UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CHRISTINA TRUST,

Plaintiff,

vs.

K&P HOMES et al.,

Defendants.

2:15-cv-01534-RCJ-VCF

ORDER

This case arises out of a homeowners' association foreclosure sale. The Court recently granted a motion to dismiss the Counterclaim and denied a countermotion for offensive summary judgment on the Counterclaim. Pending before the Court is Defendant's Motion to Reconsider (ECF No. 23). For the reasons given herein, the Court denies the motion.

I. FACTS AND PROCEDURAL HISTORY

On or about July 25, 2007, Rita Wiegand purchased real property located at 7461 Glimmering Sun Avenue, Las Vegas, Nevada, 89178 (the "Property"), giving lender Universal American Mortgage Co., LLC ("UAMC") a promissory note for $284,200 (the "Note"), secured by a deed of trust (the "DOT") against the Property. (Compl. ¶¶ 5, 9–10, ECF No. 1). On January 30, 2014, Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP, f.k.a. Countrywide Home Loans Servicing, LP ("BOA"), assigned the Note and DOT to

Plaintiff Christina Trust. (*Id.* ¶ 13; Assignment, ECF No. 1-1, at 29).[1] After recording a Notice of Delinquent Assessment Lien (the "NDAL"), a Notice of Default and Election to Sell ("the "NOD"), and a Notice of Foreclosure Sale (the "NOS"), the Tuscalante Homeowners Association (the "HOA"), through its agent Nevada Association Services, Inc. ("NAS"), sold the Property at auction to Defendant K&P Homes ("K&P") for $40,000 on May 31, 2013. (Compl. ¶¶ 6, 11–12, 14–17). None of the pre-sale notices identified what portion of the HOA lien was for superpriority versus subpriority amounts, such as late fees, collection costs, interest, fines, etc., or provided any notice of a right to cure. (*Id.* ¶¶ 19–22). Furthermore, the HOA and NAS did not comply with notice requirements under Chapter 116 of the Nevada Revised Statutes ("NRS"). (*Id.* ¶ 26).

Plaintiff sued Wiegand and K&P in this Court for unjust enrichment and to quiet title to the Property, i.e., for a declaration that the DOT still encumbers the Property because the HOA sale was not in accordance with Chapter 116, did not provide an opportunity to cure the default, was commercially unreasonable, and did not comport with due process.[2] K&P answered and filed a Counterclaim to quiet title to the Property, i.e., for a declaration that K&P is the title owner of the Property, that its deed is valid and enforceable, that the HOA sale extinguished Plaintiff's DOT, and that K&P's title is superior to any adverse interest in the Property. K&P also filed a Third-Party Complaint against Wiegand for the same declarations. Wiegand does not

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1 The Complaint contains no allegation of any assignment from UAMC to BOA, and neither the Assignment attached as Exhibit 3 or any other attachment indicates any such transfer. Plaintiff has sufficiently alleged beneficial ownership of the Note and DOT (reading the allegation that Plaintiff is the beneficiary of the DOT favorably to Plaintiff to imply that she is also the beneficiary of the Note), (*see* Compl. ¶ 5), but without further proof of the chain of assignment, the Complaint could probably not survive a summary judgment motion as to Plaintiff's standing.

2 The claim for a preliminary injunction is not a separate cause of action, and no motion for a preliminary injunction has been filed.

appear to have been served with any pleading. Plaintiff moved to dismiss the Counterclaim. K&P moved for offensive summary judgment on the Counterclaim. The Court granted the motion to dismiss and denied the motion for summary judgment. Defendant has asked the Court to reconsider.

II. DISCUSSION

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 that interpretation retroactively). The Court ruled that in the present case, the *Huson* factors weighed against the retroactive application of *SFR Investments Pool 1, 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 that the Nevada Supreme Court had adopted it, so there was no *Erie* problem with its application, and the 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 402, 405 (Nev. 1994). This Court in *US Bank, N.A. v. SFR Invs. Pool 1, LLC* had resolved the motions before it on different grounds and therefore did not address the issue closely but assumed the Nevada Supreme Court would apply its ruling retroactively. A closer look, however, showed both that *SFR Investments Pool 1* 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 1* did not apply retroactively under the *Huson* rule, as approved in *Breithaupt*. The Court noted that Defendant had failed to argue under the *Huson*/*Breithaupt* factors but essentially proposed a rule that would necessarily favor

retroactive application where the statute being interpreted predated a court's interpretation of it, which rule would obviate any retroactivity analysis.

Defendant has asked the Court to reconsider. Defendant argues that the *SFR Investments Pool 1* Court was presented with arguments against retroactivity and rejected them by applying the rule in that case (and later in other cases) where the HOA foreclosure predated that opinion. The opinion did not address retroactivity, however, under either the *Huson*/*Breithaupt* line of cases or otherwise, and arguments under that line of cases were made only in amici briefs, not in the opening or answering briefs, which means the issue was waived by both sides, and the Court had discretion whether to address it *sua sponte*. *See Powell v. Liberty Mut. Fire Ins. Co.*, 252 P.3d 668, 672 n.3 (Nev. 2011) (citing Nev. R. App. Proc. 28(a)(8) (2009)). The Court's silence on the issue indicates that it did not exercise that discretion. Whatever the reasons, the issue was not litigated. The Court expresses no opinion as to whether it would certify the issue if asked.

CONCLUSION

IT IS HEREBY ORDERED that the Motion to Reconsider (ECF No. 23) is DENIED.

IT IS SO ORDERED.

Dated this 3rd day of December, 2015.

ROBERT C. JONES
United States District Judge

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CHRISTIANA TRUST, A DIVISION OF WILMINGTON SAVINGS FUND SOCIETY, FSB NOT IN ITS INDIVIDUAL CAPACITY BUT AS TRUSTEE OF ARLP TRUST 3,

Plaintiff,

vs.

K&P HOMES, A SERIES LLC OF DEK HOLDINGS, LLC, a Nevada Limited Liability Company,

Defendants.

K&P HOMES, A SERIES LLC OF DEK HOLDINGS, LLC, a Nevada Limited Liability Company,

Counterclaimant,

vs.

CHRISTIANA TRUST, A DIVISION OF WILMINGTON SAVINGS FUND SOCIETY, FSB NOT IN ITS INDIVIDUAL CAPACITY BUT AS TRUSTEE OF ARLP TRUST 3,

Counterdefendant.

CASE NO: 2:15-CV-01534-RCJ-VCF

MOTION TO CERTIFY QUESTION OF LAW TO THE SUPREME COURT OF NEVADA

Oral Argument Requested

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K&P HOMES, A SERIES LLC OF DEK HOLDINGS, LLC, a Nevada Limited Liability Company,

Third-Party Plaintiff,

vs.

RITA WIEGAND, an individual,

Third-Party Defendant.

COMES NOW Defendant and Third-Party Plaintiff, K&P HOMES, A SERIES LLC OF DEK HOLDINGS, LLC, (K&P) by and through its counsel of record, JOHN HENRY WRIGHT, ESQ., of THE WRIGHT LAW GROUP, P,.C., hereby moves the Court to Certify the following state law question to the Nevada Supreme Court:

Whether the Nevada Supreme Court's holding in SFR Investment Pool I, LLC v. U.S. Bank, N.A., 334 P.3d 408 (Nev. 2014) is to be applied "retroactively" to cases involving HOA foreclosures that occurred prior to the date of the decision (September 18, 2014), or is the Court's holding only to be applied prospectively to HOA foreclosures that have occurred after September 18, 2014.

Defendant and Third-Party Plaintiff's motion is made pursuant to Rule 5 of the Nevada Rules of Appellate Procedure (NRAP) and is supported by the following Memorandum of Points and Authorities.

Dated this 6th day of January, 2016.

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MEMORANDUM OF POINTS AND AUTHORITIES

1. FACTUAL BACKGROUND:

1. In January 2007, the Association 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.

2. 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]

3. Wiegand became delinquent in the payment of the Association assessments and on July 31, 2012, the Association, through NAS, recorded a Notice of Delinquent Assessment Lien with the Clark County Recorder.

4. Wiegand failed to pay the Associations assessment lien and on January 30, 2013, the Association 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.

5. 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.

6. 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.

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

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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 (ECF 2) has no interest in this case.

8. 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 Association, 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.

2. PROCEDURAL BACKGROUND:

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. Christiana also filed a Certificate of Interested Parties, stating that Christiana is not aware of any other interested parties to this action.

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

On October 5, 2015 Christiana filed a Motion to Dismiss claiming that NRS Chapter 116 violates due process; NRS 116.3116 violates the takings clause of the United States and Nevada Constitutions; K&P's act of requesting quiet title and declaratory relief invokes government action; the non-judicial foreclosure provisions of NRS Chapter 116 violate due process; the ramifications of NRS Chapter 116 violates public policy; and, the Nevada Supreme Court's decision in SFR 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 the Nevada Supreme Court's decision in SFR Investment Pool I, LLC v. U.S. Bank, N.A., 334 P.3d 408 (Nev. 2014) is to only be applied prospectively. The Court reserved judgment on Christiana's due process issue and determined the motion under Chevron Oil Co. v. Huson, 404 U.S. 97 (1971).

In reaching its conclusion, the Court determined that in SFR the Nevada Supreme Court did not address the issue of retroactive application because the matter was determined on different grounds, the Nevada Supreme Court assumed that its ruling would be applied retroactively.

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Therefore, this federal court conducted an analysis under Huson and Breithaupt 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 the Nevada Supreme 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 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 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 the issue was waived by both sides, and the Court had discretion to address it *sua sponte*. This Court determined that the SFR Courts' silence on the issue indicates that is did not exercise that discretion and for whatever the reasons, the issue (of retroactive application) was not litigated.

In closing, the court stated that it expressed no opinion as to whether it would certify the issue if asked. K&P, therefore, respectfully asks this court to certify the question to the Nevada Supreme Court in accordance with NRAP 5.

3. APPLICABLE LEGAL STANDARD:

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:

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> (a) **Power to Answer.** The Supreme Court may answer questions fo 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 nay 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.

Here, and as set forth in greater detail below, the issue to be certified is ripe for certification as the current proceedings involve interpretation of Nevada law for which there is no controlling precedent and resolution fo the issue is outcome determinative to this case. Thus, it is clear that a federal court has authority to certify the legal question to the Nevada Supreme Court.

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, Ind., 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).

4. ARGUMENT:

A. Proposed Question to be Certified:

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K&P respectfully request this Court certify the following question to the Nevada Supreme Court:

> **Whether the Nevada Supreme Court's holding in SFR Investment Pool I, LLC v. U.S. Bank, N.A., 334 P.3d 408 (Nev. 2014) is to be applied "retroactively" to cases involving HOA foreclosures that occurred prior to the date of the decision (September 18, 2014), or is the Court's holding only to be applied prospectively to HOA foreclosures that have occurred after September 18, 2014.**

B. Background Relative to the Question to be Certified:

The case in question, SFR Investment Pool I, LLC v. US Bank, N.A., 334 P.3d 408, was decided by the Nevada Supreme 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 foreclosure extinguishes a first deed of trust on the property and if so, whether it can be foreclosed nonjudicially. The Nevada Supreme Court answered both questions in the affirmative. The Supreme 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. The Supreme 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. The Supreme Court also ruled that a mortgage savings clause in the CC&Rs violated NRS 116.1104.

I. 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

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from any appellate authority on the issue of whether SFR should not be applied retroactively.

ii. This issue recurs frequently.

Again, there are countless cases pending in both the federal district courts and the state courts. Therefore, not only is this issue likely to recur, it is recurring in a substantial number of the cases.

iii. There are conflicting decisions.

This issue is contested and there are conflicting decisions between this court and other courts in Nevada. In this case, the court has 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 cases Judge 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 stated:

> Plaintiff also proposes the Nevada Supreme Court's decision, SFR Investments Pool 1, LLC, 130 Nev. Ad.Op. 75, 334 P.3d 408, should be applied retroactively to permit extinguishment of its first deed of trust, and it cites Chevron Oil Co. V. Hudson, 404 U.S. 497, 106-107, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) to support it premise. However, as pointed out by Defendant SFR INVESTMENTS POOL I, LLC, the holding of *Chevron Oil Co.* is not applicable as it dealt with the issue of applying new rules of law retroactively, whereas *SFR Investments Pool I, LLC* involved statutory construction of NRS Chapter 116, which as been in existence since December 31, 1991. As noted in Morales-Izquerdo v. Department of Homeland Security, 600 F.3d 1076, 1087-1088 (9th Cir. 2010), "'[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.'" *Quoting* Rivers v. Roadway Express, 511 U.S. 298, 312-313, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994) 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. Accordingly, this Court concludes the Nevada Supreme Court's decision in *SFR Investments Pool I, LLC* should be applied retroactively, as well as prospectively.

The arguments presented to Judge Johnson were the same arguments that were presented to this court. Yet, Judge Johnson reached the exact opposite opinion on at least two separate occasions.

iv. Whether the issue has broad application.

The resolution of this issue will have an immense impact on the Nevada homeowners'

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association foreclosure market and will be applied to all foreclosures and litigation involving said foreclosures across Nevada.

v. Authority from other jurisdiction is not persuasive in this case.

Because SFR was a case of first impression, there is no persuasive authority from other jurisdictions upon which this court can rely.

vi. K&P has promptly moved for certification.

As noted above, the Court only recently denied K&P's motion for reconsideration on December 3, 2015. Therefore, this motion is timely. K&P makes the current motion now largely because motions to certify questions of state law are typically disfavored on appeal. See e.g., In re Complaint of McLinn, 744 F.2d 677, 681 (9th Cir. 1984) (notice a party should not be allowed a second chance at victory through certification). By bringing the motion now, K&P seeks to have the issues resolved in a timely manner.

vii. If certification will save time, money and resources, or promote cooperative judicial federalism.

While K&P acknowledges this Court's authority to decided cases, it is axiomatic that the Nevada Supreme Court has the final authority to interpret issues of Nevada law. Danforth v. Minnesota, 552 U.S. 264, 291-92 (2008). Without certifying the question, this Court will be left with the task of attempting to predict how the Nevada Supreme Court would rule on the issue. Strother v. S. California Permanente Med. Grp., 79 F.3d 859, 865 (9th Cir. 1996). This approach should be disfavored in this instance; especially considering the issue is likely to be ultimately decided by the Nevada Supreme Court.

viii. The issue implicates Nevada's public policy concerns.

The issue is clearly important to Nevada's public policy relating to homeowners associations and those person 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 that 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

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losing side of the argument would become 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.

K&P believes such an interpretation is a violation of the United States Supreme Court holding in Erie Railroad Co. v. Tompkins, 304 U.S. 64 and 28 U.S.C. § 1652, which states:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

K&P further argues that since issuing its decision in SFR the Nevada Supreme Court has remanded more that 150 cases with directives to the lower court to conduct proceedings consistent with the Supreme Court's holding in SFR. Virtually every case in front of the Supreme Court on this issue involved HOA foreclosures that occurred prior to the SFR decision. If it was not the intent of the Supreme Court that SFR would apply retrospectively, the Supreme Court would not have remanded all those cases for proceedings consistent therewith.

CONCLUSION

Based on all the foregoing, K&P respectfully asks the Court to certify the above referenced question to the Nevada Supreme Court.

DATED this 12th day of January, 2016

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of January 2016, I electronically filed the **K&P HOMES, LLC'S MOTION FOR CERTIFIED QUESTION TO THE NEVADA SUPREME COURT** using the CM/ECF system, which will cause the document to be served upon the following counsel of record:

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CHRISTIANA TRUST, A DIVISION OF WILMINGTON SAVINGS FUND SOCIETY, FSB, NOT IN ITS INDIVIDUAL CAPACITY BUT AS TRUSTEE OF ARLP TRUST 3

Plaintiff,

vs.

K&P HOMES, A SERISE LLC OF DEK HOLDINGS, LLC, a Nevada limited liability company,

Defendants.

Case No.: 2:15-cv-01534-RCJ-VCF

CHRISTIANA TRUST'S OPPOSITION TO MOTION TO CERTIFY QUESTION TO SUPREME COURT OF NEVADA

Plaintiff/Counter-Defendant, Christiana Trust, a Division of Wilmington Savings Fund Society, FSB, not in its Individual Capacity but as Trustee of ARLP Trust 3 ("Christiana Trust"), by and through its attorneys of record, Dana Jonathon Nitz, Esq., and Natalie C. Lehman, Esq., of the law firm of Wright, Finlay & Zak, LLP, hereby submits the following Opposition to Defendant/Counterclaimant K&P Homes, a series of DEK Holdings, LLC ("K&P Homes") Motion to Certify Question to Nevada Supreme Court.

I. INTRODUCTION

By its Counterclaim, K&P Homes sought a judicial determination that the first Deed of Trust held by Christiana Trust was extinguished by the homeowners association foreclosure sale of the property located at 7461 Glimmering Sun Avenue, Las Vegas, Nevada 89178 (hereinafter, the "Property") conducted on May 31, 2013 (hereinafter, "HOA Sale") pursuant to NRS Chapter 116 (hereinafter, the "Statute"). Christiana Trust responded to the Counterclaim by filing a Motion to Dismiss which included the argument that *SFR Investments Pool 1, LLC v. U.S. Bank*, 130 Nev. Adv. Op. 75, 334 P.3d 408 (2014) (hereinafter, "*SFR*") should not be applied retroactively. This Court agreed with Christiana Trust and granted its Motion to Dismiss on the basis of the federal common law principals of equity set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) limiting retroactivity.

K&P Homes now seeks an order from the Court to certify to the Nevada Supreme Court whether the Court correctly applied federal common law principles. However, certification is not proper because this Court's decision is not based on an interpretation of state law, but on federal common law equities. The certification process simply does not permit the Nevada Supreme Court to weigh in on whether a federal district court applied federal common law principles correctly. K&P's redress, if it believes the Court abused its discretion, is to file an appeal.

Moreover, even if a question of state law was present, the decision to certify a question to a state supreme court rests in the "sound discretion" of the district court. Even where state law is unclear, resort to the certification process is not obligatory. See *Lehman Bros. v. Schein*, 416 U.S. 386, 390, 94 S. Ct. 1741, 40 L. Ed. 2d 215 (1974).

II. STATEMENT OF FACTS

Wiegand Loan Documents

On or about July 25, 2007, Rita Wiegand (hereinafter "Wiegand") purchased the Property.[1] The Deed of Trust executed by Wiegand identified Universal American Mortgage

[1] A true and correct copy of the Grant, Bargain, Sale Deed recorded in the Clark County Recorder's Office as Book and Instrument Number 20070725-0005225 is attached to Plaintiff's

Company, LLC as the Lender, and secured a loan in the amount of $284,200.00 (hereinafter the "Wiegand Loan").[2] On October 20, 2009, an Assignment of the Deed of Trust to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing LP was recorded.[3] On January 30, 2014, an Assignment of the Deed of Trust to Christiana Trust was recorded.[4]

The HOA Sale, and Buyer's Acquisition of the Property

On July 31, 2012, a Notice of Delinquent Assessment Lien was recorded against the Property by Nevada Association Services, Inc. (hereinafter "HOA Trustee"), as agent for Tuscalante Homeowners Association (hereinafter "HOA").[5] On January 30, 2013, a Notice of Default and Election to Sell under Homeowners Association Lien was recorded against the Property by the HOA Trustee on behalf of the HOA.[6] On May 7, 2013, a Notice of Foreclosure Sale was recorded against the Property by the HOA Trustee.[7] The recorded Notice of Foreclosure Sale states a non-judicial foreclosure sale occurred on November 8, 2013 (hereinafter the "HOA Sale"), whereby K&P Homes acquired its interest in the Property, if any, for $40,000.00. On June 4, 2013, a Foreclosure Deed was recorded by which K&P Homes claimed its interest.[8]

Request for Judicial Notice (hereinafter, "Plaintiff's RJN") as **Exhibit 1**. All other recordings stated hereafter are recorded in the same manner.

[2] A true and correct copy of the Deed of Trust recorded as Book and Instrument Number 20070725-0005226 is attached to Plaintiff's RJN as **Exhibit 2.**

[3] A true and correct copy of the Corporation Assignment of Deed of Trust recorded as Book and Instrument Number 200910200002000 is attached to Plaintiff's RJN as **Exhibit 12.**

[4] A true and correct copy of the Assignment of Deed of Trust recorded as Book and Instrument Number 201401300000021 is attached to Plaintiff's RJN as **Exhibit 3**.

[5] A true and correct copy of the Notice of Delinquent Assessment Lien recorded as Book and Instrument Number 201207310002531 is attached to Plaintiff's RJN as **Exhibit 4.**

[6] A true and correct copy of the Notice of Default and Election to Sell Under Homeowners Association Lien recorded as Book and Instrument Number 201300000690 is attached to Plaintiff's RJN as **Exhibit 5.**

[7] A true and correct copy of the Notice of Foreclosure Sale recorded as Book and Instrument Number 201305070000897 is attached to Plaintiff's RJN as **Exhibit 6.**

[8] A true and correct copy of the Foreclosure Deed recorded as Book and Instrument Number 201306040000600 is attached to Plaintiff's RJN as **Exhibit 7**.

The Court's Ruling on Christiana Trust's Motion to Dismiss K&P Homes' Counterclaim

On October 5, 2015, Christiana Trust filed a Motion to Dismiss K&P's Counterclaim based in part on the argument the Nevada Supreme Court's decision in *SFR* should not be applied retroactively. On October 13, 2015, K&P filed an Opposition to Christiana Trust's Motion to Dismiss and 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 *SFR* is not retroactive. The Court determined the motion under *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), but reserved judgment on Christiana's due process issue. In reaching its conclusion, the Court determined that in *SFR* the Nevada Supreme Court did not address the issue of retroactive application because the matter was determined on different grounds, but assumed that its ruling would be applied retroactively. Therefore, this federal court conducted an analysis under *Huson* and *Breithaupt* 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 the Nevada Supreme 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 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 1 LLC v. US. Bank, NA.*, 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 1* did not apply retroactively under the *Huso*n rule, as approved in *Breithaupt*.

The court further stated that the *SFR* opinion did not address retroactivity, although the *SFR* Court had discretion to address it sua sponte. This Court determined that the *SFR* Court's

silence on the issue indicates that is did not exercise that discretion and the issue was not litigated.

III. LEGAL ARGUMENTS

A. K&P IS IMPROPERLY ASKING THE NEVADA SUPREME COURT TO DETERMINE IF A FEDERAL COURT CORRECTLY APPLIED FEDERAL COMMON LAW.

The decision to certify a question to a state supreme court rests in the "sound discretion" of the district court. *Eckard Brandes, Inc. v. Riley*, 338 F.3d 1082, 1087 (9th Cir. 2003) (quoting Louie v. United States, 776 F.2d 819, 824 (9th Cir. 1985)); *Micomonaco v. Washington*, 45 F.3d 316, 322 (9th Cir. 1995) (same); *Riordan v. State Farm Mut. Auto. Ins. Co.*, 589 F.3d 999, 1009 (9th Cir. 2009).

Once a federal court has certified a question of unsettled law to the state's highest court, the federal court is bound to follow state law as declared by its highest court. See *Sifers v. General Marine Catering Co.*, 892 F.2d 386, 391 (5th Cir. 1990); *Grover by Grover v. Eli Lilly & Co.*, 33 F.3d 716, 719 (6th Cir. 1994). The reasoning for this is that a state's fundamental interest in protecting its sovereignty would be undermined if federal courts were permitted to ignore a declaration of state law obtained through the certification process.

In short, certification allows federal courts to refer state law issues to state courts while retaining the authority to rule on federal constitutional questions. *Allstate Ins. Co. v. Serio*, 261 F.3d 143, 151–152 (5th Cir. 2001). **It is, of course, axiomatic that the proposed question to certify must ask the *state* supreme court to interpret a question of *state* law**. *Id*. Here, no basis exists for certification because the question K&P seeks to certify is whether a *federal* district court correctly applied *federal* common law principles. This Court's ruling was not based on any interpretation of unsettled state law, but on equities found in the federal common law set forth in *Chevron Oil* – a United States Supreme Court case. K&P admitted this limitation when it acknowledged the Court's order fell "under the federal common law of equity." Motion at p. 5:2. The certification process simply does not permit the Nevada Supreme Court to weigh in on whether a *federal* district court applied *federal* common law principles correctly. K&P's redress, if it believes the Court abused its discretion, is to file an appeal.

Further, this Court's ruling on retroactivity is not a violation of the U.S. Supreme Court holding in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, as K&P Homes suggested on page 10 of the Motion, because the Nevada Supreme Court approved of the holding of *Chevron Oil*, in *Breithaupt v. USAA Prop. Cas. Ins. Co.*, 867 P.2d 402, 405 (Nev. 1994).

Because the Court's ruling does not involve a question of application of any state law, K&P's request for certification is inappropriate and must be denied.

B. EVEN IF IT PRESENTED A STATE LAW QUESTION, CERTIFICATION IS NOT OBLIGATORY

Even if this case involved a situation where state law was unclear and certification necessary, resort to the certification process is not obligatory. See *Lehman Bros. v. Schein*, 416 U.S. 386, 390, 94 S. Ct. 1741, 40 L. Ed. 2d 215 (1974). Furthermore, "[m]ere difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal for the start of another lawsuit." *Id.*

In general, certification may be appropriate under the following circumstances:

- The question is of first impression or likely to recur.
- The question involves a question of state constitutional law.
- State precedents (or federal precedents interpreting state law) clearly conflict or are unclear.
- The applicable law is not the law of the state in which the federal court is located.
- The unsettled law is outcome determinative.
- The issue is important to the state.

The most important factors in determining whether to exercise discretion in favor of certification are (1) the closeness of the question, and (2) the existence of sufficient sources of state law, statutes, judicial decisions, and attorney general opinions to allow a principled rather than conjectural conclusion. 17A-124 Moore's Federal Practice - Civil § 124.22 (2015). Additional considerations include (3) whether considerations of comity are relevant in light of the particular issue and case to be decided, and (4) the practical limitations of the certification process, including significant delay and the possible inability to frame the issue so as to produce a helpful response from the state court. 17A-124 Moore's Federal Practice - Civil § 124.22 (2015).

C. IF CERTIFICATION WERE GRANTED, A STAY OF THE CASE WOULD BE INAPPROPRIATE AS THERE ARE ADDITIONAL GROUNDS UPON WHICH THIS COURT CAN DECIDE THE CASE

In addition to the retroactivity question, this Court has noted that there are additional grounds upon which it can rule on the quiet title issue, notably whether NRS 116.3116 satisfies substantive and procedural due process under the United States Constitution. *See* Order Granting Plaintiff's Motion to Dismiss K&P Homes' Counterclaim at page 3. Additionally, discovery has revealed that the HOA lien was void based on the lien containing assessments which were discharged in the bankruptcy of one of the homeowners, Lynn Burke. Thus, any stay which could be imposed would not be appropriate as there are several bases upon which this Court could decide the case without waiting for the Nevada Supreme Court to decide an unrelated issue.

IV. CONCLUSION

Based on the above, Christiana Trust respectfully requests the Court deny K&P Homes' Motion to Certify Question to Nevada Supreme Court.

DATED this 5th day of February, 2016.

WRIGHT, FINLAY & ZAK, LLP

/s/Natalie C. Lehman, Esq.
Dana Jonathon Nitz, Esq.
Nevada Bar No. 0050
Natalie C. Lehman, Esq.
Nevada Bar No. 12995
7785 W. Sahara Ave., Suite 200
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Attorneys for Plaintiff/Counter-Defendant, Christiana Trust, a Division of Wilmington Savings Fund Society, FSB, not in its individual capacity but as Trustee of ARLP Trust 3

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I am an employee of WRIGHT, FINLAY & ZAK, LLP; that service of the foregoing **CHRISTIANA TRUST'S OPPOSITION TO MOTION TO CERTIFY QUESTION TO NEVADA SUPREME COURT** was made on the 5th day of February, 2016, by electronic means or depositing a copy of same in the United States Mail, at Las Vegas, Nevada, addressed as follows:

John Henry Wright, Esq.
Nevada Bar No. 6182
The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
Phone: (702) 405-0001
Fax: (702) 405-8454
Attorney for Defendants,
K&P HOMES, A SERIES LLC OF DEK HOLDINGS, LLC

/s/Jill M. Sallade
An Employee of WRIGHT, FINLAY & ZAK, LLP

WFZ0721

JOHN HENRY WRIGHT
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Attorneys for Defendants
K&P HOMES, A SERIES LLC OF
DEK HOLDING, LLC

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CHRISTIANA TRUST, A DIVISION OF WILMINGTON SAVINGS FUND SOCIETY, FSB NOT IN ITS INDIVIDUAL CAPACITY BUT AS TRUSTEE OF ARLP TRUST 3,

Plaintiff,

vs.

K&P HOMES, A SERIES LLC OF DEK HOLDINGS, LLC, a Nevada Limited Liability Company,

Defendants.

K&P HOMES, A SERIES LLC OF DEK HOLDINGS, LLC, a Nevada Limited Liability Company,

Counterclaimant,

vs.

CHRISTIANA TRUST, A DIVISION OF WILMINGTON SAVINGS FUND SOCIETY, FSB NOT IN ITS INDIVIDUAL CAPACITY BUT AS TRUSTEE OF ARLP TRUST 3,

Counterdefendant.

CASE NO: 2:15-CV-01534-RCJ-VCF

K&P HOMES, A SERICE LLC OF DEK HOLDINGS, LLC'S REPLY TO CHRISTIANA TRUST'S OPPOSITION TO MOTION TO CERTIFY QUESTION OF LAW TO THE SUPREME COURT OF NEVADA

Oral Argument Requested

THE WRIGHT LAW GROUP P.C.
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Las Vegas, Nevada 89102
Tel: (702) 405-0001 Fax: (702) 405-8454

K&P HOMES, A SERIES LLC OF DEK HOLDINGS, LLC, a Nevada Limited Liability Company,

Third-Party Plaintiff,

vs.

RITA WIEGAND, an individual,

Third-Party Defendant.

COMES NOW Defendant and Third-Party Plaintiff, K&P HOMES, A SERIES LLC OF DEK HOLDINGS, LLC, (K&P) by and through its counsel of record, JOHN HENRY WRIGHT, ESQ., of THE WRIGHT LAW GROUP, P,.C., submits its Reply to Christiana Trust's Oppositon to Motion to Certify the following state law question to the Nevada Supreme Court:

REPLY MEMORANDUM OF POINTS AND AUTHORITIES

1. This Court Suggested that It would Defer the Question of Retroactive Application of SFR to the Nevada Supreme Court:

In its Order denying K&P's Motion for Reconsideration the Court stated that the SFR opinion did not address retroactivity and suggested that it would consider certifying the question to the Nevada Supreme Court, if asked to do so. K&P has asked the Court to do so.

2. Christiana's Opposition to Certification:

In its Opposition, Christiana argues that the United States District Court cannot certify the proposed question of law to the Nevada Supreme Court because the issue of retroactivity is somehow a federal common law issue. Christiana argues that the Court only applied the principles set out in Chevron Oil and didn't question whether or not the Nevada Supreme Court intended that their opinion in SFR applied to other cases similar to this one. Christiana is simply wrong. This Court very clearly addressed the question of retroactivity of SFR. The final paragraph of this Court's order states as follows:

> Defendant has asked the Court to reconsider. Defendant argues that the *SFR Investments Pool I* Court was presented with arguments against retroactivity and reject them by applying the rule in that case (and later in other cases) where the HOA foreclosure predated that opinion. The opinion did not address retroactivity, however, under either the *Huson/Breithaupt* line of cases or otherwise, and

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> arguments under that line of cases were made only in amici briefs, not in the opening or answering briefs, which means the issue was waived by both sides, and the Court has discretion whether to address it *sua sponte*. *See Powell v. Liberty Mut. Fire Ins. Co.*, 252 P.3d 668, 672 n.3 (Nev. 2011) (citing Nev. R. App. Proc. 28(a)(8) (2009)). The Court's silence on the issue indicates that id did not exercise that discretion. Whatever the reasons, the issue was not litigated. The Court expresses no opinion as to whether it would certify the issue if asked.

Clearly the "question" was whether or not the Nevada Supreme Court intended that SFR be applied retroactively and not a question about the application of federal common law as Christiana suggests.

3. ARGUMENT:

A. Proposed Question to be Certified:

K&P respectfully requested that this Court certify the following question to the Nevada Supreme Court:

> **Whether the Nevada Supreme Court's holding in SFR Investment Pool I, LLC v. U.S. Bank, N.A., 334 P.3d 408 (Nev. 2014) is to be applied retroactively to cases involving HOA foreclosures that occurred prior to the date of the decision (September 18, 2014), or is the Court's holding only to be applied prospectively to HOA foreclosures that have occurred after September 18, 2014.**

B. The Nevada Supreme Court Has Likely Already Resolved this Issue in Favor of Retroactive Application:

In its motion K&P argued that the above stated question is an issue of first impression in Nevada and that there may be a myriad of cases before the Federal and State Courts Nevada and that there is yet to be any precedential decision from any appellate authority on the issue of whether SFR should not be applied retroactively. However, in a recent opinion issued by the Nevada Supreme Court on January 28, 2016, the question of retroactive application of, SFR Investment Pool I, LLC v. US Bank, N.A., 334 P.3d 408, was resolved. In Shadow Wood Homeowners Association v. New York Community Bancorp, Inc., 132 Nev. Advance Opinion 5, the Nevada Supreme Court applied its holding in SFR to a case that involved an HOA foreclosure that occurred February 22, 2012, a full 31 months prior to the SFR decision on September 18, 2014. In its Shadow Wood opinion the Nevada Supreme Court applied its holding from SFR to a case with facts that arose prior to SFR. Clearly, the answer to the proposed certified question is going to be resounding "yes, we intended our decision to be applied retroactively." K&P has attached a copy

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of the Shadow Wood opinion hereto as **Exhibit 1** and would request that the court take judicial notice thereof, as K&P believes the Shadow Wood opinion answers the question of retroactive application as well as resolving a number of other issues presented in this case, including K&P's status as a bona fide innocent third-party purchaser. The Shadow Wood opinion also addresses the adequacy of the consideration paid for the property at foreclosure, which was another area of concern for this court in reaching its prior decision.

CONCLUSION

Based on all the foregoing, to the extent that the Court does not agree that the Shadow Wood opinion answers the question of retroactivity, K&P respectfully asks the Court to certify the proposed question to the Nevada Supreme Court.

DATED this 11th day of February, 2016

THE WRIGHT LAW GROUP, P.C.

JOHN HENRY WRIGHT, ESQ.
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Las Vegas, Nevada 89102
Attorney for K&P HOMES, A SERIES LLC
OF DEK HOLDINGS, LLC LLC

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of February 2016, I electronically filed the **K&P HOMES, LLC'S REPLY TO CHRISTIANA TRUST'S OPPOSITION TO MOTION FOR CERTIFIED QUESTION TO THE NEVADA SUPREME COURT** using the CM/ECF system, which will cause the document to be served upon the following counsel of record:

WRIGHT FINLAY & ZAK, LLP

Dana J. Nitz, Esq. **Dnitz@wrightlegal.net**

Natalie C. Lehman, Esq. **Nlehman@wrightlegal.net**

Attorneys for Christiana Trust

An Employee of WRIGHT LEGAL GROUP, P.C.

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EXHIBIT 1

132 Nev., Advance Opinion 5

IN THE SUPREME COURT OF THE STATE OF NEVADA

SHADOW WOOD HOMEOWNERS ASSOCIATION, INC.; AND GOGO WAY TRUST,
Appellants,
vs.
NEW YORK COMMUNITY BANCORP, INC.,
Respondent.

No. 63180

FILED

JAN 28 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

Appeal from a district court order granting summary judgment in a quiet title and declaratory relief action. Eighth Judicial District Court, Clark County; Abbi Silver, Judge.

Vacated and remanded.

Holland & Hart LLP and Patrick John Reilly, Las Vegas; Alessi & Koenig, LLC, and Bradley D. Bace, Las Vegas; Tharpe & Howell and Ryan M. Kerbow, Las Vegas,
for Appellant Shadow Wood Homeowners Association, Inc.

Law Offices of Michael F. Bohn, Ltd., and Michael F. Bohn, Las Vegas,
for Appellant Gogo Way Trust.

Brooks Hubley LLP and Gregg A. Hubley, Las Vegas; Pite Duncan, LLP, and Kenitra A. Cavin, Las Vegas,
for Respondent.

BEFORE THE COURT EN BANC.

OPINION

By the Court, PICKERING, J.:

This is an appeal from a district court order setting aside a trustee's deed following a homeowners' association (HOA) assessment lien foreclosure sale. The district court held that NRS 116.3116(2) (2013) limited the HOA lien to nine months of common expense assessments and that the HOA acted unfairly and oppressively in insisting on more than that sum to cancel the sale; that the bid price was grossly inadequate; and that the foreclosure sale buyer did not qualify as a bona fide purchaser for value. The appellants are the HOA and the lien foreclosure sale buyer whose trustee's deed the district court set aside. They argue that NRS 116.31166 (2013), which says that certain recitals in an HOA trustee's sale deed are "conclusive proof of the matters recited," renders such deeds unassailable. We disagree and reaffirm that, in an appropriate case, a court can grant equitable relief from a defective HOA lien foreclosure sale. *E.g.*, *Long v. Towne*, 98 Nev. 11, 639 P.2d 528 (1982). We conclude, though, that the district court erred in limiting the HOA lien amount to nine months of common expense assessments and in resolving on summary judgment the significant issues of fact surrounding the parties' conduct, the HOA lien amount, the foreclosure sale buyer's status, and the competing equities in this case. We therefore vacate and remand.

I.

The parties to this case are the bank that held the note and first deed of trust on the property (respondent New York Community Bank, or NYCB), the HOA (appellant Shadow Wood Homeowners Association, or Shadow Wood), and the buyer at the HOA lien foreclosure sale (appellant Gogo Way Trust). The original homeowner is not a party.

She lost the property, a condominium, on May 9, 2011, when NYCB foreclosed on its first deed of trust. At the time NYCB foreclosed, the note securing its first deed of trust had an outstanding balance of $142,000. NYCB acquired the property at foreclosure with a $45,900 credit bid.

The original homeowner also defaulted on the periodic assessments due Shadow Wood ($168.71 per month) for her share of the condominium community's budgeted common expenses. Her defaults led Shadow Wood, in 2008 and 2009, to file a notice of delinquent assessment lien, two notices of default and election to sell, and a notice of sale against her and the property. When NYCB foreclosed, it did not pay off any part of the original homeowner's delinquent assessment lien. As to first deeds of trust like NYCB's, the HOA lien statute, NRS 116.3116 (2013), splits the HOA lien into two pieces: a superpriority piece, which survives foreclosure of the first deed of trust; and a subpriority piece, which does not. *See SFR Invs. Pool 1 v. U.S. Bank, N.A.*, 130 Nev., Adv. Op. 75, 334 P.3d 408, 410 (2014). When NYCB acquired the property via credit bid, it thus took title subject to Shadow Wood's superpriority lien but the subpriority piece of the lien was extinguished.

NYCB not only failed to pay off the superpriority lien, it also did not pay the ongoing HOA monthly assessments as they came due. This led Shadow Wood, on July 7, 2011, to record a new notice of delinquent assessment lien. The new notice listed NYCB as the owner, stated that the lien delinquency was $8,238.87 as of June 29, 2011, and advised that, "[a]dditional monies shall accrue under this claim at the rate of the claimant's regular monthly or special assessments, plus permissible late charges, costs of collection and interest, accruing subsequent to the date of this notice." Shadow Wood's counsel, Alessi & Koenig, sent a

certified letter to NYCB with a copy of the notice of delinquent assessment. The letter advised that "the total amount due may differ from the amount shown on the enclosed lien" and that:

> Unless you, within thirty days after receipt of this notice, dispute the validity of this debt, or any portion thereof, our office will assume the debt is valid. If you notify our office in writing within the thirty-day period that the debt, or any portion thereof, is disputed, we will obtain verification of the debt and a copy of such verification will be mailed to you.

NYCB did not respond, and on October 13, 2011, Shadow Wood engaged the next step of the HOA lien foreclosure process, recording a notice of default and election to sell (the NOD). Although NYCB had not made any payments to Shadow Wood,[1] the NOD reduced the stated lien delinquency to $6,608.34 as of August 29, 2011. (Mathematics and the record suggest, but do not definitively establish, that Shadow Wood subtracted the original owner's delinquent monthly assessments to the extent they went back further than nine months before the NYCB foreclosure sale.) The NOD advised, "You have the right to bring your account in good standing by paying all of your past due payments plus permitted costs and expenses," which "will increase until your account becomes current," and warned that, if not paid, foreclosure sale will follow after 90 days.

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[1]At oral argument, NYCB's counsel stated that the bank "typically" would not pay HOA assessments on property acquired by credit bid at foreclosure but, rather, would wait until the bank had a purchaser to buy the property and pay off the HOA assessment lien out of escrow funds.

After receiving the NOD, NYCB sent Alessi & Koenig (the law firm who acted as Shadow Wood's collection counsel and whom the NOD designated as Shadow Wood's trustee's agent) an email on November 2, 2011, saying, "In order to pay the dues on this property we will need a detailed statement." By December 12, 2011, Alessi & Koenig had not responded to NYCB's November 2, 2011, email or its December 2, 2011, reforwarded follow-up, so NYCB emailed Shadow Wood's management company asking for "a current statement and their W9 so that we can pay the dues." NYCB's title company also sent the management company "a demand which reflects all funds owed by OUR SELLER ONLY and not those funds which might have been owed by the prior owner of the subject property." In response, Alessi & Koenig and Shadow Wood's management firm sent NYCB various, seemingly conflicting documents, which included account history ledgers for the original homeowner and NYCB that listed the monthly assessments and late charges, and summaries that broke down the fees and costs associated with the current and prior lien foreclosure processes, charges not included on the account history ledgers.

By notice of sale (NOS) dated January 18 and recorded January 27, 2012, Shadow Wood scheduled its lien foreclosure sale for February 22, 2012. By then, the stated delinquency had increased from $6,608.34 as of the NOD date to $8,539.77 as of the NOS date. As NRS 116.31162(1)(b) (2013) requires, the NOS stated:

> WARNING! A SALE OF YOUR PROPERTY IS IMMINENT! UNLESS YOU PAY THE AMOUNT SPECIFIED IN THIS NOTICE BEFORE THE SALE DATE, YOU COULD LOSE YOUR HOME, *EVEN IF THE AMOUNT IS IN DISPUTE.*

(Emphasis added.)

On January 31, 2012, NYCB sent Shadow Wood a $6,783.16 check, an amount less than the NOS said was required but which the bank later explained it derived from the account history ledgers. Shadow Wood rejected the check and sent NYCB breakdowns showing $9,017.39 as the current lien amount, consisting of $3,252.39 in unpaid monthly assessments from August 9, 2010, through February 29, 2012, plus fees and charges for publishing and posting of the notice of trustee's sale, recording fees, late fees, title research fees, and the like. Although the breakdowns itemize the charges and provide dates, some going back to 2009 and 2010, before NYCB foreclosed its first deed of trust, they also include parentheticals suggesting the same charges were incurred multiple times, and thus that the charges, or portions of them, were current.

Shadow Wood's lien foreclosure sale proceeded, as scheduled, on February 22, 2012. NYCB did not attend or try to halt the sale, and a third-party buyer, appellant Gogo Way, purchased the property for $11,018.39 in cash. The trustee's deed to Gogo Way recites:

> Default occurred as set forth in a Notice of Default and Election to Sell which was recorded in the office of the recorder of said county. 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.

After the sale, NYCB sued Shadow Wood and Gogo Way, seeking declaratory relief and to quiet title under NRS 40.010. NYCB's first amended complaint alleges that NYCB remained the owner because Shadow Wood did not conduct the sale in good faith and the sale price was commercially unreasonable. Represented jointly by Alessi & Koenig, Shadow Wood and Gogo Way counterclaimed with their own declaratory

relief and quiet title claims, in which they alleged that Shadow Wood properly foreclosed based on NYCB's failure to pay assessments and performed all statutory and contractual obligations in conducting the sale, so title vested in Gogo Way.

After discovery, both sides moved for summary judgment. At the district court's suggestion, NYCB supplemented its summary judgment motion to argue that Shadow Wood was only entitled to nine months' worth of HOA assessments, or $1,519.29 (monthly assessments of $168.71 multiplied by 9). The district court granted summary judgment for NYCB and against Shadow Wood and Gogo Way. It held that, under NRS 116.3116(2) (2013), Shadow Wood could only recover $1,519.29, and found, "based upon the papers and pleadings submitted . . . that Shadow Wood and/or its agents were attempting to profit off of the subject HOA foreclosure by including exorbitant fees and costs that could not be sued as the basis for an HOA foreclosure sale in this matter." The district court deemed Shadow Wood's rejection of NYCB's $6,783.16 check "unreasonable and oppressive" and also held that "Gogo Way Trust was not a bona fide purchaser at the subject HOA foreclosure sale." On these bases, the district court set aside Shadow Wood's sale and declared title vested in NYCB. Shadow Wood and Gogo Way appeal.

II.

A.

Summary judgment may be granted for or against a party on motion therefor "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." NRCP 56(c). That an action seeks declaratory or equitable relief does not prevent its adjudication on

summary judgment. *See* NRCP 56(a), (b) (declaratory judgment claims may be resolved on summary judgment); 10B Charles Alan Wright et al., *Federal Practice & Procedure: Civil* § 2781 (3d ed. 2014) ("if there are no triable fact issues and the court believes equitable relief is warranted, it is fully empowered to grant it on a Rule 56 motion"). This does not mean "that a court always will grant summary judgment in an action seeking equitable relief simply because there is no dispute as to the facts. If relief seems inappropriate, or the judge desires a fuller development of the circumstances of the case, the judge is free to refuse to grant the motion." *Id.* And even though equitable relief is sought, our review remains de novo. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1030 (2005). Finally, "as is true under Rule 56 generally, if genuine issues of fact do exist, summary judgment must be denied in a proceeding for equitable relief." 10B Charles Alan Wright et al., *supra*, § 2781.

B.

Nevada has adopted the 1982 Uniform Common Interest Ownership Act (UCIOA), codifying it as NRS Chapter 116. *See* 1991 Nev. Stat., ch. 245, § 100, at 570. In doing so, the Legislature also enacted unique provisions not contained in the UCIOA setting out the procedures for an HOA's nonjudicial foreclosure of delinquent assessment liens. *See* NRS 116.31162-.31168 (2013), *discussed in SFR Invs. Pool 1*, 130 Nev., Adv. Op. 75, 334 P.3d at 411-12.[2] Among these provisions are NRS

[2]The 2015 Legislature revised Chapter 116 substantially. 2015 Nev. Stat., ch. 266. Except where otherwise indicated, the references in this opinion to statutes codified in NRS Chapter 116 are to the version of the statutes in effect in 2011 and 2012, when the events giving rise to this litigation occurred.

116.31164(3)(a), which mandates that, after an HOA's nonjudicial foreclosure sale, the person who conducted the sale must "[m]ake, execute and, after payment is made, deliver to the purchaser, or his or her successor or assign, a deed without warranty which conveys to the grantee all title of the unit's owner to the unit," and its companion, NRS 116.31166, which states:

> 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.
>
> 2. Such a deed containing those recitals is conclusive against the unit's former owner, his or her heirs and assigns, and all other persons. . . .

NRS 116.31166(1)-(2) (2013).

The Gogo Way 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." Shadow Wood and Gogo Way maintain that, under NRS 116.31166, recitals such as these bar any post-sale challenge regardless of basis, whether it disputes the HOA's compliance with the statutory default, notice, and timing requirements or, as here, seeks to set aside the sale for equity-based reasons. If true, this interpretation would call into question this court's statement in *Long v. Towne*, that a common-interest community association's nonjudicial foreclosure sale may be set aside, just as a power-of-sale foreclosure sale may be set aside, upon a showing of

grossly inadequate price plus "fraud, unfairness, or oppression." 98 Nev. at 13, 639 P.2d at 580 (citing *Golden v. Tomiyasu*, 79 Nev. 503, 514, 387 P.2d 989, 995 (1963) (stating that, while a power-of-sale foreclosure may not be set aside for mere inadequacy of price, it may be if the price is grossly inadequate and there is "in addition proof of some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price" (internal quotation omitted))).

As a textual matter, the deed recitals to which NRS 116.31166 accords conclusive effect do not relate to the deficiencies NYCB alleges. The "conclusive" recitals concern default, notice, and publication of the NOS, all statutory prerequisites to a valid HOA lien foreclosure sale as stated in NRS 116.31162 through NRS 116.31164, the sections that immediately precede and give context to NRS 116.31166. *Cf. Bourne Valley Court Tr. v. Wells Fargo Bank, N.A.*, 80 F. Supp. 3d 1131, 1135 (D. Nev. 2015) (holding that under NRS 116.31166, when a foreclosure deed recited that there was a default, the proper notices were given, the appropriate amount of time elapsed between notice of default and sale, and the notice of sale was given, it was "'conclusive proof' that the required statutory notices were provided"). But NYCB does not dispute that it defaulted, at least as to the superpriority piece of the original homeowner's lien, or that Shadow Wood complied with the notice and publication requirements of NRS 116.31162 through NRS 116.31164. NYCB's claim is that Shadow Wood acted unfairly, oppressively, perhaps even fraudulently by overstating its lien delinquency, rejecting a valid tender of the amount due, and selling the property at foreclosure for a grossly inadequate price. And, while it is possible to read a conclusive recital statute like NRS 116.31166 as conclusively establishing a default

justifying foreclosure when, in fact, no default occurred, such a reading would be "breathtakingly broad" and "is probably legislatively unintended." 1 Grant S. Nelson, Dale A. Whitman, Ann M. Burkhart & R. Wilson Freyermuth, *Real Estate Finance Law* § 7:22 (6th ed. 2014). We decline to give the default recital such a broad and unprecedented reading, particularly since Shadow Wood and Gogo Way cite no germane authority in its support. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (this court will not consider arguments not cogently stated or supported with relevant authority).

History and basic rules of statutory interpretation confirm our view that courts retain the power to grant equitable relief from a defective foreclosure sale when appropriate despite NRS 116.31166. At common law, courts possessed inherent equitable power to consider quiet title actions, a power that required no statutory authority. *See MacDonald v. Krause*, 77 Nev. 312, 317, 362 P.2d 724, 727 (1961) ("It has always been recognized that equity has inherent original jurisdiction of bills to quiet title to property and to remove a cloud from the title."); *Robinson v. Kind*, 23 Nev. 330, 47 P. 977, 978 (1897) (recognizing the "well-settled rules that an action to quiet title is a suit in equity") (internal quotation omitted). Thus, in *Low v. Staples*, 2 Nev. 209 (1866), this court determined that, notwithstanding the then-existing statutory requirement that a quiet title plaintiff must be in possession of the property, *see* Compiled Laws State of Nev., tit. VIII, ch. 3, § 256, at 372 (1873), a plaintiff not in possession still may seek to quiet title by invoking the court's inherent equitable jurisdiction to settle title disputes. *Low*, 2 Nev. at 211-13. In so holding, the court explained:

> The plaintiff seeks a remedy which courts of equity have always granted independent of any

> statute, where a proper case was made out. The relief sought is a decree to compel certain persons to execute deeds of conveyance to the plaintiff, and to remove a cloud from his title. That it requires no statutory provisions to enable a court of equity to award relief in such cases, there can be no doubt.

Id. at 211.

In 1912, the Legislature adopted statutes to govern quiet title actions that largely stand today. *Compare* Revised Laws of Nev., ch. 62, §§ 5514-5526 (1912), *with* NRS 40.010-.130. And in *Clay v. Scheeline Banking & Trust Co.*, the court recognized that the statute authorizing a person to bring a quiet title claim against another who claims adversely, now numbered NRS 40.010, essentially codified the court's existing equity jurisprudence, stating that "there is practically no difference in the nature of the action under our statute and as it exists independent of statute." 40 Nev. 9, 16-17, 159 P. 1081, 1082 (1916). So, a person who brings a quiet title action may, consistent with NRS Chapter 40 and our long-standing equitable jurisprudence, invoke the court's inherent equitable powers to resolve the competing claims to such title.

The Legislature borrowed NRS 116.31166's conclusive recital language from NRS 107.030(8), which it enacted in 1927 to govern power-of-sale foreclosures. A.B. 131, 33d Leg. (Nev. 1927); 1927 Nev. Stat., ch. 173, § 2, at 295; Hearing on A.B. 221 Before the Senate Judiciary Comm., 66th Leg. (Nev., May 23, 1991) & Exhibit C (conversion table matching up each component of the Nevada bill with its UCIOA counterpart providing that the section that became NRS 116.31166 had no UCIOA equivalent, but was explained as: "Deed recitals in assessment lien foreclosure sale. *See* NRS 107.030(8)."). The conclusive recital provisions in NRS 107.030(8) have never been argued to carry the preemptive effect that

Shadow Wood and Gogo Way attribute to NRS 116.31166. While not directly addressing the preemption argument Shadow Wood and Gogo Way make as to NRS 116.31166, our post-NRS 107.080(8) cases reaffirm that courts retain the power, in an appropriate case, to set aside a defective foreclosure sale on equitable grounds. *See Golden v. Tomiyasu*, 79 Nev. at 514, 387 P.2d at 995 (adopting 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" (quoting *Oller v. Sonoma Cty. Land Title Co.*, 290 P.2d 880, 882 (Cal. Ct. App. 1955))); *McLaughlin v. Mut. Bldg. & Loan Ass'n*, 57 Nev. 181, 191, 60 P.2d 272, 276 (1936) (noting that, in the context of an action to recover possession of a property after a trustee sale, "[h]ad the conduct of the trustee and respondent, in connection with the sale, been accompanied by any actual fraud, deceit, or trickery, a more serious question would be presented"); *see also Nev. Land & Mortg. Co. v. Hidden Wells Ranch, Inc.*, 83 Nev. 501, 504, 435 P.2d 198, 200 (1967) ("In the proper case, the trial court may set aside a trustee's sale upon the grounds of fraud or unfairness."). And, cases elsewhere to have addressed comparable conclusive- or presumptive-effect recital statutes confirm that such recitals do not defeat equitable relief in a proper case; rather, such recitals are "conclusive, *in the absence of grounds for equitable relief.*" *Holland v. Pendleton Mortg. Co.*, 143 P.2d 493, 496 (Cal. Ct. App. 1943) (emphasis added); *see Bechtel v. Wilson*, 63 P.2d 1170, 1172 (Cal. Ct. App. 1936) (distinguishing between a challenge to the sufficiency of pre-sale notice, which was precluded by the conclusive recitals in the deed, and an equity-based challenge based upon the alleged

unfairness of the sale); *compare* 1 Grant S. Nelson, *Real Estate Finance Law*, *supra*, § 7:23, at 986-87 ("After a defective power of sale foreclosure has been consummated, mortgagors and junior lienholders in virtually every state have an equitable action to set aside the sale.") (footnotes omitted), *with id.* § 7:22, at 980-82 (noting that "[m]any states have attempted to enhance the stability of power of sale foreclosure titles by enacting a variety of *presumptive statutes*"), *and* 6 Baxter Dunaway, *Law of Distressed Real Estate*, § 64:161 (2015) (noting that a trustee's deed recital can be overcome on a showing of actual fraud).

The Legislature is "presumed not to intend to overturn long-established principles of law" when enacting a statute. *Hardy Cos., Inc. v. SNMARK, LLC*, 126 Nev. 528, 537, 245 P.3d 1149, 1155-56 (2010) (internal quotation omitted). Also, this court strictly construes statutes in derogation of the common law, *Holliday v. McMullen*, 104 Nev. 294, 296, 756 P.2d 1179, 1180 (1988), and has been instructed to apply "principles of law and equity, including . . . the law of real property," to NRS Chapter 116. NRS 116.1108. The long-standing and broad inherent power of a court to sit in equity and quiet title, including setting aside a foreclosure sale if the circumstances support such action, the fact that the recitals made conclusive by operation of NRS 116.31166 implicate compliance only with the statutory prerequisites to foreclosure, and the foreign precedent cited under which equitable relief may still be available in the face of conclusive recitals, at least in cases involving fraud, lead us to the conclusion that the Legislature, through NRS 116.31166's enactment, did not eliminate the equitable authority of the courts to consider quiet title actions when an HOA's foreclosure deed contains conclusive recitals. We therefore reject Shadow Wood's and Gogo Way's contention that NRS

116.31166 defeats, as a matter of law, NYCB's action to set aside the trustee's deed and to quiet title in itself.

C.

The question remains whether NYCB demonstrated sufficient grounds to justify the district court in setting aside Shadow Wood's foreclosure sale on NYCB's motion for summary judgment. *Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 669, 918 P.2d 314, 318 (1996) (stating the burden of proof rests with the party seeking to quiet title in its favor). As discussed above, demonstrating that an association sold a property at its foreclosure sale for an inadequate price is not enough to set aside that sale; there must also be a showing of fraud, unfairness, or oppression. *Long*, 98 Nev. at 13, 639 P.2d at 530.

NYCB failed to establish that the foreclosure sale price was grossly inadequate as a matter of law. NYCB compares Gogo Way's purchase price, $11,018.39, to the amount NYCB bought the property for at its foreclosure sale, $45,900.00. Even using NYCB's purchase price as a comparator, and adding to that sum the $1,519.29 NYCB admits remained due on the superpriority lien following NYCB's foreclosure sale, Gogo Way's purchase price reflects 23 percent of that amount and is therefore not obviously inadequate. *See Golden*, 79 Nev. at 511, 387 P.2d at 993 (noting that even where a property was "sold for a smaller proportion of its value than 28.5%," it did not justify setting aside the sale); *see also* Restatement (Third) of Prop.: Mortgages § 8.3 cmt. b (1997) (stating that while "[g]ross inadequacy cannot be precisely defined in terms of a specific percentage of fair market valuel, g]enerally . . . a court is warranted in invalidating a sale where the price is less than 20 percent of fair market

value and, absent other foreclosure defects, is usually not warranted in invalidating a sale that yields in excess of that amount").[3]

Other than the sale price, NYCB focuses on the actions of Shadow Wood and its counsel, Alessi & Koenig, which NYCB submits amounted to fraud, unfairness, or oppression that, combined with the inadequate price, justify setting aside the sale. NYCB focuses on Shadow Wood's alleged overstatement of its lien amount. The district held that Shadow Wood was limited to the superpriority lien that survived its first deed of trust foreclosure sale, which NYCB asserts was capped at $1,519.29, or nine months of $168.71 monthly assessments. NYCB persuaded the district court to find, as a matter of law, that Shadow Wood's actions in trying to collect more than $1,519.29 from NYCB were "unreasonable and oppressive" and justified the district court in setting aside the sale.

NYCB's argument does not account for the fact that, after foreclosing its first deed of trust, NYCB became the owner of the property. Its foreclosure sale extinguished Shadow Wood's subpriority lien, eliminating the original owner's monthly assessment arrearages going back further than the nine months accorded superpriority status by NRS 116.3116(2) (2013). But NYCB's foreclosure did not absolve NYCB of its

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[3]Although not argued by NYCB, the record includes an unauthenticated appraisal of the property setting its value at $53,000. The $11,018.39 sale price is slightly more than 20 percent of that estimate, so it does not affect the analysis in the text. *See also* Restatement (Third) of Prop.: Mortgages § 8.3 cmt. b (stating that "courts can properly take into account the fact that the value shown on a recent appraisal is not necessarily the same as the property's fair market value on the foreclosure sale date").

obligation, as the new owner, to pay the monthly HOA assessments as they came due, which it failed to do. The lien delinquency breakdowns that Shadow Wood sent NYCB charged NYCB with monthly assessments from August 9, 2010, through February 29, 2012. NYCB foreclosed its deed of trust on May 9, 2011, so Shadow Wood went back nine months, to August 9, 2010, to calculate NYCB's superpriority monthly assessment delinquency of $1,519.29. To this sum, though, Shadow Wood properly added the monthly assessments NYCB owed as owner on an ongoing basis, from June 9, 2011, projected through February 2012, when the Shadow Wood foreclosure sale occurred, which effectively doubles the monthly assessment delinquency. In holding that Shadow Wood acted unfairly and oppressively in seeking to collect more than $1,519.29, the district court erred, since it excluded the ongoing monthly assessments due from NYCB as owner.[4]

NYCB's analysis also does not adequately defend its complete exclusion of all fees and costs associated with Shadow Wood's foreclosure of its lien, even fees and costs incurred after NYCB became the owner of the property. The omission is understandable, given the district court's holding that Shadow Wood was limited as a matter of law to $1,519.29. The question of whether and, if so, to what extent costs and fees are recoverable in the context of an HOA superpriority lien is open, particularly as to foreclosures that pre-date the 2015 amendments to NRS

[4]The Shadow Wood breakdown sets out $3,252.39 as the monthly assessment delinquency from August 9, 2010, through February 29, 2012. The record does not explain the math that produced this number. Nineteen months of assessments, assuming the split month is included, works out to $3,205.49.

Chapter 116. But here, because the parties did not develop in district court what the fees and costs represent, when they were incurred, their (un)reasonableness, and the impact, if any, of Shadow Wood's covenants, conditions and restrictions (CC&Rs) on their allowance,[5] we leave this issue to further development in the district court on remand.

The district court erred in simply stopping at its conclusion that Shadow Wood was entitled only to nine months' worth of assessments. None of the parties, most importantly NYCB, whom the district court found carried its burden to show no genuine issues of material fact existed and that it therefore was entitled to judgment as a matter of law, point to uncontroverted evidence in the record to show exactly what Shadow Wood was entitled to post-NYCB's foreclosure sale and up until the association foreclosure sale, leaving that amount surrounded by issues of fact and not a proper basis upon which to enter summary judgment. *Anderson v. Heart Fed. Sav. & Loan Ass'n*, 256 Cal. Rptr. 180, 189 (Ct. App. 1989) (reversing grant of summary judgment where there remained triable issues of fact as to the amount actually owed to the trustee and thus as to whether the tender was sufficient).

As further evidence of the oppression and unfairness, NYCB points to the inconsistent lien amounts provided by Shadow Wood,

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[5]The record on appeal does not include the complete CC&Rs. Allegedly, section 4.01 of the CC&Rs reads as follows:

> The annual and special assessments, together with interest, costs and reasonable attorney's fees, shall be a charge on the Condominium Unit and shall be a continuing lien upon the Condominium Unit against which such assessment is made.

through Alessi & Koenig, from the time it filed the 2011 notice of delinquent assessment to the time it actually sold the property to Gogo Way.[6] The recorded instruments and communications between the parties indeed demonstrate that Shadow Wood and its counsel provided varying lien amounts to NYCB throughout the foreclosure process, conduct that, if it rose to the level of misrepresentations and nondisclosures that indeed prevented NYCB's ability to cure the default, might support setting aside the sale. *Cf. In re Tome*, 113 B.R. 626, 636 (Bankr. C.D. Cal. 1990) (holding that where the security interest holder had not notified the borrower that it had purchased the interest, it was bound by the previous holder's provision of inaccurate information to the borrower concerning the amount due to halt the foreclosure sale and that such inaccurate information supported setting aside the sale).

Against these inconsistencies, however, must be weighed NYCB's (in)actions. The NOS was recorded on January 27, 2012, and the sale did not occur until February 22, 2012. NYCB knew the sale had been scheduled and that it disputed the lien amount, yet it did not attend the sale, request arbitration to determine the amount owed, or seek to enjoin the sale pending judicial determination of the amount owed. The NOS included a warning as required by NRS 116.311635(3)(b):

> WARNING! A SALE OF YOUR PROPERTY IS IMMINENT! UNLESS YOU PAY THE AMOUNT SPECIFIED IN THIS NOTICE BEFORE THE SALE DATE, YOU COULD LOSE YOUR HOME,

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[6]NYCB does not argue that it invoked NRS 116.3116(8) (2013), so our analysis does not take this statute into consideration.

sale purchaser purchased the property for a "low price" did not in itself put the purchaser on notice that anything was amiss with the sale).

As to notice, NYCB submits that "the simple fact that the HOA trustee is attempting to sell the property, and divest the title owner of its interest, is enough to impart constructive notice onto the purchaser that there may be an adverse claim to title." Essentially, then, NYCB would have this court hold that a purchaser at a foreclosure sale can never be bona fide because there is always the possibility that the former owner will challenge the sale post hoc. The law does not support this contention.

When a trustee forecloses on and sells a property pursuant to a power of sale granted in a deed of trust, it terminates the owner's legal interest in the property. *Charmicor, Inc. v. Bradshaw Fin. Co.*, 92 Nev. 310, 313, 550 P.2d 413, 415 (1976). This principle equally applies in the HOA foreclosure context because NRS Chapter 116 grants associations the authority to foreclose on their liens by selling the property and thus divest the owner of title. *See* NRS 116.31162(1) (providing that "the association may foreclose its lien by sale" upon compliance with the statutory notice and timing rules); NRS 116.31164(3)(a) (stating the association's foreclosure sale deed "conveys to the grantee all title of the unit's owner to the unit"). And if the association forecloses on its superpriority lien portion, the sale also would extinguish other subordinate interests in the property. *SFR Invs.*, 334 P.3d at 412-13. So, when an association's foreclosure sale complies with the statutory foreclosure rules, as evidenced by the recorded notices, such as is the case here, and without any facts to indicate the contrary, the purchaser would have only "notice" that the former owner had the ability to raise an equitably based post-sale challenge, the basis of which is unknown to that purchaser.

That NYCB retained the ability to bring an equitable claim to challenge Shadow Wood's foreclosure sale is not enough in itself to demonstrate that Gogo Way took the property with notice of any potential future dispute as to title. And NYCB points to no other evidence indicating that Gogo Way had notice before it purchased the property, either actual, constructive, or inquiry, as to NYCB's attempts to pay the lien and prevent the sale, or that Gogo Way knew or should have known that Shadow Wood claimed more in its lien than it actually was owed, especially where the record prevents us from determining whether that is true. *Lennartz v. Quilty*, 60 N.E. 913, 914 (Ill. 1901) (finding a purchaser for value protected under the common law who took the property without record or other notice of an infirmity with the discharge of a previous lien on the property). Because the evidence does not show Gogo Way had any notice of the pre-sale dispute between NYCB and Shadow Wood, the potential harm to Gogo Way must be taken into account and further defeats NYCB's entitlement to judgment as a matter of law.

III.

"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." *Nussbaumer v. Superior Court in & for Yuma Cty.*, 489 P.2d 843, 846 (Ariz. 1971). NYCB did not tender the amount provided in the notice of sale, as statute and the notice itself instructed, and did not meet its burden to show that no genuine issues of material fact existed regarding the proper amount of Shadow Wood's lien or Gogo Way's bona fide status. Though perhaps NYCB could prove its claim at trial by presenting sufficient evidence to demonstrate that the equities swayed so far in its

favor as to support setting aside Shadow Wood's foreclosure sale, NYCB did not prove that it was entitled to summary judgment on the matter. *Chapman v. Deutsche Bank Nat'l Tr. Co.*, 129 Nev., Adv. Op. 34, 302 P.3d 1103, 1106 (2013).

We therefore vacate the district court's judgment and remand.

Pickering, J.
Pickering

We concur:

Parraguirre, C.J.
Parraguirre

Hardesty, J.
Hardesty

Douglas, J.
Douglas

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CHRISTIANA TRUST,

Plaintiff,

vs.

K&P HOMES et al.,

Defendants.

2:15-cv-01534-GMN-VCF

ORDER

This case arises out of a homeowners' association foreclosure sale. Pending before the Court is a Motion to Certify Question of Law to the Supreme Court of Nevada (ECF No. 26). For the reasons given herein, the Court grants the motion.

I. FACTS AND PROCEDURAL HISTORY

On or about July 25, 2007, Rita Wiegand purchased real property located at 7461 Glimmering Sun Avenue, Las Vegas, Nevada, 89178 (the "Property"), giving lender Universal American Mortgage Co., LLC ("UAMC") a promissory note for $284,200 (the "Note"), secured by a deed of trust (the "DOT") against the Property. (Compl. ¶¶ 5, 9–10, ECF No. 1). On January 30, 2014, Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP, f.k.a. Countrywide Home Loans Servicing, LP ("BOA"), assigned the Note and DOT to Plaintiff Christina Trust. (*Id.* ¶ 13; Assignment, ECF No. 1-1, at 29). After recording a Notice of

Delinquent Assessment Lien (the "NDAL"), a Notice of Default and Election to Sell ("the "NOD"), and a Notice of Foreclosure Sale (the "NOS"), the Tuscalante Homeowners Association (the "HOA"), through its agent Nevada Association Services, Inc. ("NAS"), sold the Property at auction to Defendant K&P Homes ("K&P") for $40,000 on May 31, 2013. (Compl. ¶¶ 6, 11–12, 14–17). None of the pre-sale notices identified what portion of the HOA lien was for superpriority versus subpriority amounts, such as late fees, collection costs, interest, fines, etc., or provided any notice of a right to cure. (*Id.* ¶¶ 19–22). Furthermore, the HOA and NAS did not comply with notice requirements under Chapter 116 of the Nevada Revised Statutes ("NRS"). (*Id.* ¶ 26).

Plaintiff sued Wiegand and K&P in this Court for unjust enrichment and to quiet title to the Property, i.e., for a declaration that the DOT still encumbers the Property because the HOA sale was not in accordance with Chapter 116, did not provide an opportunity to cure the default, was commercially unreasonable, and did not comport with due process. K&P answered and filed a Counterclaim to quiet title to the Property, i.e., for a declaration that K&P is the title owner of the Property, that its deed is valid and enforceable, that the HOA sale extinguished Plaintiff's DOT, and that K&P's title is superior to any adverse interest in the Property. K&P also filed a Third-Party Complaint against Wiegand for the same declarations. Wiegand does not appear to have been served with any pleading. Plaintiff moved to dismiss the Counterclaim, and K&P moved for offensive summary judgment on the Counterclaim. The Court granted the motion to dismiss and denied the motion for summary judgment, anticipating that *SFR Invs. Pool I, LLC v. U.S. Bank, N.A.*, 334 P.3d 408 (Nev. 2014) did not apply retroactively under *Breithaupt v. USAA Prop. & Cas. Ins. Co.*, 867 P.2d 402 (Nev. 1994). The Court declined to reconsider. K&P has now asked the Court to certify the retroactivity question to the Nevada Supreme Court.

II. LEGAL STANDARDS

> 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 court, 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.

Nev. R. App. P. 5(a). In order to be "determinative of the cause," the answer the Nevada Supreme Court is asked to answer must be dispositive of at least part of the federal case. *Volvo Cars of N. Am., Inc. v. Ricci*, 137 P.3d 1161, 1164 (Nev. 2006).

III. ANALYSIS

First, the retroactivity of *SFR Invs. Pool I, LLC* under *Breithaupt* is a question of state law. Plaintiff argues that the Court ruled purely under federal law, i.e., *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), but that is not correct. The Court ruled according to the standards outlined in *Huson* (which provides a federal rule of common law as to the retroactivity of federal rulings as to federal law) but only because the Nevada Supreme Court in *Breithaupt* had relied on *Huson* when declining to apply a state law retroactively.

Second, the retroactivity of *SFR Investments Pool I, LLC* is at least partially dispositive to the present case. If that case is not retroactive, K&P cannot prevail on its Counterclaim for a declaration that the HOA sale extinguished the DOT, because the HOA sale in this case occurred on May 31, 2013, but *SFR Investments Pool I, LLC* was not decided until September 18, 2014. If the case is retroactive, K&P will prevail as to that question. The Court has ruled that the due process defense fails (at least at the pleading stage) as against the Counterclaim, because sufficient notice has been pleaded. The Court did not address the Takings Clause in this case, but the Court has in other cases rejected arguments against NRS 116.3116 under the Takings

Clause, and it rejects the argument here. Finally, the Court deferred judgment on a substantive due process argument, but the likelihood of success on a substantive due process argument is low. There is therefore a very great chance that success on the retroactivity issue will mean success for K&P on its Counterclaim.

Third, there is no controlling precedent as to the retroactivity of *SFR Investments Pool I, LLC*.

CONCLUSION

IT IS HEREBY ORDERED that the Motion to Certify Question of Law to the Supreme Court of Nevada (ECF No. 26) is GRANTED.

IT IS FURTHER ORDERED that the following question of law is CERTIFIED to the Nevada Supreme Court pursuant to Rule 5 of the Nevada Rules of Appellate Procedure:

> **Does the rule of *SFR Investments Pool I, LLC v. U.S. Bank, N.A.*, 334 P.3d 408 (Nev. 2014) that foreclosures under NRS 116.3116 extinguish first security interests apply retroactively to foreclosures occurring prior to the date of that decision?**

See Nev. R. App. P. 5(c)(1). The nature of the controversy and a statement of facts are provided herein. *See* Nev. R. App. P. 5(c)(2)–(3). K&P Homes is designated as the Appellant, and Christiana Trust is designated as the Respondent. *See* Nev. R. App. P. 5(c)(4). The names and addresses of counsel are as follows:

Dana Jonathon Nitz and Natalie C. Lehman, attorneys for Plaintiff/Respondent
Wright, Finlay & Zak, LLP
7785 W. Sahara Ave., Suite 200
Las Vegas, NV 89117
Phone: 702-475-7964; Fax: 702-946-1345
Email: dnitz@wrightlegal.net; nlehman@wrightlegal.net

John Henry Wright, attorney for Defendant/Appellant
The Wright Law Group, P.C.
2340 Paseo Del Prado, Suite D-305
Las Vegas, NV 89102

Phone: 702-405-0001; Fax: 702-405-8454
Email: dayana@wrightlawgroupnv.com

See Nev. R. App. P. 5(c)(5). Further elaboration upon the certified question is included herein.

See Nev. R. App. P. 5(c)(6).

IT IS FURTHER ORDERED that the Clerk shall forward a copy of this Order to the Clerk of the Nevada Supreme Court under the official seal of the United States District Court for the District of Nevada. *See* Nev. R. App. P. 5(d).

IT IS SO ORDERED.

DATED: This 8th day of March, 2016.

ROBERT C. JONES
United States District Judge

15cv1534

IN THE SUPREME COURT OF THE STATE OF NEVADA

K & P HOMES,
Appellant,
vs.
CHRISTIANA TRUST,
Respondent.

No. 69986

ORDER ACCEPTING CERTIFIED QUESTION, DIRECTING BRIEFING AND DIRECTING SUBMISSION OF FILING FEE

This matter involves a legal question certified to this court, under NRAP 5, by the United States District Court for the District of Nevada. Specifically, the U.S. District Court has certified the following question to this court:

> Does the rule of *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 apply retroactively to foreclosures occurring prior to the date of that decision?

As no clearly controlling Nevada precedent explicitly answers this legal question and the answer may determine part of the federal case, we accept this certified question. *See* NRAP 5(a); *Volvo Cars of N. Am., Inc. v. Ricci*, 122 Nev. 746, 749-51, 137 P.3d 1161, 1163-64 (2006).

Accordingly, appellant shall have 30 days from the date of this order to file and serve an opening brief. Respondent shall have 30 days from the date the opening brief is served to file and serve an answering brief. Appellant shall then have 20 days from the date the answering brief is served to file and serve any reply brief. The parties' briefs shall comply with NRAP 28, 28.2, 31(c), and 32. *See* NRAP 5(g)(2). Because portions of

WFZ0755
16-11015

the record do not appear necessary to answer the certified question, the parties are not required to file a joint appendix. *See* NRAP 5(d).

Lastly, in any proceeding under NRAP 5, fees "shall be the same as in civil appeals . . . and shall be equally divided between the parties unless otherwise ordered by the certifying court." NRAP 5(e). The United States District Court order does not address the payment of this court's fees. Accordingly, appellant and respondent shall each tender to the clerk of this court, within 11 days from the date of this order, the sum of $125, representing half of the filing fee. *See* NRAP 3(e); NRAP 5(e).

It is so ORDERED.

Parraguirre, C.J.

Hardesty, J.

Douglas, J.

Cherry, J.

Saitta, J.

Gibbons, J.

Pickering, J.

cc: Wright Law Group
Wright, Finlay & Zak, LLP/Las Vegas
Clerk, United States District Court for the District of Nevada

1494
SUPREME COURT OF NEVADA
OFFICE OF THE CLERK
201 S. Carson Street, Suite 201
Carson City, Nevada 89701

Address Service Requested

CLERK, U.S. DISTRICT COURT, LAS VEGAS
333 LAS VEGAS BLVD SO., RM. 1334
LAS VEGAS NV 89101

89101870G9 C075

WRIGHT, FINLAY & ZAK, LLP
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Natalie C. Lehman, Esq.
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Attorneys for Plaintiff/Counter-Defendant, Christiana Trust, a Division of Wilmington Savings Fund Society, FSB, not in its individual capacity but as Trustee of ARLP Trust 3

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CHRISTIANA TRUST, A DIVISION OF WILMINGTON SAVINGS FUND SOCIETY, FSB, NOT IN ITS INDIVIDUAL CAPACITY BUT AS TRUSTEE OF ARLP TRUST 3

Plaintiff,

vs.

K&P HOMES, A SERISE LLC OF DEK HOLDINGS, LLC, a Nevada limited liability company,

Defendants.

K&P HOMES, A SERIES OF LLC OF DEK HOLDINGS, LLC, a Nevada Limited Liability Company,

Counterclaimant,

vs.

CHRISTIANA TRUST, A DIVISION OF WILMINGTON SAVINGS FUND SOCIETY, FSB NOT IN ITS INDIVIDUAL CAPACITY BUT AS TRUSTEE OF ARLAP TRUST 3,

Case No.: 2:15-cv-01534-RCJ-VCF

ERRATA TO CHRISTIANA TRUST'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION TO DISMISS WITH PREJUDICE DEFENDANT'S COUNTERCLAIM

Counter-defendant.

Plaintiff/Counter-Defendant, Christiana Trust, a Division of Wilmington Savings Fund Society, FSB, not in its individual capacity but as Trustee of ARLP Trust 3, by and through their counsel of record, Natalie C. Lehman, Esq. of the law firm of Wright, Finlay & Zak, LLP, hereby submit this Errata to Request for Judicial Notice in Support of Motion to Dismiss with Prejudice Defendant's Counterclaim.

Attached hereto is **Exhibit 12**, a true and correct copy of the Corporation Assignment of Deed of Trust Nevada recorded as Book and Instrument Number 200910200002000 which was inadvertently omitted from the Request for Judicial Notice in Support of the Motion to Dismiss with Prejudice Defendant's Counterclaim as filed on October 6, 2015.

DATED this 17th day of November, 2015.

WRIGHT, FINLAY & ZAK, LLP

/s/Natalie C. Lehman, Esq.
Dana Jonathon Nitz, Esq.
Nevada Bar No. 000050
Natalie C. Lehman, Esq.
Nevada Bar No. 12995
7785 W. Sahara Ave., Suite 200
Las Vegas, Nevada 89117
Attorneys for Plaintiff/Counter-Defendant, Christiana Trust, a Division of Wilmington Savings Fund Society, FSB, not in its individual capacity but as Trustee of ARLP Trust 3

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of WRIGHT, FINLAY & ZAK, LLP; that service of the foregoing **ERRATA TO CHRISTIANA TRUST'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION TO DISMISS WITH PREJUDICE DEFENDANT'S COUNTERCLAIM** was made on the 17th day of November, 2015, by depositing a true copy of same in the United States Mail, at Las Vegas, Nevada, addressed as follows:

John Henry Wright, Esq.
Nevada Bar No. 6182
The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
Phone: (702) 405-0001
Fax: (702) 405-8454
Attorney for Defendants,
K&P HOMES, A SERISE LLC OF DEK HOLDINGS, LLC

/s/Jill M. Sallade
An employee of WRIGHT, FINLAY & ZAK, LLP

Exhibit 12

Exhibit 12

Inst #: 200910200002000
Fees: $14.00
N/C Fee: $0.00
10/20/2009 11:37:34 AM
Receipt #: 99211
Requestor:
TITLE COURT SERVICE INC
Recorded By: KGP Pgs: 1
DEBBIE CONWAY
CLARK COUNTY RECORDER

RECORDING REQUESTED BY:
RECONTRUST COMPANY, N.A.
AND WHEN RECORDED MAIL DOCUMENT TO:
BAC Home Loans Servicing, LP
400 COUNTRYWIDE WAY SV-35
SIMI VALLEY, CA 93065

TS No. 09-0151680
TITLE ORDER#: 4278087
APN# 176-27-312-159

CORPORATION ASSIGNMENT OF DEED OF TRUST NEVADA

FOR VALUE RECEIVED, THE UNDERSIGNED HEREBY GRANTS, ASSIGNS AND TRANSFER TO:
BAC HOME LOANS SERVICING,LP FKA COUNTRYWIDE HOME LOANS SERVICING LP

ALL BENEFICIAL INTEREST UNDER THAT CERTAIN DEED OF TRUST DATED 07/03/2007, EXECUTED BY: RITA WIEGAND, AN UNMARRIED WOMAN,TRUSTOR: TO STEWART TITLE COMPANY, TRUSTEE AND RECORDED AS INSTRUMENT NO. 0005226 ON 07/25/2007, IN BOOK 20070725, OF OFFICIAL RECORDS IN THE COUNTY RECORDER'S OFFICE OF CLARK COUNTY, IN THE STATE OF NEVADA.

DESCRIBING THE LAND THEREIN: AS MORE FULLY DESCRIBED IN SAID DEED OF TRUST.

TOGETHER WITH THE NOTE OR NOTES THEREIN DESCRIBED OR REFERRED TO, THE MONEY DUE AND TO BECOME DUE THEREON WITH INTEREST, AND ALL RIGHTS ACCRUED OR TO ACCRUE UNDER SAID DEED OF TRUST/MORTGAGE.

DATED: October 09, 2009

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

State of: Texas)
County of: Tarrant)

BY: Angela Nava
Angela Nava, Assistant Secretary

On 10/15/09 before me Kenya R Bryant, personally appeared Assistant Secretary Angela Nava, know to me (or proved to me on the oath of _____ or through TX DL) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he/she executed the same for the purposes and consideration therein expressed.
Witness my hand and official seal.

Kenya R Bryant
Notary Public's Signature

NOTARY PUBLIC STATE OF TEXAS
KENYA RASCHELL BRYANT
My Commission Expires
October 23, 2010

EXHIBIT 3

IN THE SUPREME COURT OF THE STATE OF NEVADA

SFR INVESTMENTS POOL 1, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Appellant,
vs.
US BANK, N.A., A NATIONAL BANKING ASSOCIATION AS TRUSTEE FOR THE CERTIFICATE HOLDERS OF THE BANC OF AMERICA MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2008-A,
Respondent.

No. 63078

FILED

OCT 16 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DENYING REHEARING

NRAP 40 places strict limits on petitions for rehearing: (1) "Matters presented in the briefs and oral arguments may not be reargued in [a] petition for rehearing", NRAP 40(c)(1); and (2) "[t]he court may consider rehearing" if the petition demonstrates that the court "has overlooked or misapprehended a . . . material question of law . . . or overlooked, misapplied or failed to consider a statute [or other law] directly controlling a dispositive issue in the case." NRAP 40(c)(2). This petition for rehearing reargues matters the court already heard and

decided and so does not meet the requirements of NRAP 40(c). For these reasons, rehearing is denied. [1]

It is so ORDERED.

Gibbons, C.J.

Pickering, J.

Hardesty, J.

Parraguirre, J.

Douglas, J.

Cherry, J.

Saitta, J.

[1]There are five pending motions for leave to file briefs of amici curiae in support of the petition for rehearing: (1) one by the Silver State Schools Credit Union; Nevada Mortgage Bankers Association; and the Nevada Association of Mortgage Professionals, Inc.; (2) one by Bank of America, N.A.; Citibank, National Association; CitiMortgage, Inc.; JPMorgan Chase Bank, 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 it 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.

cc: Hon. Nancy L. Allf, District Judge
Howard Kim & Associates
Akerman LLP/Las Vegas
Miles, Bauer, Bergstrom & Winters, LLP
Eighth District Court Clerk

EXHIBIT 4

SFR Invs. Pool 1, LLC v. U.S. Bank, N.A., 334 P.3d 408, 2014 Nev. LEXIS 88, 130 Nev. Adv. Rep. 75 (2014)

Restrictions: *Unrestricted*
FOCUS(TM) Terms: *No FOCUS terms*
Print Format: *FULL*
Citing Ref. Signal: *Hidden*

SHEPARD'S SUMMARY

Unrestricted *Shepard's* Summary

No negative subsequent appellate history.

Citing References:

⚠	Cautionary Analyses:	**Distinguished (2)**
	Positive Analyses:	Followed (122)
	Neutral Analyses:	Criticized (69), Concurring Opinion (77), Explained (1), Harmonized (1)
	Other Sources:	Law Reviews (1), Statutes (6), Treatises (4), Court Documents (21)

LexisNexis Headnotes: HN1 (46), HN2 (27), HN4 (56), HN6 (48), HN7 (1), HN8 (20), HN10 (3), HN12 (108), HN14 (2), HN15 (2), HN16 (5), HN17 (21), HN18 (8), HN19 (24), HN21 (13)

PRIOR HISTORY (0 citing references)

(CITATION YOU ENTERED):
SFR Invs. Pool 1, LLC v. U.S. Bank, N.A., 334 P.3d 408, 2014 Nev. LEXIS 88, 130 Nev. Adv. Rep. 75 (2014)

SUBSEQUENT APPELLATE HISTORY (1 citing reference)

1. **Rehearing denied by:**
SFR Invs. Pool 1 v. U.S. Bank, N.A., 2014 Nev. LEXIS 126 (Nev. Oct. 16, 2014)

CITING DECISIONS (151 citing decisions)

NEVADA SUPREME COURT

2. **Followed by:**

Trashed Home Corp. v. Mortg. Elec. Registration Sys., 2015 Nev. Unpub. LEXIS 1360 (2015)
2015 Nev. Unpub. LEXIS 1360 *p.1*

3. **Cited by:**
Premier One Holdings, Inc. v. HSBC Bank USA, N.A., 2015 Nev. Unpub. LEXIS 734 (2015) **LexisNexis Headnotes HN15**
2015 Nev. Unpub. LEXIS 734 *p.1*

4. **Cited by:**
Phh Mortg. Corp. v. United Legal Servs., 2015 Nev. Unpub. LEXIS 642 (2015) **LexisNexis Headnotes HN21**
2015 Nev. Unpub. LEXIS 642 *p.1*

5. **Followed by:**
LN Mgmt. LLC Series 7923 Canoe v. Bank of N.Y. Mellon, 2015 Nev. Unpub. LEXIS 635 (2015) **LexisNexis Headnotes HN1, HN6, HN12, HN19**
2015 Nev. Unpub. LEXIS 635 *p.1*

6. **Followed by:**
Saticoy Bay LLC Series 8467 Opal Splendor v. Wells Fargo Bank, N.A., 2015 Nev. Unpub. LEXIS 620 (2015) **LexisNexis Headnotes HN4, HN12**
2015 Nev. Unpub. LEXIS 620 *p.1*

7. **Cited by:**
Cierra Trust v. CitiMortgage, Inc., 2015 Nev. Unpub. LEXIS 559 (2015)
2015 Nev. Unpub. LEXIS 559 *p.1*

8. **Cited by:**
Cogburn Street Trust v. United States Bank Nat'l Ass'n, 2015 Nev. Unpub. LEXIS 548 (2015) **LexisNexis Headnotes HN18**
2015 Nev. Unpub. LEXIS 548 *p.1*

9. **Cited by:**
Las Vegas Dev. Grp., LLC v. Cooper Castle Law Firm, LLP, 2015 Nev. Unpub. LEXIS 533 (2015) **Lexis-Nexis Headnotes HN18**
2015 Nev. Unpub. LEXIS 533 *p.1*

10. **Followed by:**
Design 3.2 LLC v. Bank of N.Y. Mellon, 2015 Nev. Unpub. LEXIS 484 (2015) **LexisNexis Headnotes HN4, HN12**
2015 Nev. Unpub. LEXIS 484 *p.1*

11. **Followed by:**

CSC Acquisition & Holding Group, LLC v. Residential Credit Solutions, Inc., 2015 Nev. Unpub. LEXIS 465 (2015) **LexisNexis Headnotes HN18**
2015 Nev. Unpub. LEXIS 465 *p.1*

12. **Followed by:**
Trashed Home Corp. v. Bank of N.Y. Mellon, 2015 Nev. Unpub. LEXIS 406 (2015) **LexisNexis Headnotes HN18**
2015 Nev. Unpub. LEXIS 406 *p.1*

13. **Followed by:**
Saticoy Bay LLC v. Wells Fargo Bank, N.A., 2015 Nev. Unpub. LEXIS 401 (2015) **LexisNexis Headnotes HN18**
2015 Nev. Unpub. LEXIS 401 *p.1*

14. **Cited by:**
Beverly v. Bank of N.Y. Mellon, 2015 Nev. Unpub. LEXIS 269 (2015) **LexisNexis Headnotes HN18**
2015 Nev. Unpub. LEXIS 269 *p.1*

15. **Cited by:**
Park v. JP Morgan Chase Bank, N.A., 2015 Nev. Unpub. LEXIS 244 (2015) **LexisNexis Headnotes HN18**
2015 Nev. Unpub. LEXIS 244 *p.1*

16. **Followed by:**
Trust v. Fannie Mae, 2015 Nev. Unpub. LEXIS 226 (2015)
2015 Nev. Unpub. LEXIS 226 *p.1*

17. **Followed by:**
Sky Las Vegas Condo. Unit Owners' Ass'n v. U.S. Bank, N.A., 2015 Nev. Unpub. LEXIS 150 (2015) **LexisNexis Headnotes HN18**
2015 Nev. Unpub. LEXIS 150 *p.1*

18. **Followed by:**
LN Mgmt. LLC v. Nationstar Mortg., LLC, 2015 Nev. Unpub. LEXIS 133 (2015)
2015 Nev. Unpub. LEXIS 133 *p.1*

19. **Followed by:**
Tangiers Drive Trust v. Bank of Am., N.A., 2015 Nev. Unpub. LEXIS 110 (2015) **LexisNexis Headnotes HN12**
2015 Nev. Unpub. LEXIS 110 *p.1*

20. **Followed by:**
LN Mgmt. LLC Series 1000 Miradero v. Bank of Am., N.A., 2015 Nev. Unpub. LEXIS 92 (2015)
2015 Nev. Unpub. LEXIS 92 *p.1*

SHEPARD'S® - 334 P.3d 408 - 184 Citing References

21. **Followed by:**
Zaisan Enters. LLC v. Green Tree Servicing, LLC, 2015 Nev. Unpub. LEXIS 80 (2015)
2015 Nev. Unpub. LEXIS 80 *p.1*

22. **Followed by:**
Saticoy Bay LLC Series 133 McLaren v. Green Tree Servicing, LLC, 2015 Nev. Unpub. LEXIS 78 (2015)
2015 Nev. Unpub. LEXIS 78 *p.1*

23. **Followed by:**
Wells Fargo Bank, N.A. v. Res. Group, LLC, 2015 Nev. Unpub. LEXIS 39 (2015) **LexisNexis Headnotes HN4, HN12**
2015 Nev. Unpub. LEXIS 39 *p.1*

24. **Followed by:**
LN Mgmt., LLC v. Nationstar Mortg., LLC, 2015 Nev. Unpub. LEXIS 30 (2015)
2015 Nev. Unpub. LEXIS 30 *p.1*

25. **Followed by:**
Eddie v. Green Tree Servicing, LLC, 2015 Nev. Unpub. LEXIS 29 (2015)
2015 Nev. Unpub. LEXIS 29 *p.1*

26. **Criticized in Concurring Opinion at, Followed by, Followed in Concurring Opinion at:**
Park v. Nationstar Mortg., LLC, 2014 Nev. Unpub. LEXIS 2174 (2014) **LexisNexis Headnotes HN1, HN6, HN12**
Criticized in Concurring Opinion at:
2014 Nev. Unpub. LEXIS 2174 *p.1*
Followed by:
2014 Nev. Unpub. LEXIS 2174 *p.1*
Followed in Concurring Opinion at:
2014 Nev. Unpub. LEXIS 2174 *p.2*

27. **Criticized in Concurring Opinion at, Followed by, Followed in Concurring Opinion at:**
SFR Invs. Pool 1, LLC v. Nationstar Mortg., LLC, 2014 Nev. Unpub. LEXIS 2170 (2014) **LexisNexis Headnotes HN1, HN2, HN4, HN8, HN12**
Criticized in Concurring Opinion at:
2014 Nev. Unpub. LEXIS 2170 *p.2*
Followed by:
2014 Nev. Unpub. LEXIS 2170 *p.1*
Followed in Concurring Opinion at:
2014 Nev. Unpub. LEXIS 2170 *p.2*

28. **Criticized in Concurring Opinion at, Followed by, Followed in Concurring Opinion at:**

Berberich v. Citimortgage, Inc., 2014 Nev. Unpub. LEXIS 2125 (2014) **LexisNexis Headnotes HN1, HN6, HN12**

Criticized in Concurring Opinion at:
2014 Nev. Unpub. LEXIS 2125 *p.1*
Followed by:
2014 Nev. Unpub. LEXIS 2125 *p.1*
Followed in Concurring Opinion at:
2014 Nev. Unpub. LEXIS 2125 *p.2*

29. **Followed by:**
Cypress Manor Drive Trust v. Bank of Am., N.A., 2014 Nev. Unpub. LEXIS 2111 (2014) **LexisNexis Headnotes HN1, HN6**
2014 Nev. Unpub. LEXIS 2111 *p.1*

30. **Followed by:**
Centeno v. Montesa, 2014 Nev. Unpub. LEXIS 2105 (2014) **LexisNexis Headnotes HN4, HN12**
2014 Nev. Unpub. LEXIS 2105 *p.1*

31. **Followed by:**
Saticoy Bay LLC Series 1050 Cactus v. Bank of Am., N.A., 2014 Nev. Unpub. LEXIS 2100 (2014) **LexisNexis Headnotes HN4, HN12**
2014 Nev. Unpub. LEXIS 2100 *p.1*

32. **Followed by:**
LN Mgmt. LLC Series 9481 Green Vineyard v. Green Tree Servicing, LLC, 2014 Nev. Unpub. LEXIS 2049 (2014)
2014 Nev. Unpub. LEXIS 2049 *p.1*

33. **Followed by:**
RLP-Vervain Court, LLC v. Wells Fargo, 2014 Nev. Unpub. LEXIS 2045 (2014) **LexisNexis Headnotes HN2, HN4, HN8, HN12**
2014 Nev. Unpub. LEXIS 2045 *p.1*

34. **Followed by:**
Park v. U.S. Bank, NA, 2014 Nev. Unpub. LEXIS 2044 (2014) **LexisNexis Headnotes HN2, HN4, HN8, HN12**
2014 Nev. Unpub. LEXIS 2044 *p.1*

35. **Followed by:**
Kal-Mor-USA, LLC v. BOA & Fid., 2014 Nev. Unpub. LEXIS 2043 (2014) **LexisNexis Headnotes HN2, HN4, HN8, HN12**
2014 Nev. Unpub. LEXIS 2043 *p.1*

36. **Followed by:**
Platinum Realty & Holdings, LLC v. Wells Fargo, 2014 Nev. Unpub. LEXIS 2041 (2014) **LexisNexis Headnotes HN2, HN4, HN8, HN12**
2014 Nev. Unpub. LEXIS 2041 *p.1*

37. **Followed by:**
Bank of Am., N.A. v. Platinum Realty & Holdings, LLC, 2014 Nev. Unpub. LEXIS 2038 (2014) **LexisNexis Headnotes HN2, HN4, HN8, HN12**
2014 Nev. Unpub. LEXIS 2038 *p.1*

38. **Followed by:**
Eagle Investors v. Bank of Am., N.A., 2014 Nev. Unpub. LEXIS 2035 (2014) **LexisNexis Headnotes HN2, HN4, HN8, HN12**
2014 Nev. Unpub. LEXIS 2035 *p.1*

39. **Followed by:**
Bank of Am., N.A. v. One Queensridge Place Homeowners' Ass'n, 2014 Nev. Unpub. LEXIS 2031 (2014) **LexisNexis Headnotes HN2, HN4, HN8, HN12**
2014 Nev. Unpub. LEXIS 2031 *p.1*

40. **Followed by:**
Kal-Mor-USA, LLC v. Bank of Am., N.A., 2014 Nev. Unpub. LEXIS 2027 (2014) **LexisNexis Headnotes HN2, HN4, HN8, HN12**
2014 Nev. Unpub. LEXIS 2027 *p.1*

41. **Criticized in Concurring Opinion at, Followed by, Followed in Concurring Opinion at:**
Villa Vecchio Ct Trust v. Deutsche Bank Nat'l Trust Co., 2014 Nev. Unpub. LEXIS 2019 (2014) **LexisNexis Headnotes HN4, HN12**
Criticized in Concurring Opinion at:
2014 Nev. Unpub. LEXIS 2019 *p.1*
Followed by:
2014 Nev. Unpub. LEXIS 2019 *p.1*
Followed in Concurring Opinion at:
2014 Nev. Unpub. LEXIS 2019 *p.2*

42. **Criticized in Concurring Opinion at, Followed by, Followed in Concurring Opinion at:**
Archambault v. Nationstar Mortg., LLC, 2014 Nev. Unpub. LEXIS 2022 (2014) **LexisNexis Headnotes HN12**
Criticized in Concurring Opinion at:
2014 Nev. Unpub. LEXIS 2022 *p.2*
Followed by:
2014 Nev. Unpub. LEXIS 2022 *p.1*
Followed in Concurring Opinion at:
2014 Nev. Unpub. LEXIS 2022 *p.2*

43. **Criticized in Concurring Opinion at, Followed by, Followed in Concurring Opinion at:**
Ayres v. Wells Fargo Bank, N.A., 2014 Nev. Unpub. LEXIS 2021 (2014) **LexisNexis Headnotes HN1, HN6, HN12**

Criticized in Concurring Opinion at:
2014 Nev. Unpub. LEXIS 2021 *p.2*
Followed by:
2014 Nev. Unpub. LEXIS 2021 *p.1*
Followed in Concurring Opinion at:
2014 Nev. Unpub. LEXIS 2021 *p.2*

44. **Followed by, Followed in Concurring Opinion at:**
Park v. Bank of Am., N.A., 2014 Nev. Unpub. LEXIS 2009 (2014) **LexisNexis Headnotes HN1, HN6, HN12**

Followed by:
2014 Nev. Unpub. LEXIS 2009 *p.1*
Followed in Concurring Opinion at:
2014 Nev. Unpub. LEXIS 2009 *p.2*

45. **Followed by, Followed in Concurring Opinion at:**
SFR Invs. Pool 1, LLC v. Nationstar Mortg., LLC, 2014 Nev. Unpub. LEXIS 2008 (2014) **LexisNexis Headnotes HN12**

Followed by:
2014 Nev. Unpub. LEXIS 2008 *p.1*
Followed in Concurring Opinion at:
2014 Nev. Unpub. LEXIS 2008 *p.2*

46. **Followed by, Followed in Concurring Opinion at:**
Saticoy Bay LLC Series 1083 Sterling Peak v. JP Morgan Chase Bank, N.A., 2014 Nev. Unpub. LEXIS 2007 (2014) **LexisNexis Headnotes HN1, HN6, HN12**

Followed by:
2014 Nev. Unpub. LEXIS 2007 *p.1*
Followed in Concurring Opinion at:
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129. **Cited by:**
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131. **Cited by:**

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132. **Followed by:**
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141. **Followed by:**
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142. **Cited by:**
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155. *NRS sec. 116.1109*

156. *NRS sec. 116.3116*

157. *NRS sec. 116.31162*

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174. *BEVERLY v. QUALITY LOAN SERV. CORP.*, 2014 NV S. Ct. Motions LEXIS 221 (Nev. Dec. 4, 2014)

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178. *SFR INVS. POOL 1 v. NATIONSTAR*, 2014 NV S. Ct. Motions LEXIS 712 (Nev. Dec. 1, 2014)

179. *7510 PERLA DEL MAR AVE v. BANK OF AM., N.A.*, 2014 NV S. Ct. Motions LEXIS 186 (Nev. Dec. 1, 2014)

180. *SATICOY BAY LLC SERIES 4456 ACROPOLIS v. BANK OF AMERICA, N.A.*, 2014 NV S. Ct. Motions LEXIS 720 (Nev. Nov. 5, 2014)

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182. *SFR INVS. POOL 1, LLC v. BANK OF AM., N.A.*, 2014 NV S. Ct. Motions LEXIS 681 (Nev. Oct. 29, 2014)

183. *SFR INVS. POOL 1, LLC v. BANK OF AMERICA, N.A.*, 2014 NV S. Ct. Motions LEXIS 540 (Nev. Oct. 29, 2014)

184. *SFR INVS. POOL 1 v. FIRST HORIZON HOME LOANS*, 2014 NV S. Ct. Motions LEXIS 693 (Nev. Oct. 28, 2014)

EXHIBIT 5

STATE OF NEVADA
DEPARTMENT OF BUSINESS AND INDUSTRY
REAL ESTATE DIVISION
ADVISORY OPINION

Subject:	Advisory No. 13-01	21 pages
The Super Priority Lien	Issued By: Real Estate Division	
	Amends/ Supersedes N/A	
Reference(s): NRS 116.3102; ; NRS 116.310312; NRS 116.310313; NRS 116.3115; NRS 116.3116; NRS 116.31162; Commission for Common Interest Communities and Condominium Hotels Advisory Opinion No. 2010-01		Issue Date: December 12, 2012

QUESTION #1:

Pursuant to NRS 116.3116, may the portion of the association's lien which is superior to a unit's first security interest (referred to as the "super priority lien") contain "costs of collecting" defined by NRS 116.310313?

QUESTION #2:

Pursuant to NRS 116.3116, may the sum total of the super priority lien ever exceed 9 times the monthly assessment amount for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115, plus charges incurred by the association on a unit pursuant to NRS 116.310312?

QUESTION #3:

Pursuant to NRS 116.3116, must the association institute a "civil action" as defined by Nevada Rules of Civil Procedure 2 and 3 in order for the super priority lien to exist?

SHORT ANSWER TO #1:

No. The association's lien does not include "costs of collecting" defined by NRS 116.310313, so the super priority portion of the lien may not include such costs. NRS 116.310313 does not say such charges are a lien on the unit, and NRS 116.3116 does not make such charges part of the association's lien.

SHORT ANSWER TO #2:

No. The language in NRS 116.3116(2) defines the super priority lien. The super priority lien consists of unpaid assessments based on the association's budget and NRS 116.310312 charges, nothing more. The super priority lien is limited to: (1) 9 months of assessments; and (2) charges allowed by NRS 116.310312. The super priority lien based on assessments may not exceed 9 months of assessments as reflected in the association's budget, and it may not include penalties, fees, late charges, fines, or interest. References in NRS 116.3116(2) to assessments and charges pursuant to NRS 116.310312 define the super priority lien, and are not merely to determine a dollar amount for the super priority lien.

SHORT ANSWER TO #3:

No. The association must *take action* to enforce its super priority lien, but it need not institute a civil action by the filing of a complaint. The association may begin the process for foreclosure in NRS 116.31162 or exercise any other remedy it has to enforce the lien.

ANALYSIS OF THE ISSUES:

This advisory opinion – provided in accordance with NRS 116.623 – details the Real Estate Division's opinion as to the interpretation of NRS 116.3116(1) and (2). The Division hopes to help association boards understand the meaning of the statute so they are better equipped to represent the interests of their members. Associations are encouraged to look at the entirety of a situation surrounding a particular deficiency and evaluate the association's best option for collection. The first step in that analysis is to understand what constitutes the association's lien, what is not part of the lien, and the status of the lien compared to other liens recorded against the unit.

Subsection (1) of NRS 116.3116 describes what constitutes the association's lien; and subsection (2) states the lien's priority compared to other liens recorded against a unit. NRS 116.3116 comes from the Uniform Common Interest Ownership Act (1982) (the "Uniform Act"), which Nevada adopted in 1991. So, in addition to looking at the language of the relevant Nevada statute, this analysis includes references to the Uniform Act's equivalent provision (§ 3-116) and its comments.

I. NRS 116.3116(1) DEFINES WHAT THE ASSOCIATION'S LIEN CONSISTS OF.

NRS 116.3116(1) provides generally for the lien associations have against units within common-interest communities. NRS 116.3116(1) states as follows:

> The association has a lien on a unit for **any construction penalty that is imposed against the unit's owner pursuant to NRS 116.310305, any assessment levied against that unit or any fines** imposed against the unit's owner from the time the construction penalty, assessment or fine becomes due. **Unless the declaration otherwise provides, any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments** under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.

(emphasis added).

Based on this provision, the association's lien includes assessments, construction penalties, and fines imposed against a unit when they become due. In addition – unless the declaration otherwise provides – penalties, fees, charges, late charges, fines, and interest charged pursuant to NRS 116.3102(1)(j) through (n) are also part of the association's lien in that such items are enforceable as if they were assessments. Assessments can be foreclosed pursuant to NRS 116.31162, but liens for fines and penalties may not be foreclosed unless they satisfy the requirements of NRS 116.31162(4). Therefore, it is important to accurately categorize what comprises each portion of the association's lien to evaluate enforcement options.

A. "COSTS OF COLLECTING" (DEFINED BY NRS 116.310313) ARE NOT PART OF THE ASSOCIATION'S LIEN

NRS 116.3116(1) does not specifically make costs of collecting part of the association's lien, so the determination must be whether such costs can be included under the incorporated provisions of NRS 116.3102. NRS 116.3102(1)(j) through (n) identifies five very specific categories of penalties, fees, charges, late charges, fines, and interest associations may impose. This language encompasses all penalties, fees,

charges, late charges, fines, and interest that are part of the lien described in NRS 116.3116(1).

NRS 116.3102(1)(j) through (n) states:

> 1. Except as otherwise provided in this section, and subject to the provisions of the declaration, the association may do any or all of the following: ...
> (j) Impose and receive any payments, fees or charges for the use, rental or operation of the common elements, other than limited common elements described in subsections 2 and 4 of NRS 116.2102, and for services provided to the units' owners, including, without limitation, any services provided pursuant to NRS 116.310312.
> **(k) Impose charges for late payment of assessments pursuant to NRS 116.3115.**
> (l) Impose construction penalties when authorized pursuant to NRS 116.310305.
> (m) Impose reasonable fines for violations of the governing documents of the association only if the association complies with the requirements set forth in NRS 116.31031.
> (n) Impose reasonable charges for the preparation and recordation of any amendments to the declaration or any statements of unpaid assessments, and impose reasonable fees, not to exceed the amounts authorized by NRS 116.4109, for preparing and furnishing the documents and certificate required by that section.

(emphasis added).

Whatever charges the association is permitted to impose by virtue of these provisions are part of the association's lien. Subsection (k) – emphasized above – has been used – the Division believes improperly – to support the conclusion that associations may include costs of collecting past due obligations as part of the association's lien. The Commission for Common Interest Communities and Condominium Hotels issued Advisory Opinion No. 2010-01 in December of 2010. The Commission's advisory concludes as follows:

> An association may collect as a part of the super priority lien (a) interest permitted by NRS 116.3115, (b) late fees or charges authorized by the declaration, (c) charges for preparing any statements of unpaid assessments and (d) the "costs of collecting" authorized by NRS 116.310313.

Analysis of what constitutes the *super priority lien* portion of the association's lien is discussed in Section III, but the Division agrees that the association's lien does include items noted as (a), (b) and (c) of the Commission's advisory opinion above. To support item (d), the Commission relies on NRS 116.3102(1)(k) which gives associations the power to: "Impose charges for late payment of assessments pursuant to NRS 116.3115." This language would include interest authorized by statute and late fees if authorized by the association's declaration.

"Costs of collecting" defined by NRS 116.310313 is too broad to fall within the parameters of charges for late payment of assessments.[1] By definition, "costs of collecting" relate to the collection of past due "obligations." "Obligations" are defined as "any assessment, fine, construction penalty, fee, charge or interest levied or imposed against a unit's owner."[2] In other words, costs of collecting includes more than "charges for late payment of assessments."[3] Therefore, the plain language of NRS 116.3116(1) does not incorporate costs of collecting into the association's lien. Further review of the relevant statutes and legislative action supports this conclusion.

B. PRIOR LEGISLATIVE ACTION SUPPORTS THE POSITION THAT COSTS OF COLLECTING ARE NOT PART OF THE ASSOCIATION'S LIEN DESCRIBED BY NRS 116.3116(1).

The language of NRS 116.3116(1) allows for "charges for late payment of assessments" to be part of the association's lien.[4] "Charges for late payments" is not the same as "costs of collecting." "Costs of collecting" was first defined in NRS 116 by the adoption of NRS 116.310313 in 2009. NRS 116.310313(1) provides for the association's

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[1] Charges for late payment of assessments comes from NRS 116.3102(1)(k) and is incorporated into NRS 116.3116(1).
[2] NRS 116.310313.
[3] "Costs of collecting" includes any fee, charge or cost, by whatever name, including, without limitation, any collection fee, filing fee, recording fee, fee related to the preparation, recording or delivery of a lien or lien rescission, title search lien fee, bankruptcy search fee, referral fee, fee for postage or delivery and any other fee or cost that an association charges a unit's owner for the investigation, enforcement or collection of a past due obligation. The term does not include any costs incurred by an association if a lawsuit is filed to enforce any past due obligation or any costs awarded by a court. NRS 116.310313(3)(a).
[4] NRS 116.3102(1)(k) (incorporated into NRS 116.3116(1)).

right to charge a unit owner "reasonable fees to cover the costs of collecting any past due obligation." NRS 116.310313 is not referenced in NRS 116.3116 or NRS 116.3102, nor does NRS 116.310313 specifically provide for the association's right to lien the unit for such costs.

In contrast, NRS 116.310312, also adopted in 2009, allows an association to enter the grounds of a unit to maintain the property or abate a nuisance existing on the exterior of the unit. NRS 116.310312 specifically provides for the association's expenses to be a lien on the unit and provides that the lien is prior to the first security interest.[5] NRS 116.3102(1)(j) was amended to allow these expenses to be part of the lien described in NRS 116.3116(1). And NRS 116.3116(2) was amended to allow these expenses to be included in the association's super priority lien.

The Commission's advisory opinion from December 2010 also relies on changes to the Uniform Act from 2008 to support the notion that collection costs should be part of the association's super priority lien. Nevada has not adopted those changes to the Uniform Act. Since the Commission's advisory opinion, the Nevada Legislature had an opportunity to clarify the law in this regard.

In 2011, the Nevada Legislature considered Senate Bill 174, which proposed changes to NRS 116.3116. S.B. 174 originally included changes to NRS 116.3116(1) such that the association's lien would specifically include "costs of collecting" as defined in NRS 116.310313. S.B. 174 proposed changes to NRS 116.3116 (1) and (2) to bring the statute in line with the changes to the same provision in the Uniform Act amended in 2008.

The Uniform Act's amendments were removed from S.B. 174 by the first reprint. As amended, S.B. 174 proposed changes to NRS 116.3116(2) expanding the super priority lien amount to include costs of collecting not to exceed $1,950, in addition to 9 months

[5] See NRS 116.310312(4) and (6).

of assessments. S.B. 174 was discussed in great detail and ultimately died in committee.[6]

Also in 2011, Senate Bill 204 – as originally introduced – included changes to NRS 116.3116(1) to expand the association's lien to include attorney's fees and costs and "any other sums due to the association."[7] The bill's language was taken from the Uniform Act amendments in 2008. All changes to NRS 116.3116(1) were removed from the bill prior to approval.

The Nevada Legislature's actions in the 2009 and 2011 sessions are indicative of its intent not to make costs of collecting part of the lien. The Nevada Legislature could have made the costs of collecting part of the association's lien, like it did for costs under NRS 116.310312. It did not do so. In order for the association to have a right to lien a unit under NRS 116.3116(1), the charge or expense must fall within a category listed in the plain language of the statute. Costs of collecting do not fall within that language. Based on the foregoing, the Division concludes that the association's lien does not include "costs of collecting" as defined by NRS 116.310313.

A possible concern regarding this outcome could be that an association may not be able to recover their collection costs relating to a foreclosure of an assessment lien. While that may seem like an unreasonable outcome, a look at the bigger picture must be considered to put it in perspective. NRS 116.31162 through NRS 116.31168, inclusive, outlines the association's ability to enforce its lien through foreclosure. Associations have a lien for assessments that is enforced through foreclosure. The association's expenses are reimbursed to the association from the proceeds of the sale. NRS 116.31164(3)(c) allows the proceeds of the foreclosure sale to be distributed in the following order:

(1) The reasonable expenses of sale;

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[6] See http://leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=423.
[7] Senate Bill No. 204 – Senator Copening, Sec. 49, ln. 1-16, February 28, 2011.

> (2) The reasonable expenses of securing possession before sale, holding, maintaining, and preparing the unit for sale, including payment of taxes and other governmental charges, premiums on hazard and liability insurance, and, to the extent provided for by the declaration, reasonable attorney's fees and other legal expenses incurred by the association;
> (3) Satisfaction of the association's lien;
> (4) Satisfaction in the order of priority of any subordinate claim of record; and
> (5) Remittance of any excess to the unit's owner.

Subsections (1) and (2) allow the association to receive its expenses to enforce its lien through foreclosure *before* the association's lien is satisfied. Obviously, if there are no proceeds from a sale or a sale never takes place, the association has no way to collect its expenses other than through a civil action against the unit owner. Associations must consider this consequence when making decisions regarding collection policies understanding that every delinquent assessment may not be treated the same.

II. NRS 116.3116(2) ESTABLISHES THE PRIORITY OF THE ASSOCIATION'S LIEN.

Having established that the association has a lien on the unit as described in subsection (1) of NRS 116.3116, we now turn to subsection (2) to determine the lien's priority in relation to other liens recorded against the unit. The lien described by NRS 116.3116(1) is what is referred to in subsection (2). Understanding the priority of the lien is an important consideration for any board of directors looking to enforce the lien through foreclosure or to preserve the lien in the event of foreclosure by a first security interest.

NRS 116.3116(2) provides that the association's lien is prior to all other liens recorded against the unit *except:* liens recorded against the unit before the declaration; first security interests (first deeds of trust); and real estate taxes or other governmental assessments. There is one exception to the exceptions, so to speak, when it comes to priority of the association's lien. This exception makes a portion of an association's lien prior to the first security interest. The portion of the association's lien given priority status to a first security interest is what is referred to as the "super priority lien" to

distinguish it from the other portion of the association's lien that is subordinate to a first security interest.

The ramifications of the super priority lien are significant in light of the fact that superior liens, when foreclosed, remove all junior liens. An association can foreclose its super priority lien and the first security interest holder will either pay the super priority lien amount or lose its security. NRS 116.3116 is found in the Uniform Act at § 3-116. Nevada adopted the original language from § 3-116 of the Uniform Act in 1991. From its inception, the concept of a super priority lien was a novel approach. The Uniform Act comments to § 3-116 state:

> [A]s to prior first security interests the association's lien does have priority for 6 months' assessments based on the periodic budget. A significant departure from existing practice, the 6 months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders. As a practical matter, secured lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit. If the lender wishes, an escrow for assessments can be required.

This comment on § 3-116 illustrates the intent to allow for 6 months of assessments to be prior to a first security interest. The reason this was done was to accommodate the association's need to enforce collection of unpaid assessments. The controversy surrounding the super priority lien is in defining its limit. This is an important consideration for an association looking to enforce its lien. There is little benefit to an association if it incurs expenses pursuing unpaid assessments that will be eliminated by an imminent foreclosure of the first security interest. As stated in the comment, it is also likely that the holder of the first security interest will pay the super priority lien amount to avoid foreclosure by the association.

III. THE AMOUNT OF THE SUPER PRIORITY LIEN IS LIMITED BY THE PLAIN LANGUAGE OF NRS 116.3116(2).

NRS 116.3116(2) states:

> A lien under this section is prior to all other liens and encumbrances on a unit except:
> (a) Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to;
> (b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent or, in a cooperative, the first security interest encumbering only the unit's owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent; and
> (c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.
> ***The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien,*** unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien. If federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior to all security interests described in paragraph (b) must be determined in accordance with those federal regulations, except that notwithstanding the provisions of the federal regulations, the period of priority for the lien must not be less than the 6 months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association.

(emphasis added)

Having found previously that costs of collecting are not part of the lien means they are not part of the super priority lien. The question then becomes what can be included as part of the super priority lien. Prior to 2009, the super priority lien was limited to 6 months of assessments. In 2009, the Nevada legislature changed the 6 months of

assessments to 9 months and added expenses for abatement under NRS 116.310312 to the super priority lien amount. But to the extent federal law applicable to the first security interest limits the super priority lien, the super priority lien is limited to 6 months of assessments.

The emphasized language in the portion of the statute above identifies the portion of the association's lien that is prior to the first security interest, i.e. what comprises the super priority lien. This language states that there are two components to the super priority lien. The first is "to the extent of any charges" incurred by the association pursuant to NRS 116.310312. NRS 116.310312(4) makes clear that the charges assessed against the unit pursuant to this section are a lien on the unit and subsection (6) makes it clear that such lien is prior to first security interests. These costs are also specifically part of the lien described in NRS 116.3116(1) incorporated through NRS 116.3102(1)(j). This portion of the super priority lien is specific to charges incurred pursuant to NRS 116.310312. Payment of those charges relieves their super priority lien status. There does not seem to be any confusion as to what this part of the super priority lien is. Analysis of the super priority lien will focus on the second portion.

A. THE SUPER PRIORITY LIEN ATTRIBUTABLE TO ASSESSMENTS IS LIMITED TO 9 MONTHS OF ASSESSMENTS AND CONSISTS ONLY OF ASSESSMENTS.

The second portion of the super priority lien is "to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien."

The statute uses the language "to the extent of the assessments" to illustrate that there is a limit on the amount of the super priority lien, just like the language concerning expenses pursuant to NRS 116.310312, but this portion concerns assessments. The limit on the super priority lien is based on the assessments for

common expenses reflected in a budget adopted pursuant to NRS 116.3115 which would have become due in 9 months. The assessment portion of the super priority lien is no different than the portion derived from NRS 116.310312. Each portion of the super priority lien is limited to the specific charge stated and nothing else.

Therefore, while the association's *lien* may include any penalties, fees, charges, late charges, fines and interest charged pursuant to NRS 116.3102 (1) (j) to (n), inclusive, the total amount of the *super priority lien* attributed to assessments is no more than 9 months of the monthly assessment reflected in the association's budget. Association budgets do not reflect late charges or interest attributed to an anticipated delinquent owner, so there is no basis to conclude that such charges could be included in the super priority lien or in addition to the assessments. Such extraneous charges are not included in the association's super priority lien.

NRS 116.3116 originally provided for 6 months of assessments as the super priority lien. Comments to the Uniform Act quoted previously support the conclusion that the original intent was for 6 months of the assessments alone to comprise the super priority lien amount and not the penalties, charges, or interest. It is possible that an argument could be made that the language is so clear in this regard one should not look to legislative intent. But considering the controversy surrounding the meaning of this statute, the better argument is that legislative intent should be used to determine the meaning.

The Commission's advisory opinion of December 2010 concluded that assessments *and* additional costs are part of the super priority lien. The Commission's advisory opinion relies in part on a Wake Forest Law Review[8] article from 1992 discussing the Uniform Act. This article actually concludes that the Uniform Act language limits the

[8] See James Winokur, *Meaner Lienor Community Associations: The "Super Priority" Lien and Related Reforms Under the Uniform Common Interest Ownership Act*, 27 WAKE FOREST L. REV. 353, 366-69 (1992).

amount of the super priority lien to 6 months of assessments, but that the super priority lien does not necessarily consist of only delinquent assessments.[9] It can include fines, interest, and late charges.[10] The concept here is that all parts of the lien are prior to a first security interest and that reference to assessments for the super priority lien is only to define a specific dollar amount.

The Division disagrees with this interpretation because of the unreasonable consequences it leaves open. For example, a unit owner may pay the delinquent assessment amount leaving late charges and interest as part of the super priority lien. If the super priority lien can encompass more than just delinquent assessments in this situation, it would give the association the right to foreclose its lien consisting only of late charges and interest prior to the first security interest. It is also unreasonable to expect that fines (which cannot be foreclosed generally) survive a foreclosure of the first security interest. Either the lender or the new buyer would be forced to pay the prior owner's fines. The Division does not find that these consequences are reasonable or intended by the drafters of the Uniform Act or by the Nevada Legislature. Even the 2008 revisions to the Uniform Act do not allow for anything other than assessments and costs incurred to foreclose the lien to be included in the super priority lien. Fines, interest, and late charges are not *costs* the association incurs.

In 2009, the Nevada Legislature revised NRS 116.3116 to expand the association's super priority lien. Assembly Bill 204 sought to extend the super priority lien of 6 months of assessments to 2 years of assessments.[11] The Commission's chairman, Michael Buckley, testified on March 6, 2009 before the Assembly Committee on Judiciary on A.B. 204 that the law was unclear as to whether the 6 month priority can

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[9] See id. at 367 (referring to the super priority lien as the "six months assessment ceiling" being computed from the periodic budget).
[10] See id.
[11] See http://leg.state.nv.us/Session/75th2009/Reports/history.cfm?ID=416.

include the association's costs and attorneys' fees.[12] Mr. Buckley explained that the Uniform Act amendments in 2008 allowed for the collection of attorneys' fees and costs incurred by the association in foreclosing the assessment lien as part of the super priority lien. Mr. Buckley requested that the 2008 change to the Uniform Act be included in A.B. 204. Mr. Buckley's requested change to A.B. 204 to expand the super priority lien never made it into A.B. 204. Ultimately, A.B. 204 was adopted to change 6 months to 9 months, but commenting on the intent of the bill, Assemblywoman Ellen Spiegel stated:

> Assessments covered under A.B. 204 are the regular monthly or quarterly dues for their home. *I carefully put this bill together to make sure it did not include any assessments for penalties, fines or late fees.* The bill covers the basic monies the association uses to build its regular budgets.

(emphasis added).[13]

It is significant that the legislative intent in changing 6 months to 9 months was with the understanding that no portion of that amount would be for penalties, fines, or late fees and that it only covers the basic monies associations use to build their regular budgets. It does make sense that a lien superior to a first security interest would not include penalties, fines, and interest. To say that the super priority lien includes more than just 9 months of assessments allows several undesirable and unreasonable consequences.

B. NEVADA HAS NOT ADOPTED AMENDMENTS TO THE UNIFORM ACT TO ALTER THE ORIGINAL INTENT OF THE SUPER PRIORITY LIEN.

The changes to the Uniform Act support the contention that only what is referenced as the super priority lien in NRS 116.3116(2) is what comprises the super priority lien. In 2008, § 3-116 of the Uniform Act was revised as follows:

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[12] See Minutes of the Meeting of the Assembly Committee on Judiciary, Seventy-fifth Session, March 6, 2009 at 44-45.
[13] See Minutes of the Senate Committee on Judiciary, Seventy-fifth Session, May 8, 2009 at 27.

SECTION 3-116. LIEN FOR ~~ASSESSMENTS~~; SUMS DUE ASSOCIATION; ENFORCEMENT.

(a) The association has a statutory lien on a unit for any assessment ~~levied against~~ attributable to that unit or fines imposed against its unit owner. Unless the declaration otherwise provides, reasonable attorney's fees and costs, other fees, charges, late charges, fines, and interest charged pursuant to Section 3-102(a)(10), (11), and (12), and any other sums due to the association under the declaration, this [act], or as a result of an administrative, arbitration, mediation, or judicial decision are enforceable in the same manner as unpaid assessments under this section. If an assessment is payable in installments, the lien is for the full amount of the assessment from the time the first installment thereof becomes due.

(b) A lien under this section is prior to all other liens and encumbrances on a unit except:

~~(i)~~(1) liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances ~~which~~ that the association creates, assumes, or takes subject to~~,~~ ;

~~(ii)~~(2) except as otherwise provided in subsection (c), a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent, or, in a cooperative, the first security interest encumbering only the unit owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent~~,~~; and

~~(iii)~~(3) liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.

(c) A ~~The~~ lien under this section is also prior to all security interests described in subsection (b)(2) ~~clause (ii) above~~ to the extent of both the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien and reasonable attorney's fees and costs incurred by the association in foreclosing the association's lien. ~~This subsection~~ Subsection (b) and this subsection ~~does~~ do not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association. [~~The~~ A lien under this section is not subject to ~~the provisions of~~ [insert appropriate reference to state homestead, dower and curtesy, or other exemptions].]

Explaining the reason for the changes to these sections, the Uniform Act includes the following comments:

> 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.

The Uniform Act's amendment in 2008 is very telling about § 3-116's original intent. The comments state reasonable attorneys' fees and court costs are *added* to the super priority lien stating that it is currently 6 months of regular common assessments. The Uniform Act adds attorneys' fees and costs to subsection (a) which defines the association's lien. Those attorneys' fees and costs attributable to foreclosure efforts are also added to subsection (c) which defines the super priority lien amount.

If the association's lien ever included attorneys' fees and court costs as "charges for late payment of assessments" or if such sum was part of the super priority lien, there would be no reason to add this language to subsection (a) and (c). Or at a minimum, the comments would assert the amendment was simply to make the language more clear. It is also clear by the language that only what is specified as part of the super priority lien can comprise the super priority lien. The additional language defining the super priority lien provides for costs that are *incurred* by the association foreclosing the lien. This is further evidence that the super priority lien does not and never did consist of interest, fines, penalties or late charges. These charges are not incurred by the association and they should not be part of any super priority lien.

The Nevada Legislature had the opportunity to change NRS 116.3116 in 2009 and 2011 to conform to the Uniform Act. It chose not to. While the revisions under the

Uniform Act may make sense to some and they may be adopted in other jurisdictions, the fact of the matter is, Nevada has not adopted those changes. The changes to the Uniform Act cannot be insinuated into the language of NRS 116.3116. Based on the plain language of NRS 116.3116, legislative intent, and the comments to the Uniform Act, the Division concludes that the super priority lien is limited to expenses stemming from NRS 116.310312 and assessments as reflected in the association's budget for the immediately preceding 9 months from institution of an action to enforce the association's lien.

IV. "ACTION" AS USED IN NRS 116.3116 DOES NOT REQUIRE A CIVIL ACTION ON THE PART OF THE ASSOCIATION.

NRS 116.3116(2) provides that the super priority lien pertaining to assessments consists of those assessments "which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien." NRS 116.3116 requires that the association take action to enforce its lien in order to determine the immediately preceding 9 months of assessments. The question presented is whether this action must be a civil action.

During the Senate Committee on Judiciary hearing on May 8, 2009, the Chair of the Committee, Terry Care, stated with reference to AB 204:

> One thing that bothers me about section 2 is the duty of the association to enforce the liens, but I understand the argument with the economy and the high rate of delinquencies not only to mortgage payments but monthly assessments. Bill Uffelman, speaking for the Nevada Bankers Association, broke it down to a 210-day scheme that went into the current law of six months. Even though you asked for two years, I looked at nine months, thinking the association has a duty to move on these delinquencies.

NRS 116 does not require an association to take any particular action to enforce its lien, but that it institutes "an action." NRS 116.31162 provides the first steps to foreclose the association's lien. This process is started by the mailing of a notice of delinquent

assessment as provided in NRS 116.31162(1)(a). At that point, the immediately preceding 9 months of assessments based on the association's budget determine the amount of the super priority lien. The Division concludes that this action by the association to begin the foreclosure of its lien is "action to enforce the lien" as provided in NRS 116.3116(2). The association is not required to institute a civil action in court to trigger the 9 month look back provided in NRS 116.3116(2). Associations should make the delinquent assessment known to the first security holder in an effort to receive the super priority lien amount from them as timely as possible.

ADVISORY CONCLUSION:

An association's lien consists of assessments, construction penalties, and fines. Unless the association's declaration provides otherwise, the association's lien also includes all penalties, fees, charges, late charges, fines and interest pursuant to NRS 116.3102(1)(j) through (n). While charges for late payment of assessments are part of the association's lien, "costs of collecting" as defined by NRS 116.310313, are not. "Costs of collecting" defined by NRS 116.310313 includes costs of collecting any *obligation*, not just assessments. Costs of collecting are not merely a charge for a late payment of assessments. Since costs of collecting are not part of the association's lien in NRS 116.3116(1), they cannot be part of the super priority lien detailed in subsection (2).

The super priority lien consists of two components. By virtue of the detail provided by the statute, the super priority lien applies to the charges incurred under NRS 116.310312 and up to 9 months of assessments as reflected in the association's regular budget. The Nevada Legislature has not adopted changes to NRS 116.3116 that were made to the Uniform Act in 2008 despite multiple opportunities to do so. In fact, the Legislative intent seems rather clear with Assemblywoman Spiegel's comments to A.B. 204 that changed 6 months of assessments to 9 months. Assemblywoman Spiegel stated that she "carefully put this bill together to make sure it did not include any

assessments for penalties, fines or late fees." This is consistent with the comments to the Uniform Act stating the priority is for assessments based on the periodic budget. In other words, when the super priority lien language refers to 9 months of assessments, assessments are the only component. Just as when the language refers to charges pursuant to NRS 116.310312, those charges are the only component. Not in either case can you substitute other portions of the entire lien and make it superior to a first security interest.

Associations need to evaluate their collection policies in a manner that makes sense for the recovery of unpaid assessments. Associations need to consider the foreclosure of the first security interest and the chances that they may not be paid back for the costs of collection. Associations may recover costs of collecting unpaid assessments if there are proceeds from the association's foreclosure.[14] But costs of collecting are not a lien under NRS 116.310313 or NRS 116.3116(1); they are the personal liability of the unit owner.

Perhaps an effective approach for an association is to start with foreclosure of the assessment lien after a nine month assessment delinquency or sooner if the association receives a foreclosure notice from the first security interest holder. The association will always want to enforce its lien for assessments to trigger the super priority lien. This can be accomplished by starting the foreclosure process. The association can use the super priority lien to force the first security interest holder to pay that amount. The association should incur only the expense it believes is necessary to receive payment of assessments. If the first security interest holder does not foreclose, the association will maintain its assessment lien consisting of assessments, late charges, and interest. If a loan modification or short sale is worked out with the owner's lender, the association is better off limiting its expenses and more likely to recover the assessments. Adding unnecessary costs of collection – especially after a short period of delinquency – can

[14] NRS 116.31164.

make it all the more impossible for the owner to come current or for a short sale to close. This situation does not benefit the association or its members.

EXHIBIT 6

ADOPTED DECEMBER 8, 2010

COMMISSION FOR COMMON INTEREST COMMUNITIES AND CONDOMINIUM HOTELS
ADVISORY OPINION NO. 2010-01

Subject: Inclusion of Fees and Costs as an Element of the Super Priority Lien

QUESTION

Under NRS 116.3116, the super priority of an assessment lien includes "assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration" during the 6 or 9 month super priority period. May the association also recover, as part of the super priority lien, the costs and fees incurred by the association in collecting such assessments?

ANSWER

An association may collect as a part of the super priority lien (a) interest permitted by NRS 116.3115, (b) late fees or charges authorized by the declaration, (c) charges for preparing any statements of unpaid assessments and (d) the "costs of collecting" authorized by NRS 116.310313.

ANALYSIS

Statutory Super Priority. NRS Chapter 116 provides for a "super priority" lien for certain association assessments. NRS 116.3116 provides, in pertinent part, as follows:

> **NRS 116.3116 Liens against units for assessments.**
>
> 1. The association has a lien on a unit for . . . any assessment levied against that unit . . . from the time the . . . assessment . . . becomes due. . . .
>
> 2. A lien under this section is prior to all other liens and encumbrances on a unit except:
>
> (a) Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to;
>
> (b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent or,

> in a cooperative, the first security interest encumbering only the unit's owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent; and
>
> (c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.
>
> The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312[1] and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien, unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien. If federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior to all security interests described in paragraph (b) must be determined in accordance with those federal regulations, except that notwithstanding the provisions of the federal regulations, the period of priority for the lien must not be less than the 6 months immediately preceding institution of an action to enforce the lien. . . .

NRS 116.3116 further provides that "Unless the declaration otherwise provides, any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section."

UCIOA. The "super priority" provisions of NRS Chapter 116, like the rest of the chapter, are based on the 1982 version of the Uniform Common Interest Ownership Act (UCIOA) adopted by the National Conference of Commissioners

[1] NRS 116.310312, enacted in 2009, provides for the recovery by the association of certain costs incurred by an association with respect to a foreclosed or abandoned unit, including costs incurred to "Maintain the exterior of the unit in accordance with the standards set forth in the governing documents" or "Remove or abate a public nuisance on the exterior of the unit...."

of Uniform State Laws (NCCUSL). A comparison of the statutory language in UCIOA[2] and NRS reveals few material changes:

UCIOA 3-116. (1994)	**NRS 116.3116 Liens against units for assessments.**(2009)
(a) The association has a statutory lien on a unit for any assessment levied against that unit or fines imposed against its unit owner. Unless the declaration otherwise provides, fees, charges, late charges, fines, and interest charged pursuant to Section 3-102(a)(10), (11), and (12) are enforceable as assessments under this section. If an assessment is payable in installments, the lien is for the full amount of the assessment from the time the first installment thereof becomes due.	1. The association has a lien on a unit for . . . any assessment levied against that unit or any fines imposed against the unit's owner from the time the . . . assessment or fine becomes due. Unless the declaration otherwise provides, any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.
(b) A lien under this section is prior to all other liens and encumbrances on a unit except	2. A lien under this section is prior to all other liens and encumbrances on a unit except:
(i) liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes, or takes subject to,	(a) Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to;
(ii) a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent, or, in a cooperative, the first security interest encumbering only the unit owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent, and	(b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent or, in a cooperative, the first security interest encumbering only the unit's owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent; and

[2] The 1982 version of UCIOA was superseded by a 1994 version, which is used here, and a 2008 version, discussed below.

(iii) liens for real estate taxes and other governmental assessments or charges against the unit or cooperative. The lien is also prior to all security interests described in clause (ii) above to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien.	(c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative. The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien, unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien. If federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior to all security interests described in paragraph (b) must be determined in accordance with those federal regulations, except that notwithstanding the provisions of the federal regulations, the period of priority for the lien must not be less than the 6 months immediately preceding institution of an action to enforce the lien.

Reported Cases. There are no reported Nevada cases addressing the issue of whether the super priority lien may include amounts other than just the 6 or 9 months of assessments. Because NRS Chapter 116 is based on a Uniform

Act, however, decisions in other states that have adopted UCIOA can be helpful. Colorado and Connecticut are both UCIOA states; reported cases in both these states have addressed the question presented in this opinion.

In *Hudson House Condominium Association, Inc. v. Brooks*, 611 A.2d 862 (Conn., 1992), the Connecticut Supreme Court rejected an argument by the holder of the first mortgage that "because [the statute] does not specifically include 'costs and attorney's fees' as part of the language creating [the association's] priority lien, those expenses are properly includable only as part of the nonpriority lien that is subordinate to [the first mortgagee's] interest." In reaching its conclusion, however, the court relied on a non-uniform statute dealing with the judicial enforcement of the association lien.[3] In a footnote the court also noted that the super priority language of the Connecticut version of UCIOA 3-116 had since been amended to expressly include attorney's fees and costs in the priority debt.

The two Colorado cases that have considered this issue reached their conclusion, that the priority debt *includes* attorneys' fees and costs, based on statutory language similar to Nevada's. The language of the court in *First Atl. Mortgage, LLC v. Sunstone N. Homeowners Ass'n*, 121 P.3d 254 (Colo. App 2005) is very helpful:

> Within the meaning of Section 2(b), a "lien under this section" may include any of the expenses listed in subsection (1), including "fees, charges, late charges, attorney fees, fines, and interest." Thus, ***although the maximum amount of a super priority lien is defined solely by reference to monthly assessments, the lien itself may comprise debts other than delinquent monthly assessments.***[Emphasis added.]

[3] C.G.S.A. Section 47-258(g)

In support of its holding, the Sunstone court quoted the following language from James Winokur, *Meaner Lienor Community Associations: The "Super Priority" Lien and Related Reforms Under the Uniform Common Ownership Act*, 27 Wake Forest L. Rev. 353, 367:

> A careful reading of the . . . language reveals that the association's Prioritized Lien, like its Less-Prioritized Lien, may consist not merely of defaulted assessments, but also of fines and, where the statute so specifies, enforcement and attorney fees. The reference in Section 3-116(b) to priority "to the extent of" assessments which would have been due "during the six months immediately preceding an action to enforce the lien" merely limits the maximum amount of all fees or charges for common facilities use or for association services, late charges and fines, and interest which can come with the Prioritized Lien.

The decision of the court in Sunstone was followed in *BA Mortgage, LLC v. Quail Creek Condominium Association, Inc.*, 192 P.2d 447 (Colo. App, 2008).

A comparison of the language of the Colorado statute and the language of the Nevada statute reveals that the two are virtually identical:

CRS 38-33.3-316 Lien for assessments. (2008)	**NRS 116.3116 Liens against units for assessments**. (2009)
(1) The association . . . has a statutory lien on a unit for any assessment levied against that unit or fines imposed against its unit owner. Unless the declaration otherwise provides, **fees, charges, late charges, attorney fees, fines, and interest** charged pursuant to section 38-33.3-302 (1) (j), (1) (k), and (1) (l), section 38-33.3-313 (6), and section 38-33.3-315 (2) are enforceable as assessments under this article. The amount of the lien shall include all those items set forth in this section from the time such items become due. . . .	. The association has a lien on a unit for . . . any assessment levied against that unit or any fines imposed against the unit's owner from the time the . . . assessment or fine becomes due. Unless the declaration otherwise provides, any . . . **fees, charges, late charges, fines and interest** charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section. . . .

ADOPTED DECEMBER 8, 2010

(2) (a) A lien under this section is prior to all other liens and encumbrances on a unit except: * * * (b) Subject to paragraph (d) of this subsection (2), a lien under this section is also prior to the security interests described in subparagraph (II) of paragraph (a) of this subsection (2) to the extent of: (I) **An amount equal to the common expense assessments based on a periodic budget adopted by the association under section 38-33.3-315 (1) which would have become due, in the absence of any acceleration, during the six months immediately preceding** institution by either the association or any party holding a lien senior to any part of the association lien created under this section of an action or a nonjudicial foreclosure either to enforce or to extinguish the lien. [Emphasis added.]	2. A lien under this section is prior to all other liens and encumbrances on a unit except: * * * The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and **to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding** institution of an action to enforce the lien, unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien. If federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior to all security interests described in paragraph (b) must be determined in accordance with those federal regulations, except that notwithstanding the provisions of the federal regulations, the period of priority for the lien must not be less than the 6 months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association. [Emphasis added.]

2008 UCIOA. In 2008 NCCUSL proposed the following amendment to 3-116 of UCIOA[4]:

> SECTION 3-116. LIEN FOR ~~ASSESSMENTS;~~ SUMS DUE ASSOCIATION; ENFORCEMENT.
>
> (a) The association has a statutory lien on a unit for any assessment ~~levied against~~ attributable to that unit . . .. Unless the declaration otherwise provides, **reasonable attorney's fees and costs, other fees, charges, late charges, fines, and interest** charged pursuant to Section 3-102(a)(10), (11), and (12), and any other sums due to the association under the declaration, this [act], or as a result of an administrative, arbitration, mediation, or judicial decision are enforceable in the same manner as unpaid assessments under this section. If an assessment is payable in installments, the lien is for the full amount of the assessment from the time the first installment thereof becomes due.
>
> (b) A lien under this section is prior to all other liens and encumbrances on a unit except:
>
> ~~(i)~~(1) liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances ~~which~~ that the association creates, assumes, or takes subject to~~,~~;
>
> ~~(ii)~~(2) except as otherwise provided in subsection (c), a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent~~,~~ or, in a cooperative, the first security interest encumbering only the unit owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent~~,~~; and
>
> ~~(iii)~~(3) liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.
>
> (c) A ~~The~~ lien under this section is also prior to all security interests described in subsection (b)(2) ~~clause (ii) above~~ to the extent of **both** the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien **and reasonable attorney's fees and costs incurred by the association in foreclosing the association's lien**.. . . [Emphasis added.]

[4] The changes noted are to 1994 UCIOA.

New Comment No. 8 to 3-116 states as follows:

> 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).[5] 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 added.]

Discussion. The Colorado Court of Appeals and the author of the Wake Forest Law Review article quoted by the court in the *Sunstone* case both concluded that although the assessment portion of the super priority lien is limited to a finite number of months, because the assessment lien itself includes "fees, charges, late charges, attorney fees, fines, and interest," these charges may be included as part of the super priority lien amount. This language is the same as NRS 116.3116, which states that "fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments." As the *Sunstone* court noted "although the maximum amount of the super priority lien is defined solely by reference to monthly assessments, the lien itself may comprise debts other than delinquent monthly assessments."

[5] The statutory change noted by the Connecticut Supreme Court in the Hudson House case referred to above.

The referenced statute, NRS 116.3102, provides that an association has the power to:

> (j) Impose and receive any payments, fees or charges for the use, rental or operation of the common elements, other than limited common elements described in subsections 2 and 4 of NRS 116.2102, and for services provided to the units' owners, including, without limitation, any services provided pursuant to NRS 116.310312.
>
> (k) Impose charges for late payment of assessments pursuant to NRS 116.3115.
>
> (l) Impose construction penalties when authorized pursuant to NRS 116.310305.
>
> (m) Impose reasonable fines for violations of the governing documents of the association only if the association complies with the requirements set forth in NRS 116.31031.
>
> (n) Impose reasonable charges for the preparation and recordation of any amendments to the declaration or any statements of unpaid assessments, and impose reasonable fees, not to exceed the amounts authorized by NRS 116.4109, for preparing and furnishing the documents and certificate required by that section.

It is immediately apparent that the charges authorized by NRS 116.3102(1)(j) through (n) cover a wide variety of circumstances. The fact that "fees, charges, late charges, fines and interest" that may be included as part of the assessment lien under NRS 116.3116 include amounts unrelated to monthly assessments does not mean, however, that such amounts should not be included in the super lien if they do relate to the applicable super priority monthly assessments. It appears that only those association charges authorized under NRS 116.3102(1) Subsections (k) and a portion of (n) apply to the collection of unpaid assessments, i.e., Subsection (k)'s charges for late payment of

assessments and Subsection (n)'s charges for preparing any statements of unpaid assessments. Subsection (j)'s charges for use of common elements or providing association services, Subsection (l)'s construction penalties and Subsection (n)'s amendments to the declaration and providing resale information clearly do not relate to the collection of monthly assessments.

The inclusion of the word "fines" authorized by NRS 116.3102(1)(m) as part of the assessment lien presents an additional problem in Nevada. The "fines" referred to in NRS 116.3116/NRS 116.3102(1)(m) are fines authorized by NRS 116.31031. While fines may be imposed for "violations of the governing documents," which, of course, could include non-payment of assessments required by the governing documents, the hearing procedure mandated by NRS 116.31031 prior to the imposition of "fines" refers to an inquiry involving conduct or behavior that violates the governing documents, not the failure to pay assessments. Because "fines" involve conduct or behavior, enforcement of fines are given special treatment under NRS 116.31162:

> 4. The association may not foreclose a lien by sale based on a fine or penalty for a violation of the governing documents of the association unless:
>
> (a) The violation poses an imminent threat of causing a substantial adverse effect on the health, safety or welfare of the units' owners or residents of the common-interest community; or
>
> (b) The penalty is imposed for failure to adhere to a schedule required pursuant to NRS 116.310305.

Thus, to use the words of the *Sunstone* court, the "plain language" of NRS 116.3116, when read in conjunction with NRS 116.3102(1) (j) through (n), supports the conclusion that the only additional amounts that can be included as part of the super priority lien in Nevada are "charges for late payment of

assessments pursuant to NRS 116.3115" and "reasonable charges for the preparation and recordation of . . . any statements of unpaid assessments." NRS 116.3102(1)(k),(n). Note that the reference in Subsection (k) to NRS 116.3115 appears to be solely for the purpose of identifying what is meant by the word "assessment," though NRS 116.3115(3) provides for the payment of interest on "Any assessment for common expenses or installment thereof that is 60 days or more past due...."

Conclusion. The super priority language contained in 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"[6] have all concluded otherwise.

Accordingly, both a plain reading of the applicable provisions of NRS 116.3116 and the policy determinations of commentators, the state of Connecticut and lenders themselves support the conclusion that associations should be able to include specified costs of collecting as part of the association's super priority lien. We reach a similar conclusion in finding that Nevada law

[6] See New Comment No. 8 to UCIOA 3-116(2008) quoted above.

authorizes the collection of "charges for late payment of assessments" as a portion of the super lien amount.

In 2009, Nevada enacted NRS 116.310313, which provides as follows:

> **NRS 116.310313 Collection of past due obligation; charge of reasonable fee to collect.**
>
> 1. An association may charge a unit's owner reasonable fees to cover the costs of collecting any past due obligation. The Commission shall adopt regulations establishing the amount of the fees that an association may charge pursuant to this section.
>
> 2. The provisions of this section apply to any costs of collecting a past due obligation charged to a unit's owner, regardless of whether the past due obligation is collected by the association itself or by any person acting on behalf of the association, including, without limitation, an officer or employee of the association, a community manager or a collection agency.
>
> 3. As used in this section:
>
> (a) "Costs of collecting" includes any fee, charge or cost, by whatever name, including, without limitation, any collection fee, filing fee, recording fee, fee related to the preparation, recording or delivery of a lien or lien rescission, title search lien fee, bankruptcy search fee, referral fee, fee for postage or delivery and any other fee or cost that an association charges a unit's owner for the investigation, enforcement or collection of a past due obligation. The term does not include any costs incurred by an association if a lawsuit is filed to enforce any past due obligation or any costs awarded by a court.
>
> (b) "Obligation" means any assessment, fine, construction penalty, fee, charge or interest levied or imposed against a unit's owner pursuant to any provision of this chapter or the governing documents.

Since Nevada law specifically authorizes an association to recover the "costs of collecting" a past due obligation and, further, limits those amounts, we conclude that a reasonable interpretation of the kinds of "charges" an association

may collect as a part of the super priority lien include the "costs of collecting" authorized by NRS 116.310313. Accordingly, the following amounts may be included as part of the super priority lien amount, to the extent the same relate to the unpaid 6 or 9 months of super priority assessments: (a) interest permitted by NRS 116.3115, (b) late fees or charges authorized by the declaration in accordance with NRS 116.3102(1)(k), (c) charges for preparing any statements of unpaid assessments pursuant to NRS 116.3102(1)(n) and (d) the "costs of collecting" authorized by NRS 116.310313.

EXHIBIT 7

DISTRICT COURT

CLARK COUNTY, NEVADA

NV EAGLES, LLC, a Nevada Limited Liability Company, Plaintiff, v. WELLS FARGO BANK, INC., a South Dakota Corporation, AMERICAN STERLING BANK, a Missouri Corporation, BANK OF AMERICA, N.A., a Foreign Corporation, GERONIMO B. DELACRUZ and CERILIA B. DELACRUZ, an individual and DOES I through X, inclusive; ROE ENTITIES XI through XX, Defendants.	Case No.: A-13-690943-C Dept.: XXIX

DECLARATION OF JORY GARABEDIAN

I, Jory Garabedian, declare under penalty of perjury that the following is true and correct:

1. I am over 18 years of age, of sound mind, and capable of making this Affidavit. The facts stated in this Declaration are based on my personal knowledge, as well as a review of information in certain files maintained by my employer, Miles, Bauer, Bergstrom & Winters, LLP, and are true and correct.

2. I am employed as an attorney with the law firm of Miles, Bauer, Bergstrom & Winters, LLP in Henderson, Nevada. I am authorized to submit this affidavit on behalf of Miles, Bauer, Bergstrom & Winters, LLP.

3. In 2011 and again in 2012, my law firm was retained by Bank of America, N.A. to represent the interests of Bank of America and Mortgage Electronic Registration Systems, Inc., as nominee for Bank of America, N.A., successor by merger to BAC Home Loans

Servicing, LP, with regard to Notices of Default that were received by Bank of America and MERS from The Terraces Homeowners Association and Seven Hills Master Community Association relating to alleged homeowners' association liens against property located at 1112 Cathedral Ridge Street, Henderson, NV 89052 in which Bank of America was the beneficiary/investor of the first deed of trust loan secured by the property.

4. I have personal knowledge of the records of Miles, Bauer, Bergstrom & Winters, LLP as they pertain to the client files of Bank of America, N.A. related to the matter set forth above. Attached hereto are documents from the file. All of the documents listed below and attached hereto are maintained by Miles, Bauer, Bergstrom & Winters, LLP in the regular and ordinary course of business. The documents were created contemporaneously with the events reflected or within a reasonable time thereafter. The attached documents are true and complete copies of the records maintained by Miles, Bauer, Bergstrom & Winters, LLP. Based upon my experience and job duties, I am familiar with the manner and procedure in which such documents are created, maintained, and utilized in the regular course of business for Miles, Bauer, Bergstrom & Winters, LLP.

5. On July 29, 2011, Rock K. Jung, Esq., an attorney with Miles, Bauer, Bergstrom & Winters, LLP, sent a letter to The Terraces Homeowners Association, c/o LAW Collections, 9680 W. Tropicana Avenue, Suite 121, Las Vegas, NV 89147, via First Class Mail. A true and correct copy of the July 29, 2011 letter is attached hereto as **Exhibit 1**.

6. Attached hereto as **Exhibit 2** is a true and correct copy of an August 15, 2011 Escrow Demand received from Account Recovery Solutions, LLC regarding the amount owed to The Terraces Homeowners Association.

7. On September 22, 2011, Rock K. Jung, Esq., an attorney with Miles, Bauer, Bergstrom & Winters, LLP, sent a letter to Account Recovery Solutions, LLC enclosing a check in the amount of $450.00. A true and correct copy of the letter and the check are attached as **Exhibit 3.**

8. On October 7, 2011, the $450.00 check was returned to Miles, Bauer, Bergstrom & Winters, LLP by Account Recovery Solutions, LLC.

9. On August 24, 2012, Paterno C. Jurani, Esq., an attorney with Miles, Bauer, Bergstrom & Winters, LLP, sent a letter to Seven Hills Master Community Association, c/o Leach Johnson Song & Gruchow, 8945 W. Russell Road #330, Las Vegas, NV 89148 via First Class Mail. A true and correct copy of the August 24, 2012 letter is attached hereto as **Exhibit 4.**

10. Attached hereto as **Exhibit 5** is a true and correct copy of an August 30, 2012 letter received via facsimile from Leach Johnson Song & Gruchow, attorneys for Seven Hills Master Community Association, responding to the August 24, 2012 letter referenced above.

FURTHER DECLARANT SAYETH NOT.

3/31/14

Jory Garabedian

DOUGLAS E. MILES *
Also Admitted in California and Illinois
RICHARD J. BAUER, JR.*
JEREMY T. BERGSTROM
Also Admitted in Arizona
FRED TIMOTHY WINTERS*
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July 29, 2011

SENT VIA FIRST CLASS MAIL

The Terraces Homeowners Association
LAW Collections
9680 W. Tropicana Avenue, Suite 121
Las Vegas, NV 89147

Re: *Property Address: 1112 Cathedral Ridge Street, Henderson, NV 89052*
MBBW File No. 11-H1151

Dear Sirs:

This letter is in response to your Notice of Default with regard to the HOA assessments purportedly owed on the above described real property. This firm represents the interests of MERS as nominee for Bank of America, N.A., as successor by merger to BAC Home Loans Servicing, LP (hereinafter "BANA") with regard to these issues. BANA is the beneficiary/servicer of the first deed of trust loan secured by the property.

As you know, NRS 116.3116 governs liens against units for assessments. Pursuant to NRS 116.3116:

> The association has a lien on a unit for:
> ...
> *any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section*

While the HOA may claim a lien under NRS 116.3102 Subsection (1), Paragraphs (j) through (n) of this Statute clearly provide that such a lien is JUNIOR to first deeds of trust to the extent the lien is for fees and charges imposed for collection and/or attorney fees, collection costs, late fees, service charges and interest. See Subsection 2(b) of NRS 116.3116, which states in pertinent part:

> 2. A lien under this section is prior to all other liens and encumbrances on a unit except:

(b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent...

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

Subsection 2b of NRS 116.3116 clearly provides that an HOA lien "is prior to all other liens and encumbrances on a unit except: a first security interest on the unit..." But such a lien is prior to a first security interest to the extent of the assessments for common expenses which would have become due during the 9 months before institution of an action to enforce the lien.

Based on Section 2(b), a portion of your HOA lien is arguably senior to BANA's first deed of trust, specifically the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessment dated June 9, 2011. For purposes of calculating the nine-month period, the trigger date is the date the HOA sought to enforce its lien. It is unclear, based upon the information known to date, what amount the nine months' of common assessments pre-dating the NOD actually are. That amount, whatever it is, is the amount BANA should be required to rightfully pay to fully discharge its obligations to the HOA per NRS 116.3102 and my client hereby offers to pay that sum upon presentation of adequate proof of the same by the HOA.

Please let me know what the status of any HOA lien foreclosure sale is, if any. My client does not want these issues to become further exacerbated by a wrongful HOA sale and it is my client's goal and intent to have these issues resolved as soon as possible. Please refrain from taking further action to enforce this HOA lien until my client and the HOA have had an opportunity to speak to attempt to fully resolve all issues.

Thank you for your time and assistance with this matter. I may be reached by phone directly at (702) 942-0412. Please fax the breakdown of the HOA arrears to my attention at (702) 942-0411. I will be in touch as soon as I've reviewed the same with BANA.

Sincerely,

MILES, BAUER, BERGSTROM & WINTERS, LLP

Rock K. Jung, Esq.

DOUGLAS E. MILES *
Also Admitted in Nevada and Illinois
RICHARD J. BAUER, JR.*
JEREMY T. BERGSTROM
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* CALIFORNIA OFFICE
1231 E. DYER ROAD
SUITE 100
SANTA ANA, CA 92705
PHONE (714) 481-9100
FACSIMILE (714) 481-9141

September 22, 2011

Account Recovery Solutions, LLC
9680 W. Tropicana Avenue, Suite 121
Las Vegas, NV 89147

Re: *Property Address:* 1112 Cathedral Ridge Street
LOAN #: 104013232
MBBW File No. 11-H1151

Dear Sir/Madame:

As you may recall, this firm represents the interests of Bank of America, N.A., as successor by merger to BAC Home Loans Servicing, LP (hereinafter "BANA") with regard to the issues set forth herein. We have received correspondence from your firm regarding our inquiry into the "Super Priority Demand Payoff" for the above referenced property. The Statement of Account provided by you in regards to the above-referenced address shows a full payoff amount of $2,188.20. BANA is the beneficiary/servicer of the first deed of trust loan secured by the property and wishes to satisfy its obligations to the HOA. Please bear in mind that:

NRS 116.3116 governs liens against units for assessments. Pursuant to NRS 116.3116:

> The association has a lien on a unit for:
> ...
> *any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section*

While the HOA may claim a lien under NRS 116.3102 Subsection (1), Paragraphs (j) through (n) of this Statute clearly provide that such a lien is JUNIOR to first deeds of trust to the extent the lien is for fees

EXHIBIT
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and charges imposed for collection and/or attorney fees, collection costs, late fees, service charges and interest. See Subsection 2(b) of NRS 116.3116, which states in pertinent part:

> 2. A lien under this section is prior to all other liens and encumbrances on a unit except:
> (b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent...
> **The lien is also prior to all security interests described in paragraph (b) to the extent of the assessments for common expenses...which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien.**

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

Our client has authorized us to make payment to you in the amount of $450.00 to satisfy its obligations to the HOA as a holder of the first deed of trust against the property. Thus, enclosed you will find a cashier's check made out to Account Recovery Solutions, LLC in the sum of $450.00, which represents the maximum 9 months worth of delinquent assessments recoverable by an HOA. This is a non-negotiable amount and any endorsement of said cashier's check on your part, whether express or implied, will be strictly construed as an unconditional acceptance on your part of the facts stated herein and express agreement that BANA's financial obligations towards the HOA in regards to the real property located at 1112 Cathedral Ridge Street have now been "paid in full".

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

Sincerely,

MILES, BAUER, BERGSTROM & WINTERS, LLP

Rock K. Jung, Esq.

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S. SHELLY RAISZADEH
SHANNON C. WILLIAMS
LAWRENCE R. BOIVIN
RICK J. NEHORAOFF
BRIAN M. LUNA
ELIZABETH D. SCOTT

August 24, 2012

SENT VIA FIRST CLASS MAIL

Seven Hills Master Community Association
Leach Johnson Song & Gruchow
Attn: John Leach, Esq.
8945 W. Russell Road #330
Las Vegas, NV 89148

Re: *Property Address: 1112 Cathedral Ridge Street, Henderson, NV 89052*
MBBW File No. 12-H1607

Dear Sirs:

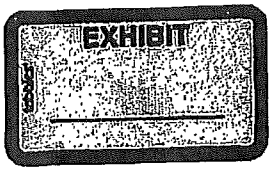
This letter is in response to your Notice of Sale with regard to the HOA assessments purportedly owed on the above described real property. This firm represents the interests of MERS as nominee for Bank of America, N.A., as successor by merger to BAC Home Loans Servicing, LP (hereinafter "BANA") with regard to these issues. BANA is the beneficiary/servicer of the first deed of trust loan secured by the property.

As you know, NRS 116.3116 governs liens against units for assessments. Pursuant to NRS 116.3116:

> The association has a lien on a unit for:
> ...
> *any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section*

While the HOA may claim a lien under NRS 116.3102 Subsection (1), Paragraphs (j) through (n) of this Statute clearly provide that such a lien is JUNIOR to first deeds of trust to the extent the lien is for fees and charges imposed for collection and/or attorney fees, collection costs, late fees, service charges and interest. See Subsection 2(b) of NRS 116.3116, which states in pertinent part:

> 2. A lien under this section is prior to all other liens and encumbrances on a unit except:



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(b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent...

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

Subsection 2b of NRS 116.3116 clearly provides that an HOA lien "is prior to all other liens and encumbrances on a unit except: a first security interest on the unit..." But such a lien is prior to a first security interest to the extent of the assessments for common expenses which would have become due during the 9 months before institution of an action to enforce the lien.

Based on Section 2(b), a portion of your HOA lien is arguably senior to BANA's first deed of trust, specifically the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessment. For purposes of calculating the nine-month period, the trigger date is the date the HOA sought to enforce its lien. It is unclear, based upon the information known to date, what amount the nine months' of common assessments pre-dating the NOD actually are. That amount, whatever it is, is the amount BANA should be required to rightfully pay to fully discharge its obligations to the HOA per NRS 116.3102 and my client hereby offers to pay that sum upon presentation of adequate proof of the same by the HOA.

Please let me know the status of the Foreclosure sale that is scheduled for November 15, 2012. My client does not want these issues to become further exacerbated by a wrongful HOA sale and it is my client's goal and intent to have these issues resolved as soon as possible. Please refrain from taking further action to enforce this HOA lien until my client and the HOA have had an opportunity to speak to attempt to fully resolve all issues.

Thank you for your time and assistance with this matter. I may be reached by phone directly at (702) 942-0413. Please fax the breakdown of the HOA arrears to my attention at (702) 942-0411. I will be in touch as soon as I've reviewed the same with BANA.

Sincerely,

MILES, BAUER, BERGSTROM & WINTERS, LLP

Paterno C. Jurani, Esq.

EXHIBIT 8

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S. SHELLY RAISZADEH
SHANNON C. WILLIAMS
LAWRENCE R. BOIVIN
RICK J. NEHORAOFF
BRIAN M. LUNA

June 25, 2012

SENT VIA FIRST CLASS MAIL

Sierra Crossings HOA
Absolute Collections Services, LLC
PO Box 12117
Las Vegas, NV 89112

Re: *Property Address: 3655 Wild Springs Street, Las Vegas, NV 89129*
MBBW File No. 12-HI272

Dear Sirs:

This letter is in response to your Notice of Default with regard to the HOA assessments purportedly owed on the above described real property. This firm represents the interests of MERS as nominee for Bank of America, N.A., as successor by merger to BAC Home Loans Servicing, LP (hereinafter "BANA") with regard to these issues. BANA is the beneficiary/servicer of the first deed of trust loan secured by the property.

As you know, NRS 116.3116 governs liens against units for assessments. Pursuant to NRS 116.3116:

> The association has a lien on a unit for:
> ...
> *any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section*

While the HOA may claim a lien under NRS 116.3102 Subsection (1), Paragraphs (j) through (n) of this Statute clearly provide that such a lien is JUNIOR to first deeds of trust to the extent the lien is for fees and charges imposed for collection and/or attorney fees, collection costs, late fees, service charges and interest. See Subsection 2(b) of NRS 116.3116, which states in pertinent part:

> 2. A lien under this section is prior to all other liens and encumbrances on a unit except:

(b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent…

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

Subsection 2b of NRS 116.3116 clearly provides that an HOA lien "is prior to all other liens and encumbrances on a unit except: a first security interest on the unit…" But such a lien is prior to a first security interest to the extent of the assessments for common expenses which would have become due during the 9 months before institution of an action to enforce the lien.

Based on Section 2(b), a portion of your HOA lien is arguably senior to BANA's first deed of trust, specifically the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessment dated May 22, 2012. For purposes of calculating the nine-month period, the trigger date is the date the HOA sought to enforce its lien. It is unclear, based upon the information known to date, what amount the nine months' of common assessments pre-dating the NOD actually are. That amount, whatever it is, is the amount BANA should be required to rightfully pay to fully discharge its obligations to the HOA per NRS 116.3102 and my client hereby offers to pay that sum upon presentation of adequate proof of the same by the HOA.

Please let me know what the status of any HOA lien foreclosure sale is, if any. My client does not want these issues to become further exacerbated by a wrongful HOA sale and it is my client's goal and intent to have these issues resolved as soon as possible. Please refrain from taking further action to enforce this HOA lien until my client and the HOA have had an opportunity to speak to attempt to fully resolve all issues.

Thank you for your time and assistance with this matter. I may be reached by phone directly at (702) 942-0412. Please fax the breakdown of the HOA arrears to my attention at (702) 942-0411. I will be in touch as soon as I've reviewed the same with BANA.

Sincerely,

MILES, BAUER, BERGSTROM & WINTERS, LLP

Rock K. Jung, Esq.

IN THE SUPREME COURT OF THE STATE OF NEVADA

K&P HOMES, A SERIES 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.	Case No.: 69966 US District Court Case No.: 2:15-cv-01534

RESPONDENT'S APPENDIX

VOLUME IV

WRIGHT, FINLAY & ZAK, LLP
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Attorneys for Plaintiff,
Christiana Trust, A Division of Wilmington Savings Fund Society, Not in Its Individual Capacity But As Trustee of ARLP Trust 3

DOCUMENT	VOLUME	BATE NO
Answer to Complaint and Counterclaim and Third Party Complaint	I	WFZ 0138-0152
Complaint for Quiet Title and Declaratory Relief	I	WFZ 0001-0137
Counter Motion for Summary Judgment	II	WFZ 0323-0429
Errata to Request for Judicial Notice in Support of Motion to Dismiss with Prejudice Defendant's Counterclaim	IV	WFZ 0758-0762
Motion for Reconsideration	IV	WFZ 0549-0698
Motion to Certify Question of Law to the Supreme Court	IV	WFZ 0703-0713
Motion to Dismiss w Prejudice Defendants' Counterclaim	I	WFZ 0153-0180
Opposition to Motion to Certify	IV	WFZ 0714-0721
Order Accepting Certified Question	IV	WFZ 0755-0757
Order Denying Deft K&P Homes' Motion to Reconsider	IV	WFZ 0699-0702
Order Granting Motion to Certify Question of Law	IV	WFZ 0750-0754
Order Granting Motion to Dismiss and Denying Motion for Summary Judgment	III	WFZ 0537-0548
Reply to Opposition to Motion to Certify	IV	WFZ 0722-0749
Request for Judicial Notice	II	WFZ 0181-0322
Response to Motion to Dismiss	III	WFZ 0430-0536

RESPONDENT'S APPENDIX VOLUME IV

DATE	DOCUMENT	VOLUME	BATE NO
2015-11-20	Motion for Reconsideration	IV	WFZ 0549-0698
2015-12-3	Order Denying Deft K&P Homes' Motion to Reconsider	IV	WFZ 0699-0702
2016-1-8	Motion to Certify Question of Law to the Supreme Court	IV	WFZ 0703-0713
2016-2-5	Opposition to Motion to Certify	IV	WFZ 0714-0721
2016-2-11	Reply to Opposition to Motion to Certify	IV	WFZ 0722-0749
2016-3-9	Order Granting Motion to Certify Question of Law	IV	WFZ 0750-0754
2016-4-13	Order Accepting Certified Question	IV	WFZ 0755-0757
2015-11-15	Errata to Request for Judicial Notice in Support of Motion to Dismiss with Prejudice Defendant's Counterclaim	IV	WFZ 0758-0762

PROOF OF SERVICE

I certify that I electronically filed, on the 27 day of ~~April~~ June, 2016, the foregoing **APPENDIX VOLUME IV** with the Clerk of the Court for the Nevada Supreme Court by using the CM/ECF system. I further certify that all parties of record to this appeal either are registered with the CM/ECF or have consented to electronic service.

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

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

John Henry Wright, Esq.
THE WRIGHT LAW GROUP, P.C.
2340 Pasaeo Del Prado
Suite D-305
Las Vegas, NV 89102
dayana@wrightlawgroupnv.com

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

An Employee of Wright, Finlay & Zak, LLP

JOHN HENRY WRIGHT
THE WRIGHT LAW GROUP, P.C.
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Las Vegas, Nevada 89102
Telephone: (702) 405-0001
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Email: john@wrightlawgroupnv.com
Attorneys for Defendants
K&P HOMES, A SERIES LLC OF
DEK HOLDING, LLC

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CHRISTIANA TRUST, A DIVISION OF WILMINGTON SAVINGS FUND SOCIETY, FSB NOT IN ITS INDIVIDUAL CAPACITY BUT AS TRUSTEE OF ARLP TRUST 3,

Plaintiff,

vs.

K&P HOMES, A SERIES LLC OF DEK HOLDINGS, LLC, a Nevada Limited Liability Company,

Defendants.

K&P HOMES, A SERIES LLC OF DEK HOLDINGS, LLC, a Nevada Limited Liability Company,

Counterclaimant,

vs.

CHRISTIANA TRUST, A DIVISION OF WILMINGTON SAVINGS FUND SOCIETY, FSB NOT IN ITS INDIVIDUAL CAPACITY BUT AS TRUSTEE OF ARLP TRUST 3,

Counterdefendant.

CASE NO: 2:15-CV-01534-RCJ-VCF

K&P HOMES, A SERIES LLC OF DEK HOLDINGS, LLC'S MOTION FOR RECONSIDERATION PURSUANT TO FRCP 60(b)

THE WRIGHT LAW GROUP P.C.
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
Tel: (702) 405-0001 Fax: (702) 405-8454

K&P HOMES, A SERIES LLC OF DEK HOLDINGS, LLC, a Nevada Limited Liability Company,

Third-Party Plaintiff,

vs.

RITA WIEGAND, an individual,

Third-Party Defendant.

Defendant and Third-Party Plaintiff, K&P HOMES, A SERIES LLC OF DEK HOLDINGS, LLC, (K&P) by and through its counsel of record, JOHN HENRY WRIGHT, ESQ., of THE WRIGHT LAW GROUP, P,.C., hereby submits this Motion for Reconsideration of the Court's Order (ECF No. 19) on Defendant Christiana Trust's Motion to Dismiss Counterclaim (ECF No. 11) and K&P's Countermotion for Summary Judgment (ECF No. 14). This Motion for Reconsideration is made and based upon the records and files in this case, the attached memorandum of points and authorities and is made pursuant to FRCP 60(b).

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION

1. INTRODUCTION:

On November 9, 2015, the Court issued its Order granting Christiana Trust's Motion to Dismiss Counterclaim on the basis that the Nevada Supreme Court's decision in SFR Investment Pool I, LLC v. U.S. Bank, N.A., 334 P.3d 408 (Nev. 2014) is to only be applied prospectively. The Court reserved judgment on Christiana's due process issue and determined the motion under Chevron Oil Co. v. Huson, 404 U.S. 97 (1971).

In reaching its conclusion, the Court determined that SFR did not address the issue of retroactive application because it was determined on different grounds, the Nevada Supreme Court assumed that its ruling would be applied retroactively. Therefore, the Court conducted an analysis under Huson and Breithaupt and concluded that under the federal common law of equity it would not be fair to apply SFR retroactively.

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Las Vegas, Nevada 89102
Tel: (702) 405-0001 Fax: (702) 405-8454

K&P Homes, LLC respectfully requests that the court reconsider its decision on the grounds that the Nevada Supreme Court was presented with arguments regarding the prospective versus retroactive application of SFR and rejected the arguments for only the prospective application. K&P Homes, LLC further requests that the court reconsider its decision on the grounds that the court did not accept the allegations in K&P's Counterclaim as true.

2. APPLICABLE RULE:

FRCP 60(b) authorizes the court to give relief from a judgment, order, or proceeding for mistake, inadvertence, surprise or excusable neglect.

> **(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

Relief under Rule 60(b) is addressed to the discretion of the court and the authority to give relief granted has been exercised in a wide variety of cases. Every case must be decided on its own circumstances.

Reconsideration of an order may be merited if the party requesting reconsideration can demonstrate that the court overlooked controlling decisions or factual matters that were put before it on the underlying motion. Rose v. Barnhart, 392 F. Supp. 2d 669 (S.D. N.Y. 2005).

3. ARGUMENT:

A. The Nevada Supreme Court rejected the banks' prospective arguments:

In its reasoning, the 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

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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. This is a violation of the United States Supreme Court holding in Erie Railroad Co. v. Tompkins, 304 U.S. 64 and 28 U.S.C. § 1652, which states:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

In this case, the court erroneously concluded that the Nevada Supreme Court in SFR court did not address the retroactivity of its decision. However, in reality the Nevada Supreme 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.**
>
> 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

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> 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.

(**Exhibit 1,** at 15-18)[1]

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

[1]Upon review, the arguments made by Christiana in its Motion to Dismiss virtually mirror the arguments made in the Amicus Brief submitted to the Nevada Supreme Court.

> 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 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.

(**Exhibit 2**, at 8-9)

Two separate Amicus Briefs presented these arguments to the Nevada Supreme Court on October 16, 2014. Subsequently, in a decision agreed upon by all seven justices, the Nevada Supreme Court denied U.S. Bank's Petition for Rehearing on October 18, 2014. In the order denying U.S. Bank's petition, the Nevada Supreme 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**.

(**Exhibit 3**, emphasis added)

The argument presented to this court by Christiana was previously presented to the Nevada Supreme Court and was soundly rejected. It was incorrect for Christiana to argue to this court that the issue had not been presented to the Nevada Supreme Court. Likewise, it was erroneous for the Court to have so concluded.

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

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

Additionally, as recently as August 15, 2015 this very court determined that SFR applied 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) this 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 Court's August 15, 2015, ruling is consistent with the actions of the Nevada Supreme Court in remanding more than 122 cases so far involving HOA sales that occurred prior to the SFR decision. Attached hereto as **Exhibit 4** is the Lexis/Nexis printout of the shepardization of SFR.[2] Thus, regardless of whether or not the Nevada Supreme Court has adopted the Breithaupt/Huson factors, it is abundantly clear that the Nevada Supreme Court intended that SFR apply retrospectively.

Additionally, when the Breithaupt/Huson factors are correctly applied to the actual facts of this case, the court cannot reach the conclusion that SFR should not 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 (*see*, section B *infra*), 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

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[2] We are not attaching this list as precedent, rather we are attaching it as empirical evidence of how the court has mechanically been treating all of the pre-SFR cases by ordering that they be re-litigated because the lower courts misapplied controlling law, which would not be proper if the SFR was only to be applied prospectively.

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 claims that they read it in a manner most favorable to them does not make it ambiguous.

28 U.S.C. § 1652 mandates that the laws of the states be regarded as rules of decision in civil actions in the courts of the United States. In this case, there is no doubt that the Nevada Supreme Court was presented the arguments relating to the prospective versus retroactive application of its ruling and rejected those arguments. Thus, it is improper for the federal district court to now order that the Nevada Supreme Court decision in SFR does not apply retroactively.

B. Reasonable Lenders Did Not Misunderstand the Statute:

In its order (ECF No. 19) the court stated that the SFR 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)

The Nevada Supreme 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 the Nevada Supreme 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,

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> 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)

Thus, the CCICCH and NRED are recognized by the Nevada Supreme 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.[3] The Nevada Supreme Court relied on the NRED Advisory Opinion 13-01 in reaching its decision in SFR. (*Id.* at 417).

Further, as noted above, the Nevada Supreme 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 ben 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 commons 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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[3]NRED's Advisory Opinion is attached hereto as **Exhibit 5**.

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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)

A copy of the December 8, 2010 CCICCH Advisory Opinion is attached hereto as **Exhibit 6**.

It is abundantly clearly 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 sworn affidavits claiming that it forwarded letters to various HOA's and their agents. One such letter, dated July 29, 2011, contains the following language:

> Based on Section 2(b), a portion of your HOA lien is arguably senior to BANA's first deed of trust, specifically the nine months of assessments for common expenses incurred before the date you notice of delinquent assessment dated June 9, 2011.

(**Exhibit 7**, affidavit of Jory Garabedian, dated March 31, 2014, in Case No. A-13-690943, District Court, Clark County, Nevada, with attached letter dated July 29, 2011)

Further, BANA's understanding of the implications of an HOA foreclosure are clearly expressed to one borrower on June 25, 2012 as follows:

> Subsection 2b of NRS 116.3116 clearly provides that an HOA lien "is prior to all

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> other liens and encumbrances on a unit except: a first security interest on the unit..." But such a lien is prior to a first security interest to the extent of the assessments for common expenses which would have become due during the 9 months before institution of an action to enforce the lien.
>
> Please be advised that , in the event you do not immediately bring your HOA account current by paying all sums past due, **BANA, *may* advance the sums necessary to protect *its lien interest* on the property**. If BANA does in fact advance said sums, those sums may be added on the balance you owe on the first position note and deed of trust you executed. BANA may do this per Nevada law and per the express terms of the note and deed of trust you executed. Further, BANA may add the attorney's fees and costs that are being incurred as a result of this matter to your loan. BANA may also do this per Nevada law and per the express terms of the note and deed of trust you executed. Please note that the HOA foreclosure sale may still occur despite any advancement of sums made by BANA in order to protect its lien interest on the property, since the amount that my client may advance may not be the same amount that your HOA/Absolute Collections Services is claiming to be due and owing from you. Thus, we strongly advise that you contact your HOA and/or Absolute Collections Services immediately to bring you HOA account current to avoid having your property sold at a potential HOA foreclosure sale by Absolute Collections Services.

(**Exhibit 8**, emphasis changed from original)[4]

K&P reminds the court that 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 the Nevada Supreme 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.

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

At 7:19-8:2 of the court's order (ECF No.19) the court states:

> 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 constitution record notice of yet-nonexistent HOA liens.

This appears to be based on the misconception that the SFR court reached that conclusion in a vacuum. That is certainly not the case. The Nevada Legislature adopted the UCIOA in 1991 and

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[4]This letter was disclosed by BANA in another HOA foreclosure case in the Clark County District Court. Case No. A-14-706874-C)

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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 are recorded. This is not a novel interpretation on the part of 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.
> . . .
> . . . 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*

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recorded and, therefore, *senior* or *prior* to the Deed of Trust.

In SFR, the Nevada Supreme Court also likened the HOA lien to a tax lien. The 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, 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.

D. K&P did argue Huson/Breithaupt factors:

The court also erred in its characterization of K&P's argument regarding the application of the Huson case. At 12:5-5 the court states:

> K&P does not argue under the *Huson/Breithaupt* factors but essentially propose a rule that necessarily favors retroactive application where the statute being interpreted predates the court's interpretation of it. Such a rule would of course obviate any retroactivity analysis , because under the rule against advisory opinions, the American courts do not generally interpret statues that have not yet been adopted. The court rejects this line of argument.

In reality, K&P did address the Huson factors. In its opposition K&P argued as follows:

> Christiana claims that SFR overrules 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

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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 Association assessment lien does not have a limited super priority over a first deed of trust.

The cases cited by the Chevron court 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, 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 is over 20 years old. The language has not changed and there is no question the law applies. 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 chose to, internally, read the statute in one manner. A manner which, ultimately, was proven wrong. The doctrine of nonretroactivity has no application herein.

This is clearly an argument that addresses the three factors identified in Huson.

E. The Court reached conclusions is based on evidence that has not been introduced:

In rendering it's decision, the court appears to have reached conclusions that are not based on admitted evidence. As noted in Section C, *supra*, the court stated:

> [A]nd the practice in the real estate industry prior to the announcement of the Nevada Supreme Court's controversial decision was to treat such sales not extinguishing first mortgages, such that traditional investors would not bother to bid a such sales where the home was worth less than the first mortgage." (ECF No. 19 at 10:2-6)

This factual statement is not supported by any evidence whatsoever and appears to have been included simply to support the court's conclusion that the SFR decision "decid[ed] an issue of first impression whose resolution was not clearly foreshadowed." (Contrary to the actual evidence as discussed in Section B, *supra*, such as the NRED and CCICCH advisory opinions.

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In yet another instance of making factual conclusion without admitted evidence in support thereof, the court states:

> Indeed, in no case of which the Court is aware has an HOA failed to obtain a bid a auction sufficient to cover its entire lien, not just the relatively small superpriority amount.
> (ECF No. 19:11-12)

K&P has searched Christiana's Motion to Dismiss and does not find anywhere in the Motion where such a claim is made. This too, appears to simply be a phantom claim asserted by the court to support the second prong of the Huson test. If such a claim had been asserted by Christiana, K&P would have easily dispelled the claim by providing information to the Court that there have indeed been many cases where the HOA has not obtained a bid sufficient to pay even the super-priority portion of the lien. In those cases the HOA obtained title via a credit bid in accordance with NRS 116.31164(2).

K&P offers the following information on three cases filed in Clark County District Court:

- Case No. A-14-705370-C, involved an HOA foreclosure by Aviano Homeowners Association on a property located at 9668 Padre Peak Court, Las Vegas, Nevada.
- Case No. A-14-708202-C, involved an involved an HOA foreclosure by Red Hills Homeowners Association on a property located at 8725 Red Rio Drive, Las Vegas, Nevada.
- Case No. A-13-693013-C, involved an involved an HOA foreclosure by Hillsboro Heights Homeowners Association on a property located at 1882 Hillsboro Drive, Henderson, Nevada.

These three cases provide proof, in the form of public records, of the fact that there have indeed been instances where the HOA has not received bids sufficient to pay their entire lien and have had to resort to making a credit bid on the property. This information is offered to show that the court's conclusion was erroneous. The Wright Law Group, LLC, K&P's attorneys, is a small law firm and it alone has the above referenced three cases where an HOA at their auction did not receive bids sufficient to satisfy their lien.

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F. The Court did not apply the proper standard for a Motion to Dismiss:

Further, the court did not apply the proper standard for a Motion to Dismiss and did not accept the allegations of K&P's Counterclaim as true. Rather, the Court appears to have adopted the allegations contained in Christiana's Complaint.

In the court's Statement of Facts at 2:8-10 the court recites allegations contained in Christiana's Complaint. Specifically, the court stated:

> Furthermore, the HOA and NAS did not comply with notice requirement under Chapter 116 of the Nevada Revises Statutes ("NRS") (*Id.* ¶ 26).

Yet, at 6:15-21 the court acknowledges that K&P, in its Counterclaim, has alleged more than mere compliance with Chapter 116's requirements. The court states:

> K&P has alleged that Christiana Trust was "mailed by certified registered mail, return receipt requested, a notice of sale for the Property." (Countrcl. ¶ 15, ECF No. 8). Because K&P has sufficiently alleged having mailed Christiana Trust notice of the sale, the Court will not dismiss the Counterclaim for a declaration that the sale extinguished Christina (sic) Trust's interest in the Property for lack of notice under *Shelley* and the Due Process Clause of the Fifth Amendment.

As the court noted at 3:10-18, when considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint (in this case a Counterclaim) does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See* Bell Atl. Corp. V. Twombly, 550 U.S. 544, 555 (2007). In considering whether the complaint (counterclaim) is sufficient to state a claim, the court will take all material allegations as true and construe them in a light most favorable to the plaintiff (counterclaimant). *See* NL Indus., Inc. v. Kaplan, 792 F.2d 896 (9th Cir. 1986). The court, however, is not required to accept as true allegation that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. *See* Sprewell v. Golden State Warriors, 266 F.3rd 979, 988 (9th Cir. 2001).

In this case, however, it appears that the court did the exact opposite of the cases it cited. In this case, Christiana moved to dismiss K&P's Counterclaim. K&P was the non-moving party. The court is required to take K&P's assertions in its Counterclaim as true. However, the court appears to have taken the unsupported assertions of Christiana's complaint as true.

Further, the actual evidence attached to K&P's counter-motion for summary judgment clearly shows that the notices were provided to Christiana and are publicly recorded. As such, per

Hal Roach Studios, Inv. v. Richard Feiner & Co., 896 F.2d 1542 (9th Cir. 19900; Branch v. Tunnell, 14 F.3d 449 (9th Cir. 1994); Mack v. S. Bay Beer Distribs., Inc., 798 F.2d 1279 and Federal Rule of Evidence 201, the evidence can be considered on a motion to dismiss (ECF 19 at 4:10-17). Thus, based on the foregoing, it was erroneous for the court to find that the HOA and NAS failed to provide notice of the sale to Christiana. K&P requests that the court reconsider its finding with respect to whether or not Christiana was provided notice of the foreclosure sale and conclude that notice was in fact provided.

CONCLUSION

K&P respectfully asks the Court to reconsider its decision and deny Christiana's Motion to Dismiss and Grant K&P HOMES, LLC'S Motion for Summary Judgment.

DATED this 20th day of November, 2015

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of November 2015, I electronically filed the **K&P HOMES, LLC'S MOTION TO RECONSIDER** using the CM/ECF system, which will cause the document to be served upon the following counsel of record:

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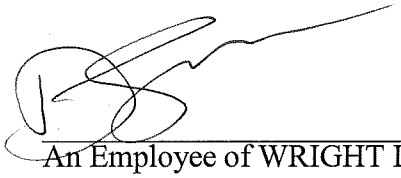

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EXHIBIT 1

IN THE SUPREME COURT OF NEVADA

SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company,

Appellant,

v.

U.S. BANK, N.A., A NATIONAL BANKING ASSOCIATION AS TRUSTEE FOR THE CERTIFICATE HOLDERS OF THE BANC OF AMERICA PASS-THROUGH CERTIFICATES, SERIES 2008-A,

Respondent.

Supreme Court No. 63078

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable NANCY L. ALLF, District Judge
District Court Case No. A-12-673671-C

BRIEF OF AMICI CURIAE SUPPORTING RESPONDENT U.S. BANK'S PETITION FOR REHEARING AND SUPPORTING AFFIRMANCE OF DISTRICT COURT

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Detached from motion filed on 10-13-14 and filed separately per order on 10-16-14.

NRAP 26.1 DISCLOSURE STATEMENT

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 in order that the judges of this court may evaluate possible disqualification or recusal.

Amicus curiae Bank of America, N.A. is wholly owned by BANA Holding Corporation, which is wholly owned by BAC North America Holding Company, which is wholly owned by NB Holdings Corporation, which is wholly owned by Bank of America Corporation. Bank of America Corporation's stock is publicly traded on the New York Stock Exchange under the ticker symbol "BAC." To the best of its knowledge, no person or entity owns more than 10% of Bank of America Corporation's stock.

Amicus curiae Wells Fargo Bank, National Association is wholly owned by Wells Fargo & Company. Wells Fargo & Company's stock is publicly traded on the New York Stock Exchange under the symbol "WFC." To the best of its knowledge, no person or entity owns more than 10% of Wells Fargo & Company's stock.

Amicus curiae JPMorgan Chase Bank, National Association is wholly owned by JP Morgan Chase & Company. JP Morgan Chase & Company's stock is publicly traded on the New York Stock Exchange under the symbol "JPM." To the

best of its knowledge, no person or entity owns more than 10% of JP Morgan Chase & Company's stock.

Amicus curiae Citibank, National Association is wholly owned by Citicorp, which is wholly owned by Citigroup, Inc. Citigroup, Inc.'s stock is publicly traded on the New York Stock Exchange under the symbol "C." To the best of its knowledge, no person or entity owns more than 10% of Citigroup, Inc.'s stock.

Amicus curiae CitiMortgage, Inc. is wholly owned by Citigroup Network Holdings LLC, which is wholly owned by Citicorp USA, Inc., which is wholly owned by Citibank, National Association, which is wholly owned by Citicorp, which is wholly owned by Citigroup, Inc. Citigroup, Inc.'s stock is publicly traded on the New York Stock Exchange under the symbol "C." To the best of its knowledge, no person or entity owns more than 10% of Citigroup, Inc.'s stock.

Amicus curiae Nationstar Mortgage LLC is wholly owned by Nationstar Sub 1 LLC and Nationstar Sub 2 LLC, which are both wholly owned by Nationstar Mortgage Holdings Inc. Nationstar Mortgage Holdings Inc.'s stock is publicly traded on the New York Stock Exchange under the symbol "NSM." To the best of its knowledge, no person or entity owns more than 10% of Nationstar Mortgage Holdings Inc.'s stock.

Amicus curiae Ocwen Loan Servicing, LLC is wholly owned by Ocwen Mortgage Servicing, Inc., which is wholly owned by Ocwen Financial

Corporation. Ocwen Financial Corporation's stock is publicly traded on the New York Stock Exchange under the symbol "OCN." To the best of its knowledge, no person or entity owns more than 10% of Ocwen Financial Corporation's stock.

Abran E. Vigil and Matthew D. Lamb of BALLARD SPAHR LLP are expected to appear on behalf of amici curiae in this Court.

Dated October 13, 2014.

BALLARD SPAHR LLP

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STATEMENT OF AMICI CURIAE

Amici curiae Bank of America, N.A.; Citibank, National Association; CitiMortgage, Inc.; JPMorgan Chase Bank, National Association; Nationstar Mortgage, LLC; Ocwen Loan Servicing, LLC; and Wells Fargo Bank, National Association (collectively, "Amici") collectively originate and/or service a substantial number of residential mortgage loans in Nevada. Many of these loans are secured by properties located within homeowners associations, condominium associations, and other common interest communities (referenced herein collectively as "HOAs").

Amici agree with Respondent U.S. Bank, as Trustee (the "Trust"), that this Court misconstrued Nevada law in its initial decision that first-priority deeds of trust are extinguished when an HOA sells a home in a nonjudicial foreclosure sale to recover delinquent HOA super-priority assessments. Amici and borrowers on the mortgage loans they service will be seriously disadvantaged if this Court leaves its initial decision in place. Accordingly, Amici urge the Court to reconsider and overturn its initial opinion or, at a minimum, to clarify that the decision has only prospective effect. Amici support the Trust's Petition for Rehearing and have contemporaneously moved for leave to file this proposed brief.

ARGUMENT

Nevada courts are confronted by hundreds of cases arising from the same fact pattern: A financially distressed homeowner with substantial mortgage debt defaults on his or her obligations to the HOA and the mortgagee. The HOA undertakes a nonjudicial foreclosure and sells the home to a speculator for a fraction of its value, generally the amount of the unpaid amounts due the HOA. Often, this nonjudicial foreclosure takes place after the lender has attempted to tender the superpriority amount and the HOA has rejected the tender. In any event, after the sale the speculator now asserts that it has acquired title free and clear of the lender's security interest, and litigation ensues. In the meantime, the speculator evicts the borrower, rents out the property, and recovers its investment, together with a handsome profit.

I. The Court's initial decision would produce an unexpected and unfair result, injuring mortgage lenders and borrowers alike.

The initial decision in this case has the potential to produce wholly unexpected and extraordinarily unfortunate results in hundreds of cases. It could extinguish the first mortgage lender's security interest, which frequently amounts to hundreds of thousands of dollars, even where the lender has made good faith efforts to cure the lien, and leave the borrower with no home and a substantial personal debt for the remaining balance of the borrower's loan, without any offset for the fair market value of the property nor opportunity to redeem the property—

all while rewarding third party real estate speculators who acquire properties for pennies on the dollar. The opinion will be especially damaging if it is given retrospective effect, since actors in the Nevada real estate community almost unanimously rejected this interpretation of the statute. By contrast, a decision that a nonjudicial HOA foreclosure leaves the first deed of trust intact would avoid these surprising and deleterious results.

Since the Court's initial decision overlooks two material questions of law—the application of Nevada rules of statutory construction and the question of whether the opinion applies retrospectively—the Court should grant the Petition for Rehearing. See NRAP 40(c)(2)(A).

A. The initial decision allows an HOA foreclosure to extinguish a much-larger first deed of trust, even though in practice, HOAs routinely refuse to allow lenders to cure HOA liens.

Under the decision, a buyer at an HOA foreclosure sale can eliminate a lender's entire interest under a first deed of trust (here, $885,000) by investing a comparatively tiny sum of money (here, $6,000) in satisfaction of an HOA lien. The Court has suggested that a mortgage lender can protect its interest by paying off the priority portion of the HOA lien, and thus preventing the HOA from foreclosing. Opinion at 13 ("U.S. Bank could have paid off the…lien to avert loss of its security; it also could have established an escrow for…assessments to avoid having to use its own funds to pay delinquent dues."). Unfortunately, in practice

this is not the case, since HOAs and their foreclosure agents often refuse to allow lenders to satisfy delinquent assessments.

Frequently, HOAs and their foreclosure agents have taken the position that the federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq., prohibits them from specifying the amount of an HOA lien to a mortgage lender. As a result, they will not disclose the amount of the lien even where the lender expresses an interest in paying it. See, e.g., Nev. Ass'n Servs., Inc. v. Benzer, No. 2:13-cv-02128-RFB-NJK, Reply in Support of Capital One, National Association's Motion to Extend Time to Amend Pleadings and Motion for Leave to File Amended Answer and Counterclaim, Sep. 12, 2014, ECF No. 67 at 3:3-4:7 (D. Nev. 2013) (HOA foreclosure agent refused to provide lender with amount of HOA lien on four separate occasions, then foreclosed against property despite tender of payment); Bank of Am., N.A. v. Allure Homeowners Ass'n, No. A-12-670230-B (Nev. Dist. Ct. 2012) (action seeking declaration that first mortgagee has right to pay off prioritized portion of HOA lien).

In many other cases, the HOA's foreclosure agent and the lender dispute the amount of the lien that is entitled to a statutory priority and the HOA tries to foreclose despite the lender's attempt to tender payment. See, e.g., CitiMortgage, Inc. v. Country Gardens Owners' Ass'n, 2:13-cv-02039-GMN-VCF, 2013 WL 6409951, at *1 (D. Nev. Dec. 5, 2013) (HOA foreclosure agent refused to postpone

sale after dispute over priority amount of lien); CitiMortgage, Inc. v. Villa Del Oro Owners Ass'n, 2:13-cv-02040-GMN, 2013 WL 6409958, at *1 (D. Nev. Dec. 5, 2013) (same); CitiMortgage, Inc. v. Liberty at Mayfield Cmty. Ass'n, 2:13-cv-02033-GMN-GWF, 2013 WL 6388727, at *1 (D. Nev. Dec. 5, 2013) (same).

B. The Court's initial ruling misapprehends the Nevada Legislature's intent and subjects homeowners to an increased risk of eviction, enormous unsecured debts, and the potential loss of access to credit.

In the context of foreclosures by mortgage lenders, the Nevada Legislature has created extensive protections for homeowners, including a mandatory foreclosure mediation program, see NRS 107.086, and a "Homeowner's Bill of Rights," which requires lenders to provide borrowers with information about foreclosure prevention alternatives before starting foreclosure proceedings. See S.B. 321, 2013 Leg., 77th Sess. (Nev. 2013). The Court's initial ruling, allowing HOAs to extinguish pre-existing first deeds of trust via nonjudicial foreclosure, effectively circumvents many of these protections. While the desire to help HOAs recover assessments more quickly is understandable, requiring HOAs to conduct a judicial foreclosure better protects the interests of borrowers and lenders and thereby better effectuates the intent of this legislation. Permitting nonjudicial foreclosures by HOAs to extinguish first deeds of trust incentivizes real estate speculators to redouble their efforts, foreseeably resulting in increased evictions and displaced homeowners.

By contrast, preservation of a first mortgage lien in a nonjudicial foreclosure would encourage potential bidders on HOA properties to discuss modifications to the deed of trust with the lender, such as the payment of less than the full loan balance in satisfaction of the deed of trust. As explained below, this would help the borrower minimize his or her unsecured debt for the balance of the mortgage. In certain circumstances, it could even lead to mediation proceedings, loan modifications and continued residency of the borrower in the borrower's own home.[1]

As it stands, the current ruling burdens homeowners in HOA-governed neighborhoods with vastly larger unsecured debts than they would otherwise owe to lenders. Even if an HOA foreclosure extinguishes a lender's security interest, it

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[1] See generally Premier One Holdings, Inc. v. BAC Home Loans Servicing LP, 2:13-cv-895 JCM GWF, 2013 WL 4048573, at *5 (D. Nev. Aug. 9, 2013) ("[C]ourts should not incentivize banks to foreclose on property at the first sign of distress. Banks should be encouraged to work with homeowners so that the bank may recoup as much of its loan as possible and the homeowner can remain in the home. Banks should also be encouraged to participate in a program like the State of Nevada Foreclosure Mediation Program (FMP) in good faith. Banks have considerations that an HOA does not have when considering foreclosure, such as: if the property value on the market is fluctuating; the homeowner's long term ability to pay back the loan; and, whether the bank should allocate resources first to foreclosing on property owners with no chance at paying back their mortgage versus working with home owners that may merely be struggling to pay back their mortgages. An HOA has none of these considerations and merely wants to collect its statutorily entitled fees in the easiest manner possible.").

does not extinguish the underlying debt owed by the borrower. In this particular case, the Court's opinion would render the Sherwoods personally liable to the Trust for the full balance of their $885,000 loan, with no offset for the actual value of the subject property. In contrast, if the Trust still holds a valid security interest in the property and if it forecloses against the property and seeks a deficiency judgment, it must offset the sale price against the balance of the loan. Obviously, this would dramatically reduce the amount of the Sherwoods' debt to the Trust. Of course, a smaller debt owed to the lender reduces the adverse impact on credit scores, the financial pressure on the borrower and the likelihood of bankruptcy.[2]

Finally, the Court's decision threatens to reduce the availability of mortgage credit statewide in HOA neighborhoods. See Premier One Holdings, Inc. v. BAC Home Loans Servicing LP, No. 2:13-cv-00895-JCM-GWF, 2013 WL 4048573, at *6 (D. Nev. Aug. 9, 2013) ("[I]t would be absurd to permit an HOA foreclosure to extinguish a bank's deed of trust because it would risk plunging the local economy back towards a recession. Banks will not lend money to buy houses when their deed of trust could be eliminated by HOA charges.").

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[2] Even in the rare instance where there is sufficient equity in the property to satisfy both the HOA lien and the full amount owed under the first deed of trust, the homeowner will still face the personal and financial difficulties associated with being evicted from his or her home.

When the Nevada Legislature enacted NRS 116.3116(2), it presumably did not intend to saddle financially distressed homeowners who have already endured an HOA foreclosure with six-figure debts. Nor did it intend to choke off the supply of credit to homeowners.[3] Nor did it seek to provide windfalls to third party speculators, frequently amounting to hundreds of thousands of dollars, and thereby to encourage them to pursue a business strategy resulting in the eviction of Nevadans from their homes.

II. Long-established statutory construction principles require interpretation of ambiguous statutes to reflect the practical understandings of affected parties and to avoid absurd results.

The universal real-world understanding of NRS 116.3116(2) that prevailed prior to the courts' decision supports the Trust's interpretation of the statute. "In some cases, the true meaning of an ambiguous statute may be found from

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[3] SFR's approach would also damage HOAs. If a nonjudicial HOA foreclosure extinguishes a lender's first deed of trust, then the lender is first in line to be paid from the proceeds of the HOA foreclosure after the prioritized portion of the HOA lien is satisfied. See NRS 116.31164(3)(c)(3)-(4). The non-prioritized portion of the HOA lien is only paid if the proceeds of the sale are enough to satisfy the prioritized portion of the lien and the full balance owed under the first deed of trust. For example, if an HOA forecloses under a $5,000 lien which includes a $1,000 priority component, and the property is also encumbered by a $100,000 deed of trust, the HOA will only recover $1,000, representing the priority portion of its lien. The remaining $4,000 in proceeds will be used to satisfy the deed of trust, which is extinguished under the Court's original opinion. By contrast, if the first deed of trust survives, all $5,000 in proceeds of the sale flow to the HOA, and the entire lien is satisfied.

extraneous circumstances. For this purpose, courts may resort to, or take judicial notice of, facts or events of common knowledge reasonably within the scope of judicial cognizance." 73 Am. Jur. 2d Statutes § 64. Therefore, a court interpreting an ambiguous statute may consider the practical interpretation of the statute among affected individuals. See State v. Coloff, 125 Mont. 31, 35, 231 P.2d 343, 345 (1951) ("The practical construction given a statute for a long period of time has been considered strong evidence of the meaning of the law.").[4]

Courts defer to the practical understanding of a statute because it is strong evidence of legislative intent. Overturning a publicly accepted interpretation of a statute upsets the reliance interests of individuals and businesses who depend upon it. When parties structure their transactions on the assumption that a given interpretation of a statute will control, it is unfair to upset their expectations by adopting a novel and different interpretation.

The Court needs look no further than the facts of this case to determine the practical understanding of NRS 116.3116(2) in the Nevada real estate and lending

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[4] "The practical construction of a statute is generally presumed to be the true one." 73 Am. Jur. 2d Statutes § 75; accord Dykes v. Norfolk & W. Ry. Co., 462 N.E.2d 676, 681, 123 Ill. App. 3d 1, 8 (1984) ("If the meaning of the statute were in doubt, the practical construction given it through all these years should be presumed to be the correct one..."); Frost v. State, 172 N.W.2d 575, 587 (Iowa 1969) ("[T]he practical construction of a statute, the meaning given it by contemporary usage, is presumed to be the true one and will not be disturbed except for cogent reasons.").

community. If SFR (or any other bidders who attended the HOA foreclosure sale), much less the Trust, had genuinely believed that the sale would extinguish the Trust's Deed of Trust, the subject property certainly would have sold for much more than $6,000. Accordingly, the vast majority of Nevada state and federal courts have adopted the view of NRS 116.3116(2) advocated by the Trust.[5]

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[5] See Bayview Loan Servicing v. Alessi & Koenig, 962 F. Supp. 2d 1222, 1226 (D. Nev. 2013) ("If investors believed that HOA foreclosures extinguished first mortgages, homes sold at HOA foreclosure sales would sell for significant fractions of their fair market value, not for the tiny fractions of their fair market value approximating the HOA lien at which HOA-foreclosed homes invariably sell. That investors will not pay significant amounts, i.e. fair amounts, for HOA-foreclosed homes indicates their perception that the first mortgage survives, preventing any profit through resale."); Freedom Mortgage Corp. v. Trovare Homeowners Ass'n, No. 2:11-cv-01403-MMD-GWF, 2013 U.S. Dist. LEXIS 106442, at *5 (D. Nev. July 29, 2013) ("[T]his Court has had opportunity to interpret the 'super priority' provision of NRS 116.3116(2)(c) and has held that foreclosure by an HOA does not eliminate a first security interest."); Beverly v. Weaver-Farley, No. 3:13-cv-00348-LRH-VPC, 2013 WL 5592332, at *2 (D. Nev. Oct. 9, 2013) (dismissing quiet title lawsuit functionally identical to this case); Kal-Mor-USA, LLC v. Bank of America, N.A., No. 2:13-cv-0680-LDG-VCF, 2013 WL 3729849, at *3 (D. Nev. July 8, 2013) (same); Weeping Hollow Avenue Trust v. Spencer, No. 2:13-cv-00544-JCM-VCF, 2013 WL 2296313, at *5-6 (D. Nev. May 24, 2013) (same); Diakonos Holdings, LLC v. Countrywide Home Loans, Inc., No. 2:12-cv-00949-KJD-RJJ, 2013 WL 531092, at *2-3 (D. Nev. Feb. 11, 2013) (same); see also Andrea J. Boyack, Community Collateral Damage: A Question of Priorities, 43 Loy. U. Chi. L.J. 53, 99 (2011) ("The…'super priority'" portion of the association lien does not have a true priority status under [the Uniform Common Interest Ownership Act] since this six-month assessment lien cannot be foreclosed as senior to a mortgage lien. Rather, it either creates a payment priority for some portion of unpaid assessments, which would take the first position in the foreclosure repayment 'waterfall,' or grants

(continued...)

Overturning this practical understanding of the statute upsets the expectations of borrowers and lenders. Indeed, this Court's prior decision likely conflicted with the expectations even of speculators such as SFR. SFR openly admits that it rents out HOA-foreclosed properties in order to recoup its tiny initial investment. See SFR Investments Pool 1, http://www.sfrassetmanagement.com ("We are a privately owned investment company which purchases, leases and manages over 300 residences in neighborhoods throughout Las Vegas. Our mission is to buy and then lease high-quality houses in desirable neighborhoods at affordable rates."). Therefore, SFR's business model is profitable even if it does not ultimately acquire clear title. All that SFR has to do to make a profit is collect enough rents to recoup the purchase price before the first mortgage lender forecloses. The Court's initial decision here awarded SFR a windfall on top of its expected profit.

Likewise, the absurd and unfair results produced by SFR's interpretation provide a strong basis for rejecting that interpretation. This Court has held that a "fundamental rule" of statutory construction is that "the unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another that would produce a

(...continued)
durability to some portion of unpaid assessments, allowing the security for such debt to survive foreclosure").

reasonable result." Hughes Props. v. State, 100 Nev. 295, 298, 680 P.2d 970, 971 (1984).[6] The Court should consider which view is better-supported by reason and public policy. See Harris Assocs. v. Clark County Sch. Dist., 119 Nev. 638, 642, 81 P.3d 532, 534 (2003) ("An ambiguous Nevada statutory provision should...be interpreted in accordance with what reason and public policy would indicate the legislature intended.") (internal citations and quotation marks omitted). Here, SFR's approach would produce absurd results by severely damaging lenders and borrowers (and also HOAs)—the three parties which NRS 116.3116(2) is designed to protect. Therefore, SFR's approach must be rejected in favor of the more reasonable interpretation advocated by the Trust.

III. The statutory language at issue does not unambiguously compel the conclusion that HOAs may wipe out first mortgages by pursuing nonjudicial foreclosures.

Under Nevada law, the first step in construing any statute is to determine whether the statute is clear or ambiguous. "A statute's language is ambiguous

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[6] Accord General Motors v. Jackson, 111 Nev. 1026, 1029, 900 P.2d 345, 348 (1995) ("A statute should always be construed to avoid absurd results."). Indeed, even if a statute is unambiguous, a court should reject an interpretation of the statute that leads to absurd results. See Berkson v. Lepome, 126 Nev. Adv. Rep. 46, 245 P.3d 560, 571 (2010) (Pickering, J., concurring in part and dissenting in part) ("[T]he 'plain meaning' rule does not justify reading a statute in a way that leads to an absurd result."); State v. Friend, 118 Nev. 115, 118, 40 P.3d 436, 439 (2002) (rejecting "literal, plain meaning interpretation" of relevant statute because it would lead to an absurd result).

when it is capable of more than one reasonable interpretation." J.D. Constr., Inc. v. IBEX Int'l Grp., 126 Nev. Adv. Rep. 36, 240 P.3d 1033, 1040 (2010). When making the threshold determination of whether a statutory provision is clear or ambiguous, a court examines the statute as a whole.[7]

Here, the statute provides that an HOA may obtain super-priority lien status for budgeted but unpaid HOA dues "during the 9 months immediately preceding institution of an action to enforce the lien." NRS 116.3116(2) (emphasis added). Accordingly, this case turns on the proper interpretation of the phrase "institution of an action to enforce the lien."

Manifestly, this phrase does not unequivocally encompass institution of steps to effect a nonjudicial foreclosure. In dissent, three Justices of this Court read the phrase to be limited to judicial foreclosure proceedings only. In doing so, they concluded that first mortgage liens should be preserved when an HOA sells a

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[7] See Clark Cnty. v. S. Nev. Health Dist., 128 Nev. Adv. Rep. 58, 289 P.3d 212, 215-16 (2012) (rejecting plain language arguments which focused on individual subcomponents of relevant statute and holding that statute was ambiguous when read as a whole); see also State v. A. L. (In re A.L.), 123 Nev. 26, 31, 153 P.3d 32, 35 (2007) ("[W]hen statutory provisions appear to conflict, the court should attempt to harmonize those provisions in order to carry out the overriding legislative purpose as indicated by the entire act."); Banegas v. State Indus. Ins. Sys., 117 Nev. 222, 229, 19 P.3d 245, 250 (2001) ("[W]ords within a statute must not be read in isolation, and statutes must be construed to give meaning to all of their parts and language within the context of the purpose of the legislation.").

property following a nonjudicial foreclosure. The majority reached the opposite conclusion but did not suggest it was compelled by the plain language of the statute. Rather, the majority opinion is based, *inter alia*, on commentary from the National Conference of Commissioners on Uniform State Laws, slip op. at 3, 17; and *Black's Law Dictionary*, *id.* at 14-15.

Because the language of the statute is ambiguous, this Court should apply normal canons of statutory construction, including, of course, the rules favoring interpretations in accord with prevailing practical understandings and rejecting interpretations producing absurd results.

IV. The Court's opinion creates a host of additional issues and ensures ongoing litigation between property speculators, homeowners, and lenders.

The Court's initial decision opens a host of related legal issues that will take the Nevada courts years to resolve. Among other things, courts will have to decide whether an HOA foreclosure is unlawful, and therefore void, where: (1) an HOA refuses to identify the amount of its lien to a lender and then forecloses; (2) the lender tenders the priority portion of the HOA lien, but the HOA forecloses anyway; (3) the HOA fails to provide notice of the sale as required by NRS Chapter 116; or (4) the sale is commercially unreasonable. They will also have to address whether an HOA foreclosure can extinguish a first security interest for a loan insured by the federal government. See Washington & Sandhill Homeowners

Ass'n v. Bank of Am., N.A., 2:13-cv-01845-GMN-GWF, 2014 WL 4798565, at *6-7 (D. Nev. Sept. 25, 2014) (holding that, under Supremacy and Property Clauses of United States Constitution, HOA foreclosure does not extinguish first security interest for loan insured by Department of Housing and Urban Development). If the Court leaves its initial decision in place, then Amici will obviously dispute the validity of HOA foreclosure sales where any of these issues are present. Thus, the Court's opinion creates far more uncertainty than it resolves. To give borrowers, lenders, and HOAs the predictability they need to structure their transactions, the Court should grant the Petition for Rehearing and adopt the statutory construction advocated by the Trust.

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

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 interests 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 an 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, its 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 (1994) (quoting Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07, 92 S. Ct. 349, 355 (1971)).[8]

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

[8] The United States Supreme Court limited the applicability of Chevron Oil for purposes of federal cases in Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97, 113 S. Ct. 2510, 2517-18 (1993). However, the Ninth Circuit Court of Appeals has held that Chevron Oil continues to be good law. See Nunez-Reyes v. Holder, 646 F.3d 684, 692 (9th Cir. 2011). And in any event, the Harper decision is completely irrelevant for purposes of Nevada law.

whose resolution was not clearly foreshadowed. As explained in Section II above, until very recently, actors in the Nevada real estate market 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 decisions 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 HOA foreclosures 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. And finally, it would grant real estate speculators such as SFR windfalls amounting to hundreds of millions if not billions of dollars. These speculators should not be allowed to profit off a statutory construction which the Nevada real estate community almost unanimously rejected. For all these reasons, if the Court upholds its initial decision, it should clarify that the decision only applies prospectively.

CONCLUSION

For the foregoing reasons, Amici respectfully request that the Court grant U.S. Bank's Petition for Rehearing.

Dated October 13, 2014.

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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 requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in normal Times New Roman 14 point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 29(e) and NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points or more, and contains 4,618 words excluding the parts of the brief exempted by NRAP 32(a)(7)(C).

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

Dated October 13, 2014.

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EXHIBIT 2

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

v.

U.S. BANK, A NATIONAL BANKING ASSOCIATION AS TRUSTEE FOR THE CERTIFICATE HOLDERS OF THE BANC OF AMERICA MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2008-A, Respondent

---

CASE NO.: 63078

District Court Case No.: A-13-673671-C

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

AMICUS BRIEF IN SUPPORT OF THE RESPONDENT U.S. BANK, N.A. AS TRUSTEE FOR THE CERTIFICATE HOLDERS OF THE BANC OF AMERICA MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2008-A'S PETITION FOR REHEARING SEEKING AFFIRMANCE

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STATEMENT OF INTEREST

The United Trustees Association ("UTA") and American Legal & Financial Network ("ALFN") (collectively, "Amici") hereby submit this Amicus Brief in support of the Respondent's Petition for Rehearing. The UTA is a national organization that, since 1968, has been the source for information, expertise, continuing education and opinion on foreclosure issues and practices for its members. UTA membership is comprised of those acting as foreclosure trustees under real property deeds of trust, along with title companies, financial institutions, auctioneers, posting and publication companies, computer service firms, and other independent companies. UTA members also work in allied and support organizations, including posting and publishing companies and computer service firms. Many of the UTA's members transact business and live in the State of Nevada.

As the largest national organization of its kind, the ALFN is a professional organization created to bring residential mortgage industry professionals together with lawyers that provide services to the industry. ALFN membership includes loan servicers, mortgage bankers, title companies, investors and other loan origination and servicing businesses, as well as the attorneys that support these groups. Like the UTA, many of the ALFN's members live and work in the state of Nevada.

The Amici request that the Court grant Respondent U.S. Bank's Petition for Rehearing, reconsider its decision and adopt the Dissent's view that a HOA must foreclose judicially to trigger the super-lien priority.

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INTRODUCTION

The Majority decision in this case misapprehends various components of NRS 116.3116 et seq., and strays from the expressed legislative intent and two decades of practice with the Act. Application of the Majority opinion, if not revised, will have numerous, far-reaching consequences on the entire mortgage lending industry in this State, from the existing and future hopeful borrowers, the HOAs and the existing and future (reluctant) lenders. If the Dissent's view is adopted such that the HOA lien attains super-priority status and can extinguish a first mortgage only through a judicial action, the application of the Act will conform to the legislative intent and practice and will avoid the adverse consequences to the industry.

The importance of HOAs and the need for them to lien properties to fund their operation for the good of the entire community is not questioned. The suggestion by the Majority that the HOAs must be able to extinguish the first deeds of trust in a non-judicial foreclosure sale to accomplish those goals is not supported by the Act. Actually, the HOAs can accomplish their goals by several means contemplated by the Act: (1) sue the unit's owner[1]; (2) institute a judicial action and name the unit's owner and all lienholders[2]; (3) assert its super-priority lien when the first mortgagee forecloses[3]; (4) per the Dissent, at p. 3, commence a non-

[1] NRS 116.3116(7).

[2] NRS 116.3116(2)(c).

[3] When the first mortgagee forecloses, the sub-priority portion of any HOA lien would be extinguished but the most recent nine months would not, so in order for the mortgagee to convey title free and clear of any liens, the nine month portion was paid. This option represents the clear intent of the Legislature. Extending the priority period in 2009 from six to nine months to protect the HOAs would have been unnecessary if HOAs could simply non-judicially foreclose on a super-priority lien before a senior deed of trust. See also, Hearing on SB 174 Before Senate Comm. on the Judiciary, 76th Legislature (2011), Statement of Michael Buckley, May 17, 2011, p. 12 ("The association can only get the super priority lien

judicial foreclosure under NRS 116.31162-116.31168 where the buyer takes subject to that first mortgage.[4] Per the Majority, the HOA can eliminate any first mortgage via a non-judicial foreclosure under NRS 116.31162-116.31168, giving a windfall to the purchaser who takes title free and clear. These options should be viewed in accordance with the Official Comments to UCIOA § 3-116 (1982): "[T]he 6 months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and *the obvious necessity for protecting the priority of the security interests of lenders*." (Emphasis added.) By initially adopting UCIOA (1982), the Legislature implicitly recognized this equitable balance. The four options preserve this equitable balance; the Majority abandons the balance and advances only the interests of the HOA – and more particularly, the interests of the investors or speculators like SFR. To restore the balance, the Majority should adopt the Dissent's view. (The existing practice permitting the HOA to assert its super-priority lien when the first mortgagee forecloses should continue.)

The Dissent's view avoids the questions of actual versus statutory notice in a non-judicial foreclosure raised by the Majority decision and ensures due process rights are preserved. Requiring the HOA to judicially foreclose to establish a super-priority will reduce the horrific impact that the Majority's opinion will shortly have on borrowers, HOAs, property values and sales, first mortgagees, the courts, investors, and new loan originations in Nevada.

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if there is a foreclosure by the first mortgage."); Statement of Michael Buckley, February 24, 2011, p. 4; and Statement of Senator Allison Copening, June 4, 2011, pp. 21-22.

[4] This was standard practice until only the last few years, as the buyers would collect rents from the unit's owner or evict and collect them from a new tenant **until the first deed of trust foreclosed**. See Las Vegas Review Journal, "Shrewd investors snap up HOA liens, rent out houses," March 18, 2013. AMICI's Addendum UTA/ALFN01-04.

A. NRS 116.3116 SHOULD REQUIRE THE HOA TO INSTITUTE A JUDICIAL "ACTION" TO TRIGGER A "SUPER-PRIORITY" LIEN THAT COULD EXTINGUISH A FIRST MORTGAGE.

1. A national trend exists, requiring the HOA to file a lawsuit to trigger the super-priority lien.

The Majority purportedly relies on the legislative history of the UCIOA to establish that a non-judicial foreclosure extinguishes a deed of trust. However, no UCIOA state has concluded that a non-judicial HOA foreclosure sale can eliminate a senior deed of trust. Seven of the other eight UCIOA jurisdictions (Colorado, Connecticut, Delaware, Vermont, Alaska, Massachusetts and West Virginia) only allow an HOA to foreclose its super-priority lien judicially[5] and Minnesota only in a foreclosure by the mortgage holder.[6] While the Majority, at 3, recognizes a benefit of adopting a uniform act, it fails to acknowledge the jurisprudence in these other UCIOA states requiring judicial foreclosures (or lender foreclosure) to trigger and foreclose super-priority liens. The Majority should reconsider, and instead adopt the Dissent's interpretation of NRS 116.3116.

2. The requirement that an HOA institute a judicial foreclosure to trigger the "super-priority" lien protects homeowners, HOAs and lienholders and prevents the administration nightmares created by the Majority's opinion.

Requiring the words "institution of an action" to mean a judicial foreclosure action would require the service of a summons and complaint on all interested parties in the case, including homeowners and *all* lienholders. This affords the first mortgagee an opportunity to appear and protect its interest in the property with the supervision of the court. However, the Majority's analysis runs afoul of due process protections because the statutes do not absolutely require the HOA in a

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[5] Colo. Rev. Stat. § 38-33.3-316 (11)(b); Conn. Gen. Stat. § 47-258 (j); Del. Code Ann. Tit. 25, § 81-316(j); Vt. Stat. Ann. Tit. 27A, § 3-116(j); Alaska Stat. § 34.08.470 (j); Mass. Gen. Laws ch. 183A, § 6(c) and ch. 254, § 5; and W.Va. Code § 36B-3-116 (f).

[6] Minn. Stat. § 515B.3-116.

non-judicial foreclosure to send notice of the lien or sale to the first mortgagee[7] and do not afford the mortgagee the opportunity to cure. When, in 1993, the Legislature modified the requirement of notice to all lienholders of the non-judicial sale to only require notice to the unit's owner and *lienholders subordinate to the first deed of trust.*[8] The mortgagee would then suffer a violation of its due process rights if the first mortgage can be extinguished by the HOA non-judicial sale. **If the right to receive notice is removed but the first mortgage cannot be extinguished, the due process rights are not threatened.**

The Majority's view creates administration problems under NRS 116.31164(3)(c) avoided by the Dissent's view. That statute does not account for the fact that the HOA's lien may include super-priority and sub-priority portions through NRS 116.3116(2). That statute also provides for reimbursement of expenses which do not enjoy super-priority under NRS 116.3116(2)(c), before satisfaction of the first mortgage. The Dissent's view avoids both these problems since a non-judicial sale does not trigger the super-priority and the entire HOA lien is superior to all lienholders subordinate to the first mortgage so all the expenses are properly recoverable against them. An HOA sale *under the administration of the court* would properly result in payment of the nine months of assessments (rather than the HOA's entire lien and non-priority expenses), then the first security interest mortgage, and then the remainder to the HOA and other lienholders in their order of priority.

The Majority, at 18-19, relies on NRS 116.310312 (for maintenance or abatement expenses) as a basis to conclude that the super-priority in NRS 116.3116 must be "read to encompass judicial and non-judicial foreclosure." The Majority however failed to recognize that **the first security interest is given no priority**

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[7] See NRS 116.311635(1)(b)(2) and 116.31168.

[8] When NRS 116.31168(1) is read with NRS 107.090(3) and (4), how can any first deed of trust be subordinate to any deed of trust?

over the maintenance and abatement lien under NRS 116.310312; only liens recorded prior to the declaration and "Liens for real estate taxes and other governmental assessments or charges" are afforded such priority. NRS 116.310312 therefore lends no support to the Majority's interpretation of NRS 116.3116.

The Majority, at 13, scolds the lenders because they "could have established an escrow for []HOA assessments to avoid having to use its own funds to pay delinquent dues," thereby protecting themselves from extinguishment. However, the Majority fails to recognize that the right to "establish an escrow account, loan trust account or other impound account for advance contributions for the payment of assessments" was not created until October 1, 2013, upon the adoption of NRS 116.3116(3). Moreover, the unit's owner must consent to the establishment of such an account. Collecting one month at a time provides the mortgagee only one month's protection, but imagine the owner's surprise – and fury! – getting a bill for an entire year on his next statement.

The problems of due process and administration are avoided if the non-judicial foreclosure cannot extinguish the first mortgage, as the Dissent argued.

3. Since the non-judicial foreclosure scheme does not mandate notice and an opportunity to cure, the HOAs face crippling liability for wrongful foreclosure if they guess wrong.

The Majority suggests a lender can prevent extinguishment by paying any delinquent assessments incurred by the homeowner. But when the first mortgagee is not required to get notices of delinquency, default and sale and is not expressly permitted to cure the deficiency that analysis must fail. While the Majority accepted as true, at this stage of the pleadings, the allegation in the Complaint that the subject HOA gave all statutory notices, many HOAs did not and are exposed to enormous liability to the first mortgagees whose interests were extinguished. Such liability may often exceed the E&O insurance carried by the HOA, putting the cost of defense and liability on the individual members of the HOA.

It was not until October 1, 2013, when NRS 116.4109(7) went into effect that the first mortgagee even had a right to request a statement of demand of the amount of the monthly assessment and fees and costs currently due. Previously, the HOAs regularly refused to provide the information to lenders, citing the Fair Debt Collections Practices Act, the borrower's right to privacy, and numerous other excuses.[9] Still, the HOAs refuse to provide the lenders the 9-month super-priority amount and even refuse the lender's offer to cure.[10] The Majority, at 23, says "nothing appears to have stopped U.S. Bank from determining the precise superpriority amount in advance of the sale *or paying the entire amount and requesting a refund of the balance*." Is it reasonable to expect the HOA that refused to provide the 9-month payoff turn around and refund the difference just because the holder asks for it back?

If the Nevada Legislature intended for the non-judicial foreclosure to extinguish a first mortgage, it would have required the HOA to give the notices, provide the 9-month amount and accept the amount from the holder *in every instance*. The lack of guidance by the Legislature puts the burden on HOAs to choose whether to give notice, give the 9-month quote, and accept the 9-month payoff. And if the HOA was inclined to provide a 9-month quote, when does the 9 months start? Before the Notice of Delinquent Assessment? Notice of Default? Notice of Sale? Sale? The Majority's opinion now exposes HOAs who choose wrong to significant liability for wrongfully foreclosing out the first mortgagee's interest, as well as the cost of defending those suits. Requiring the HOA judicially foreclose to enforce its super-priority lien will rescue the HOAs from liability for *past* non-judicial foreclosures and protect them from having to answer these confusing questions as they will be resolved by the court's supervision. But if an HOA non-judicial sale cannot extinguish a first mortgage, there is no need for the

[9] See for example, UTA/ALFN05, 06-07.
[10] See for example, UTA/ALFN08-10, 11-12 and 13.

HOA to give notice of its sale to the first mortgagee or provide it with or accept the 9-month payoff amount, and the HOAs who did not are then not exposed to liability to the first mortgagees.

The Dissent's view avoids these problems and should be adopted. Any judicial foreclosure requires notice and any judgment can clearly spell out which lien is being foreclosed, putting homeowners, first mortgagees and prospective bidders on notice so they can make educated decisions on how to protect their interests.

B. IMPORTANT PUBLIC POLICIES ARE SEVERELY IMPACTED BY THE RECENT MAJORITY OPINION.

1. The Majority opinion would substantially impact the borrowers on deeds of trust that have been extinguished by a non-judicial HOA sale.

On several levels, the Majority opinion has far-reaching and potentially devastating consequences for borrowers whose deeds of trust were extinguished by an HOA's non-judicial foreclosure.

First, requiring the HOA to enforce its super-priority lien via a judicial foreclosure may provide the homeowners a one-year right of redemption. Petition, at 5-6.

Second, the Majority opinion exposes Nevada borrowers to litigation by the first mortgagees to recover deficiency judgments for the amounts owed on the underlying Note which would otherwise have been offset in a judicial foreclosure by the value of the property. Petition, at 7. Thousands of Nevada borrowers are thus exposed to damages and attorneys' fees in lawsuits by the first mortgagees, causing many to file bankruptcy, creating a downward spiral and making it harder for the borrowers and Nevada's housing market to get back on their feet.

Third, an unintended result of the Majority is that it eliminates the important borrower protections designed to help borrowers stay in their homes under the

FMP, Homeowner Bill of Rights ("HOBR") and CFPB[11] regulations, with which the HOAs need not comply. The Majority, at 11, mentioned first security holders "strategically delay[ing] foreclosure," without at the same time recognizing the months of delays stem[ing] from first mortgagees' attempts to help the borrowers keep their homes under these rules. The Majority undermines the intent of these rules by allowing an HOA to foreclose ahead of a deed of trust and eliminate the very thing the lender is working with the borrower to preserve.

Fourth, the Majority opinion encourages opportunistic first mortgagees to completely bypass the borrower-friendly protections with the FMP, HOBR and CFPB Regulations by simply buying the property at the HOA's sale.

Fifth, an unintended result may also be to force first mortgagees to abandon their loan modification or loss mitigation efforts with the borrower beyond what is required of them by the consumer protection programs and rush to record a notice of default to stop a HOA sale through NRS 116.31162(6).[12]

Granting rehearing and adopting the Dissent's view of NRS 116.3116 et seq. will avoid or mitigate the harsh impact of the decision on homeowners.

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

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[11] 12 C.F.R. 1024.41(f), concerning "dual-tracking," prohibits a servicer from making the first notice or filing required for a foreclosure process until a mortgage loan account is more than 120 days delinquent.

[12] The statute, effective October 1, 2013, precludes a HOA from proceeding with a foreclosure while the borrower and lender are in the FMP exploring the borrower staying in his home through loan modification, among other options. The FMP can take close to 360 days before the time to appeal has run and the certificate must issue, if there is no appeal. It makes no sense for the Legislature to expressly preclude the HOA from foreclosing during FMP unless the mortgage would survive the eventual HOA non-judicial sale.

survived the HOA's non-judicial foreclosure – as evidenced by many CC&Rs providing "mortgagee protection clauses" 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 sales over the last 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 HOAs must judicially foreclosure on their super-priority lien will eliminate this risk.

3. The Majority decision negatively impacts the origination of new loans in Nevada.

In the short-term, any lender will have to weigh enormous risks before making a loan on a property subject to a Nevada HOA. Prospective homebuyers' access to money will be significantly impacted, harming Nevada's rebounding housing market.

In the long-term, prospective lenders would undoubtedly have to increase costs, fees, and out of pocket expenses to make up for the additional risk associated with lending money to individuals on properties located in HOAs. Many borrowers would be unable to qualify for new loans due to the increases. Market values would decrease due to a glut of unsellable properties.

Requiring HOAs to judicially foreclose to enforce their super-priority liens would lead to predictability from the court's supervision and reduce the risk to prospective lenders, decreasing the cost of new loans and stabilizing or improving the housing market.

CONCLUSION

Based on the above, this Court should reverse its decision, render a ruling in favor of the preservation of a first mortgage after a HOA non-judicial sale, and affirm the dismissal.

DATED this 15th day of October, 2014.

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DATED this 15th day of October, 2014.

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PROOF OF SERVICE

I certify that I electronically filed on the 15th day of October, 2014, the foregoing **AMICUS BRIEF IN SUPPORT OF THE RESPONDENT U.S. BANK, N.A. AS TRUSTEE FOR THE CERTIFICATE HOLDERS OF THE BANC OF AMERICA MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2008-A'S PETITION FOR REHEARING SEEKING AFFIRMANCE** with the Clerk of the Court for the Nevada Supreme Court by using the CM/ECF system. I further certify that all parties of record to this appeal either are registered with the CM/ECF or have consented to electronic service.

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

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

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