Exhibit 5

Exhibit 5

HOWARD C. KIM, ESQ.
Nevada Bar No. 10386
E-mail: howard@kgelegal.com
DIANA CLINE EBRON, ESQ.
Nevada Bar No. 10580
E-mail: diana@kgelegal.com
JACQUELINE A. GILBERT, ESQ.
Nevada Bar No. 10593
E-mail: jackie@kgelegal.com
KAREN L. HANKS, ESQ.
Nevada Bar No. 9578
E-mail: karen@kgelegal.com
KIM GILBERT EBRON
fka Howard Kim & Associates
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139
Telephone: (702) 485-3300
Facsimile: (702) 485-3301
Attorneys for SFR Investments Pool 1, LLC

KIM GILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NATIONSTAR MORTGAGE LLC, a foreign corporation doing business in Clark County, Nevada; FEDERAL NATIONAL MORTGAGE ASSOCIATION, a government sponsored enterprise, and FEDERAL HOUSING FINANCE AGENCY, as Conservator of Fannie Mae,

Plaintiffs,

vs.

SFR INVESTMENTS POOL 1, LLC, a Nevada Limited Liability Company; TALASERA AND VICANTO HOMEOWNERS ASSOCIATION, a Nevada Nonprofit Corporation,

Defendants.

Case No. 2:15-cv-00267-RFB-NJK

SUPPLEMENT TO CERTIFICATE OF INTERESTED PARTIES [Dkt. 38]

Pursuant to Local Rule 7.1-1 of the U.S. District Court of Nevada, the undersigned counsel for SFR Investments Pool 1, LLC hereby certifies that the following have an interest in the outcome of this case:

1. SFR Investments Pool 1, LLC is wholly owned by SFR Investments, LLC. SFR Investments, LLC is a Nevada limited liability company
2. SFR Investments, LLC is wholly owned by SFR Funding, LLC. SFR Funding, LLC is a

Delaware limited liability company.

3. SFR Funding, LLC is wholly owned by Xiemen Limited Partnership. Xiemen Limited Partnership is a Canadian entity.

4. Xiemen Limited Partnership is comprised of two partners: Xiemen Investments, Ltd. and John Gibson.

5. Xiemen Investments, Ltd. is a Canadian corporation and John Gibson is domiciled in South Africa.

6. There is no publically held corporation owning more than 10% of Xiemen Investments, Ltd.

These representations are made to enable judges of the Court to evaluate possible disqualification or recusal.

DATED this 10th day of May, 2016.

KIM GILBERT EBRON

/s/ Howard C. Kim
HOWARD C. KIM, ESQ.
Nevada Bar No. 10386
DIANA CLINE EBRON, ESQ.
Nevada Bar No. 10580
JACQUELINE A. GILBERT, ESQ.
Nevada Bar No. 10593
KAREN L. HANKS, ESQ.
Nevada Bar No. 9578
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139
Attorneys for SFR Investments Pool 1, LLC

KIM GILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

KIM GILBERT EBRON
7625 DEAN MARTIN DRIVE, SUITE 110
LAS VEGAS, NEVADA 89139
(702) 485-3300 FAX (702) 485-3301

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of May 2016, pursuant to FRCP 5, I served via the CM-ECF electronic filing system the foregoing **SUPPLEMENT TO CERTIFICATE OF INTERESTED PARTIES [Dkt. 38]** to the following parties:

Kristin A. Schuler-Hintz, Esq.
Thomas N. Beckom, Esq.
McCARTHY & HOLTHUS, LLP
9510 West Sahara Avenue, Suite 200
Las Vegas, Nevada 89117
Attorneys for Federal National Mortgage Association & Nationstar Mortgage

Leslie Bryan Hart, Esq.
John D. Tennert, Esq.
FENNEMORE CRAIG, P.C.
300 East Second Street, Suite 1510
Reno, Nevada 89501
Attorneys for Federal Housing Finance Agency

Asim Varma, Esq.
Howard N. Cayne, Esq.
Michael A.F. Johnson, Esq.
(*Pro Hac Vice*)
ARNOLD & PORTER LLP
555 12th Street NW
Washington, DC 20004
Attorneys for Federal Housing Finance Agency

Sean L. Anderson, Esq.
Ryan D. Hastings, Esq.
LEACH JOHNSON SONG & GRUCHOW
8945 W. Russell Road, Suite 330
Las Vegas, NV 89148
Attorneys for Talasera & Vicanto Homeowners Association

/s/ Jeremy R. Beasley
An employee of Kim Gilbert Ebron

Exhibit 4

Exhibit 4

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

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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

Respectfully Submitted by:
WRIGHT, FINLAY & ZAK, LLP
Dana Jonathon Nitz, Esq.
Nevada State Bar No. 50
Chelsea A. Crowton, Esq.
Nevada State Bar No. 11547
5532 S. Ft. Apache Rd., #110
Las Vegas, Nevada 89148
702-475-7964; Fax 702-946-1345
Attorneys for Amici Curiae, United Trustees Association and American Legal & Financial Network, in Support of Respondent

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

[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**

[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

[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.

WRIGHT, FINLAY & ZAK, LLP

_/s/ Dana Jonathon Nitz, Esq.___
Dana Jonathon Nitz, Esq.
Nevada Bar No. 50
Chelsea A. Crowton, Esq.
Nevada Bar No. 11547
Attorneys for Amici Curiae, United Trustees Association and American Legal & Financial Network, in Support of Respondent

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of N.R.A.P. 32(a)(4), the typeface requirements of N.R.A.P. 32(a)(5) and the type style requirements of N.R.A.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point, Times New Roman style. I further certify that this brief complies with the page- or type-volume limitations of N.R.A.P. 32(a)(7) because, excluding the parts of the brief exempted by N.R.A.P. 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 3,353 words. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 15th day of October, 2014.

/s/ Dana Jonathon Nitz, Esq.
Dana Jonathon Nitz, Esq.
Nevada Bar No. 50
Attorneys for Amici Curiae, United Trustees Association and American Legal & Financial Network, in Support of Respondent

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.

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

Howard C. Kim, Esq.
Diana S. Cline, Esq.
Jacqueline A. Gilbert, Esq.
HOWARD KIM & ASSOCIATES
1055 Whitney Ranch Drive, Suite 110
Henderson, Nevada 89014
Attorneys for Appellant

Ariel E. Stem, Esq.
Natalie L. Winslow, Esq.
AKERMAN LLP
1160 Town Center Drive, Suite 330
Las Vegas, Nevada 89144
Attorneys for Respondent

Michael R. Brooks, Esq.
Alia A. Najjar, M.D.
BROOKS HUBLEY LLP
1645 Village Center Circle, Suite 200
Las Vegas, Nevada 89134
Attorneys for Amici Curiae Silver State Schools Credit Union, Nevada Mortgage Bankers Association, and Nevada Association of Mortgage Professionals

Leslie Bryan Hart
LIONEL SAWYER & COLLINS
50 W. Liberty Street, Suite 1100
Reno, Nevada 89501
Robert R. Maddox
Kevin C. Newsom
R. Aaron Chastain
BRADLEY ARANT BOULT CUMMINGS LLP
1819 Fifth Avenue North
Birmingham, Alabama 35203
Attorneys for Amicus Curiae Mortgage Bankers Association

Abran E. Vigil
Matthew D. Lamb
BALLARD SPAHR LLP
100 North City Parkway, Suite 1750
Las Vegas, Nevada 89106.
Attorneys for Amici Curiae Bank of America, N.A.; Wells Fargo Bank, National Association; JPMorgan Chase Bank, National Association; Citibank, National Association; CitiMortgage, Inc.; Nationstar Mortgage, LLC; and Ocwen Loan Servicing, LLC

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

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

____/s/ Dana Jonathon Nitz, Esq._____
An Employee of Wright Finlay Zak, LLP

Exhibit 3

Exhibit 3

STATEMENT OF PRINCIPLES

HOA SUPER PRIORITY LIENS

Within state legislatures and the courts, a debate has been taking place over whether priority lien status should be granted to one private party over another private lienholder that has followed proper procedures to record a first lien. In some jurisdictions, the debate over "super priority" liens has even extended to whether or not the subordinately filed lien should be granted the ability to extinguish liens recorded first in time.

The trade association signatories to this statement affirm the following as their joint public policy position on super priority liens for common interest communities, including condominiums, planned communities, and real estate cooperatives (referred to here, collectively, as HOAs):

- We support the bedrock principle in real estate finance of "first in time, first in right," that any private lien secured after origination of a property's first lien mortgage or deed of trust should not take priority over that mortgage or deed of trust in foreclosure (i.e. "payment priority"), or have the ability to extinguish the mortgagee's interests (i.e. "true priority").

- We are opposed to policy initiatives that seek to give priority lien status to one private party ahead of another private lienholder that has followed proper procedures to record their lien. These initiatives run contrary to the very heart and nature of secured lending, and can destabilize the entire real estate finance system by undermining the value of the collateral securing a loan — resulting in higher costs that will ultimately be borne by consumers.

- If state policymakers decide to proceed contrary to this core principle and allow for an HOA super priority lien within their jurisdiction, this lien should exist as a payment priority that is satisfied from the proceeds of a foreclosure sale conducted by a superior lienholder or encumbrancer. At no time should this lien hold true priority status with the capacity to extinguish a mortgagee's superior interests in a property. Additionally, if a payment priority HOA super lien exists:

    - What is included within this lien must be expressly defined.

    - The associated costs must be reasonably limited. Included in the HOA super priority lien should only be the following:

        - Six months of delinquent regular assessments owed to the HOA by the homeowner, based on the HOA's current periodic budget year, and excluding special assessments;

        - An interest rate based on the lien amount that is commercially reasonable and based on interest rates for other collection actions; and

        - Reasonable collection costs for the aforementioned six months of delinquent assessments, which should be defined by prescribed limits. The costs should be similar to amounts incurred in other collection actions, and must not be framed within generic statements of law — examples of generic statements of law include "attorney's fees" or "necessary costs."

- The maximum amount of an HOA super priority lien should be capped at one percent of the mortgage amount.

- An HOA's super lien should lose its payment priority status if the HOA sells its lien interest to a third party.

American Bankers Association
American Financial Services Association
Association of Mortgage Investors
Housing Policy Council of the Financial Services Roundtable
Mortgage Bankers Association
Securities Industry and Financial Markets Association
Structured Finance Industry Group

APPENDIX

HOA SUPER PRIORITY LIENS

July 23, 2015

Issue History:

In 1982, the Uniform Law Commission (ULC) developed the *Uniform Common Interest Ownership Act* (UCIOA)[1] as model law. UCIOA contained language for the formation, management, and termination of common interest communities, including condominiums, planned communities, and real estate cooperatives (referred to here, collectively, as HOAs). Prior to UCIOA, the ULC developed related models in the late 1970s: the *Uniform Condominium Act* (UCA)[2] and the *Uniform Planned Community Act* (UPCA).[3] Since their creation, more than 20 jurisdictions have adopted variations of these acts or their amended versions — in whole or in part.[4]

Notably, the ULC suggested in each model that HOAs should hold a "super priority" lien on a property for several months of delinquent assessments. Typically, adopting jurisdictions have quantified the super priority lien as between six and nine months of unpaid amounts and related collection costs.

For decades, HOA super priority liens have been enforced as a "payment priority" from the proceeds of a foreclosure sale conducted by a superior lienholder or encumbrancer. However, in 2014 the Nevada Supreme Court[5] and the District of Columbia Court of Appeals[6] ruled that HOA super priority liens are "true priority" liens — meaning an HOA may conduct a foreclosure sale on this lien and if an otherwise superior lienholder or encumbrancer does not act to satisfy it, their otherwise advanced lien interest will be extinguished.

Existing Dangers:

These rulings[7] — shifting HOA super liens from a payment priority to a true priority — have created profound, unintended consequences for mortgage lenders, the servicers of their loans, and the housing industry at large:

- In a true priority jurisdiction, a relatively diminutive HOA super priority lien amount — likely totaling in the thousands of dollars — now has the capacity to wipe out a mortgage or deed of trust worth hundreds of thousands of dollars. In the prior noted Nevada Supreme Court case, an HOA foreclosure sale was executed for $6,000, in order to satisfy a delinquent $4,500 HOA super priority

[1] http://www.uniformlaws.org/Act.aspx?title=Common%20Interest%20Ownership%20Act%20(1982).
[2] http://www.uniformlaws.org/Act.aspx?title=Condominium%20Act.
[3] http://www.uniformlaws.org/Act.aspx?title=Planned%20Community%20Act.
[4] According to the ULC's website, as of July 23, 2015 nine states have adopted UCIOA: AK, CO, CT, MN, NV and WV (1982 version); and CT, DE and VT (2008 version). Additionally, 14 states have adopted UCA: AL, AZ, KY, ME, MN, MO, NE, NM, PA, RI, TX, VA, WA and WV. Pennsylvania has also adopted UPCA. However, it is likely that the ULC's aforementioned list is not definitive, given that Tennessee's existing condominium law and the District of Columbia's existing condominium law are both similarly structured to the UCA model and are not listed on the ULC's website.
[5] *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*
[6] *Chase Plaza Condominium Assoc. Inc. v. JPMorgan Chase Bank, N.A.*
[7] In 2012, a Washington State case — *Summerhill Village Homeowners Assoc. v. Roughley* — also established true priority for that State's HOA super liens. Note that these are state interpretations of their laws, and these decisions are only controlling in states where and when they are made.

lien amount.[8] This resulted in a loss of $885,000 for the otherwise superior first lien mortgagee through lien extinguishment.

- HOAs do not always provide appropriate notice to a superior lienholder or encumbrancer that a super priority lien amount is delinquent — resulting in mortgage servicers being unaware of lien concerns until well after the HOA foreclosure sale has been conducted. Inadequate state notice requirements exacerbate this problem.

- Even if a servicer does determine that a property is subject to an HOA super priority lien, communication with HOAs is often difficult. Most HOAs do not have current registered agent information on file with their secretary of state and less than 20 percent are managed by a professional company.

- Numerous "payoff" issues have also arisen, including HOAs improperly rejecting servicers' tender to satisfy the statutorily mandated super priority lien amount — in order to instead collect their full delinquent costs in foreclosure. In certain instances, some HOAs have even affirmatively refused to disclose to servicers the amount owed.

- Further, there is no mechanism to dispute the super priority lien amount purportedly owed by the homeowner, which essentially represents a private dispute with no judicial finding of the validity of the HOA's claim.

- Moreover, speculative investors have begun capitalizing on HOA foreclosure sales in order to experience windfall profits upon resale.

- Over 1,000 Nevada cases are being litigated to determine whether clear title existed for purchasers at HOA foreclosure sales, and subsequently whether proper notice was given by HOAs to first lien mortgagees before these sales were executed. If the courts determine notice was proper under Nevada law and clear title exists, holders of first lien deeds of trust will lose hundreds of millions of dollars.

If other jurisdictions begin adopting a true priority standard, many of the aforementioned consequences will inevitably result there as well, leading to serious financial impacts that will directly harm consumers:

- Lenders in true priority jurisdictions will need to financially account for the risks related to possible extinguishment in order to continue originating mortgage loans. The impact this might have on a consumer's loan will depend on an individual lender's risk mitigation strategy. For example, a lender might price the related risk into higher interest rates, mitigate it through higher down payment requirements, or completely exit risky jurisdictions altogether. Inevitably, any option will have a negative impact on consumers seeking mortgage credit or refinance options in a time when the market is experiencing the lowest interest rates in decades. It may even impact homeowner property sales as consumers are offered less favorable loan terms for homes in HOA-managed areas.

- Aside from access to credit and property sale impacts, homeowners are also vulnerable to additional risks in a true priority jurisdiction. They could inadvertently lose their homes (and their hard-earned equity) in the course of an assessment dispute with their HOA. Added concerns arise when a

[8] *See supra* note 5 (the specific lien amount owed ranged from $1,149.24 when the notice of delinquency was recorded to $4,542.06 when the notice of sale was sent).

homeowner is out of town, sick, etc. for an extended time period and inadvertently neglects to stay current on their HOA assessments. These concerns exist even if a homeowner is mortgage-free.

Notably, true priority HOA super liens significantly affect several public programs and federal government interests, including the Federal Housing Administration's (FHA) mortgage insurance program — which helps create sustainable homeownership opportunities for first-time and low- to moderate-income homebuyers, and the Federal Housing Finance Agency's (FHFA) conservatorship of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac). Given the magnitude of these concerns, numerous legal actions have been undertaken to challenge the appropriateness of true priority HOA super liens:

- In September 2014, the U.S. District Court for Nevada marginally limited the Nevada Supreme Court decision, barring HOA foreclosure sales on first lien deeds of trust in Nevada that are insured through FHA. The District Court held in *Washington and Sandhill Homeowners Association v. Bank of America N.A.* that the U.S. Constitution's Supremacy Clause bars foreclosure sales of this type and renders them invalid.

- Additionally, FHFA has directly intervened in several actions on this true priority issue. In June 2015, FHFA and Fannie Mae successfully challenged the ability of HOA super priority liens to extinguish federal government property interests in a case before the U.S. District Court for Nevada. In *Skylights LLC v. Byron et al*, FHFA and Fannie Mae did not dispute that recently upheld Nevada law allows an HOA's foreclosure of its super priority lien to extinguish an otherwise first position deed of trust if that lien is not properly satisfied by an otherwise superior lienholder or encumbrancer. However, FHFA and Fannie Mae counterclaimed that provisions of the federal *Housing and Economic Recovery Act of 2008* (HERA) prohibit an HOA from foreclosing on Fannie Mae's property interests without the consent of its conservator, FHFA. Given that FHFA did not consent to the extinguishment in question (and has publically stated it will not do so),[9] the District Court determined that the HOA's foreclosure sale did not extinguish Fannie Mae's property interests, nor allow the property to be conveyed free of this encumbrance.

    - Importantly, the District Court's decision included language indicating that the ruling could be limited to a scenario where Fannie Mae was the deed of trust's record beneficiary at the time of the HOA's foreclosure. However, three cases decided in July 2015 expanded the ruling to the more common scenario for Fannie Mae or Freddie Mac — where either own the debt but are not the recorded beneficiary of the deed of trust. These cases are *Elmer v. JPMorgan Chase Bank, N.A*; *Premiere One Holdings, Inc. v. Fed. Nat'l Mortg. Ass'n*; and *Williston Inv. Group, LLC v. JPMorgan Chase Bank, N.A.*

- While the aforementioned District Court decisions are not controlling in other jurisdictions, nor are other judges within the U.S. District Court for Nevada bound by these rulings, they do provide exceedingly favorable precedent for these arguments.

- Importantly, even if HOA super liens are eventually unable to extinguish FHFA and FHA property interests in any jurisdiction that adopts a true priority standard, loans made with private capital will remain vulnerable to extinguishment and investors will not have as much of an incentive to invest in homeownership, creating a major barrier to full housing market recovery and the ability of consumers to purchase homes in true priority states.

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[9] FHFA Statement on HOA Super-Priority Lien Foreclosures, *available at* http://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-on-HOA-Super-Priority-Lien-Foreclosures.aspx (April 21, 2015).

Exhibit 2

Exhibit 2

MINUTES OF THE
SENATE COMMITTEE ON FINANCE

Seventy-sixth Session
June 4, 2011

The Senate Committee on Finance was called to order by Chair Steven A. Horsford at 8:24 a.m. on Saturday, June 4, 2011, in Room 2134 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Steven A. Horsford, Chair
Senator Sheila Leslie, Vice Chair
Senator David R. Parks
Senator Moises (Mo) Denis
Senator Dean A. Rhoads
Senator Barbara K. Cegavske
Senator Ben Kieckhefer

GUEST LEGISLATORS PRESENT:

Senator Allison Copening, Clark County Senatorial District No. 6
Senator Michael A. Schneider, Clark County Senatorial District No. 11

STAFF MEMBERS PRESENT:

Rex Goodman, Principal Deputy Fiscal Analyst
Eric King, Program Analyst
Mark Krmpotic, Senate Fiscal Analyst
Wade Beavers, Committee Secretary

OTHERS PRESENT:

William Uffelman, Nevada Bankers Association
Garrett Gordon, Southern Highlands Homeowners Association
Bryan Gresh, Community Association Management Executive Officers, Inc.
Renny Ashleman, City of Henderson

Chris Ferrari, Concerned Homeowners Association Members Political Action Committee
Judy Stokey, NV Energy
Steve Wiel, Nevada Representative, Southwest Energy Efficiency Project
Stacey Crowley, Director, Office of Energy, Office of the Governor; Acting Nevada Energy Commissioner
Rebecca Gasca, Legislative and Policy Director, American Civil Liberties Union of Nevada
Mike Draper, General Motors Company
David Goldwater, Google Inc.
Todd R. Campbell, Director of Public Policy, Clean Energy Fuels
Kyle Davis, Nevada Conservation League
Susan Fisher, City of Reno
Lesley Pittman, United Way of Southern Nevada
Dolores Hauck, United Way of Southern Nevada
Mendy Elliott, United Way of Northern Nevada and the Sierra
Dr. Michael Thompson, Child Care Association of Nevada
Carol Levins, Creative Kids Learning Center
David Walton, Regional Director, Challenger Schools
Maureen Avery, Creative Kids Learning Center
Jack Woodcock
James R. Wells, Executive Officer, Public Employees' Benefits Program

CHAIR HORSFORD:
I will open the hearing on Senate Bill (S.B.) 428.

SENATE BILL 428: Makes an appropriation to the State Gaming Control Board to replace computer and technology hardware. (BDR S-1243)

This bill has been discussed several times and the Committee is prepared to make a decision.

MARK KRMPOTIC (Senate Fiscal Analyst, Fiscal Analysis Division, Legislative Counsel Bureau):
Senate Bill 428 allows for an appropriation from the General Fund to the Gaming Control Board for replacement computer and technology hardware in the amount of $1,256,104. Staff is providing a worksheet (Exhibit C) which outlines these costs.

Based on testimony which was provided by representatives of the Gaming Control Board, there are several options available to the Committee in reducing the appropriation. This would be based on two scenarios. In the first, as described on page 1 of Exhibit C, all items purchased before or during fiscal year (FY) 2006-2007 would be replaced. Staff has worked with the Board to compile this information. By adjusting the replacement time frame, the appropriation needed for the Board would be a total of $784,758. In comparison to the original figure, this would amount to a reduction of $471,346 to the overall appropriation.

The second option, as described on page 2 of Exhibit C, would provide for the replacement of items which fall into the first or second priority groups, as determined by the Board. These items would have been purchased before or during FY 2006-2007, with the exception of one switch which was purchased in FY 2007-2008. This would amount to a cost of $719,957. In comparison to the original figure, this would amount to a General Fund reduction of $536,147.

CHAIR HORSFORD:
Based upon this review, and in light of the need for the identified equipment, I would accept a motion to approve the second option as an amendment to S.B. 428.

SENATOR PARKS MOVED TO AMEND AND DO PASS S.B. 428.

SENATOR DENIS SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

* * * * *

CHAIR HORSFORD:
I will open the hearing on S.B. 425.

SENATE BILL 425: Makes an appropriation to the Department of Motor Vehicles for the replacement of computers and other associated equipment. (BDR S-1264)

MR. KRMPOTIC:
Staff has provided Amendment 810 to S.B. 425 (Exhibit D). There were originally 15 or 16 separate bills which identified one-time appropriations for the Department of Motor Vehicles (DMV) from the State Highway Fund. At the request of Chair Horsford, Legal Division Staff have combined each of those individual bills and appropriations into S.B. 425. These are now listed in various sections of the bill. The collective amounts identified in S.B. 425 now total approximately $3.6 million in State Highway Fund money. This is equivalent to what has been included in the Governor's recommended budget for one-time appropriations to DMV.

I will briefly describe various sections in the amendment. In section 1, there is a provision for the appropriation of $102,584 for computer hardware, software and printers. This would be made to the Director's Office of DMV, B/A 201-4744.

PUBLIC SAFETY

MOTOR VEHICLES

DMV – Director's Office — Budget Page DMV-1 (Volume III)
Budget Account 201-4744

This was the provision which was originally included in S.B. 425. The identification of the Director's Office as the recipient of these funds has been added in the amendment to provide greater clarity about the destination and the purpose of the appropriation.

Section 2 provides for an appropriation to the Automation account, B/A 201-4715, totaling $905,210 for replacement of computer hardware, software and printers.

DMV – Automation — Budget Page DMV-15 (Volume III)
Budget Account 201-4715

This section previously represented the appropriation which was included in S.B. 425.

Section 3 is on page 3 of Exhibit D. This is a provision for the appropriation of $49,323 to the Central Services Division, B/A 201-4741.

DMV – Central Services – Budget Page DMV-40 (Volume III)
Budget Account 201-4741

This appropriation was previously included in S.B. 454 in the same amount. However, the receiving Division has now been specifically identified.

SENATE BILL 454: Makes an appropriation to the Department of Motor Vehicles for the replacement of office equipment. (BDR S-1260)

Section 4 would make a $23,670 appropriation for replacement office equipment in the Motor Carrier Division, B/A 201-4717.

DMV – Motor Carrier — Budget Page DMV-63 (Volume III)
Budget Account 201-4717

This was previously included in S.B. 455.

SENATE BILL 455: Makes an appropriation to the Motor Carrier Division of the Department of Motor Vehicles for the replacement of a vehicle and office equipment. (BDR S-1252)

The $23,670 is a reduced amount from the original request of $41,613, as outlined in section 4 of Exhibit D. The reduction occurred because the appropriation which was originally included in the bill included a replacement vehicle. An amendment, in addition to testimony, has been provided by DMV indicating that they are requesting to make the appropriation for the vehicles to the State Motor Pool. The State Motor Pool would administer the vehicles and DMV would pay them for the use.

This pertains to section 17 of S.B. 425, as amended, which includes the appropriation to the Motor Pool Division for the vehicles.

Section 5 pertains to an appropriation to the Compliance Enforcement Division, B/A 201-4740, totaling $174,651 for computer hardware, software and printers.

DMV – Compliance Enforcement — Budget Page DMV-27 (Volume III)
Budget Account 201-4740

This appropriation was previously included in S.B. 456.

SENATE BILL 456: Makes an appropriation to the Department of Motor Vehicles for the replacement of computers and other associated equipment. (BDR S-1259)

Section 6 identifies an appropriation of $16,516 to the Compliance Enforcement Division for training equipment, office equipment and protective equipment. This appropriation was previously included in S.B. 457.

SENATE BILL 457: Makes an appropriation to the Department of Motor Vehicles for the replacement of vehicles and other equipment. (BDR S-1258)

In this provision, the amount requested has been reduced from a previous total of $91,837. This is based on the appropriation of vehicles which will now be appropriated from the Motor Pool Division, as described in section 17.

Section 7 would make an appropriation to the Hearings office, B/A 201-4732, in the amount of $43,041.

DMV – Hearings — Budget Page DMV-11 (Volume III)
Budget Account 201-4732

This appropriation was previously included in S.B. 458.

SENATE BILL 458: Makes an appropriation to the Department of Motor Vehicles for computers and other associated equipment. (BDR S-1255)

Section 8 would make an appropriation to the Field Services Division, B/A 201-4735, in the amount of $1,123,927 for replacement computer hardware, software and printers.

DMV – Field Services — Budget Page DMV-56 (Volume III)
Budget Account 201-4735

This provision was previously included in S.B. 459.

SENATE BILL 459: Makes an appropriation to the Department of Motor Vehicles for the replacement of computers and other associated equipment. (BDR S-1257)

Section 9 of the bill would make another appropriation to the Field Services Division. This appropriation would total $164,348 for office equipment. This provision was previously included in S.B. 460.

SENATE BILL 460: Makes an appropriation to the Department of Motor Vehicles for the replacement of office equipment and a vehicle. (BDR S-1256)

This amount has been reduced from the previous request of $188,366. This is, again, a result of the decision to appropriate the required vehicle from the Motor Pool Division, as is described in section 17.

Section 10 would appropriate $113,680 to the Administrative Services Division, B/A 201-4745, for a replacement vehicle, forklift, mail scanners, telephones and headsets.

DMV – Administrative Services — Budget Page DMV-21 (Volume III)
Budget Account 201-4745

This provision was previously included in S.B. 461.

SENATE BILL 461: Makes an appropriation to the Department of Motor Vehicles for the replacement of a forklift, mail scanners, telephones, headsets and office equipment. (BDR S-1265)

The vehicle has not been removed from this appropriation because it is a heavy-duty specialty vehicle. It is a special pick-up truck to haul license plates to various offices throughout the State. This would not be a standard Motor Pool vehicle which could be incorporated into a leasing agreement.

Section 11 of the bill would appropriate $156,145 to the Motor Carrier Division. This provision was previously included in S.B. 462.

SENATE BILL 462: Makes an appropriation to the Motor Carrier Division of the Department of Motor Vehicles for the replacement of computers and other associated equipment. (BDR S-1253)

Section 12 would appropriate $192,285 to the Administrative Services Division. This provision was previously included in S.B. 463.

SENATE BILL 463: Makes an appropriation to the Department of Motor Vehicles for the replacement of computers and other associated equipment. (BDR S-1266)

Section 13 would appropriate $2,121 to the Hearings Division. This provision was previously included in S.B. 464.

SENATE BILL 464: Makes an appropriation to the Department of Motor Vehicles for the replacement of office equipment. (BDR S-1254)

Section 14 would appropriate $4,242 to the Director's Office. This provision was previously included in S.B. 465.

SENATE BILL 465: Makes an appropriation to the Department of Motor Vehicles for the replacement of office equipment. (BDR S-1263)

Section 15 would appropriate $41,589 for computer hardware, software and printers. This provision was previously included in S.B. 466.

SENATE BILL 466: Makes an appropriation to the Department of Motor Vehicles for the replacement of computers and other associated equipment. (BDR S-1262)

Section 16 would appropriate $345,083 to the Central Services Division for computer hardware, software and printers. This provision was previously included in S.B. 467.

SENATE BILL 467: Makes an appropriation to the Department of Motor Vehicles for the replacement of computers and other associated equipment. (BDR S-1261)

In addition to combining a number of bills into one, Amendment 810 identifies the specific divisions within DMV to which the funds will be appropriated.

CHAIR HORSFORD:
The Committee will recall hearing these various bills in their original forms. I will accept a motion to pass the recommendations as they are now included in S.B. 425.

SENATOR DENIS MOVED TO AMEND AND DO PASS S.B. 425 WITH AMENDMENT 810.

SENATOR LESLIE SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR HORSFORD:
I will open the hearing on S.B. 473.

SENATE BILL 473: Revises provisions governing consumer affairs. (BDR 18-1190)

SENATOR DENIS:
This bill pertains to the Consumer Affairs Division in the Department of Business and Industry, B/A 101-3811.

COMMERCE AND INDUSTRY

BUSINESS AND INDUSTRY

B&I – Consumer Affairs — Budget Page B&I-22 (Volume II)
Budget Account 101-3811

We are examining the possibility of eliminating the Division or suspending that action for two years. We will be keeping the position of the Ombudsman of Consumer Affairs for Minorities.

MR. KRMPOTIC:
The Senate Committee on Finance and the Assembly Committee on Ways and Means have voted to retain the Ombudsman for Minority Affairs position. The Consumer Affairs Division has not been retained through the budget process.

The Ombudsman for Minority Affairs position has been included in the Director's Office for the Department of Business and Industry, B/A 101-4681.

B&I – Business and Industry Administration — Budget Page B&I-1 (Volume II)
Budget Account 101-4681

The Department has recommended one amendment to S.B. 473. This change would delete section 3, subsection 1, which had been included to repeal the statutory provisions providing for the Ombudsman for Minority Affairs position.

SENATOR DENIS:
I would propose that we approve that change. Rather than eliminate the Consumer Affairs Division, I would propose adding language which would, instead, simply leave the Division unfunded for two years, as has been done previously. In this way, we will be able to return to the issue in the future. Consumer affairs problems are something we will need to continue to address when we have more funding available.

CHAIR HORSFORD:
In other words, the Consumer Affairs Division would be suspended for two years and the decision to restore it would be made by the next Legislature.

SENATOR DENIS:
That is correct.

SENATOR DENIS MOVED TO AMEND AND DO PASS S.B. 473.

SENATOR LESLIE SECONDED THE MOTION.

SENATOR CEGAVSKE:
What would be the fiscal impact of retaining the Ombudsman for Minority Affairs position?

CHAIR HORSFORD:
We have already closed this budget in accordance with this measure. There would be no additional fiscal impact as the budget already accounts for the position's retention. This was included in a budget amendment from the Governor's Office.

MR. KRMPOTIC:
Staff would like to clarify the motion. Does the Committee wish to retain the functions of the Consumer Affairs Division while suspending those functions for two years?

SENATOR DENIS:
It is my intent to do something similar with this Division to what has been done with it over the past two years. It should be "mothballed" for two years.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR HORSFORD:
I will open the hearing on S.B. 485.

SENATE BILL 485: Revises provisions governing the payment of certain expenses for the provision of care pursuant to the State Plan for Medicaid. (BDR 38-1196)

MR. KRMPOTIC:
This bill would implement a previously approved budget decision which would require the counties to pay an additional portion under the State Plan for Medicaid county-match program.

This bill was heard several weeks ago. Since that time, on May 24, 2011, the Committees have revised their initial action with regard to this provision resulting in a General Fund reduction totaling $6 million in FY 2011-2012 and $8.5 million in FY 2012-2013.

At the original hearing, the Committee was interested in identifying, in statute, the percentages which would implement the budget reductions as has been previously noted.

Staff has received information from the Division of Health Care Financing and Policy which identifies those percentages for each fiscal year based on the budgetary actions taken by the Senate Committee on Finance and the Assembly Committee on Ways and Means. These figures included 142 percent in FY 2011-2012 and 132 percent in FY 2012-2013. Those are the federal

benefit rate percentages for the county match expansion as it is currently proposed.

No other specific issues have been identified by the Committee on this bill. If the Committee wishes to identify those percentages in the bill, they would be included and the bill would serve to implement the budgetary decisions which have already been made.

SENATOR LESLIE MOVED TO DO PASS S.B. 485.

SENATOR PARKS SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR HORSFORD:
I will open the hearing on Assembly Bill (A.B.) 486.

ASSEMBLY BILL 486: Makes an appropriation to the Division of Forestry of the State Department of Conservation and Natural Resources for the replacement of critical equipment. (BDR S-1246)

MR. KRMPOTIC:
This bill is an appropriation to the Division of Forestry for replacement of equipment. The appropriation, as recommended by the Governor, would come from the General Fund and would total $677,344. Certain equipment has been identified by the Division as "critical." This included a vehicle exhaust system at the Mt. Charleston fire station; a heavy-duty, tool-equipped truck, costing $97,527; diagnostic scan tools; the purchase and equipping of two, type-3 wildland fire engines, costing $517,492; and a multi-use tractor, costing $35,125. This information was received from the Division at a presentation several weeks ago.

Staff has no recommended adjustments or amendments to this bill.

SENATOR RHOADS MOVED TO DO PASS S.B. 486.

SENATOR DENIS SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR HORSFORD:
I will open the hearing on A.B. 490.

ASSEMBLY BILL 490: Makes an appropriation to the Legislative Fund for major computer projects for the Legislative Counsel Bureau. (BDR S-1240)

MR. KRMPOTIC:
This bill would make an appropriation to the Legislative Fund. This bill has been submitted by the Legislative Counsel Bureau (LCB).

The appropriation would total $734,000. It would fund one-time expenditures for information technology purchases, including switches and hardware, totaling $599,000; new accounting system software, totaling $125,000; and Granicus hardware and software, totaling $10,000. These requested appropriations were presented by Mr. Lorne J. Malkiewich several weeks ago. He also provided testimony pertaining to the switches which were being contemplated for purchase.

Staff has no suggested adjustments or amendments for this bill.

SENATOR KIECKHEFER MOVED TO DO PASS A.B. 490.

SENATOR PARKS SECONDED THE MOTION.

SENATOR DENIS:
I asked a question pertaining to the switches at the original hearing on this bill. That information has been provided to me and I am satisfied with the proposed purchases. I will support this motion.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR HORSFORD:
I will open the hearing on A.B. 491.

ASSEMBLY BILL 491: Makes an appropriation to the Division of Forestry of the State Department of Conservation and Natural Resources for major repair and renovation work on certain crew carriers. (BDR S-1248)

MR. KRMPOTIC:
This bill would appropriate $278,050 to the Division of Forestry. This money would provide for the repair and renovation of 25 crew carriers, each of which have exceeded their use by 100,000 miles.

At the original hearing on this bill, the Division provided information indicating that the crew carriers range in age from 13 to 15 years. The mileage on the crew carriers ranges between 100,000 to 200,000 miles. The Division indicated that the repairs and renovations would allow the vehicles to be kept on the road for an additional three to four years.

Staff has no recommended adjustments or amendments to this appropriation.

SENATOR RHOADS MOVED TO DO PASS A.B. 491.

SENATOR LESLIE SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR HORSFORD:
I will open the hearing on A.B. 492.

ASSEMBLY BILL 492: Makes appropriations to the Legislative Fund for dues to national organizations. (BDR S-1239)

MR. KRMPOTIC:
This bill would make appropriations to the Legislative Fund for dues to national organizations. This item was submitted by LCB. The appropriation would total $349,446.

When Mr. Malkiewich presented this bill to the Committee, he provided supplemental information on the organizations which will be included in the payments. They include the National Conference of State Legislatures, the

Council of State Governments, the American Legislative Exchange Council, the National Conference of Commissioners on Uniform State Laws, the Education Commission of the States and the Interstate Commission on Educational Opportunities for Military Children.

There is an additional appropriation, as included in section 2 of the bill, of $711,066, which would provide $355,083 in FY 2011-2012 and $355,983 in FY 2012-2013 for dues to the aforementioned organizations.

Staff has no recommended amendments or adjustments to this appropriation.

SENATOR RHOADS MOVED TO DO PASS A.B. 492.

SENATOR DENIS SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

* * * * *

CHAIR HORSFORD:
I will open the hearing on A.B. 493.

ASSEMBLY BILL 493: Provides a temporary waiver from certain minimum expenditure requirements for school districts, charter schools and university schools for profoundly gifted pupils. (BDR S-1179)

MR. KRMPOTIC:
This is a budget implementation bill. It would provide a temporary waiver from certain minimum expenditures for school districts, charter schools and university schools for profoundly gifted pupils. The waiver would apply throughout the upcoming biennium.

Under section 1 of the bill, each school district is not required to comply with the provisions governing the minimum amount of money that must be expended during each school year of the biennium for library books, computer software and instruction-related equipment as prescribed pursuant to *Nevada Revised Statute* (NRS) 387.207.

The waiver from the purchase of textbooks was granted for the current fiscal year during the Twenty-sixth Special Session of the Legislature to allow the school districts to address the budgetary reductions that were being implemented.

Staff has no additional information or suggested modifications to this legislation.

SENATOR LESLIE MOVED TO DO PASS A.B. 493.

SENATOR PARKS SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

* * * * *

CHAIR HORSFORD:
I will open the hearing on A.B. 495.

ASSEMBLY BILL 495: Makes an appropriation to the Division of Forestry of the State Department of Conservation and Natural Resources for necessary services and equipment to transition the State's Very High Frequency radio system from wideband to narrowband in accordance with the Federal Communications Commission mandate. (BDR S-1247)

MR. KRMPOTIC:
This bill is the third, and last, appropriation bill for the Division of Forestry. It would appropriate $162,267 for services and equipment necessary to the transfer of the State's high-frequency radio system from wideband to narrowband. This will allow the Division to meet mandates put forward by the Federal Communications Commission.

The bill includes $5,400 for programming costs, $53,918 for 9 new mountaintop repeaters and $102,949 for 26 new radio consoles which will replace those in stations and at the Elko Dispatch Center which cannot be upgraded to meet the new requirement.

Staff has no recommended adjustments or amendments to this bill.

SENATOR RHOADS MOVED TO DO PASS A.B. 495.

SENATOR PARKS SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

* * * * *

CHAIR HORSFORD:
I will open the hearing on S.B. 265.

SENATE BILL 265 (1st Reprint): Revises provisions governing sentencing of criminal offenders and determining eligibility of prisoners for parole. (BDR 14-311)

SENATOR DAVID R. PARKS (Clark County Senatorial District No. 7):
Senate Bill 265 provides for the aggregation of consecutive sentences for inmates. Under current processes, an inmate may be eligible for a parole hearing on a lesser charge shortly after entering prison, even though they would not be eligible for release for decades to come. The current process places a burden on the Board of Parole Commissioners and, especially, the victims of crime. By aggregating consecutive sentences, an inmate will not receive his or her first parole hearing until he or she has served the minimum time from the total of all consecutive sentences.

In Nevada's prison system, between 10 and 20 percent of inmates are serving consecutive sentences. An example would be an inmate who serves one year in a county jail prior to being found guilty of three charges of burglary, assault and second-degree murder. The burglary charge would elicit a one-year to five-year sentence. Therefore, the inmate would become eligible for a parole hearing on the burglary charge immediately after entering prison. Senate Bill 265 would add the minimum of all three sentences. The first parole hearing would take place only after a total minimum time had been served.

This bill will have several easily identifiable effects. The first would be that victims would not become revictimized by being forced to attend a parole hearing within several years of the crime.

Second, there is often confusion among inmates in trying to understand how to proceed toward parole hearings. This will streamline the process. Inmates will

know, upon entry into prison, what the minimum amount of time for all charges will be before they can receive a parole hearing.

This legislation would become effective after July 1, 2012.

In our previous hearing on this bill, the Department of Corrections indicated that they would have to revamp their NOTIS system for parole hearings. They estimated the cost of this to be approximately $100,000. I do not know whether they have refined that estimate. It was indicated that they would work with a consultant to revise that figure.

There are no further amendments proposed for this bill.

CHAIR HORSFORD:
With the bill explanation, there is no reason for us to hold this bill. I will accept a motion to do pass S.B. 265 as amended.

SENATOR LESLIE MOVED TO DO PASS S.B. 265 AS AMENDED.

SENATOR DENIS SECONDED THE MOTION.

THE MOTION CARRIED. (SENATORS CEGAVSKE AND KIECKHEFER VOTED NO.)

* * * * *

CHAIR HORSFORD:
There is no one here from the Attorney General's Office to testify on S.B. 72. I have not been informed of the final outcome of the negotiations on the fiscal impact of that bill. I will not hear that bill today unless someone wishes to testify on that issue.

SENATE BILL 72 (1st Reprint): Revises provisions governing the assignment of certain criminal offenders to residential confinement. (BDR 16-120)

I will open the hearing on S.B. 174.

SENATE BILL 174 (1st Reprint): Revises provisions relating to common-interest communities. (BDR 10-105)

SENATOR ALLISON COPENING (Clark County Senatorial District No. 6):
I will present S.B. 174. An outline of my testimony has been submitted to Staff (Exhibit E). A copy of proposed Amendment No. 7336 has also been included (Exhibit F). This bill is an omnibus homeowners' association (HOA) bill which has been vetted by two different working groups. The second of these was led by Assemblyman William Horne with participation by Assemblyman James Ohrenschall.

Stakeholder positions considered at the meeting included HOA industry professionals, including those from the Howard Hughes Corporation in the Southern Highlands Golf Club and Community, legal aid centers from northern and southern Nevada, realtors, investors, bankers and homeowners.

The goal of S.B. 174 is primarily to put a collection policy in place whereby hard caps will be enforced on the amount of fees which can be charged to homeowners who stop paying their assessments. Regulations are currently in place, but this collection policy would be more restrictive of collection costs than is provided in current regulations.

The collection policy can be found in section 3.5, page 11 of the proposed amendment. An overview handout has been provided to Staff (Exhibit G) outlining the difference between the proposals and current regulation.

The bill provides a $1,500 cap on collection services. Current regulations allow a cap of $1,950. This legislation would create a $1,000 cap on third-party hard costs charged to a unit owner. The current regulation has no cap. This legislation has a $600 cap on collection services related to a fine. Current law has no cap.

This bill also includes a cap on collection services, not including attorney fees, which might be incurred by an association because a unit owner has filed for bankruptcy or when an action has been filed pertaining to the related enforcement of a past-due obligation when attorney fees are authorized by the governing documents of the association. Current law has no cap in this area.

This bill provides a nine-month super-priority for collection costs and reasonable attorney fees on past-due obligations. Current law provides for an exemption of Fannie Mae and Freddie Mac in this particular situation.

This bill also requires mandatory payment plans for homeowners in default. This is an important issue. This was an important provision for the representatives of the legal aid centers. They wanted to make sure that homeowners in default are offered payment plans before liens are applied to their homes.

This policy is important because some collection companies have been charging substantial fees to collect on the delinquent accounts of HOA unit owners. This negatively affects the person who might buy the foreclosed home. It makes it more difficult for realtors to sell homes. It negatively affects the profits of investors who buy the home to resell.

It also affects those homeowners in default who may be trying to make their accounts current before foreclosure.

The policy also clarifies that an HOA will be the first to be paid back when a foreclosure occurs on a home. This is otherwise known as a "super-priority lien." This includes up to nine months of back-assessments and costs incurred by HOAs for attempting to collect the delinquent assessment. This has been the practice of the banking industry for years, but the current language in statute is not sufficiently specific and it has been challenged. Despite the challenges, judges in three separate district court cases have concluded that collection costs and reasonable attorney fees for unpaid HOA assessments are included in super-priority liens. The language in S.B. 174 clarifies this.

The bill also includes elements of A.B. 448, per an agreement made with the Chair of the Assembly Committee on Judiciary, Assemblyman William Horne. Assembly Bill 448 did not make it to the Senate before the second house passage deadline, but it had some homeowner protections which we believe should be included in S.B. 174.

ASSEMBLY BILL 448 (1st Reprint): Revises provisions relating to real property. (BDR 10-513)

I have received notification from representatives of certain HOAs who have continuing issues with certain sections of the bill. We will work with them to resolve those problems.

The bill includes provisions for a study to be performed by LCB on HOA-related bills to determine whether an interim Legislative committee should be

established to vet HOA issues and bring forward committee bills. Some legislators feel that too much time is spent vetting conflicting HOA bills, requiring an excessive expenditure of staffing hours. One staff member, in particular, has told me that he spends 50 percent of his time in the interim working on nothing but HOA bills. This represents a significant cost to the State. The study will allow us to determine the necessity of a statutory interim committee.

The collection policy in this bill is designed to help homeowners, but it is also designed to help keep HOAs solvent. I am aware of two HOAs which have gone bankrupt resulting from a high number of homeowners who do not pay their assessments. Almost all of the HOAs are suffering from the results of foreclosures, and many of them are in dire financial straits. Some HOAs are borrowing money against the reserve funds in order to continue operation. This may quickly become a serious problem. According to guidelines established by Fannie Mae and the U.S. Department of Housing and Urban Development (HUD), it is a requirement that the reserves of an HOA be adequately funded. To the extent that the HOAs are borrowing against these reserves, they may already be out of compliance with those guidelines. The housing data in Nevada indicates that 49 percent of all homes purchased in the month of March were financed through the Federal Housing Administration. Future loans are at risk if we do not ensure that these HOAs stay solvent.

Currently, other HOAs are raising monthly assessments or levying special assessments in order to pay their bills. We must find a way to keep these HOAs financially sound.

The HOAs are currently made whole when the home is foreclosed upon and lending institutions have paid collection costs and other fees as the first lien holder, otherwise known as super-priority. Recently, there has been some misinformation disseminated by an investor group called the Concerned Homeowner Association Members Political Action Committee (CHAMP). They have stated that S.B. 174 may negatively affect Fannie Mae and Freddie Mac financing for our State if the HOA is paid in the super-priority lien category. This is false. Fannie Mae and Freddie Mac have absolutely nothing to do with this bill and this fact has been confirmed by Mr. Bill Uffelman of the Nevada Bankers Association. Mr. Uffelman has confirmed that Fannie Mae and Freddie Mac have always reimbursed the first security lien holder up to six months of assessments only, per federal regulations, even though current Nevada statute allows for an

association to collect up to nine months of back-assessments. This pay schedule will remain the same under this bill, as Fannie Mae and Freddie Mac have a specific carveout in our current statutes. This carveout language can be found on page 36 of Amendment 7336, lines 37 through 45 and it continues on page 37, lines 1 through 4.

When a bank forecloses, the super-priority letter from an HOA, asking for up to nine months of the assessments and collection costs for the association, goes to the first security lien holder. The lender complies and then pays the association. The lender then turns to Fannie Mae and Freddie Mac and requests reimbursement for the six months of assessments and collection costs. This is allowable per federal regulations. Fannie Mae and Freddie Mac have always paid these claims. The lender pays for the other three months of assessments and collection costs. The association never deals directly with Fannie Mae and Freddie Mac, and, under S.B. 174, nothing about this process will change. Federal law always trumps State and local law. Mr. Uffelman has confirmed that Fannie Mae and Freddie Mac would continue to pay only the six months of assessment and collection costs, and this bill would not affect the process.

It bears repeating, however, that if HOAs are forced to dip into reserves to make up for delinquent accounts and they are not the first to be made whole at foreclosure, we will most certainly see an issue arise from loans being denied by HUD.

Senate Bill 174 helps many different demographics and entities, including homeowners who are delinquent in paying their HOA assessments, realtors who are trying to sell foreclosed homes to clients, investors who are buying foreclosed homes, first-time home buyers, the banking industry, clients of legal aid who are struggling financially, HOAs which are struggling financially and homeowners who must contribute financially to keep the HOAs solvent.

I would like to refer to an article (Exhibit H) by Hubble Smith in the *Las Vegas Review-Journal*. It was published yesterday. It shows the favorability of S.B. 174. It is important to note that the author interviewed real estate agent Rutt Premsrirut, who is a leader in CHAMP. Mr. Premsrirut feels lawmakers should limit the abilities of HOAs to foreclose upon property owners because of unpaid dues and assessments. We have done that with this bill. The legislation would require the offering of mandatory payment plans for homeowners in default.

Mr. Premsrirut went on to say that a measure which was passed in North Carolina would require dues or assessments to remain unpaid for 90 days before an association could begin foreclosure action against a property owner. In this bill, we have actually made that requirement stronger and proposed that the time frame be 120 days.

Mr. Premsrirut declares that the North Carolina statute would require the HOAs' executive board to vote to begin any foreclosure proceedings against an owner. This has also been included in S.B. 174. The HOA executive boards in Nevada would also be required to meet before taking any action on a foreclosure.

We have addressed all of the issues which have been raised by investors. We have also addressed an issue which was raised by the City of Henderson. The members have received an e-mail from Renny Ashleman, a representative of the City of Henderson, expressing concerns about language in section 6 requiring that a government agency which owned a security wall would be responsible for its repair. We have agreed to remove the term "government entity" in section 6 of the bill. This should satisfy the concerns of the representative from Henderson.

CHAIR HORSFORD:
We have received letters from the Federal Housing Finance Agency (Exhibit I) and the Howard Hughes Corporation (Exhibit J) and Robert A. Massi (Exhibit K) which will become part of the public record.

WILLIAM UFFELMAN (Nevada Bankers Association):
I will verify Senator Copening's statements on my behalf. She has truly stated what is, to my understanding, the position of the federal home loan agencies relative to the payment of six months of back-assessment of HOA fees.

The aim of the banks, throughout the drafting of this bill, has been to control costs. During the 2009 Legislative Session, the process we thought to implement was derailed. This bill, with the limitations and caps that it has included, will be an important factor in the banks' calculations relative to foreclosures. The caps on attorney fees, relative to the limitations on the fees on which attorney fees can be claimed and awarded, will also push down some of theses costs.

Exhibit 1

Exhibit 1

MOCK-UP

PROPOSED AMENDMENT 8897 TO ASSEMBLY BILL NO. 98 FIRST REPRINT

PREPARED FOR ASSEMBLYMAN FRIERSON
MAY 15, 2013

PREPARED BY THE LEGAL DIVISION

NOTE: THIS DOCUMENT SHOWS PROPOSED AMENDMENTS IN CONCEPTUAL FORM. THE LANGUAGE AND ITS PLACEMENT IN THE OFFICIAL AMENDMENT MAY DIFFER.

EXPLANATION: Matter in (1) ***blue bold italics*** is new language in the original bill; (2) ***green bold italic underlining*** is new language proposed in this amendment; (3) ~~red strikethrough~~ is deleted language in the original bill; (4) ~~purple double strikethrough~~ is language proposed to be deleted in this amendment; (5) orange double underlining is deleted language in the original bill that is proposed to be retained in this amendment; and (6) **green bold** is newly added transitory language.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. **Chapter 116 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 to 5, inclusive, of this act.**

Sec. 2. ***As used in NRS 116.3116 to 116.31168, inclusive, and sections 2 to 5, inclusive, of this act, unless the context otherwise requires, the words and terms defined in sections 3 and 4 of this act have the meanings ascribed to them in those sections.***

Sec. 3. ***"First security interest" means the first security interest described in paragraph (b) of subsection 2 of NRS 116.3116.***

Sec. 4. ***"Super-priority lien" means the amount of the association's lien which, pursuant to subsection of NRS 116.3116, is prior to the first security interest.***

Sec. 5. ***Unless the parties agree otherwise, the association shall apply any sums paid by a unit's owner who is delinquent in paying assessments in the following order:***

1. Unpaid assessments;

2. Charges for late payment of assessments;

3. Interest on past due assessments;

4. Costs of collecting past due assessments charged to the unit's owner pursuant to NRS 116.310313; and

5. All other unpaid fees, charges, fines, penalties, costs of collecting charged to a unit's owner pursuant to NRS 116.310313, interest and late charges.

Sec. 6. **NRS 116.1203 is hereby amended to read as follows:**

116.1203 1. Except as otherwise provided in subsections 2 and 3, if a planned community contains no more than 12 units and is not subject to any developmental rights, it is subject only to NRS 116.1106 and 116.1107 unless the declaration provides that this entire chapter is applicable.

2. The provisions of NRS 116.12065 and the definitions set forth in NRS 116.005 to 116.095, inclusive, to the extent that the definitions are necessary to construe any of those provisions, apply to a residential planned community containing more than 6 units.

3. Except for NRS 116.3104, 116.31043, 116.31046 and 116.31138, the provisions of NRS 116.3101 to 116.350, inclusive, ***and sections 2 to 5, inclusive, of this act*** and the definitions set forth in NRS 116.005 to 116.095, inclusive, to the extent that such definitions are necessary in construing any of those provisions, apply to a residential planned community containing more than 6 units.

Sec. 7. **NRS 116.12075 is hereby amended to read as follows:**

116.12075 1. The provisions of this chapter do not apply to a nonresidential condominium except to the extent that the declaration for the nonresidential condominium provides that:

(a) This entire chapter applies to the condominium;

(b) Only the provisions of NRS 116.001 to 116.2122, inclusive, and 116.3116 to 116.31168, inclusive, ***and sections 2 to 5, inclusive, of this act*** apply to the condominium; or

(c) Only the provisions of NRS 116.3116 to 116.31168, inclusive, ***and sections 2 to 5, inclusive, of this act*** apply to the condominium.

2. If this entire chapter applies to a nonresidential condominium, the declaration may also require, subject to NRS 116.1112, that:

(a) Notwithstanding NRS 116.3105, any management, maintenance operations or employment contract, lease of recreational or parking areas or facilities and any other contract or lease between the association and a declarant or an affiliate of a declarant continues in force after the declarant turns over control of the association; and

(b) Notwithstanding NRS 116.1104 and subsection 3 of NRS 116.311, purchasers of units must execute proxies, powers of attorney or similar devices in favor of the declarant regarding particular matters enumerated in those instruments.

~~[Section 1.]~~ ***Sec. 8.*** NRS 116.31034 is hereby amended to read as follows:

116.31034 1. Except as otherwise provided in subsection 5 of NRS 116.212, not later than the termination of any period of declarant's control, the units' owners shall elect an executive board of at least three members, all of whom must be units' owners. The executive board shall elect the officers of the association. Unless the governing documents provide otherwise, the officers of the association are not required to be units' owners. The members of the executive board and the officers of the association shall take office upon election.

2. The term of office of a member of the executive board may not exceed 3 years, except for members who are appointed by the declarant. Unless the governing documents provide otherwise, there is no limitation on the number of terms that a person may serve as a member of the executive board.

3. The governing documents of the association must provide for terms of office that are staggered in such a manner that, to the extent possible, an equal number of members of the executive board are elected at each election. The provisions of this subsection do not apply to:

(a) Members of the executive board who are appointed by the declarant; and

(b) Members of the executive board who serve a term of 1 year or less.

4. Not less than 30 days before the preparation of a ballot for the election of members of the executive board, the secretary or other officer specified in the bylaws of the association shall cause notice to be given to each unit's owner of the unit's owner's eligibility to serve as a member of the executive board. Each unit's

owner who is qualified to serve as a member of the executive board may have his or her name placed on the ballot along with the names of the nominees selected by the members of the executive board or a nominating committee established by the association.

5. Before the secretary or other officer specified in the bylaws of the association causes notice to be given to each unit's owner of his or her eligibility to serve as a member of the executive board pursuant to subsection 4, the executive board may determine that if, at the closing of the prescribed period for nominations for membership on the executive board, the number of candidates nominated for membership on the executive board is equal to or less than the number of members to be elected to the executive board at the election, then the secretary or other officer specified in the bylaws of the association will cause notice to be given to each unit's owner informing each unit's owner that:

(a) The association will not prepare or mail any ballots to units' owners pursuant to this section and the nominated candidates shall be deemed to be duly elected to the executive board unless:

(1) A unit's owner who is qualified to serve on the executive board nominates himself or herself for membership on the executive board by submitting a nomination to the executive board within 30 days after the notice provided by this subsection; and

(2) The number of units' owners who submit such a nomination causes the number of candidates nominated for membership on the executive board to be greater than the number of members to be elected to the executive board.

(b) Each unit's owner who is qualified to serve as a member of the executive board may nominate himself or herself for membership on the executive board by submitting a nomination to the executive board within 30 days after the notice provided by this subsection.

6. If the notice described in subsection 5 is given and if, at the closing of the prescribed period for nominations for membership on the executive board described in subsection 5, the number of candidates nominated for membership on the executive board is equal to or less than the number of members to be elected to the executive board, then:

(a) The association will not prepare or mail any ballots to units' owners pursuant to this section;

(b) The nominated candidates shall be deemed to be duly elected to the executive board not later than 30 days after the date of the closing of the period for nominations described in subsection 5; and

(c) The association shall send to each unit's owner notification that the candidates nominated have been elected to the executive board.

7. If the notice described in subsection 5 is given and if, at the closing of the prescribed period for nominations for membership on the executive board described in subsection 5, the number of candidates nominated for membership on the executive board is greater than the number of members to be elected to the executive board, then the association shall:

(a) Prepare and mail ballots to the units' owners pursuant to this section; and

(b) Conduct an election for membership on the executive board pursuant to this section.

8. Each person who is nominated as a candidate for membership on the executive board pursuant to subsection 4 or 5 must:

(a) Make a good faith effort to disclose any financial, business, professional or personal relationship or interest that would result or would appear to a reasonable person to result in a potential conflict of interest for the candidate if the candidate were to be elected to serve as a member of the executive board; and

(b) ~~[Disclose whether the candidate is]~~ ***Be*** a member in good standing. For the purposes of this paragraph, a candidate shall not be deemed to be in "good standing" if the candidate has any unpaid and past due assessments or construction penalties that are required to be paid to the association.

~~[➥ The]~~ ***If a candidate who is not deemed to be in good standing pursuant to this paragraph satisfies all such unpaid and past due assessments or construction penalties before the closing of the prescribed period for nominations for membership on the executive board, he or she shall be deemed to be in good standing and may proceed as a candidate for membership on the executive board.***

9. A candidate must make all disclosures required pursuant to ~~[this]~~ ***paragraph (a) of*** subsection ***8*** in writing to the association with his or her candidacy information. Except as otherwise provided in this subsection, the association shall distribute the disclosures, on behalf of the candidate, to each member of the association with the ballot or, in the event ballots are not prepared and mailed pursuant to subsection 6, in the next regular mailing of the association. The association is not obligated to distribute any disclosure pursuant to this subsection if the disclosure contains information that is believed to be defamatory, libelous or profane.

~~[9.]~~ ***10. If a candidate fails to make all disclosures required pursuant to paragraph (a) of subsection 8 before the closing of the prescribed period for nominations for membership on the executive board, the association may:***

(a) Reject his or her nomination as a candidate for membership on the executive board; or

(b) If the association has reason to believe that a potential conflict of interest exists, distribute the disclosure, on behalf of the candidate, to each member of the association with the ballot or, in the event ballots are not prepared and mailed pursuant to subsection 6, in the next regular mailing of the association.

11. Unless a person is appointed by the declarant:

(a) A person may not be a member of the executive board or an officer of the association if the person, the person's spouse or the person's parent or child, by blood, marriage or adoption, performs the duties of a community manager for that association.

(b) A person may not be a member of the executive board of a master association or an officer of that master association if the person, the person's spouse or the person's parent or child, by blood, marriage or adoption, performs the duties of a community manager for:

(1) That master association; or

(2) Any association that is subject to the governing documents of that master association.

~~[10.]~~ ***12.*** An officer, employee, agent or director of a corporate owner of a unit, a trustee or designated beneficiary of a trust that owns a unit, a partner of a partnership that owns a unit, a member or manager of a limited-liability company that owns a unit, and a fiduciary of an estate that owns a unit may be an officer of the association or a member of the executive board. In all events where the person serving or offering to serve as an officer of the association or a member of the executive board is not the record owner, the person shall file proof in the records of the association that:

(a) The person is associated with the corporate owner, trust, partnership, limited-liability company or estate as required by this subsection; and

(b) Identifies the unit or units owned by the corporate owner, trust, partnership, limited-liability company or estate.

~~[11.]~~ ***13.*** Except as otherwise provided in subsection 6 or NRS 116.31105, the election of any member of the executive board must be conducted by secret written ballot in the following manner:

(a) The secretary or other officer specified in the bylaws of the association shall cause a secret ballot and a return envelope to be sent, prepaid by United States mail, to the mailing address of each unit within the common-interest community or to any other mailing address designated in writing by the unit's owner.

(b) Each unit's owner must be provided with at least 15 days after the date the secret written ballot is mailed to the unit's owner to return the secret written ballot to the association.

(c) A quorum is not required for the election of any member of the executive board.

(d) Only the secret written ballots that are returned to the association may be counted to determine the outcome of the election.

(e) The secret written ballots must be opened and counted at a meeting of the association. A quorum is not required to be present when the secret written ballots are opened and counted at the meeting.

(f) The incumbent members of the executive board and each person whose name is placed on the ballot as a candidate for membership on the executive board may not possess, be given access to or participate in the opening or counting of the secret written ballots that are returned to the association before those secret written ballots have been opened and counted at a meeting of the association.

~~[12.]~~ ***14.*** An association shall not adopt any rule or regulation that has the effect of prohibiting or unreasonably interfering with a candidate in the candidate's campaign for election as a member of the executive board, except that the candidate's campaign may be limited to 90 days before the date that ballots are required to be returned to the association.

~~[13. A]~~

15. An eligible candidate who has submitted a nomination form for election as a member of the executive board may request that the association or its agent either:

(a) Send before the date of the election and at the association's expense, to the mailing address of each unit within the common-interest community or to any other mailing address designated in writing by the unit's owner a candidate informational statement. The candidate informational statement:

(1) Must be no longer than a single, typed page;

(2) Must not contain any defamatory, libelous or profane information; and

(3) May be sent with the secret ballot mailed pursuant to subsection ~~[11]~~ ***13*** or in a separate mailing; or

(b) To allow the candidate to communicate campaign material directly to the units' owners, provide to the candidate, in paper format at a cost not to exceed 25 cents per page for the first 10 pages and 10 cents per page thereafter, in the format of a compact disc at a cost of not more than $5 or by electronic mail at no cost:

(1) A list of the mailing address of each unit, which must not include the names of the units' owners or the name of any tenant of a unit's owner; or

(2) If the members of the association are owners of time shares within a time share plan created pursuant to chapter 119A of NRS and:

(I) The voting rights of those owners are exercised by delegates or representatives pursuant to NRS 116.31105, the mailing address of the delegates or representatives.

(II) The voting rights of those owners are not exercised by delegates or representatives, the mailing address of the association established pursuant to NRS 119A.520. If the mailing address of the association is provided to the candidate pursuant to this sub-subparagraph, the association must send to each owner of a time share within the time share plan the campaign material provided by the candidate. If the campaign material will be sent by mail, the candidate who provides the campaign material must provide to the association a separate copy of the campaign material for each owner and must pay the actual costs of mailing before the campaign material is mailed. If the campaign material will be sent by electronic transmission, the candidate must provide to the association one copy of the campaign material in an electronic format.

➥ The information provided pursuant to this paragraph must not include the name of any unit's owner or any tenant of a unit's owner. If a candidate who makes a request for the information described in this paragraph fails or refuses to provide a written statement signed by the candidate which states that the candidate is making the request to allow the candidate to communicate campaign material directly to units' owners and that the candidate will not use the information for any other purpose, the association or its agent may refuse the request.

[14.] ***16.*** An association and its directors, officers, employees and agents are immune from criminal or civil liability for any act or omission which arises out of the publication or disclosure of any information related to any person and which occurs in the course of carrying out any duties required pursuant to subsection [13.] ***15.***

[15.] ***17.*** Each member of the executive board shall, within 90 days after his or her appointment or election, certify in writing to the association, on a form prescribed by the Administrator, that the member has read and understands the governing documents of the association and the provisions of this chapter to the best of his or her ability. The Administrator may require the association to submit a copy of the certification of each member of the executive board of that association at the time the association registers with the Ombudsman pursuant to NRS 116.31158.

Sec. 9. **NRS 116.31068 is hereby amended to read as follows:**

116.31068 1. Except as otherwise provided in subsection 3, an association shall deliver any notice required to be given by the association under this chapter to any mailing or electronic mail address a unit's owner designates. Except as otherwise provided in subsection 3, if a unit's owner has not designated a mailing or electronic mail address to which a notice must be delivered, the association may deliver notices by:

(a) Hand delivery to each unit's owner;

(b) Hand delivery, United States mail, postage paid, or commercially reasonable delivery service to the mailing address of each unit;

(c) Electronic means, if the unit's owner has given the association an electronic mail address; or

(d) Any other method reasonably calculated to provide notice to the unit's owner.

2. The ineffectiveness of a good faith effort to deliver notice by an authorized means does not invalidate action taken at or without a meeting.

3. The provisions of this section do not apply:

(a) To a notice required to be given pursuant to NRS 116.3116 to 116.31168, inclusive [,] ***, and sections 2 to 5, inclusive, of this act;*** or

(b) If any other provision of this chapter specifies the manner in which a notice must be given by an association.

[Sec. 2.] ***Sec. 10.*** NRS 116.31086 is hereby amended to read as follows:

116.31086 1. If an association solicits bids for an association project, the ***association shall review and compare the initial bids for the association project and, after such a review and comparison, may request any of the bidders to submit a revised bid to ensure that the bids received are consistent with respect to the specified services or goods being purchased by the association.***

2. If an association requests a revised bid from a bidder pursuant to subsection 1, the association shall explain to the bidder the way in which the bid needs to be revised, including, without limitation, any specifications needed in the revised bid. Any revised bids ***received by the association*** must ***not*** be ***sealed and must be*** opened during a meeting of the executive board.

[2.] ***3.*** As used in this section, "association project" [includes, without limitation,] ***means*** a project that [involves] ***:***

(a) Involves the maintenance, repair, replacement or restoration of any part of the common elements ***;*** or [which involves]

(b) Involves the provision of services to the association [.] ***,***

➥ ***and costs $2,500 or more or 10 percent or more of the total annual assessment made by the association.***

[Sec. 3.] ***Sec. 11.*** NRS 116.31144 is hereby amended to read as follows:

116.31144 1. Except as otherwise provided in subsection 2, the executive board shall:

(a) If the annual budget of the association is ~~[$45,000 or more but]~~ less than ~~[$75,000,]~~ ***$150,000,*** cause the financial statement of the association to be reviewed ~~[by an independent certified public accountant during the year immediately preceding the year in which a study of the reserves of the association is to be conducted pursuant to NRS 116.31152.~~

~~(b) If the annual budget of the association is $75,000 or more but less than $150,000, cause the financial statement of the association to be reviewed]~~ by an independent certified public accountant every fiscal year.

~~[(c)]~~ ***(b)*** If the annual budget of the association is $150,000 or more, cause the financial statement of the association to be audited by an independent certified public accountant every fiscal year.

2. ~~[Except as otherwise provided in this subsection, for]~~ ***For*** any fiscal year, the executive board of an association shall cause the financial statement for that fiscal year to be audited by an independent certified public accountant if, within 180 days before the end of the fiscal year, ~~[15]~~ ***51*** percent of the total number of voting members of the association submit a written request for such an audit. ~~[The provisions of this subsection do not apply to an association described in paragraph (c) of subsection 1.]~~

3. The Commission shall adopt regulations prescribing the requirements for the auditing or reviewing of financial statements of an association pursuant to this section. Such regulations must include, without limitation:

(a) The qualifications necessary for a person to audit or review financial statements of an association; and

(b) The standards and format to be followed in auditing or reviewing financial statements of an association ~~[.]~~ ***in accordance with generally accepted accounting principles in the United States.***

Sec. 12. **NRS 116.3116 is hereby amended to read as follows:**

116.3116 1. 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. ***The association's lien does not include the costs of collecting a past due obligation charged to a unit's owner pursuant to NRS 116.310313.***

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 ~~[;]~~ ***, unless the association's lien is prior to such a security interest pursuant to subsection 3;*** and

(c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.

~~[.]~~

3. The ***association's*** lien is also prior to all security interests described in paragraph (b) ***of subsection 2*** to the extent of ~~[any]~~ ***:***

(a) Any charges incurred by the association on a unit pursuant to NRS 116.310312 ***;*** and ~~[to the extent of]~~

(b) An amount not to exceed 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]~~ ***the date on which the association mails a notice of delinquent assessment pursuant to paragraph (a) of subsection 1 of NRS 116.31162 or the***

commencement of a civil action to enforce the lien, unless federal regulations ***or policies*** adopted by the Federal Home Loan Mortgage Corporation ***,*** ~~[or]~~ the Federal National Mortgage Association ***or the Veteran's Administration*** require a shorter period of priority for the lien. If federal regulations ***or policies*** adopted by the Federal Home Loan Mortgage Corporation ***,*** ~~[or]~~ the Federal National Mortgage Association ***or the Veteran's Administration*** 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) ***of subsection 2*** must be determined in accordance with those federal regulations ~~[.]~~ ***or policies,*** except that notwithstanding the provisions of the federal regulations ~~[.]~~ ***or policies,*** 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.]~~ ***the recordation of the notice of lien pursuant to NRS 116.31162.***

➥ 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.

~~[3.]~~ ***4. The holder of the first security interest or the holder's authorized agent may establish an escrow account, loan trust account or other impound account for advance contributions for the payment of assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115***

5. Unless the declaration otherwise provides, if two or more associations have liens for assessments created at any time on the same property, those liens have equal priority.

~~[4.]~~ ***6.*** 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.

~~[5.]~~ ***7.*** A lien for unpaid assessments is extinguished unless ~~[proceedings]~~ ***a notice of delinquent assessment is mailed pursuant to paragraph (a) of subsection 1 of NRS 116.31162, or a civil action*** to enforce the lien ~~[are instituted]~~ ***is commenced,*** within 3 years after the full amount of the assessments becomes due.

~~[6.]~~ ***8.*** This section does not prohibit actions to recover sums for which subsection 1 creates a lien or prohibit an association from taking a deed in lieu of foreclosure.

~~[7.]~~ ***9.*** A judgment or decree in any ***civil*** action brought under this section must include costs and reasonable attorney's fees for the prevailing party.

~~[8.]~~ ***10*** The association, upon written request, shall furnish to a unit's owner a statement setting forth the amount of unpaid assessments against the unit. If the interest of the unit's owner is real estate or if a lien for the unpaid assessments may be foreclosed under NRS 116.31162 to 116.31168, inclusive, the statement must be in recordable form. The statement must be furnished within 10 business days after receipt of the request and is binding on the association, the executive board and every unit's owner.

~~[9.]~~ ***11.*** In a cooperative, upon nonpayment of an assessment on a unit, the unit's owner may be evicted in the same manner as provided by law in the case of an unlawful holdover by a commercial tenant, and:

(a) In a cooperative where the owner's interest in a unit is real estate under NRS 116.1105, the association's lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive.

(b) In a cooperative where the owner's interest in a unit is personal property under NRS 116.1105, the association's lien:

(1) May be foreclosed as a security interest under NRS 104.9101 to 104.9709, inclusive; or

(2) If the declaration so provides, may be foreclosed under NRS 116.31162 to 116.31168, inclusive.

~~[10.]~~ ***12.*** In ~~[an]~~ ***a civil*** action by an association to collect assessments or to foreclose a lien created under this section, the court may appoint a receiver to collect all rents or other income from the unit alleged to be due and owing to a unit's owner before commencement or during pendency of the action. The receivership is governed by chapter 32 of NRS. The court may order the receiver to pay any sums held by the receiver to the

association during pendency of the action to the extent of the association's common expense assessments based on a periodic budget adopted by the association pursuant to NRS 116.3115.

Sec. 13. **NRS 116.31162 is hereby amended to read as follows:**

116.31162 1. Except as otherwise provided in subsection 4, in a condominium, in a planned community, in a cooperative where the owner's interest in a unit is real estate under NRS 116.1105, or in a cooperative where the owner's interest in a unit is personal property under NRS 116.1105 and the declaration provides that a lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive, the association may foreclose its lien by sale after all of the following occur:

(a) The association has mailed by certified or registered mail, return receipt requested, ***a notice of delinquent assessment which states the amount of the assessments and other sums which are due in accordance with subsection 1 of NRS 116.3116, a description of the unit to which the notice of delinquent assessment applies and the name of the record owner of the unit,*** to ~~[the unit's]~~ ***:***

(1) The unit's owner or his or her successor in interest, at his or her address, if known, and at the address of the unit ~~[, a notice of delinquent assessment which states the amount of the assessments and other sums which are due in accordance with subsection 1 of NRS 116.3116, a description of the unit against which the lien is imposed and the name of the record owner of the unit.]~~ ***;***

(2) Each person who has requested notice pursuant to NRS 107.090 or 116.31168, at the address provided in the request;

(3) Any holder of a recorded security interest encumbering the unit owners' interest, at an address reasonably likely under the circumstances to result in notice of the delinquent assessment being provided to the holder; and

(4) If the unit's owner has notified the association, 30 days before the mailing of the notice of delinquent assessment, that the unit is the subject of a contract of sale and the association has been requested to furnish the certificate required by NRS 116.4109, the purchaser of the unit, at an address reasonably likely under the circumstances to result in notice of the delinquent assessment being provided to the purchaser.

(b) Not less than 30 days after mailing the notice of delinquent assessment pursuant to paragraph (a), the association or other person conducting the sale has executed and caused to be recorded, with the county recorder of the county in which the common-interest community or any part of it is situated, a notice of default and election to sell the unit to satisfy the lien which must contain the same information as the notice of delinquent assessment and which must also comply with the following:

(1) Describe the deficiency in payment.

(2) ***State whether or not the holder of the first security interest has paid to the association or its agent the super-priority lien.***

(3) State the name and address of the person authorized by the association to enforce the lien by sale.

~~[(3)]~~ ***(4)*** Contain, in 14-point bold type, the following warning:

WARNING! IF YOU FAIL TO PAY THE AMOUNT SPECIFIED IN THIS NOTICE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE!

(c) The unit's owner or his or her successor in interest has failed to pay the amount of the lien, including costs, fees and expenses incident to its enforcement, for 90 days following the recording of the notice of default and election to sell.

2. The notice of default and election to sell must be signed by the person designated in the declaration or by the association for that purpose or, if no one is designated, by the president of the association. ***At the time***

of recording a notice of default and election to sell, the association or other person conducting the sale shall also mail a copy of the notice by certified or registered mail, return receipt requested, to:

(a) The unit's owner or his or her successor in interest, at his or her address, if known, and at the address of the unit;

(b) Each person who has requested notice pursuant to NRS 107.090 or 116.31168, at the address provided in the request;

(c) Any holder of a recorded security interest encumbering the unit owners' interest, at an address reasonably likely under the circumstances to result in notice to the holder of the recording of the notice of default and election to sell; and

(d) If the unit's owner has notified the association, 30 days before the recordation of the notice, that the unit is the subject of a contract of sale and the association has been requested to furnish the certificate required by NRS 116.4109, the purchaser of the unit, at an address reasonably likely under the circumstances to result in notice to the purchaser of the recording of the notice of default and election to sell.

3. The period of 90 days begins on the first day following:

(a) The date on which the notice of default is recorded; or

(b) The date on which a copy of the notice of default is mailed by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest at his or her address, if known, and at the address of the unit,

➥ whichever date occurs later.

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.

Sec. 14. **NRS 116.311635 is hereby amended to read as follows:**

116.311635 1. The association or other person conducting the sale shall also, after the expiration of the 90 days and before selling the unit:

(a) Give notice of the time and place of the sale in the manner and for a time not less than that required by law for the sale of real property upon execution, except that in lieu of following the procedure for service on a judgment debtor pursuant to NRS 21.130, service must be made on the unit's owner as follows:

(1) A copy of the notice of sale must be mailed, on or before the date of first publication or posting, by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest at his or her address, if known, and to the address of the unit; and

(2) A copy of the notice of sale must be served, on or before the date of first publication or posting, in the manner set forth in subsection 2; and

(b) Mail, on or before the date of first publication or posting, a copy of the notice by ~~[first-class mail,]~~ ***certified or registered mail, return receipt requested,*** to:

(1) Each person entitled to receive a copy of the notice of default and election to sell ~~[notice under NRS 116.31163;]~~ ***pursuant to paragraphs (b), (c) and (d) of subsection 2 of NRS 116.31162, at the address set forth in those paragraphs.***

(2) The ~~[holder of a recorded security interest or the]~~ purchaser of the unit, if ~~[either of them]~~ ***the purchaser*** has notified the association, before the mailing of the notice of sale, of the existence of the ~~[security interest,]~~ lease or contract of sale, as applicable; and

(3) The Ombudsman.

2. In addition to the requirements set forth in subsection 1, a copy of the notice of sale must be served:

(a) By a person who is 18 years of age or older and who is not a party to or interested in the sale by personally delivering a copy of the notice of sale to an occupant of the unit who is of suitable age; or

(b) By posting a copy of the notice of sale in a conspicuous place on the unit.

3. Any copy of the notice of sale required to be served pursuant to this section must include:

(a) The amount necessary to satisfy the lien as of the date of the proposed sale; ~~[and]~~

(b) ***A statement of whether or not the holder of the first security interest has paid to the association or its agent the super-priority lien; and***

(c) The following warning in 14-point bold type:

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. YOU MUST ACT BEFORE THE SALE DATE. IF YOU HAVE ANY QUESTIONS, PLEASE CALL (name and telephone number of the contact person for the association). IF YOU NEED ASSISTANCE, PLEASE CALL THE FORECLOSURE SECTION OF THE OMBUDSMAN'S OFFICE, NEVADA REAL ESTATE DIVISION, AT (toll-free telephone number designated by the Division) IMMEDIATELY.

4. Proof of service of any copy of the notice of sale required to be served pursuant to this section must consist of:

(a) A certificate of mailing which evidences that the notice was mailed through the United States Postal Service; or

(b) An affidavit of service signed by the person who served the notice stating:

(1) The time of service, manner of service and location of service; and

(2) The name of the person served or, if the notice was not served on a person, a description of the location where the notice was posted on the unit.

Sec. 15. **NRS 116.31164 is hereby amended to read as follows:**

116.31164 1. The sale must be conducted in the county in which the common-interest community or part of it is situated, and may be conducted by the association, its agent or attorney, or a title insurance company or escrow agent licensed to do business in this State, except that the sale may be made at the office of the association if the notice of the sale so provided, whether the unit is located within the same county as the office of the association or not. The association or other person conducting the sale may from time to time postpone the sale by such advertisement and notice as it considers reasonable or, without further advertisement or notice, by proclamation made to the persons assembled at the time and place previously set and advertised for the sale.

2. On the day of sale originally advertised or to which the sale is postponed, at the time and place specified in the notice or postponement, the person conducting the sale may sell the unit at public auction to the highest cash bidder. ***The person conducting the sale shall notify the bidders at the public auction whether or not the holder of the first security interest has paid to the association or its agent the super-priority lien.*** Unless otherwise provided in the declaration or by agreement, the association may purchase the unit and hold, lease, mortgage or convey it. The association may purchase by a credit bid up to the amount of the unpaid assessments and any permitted costs, fees and expenses incident to the enforcement of its lien.

3. After the sale, the person conducting the sale shall:

(a) Make, 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;

(b) Deliver a copy of the deed to the Ombudsman within 30 days after the deed is delivered to the purchaser, or his or her successor or assign; and

(c) ~~[Apply]~~ ***Subject to the provisions of subsection 4, apply*** the proceeds of the sale for the following purposes in the following order:

(1) The reasonable expenses of sale;

(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.

4. If, before the sale, the holder of the first security interest has not paid to the association or its agent the super-priority lien, the amount of the proceeds of the sale applied to satisfy the association's lien must be limited to the amount of the super-priority lien. The proceeds of the sale may be applied to the portion of the association's lien which is not the super-priority lien only if proceeds of the sale remain after satisfaction of the first security interest.

5. The foreclosure by sale of the super-priority lien extinguishes the first security interest, unless, before the sale, the holder of the first security interest pays to the association or its agent the amount of the super-priority lien.

Sec. 16. **NRS 116.31163 is hereby repealed.**

TEXT OF REPEALED SECTION

116.31163 Foreclosure of liens: Mailing of notice of default and election to sell to certain interested persons. The association or other person conducting the sale shall also mail, within 10 days after the notice of default and election to sell is recorded, a copy of the notice by first-class mail to:

1. Each person who has requested notice pursuant to NRS 107.090 or 116.31168;

2. Any holder of a recorded security interest encumbering the unit's owner's interest who has notified the association, 30 days before the recordation of the notice of default, of the existence of the security interest; and

3. A purchaser of the unit, if the unit's owner has notified the association, 30 days before the recordation of the notice, that the unit is the subject of a contract of sale and the association has been requested to furnish the certificate required by NRS 116.4109.

H

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.

Supreme Court Case No.: 69966

Certified Question from the U.S. District Court for the District of Nevada, Case No. 2:15-cv-01534

Brief of *Amicus Curiae* Federal Housing Finance Agency in Support of Respondent

FENNEMORE CRAIG, P.C.
Leslie Bryan Hart, Esq. (SBN 4932)
John D. Tennert III, Esq. (SBN 11728)
300 E. Second St., Suite 1510
Reno, NV 89501
Tel: (775) 788-2228
Fax: (775) 788-2229
lhart@fclaw.com,
jtennert@fclaw.com

ARNOLD & PORTER LLP
(*Pro Hac Vice* to be submitted)
Michael A.F. Johnson, Esq.
601 Massachusetts Ave., N.W.
Washington, DC 20001
Tel: (202) 942-5000
Fax: (202) 942-5999
Michael.Johnson@aporter.com

Attorneys for Amicus Curiae *Federal Housing Finance Agency*

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STATEMENT OF INTEREST

Amicus curiae the Federal Housing Finance Agency, an indendent agency of the U.S. government, respectfully files this brief supporting Respondent.[1] This appeal directly affects the interests of two entities presently in FHFA conservatorship—Fannie Mae and Freddie Mac (the "Enterprises"). As federally chartered corporations Congress created to enhance the nation's home-finance market, the Enterprises own millions of mortgages, including hundreds of thousands of properties in Nevada.

In 2008, Congress established FHFA as the Enterprises' regulator. 12 U.S.C. § 4511. Congress vested FHFA with the power to place the Enterprises into conservatorship under statutorily defined circumstances, mandating that as Conservator, FHFA would succeed to all "rights, titles, powers, and privileges" of the entity in conservatorship with respect to its property. 12 U.S.C. § 4617. On September 6, 2008, FHFA placed the Enterprises into conservatorship, a status they maintain to this day.

FHFA has an interest in this case because the underlying issue—whether homeowners' association foreclosure sales conducted under NRS 116.3116 and completed before this Court issued its decision in *SFR Investments Pool 1, LLC v.*

[1] Under Rule 29(a) of the Nevada Rules of Appellate Procedure, FHFA may file without consent of the parties or leave of court. Nev. R. App. P. 29(a).

U.S. Bank, N.A., 334 P.3d 408 (Nev. 2014), can extinguish first deed-of-trust interests—affects many hundreds of deeds of trust owned by FHFA's conservatees. Although FHFA and the Enterprises have other defenses to claims that such HOA sales extinguished their liens, litigating those defenses property-by-property has proven exceptionally costly and burdensome. That burden would be significantly reduced if this Court were to hold that its *SFR* decision applies only prospectively, not retroactively. Accordingly, and in furtherance of the Conservator's statutory power to preserve and conserve Enterprise assets and property, 12 U.S.C. § 4617(b)(2)(D)(2), FHFA respectfully submits this *amicus curiae* brief in support of Respondent's position that *SFR* should be applied only prospectively.

INTRODUCTION

A little more than a year-and-a-half ago, in *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408 (Nev. 2014), this Court held that the superpriority portion of HOA assessment liens constituted a true priority lien rather than merely a payment priority designation. In practical terms, this meant that HOA foreclosure sales properly conducted under NRS 116.3116 could, as a matter of Nevada law, extinguish all other private enumbrances on the underlying property, including first deeds of trust.

The *SFR* decision established a new and unexpected principle of law, placing countless deeds of trust at risk of extinguishment or drastic and immediate

devaluation. To prevent that unforeseen and inequitable result, and to preserve the settled expectations of the housing-finance market, the Court should hold that *SFR* applies only prospectively, not retroactively.

ARGUMENT

This Court has adopted a three-factor analysis for determining whether a judicial ruling applies retroactively:

(1) The Court considers whether "the decision . . . establish[es] 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 look "to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."
(3) The Court considers whether retroactive application "could produce substantial inequitable results."

Breithaupt v. USAA Prop. & Cas. Ins. Co., 867 P.2d 402, 405 (Nev. 1994) (quoting *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106–07 (1971)). Here, all three factors cut against applying *SFR* retroactively.

I. *SFR* Established a New Principle of Law

A decision establishes 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." *Breithaupt*, 867 P.2d at 405 (quotation omitted). Here, whether NRS 116.3116 establishes a true priority lien was a question of first impression for the *SFR* Court. *See SFR*, 334 P.3d at

409 (2014) ("*We must decide* whether this 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.") (emphasis added).[2] Hence, whether *SFR* established a new principle of law under the *Briethaupt* test depends upon whether its resolution was "clearly foreshadowed." It was not.

As this Court acknowledged in *SFR*, "Nevada's state and federal district courts [we]re divided on whether NRS 116.3116 establishes a true priority lien." *SFR Investments Pool 1 v. U.S. Bank*, 334 P.3d 408, 412 (Nev. 2014), *reh'g denied* (Oct. 16, 2014). The *SFR* Court then listed cases illustrating this division. *Id.* (*comparing 7912 Limbwood Court Trust v. Wells Fargo Bank, N.A.*, 979 F. Supp. 2d 1142, 1149 (D. Nev. 2013); *Cape Jasmine Court Trust v. Cent. Mortg. Co.*, No. 2:13–CV–1125, 2014 WL 1305015, at *4 (D. Nev. Mar. 31, 2014); *First 100, LLC v. Burns*, No. A677693 (8th Jud. Dist. Ct. May 31, 2013); *with Bayview Loan Serv'g, LLC v. Alessi & Koenig, LLC*, 962 F. Supp. 2d 1222, 1225 (D.Nev.2013); *Weeping Hollow Ave. Trust v. Spencer*, No. 2:13–CV–00544, 2013 WL 2296313, at *6 (D. Nev. May 24, 2013); *Diakonos Holdings, LLC v. Countrywide Home Loans, Inc.*, No. 2:12–CV–00949, 2013 WL 531092, at *3 (D. Nev. Feb. 11,

[2] K&P implausibly claims that the Nevada Supreme Court "has already rejected [Respondent]'s prospective argument." K&P Br. at 16. That is wrong: As K&P acknowledges, the issue presented to the Court for review "is clearly an issue of first impression in Nevada," without "any precedential decision from any appellate authority." *Id.* at 10.

2013)). The fact that such a split among lower authorities existed confirms that the *SFR* holding was not clearly foreshadowed.

Decisions postdating *SFR* similarly remarked how the law was unsettled prior to this Court's decision. As one federal court noted, before the *SFR* decision,

> purchasing property at an HOA foreclosure sale was a *risky investment*, akin to purchasing a lawsuit. Nevada state trial courts and decisions from the United States District Court for the District of Nevada were divided on the issue of whether HOA liens are true priority liens such that their foreclosure extinguishes a first deed of trust on the property.

Bourne Valley Court Trust v. Wells Fargo Bank, N.A., 80 F. Supp. 3d 1131, 1136 (D. Nev. 2015) (Pro, J.) (emphasis added). That court remarked that uncertainty prior to *SFR* was so high that "title insurance companies refused to issue title insurance policies on titles received from foreclosures of HOA super priority liens absent a court order quieting title." *Id.*

A second federal judge, writing just after *SFR* was issued, noted that until that decision, "whether the foreclosure of an [HOA lien] under [NRS] § 116.3116 extinguishes a first security interest remained an *open question* that had not been directly addressed by the Supreme Court of Nevada." *Washington & Sandhill Homeowners Ass'n v. Bank of Am., N.A.*, No. 2:13-CV-01845-GMN, 2014 WL 4798565, at *3 (D. Nev. Sept. 25, 2014) (emphasis added). A third federal court similarly remarked that "lenders and investors *were at loggerheads* over the legal effect of [an HOA's] nonjudicial foreclosure of a superpriority lien on a lender's

first trust deed. . . . The Nevada Supreme Court *settled the debate* . . . in *SFR*." *Freedom Mortg. Corp. v. Las Vegas Dev. Grp., LLC* 106 F. Supp. 3d 1174, 1176 (D. Nev. 2015) (emphasis added). As these three judges confirmed, the meaning of NRS 116.3116 was unsettled prior to *SFR*, and this Court's ruling was not clearly foreshadowed.

Just as *SFR* was not foreseen by the many state and federal courts that issued contrary holdings, neither did many market participants anticipate this outcome.[3] In recent years, hundreds of cases seeking to quiet title following an HOA sale have been filed in state and federal court. Many of these cases involved owners of the deeds of trust encumbering the subject properties (or parties, such as loan servicers, that stand in the shoes of loan owners), where the secured loan was issued and the corresponding deed of trust was executed *after* the passage of NRS 116.3116 but *before* the *SFR* decision. *See, e.g.*, Compl., *Nationstar Mortg., LLC v. D'Andrea Cmty. Ass'n*, Case No. 3:15-cv-00377, Dkt. No. 1 (D. Nev. July 21, 2015); Notice of Appeal, *Nationstar v. SFR Investments Pool 1, LLC*, No. 69400, Doc. No. 15-38731 (Dec. 18, 2015) (appealing, *inter alia*, the district court's denial of plaintiffs' counter-motion for summary judgment). Had market participants lacking other protection from deed-of-trust extinguishment understood that then-

[3] *See* Resp.'s Ans. Br. at 13, 16-19, 28-35 (discussing lenders', HOAs' and buyers' pre-*SFR* behavior).

existing law allowed an HOA sale to terminate their lien, they likely would have protected themselves contractually when writing their mortgages, or even refrained from writing them—and, in either case, would not now be litigating whether their interests survived the HOA sales.[4]

The *SFR* decision also contravened *lawmakers'* previous understandings of how NRS 116.3116 operates: that the statute creates a payment priority, not a true priority lien.[5] In subsequent sessions after the initial passage of NRS 116.3116, the Nevada legislature revisited the statute, considering an amendment that would have led to the same outcome as *SFR*. Specifically, one year before *SFR* was decided—indeed, before the underlying case was even commenced—Assemblyman Jason Frierson drafted a proposed amendment that would have added, *inter alia*, the following sentence to NRS 116.3116:[6] "The foreclosure by sale of the super-priority lien extinguishes the first security interest, unless, before the sale, the holder of the first security interest pays to the association or its agent the amount of the super-priority lien." AB 98, Prop. Am. 8897, 77th Reg. Session (2013), § 15,

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[4] As explained *infra*, FHFA, Fannie Mae, and Freddie Mac have such protection under 12 U.S.C. § 4617(j)(3). *See infra* p.16.

[5] *See* Resp.'s Ans. Br. at 21-28 (discussing legislative history).

[6] The Legislature's staff prepared a draft of Assemblyman Frierson's amendment on May 15, 2013, seven days *before* the filing of the district court complaint in *SFR*. The proposal therefore could not have been a response to that litigation.

(copy attached as Exh. 1).[7] Whether the amendment was offered to *change* the meaning of NRS 116.3116 or to *resolve uncertainty* about what the current legislature thought the prior legislature intended, there would have been no need for the proposal if the existing statute *clearly foreshadowed* the result the amendment would have brought about—and that the *SFR* decision later effected.[8]

Similarly, during a separate pre-*SFR* legislative debate concerning another potential amendment to NRS 116.3116, State Senator Allison Copening described NRS 116.3116 as giving HOAs superpriority for a portion of their liens "[w]hen a bank forecloses." Hearing on SB 174 Before Senate Comm. on Finance, 76th Legislature, (2011) (Statement of Sen. Allison Copening) (copy attached as Exh. 2), at 22. Thus, the premise underlying Senator Copening's remark is that NRS 116.3116 does *not* permit an HOA sale to extinguish a bank's deed-of-trust interest, but instead only gives the HOA a limited superpriority claim on funds realized through *the bank's* foreclosure on *its* deed of trust. Of course, the effect of *SFR* is far more dramatic—that decision encourages HOAs to initiate foreclosures *before* banks and leads directly to the extinguishment of bank deeds of trust. Although this Court in *SFR* ultimately rejected Senator Copening's interpretation of NRS 116.3116, the Senator's public, contrary interpretation confirms that the

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[7] http://www.leg.state.nv.us/Session/77th2013/Exhibits/Assembly/JUD/AJUD1132PP.pdf.

[8] The Legislature rejected the proposed amendment.

text and case law regarding the statute did not clearly foreshadow the result of *SFR*.

II. Retroactivity Would Impair the Purpose and Operation of NRS 116.3116

In evaluating the second *Breithaupt* factor, 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." *Breithaupt*, 867 P.2d at 405 (quotation omitted). Here, retroactive application of *SFR* will undermine rather than further the interests animating NRS 116.3116.[9] Specifically, while NRS 116.3116 was meant to allow an HOA lien to diminish the value of the deed of trust by only a small amount—nine months of unpaid assessments,[10] which practical experience reveals to generally total only a few hundred or a few thousand dollars—the SFR decision allows an HOA lien to completely extinguish deed-of-trust interests, which often run to the hundreds of thousands of dollars.

To determine NRS 116.3116's purpose, the Court should look to the Comments to the Uniform Common Interest Ownership Act of 1982 (the "UCIOA"). As the *SFR* Court noted, NRS 116.3116 "is a creature of the

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[9] *See* Resp.'s Ans. Br. at 44-45.

[10] The generally applicable rule provides for a superlien of up to nine months of unpaid assessments, while an exception for certain deed-of-trust owners, including the Enterprises, reduces the period to six months. NRS 116.3116(3)(b)-(c).

[UCIOA]." *SFR*, 334 P.3d at 410. Thus, this Court considers, *inter alia*, the Comments to the UCIOA in interpreting the provision. *See id.* According to those Comments, the underlying purpose of the provision is to "strike[] 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." UCIOA §3-116, cmt. 1.[11] Thus, NRS 116.3116 was meant to "balance" competing lien interests in a way that would allow HOAs, in the event of a serious default, to recover nine months of unpaid assessments before the mortgagee received anything, with the mortgagee then recovering the amount of its entire lien (to the extent the foreclosure sale realized sufficient funds), with the HOA then receiving any residual amount to cover further unpaid assessments.

The *SFR* decision ushered in a new paradigm that strikes a very different balance. Instead of effectively reducing the mortgagee's likely recovery by—at most—the amount of *nine months* of back HOA assessments, the SFR decision puts the mortgagee's *entire lien* at grave risk of complete extinguishment. In

[11] Eighteen states that, like Nevada, have adopted a version of the UCIOA part ways with the *SFR* Court and strike this equitable balance; these eighteen states do not permit HOA liens to extinguish first deeds of trust. *See* Ala. Code § 35-81-316 (Alabama); A.S. § 34.08.470 (Alaska); C.R.S. § 38-33.3-316 (Colorado); C.G.S.A. § 47-258 (Connecticut); 25 Del.C. § 81-316 (Delaware); Fla. Stat. § 718.116(5)(a) (Florida); H.R.S. § 514B-146 (Hawaii); 765 Ill. Comp. Stat. § 605/9 (Illinois); Md. Code Real Prop. § 11-110(f)(2), (3) (Maryland); M.G.L.A. 183A § 6(c) (Massachusetts); M.S.A. § 515B.3-116 (Minnesota); N.H. Rev. Stat. § 356-B:46 (New Hampshire); N.J. Stat. § 46:8B-21(b) (New Jersey); Or. Rev. Stat. §§ 94.709, 100.450 (Oregon); 27A V.S.A. § 3-116 (Vermont); W.Va. Code § 36-B-116 (West Virginia); 68 Pa. Cons. Stat. §§ 3315(b)(2), 5315(b)(2) (Pennsylvania); Tenn. Code § 66-27-415(b)(2)(A) (Tennessee).

colloquial terms, the decision changed the effect of a statute from "sharing the pain" of default between mortgagees and HOAs, to visiting virtually all of the pain on mortgagees—without even providing commensurate benefit to the HOAs. In practical effect, the facts of many cases confirm that while HOAs are being made whole under *SFR* for assessment liens running only into the thousands of dollars, mortgagees stand to lose every penny of deed-of-trust interests running to the hundreds of thousands or more. *See, e.g.*, *Nationstar Mortgage, LLC v. SFR Investments Pool 1, LLC*, Case No. 2:15-cv-00583, 2016 WL 1718374, at *4 (D. Nev. Apr. 29, 2016) (ordering that a claim that a $1,350 HOA superlien extinguished a $210,123 mortgage lien be tried); HOA Answer & Crossclaim, *Wells Fargo Bank, N.A. v. Beverly*, Case No. 3:15-cv-00601, Dkt. No. 18 (D. Nev. Mar. 17, 2016) (asserting that an HOA lien and related fees totaling $4,142.25 extinguished a mortgage lien in the original amount of $296,800.00).

Indeed, concerning pre-*SFR* foreclosure sales, HOAs will be made whole regardless of whether this Court applies *SFR* retrospectively or only prospectively, because the deeds that HOAs have already sold to investors were deeds without warranty. *See Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 366 P.3d 1105, 1110 (Nev. 2016) (quoting the version of Nevada's HOA nonjudicial foreclosure statute that was in effect at the time of the *SFR* decision as requiring the entity conducting the sale to execute and deliver a deed without warranty); these deeds without

warrant by definition carry the risk of defect in title. *See* Black's Law Dictionary (9th ed. 2009) (Deed-Quitclaim Deed). Thus, the only real beneficiaries of a retrospective application of *SFR* would the entities—including foreign investment funds[12]—that acquired valuable properties for pennies on the dollar before the *SFR* decision. With respect, FHFA submits that this result is no balance at all.

III. Retroactivity Would Inequitably Reallocate Substantial Losses Within Closed Contractual Relationships

The third factor that the Court must consider is "whether retroactive application could produce substantial inequitable results." *Breithaupt*, 867 P.2d at 405 (quotation omitted). Here, retroactivity would disrupt lenders' justifiable reliance on a common understanding of the law, inequitably reallocating the cost of default within contractual arrangements that cannot be repriced.

Where "there has been justifiable reliance on earlier decisions," a new decision should not be given retroactive effect. *See Ziglinski v. Farmers Ins. Grp.*, 558 P.2d 1147, 1148 (Nev. 1977). Here, between the Statute's enactment in 1991 and the *SFR* decision in 2014, the Enterprises and other participants in Nevada's housing-finance market purchased interests in hundreds of thousands of properties located in common-interest communities to which the Statute applies. Prior to the

[12] *See* Supp. Cert. of Int. Parties, Case No. 2:15-cv-00267-RFB-NJK, Dkt. No. 61 (D. Nev. May 10, 2016) (identifying investor SFR Investments Pool 1, LLC's ultimate owners as a foreign entity called Xiemen Investments, Ltd. and a South African individual) (attached as Exh. 5).

SFR decision, reasonable participants such as the Enterprises did not anticipate that their first-position mortgages could be erased via a homeowners' association foreclosure sale.

A July 23, 2015 statement from the American Bankers Association and six other housing-finance trade associations confirms the pre-*SFR* understanding of the Statute. *See* American Bankers Association, et al., Statement of Principles, July 23, 2015 (copy attached as Exh. 3).[13] The Statement of Principles characterizes the trade associations' view that "[f]or decades"—prior to the *SFR* decision—"HOA super priority liens have been enforced as a 'payment priority' from the proceeds of a foreclosure sale conducted by a superior lienholder or encumbrancer." *Id.* at 7.[14] The *SFR* decision and a similar holding in another jurisdiction, however, altered this common understanding, "shifting HOA super liens from a payment priority to a true priority." *Id.* at 8. By disrupting mortgage market participants' settled expectations in contract rights, this shift "created profound, unintended

[13] The Statement of Principles, which is equivalent to a press release, is judicially noticeable for the fact that the signatories made the statements therein. *See* NRS 47.130(2).

[14] United Trustees Association and American & Legal Financial Network's *amicus* brief in support of rehearing in *SFR* further confirms that, before *SFR*, market participants relied on the understanding that the Statute created a payment priority for HOA liens. *See* United Trustees Br. in support of U.S. Bank's Mot. for Rehearing, *SFR Investments Pool 1 v. U.S. Bank*, Nevada Supreme Court Case No. 63078 (brief filed Oct. 16, 2014) (copy attached as Exh. 4).

consequences for mortgage lenders, the servicers of their loans, and the housing industry at large." *Id.*

In substance, those "profound, unintended consequences" amount to exponentially increasing the financial risk mortgagees face upon borrower default and leaving borrowers who are unable to make their mortgage payments with no asset with which to reduce their debt. As explained above, instead of being exposed to a diminution in the recoverable value of the collateral of at most only a few months' worth of HOA assessments, mortgagees were suddenly placed at grave risk of complete extinguishment of their collateral interest. While it might in theory be possible to incorporate that risk into the terms of a mortgage loan at issuance, once the loan is written the terms are what they are and the mortgagee cannot reprice the loan to account for the sudden increase in risk. Indeed, because this case affects deed-of-trust interests in properties where the HOA has already sold the property at foreclosure, it is all but certain that the borrowers have stopped making any mortgage payments at all and the lenders' only realistic hope of recovery lies in the collateral, which the *SFR* decision places at grave risk.

At bottom, because the issue before the Court concerns the effect of the *SFR* decision on mortgages that have *already been written* with terms that *cannot be adjusted*, the new legal environment *SFR* ushered in imposes great and unrecoverable costs upon mortgagees—costs that will now surely be passed on to

subsequent borrowers. *See* Statement of FHFA General Counsel Alfred M. Pollard, Judiciary Committee, Nevada State Legislature (Apr. 7, 2015), at E4 ("[I]f underwriting standards change, some unit owners may face challenges in securing a loan to buy a unit or refinance."). The likely, and inequitable, result is that *all* Nevada mortgage borrowers will now bear those costs in the form of higher loan pricing and/or stricter loan underwriting.

K&P claims in response that the *SFR* holding was aligned with how a "reasonable lender" would have understood NRS 116.3116 prior to *SFR*, *see* K&P Br. at 23. That is wrong, and the evidence that K&P offers as support is not persuasive. K&P points to advisory opinions from the Nevada Commission for Common Interest Communities and Condominium Hotels ("CCICCH") and the Nevada Real Estate Division ("NRED") published prior to the *SFR* decision. K&P Br. at 24. But these advisory opinions were not binding on the *SFR* Court and therefore express only the issuing organizations' opinions, not neutral or reliable statements of the law. *See State Indus. Ins. Sys. v. Campbell*, 862 P.2d 1184, 1185 (Nev. 1993) ("[T]his court may undertake independent review of [an] administrative construction of a statute.") (internal quotation omitted); *UMC Physicians' Bargaining Unit of Nev. Serv. Emps. Union, SEIU Local 1107 v. Nev. Serv. Emps. Union/SEIU Local 1107*, 178 P.3d 709, 712 (Nev. 2008) ("Although we give deference to an administrative body's conclusions of law when they are

closely related to the facts, we independently review purely legal issues including matters of statutory and regulatory interpretation."); *accord* NRED Advisory Opinion 13-01 (clarifying that the NRED Advisory Opinion "is not a rule, regulation, or final legal determination"). As importantly, the NRED advisory opinion addressed the issue of whether the Statute creates a true priority lien only in passing—and the Division's administrator later walked back the conclusions made in the Advisory Opinion, *see* Gail Anderson, Summary of NRED Advisory Opinion 13-01, Presentation to Senate Committee on Judiciary, at 6 (stating that although the NRED "believes an association's foreclosure *should* be able to extinguish a first secured [lien], the Division also *recognizes problems with the current laws making that conclusion uncertain*") (emphasis added);— while the CCICCH never even addresses the issue at all. *See* CCICCH, Advisory Opinion No. 2010-01.[15]

Neither does K&P's quotation of a 2008 comment to the UCIOA support this conclusion. *See* K&P Br. at 24 (quoting Comment 8 to UCIOA 3-116 (2008)). This comment describes an amendment to the UCIOA adding HOAs' reasonable

[15] Instead, the CCICCH advisory opinion concerns whether HOAs may recover under NRS 116.3116 the costs and fees incurred in collecting HOA assessments. *See id.* K&P presumably included the quoted portion of the CCICCH advisory opinion because the quotation indicates that "Fannie Mae and local lenders" weighed in on the question whether NRS 116.3116 permits HOAs to recover the costs and fees incurred in collecting HOA assessments. *See id.* at 12 (quoted in K&P Br. at 23). That market participants were aware, prior to the *SFR* decision, of HOAs' authority to levy or attach liens is not in doubt, however.

attorneys' fees and court costs to HOA liens under the UCIOA; the comment does not address whether the relevant UCIOA provision establishes a payment priority or a true priority lien—let alone whether Nevada law does. *See id.* Thus, the comment sheds no light on reasonable market participants' pre-*SFR* understanding of NRS 116.3116.

Finally, FHFA respectfully notes that retroactive application of *SFR* has caused a tidal wave of costly litigation that drains the resources of the state and federal courts in Nevada, and of the taxpayer-supported Enterprises. FHFA, the Enterprises, and the Enterprises' servicers are currently litigating several hundred cases in which a purchaser at an HOA foreclosure sale claims an interest in property, based on NRS 116.3116, that it asserts is free and clear of a deed of trust owned by Fannie Mae or Freddie Mac. In these cases, FHFA, the Enterprises, and their servicers argue that 12 U.S.C. § 4617(j)(3)—which provides that when the Enterprises are under the conservatorship of FHFA, none of their property "shall be subject to . . . foreclosure . . . without the consent of [FHFA]"—preempts NRS 116.3116 to the extent the state statute would otherwise permit the HOA's foreclosure of its superpriority lien to extinguish the Enterprises' interests in the Property while the Enterprises are under FHFA's conservatorship.[16]

[16] In July 2015, FHFA and the Enterprises filed a complaint against a proposed class of current record owners of properties as to which (i) an HOA foreclosure sale occurred on or after September 18, 2009 and (ii) an Enterprise lien had

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Although, thus far, federal district courts in Nevada have resolved eleven cases presenting the same legal issue in FHFA and the Enterprises' favor on dispositive motions,[17] litigating these cases one by one, almost all of which involve

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attached and had not been satisfied at the time of the sale (and over which the federal court could exercise *in rem* jurisdiction). *See* Corrected First Am. Compl., *FHFA v. SFR*, Case No. 2:15-cv-1338; Dkt. No. 22 (July 15, 2015), at 3. This proposed class included record owners of hundreds of properties, *see* Decl. of Michael A.F. Johnson, *FHFA v. SFR*, Case No. 2:15-cv-1338; Dkt. No. 106-1 (Mar. 26, 2016), at ¶ 25, with the HOA foreclosure sales for many of these properties having occurred prior to the *SFR* decision. *See id.*, Ex. 10 (The federal district court denied certification of this proposed class. Order, *FHFA v. SFR*, Case No. 2:15-cv-1338; Dkt. No. 104 (May 2, 2016), at 1. FHFA and the Enterprises have appealed that denial. Notice of Appeal, *FHFA v. SFR*, Case No. 2:15-cv-1338; Dkt. No. 106 (June 9, 2016).).

[17] *See Skylights v. Byron*, 112 F. Supp. 3d 1145 (D. Nev. 2015); *Elmer v. Freddie Mac*, No. 2:14-cv-01999-GMN-NJK, 2015 WL 4393051 (D. Nev. July 14, 2015); *Premier One Holdings, Inc. v. Fannie Mae*, No. 2:14-cv-02128-GMN-NJK, 2015 WL 4276169 (D. Nev. July 14, 2015); *Williston Inv. Grp., LLC v. JP Morgan Chase Bank, NA*, No. 2:14-cv-02038-GMN-PAL, 2015 WL 4276144 (D. Nev. July 14, 2015); *My Glob. Vill., LLC v. Fannie Mae*, No. 2:15-cv-00211-RCJ-NJK, 2015 WL 4523501 (D. Nev. July 27, 2015); *1597 Ashfield Valley Trust v. Fannie Mae*, No. 2:14-cv-02123-JCM, 2015 WL 4581220 (D. Nev. July 28, 2015); *Fannie Mae v. SFR Invs. Pool 1, LLC*, No. 2:14-CV0-2046-JAD-PAL, 2015 WL 5723647 (D. Nev. Sept. 28, 2015); *Saticoy Bay, LLC Series 1702 Empire Mine v. Fannie Mae*, No. 2:14-CV-01975-KJD-NJK, 2015 WL 5709484 (D. Nev. Sept. 29, 2015); *Berezovsky v. Moniz*, No. 2:15-cv-01186-GMN-GWF, 2015 WL 8780198 (D. Nev. Dec. 15, 2015); Order, *Opportunity Homes, LLC v. Freddie Mac*, No. 2:15-cv-008993-APG-GWF (D. Nev. Mar. 11, 2016), ECF No. 39; *FHFA v. SFR Investments Pool 1, LLC*, No. 2:15-cv-1338-GMN-CWH, 2016 WL 2350121 (D. Nev. May 2, 2016).

Further, Nevada state courts have granted the Enterprises and their servicers summary judgment in six cases concerning related issues. *See Saticoy Bay LLC Series 9641 Christine View vs. Fannie Mae*, No. A-13-690924-C (Nev. Dist. Ct. Dec. 8, 2015); *5312 La Quinta Hills LLC, vs. BAC Home Loans Serv'g LP*, No. A-13-693427-C (Nev. Dist. Ct. Jan. 6, 2016); *NV West Servicing LLC v. Bank of America, N.A.*, No. A-14-705996-C (Nev. Dist. Ct. Jan. 25, 2016); *Fort Apache Homes, Inc. vs. JPMorgan Chase Bank, N.A.*, No. A-13-691166-C (Nev. Dist. Ct. Feb. 5, 2016); *RLP-Buckwood Court, LLC, v. GMAC Mortg., LLC*, No. A-13-686438-C, (Nev. Dist. Ct. May 24, 2016); *A&I LLC Series 3 v. Lowry*, No. A-13-691529-C (Nev. Dist. Ct. May 31, 2016).

a single property, is costly. While FHFA understands that litigation is sometimes necessary to protect the rights underlying contractual relationship such as mortgage lending, FHFA respectfully submits that creating the need for such costly activity by altering the legal landscape retrospectively is inequitable—especially when the costs must be borne by federally chartered, public-mission-oriented, taxpayer-supported entities such as the Enterprises in conservatorship.

CONCLUSION

For the reasons stated above, FHFA urges the Court to hold that this Court's decision in *SFR* applies only prospectively.

DATED this 14th day of July, 2016.

FENNEMORE CRAIG, P.C.

By: /s/ Leslie Bryan Hart
Leslie Bryan Hart, Esq. (SBN 4932)
John D. Tennert III, Esq. (SBN 11728)
300 E. Second St., Suite 1510
Reno, NV 89501
Tel: (775) 788-2228 - Fax: (775) 788-2229
lhart@fclaw.com, jtennert@fclaw.com

ARNOLD & PORTER LLP
Michael A.F. Johnson, Esq.*
601 Massachusetts Ave., N.W.
Washington, DC 20001
Tel: (202) 942-5000 - Fax: (202) 942-5999
Michael.Johnson@aporter.com
(**Pro Hac Vice* to be Submitted)

Attorneys for *Amicus Curiae* Federal Housing Finance Agency

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of N.R.A.P. 32(a)(4), the typeface requirements of N.R.A.P. 32(a)(5) and the type style requirements of N.R.A.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point, Times New Roman style. I further certify that this brief complies with the page- or type-volume limitations of N.R.A.P. 32(a)(7) because, excluding the parts of the brief exempted by N.R.A.P. 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 4,788 words.

I further 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. Finally, I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

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sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 14th day of July, 2016.

FENNEMORE CRAIG, P.C.
By: /s/ Leslie Bryan Hart
Leslie Bryan Hart, Esq. (SBN 4932)
John D. Tennert III, Esq. (SBN 11728)
300 E. Second St., Suite 1510
Reno, NV 89501
Tel: (775) 788-2228 - Fax: (775) 788-2229
lhart@fclaw.com, jtennert@fclaw.com

ARNOLD & PORTER LLP
Michael A.F. Johnson, Esq.*
601 Massachusetts Ave., N.W.
Washington, DC 20001
Tel: (202) 942-5000 - Fax: (202) 942-5999
Michael.Johnson@aporter.com
(**Pro Hac Vice* to be Submitted)

Attorneys for *Amicus Curiae* Federal Housing Finance Agency

CERTIFICATE OF SERVICE

Pursuant to NEFCR 9(b)(d)(e), I certify that on the 14th day of July, 2016, a true and correct copy of the AMICUS CURIAE FEDERAL HOUSING FINANCE AGENCY'S BRIEF IN SUPPORT OF RESPONDENT'S BRIEF was transmitted electronically through the Court's e-filing system to the attorney(s) associated with this case.

THE WRIGHT LAW GROUP, P.C.
John Henry Wright, Esq.
2340 Paseo Del Prado, Suite D-305
Las Vegas, NV 89102
Attorney for Appellant

WRIGHT, FINLAY & ZAK, LLP
Dana Jonathon Nitz, Esq.
Natalie C. Lehman, Esq
7785 W. Sahara Avenue, Suite 200
Las Vegas, NV 89117
Attorneys for Appellee

/s/ Pamela Carmon
An Employee of Fennemore Craig, P.C.

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