that the Nevada Supreme Court approved the *Huson* rule as a general matter. The Court ruled that *SFR Investments Pool I* did not apply retroactively under the *Huson* rule, as approved in *Breithaupt.*.

The federal court further stated that the SFR opinion did not address retroactivity, however, under either the Huson/Breithaupt line of cases or otherwise, and argument under that line of cases were made only in amici briefs, not in the opening or answering briefs, which means that

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the issue was waived by both sides, and the federal court had discretion to address it *sua sponte*. The federal court determined that this Court's silence on the issue in SFR indicates that is did not exercise that discretion and for whatever the reasons, the issue (of retroactive application) was not litigated.

II. STATEMENT OF THE FACTS

In January 2007, the Tuscalante Homeowners Association (the "HOA") recorded its Declaration of Covenants, Conditions and Restrictions with the office of the Clark County Recorder, establishing its lien rights in accordance with Chapter 116 of Nevada Revised Statutes.

In July 2007, Rita Wiegand ("Wiegand") acquired the property through a Grant Bargain Sale Deed. The property was financed through Universal Home Mortgage Company, LLC., who recorded a first deed of trust with the Clark County Recorder's office. The deed of trust was assigned to BAC Home Loan Servicing and U.S. Bank, N.A ("U.S. Bank"), and ultimately assigned to Christiana on January 30, 2014.[1]

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[1]The assignment to Christiana occurred seven months after the property was sold at the foreclosure sale. At the time of the foreclosure sale the deed of trust was held by U.S. Bank, N.A., which is not a party to this case and, according to Christiana's Notice of Interested Parties has no interest in this case.

Wiegand became delinquent in the payment of the Association assessments and on July 31, 2012, the HOA, through Nevada Association Services, Inc. ("NAS"), recorded a Notice of Delinquent Assessment Lien with the Clark County Recorder.

Wiegand failed to pay the HOA's assessment lien and on January 30, 2013, the HOA recorded a Notice of Default and Election to Sell Real Property to Satisfy Delinquent Assessment Lien with the Clark County Recorder. The Notice of Default was mailed via certified mail to both Wiegand and U.S. Bank, the then holder of the deed of trust.

Neither Wiegand nor any other person paid the Association's lien and on May 7, 2013, the Association recorded a Notice of Foreclosure Sale with the Clark County Recorder. The Notice of Sale was mailed to both Wiegand and U.S. Bank via certified mail.

The Notice of Sale was published for three consecutive weeks in the Nevada Legal News. It was also posted on the Property and three of the most public places in Clark County, Nevada, as well as three of the most public places in the Las Vegas, Nevada.

Again, neither Wiegand nor any other person paid the HOA's assessment lien. Therefore, the Property was sold at a foreclosure auction on May 31, 2013.

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At the foreclosure auction held on May 31, 2013, K&P was the highest bidder and purchased the Property for Forty Thousand dollars ($40,000). The HOA, through its agent NAS, provided K&P with a Foreclosure Deed containing all the recitals required under NRS 116.31164, which constitutes "conclusive proof" that the Property passed to K&P free of any claims by Wiegand or any other persons, including U.S. Bank or Christiana.

III. SUMMARY OF THE ARGUMENTS

The single argument in this case is whether or not this Court's decision in SFR applies to HOA foreclosures that occurred prior to the date of that decision. Christiana will argue that SFR should be applied prospectively only, for it establishes a new principle of law by overruling clear past precedent on which litigants may have relied and by deciding an issue of first impression whose resolution was not clearly foreshadowed. Christiana argues that the SFR decision was not clearly foreshadowed as no court prior to 2012 had ever addressed this issues. Last, Christiana argues that this Court's "faulty" interpretation of NRS Chapter 116 radically changed the way participants in this area of law conducted business for more than 20 years, because reasonable lenders would not have interpreted NRS 116.3116 as extinguishing their Deed of Trust.[2]

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[2] *See* Christiana's Motion to Dismiss at 4:21-23

K&P submits that SFR is to be applied retrospectively as well as prospectively because SFR did not create new law. It merely interpreted a statute that has been in effect since 1991. This Court was presented with identical arguments in the Amici Briefs filed in support of U.S. Bank's Motion for Rehearing in SFR and rejected them. Further, reasonable lenders did not misunderstand the statute, they chose to interpret it in a manner that suited their dialogue when arguing with HOA's. Last, SFR did not determine that recording of the CC&Rs created the HOA super priority lien, the statute does.

IV. ARGUMENT

A. Background Relative to Certified Question:

The case in question, SFR Investment Pool I, LLC v. US Bank, N.A., 334 P.3d 408, was decided by this Court on September 18, 2014. Virtually every case before the United States District Court for the District of Nevada as well as the Nevada State District Courts regarding the subject of HOA foreclosures involves a lien that was foreclosed by a Homeowners Association as a result of the property owner defaulting on the payment of monthly Association dues and assessments. In every one of those cases the property was secured by a Deed of Trust in favor of a financial institution. The SFR case presented the question of whether or not a Homeowners Association's lien under NRS 116.3116(2) is a true priority lien such that its

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foreclosure extinguishes a first deed of trust on the property and if so, whether it can be foreclosed nonjudicially. This Court answered both questions in the affirmative. This Court also addressed arguments regarding the content of notices provided to US Bank and whether or not a mortgage savings clause contained within the Association's declaration of CC&Rs was valid. This Court ruled that since the notice of default and notice of sale were provided to other interested parties and not just the lender that the notices were not required to breakdown the amount of super priority lien. This Court also ruled that a mortgage savings clause in the CC&Rs violated NRS 116.1104.

1. This an issue of first impression with no controlling precedent.

This issue is clearly an issue of first impression in Nevada. While there may be a myriad of cases before the Federal and State Courts Nevada, there is yet to be any precedential decision from any appellate authority on the issue of whether SFR should not be applied retroactively.

2. There are conflicting decisions.

This issue is contested and there are conflicting decisions between various courts in Nevada. In this case, the federal court determined that SFR is to be applied prospectively only. However, there are other cases where trial level courts have determined that SFR applies retrospectively. In at least two other federal cases Judge

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Susan Johnson rejected the bank's argument for prospective application only. In case no. A-15-7122683 and case no. A-13-693826 Judge Johnson was presented with the same facts as this case. Judge Johnson applied the holdings in Morales-Izquerdo v. Department of Homeland Security, 600 F.3d 1076, 1087-1088 (9th Cir. 2010) and Rivers v. Roadway Express, 511 U.S. 298 (1994) which stated that when a court interprets a statute, '" it is explaining its understanding of what the statute has meant continuously since the date when it became law.'" Morales-Izaquierdo, 600 F.2d at 1088, *quoting* Rivers, 511 U.S. at 313 n.12. As a consequence, judicial interpretations are given "[f]ull retroactive effect[.] Morales-Izaquerdo, 600 F.3d at 1088.

Because this Court was interpreting NRS 116. 3116, et seq., the same rules apply. This Court was explaining what the statute has meant since it became law in 1991.

3. The issue has broad application.

The resolution of this issue will have an immense impact on the Nevada homeowners' association foreclosure market and will be applied to all foreclosures and litigation involving said foreclosures across Nevada. This Court has the final authority to interpret issues of Nevada law. Danforth v. Minnesota, 552 U.S. 264, 291-92 (2008). The issue presented here is clearly important to Nevada's public

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policy relating to homeowners associations and those persons who purchased properties at foreclosure sales with the belief that the first deed of trust was extinguished by the HOA foreclosure. Here, a ruling that SFR does not apply to those foreclosures occurring prior to September 18, 2014 would greatly impact the rights of those purchasers.

In addition, adopting Christiana' argument would make the parties who were on the side of the arguments that SFR agreed with (the winners) now losers and those parties that were on the losing side of the argument would become winners because, regardless of the position they took or how they interpreted the statute, the decision of this Court will not apply to them if the HOA foreclosure occurred prior to September 18, 2014.

In Shadow Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc., 366 P.3d 1105 (Nev. 2016) this Court stated:

> Where the complaining party has access to all the facts surrounding the questioned transaction and merely makes a mistake as to the legal consequences of his act, equity should normally not interfere, especially where the rights of third parties might be prejudiced thereby.

The fact that banks misinterpreted NRS 116.3116 is not a basis for upsetting every validly conducted HOA foreclosure that occurred prior to SFR.

In a similar HOA foreclosure involving the extinguishment of a deed of trust held by J.P Morgan Chase Bank, N.A., Case No. A-13-679365-C, Judge Douglas E.

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Smith stated, "A persons misinterpretation of the law does not make the consequences unfair, especially with a sophisticated party such as Chase." Yet, that is what Christiana argues for in this instance. The bank's want to be relieved of the consequences of their misinterpretation of the law.

B. SFR Applies to the Law at Issue, a statute enacted in 1991, and all subsequent transactions subject to that law:

In its Motion to Dismiss Christiana alleged that the decision in SFR should not be applied retroactively. Christiana's argument suggests that SFR does not even apply to the litigants in SFR despite the fact that this Court clearly remanded the case for further proceedings consistent with the decision. Christiana's contention also means that the decision of this Court resolving a conflict by the lower courts did not overturn and/or reverse those court's decisions with which this Court disagreed. *Since this case is being decided after SFR and Christiana claims it does not apply, then SFR has no application retroactively or prospectively.*

SFR interprets a statute from 1991. The language at issue was written in 1991 and this case, and all other cases generically referred to by Christiana in its Motion to Dismiss occurred factually subject to that law. The fact that Christiana and other lenders chose to interpret the statute in a manner inconsistent with the express language is not a basis for relief. In fact, this issue was raised in SFR and this Court rejected the argument relying, in part, on language in 7912 Limbwood Court Trust

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v. Wells Fargo Bank., N.A., 979 F.Supp. 2d 1142, 1152 (D. Nev. 2013), specifically addressing the fact that the law was adopted in 1991 and the statute might entitle an Association to a super priority lien over a first deed of trust. SFR at 418. This also dismissed the alleged due process violation claims Christiana raised as a basis for the denial of retroactive application. This issue was argued, denied and there is no good faith basis such as a change in the law.

Christiana claims that SFR overruled clear precedent. This is not true. SFR is the first case to address the claims by lenders that the specific language of NRS 116.3116(2) should not be read to permit an association lien to have priority over a first deed of trust. There is not one single authoritative case to which Christiana can point from the date of the first deed of trust in this case indicating any precedent that an HOA assessment lien does not have a limited super priority over a first deed of trust.

Christiana and the federal court relied on Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). However, the cases cited by the United States Supreme Court in Chevron make the distinction clear. Chevron relied upon Hanover Shoe v. United Shoe Mach. Corp, 392 U.S. 481, 496 (1968) wherein it was determined that no prior long-standing precedent exists upon which the actor was relying until a subsequent decision reversed the precedent making the actions wrongful. In that situation,

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nonretractile application would be appropriate. Chevron relied upon a different case, Allen v. State Board of Elections, 393 U.S. 544, 572 (1969) to highlight an issue of first impression. That case involved consolidated matters regarding the application of the Voting Rights Act of 1965 and specifically the prohibition under Section 5 that no new voting procedures could be enacted by a state without receiving a declaratory judgment in the USDC for the District of Columbia that the new law does not deny or abridge the right to vote by race or color. The question was whether the new laws fell within Section 5. The United States Supreme Court determined that the new enactments were not clearly subject to Section 5 although determining that the result was that they were. Therefore, the court declined to make its decision retroactive and did not require new elections but the laws would not be effective in the future.

These are not the same factual situations as in SFR. The law at issue (NRS 116.3116) is over 20 years old. The language had not changed and there is no question the law applied. There is no question if the actions were subject to the law. The only issue is whether Christiana and other lenders were interpreting the law correctly. It is not whether they relied upon a long-standing case precedent. They were not. This is not a brand new law or a new provision that had no predecessor in the prior version of the law. This only arises because Christiana and other lenders

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chose to, internally, read the statute in one manner. A manner which, ultimately, was proven wrong. The doctrine of nonretroactivity has no application herein.

C. This Court Has Already Rejected Christiana's Prospective Arguments:

As noted above, in adopting the "prospective only" argument, the federal court has determined that the parties who were on the side of the arguments that SFR agreed with (the winners) are now losers and those parties that were on the losing side of the argument are now winners because, regardless of the position they took or how they interpreted the statute, the decision of the Nevada Supreme Court will not apply to them if the HOA foreclosure occurred prior to September 18, 2014, the date of the SFR decision. In this case, the federal court erroneously concluded that this Court did not address the retroactivity of its decision. However, this Court was presented with arguments against the retroactive application of its decision in two separate Amicus briefs.

On October 16, 2014, a group of banks consisting of Bank of America, N.A.; Wells Fargo Bank, National Association; JP Morgan Chase, National Association; Citibank, National Association; CitiMortgage, Inc.; Nationstar Mortgage, LLC; and Ocwen Loan Servicing, LLC, filed an Amicus Curiae Brief supporting U.S. Bank's Petition for Rehearing. At p.15 of the brief the following argument was presented:

> **V. If the Court leaves its initial decision in place, it should clarify that the decision only applies prospectively.**

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Amici and other Nevada lenders have outstanding hundreds of millions if not billions of dollars in first mortgage loans on Nevada properties that were sold in nonjudicial foreclosures prior to this Court's initial decision. If the Court leaves in place its holding that an HOA may extinguish a first mortgage by foreclosing nonjudicially, these mortgages are at risk of retroactive extinction. Accordingly, the court should protect the interest of lenders and homeowners who have relied upon the practical understanding of NRS 116.3116(2). The Court can do this by clarifying that its opinion only applies prospectively. In Breithaupt v. USAA Prop. & Cas. Ins. Co., the Court provided the following standard for deciding whether an opinion has retrospective effect or prospective effect only. Importantly, even where a decision involves and issue of first impression, the Court may opt to only give the decision prospective effect:

> In determining whether a new rule of law should be limited to prospective application, courts have considered three factors; (1 "the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed;" (2) the court must "weigh the merits and demerits in each case by looking to the prior history of the rule in question, it purpose and effect, and whether retrospective operation will further or retard its operation;" and (3) courts consider whether retroactive application "could produce substantial inequitable results."

Breithaupt v. USAA Prop. & Cas. Ins. Co., 110 Nev. 31, 35, 867 P.2d 402, 405 (19994) (quoting Chevron Oil. v. Huson, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355 (1071)

Clearly, each of the three Breithaupt factors is satisfied in this case, as to the first factor, the Court's initial opinion decides an issue of first impression whose resolution was not clearly foreshadowed. As explained in Section II above, until very recently, actors in the Nevada real estate marked did not seriously believe that a nonjudicial HOA foreclosure could extinguish a first security interest. This was reflected in the extremely low price paid for HOA-foreclosed properties: in this case, for instance, a property encumbered by an $885,000 security interest sold for only $6,000. It was also reflected in the decision of the substantial majority of courts which held that the first security interest

survived. And finally, it was reflected in the business strategy of real estate speculators, who focused on quickly renting out these properties before a first mortgagee could foreclose.

Second, giving retrospective effect to the Court's initial decision does not promote the underlying goal of NRS 116.3116(2). According to SFR and the Court's opinion, the statute's purpose is to incentivize mortgage lenders to pay HOA assessments under threat of losing their security interests. However, it is obviously too late for the statute to accomplish this purpose with respect to nonjudicial foreclosure which occurred before the Court's opinion.

Finally, giving retrospective effect to the Court's decision would produce substantial inequitable results. As explained in Section I above, it is grossly inequitable to lenders to allow a first deed of trust to be extinguished for pennies on the dollar (or in this case, seven-tenths of one penny on the dollar) by a nonjudicial HOA foreclosure. Allowing a first security interest to be extinguished would also subject thousands of homeowners who have already endured an HOA foreclosure to six-figure unsecured debts.

A similar argument was made by United Trustees Association and American Legal & Financial Network in its Amicus Brief in Support of U.S. Bank's Petition for Rehearing, which was also filed October 16, 2014, by the same law firm that represents Christiana in this case. In United Trustee's Amicus Brief the following argument was presented to the Nevada Supreme Court:

2. The Majority opinion creates legal uncertainty regarding the validity of prior HOA sales.

Opportunistic investors buying properties at HOA non-judicial sales with the hope that the first mortgage is wiped out arose over the last four years. For nearly two decades, HOAs and first mortgagees jointly believed that the first mortgage survived the HOA's non-judicial foreclosure – as evidenced by many CC&Rs providing "mortgage protection clause" to this day. What happens to older sales now? Does the purchaser at an HOA sale in 1993 now hold title or does the person who bought the same property from the foreclosing first mortgagee? Large numbers of properties sold at HOA non-judicial sale over the last

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> couple of decades could now be tied up in title disputes. The massive impending litigation will impact Nevada's already fragile housing market, as well as innocent homeowners and lenders.
>
> Granting rehearing and adopting the Dissent's view that HOA's must judicially foreclosure (sic) on their super-priority lien will eliminate this risk.

Two separate Amicus Briefs presented these arguments to this Court on October 16, 2014. Subsequently, in a decision agreed upon by all seven justices, this Court denied U.S. Bank's Petition for Rehearing on October 18, 2014. In the order denying U.S. Bank's petition, this Court included a footnote relating specifically to the Amicus Briefs filed in support of U.S. Bank's petition. The footnote reads as follows:

> There are five pending motions for leave to file briefs of amici curiae in support of the petition for rehearing: (1) by the Silver State Schools Credit Union; Nevada Mortgage Brokers Association; and the Nevada Association of Mortgage Professionals, Inc.; (2) one by Bank of America N.A.; Citibank, National Association; CitiMortgage, Inc.; JP Morgan Chase, National Association; Nationstar Mortgage, LLC; Ocwen Loan Servicing, LLC and Wells Fargo Bank, National Association; (3) one by Mortgage Bankers Association; (4) one by United Trustees Association and American Legal & Financial Network; and (5) one for Nevada Land Title Association. Cause appearing, we grant the motions and direct the clerk to (1) file the amicus brief received on October 10, 2014; (2) detach the proposed amicus brief attached to the motion filed on October 13, 2014, and file is separately herein; (3) detach the proposed amicus brief attached to the motion filed on October 14, 2014 and file it separately herein; (4) file the amicus brief received on October 15, 2014; and (5) file the amicus brief received on October 16, 2014. NRAP 29(a). **We have considered the briefs of amici curiae in resolving the petition for rehearing.**

Further, since issuing its decision in SFR this Court has remanded more that 150 cases with directives to the lower court to conduct proceedings consistent with

this Court's holding in SFR. Virtually every case in front of this Court on this issue involved HOA foreclosures that occurred prior to the SFR decision. If it was not the intent of this Court that SFR would apply retrospectively, this Court would not have remanded all those cases for proceedings consistent therewith.

Additionally, prior to issuing its decision in this case, on August 15, 2015 the very same federal court determined that SFR did apply retrospectively. In U.S. Bank, N.A, v. SFR Investment Pool I, LLC, 3:15 cv 00241-RCJ-WGC,(2015 U.S. Dist. LEXIS 112807) the federal court stated:

> US Bank argues that SFR Investments Pool I's interpretation of NRS 116.3116 should not apply retroactively, i.e. the it should only apply to HOA foreclosure sales occurring after the date SFR Invs. Pool I, LLC was decided. The Court is compelled to reject the argument under Erie. The SFR Investments Pool I Court itself applied NRS 116.3116 retroactively in the way US Bank argues against. The HOA foreclosure sale had already occurred in that case, as well, and the Nevada Supreme Court gave no indication that its ruling was not to apply in the case before it but only to future HOA foreclosure sales.

The federal court's August 15, 2015, ruling is consistent with the actions of this Court in remanding more than 150 cases so far involving HOA sales that occurred prior to the SFR decision. Thus, regardless of whether or not this Court has adopted the Breithaupt/Chevron factors, it is abundantly clear that this Court intended that SFR apply retrospectively.

Additionally, when the Breithaupt/Chevron factors are correctly applied to the actual facts of this case, this Court cannot reach the conclusion that SFR should not

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be applied retrospectively. First, it was not the practice in the real estate industry to treat such sales as not extinguishing a deed of trust. Quite the opposite is true, as is shown by the (2010) opinion of the Commission for Common Interest Communities and the (2012) opinion Nevada Real Estate Board, and the principle of first in time is first in right has been around for centuries, so any confusion (to the extent there was any) was only on the part of lenders, but certainly not the entire real estate industry. Second, SFR did not involve a new principle of law. The statute interpreted by SFR was enacted by the Nevada Legislature in 1991, twenty-three years before SFR, and SFR did not overrule any clear precedent. Nor was the language of NRS 116.3116 ambiguous, all seven Supreme Court Justices agreed that the statute was clear and unambiguous. Just because lenders now claim that they read it in a manner most favorable to them does not make it ambiguous.

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D. Reasonable Lenders Did Not Misunderstand the Statute:

In its Motion to Dismiss, Christiana argued that this Court's interpretation of NRS Chapter 116 is contrary to how a reasonable lender would have understood it. This is simply not the case. NRED is a division of the Nevada Department of Business and Industry. In SFR the Nevada Supreme Court stated:

> The Nevada Real Estate Division of the Department of Business and Industry (NRED is charged with administering Chapter 116, *NRS 116.615; see State Dep't. of Bus & Indus. v. Nev. Ass's Servs., Inc., 294 P.3d 1223, NRS 116.623(1)(a)* tasks NRED with issuing "advisory

> opinions as to the applicability or interpretation of . . . [a]ny provision of this chapter."

(334 P.3d at 416-417)

This Court referred to its earlier decision in State Dep't. of Bus & Indus. v. Nev. Ass's Servs., Inc., 294 P.3d 1223, which held that Chapter 116 requires that the Commission for Common Interest Communities and Condominium Hotels (CCICCH) and the Real Estate Division, and no other commission or division, interpret NRS Chapter 116. When discussing the provisions of NRS 116.615 this Court stated:

> NRS 116.615 provides, in pertinent part of the chapter as follows:
>
> > 1. The provision of this chapter must be administered by the [Real Estate] Division, subject to the administrative supervision of the Director of the Department of Business Industry.
> >
> > 2. The CCICCH and the [Real Estate] Division may do all things necessary and convenient to carry out the provisions of this chapter, including, without limitation, prescribing such forms and adopting such procedures as are necessary to carry out the provision of this chapter.
> >
> > 3. [The CCICCH], or the [Real Estate] Administrator with the approval of the [CCICCH], may adopt such regulations as are necessary to carry out the provisions of this chapter.
>
> The language of this provision is clear that CCICCH and the Real Estate Division are responsible for regulating and administering the chapter. There is no provision granting any other commission or department the authority to regulate or interpret the language of the chapter.

(294 P.3d at 1227)

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Thus, the CCICCH and NRED are recognized by this Court as the proper authorities to interpret and administer Chapter 116, NRS 116.615. On December 12, 2012, NRED issued Advisory Opinion No. 13-01, which defined the super-priority portion of an HOA lien and announced to the entire real estate sector, including lenders, that an HOA super-priority lien was superior to a first deed of trust and when foreclosed, removed all junior liens, including a lender's deed of trust. This Court relied on the NRED Advisory Opinion 13-01 in reaching its decision in SFR. (*Id.* at 417).

Further, as noted above, this Court also determined that CCICCH is responsible for interpreting Chapter 116. On December 8, 2010, CCICCH issued Advisory Opinion No. 2010-01, which addressed the fees that an HOA could collect as part of the Super-Priority portion of the HOA lien, in its Advisory Opinion the commission concluded:

> **Conclusion.** The super priority language contained in the UCIOA 3-116 reflected a change in the traditional common law principle that granted first priority to a mortgage lien recorded prior to the date a common expense assessment became delinquent. The six month priority rule contained in UCIOA 3-116 established a compromise between the interests of the common interest community and the lending community. The argument has been advanced that limiting the super priority to a finite amount, i.e., UCIOA's six months of budgeted common expense assessments, is necessary in order to preserve this compromise and the willingness of lenders to continue to lend in common interest communities. The state of Connecticut, in 1991 NCCUSL, in 2008, as well as Fannie Mae and local lenders* have all concluded otherwise.

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The following footnote was included in the commission's conclusions:

> *New Comment No. 8 to UCIOA 3-116(2008).
> 8. Associations must be legitimately concerned, as fiduciaries of the unit owners, that the association be able to collect periodic common charges from recalcitrant unit owners in a timely way. To address those concerns, the section contains these 2008 amendments:
>
> **First, subsection (a) is amended to add the cost of the association's reasonable attorneys fees and court costs to the total value of the association's existing "super lien"** – currently, 6 months of regular common assessments. This amendment is identical to the amendment adopted by Connecticut in 1991; see C.G.S. Section 47-258(b). The increased amount of the association's lien has been approved by Fannie Mae and local lenders and has become a significant tool in the successful collection efforts enjoyed by associations in that state.
> (Emphasis in original)

It is abundantly clear that since as early as December 2010, lenders have been fully aware of the interpretation of the statute by CCICCH and NRED. It is also abundantly clear that Lenders and Fannie Mae were involved in the drafting of the UCIOA and its amendments. For lenders to come into court and claim that there was confusion in the real estate industry prior to SFR is simply untruthful.

Further, banks, and in particular, Bank of America, N.A., Christiana's predecessor in this case, have been aware of the reality that an HOA foreclosure would extinguish their deed of trust for several years prior to the NRED Advisory Opinion and the SFR decision. For example, in the case of Bank of America, the law firm of Miles, Bauer, Bergstrom & Winter, LLC has provided countless numbers of

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sworn affidavits claiming that it forwarded letters to various HOA's and their agents. BANA's understanding of the implications of an HOA foreclosure are clearly expressed in those letters. It was BANA that held the Deed of Trust in this case at the time the notices were mailed and the auction was conducted by the HOA. The Deed of Trust was later assigned to Christiana. Clearly, any argument being asserted that prior to this Court's decision in SFR lenders were not aware of the potential that an HOA foreclosure would extinguish a first deed of trust are false. Lenders, and BANA in particular, have always been aware of the implications of the statute. They just simply challenged the HOA's in hopes the HOA's would acquiesce to the bank's claims of superior status.

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E. SFR did not determine that the recording of the CC&R's created the lien, the Statute does:

In the federal court, in referring to SFR, Judge Jones stated in his order as follows:

> Under that recent interpretation, a first mortgage recorded before and HOA lien even arises is extinguish by a foreclosure of the HOA lien so long as the declaration creating the HOA was recorded before the first mortgage was. In other words, the mere recordation of an HOA declaration that could in theory give rise to future HOA liens is treated under Chapter 116 as essentially constituting record notice of yet-nonexistent HOA liens.

This appears to be based on the misconception that this Court, in SFR, court reached that conclusion in a vacuum. That is certainly not the case. The Nevada Legislature

adopted the UCIOA in 1991 and fashioned that statute after the act. Subsection (5) of NRS 116.3116 states as follows:

> 5. Recording of the declaration constitutes record notice **and perfection of the lien**. No further recordation of any claim of lien for assessment under this section is required.
> (Emphasis added)

Thus, it is the legislature, not SFR, that determined that the lien is perfected at the time of the recording of the CC&Rs. NRS 116.3116 makes it clear that the super priority exist only in cases where the CC&Rs were recorded prior to the Deed of Trust. It is not a matter of the lien being non-existent. It exists from the moment the declaration of CC&R's is recorded. This is not a novel interpretation on the part of this Court in SFR, it is simply the application of common law theory of first in time is first in right and in fact was based on the Federal District Court's opinion in 7912 Limbwood Court Trust v. Wells Fargo Bank, N.A., et al., 979 F. Supp. 2d 1142, 1152 (Nev. 2014). Judge Philip Pro well-reasoned opinion in Limbwood is as follows:

> . . . Under settled foreclosure principles, foreclosure of a superior lien extinguishes junior security interests (citations omitted). If junior lienholders want to avoid this result, they readily can preserve their security interest by buying out the senior lienholder's interest (citations omitted).
>
> Nothing in the statute suggests that anything other than normal foreclosure principles apply to an HOA foreclosure sale, nor is it inconsistent with Chapter 116 to apply the usual principle that foreclosure of a senor interest extinguishes junior interests.
> . . .

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> . . . Chapter 116 provides that an HOA perfects its lien by recording the declaration, which provides notice to any future first deed of trust holder of the potential that, under the statute, a super priority lien may take priority over the first deed of trust, even if the notice of default on the assessments is recorded after the first deed of trust. *Id.* § 116.3116(4). Chapter 116 was enacted in 1991, and thus Wells Fargo was on notice that by operation of the statute, the 1995 Elkhorn CC&Rs might entitle the HOA to a super priority lien at some future date which would take priority over the first deed of trust recorded in 2004. Consequently, the conclusion that foreclosure on an HOA super priority lien extinguishes all junior liens, including a first deed of trust recorded prior to a notice of delinquent assessments, does not violate Wells Fargo's due process rights.
>
> (*Id.* at 1149,1150 & 1152)

An HOA lien is no different than the concept of the recording of a deed of trust. When the bank records its deed it has a lien, it is *of record*, and when the borrower defaults the bank forecloses, but the bank cannot foreclose without a default. Likewise, when the HOA records its declaration it has a lien that is *of record*, when the homeowner defaults the HOA forecloses, but not before a default. Because the Deed of Trust is recorded after the declaration, the Associations lien is *first recorded* and, therefore, *senior* or *prior* to the Deed of Trust.

In SFR, this Court also likened the HOA lien to a tax lien. This court stated:

> . . . thus, the association's foreclosure properly should be viewed as extinguishing of the otherwise first mortgage (to the same extent that foreclosure of a real estate tax lien would extinguish that same mortgage).

(334 P.3d at 414)

The idea that the HOA super-priority lien would extinguish the later recorded deed of trust is not a novel idea. This is centuries old lien law, and as noted above,

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pursuant to NRS 116.3116(2)(a) the HOA lien is *prior to all other liens* and encumbrances on the unit ***except*** liens and encumbrances recorded ***before*** the recordation of the declaration. Therefore, it is abundantly clear that the legislature intended that the common law theory of first in time is first in right applies to HOA liens and deeds of trusts under NRS 116.3116 and there should be no doubt that any lenders learned counsel would be able to recognize that the bank's deed of trust, if recorded after the declaration of CC&Rs, would be extinguished by the foreclosure of and HOA super-priority lien.

When all the foregoing is taken into consideration, the conclusion that "the practice in the real estate industry prior to the announcement of Nevada Supreme Court's controversial decision was to treat such sales as not extinguishing first mortgages" lacks credible evidentiary support and cannot be justified.

CONCLUSION:

Based on all the foregoing, it is clear that this Court's decision in SFR was intended to apply both prospectively and retrospectively. The SFR decision merely interpreted a statute that was enacted in 1991. The fact that lenders chose to

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interpret the statute in a manner that was ultimately proven wrong does not constitute a basis for only a prospective application.

DATED this 25th day of April, 2016.

/s/ John Henry Wright
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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32 (a)(4), the typeface requirement of NRAP 32(a)(5) and the type style requirement of NRAP 32(a)(6) because this brief has been prepared in proportionately spaced typeface using WordPerfect X6 in 14 point and Times New Roman.

2. I further certify that this brief complies with the page- or typed-volume limitations of NRAP 32(a)(7) because excluding the parts of the brief that are exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 7,330 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires

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every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any of the transcript or appendix where the matter relied on is found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 25th day of April, 2016.

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