**Case No. 70501**

IN THE SUPREME COURT OF NEVADA

BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP, fka COUNTRYWIDE HOME LOANS, LP, a national association,

Appellant,

vs.

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

Respondent.

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**APPEAL**

From the Eighth Judicial District Court, Department XXI, Clark County
The Honorable VALERIE ADAIR, District Judge
District Court Case No. A-13-684501-C

# RESPONDENT'S ANSWERING BRIEF

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## NRAP 26.1 DISCLOSURE

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

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

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

DATED this 7th day of December, 2016.

**KIM GILBERT EBRON**

*/s/Jacqueline A. Gilbert*
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## ROUTING STATEMENT

This is one of many cases pending before this Court on issues related to NRS 116 non-judicial foreclosure sales. While SFR Investments Pool 1, LLC believes that this Court has already decided the issue of the constitutionality of the non-judicial foreclosure statutes NRS 116.3116 through NRS 116.31168, it believes that this case should be retained by the Nevada Supreme Court until the constitutionality issue is finally put to rest. Additionally, this case raises an issue regarding alleged attempted payment of the super-priority amount. What constitutes actual tender and release of the super-priority portion of an association lien is an issue of first impression which also supports retention by the Nevada Supreme Court.

## FACTUAL AND PROCEDURAL BACKGROUND

SFR Investments Pool 1, LLC ("SFR") generally agrees with the Bank's procedural background portion of the Bank's Statement of Facts section. (*See* AOB at 3-5.) SFR also generally concurs with the Bank's presentation of the factual background with two notable exceptions. (*See* AOB at 1-3.)

SFR disputes the Bank's assertion that it "tendered a check" for payment of the Association lien. (*See* AOB at 3.) The district court found the payment submitted by Miles, Bauer, Bergstrom & Winters, LLP, on behalf of the Bank was offered conditionally. A conditional payment is not tender and does not satisfy a lien.

SFR also disputes the Bank's description of the Association's Notice of Sale as failing to describe the "deficiency in payment" as required by NRS 116.31162(1)(b)(1). (*See* AOB at 3.) The Notice stated the total amount of the lien, which had been held sufficient by this Court. *See SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. ___, 334 P.3d 408, 418 (2014).

SFR also presents the following recital of facts relating to this case:

| DATE | FACTS |
|---|---|
| 1991 | Nevada adopted Uniform Common Interest Ownership Act as NRS 116, including NRS 116.3116(2). |
| July 15, 1998 | The Association perfected and gave notice of its lien by recording its Declaration of Covenants, Conditions and |

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| | Restrictions as Instrument No. 980715.01172.[1] |
| November 3, 2010 | Grant Bargain Sale Deed transferred the Property to Armando A. Carias, recorded as Instrument No. 201011030002713.[2] |
| November 3, 2010 | Deed of Trust in favor of W.J. Bradley Mortgage Capital Corp. was recorded as Instrument No. 201011030002714.[3] The lender prepared, and Carias signed, a Planned Unit Development Rider ("PUD Rider") as part of the First Deed of Trust, recognizing the need to pay assessments to the Association and the ability of the lender to pay the assessments should Carias default.[4] |
| January 26, 2012 | Assignment of Deed of Trust in favor of Bank of America, N.A., recorded as Instrument No. 201201260003419.[5] |
| February 23, 2012 | Association, through its agent, Alessi & Koenig, LLC ("Alessi") recorded a Notice of Delinquent Assessment (Lien) as Instrument No. 201202230001691.[6] |
| May 8, 2012 | Association recorded a Notice of Default and Election to Sell under the Homeowners Association Lien as Instrument No. 201205080002884.[7]<br><br>Alessi mailed the Notice of Default to BANA.[8] |
| January 22, 2013 | Association recorded a Notice of Trustee's Sale as Instrument No. 201301220003107.[9] |

[1] 2JA_279.
[2] 2JA_281-286.
[3] 2JA_288-301.
[4] *Id.*
[5] 2JA_303-304.
[6] 2JA_306.
[7] 2JA_308.
[8] 2JA_323-327.
[9] 2JA_310.

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| | Alessi mailed the Notice of Default to BANA.[10] |
| February 20, 2013 | Association foreclosure sale took place and SFR placed the highest bid, $21,000.[11]<br><br>Trustee's Deed Upon Sale vesting title in SFR recorded as Instrument No. 201302260003889.[12]<br><br>As evidenced by the Trustee's Deed Upon Sale, the Association foreclosure sale complied with requirements of law, including but not limited to, the elapsing of 90 days, recording and mailing of copies of Notice of Delinquent Assessment and Notice of Default, and the recording, posting, and publication of the Notice of Sale.<br><br>SFR has no reason to doubt the recitals in the Trustee's Deed Upon Sale – if there were any issues with delinquency or noticing, none of these were communicated to SFR.[13]<br><br>Further, neither SFR, nor its manager, have any relationship with the Association besides owning property within the community and bidding on properties at auction.[14]<br><br>Similarly, neither SFR, nor its manager, have any relationship with the Association's agent beyond attending auctions and bidding on properties.[15] |
| Before February 23, 2013 | No release of the super-priority lien was recorded.[16]<br><br>No lis pendens was recorded by BANA.[17] |
| July 1, 2013 | Alessi filed a Complaint in Interpleader regarding excess |

[10] 2JA_328-330.
[11] 2JA_312-313.
[12] *Id.*
[13] 2JA_319 at ¶ 7.
[14] *Id.* at ¶ 8.
[15] *Id.* at ¶ 9.
[16] *Id.* at ¶ 10.
[17] *Id.* at ¶ 6.

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|---|---|
| | proceeds from the foreclosure sale.[18] |
| January 9, 2014 | BANA filed its Answer, Cross-Claim and Third-Party Complaint.[19] |
| February 14, 2014 | SFR filed its Answer, Counterclaim and Cross-Claim.[20] |
| March 11, 2014 | BANA filed its Answer to SFR's Counterclaim.[21] |
| April 16, 2015 | BANA filed its Amended Answer to Alessi, SFR and Sutter Creek Homeowners' Association ("Association").[22] |
| May 8, 2015 | SFR filed its Answer to Bank of America's Cross-Claim.[23] |
| May 13, 2015 | Alessi and Association filed their Answer to BANA's Cross-Claims and Counter Claims.[24] |
| October 30, 2015 | BANA filed Motion for Summary Judgment.[25] |
| November 2, 2015 | SFR filed Motion for Summary Judgment.[26] |
| April 18, 2016 | Court denied BANA's Motion for Summary Judgment and grants SFR's Motion for Summary Judgment.[27] |
| May 16, 2016 | BANA filed Motion for Reconsideration.[28] |
| May 24, 2016 | BANA filed Notice of Appeal.[29] |

[18] 1JA_001-027.
[19] 1JA_032-044.
[20] 1JA_045-058.
[21] 1JA_059-064.
[22] 1JA_103-126.
[23] 1JA_129-366.
[24] 1JA_137-151.
[25] 1JA_217-253.
[26] 1JA_254-330.
[27] 4JA_788-795.
[28] 4JA_806-887.
[29] 4JA_888-894.

## SUMMARY OF THE ARGUMENT

This case begins shortly after the 2008 financial crisis, when many Nevada homeowners defaulted on payments to their homeowners associations, along with their mortgage payments. Lenders such as Bank of America, N.A., ("BANA" or "Bank"),[30] sat on their nonperforming loans, oftentimes for years, effectively blocking new owners from taking possession and paying assessments. As a result associations did not receive assessments from these properties. Associations sought to enforce their liens through collections, generally without result. Associations eventually exercised their right to nonjudicial foreclosure on their liens to recoup their losses and, as a consequence, transfer homes to owners who would pay assessments.

Lenders bet on their interpretation of NRS 116.3116(2), wagering that first deeds of trust could not be extinguished by association superpriority liens. When associations took reasonable steps to collect assessments, lenders balked. When associations warned of impending foreclosures, lenders either continued to balk or made impermissibly conditioned offers of payment.

[30] Appellant's full name is Bank of America, N.A., Successor by Merger to BAC Home Loans Servicing, LP, fka Countrywide Home Loans Servicing, LP, a national association.

By the time this Court, in the *SFR* decision[31], held that an association's lien for assessment was a true superpriority lien, the lenders' stonewalling had already forced hundreds of associations to carry out foreclosure sales. It was the lenders' reckless decision not to foreclose, not to require their borrowers to pay assessments, and opting not to exercise their rights under the PUD riders to pay the assessments themselves and add them to the note that cost them their security interests: not the State, not the Association, not the Trustee, and not third-party purchasers such as SFR, who did nothing more than attend a public auction and bid.

The property in this case, 3617 Diamond Spur Avenue ("Property"), was the subject of one such association foreclosure. The homeowner fell into arrears on assessments owed to the Sutter Creek Homeowners' Association ("Association"). (2JA_306.) After issuing a series of notices and recordings, the Association's trustee, Alessi & Koenig ("Alessi" or "Trustee") held a foreclosure sale to recover the delinquent assessments on February 20, 2013. SFR Investments Pool 1, LLC ("SFR"), the highest bidder, took title to the Property. (2JA_312-13.)

The record shows this foreclosure sale was properly noticed and conducted. Consequently, the Association's sale transferred ownership to SFR and extinguished

[31] *SFR Investments Pool 1, LLC v. U.S. Bank. N.A.*, 130 Nev. ___, 334 P.3d 408, 418 (2014).

the Bank's First Deed of Trust ("FDOT"). Thus, in reviewing the evidence, the District Court's properly granted summary judgment to SFR.

First, the District Court properly rejected the Bank's "tender" claim, recognizing that the proffered payment was impermissibly conditional and acceptance of the payment offer required the Association potentially to waive its rights to its entire lien and to concede an undecided matter. The District Court properly concluded the Bank's offer did not constitute a valid tender. Moreover, beyond this one-time, "non-negotiable" payment offer, the Bank could point to no further action it took to protect its interest. (2JA_312-13 at 24:19-25:25.) Additionally, the Bank's reliance on *Stone Hollow* is unwarranted because that unpublished decision[32] is noncontrolling and easily distinguished from the present matter; here, the amount to pay off the lien was in dispute and the issue of conditional payment has also been raised.[33] Lastly, even assuming valid tender were made, which there wasn't, SFR's status as a bona fide purchaser renders it an inappropriate party from whom to seek relief. This Court should affirm that the Association was within its rights to reject an offer of payment that included unreasonable demands to

[32] *See Stone Hollow Avenue Trust v. Bank of America, N.A.*, Case No. 64955, 382 P.911 (Table) (Nev. August 11, 2016) (unpublished order).

[33] On June 15, 2012, Alessi sent a letter with a ledger to the Bank's representative, Miles, Bauer, Bergstrom & Winters, LLP ("Miles Bauer"), stating the amount was $2,930.00. 4JA_790. In reply, Miles Bauer sent a check for $720.00 with conditions that were "non-negotiable."

which the Bank had no right to insist.

The District Court properly rejected the Bank's constitutional challenges. As noted in the findings, the Bank was clearly on notice of the pending action, having sent at least two letters to Alessi. (4JA_790-91, ¶¶ 9, 11.) Thus, having received actual notice, the Bank lacks proper standing to challenge the statute and the constitutional issue may be avoided. Should this Court deem it appropriate to re-visit the matter, SFR requests that this Court take the opportunity to outright reject the *Bourne Valley* decision, which improperly ignored the prior ruling of this Court and does not constitute binding authority upon it. Instead, this Court should maintain the statutory construction from its prior *SFR* decision, wherein it unanimously determined that the provisions of NRS 107.090 are incorporated into the NRS 116 association foreclosure scheme and mandate notice of association foreclosure sales be sent to junior lienholders like the Bank. *SFR*, 334 P.3d at 411, 418, and 422. Further, the Association was neither a state actor, nor engaged in state action, and thus due process is not even implicated in this case. This Court has already construed a constitutional reading of the statutes regarding noticing provisions and should affirm it prior ruling.

Lastly, the Bank brings to this Court a series of legal assertions masquerading as issues of material fact, but brings no evidence, no new arguments, and no valid reason to overturn the properly conducted association foreclosure sale. The Bank

misstates the effect of the recitals in the Foreclosure Deed and their effect on presumptions and burdens of proof. As cited above, independent evidence confirms the Bank received adequate notice and no evidence is proffered to refute these facts.

As for commercial reasonability, price alone cannot establish that a sale was unreasonable and the Bank fails even to allege anything more. The Bank implies the home's price at auction somehow impugns a general obligation of good faith by the Association, but fails to show how or explain what relevant fact the District Court overlooked. There is no reason to believe any new fact will support a finding to fraud, oppression or unfairness.

Finally, as to the question of SFR's status as a bona fide purchaser, the District Court ruled properly in rejecting the notion that the FDOT somehow constituted a formal challenge to the validity of the foreclosure sale or that SFR had a duty to inquire about any possible private correspondence between Alessi and the Bank. These are not factual disputes disregarded by the District Court, but faulty legal arguments. The FDOT is a junior interest, not a competing claim. As there is no reasonable prospect of any new facts to be presented as might affect the legal conclusions, this Court should affirm.

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## ARGUMENT

### I. THE BANK'S UNRECORDED, NON-NEGOTIABLE PAYMENT DOES NOT CONSTITUTE VALID TENDER.

#### A. Conditional Offers to Pay are not Tender.

Nevada has not defined the term "tender," but other states within the Ninth Circuit have determined that "tender" means the actual unconditional production of money. *See*, *e.g.*, *Bembridge v. Miller,* 385 P.2d 172, 175 (Or. 1963) (tender requires the unconditional offer to pay the full amount of the debt and actual presentment of money); *Equitable Life Assur. Soc. of United States v. Boothe*, 86 P.2d 960, 962 (Or. 1939) (tender means "an unconditional offer of payment, consisting in the actual production, in current coin of realm, of a sum not less than the amount due."). Courts have elaborated that a tender must be "an offer of payment with no conditions *or only with conditions upon which the tendering party has a right to insist*." *Fresk v. Kraemer*, 377 Or. 513, 522, 99 P.3d 282, 287 (2004) (emphasis added).

Here the Bank conditioned its proposed payment through a letter from Bank representative Miles Bauer as follows:

> This is a non-negotiable amount and any endorsement of said cashier's check on your part, whether express or implied, will be strictly construed as an unconditional acceptance on your part of the facts stated herein and express agreement that BANA's financial obligations toward the HOA in regards to the real property located at 3617 Diamond Spur Avenue have now been "paid in full."

(2JA_412.) The check also included language that could be construed to mean

it was meant to pay the entirety of the Association's lien: "To Cure HOA Deficiency." (1JA_101.)

The district court properly found that the offer to pay "was conditional, requiring the Association to waive its rights as to a currently undecided matter – namely, what amounts are included in a super-priority lien pursuant to NRS 116 – this payment attempt did not constitute a sufficient tender to protect BANA's interest in the Property." (4JA_794.) Further, the restrictive language accompanying the payment attempt stated that acceptance of the check would mean that the Association accepts all of the facts and arguments posited by the Bank in its letter, and the Bank never again would have to pay the Association further sums after said check. (2JA_411-12.) In other words, if, like the bank in *Shadow Wood*, the Bank were to foreclose and take title to the Property, it could argue it was relieved of any obligation to pay assessments despite being the unit owner. *See Shadow Wood Homeowners Assoc., Inc., v. New York Comm. Bancorp, Inc.*, 132 Nev. ___, ___, 366 P.3d 1105, 1113 (2016) (stating the lender's conditional offer failed to consider its obligation to pay ongoing assessment).

Lastly, the District Court herein fully considered the conditional nature of the payment, making the Bank's reliance of *Stone Hollow* flawed in regards to this issue.

*Stone Hollow*, 382 P.3d at n.1.[34] The District Court properly concluded the alleged payment attempt did not constitute actual tender.

Furthermore, tender by a junior lien interest holder is only effective in redeeming that holder's interest when it is both "unconditional" and, if rejected, the tender is "kept good." Restatement (Third) of Property: Mortgages § 6.4, cmt. g (the "Restatement"). In keeping an unconditional tender "good," the Restatement contemplates that, after rejection by a senior interest holder, the junior interest holder deposits the funds into an escrow account and advises senior interest holder that the funds are being held for payment. *Id.* Alternatively, "segregation of the funds is not

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[34] *Stone Hollow*'s footnote states: "Appellant argues in its answer to the rehearing petition that Heritage Estates was justified in rejecting the tender because respondent made the tender conditional. We decline to consider this argument because it was not raised either in district court or on appeal."

Additionally, any reliance by the Bank on this unpublished order to suggest that its offer of payment ends the discussion is misplaced. As the rule clearly states, "[a] party may cite for its persuasive value, if any, an unpublished disposition issued by this court on or after January 1, 2016." NRAP 36(c)(3). However, the order is not binding precedent. For example, while the *Stone Hollow* order relied on by the Bank appears to disavow the need to do a *Shadow Wood* balancing test when the Bank has sent a check for nine months of assessments, a more recent unpublished order suggests the opposite. *See Nationstar Mortgage, LLC v. Messina*, Case No. 68603 (Nev. Dec. 2, 2016) (unpublished order) ("Factors to consider [in an equitable quiet title action] include whether tender was given, price at foreclosure sale and whether there was fraud, unfairness, or oppression."). Thus, these issues surrounding "tender" or other alleged offers of payment remain open without binding case law on the issue. However, in this case, as seen in the order and addressed in text, the district court did consider the issues and rejected the Bank's arguments.

essential if [junior interest holder] can show that he or she continues to be ready, willing and able to pay." *Id.* Here, the Bank did nothing after its check was rejected. The Bank provided no evidence that it communicated to the Association that its offer to pay was kept open.

### B. Changes in Lien Priority Must be Recorded Under NRS Chapter 111.

Even if the Bank's attempted payment could be construed as "tender," it would not be effective to allow the deed of trust to remain on the Property, as it was not recorded. Under Nevada law, every interest in property must be recorded as set forth NRS 111.315, which reads:

> **NRS 111.315 Recording of conveyances and instruments: Notice to third persons.** Every conveyance of real property, and every instrument of writing setting forth an agreement to convey any real property, or whereby any real property may be affected, proved, acknowledged and certified in the manner prescribed in this chapter, to operate as notice to third persons, shall be recorded in the office of the recorder of the county in which the real property is situated or to the extent permitted by NRS 105.010 to 105.080, inclusive, in the Office of the Secretary of State, but shall be valid and binding between the parties thereto without such record.

If a "conveyance" is not recorded, it will have no effect on a subsequent purchaser. This is confirmed by NRS 111.325 which reads:

> **NRS 111.325 Unrecorded conveyances void as against a subsequent bona fide purchaser for value when conveyance recorded.**
>
> Every conveyance of real property within this State hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser, in good faith and for valuable consideration, of the same real property, or any portion thereof, where his or her own conveyance shall be first duly.

(Emphasis added).

As such, any "tender" by the Bank is a "conveyance" under Nevada law as can be seen from NRS 111.010(1) defining conveyance:

> **NRS 111.010 Definitions.** As used in this chapter:
> 1. "Conveyance" shall be construed to embrace **every instrument in writing**, except a last will and testament, **whatever may be its form**, and by whatever name it may be known in law, by which any estate or interest in lands is **created, alienated, assigned or surrendered**. (emphasis added)

As noted by the District Court, the Bank should have made some effort to put potential purchasers on notice that it contested the Association's superpriority lien and authority to sell. (4JA_804.) The Bank claims its only obligation under the *SFR* decision was "to seek to pay the superpriority amount of the lien before the foreclosure sale." (AOB at 15.) Nothing in *SFR* or any of the other cases cited by the Bank suggests an exception to recording requirements and their effects upon a *subsequent purchaser*, such as SFR. Put very simply, without the Bank recording something, SFR was entitled to rely on the recorded documents and presume the Bank's FDOT would be extinguished in the sale.

As stated above, the definition of "conveyance" is broad and includes extinguishment or discharge of the lien. NRS 111.010.

The purported satisfaction of the superpriority portion of the association's lien is a surrender or release of the Association's senior position. Black's Law Dictionary defines "surrender" and "release" as:

> **Surrender, n. (15c) 1.** The act of yielding to another's power or control. 2. The giving up of a right or claim.
>
> **Release, n. (14c)** Liberation from an obligation, duty, or demand; the act of giving up a right or claim to the person against whom it could have been enforced. 2. The relinquishment or concession of a right, title or claim. 3. A written discharge, acquaintance, or receipt; specifically a writing - either under seal or supported by sufficient consideration. 4. A written authorization or permission for publication. 5. The act of conveying an estate or right to another, or of legally disposing of it. 6. A deed or document effecting a conveyance. 7. The action of freeing of the fact of being freed from restraint or confinement. 8. A document giving formal discharge from custody.
>
> **Release of mortgage.** A written document that discharges a mortgage upon full payment by the borrower and **that is publicly recorded** to show that the borrower has full equity in the property.

Black's Law Dictionary 971 (6th ed. 1990) (emphasis added).

Because the satisfaction of a lien is a form of conveyance, "surrender" or discharge, NRS 111.315 requires that the Bank's satisfaction be recorded to be effective as to SFR.

### C. Changes in Lien Priority Must be Recorded Under NRS 106.220.

Further, because any purported tender would change the priority of the Association's lien versus the deed of trust, it is required to be recorded as well.

> **NRS 106.220 Filing and recording of instruments subordinating or waiving priority of mortgages or deeds of trust; constructive notice; effect of unrecorded instruments.**
>
> 1. **Any instrument by which any mortgage or deed of trust of, lien upon or interest in real property is subordinated or waived as to priority, must**, ..., **be recorded in the office of the recorder of the county in which the property is located**, and from the time any of the same are so filed for record operates as constructive notice of the contents there of to all persons. The instrument is not enforceable under this chapter or chapter 107 of NRS unless and until it is recorded.

(Emphasis added).

Thus, to the extent the Bank alleges that any payment cured the Association's superpriority portion of the lien, this would be an interest in property required by law to be recorded in accordance with NRS 106.220 if it is to survive a properly recorded subsequent purchaser's interest.

The appropriate action for the Bank was to record a Notice of Partial (or full) Payment against Lien on the Property, indicating satisfaction of the notices recorded by the Association. Here, the Bank did nothing. Therefore, the Bank's alleged interest is void against the Foreclosure Deed and the purchaser as a matter of law. The Bank argues that SFR had "inquiry notice" but doesn't state how a purchaser would be prompted to inquire, or what inquiry would have ensured that SFR knew of the lien's satisfaction, given that nothing was recorded.

As shown above, whether regarded as an assignment, subrogation or subordination, the instrument must be recorded with the County Recorder's Office to be effective as to subsequent purchasers, such as SFR. The Bank has not shown any evidence of having recorded any interest relating to its alleged payment. As such, the Bank's claim that it paid the superpriority portion of the Association's lien is void against SFR by virtue of the recording statutes. As a result, any alleged "tender" by the Bank would be ineffective against SFR and the resulting foreclosure sale, even if it were valid tender, which it isn't.

…

### D. The Association Rejected the Offer in Good Faith.

In claiming the Association acted in bad faith by rejecting payment, the only argument the Bank can muster is to suggest that the Association would have received the same amount for the lien either by rejecting it and proceeding with foreclosure or accepting it and foregoing foreclosure. This is false.

As discussed above, the Bank's payment came with unjustified conditions that extended beyond the superpriority amount, potentially affecting the entire lien and the Association's ability to collect it. However, assuming *arguendo*, the amount was appropriate, even "an actual tender of the proper amount due and owing will not operate to discharge a lien where the lienholder in good faith believes that a greater sum is due." *See Segars v. Classen Garage & Service Co*., 612 P.2d 293, 295 (Okla. Ct. App. 1980). Whether or not a lender had to pay nine months' assessments plus collections costs to protect its deed of trust was still open to dispute at the relevant time. *Shadow Wood*, 366 P.3d at 1113. This open question along with the "non-negotiable" nature of the payment offer gave the Association a good faith reason for rejection.

### E. If A Rejection of Tender is Unjustified, Then the Proper Remedy is for Money Damages Against the Party Who Caused the Damages.

It is important to clarify that lenders were in a position to prevent any purchaser from being a bona fide purchaser ("BFP"). A BFP is one who "takes the

property 'for a valuable consideration and *without notice* of the prior equity. . .'" *Shadow Wood*, 366 P.3d at 1114 (emphasis added). Thus, all a lender has to do defeat BFP status is to put purchasers on notice of their claim to the property. This Court has suggested actions that a lender could take, such as "seeking a temporary restraining order and preliminary injunction and filing a lis pendens on the property." *Id.* This list is not exhaustive – lenders also could have attended the sales and announced their tenders. Here, no such action was taken.

Yet, despite a lender's inaction in not putting a purchaser on notice, a lender is not without a remedy, even when tender is rightfully made but wrongfully rejected. **To the extent that an association wrongfully rejects tender, a lender's remedy is against the parties who harmed it, in lieu of displacing an innocent third-party purchaser.** To that extent, this Court was correct in identifying when an association would be liable to a lender. "[When] rejection of a tender is unjustified, the tender is effective to discharge the lien[,]" *Stone Hollow*.

A lender's right to recover from a wrongful foreclosure is consistent with this Court precedent in *Swartz* when it held:

> …the ideal remedy would be to return that property to the former owner pending constitutionally sufficient proceedings. Unfortunately, this may no longer be done without injury to innocent third parties who are bona fide purchasers of the property. However, (the homeowner) has also sought compensatory relief in her complaint. We therefore reverse and remand the case to the court below for appropriate proceedings consistent with this opinion.

*Swartz v. Adams*, 93 Nev. 240, 245–46, 563 P.2d 74, 77 (1977). Further, *Swartz* dealt with a party without notice, meaning that the former owner was not even afforded the opportunity to put potential buyers on notice of the defects in the sale. *Id.*

This is also consistent with the Restatement's commentary regarding non-judicial foreclosure jurisdictions where price alone is not enough to set aside a sale: the wrongly injured junior lienholder must seek a remedy from someone other than the purchaser. *See* Restatement (Third) Property: Mortgages, §8.3, Comment *b*.

Other courts have consistently found that a BFP is protected even when there is a wrongful rejection of tender. *See Moeller v. Lien*, 25 Cal.App.4th 822, 831-32 (Cal.Ct.App. 1994) (precluding an attack by the trustor on the trustee's sale to a BFP even where the trustee wrongfully rejected a proper tender by the trustor).

Given that lenders simply had a collateral interest in the property, a remedy for monetary damages is a perfect substitute. *Munger v. Moore,* 11 Cal. App. 3d 1, 7, 89 Cal. Rptr. 323 (Ct. App. 1970) ("a trustee or mortgagee may be liable to the trustor or mortgagor for damages sustained where there has been an illegal, fraudulent or willfully oppressive sale of property under a power of sale contained in a mortgage or deed of trust") (citations omitted).

Protecting BFPs by making a lender's remedy against a trustee who wrongfully rejected tender is sound policy. In a foreclosure proceeding with a wrongfully rejected tender, the only party with truly clean hands is the BFP. Every other party – i.e., the lender and the foreclosure agent – was directly involved in the rejection of the tender. It was the lender who made the alleged tender and chose not to inform potential buyers of that tender. In fact, the lender knew that a sale was going forward by the mere fact that the so-called tender was rejected. At the very least, a lender could have sent someone to the sale or recorded a notice to put purchasers on notice. If a tender was wrongfully rejected, some of the blame rests with the Association as it was its duty to accept and announce proper tender. The BFP could have done nothing to prevent the situation.

Allowing lenders to seek monetary damages against an association inherently keeps the liability on the parties who wrongfully reject tender and who are responsible. In contrast, taking the BFP's ownership interest in the property away due to actions not known by the BFP only punishes the BFP. In such a circumstance, the association that wrongfully rejects tender escapes without punishment. Protecting the BFP in this regard and holding the trustee accountable also affords an adequate remedy to the complaining party.

Here, as in *Swartz*, the proper remedy is for compensatory damages from the Trustee or Association and not the overturning of a foreclosure sale. Any other result

would cause prejudice to an innocent third party. If this Court wants to protect the foreclosure process through its statutory schemes and create accountability on the proper parties, it can easily do so by requiring any harmed party to seek compensatory damages. This in turn protects the BFPs.

## II. NRS 116 NOTICING PROVISIONS ARE CONSTITUTIONAL.

The Bank received actual notice of the pending foreclosure action, as evidenced by its correspondence with the Trustee. (2JA_401-02.) Further, the Trustee offered evidence of mailing all notices required under NRS 116, thus ensuring that the Bank and other parties had adequate notice and an opportunity to cure the lien. (2JA_323-30.) The statutory notice requirements worked exactly as they should and did not injure anyone's due process rights, to the extent that such rights even apply. In finding all of the notices requirements were met and that the Bank had actual notice, the District Court could only conclude the Bank's constitutional challenge failed. (4JA_791-93.) As such, the ruling should not be disturbed.

### A. The Bank Cannot Raise a Facial or As-Applied Challenge Because it Received Actual Notice.

The Bank had actual notice of the sale, as evidenced by its pre-foreclosure correspondence with the Association's Trustee. (2JA_401-02.) Thus, the Bank suffered no prejudice to its rights as a result of the NRS 116 noticing provisions and

therefore lacks standing to assert a facial constitutional challenge. *Wiren v. Eide*, 542 F.2d 757, 762 (9th Cir. 1976) ("[R]eceipt of actual notice deprives [appellant] of standing to raise the claim" that the statutory notice scheme violated due process.); *Green Tree Servicing, LLC v. Random Antics, LLC*, 869 N.E.2d 464, 470-71 (Ind. Ct. App. 2007) (holding a claimant who receives actual notice cannot claim that the noticing provisions of the statute are unconstitutional). Any irregularity in notices does not violate due process where one has actual notice of the action to be taken. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 272 (2010) (debtor's failure to serve a summons and complaint does not violate due process where creditor received "actual notice of the filing and contents of [debtor's Chapter 13] plan."); *see also In re Medaglia*, 52 F.3d 451, 455-56 (2d Cir. 1995) ("[D]ue process is not offended by requiring a person with actual, timely knowledge of an event that may affect a right to exercise due diligence and take necessary steps to preserve that right.") (cited with favor in *SFR*, 334 P.3d at 418).

Additionally, the Bank claims that the failure of NRS 116 is that it did not require actual notice to lenders. The Bank further argues that *Mennonite* and *Mullane* decisions to support its position that any party must receive actual notice to satisfy due process. While the Bank had actual notice, this misstates U.S. Supreme Court precedent. Due process, if it were required here, does not require actual notice: "our cases have never required actual notice." *Dusenbery v. United States*, 534 U.S. 161,

171 (2002). Due process requires only that the notice be "reasonably calculated . . . to apprise interested parties of the pendency of the action[.]" *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). If a notice identifies an event that will impact an individual's property interest, then due process is satisfied. *Espinosa*, 559 U.S. at 272 (bankruptcy plan's filing and contents); *Jones v. Flowers*, 547 U.S. 220, 239 (2006) (tax sale); *Dusenbery*, 534 U.S. at 168 (cash forfeiture); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1983) (tax sale).

Here, the notice the Bank received satisfied due process because it was "reasonably calculated . . . to apprise [the Bank] of" the pendency of the Association's foreclosure, as evidenced by the Bank's correspondence with the Association. The statutes worked just as recognized by the Nevada Supreme Court in the *SFR* decision, where both the majority and dissent recognized that notices of default and sale were required to be sent to junior lienholders like the Bank. *SFR*, 334 P.3d at 411, 417, 418, 422 (noting the incorporation of NRS 107.090(3)(b) and (4) through NRS 116.31168). The Bank's (in)action caused its loss, not the statute, the Association, and certainly not SFR. This Court should reaffirm its interpretation of the statues and affirm.

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## B. Regarding *Bourne Valley Court Trust v. Wells Fargo Bank*

### *1. Bourne Valley is not Binding Upon This Court.*

SFR is mindful of the recent Ninth Circuit opinion in *Bourne Valley Court Trust v. Wells Fargo Bank*, 832 F.3d 1154 (9th Cir. 2016).[35] However, *Bourne Valley* is not binding on this Court. With respect to federal law, the federal circuit courts of appeals and state supreme courts are subject to the decisions and jurisdiction of the Supreme Court of the United States. *Iowa Nat. Bank v. Stewart,* 232 N.W. 445, 454 (Iowa 1930). The U.S. Supreme Court has final appellate jurisdiction over federal questions. *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075 (7th Cir. 1970) (decisions of Supreme Court on national law have a binding effect on all lower courts, whether state or federal). "Until the Supreme Court of the United States has spoken, state courts are not precluded from exercising their own judgment upon questions of federal law." *Stewart,* 232 N.W. at 454 (holding finality regarding federal law rests with the United States Supreme Court).

"The decisions of the federal district courts and panels of the federal circuit court of appeals are not binding upon [the Court]." *Blanton v. N. Las Vegas Mun. Court*, 103 Nev. 623, 633, 748 P.2d 494, 500 (1987). Certainly, a federal court's

[35] On November 4, 2016, the Ninth Circuit issued its order denying Bourne Valley Court Trust's petition for rehearing and en banc reconsideration. (Case No. 15-15233 at DE 69.) SFR is informed and believes that Bourne Valley will be filing a timely Petition for Writ of Certiorari.

construction of a Nevada statute is not binding on this Court. Lower federal courts, including the circuit courts of appeal, "exercise no appellate jurisdiction over state tribunals, [and] decisions of lower federal courts are not conclusive on state courts." *Lawrence,* 432 F.2d at 1076. "In passing on federal constitutional questions, the state courts and the lower federal courts have the same responsibility and occupy the same position; there is a parallelism but not paramountcy for both sets of courts are governed by the same reviewing authority of the [United States] Supreme Court." *State v. Coleman,* 214 A.2d 393, 402-403 (N.J. 1965); *Stewart,* 232 N.W. at 454.

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

Here, the Bank argues the only notice provisions are "opt in" and thus inadequate to protect the rights of lenders. (AOB at 17.) As described in the previous section, this does not jibe with what happened, or describe the law as construed by this Court, as described below. The Association mailed notices to the Bank in compliance with the noticing scheme consistent with the provisions of NRS 116 and NRS 107.090, thereby fulfilling the minimum requirements of due process. The statutes fulfilled their purpose by informing the Bank of the pending action affecting its interest. Lack of notice did not cause the Bank's subsequent loss of interest in the

Property, but rather its inaction. This Court need not follow *Bourne Valley*, particularly where it is clear that the ruling does not conform to the facts of this matter.

### 2. ***This Court has the Ultimate Right and Duty to Interpret Nevada Law, including NRS 116.31163-116.31168 and the Incorporation of NRS 107.090.***

It is the Nevada Supreme Court that leads in the interpretation of Nevada law above all other Courts. If a state law is challenged as being facially unconstitutional "a federal court must, of course, consider any limiting construction that a state court . . . has proffered." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982). After all, "it is solely within the province of the state courts to authoritatively construe state legislation." *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1146 (9th Cir. 2001). These principles are so important that the U.S. Supreme Court has reminded lower courts that "it is not our function to construe a state statute contrary to the construction given it by the highest court of a State." *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974). *Bourne Valley* ignored these principles and ignored this Court interpretation of NRS 116.3116's noticing scheme.

This Court must declare its interpretation of Nevada law on the subject of the NRS 116 noticing provisions. *Bourne Valley* completely ignored the statutory construction of this Court, opining that it would "render the express notice provisions of Chapter 116 entirely superfluous." *Bourne Valley*, 832 F.3d at 1159.

In doing so, the *Bourne Valley* majority interpreted Nevada law in a manner that is contrary "to the construction given it by" Nevada's Supreme Court. *O'Brien*, 414 U.S. at 531. This is impermissible because "it is not [*Bourne Valley*'s] function to construe a state statute contrary to the construction given it by the highest court of a State." *Id.* It is also debatable that the express notice provisions would indeed be superfluous.

### *3. NRS 116.31168 and NRS 107.090 Mandate Notice to Junior Lienholders of Record.*

In 2014, the Nevada Supreme Court interpreted NRS 116.3116-116.31168 in a way that provided *Bourne Valley* with a "limiting construction." In *SFR*, all seven Nevada justices construed these statutes as **requiring notice to junior lienholders like the Bank**. *Id.* at 411, 418, 422 (emphasis added). Such a construction was, in part, based on NRS 116.31168(1), which stated:

> The provisions of NRS 107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed. The request must identify the lien by stating the names of the unit's owner and the common-interest community.[36]

NRS 116.31168(1).

[36] The Bank makes much ado about this second sentence, which if read in context with NRS 107.090(2), is meant to replace the second sentence there, which is grammatically similar but requires the request for notice to include particulars of a deed of trust, which are not relevant to an association sale.

The majority again referenced NRS 107.090(3)(b) and (4), noting these sections require the "notice of default and notice of sale [be sent to] 'each other person with an interest whose interest or claimed interest is subordinate to the deed of trust.'" *Id.* Based on this interpretation, the *dissent* noted, "[a]s the majority points out, by incorporating certain notice provisions from Chapter 107, Chapter 116 appears to mandate that the association mail the notice of default and notice of sale to the first security holders who have recorded their interest when the association is foreclosing on its lien." *SFR*, 334 P.3d at 422 (Gibbons, C.J., dissenting). All seven justices determined that incorporation of NRS 107.090 required notice to junior lienholders, like the Bank.

The *Bourne Valley* majority found this Court's construction "meaningless." It improperly rejected this Court's construction, opining that incorporation of NRS 107.090 would "render the express notice provisions of Chapter 116 entirely superfluous." *Bourne Valley*, 832 F.3d at 1159. In doing so, the *Bourne Valley* majority interpreted Nevada law in a way that is contrary "to the construction given it by" Nevada's Supreme Court. *O'Brien*, 414 U.S. at 531. This is impermissible because "it is not [the *Bourne Valley* Court's] function to construe a state statute contrary to the construction given it by the highest court of a State." *Id.*

Thus, the Bank's argument against the provision of mandatory notice to junior lienholders by incorporation of NRS 107.090 has already been decided and lost.

(AOB at 27-28.) Similarly, the term "request" as described above does not affect these provisions in the manner described by the Bank. Notice is mandatory.

### 4. ***The Bank and* Bourne Valley *Majority Misunderstand the Interplay of the Noticing Statutes.***

The majority in *Bourne Valley*, as well as the Bank, misunderstand the interplay between NRS 107.090, NRS 116.31163, and NRS 116.311635. On the one hand, NRS 107.090(3) and NRS 107.090(4) focus on junior lienholders; these provisions require notice to **junior** lienholders. On the other hand, NRS 116.31163 and NRS 116.311635 require notice to all holders of a recorded interest at the time the CC&Rs were recorded ("has notified"),[37] to any other interested party who has formally requested notice and allows any holder of a recorded security interest, whether the beneficiary of record or not, to otherwise notify the association so as to receive notice. This broader focus expands the number of entities who receive notice and does not require reading that the NRS 116 provisions "have no meaning whatsoever" as BANA would suggest. (AOB at 29.)

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[37] Pursuant to Nevada's recording statutes, a person is on notice of all documents recorded that are prior to her interest – for example, anything recorded before the CC&Rs, but not of those documents recorded after her interest. NRS 111.320 ("Every such conveyance or instrument of writing, acknowledged or proved and certified, and recorded in the manner prescribed in this chapter or in NRS 105.010 to 105.080, inclusive, must from the time of filing the same with the Secretary of State or recorder for record, impart notice to all persons of the contents thereof; and subsequent purchasers and mortgagees shall be deemed to purchase and take with notice.").

For instance, due process, to the extent it applies, would not necessarily require notice to a senior lienholder whose interest was unaffected, like the real estate taxing authority. Under NRS 116.3116(2)(c), "liens for real estate taxes" are senior to an association lien. Yet, under NRS 116.31163 and NRS 116.311635, the real estate taxing authority can request notice, even if it has not recorded a lien against the property at that time, and would receive notice if it had mailed a notice of lien to the association. Under NRS 116.31163(1) and 116.311635(b)(1), a person may formally request notice even if it does not have a lien interest in the property, such as a loan servicer who want to stay on top of developments as to its collateral. Under NRS 116.31163(2) and 116.311635(b)(2) those persons who are holders of a recorded security interest but not necessarily the beneficiary of record—and who may not be otherwise known to the association— can notify the association of their interest and receive notice. An excellent example is where Mortgage Electronic Registration Systems, Inc. ("MERS") is named as the beneficiary of record. The MERS system allows a deed of trust to be transferred any number of times without changing the beneficiary or record, or the servicer of the loan may want notice as the holder but not the recorded holder. Both NRS 116.31163 and 116.311635 allow these "shadow owners" or other interested parties to be sent notice—where they might not otherwise be known to an association—**in addition to** all junior lienholders who have properly recorded their interests. Neither the Bank's nor

*Bourne Valley*'s interpretation of NRS 107.090, 116.31163, and 116.311635 contemplated such construction, which is consistent with this Court's analysis.

Simply put, the Nevada Supreme Court needs to set the record straight for all Courts on this Court's interpretation and inclusion of NRS 107.090 into NRS 116.31162 to 116.31168.

***5. The 2015 Legislative Amendments Provided Clarity to Existing law.***

That the Legislature amended the provisions in 2015 does not change this meaning. The amendments regarding who was to be sent notice were legislative pronouncements of what the existing law was, enacted to remove any doubt regarding the interpretation of that law. *PEBP v. LVMPD*, 124 Nev. 138, 157, 179 P.3d 542, 554-555 (2008). Here, the pre-2015 statutes expressly incorporated NRS 107.090. The 2015 amendments merely created redundancy of already existing law. And, to be clear, any doubt as to notice was created by the lenders. As was the case here, the associations sent the notices to recorded holders of deeds of trust.

**C. Associations do not Meet the State Actor Test.**

The Bank failed to do a state actor analysis, looking only to state action, and offered no argument in its opening brief regarding state actor at all. The Bank ignored all case law regarding state actor and thereby waived any right to such argument or to claim due process.

In order for due process to be implicated, there must be a state actor.

*Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). The burden of proving a state actor is on the party claiming a deprivation of a constitutionally protected interest. *Flagg Bros., Inc. v. Lefkowitz*, 436 U.S. 149, 156 (1978). Such a burden is steep, hinging on a "necessarily fact-bound inquiry[.]" *Brentwood*, 531 U.S. at 298.

A state action is a two-part analysis, it requires *both* (1) an alleged constitutional deprivation "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," ***and*** (2) that "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 937 (1982); *see Am. Mfr. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999). If a state actor is not involved, then due process ─ including concerns about "notice" ─ is inapplicable. *Brentwood*, 531 US at 295; *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) ("If the action of the respondent school is not state action, our inquiry ends."). As one federal district court noted, "the power to impose fines or enforce liens are not traditional and exclusive governmental functions." *Snowdon v. Preferred RV Resort Owners Ass'n,* 2:08-cv-01094-RCJ-PAL (D. Nev. Apr. 1, 2009), at 14:14-15 ("[Association] did not perform the traditional and exclusive public function of municipal governance." (internal citation omitted)). Exclusivity is the test's *sine qua non*. *Rendell-Baker*, 457 U.S. at 842.

Furthermore, the U.S. Supreme Court has never held that the enactment of a remedy transforms a private entity into a state actor. *Sullivan*, 526 U.S. 40, 53 (1999). ("We have never held that the mere availability of a remedy for wrongful conduct, even when the private use of that remedy serves important public interests, so significantly encourages the private activity as to make the State responsible for it."). Indeed, the United State Supreme Court held in *Flagg Bros*. that New York's enactment of UCC 7-210 did not significantly encourage a warehouse owner's decision to send a letter threatening to sell belongings. *Flagg Bros*., 436 U.S. at 165. Instead, the Court recognized that a State's mere acquiescence in private conduct does not constitute state action and enacting a statute to permit such action does not constitute "encouragement" or compulsion. *Id.* The Ninth Circuit reached a similar holding in *Charmicor v. Deaner* and *Apao v. Bank of N.Y.*, where the court held that without overt official involvement by the state itself, a private party, exercising a private remedy does not result in state action. 572 F.2d 694, 696 (9th Cir. 1978); 324 F.3d 1091, 1095 (9th Cir. 2003). As those cases noted, the source of the right, whether through contract or statute, was not relevant to the due process analysis. *Id.* As noted in the *Bourne Valley* dissent, the majority ignored these prior cases. 832 F.3d at 1162-163 (Wallace, J. dissenting).

Here, the Bank offered no evidence that Association is a state actor. Perhaps the Bank is relying on the actual enactment of the statute to define state action but

does not state so expressly. In making this argument, the Bank completely ignores *Lugar, Flagg Bros., Charmicor* and *Apao.* If the Bank had considered these case, it would have seen that if an analysis were to be done, pursuant to the public function test, a private entity can only be treated as a state actor if the entity performed a function that has been traditionally the **exclusive** function of the state. *Flagg Bros.*, 436 U.S. at 158 ("While many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'") (emphasis added). As the dissent in *Bourne Valley* properly notes, the timing is off for the enactment to have deprived the Bank of any property right, as the statute was enacted long before the Bank received the First Deed of Trust. 832 F.3d at 1160 (Wallace, J. dissenting). Indeed, as discussed above, this is consistent with this Court's conclusion that lenders were "on notice that by operation of the statute [enacted in 1991], the [earlier recorded] CC&R's might entitle the HOA to a super priority lien at some future date which would take priority over a [later recorded] first deed of trust." *SFR*, 334 P.3d at 418 (*quoting* with approval *7912 Limbwood Court Trust v. Wells Fargo Bank, N.A.*, 979 F. Supp. 2d 1142, 1152 (D. Nev. 2013)).

This is also why the Bank's reliance on *Island Financial* and *Reeder* fails. *Island Financial* struck down "opt-in" notice provisions that did not require notice to property owners whose interests were easily identifiable. *Island Fin., Inc. v. Ballman*, 92 Md. App. 125, 136, 607 A.2d 76, 82 (1992). Not only is this contrary

to NRS 116.31168 *and* NRS 107.090 which requires notice to identifiable property interest holders, but it case involved overt government action, requiring that a foreclosure sale be ratified by the court, making the court "the vendor." *Island Fin., Inc.*, 92 Md. App. at 1136, 607 A.2d at 78, 82. Thus, it is distinguishable from an NRS 116 sale.

Similarly, *Reeder* involved a very different noticing scheme. *Reeder* struck down an "opt-in" notice provision because it did not require notice to property owners who were easily identifiable. *Reeder & Associates v. Locker*, 542 N.E.2d 1371, 1371 (Ind. Ct. App. 1989). This is contrary to NRS 116.31168 *and* NRS 107.090 which requires notice to identifiable property interest holders. Furthermore, the request notice portion of the statutes are for situations where, as here, MERS is involved in transferring interests without recording same.

Put simply, nothing compels an association (a private party) to foreclose (a private remedy). That decision by an association is purely private. *See* NRS 116.3102(3) (granting the executive board the authority to determine whether to take enforcement action to collect unpaid assessments). The second prong of *Lugar* fails here and due process is not implicated.

### D. The Bank's Constitutional Challenge Fails on All Levels.

#### *1. The Bank Cannot Meet the Standard for Constitutional Challenge.*

Even if this Court gets to a due process challenge, the Bank cannot meet the

high standard of showing that NRS 116's noticing provisions are unconstitutional. Whether a statute is constitutional is a question of law. *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 508, 217 P.3d 546, 551 (Nev. 2009). "'Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional.'" *Id.* (quoting *Silvar v. Dist. Ct.*, 122 Nev. 289, 294, 129 P.3d 682, 684 (Nev. 2006)).

The Bank must show there is "no set of circumstances under which the statute would be valid." *Déjà vu Showgirls v. State, Dept. of Tax.*, 130 Nev. ___, ___, 334 P.3d 392, 398 (2014); *see Flamingo Paradise Gaming*, 217 P.3d at 552 (citing *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) (noting reaffirmance of the requirement that a statute be void in all its applications to be successful, when civil statutes are at issue)). Courts disfavor facial challenges because they rest on speculation, and "run contrary to the fundamental principle of judicial restraint that courts should neither "'anticipate a question of constitutional law in advance of the necessity of deciding it'" nor "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Washington State Grange*, 552 U.S. at 450-51 (quoting *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, (1936)).

"The most fundamental principle of constitutional adjudication" is the constitutional avoidance doctrine. *United States v. Lovett*, 328 U.S. 303, 320 (1946)

(Frankfurter, J., concurring); *Ashwander*, 297 U.S. at 341, 346-48 (Brandeis, J., concurring). Courts "will not decide the constitutionality of a statute based upon a supposed or hypothetical case which might arise thereunder." *Carlisle v. State*, 98 Nev. 128, 130, 642 P.2d 596, 598 (1982). Thus, courts must "avoid considering the constitutionality of a statute unless it is absolutely necessary to do so." *Sheriff v. Andrews*, 128 Nev. ___, ___, 286 P.3d 262, 263 (2012). Furthermore, "when 'a statute may be given conflicting interpretations, one rendering it constitutional and the other unconstitutional, the constitutional interpretation is favored.'" *State v. Kopp*, 118 Nev. 199, 203, 43 P.3d 340, 342 (2002) (*quoting Sheriff v. Wu*, 101 Nev. 687, 689–90, 708 P.2d 305, 306 (1985)).

***2.* SFR *Provided a Constitutional Reading of the Statutes.***

The Bank mischaracterizes the due process analysis the *SFR* opinion by stating this Court did not decide the facial due process challenge in this case. AOB at 31. They are wrong in limiting what that case decided. *SFR* demonstrated at least one circumstance in which the statute was valid, and therefore, its facial challenge cannot stand. *Washington State Grange*, 552 U.S. at 449. The inquiry should stop here.

Second, in *SFR* this Court did both a facial and as-applied analysis, rejecting both. As discussed above, both the majority and dissent recognized that notice must be sent to all junior lienholders, noting the incorporation of NRS 107.090(3)(b) and

(4) which, in the case of a bank foreclosure sale, requires notice of default and notice of sale to "[e]ach other person with an interest whose interest or claimed interest is subordinate to the deed of trust." *SFR*, 334 P.3d at 411, 418, 422. The facial analysis was required for this Court to state that "'requirements of law' include compliance with NRS 116.31162 through NRS 116.31168 and by incorporation, NRS 107.090 . . . we conclude that [the bank's] due process challenge to the lack of adequate notice fails. . . ." *SFR*, 334 P.3d at 418.

Third, the majority rejected the lender's due process arguments as "protean," and non-starters, noting that since Chapter 116 was adopted in 1991, the lender "was on notice that by operation of the statute, the [earlier recorded] CC&R's might entitle the HOA to a super priority lien at some future date which would take priority over a [later recorded] first deed of trust." *Id*. at 418 (quoting with approval *Limbwood* 979 F. Supp. 2d at 1152 (rejecting a due process challenge to a non-judicial foreclosure of a super priority lien)).[38] "To the extent U.S. Bank argues that a statutory scheme that gives an HOA a super priority lien that can be foreclosed nonjudicially thereby extinguishing an earlier filed deed of trust, offends due process, the argument is a nonstarter." *Id.* at 418. In fact, this Court considered and

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

rejected additional facial challenges made by amici in support of U.S. Bank's Motion for Reconsideration. *See SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, No. 63078, Order Denying Rehearing, at 2 n.1 (Nev. Oct. 16, 2014).[39] The Bank's appeal on these grounds has already been decided by this Court.

Additionally, the Bank's reading of the statutes requires this Court to ignore the constitutional avoidance doctrine and limit the meaning of the plain words. While the Bank claims that the statutes require notice only to the unit owner and those other persons who request it, the Bank is wrong. As discussed fully above, junior lienholders of record or otherwise known to the association are mandated to receive notice via NRS 116.31168(1) and NRS 107.090(3)(b) and (4). The statutes allow others with either superior liens or unrecorded interests to also be sent notices upon request. The Bank's construction should be rejected.

Even assuming *arguendo* the Bank provides a reasonable alternate reading of NRS 116.31168, which it does not, then its interpretation must be rejected in favor of *SFR*'s constitutional interpretation. *State v. Castaneda*, 126 Nev. 478, 481, 245 P.3d 550, 552 (2010) ("'every reasonable construction must be resorted to, in order

[39] *Available at* http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=31261, document number 14-34519.

to save a statute from unconstitutionality.'") (*quoting Hooper v. California*, 155 U.S. 648, 657, 15 S.Ct. 207, 39 L.Ed. 297 (1895)).

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

## III. THE BANK PROVIDES NO QUESTION OF MATERIAL FACT TO CHALLENGE THE DISTRICT COURT'S RULING.

*Shadow Wood* states that deed recitals are conclusive as to the matters recited pursuant to NRS 116.31166(1). *Shadow Wood*, 366 P.3d at 1100 (holding the Trustee's Deed contains recitals deemed "conclusive" as to the "Default" and that "All requirements of law regarding the mailing of copies of notices and the posting and publication of the copies of the Notice of Sale have been complied with."). *Shadow Wood* merely allows a party to bring competing evidence if the action is in equity. *Shadow Wood,* 366 P.3d at 1100. This is congruent with the *SFR* decision, which states that a foreclosure deed that recites "compliance with notice provisions of NRS 116.31162 through NRS 116.31168 'is conclusive' as to the recitals 'against

the unit's former owner, his or her heirs and assigns and all other persons.'" *SFR*, 334 P.3d at 411-412 (quoting NRS 116.31166(2)).

In addition to deed recitals, "there is a presumption in favor of the record titleholder." *Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 669, 918 P.2d. 314, 318 (1996). These presumptions both fix the burden of production and shift the burden of proof onto the Bank to show "that the nonexistence of the presumed fact is more probable than its existence." *Yeager v. Harrah's Club, Inc.*, 111 Nev. 830, 834, 897 P.2d 1093, 1095 (1995) (citing NRS 47.180). Thus, in the present matter, the Bank would have to provide competent evidence that the Association foreclosure sale and deed were invalid or that there was any equitable reason to unwind the sale, such as fraud, oppression or unfairness. *Shadow Wood*, 366 P.3d at 1111. Even then, the Bank would also have to demonstrate that SFR somehow knew about any irregularities with the sale or participated in some way as to overcome SFR's status as a bona fide purchaser. *Id*. Here, any argument regarding the conclusive nature of the deed recitals is superfluous because the District Court alternatively found that "the Association Foreclosure Sale was properly noticed in this case. (4JA_793:9-11.) Thus, the Bank's claim that the Court ruled the deed recitals "resolve *all* questions of statutory compliance," is misleading. (AOB at 34.) The District Court correctly attributed the conclusive effect *Shadow Wood* as to the notices being properly provided, but also cited other findings of fact. (4JA_789-92.)

The district court properly found that:

> 15. Alessi, on behalf of the Association, mailed the NOS to BANA.
>
> 16. On February 20, 2013, SFR was the highest bidder at the Association's public non-judicial foreclosure auction and purchased the Property for $21,000.00 ("Association Foreclosure Sale").
>
> 17. On February 26, 2013, a Trustee's Deed Upon Sale was recorded in the Official Records of the Clark County Recorder as Instrument No. 201302260003889 ("Foreclosure Deed"). The Foreclosure Deed contains the following recitals:
>
> > This conveyance is made pursuant to the powers conferred upon the Trustee by NRS 116 et seq., and that certain Notice of Delinquent Assessment Lien, described herein. Default occurred as set forth in a Notice of Default and Election to Sell which was recorded in the office of the recorder of said county. All requirements of law regarding the mailing of copies of notices and the posting and publication of the Notice of Sale have been complied with. Said Property was sold by said Trustee at public auction on February 20, 2013, at the place indicated on the Notice of Trustee's Sale.

(4JA_791.)

The Bank did not and does not have any new facts to present. In challenging the efficacy of the deed recitals, the Bank points out only hypothetical examples for which the Bank desires proof of compliance, e.g., a fee schedule, proposed repayment plan and notice of right to contest the past due obligation that are owed to homeowners per NRS 116.31162, but are irrelevant to a challenge by a lienholder.

(AOB at 36.) The Bank also knowingly points out the absurdity of requiring recital compliance with post-sale requirements of NRS 116.31164(3). (*Id*.)The Bank thus takes issue with the statutory recitations omitting requirements that are plainly irrelevant or premature. No one claimed deed recitals resolve all questions of statutory compliance, and no one used them in such a manner. It should be obvious why the recitals are circumscribed as they are, and why the District Court ruled to grant summary judgment on behalf of SFR. This Court should likewise reject these arguments and affirm.

### A. No Purported Facts Suggest the Association Violated its Obligation of Good Faith and Fair Dealing.

"Every contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement." NRS 116.3113. Because the Bank alleges bad faith on the part of the HOA, the Bank bears the burden of producing evidence of some defect in the sale or proof of bad faith. Currently, no bad faith or defect has been presented in the record. Instead the Bank rest on its argument that the Association improperly rejected the Bank conditional payment. Yet, the Bank also argues that the Association would have received the same price either way. Thus, it cannot now claim some violation by the Association. However, for the reasons stated above, the rejection of the conditional payment was neither tender or a rejection in bad faith. *See supra* at §I(D). Ultimately, the Bank's failure to produce

any evidence of bad faith on the part of the Association demonstrates that no genuine issue of material fact remains regarding this issue.

### B. BANA Presented No Admissible Evidence to Challenge the Commercial Reasonableness of the Foreclosure Sale.

*Shadow Wood* reaffirmed that Nevada adopted the California rule that "inadequacy of price, **however gross**, is not in itself a sufficient ground for setting aside a trustee's sale legally made; there must be in addition proof of some element of fraud, unfairness or oppression **as accounts for and brings about the inadequacy of price**[.]" *Shadow Wood*, 366 P.3d at 1110 (quoting *Golden v. Tomiyasu*, 79 Nev. 503, 514, 387 P.2d 989, 995 (Nev. 1964) (internal citations omitted) (emphasis added). More recently, a panel of this Court, in an unpublished order, recognized this reaffirmance in *Shadow Wood* "that a low sales price is not a basis for voiding a foreclosure sale absent 'fraud, unfairness, oppression . . . ." *Centeno v. J.P. Morgan Chase Bank, N.A.*, Nevada Supreme Court Case No. 67365 (Mar. 18, 2016) (unpublished Order Vacating and Remanding).[40] To that extent, *Golden* went on to

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

say that even when the inadequacy was so great as to "shock the conscience" the California rule as stated above would still apply. *See Golden* 79 Nev. at 514-15, 386 P.2d at 955. ("In approving the rule thus stated, we necessarily reject the dictum in *Dazet v. Landry*, … implying that the rule requiring more than mere inadequacy of price will not be applied if 'the inadequacy be so great as to shock the conscience.'"). Thus, no argument is left regarding the standard to set aside a sale. This makes it all the more baffling when the Bank cites to foreign jurisdictions which have found a mere low sales price enough to overturn the sale. (*See* AOB at 25 (citing *Will v. Mill Condo Owner's Ass'n,* 848 A.2d 336, 340 (Vt. 2004)).)

Here, the District Court stated that "[a] sale pursuant to NRS 116 cannot be commercially unreasonable as a matter of law based on price alone." (4JA_803:15-16.) Further, despite no need to do so, the District Court did engage in equity balancing analysis pursuant to *Shadow Wood* and found that for multiple reasons "equity does not favor granting [the Bank] relief in this case." (*Id.* at 804:7-19.)

This holding by the District Court is correct because the Bank has offered no evidence of any fraud, unfairness or oppression in the sale process that would justify setting aside the sale. In fact, the Bank has failed to even identify the appropriate standard as stated in *Shadow Wood* to set aside a foreclosure sale. Here, the Association's sale was publicly noticed, as required by statute, multiple bidders attended the auctions, and neither the homeowner nor the Bank paid any amount to

cure the lien before the foreclosure sale. Viewing the transaction as a whole, the sale was commercially reasonable. As a matter of law, the Bank cannot exclusively rely upon SFR's winning bid as evidence that it was not. Ultimately, this Court should affirm as the Bank has not alleged any fraud, oppression or unfairness that has plagued the sale, and certainly none that can be attributed to the price paid by SFR.

### C. The Price Paid at Auction Was Commercially Reasonable.

First, there is no requirement in NRS 116.3116 through 116.31168 that the foreclosure sale price be commercially reasonable. This Court has held when interpreting a statute: "where the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself." *Pro-Max Corp. v. Feenstra*, 117 Nev. 90, 94-95, 16 P.3d 1074, 1077 (2001) (interpreting NRS 106.240). The provisions of NRS 116.3116, et seq., are clear and unambiguous.

Second, so-called fair market value has no applicability to a forced sale situation. *Bourne Valley*, 80 F.Supp.3d, 1131, 1136 (D. Nev. 2015) (reversed on other grounds); *BFP v. Resolution Trust Corporation*, 511 U.S. 531 (1994). As the *Bourne Valley* court recognized, when assessing commercial reasonableness of an association sale, the material facts affecting the specific market at that time must be considered, including the split in the courts as to the interpretation of NRS 116.3116(2), and whether there was evidence of fraud, oppression or unfairness:

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

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

Likewise, in *BFP*, the U.S. Supreme Court was analyzing whether the price received at a mortgage foreclosure sale was less than "reasonably equivalent value" under the bankruptcy code. Just like the Bank in this case, the Chapter 11 debtor argued that because the property sold for a fraction of its fair market value, the price paid was not reasonable. The Court held that "a 'reasonably equivalent value' for foreclosed real property is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with." *BFP*, 511 U.S. at 545. The Court explained that in a forced sale situation, "fair market value

cannot—or at least cannot always—be the benchmark[]" used to determine reasonably equivalent value. *Id*. at 537. This is so because the market conditions that generally lead to "fair market value" do not exist in the forced sale context, where sales take place with significant restrictions:

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

*Id.* at 537-538 (quoting Black's Law Dictionary 971 (6th ed. 1990) (emphasis added)). The Court recognized that property sold in a forced sale context, i.e., a foreclosure, "is simply worthless [because] [n]o one would pay as much to own such property as he would pay to own real estate that could be sold at leisure and pursuant to normal marketing techniques." *Id*. at 539. As the Court further noted,

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

itself.

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

While the *BFP* holding related to a mortgage foreclosure sale, other courts have extended the *BFP* analysis to tax-defaulted sales of real property with adherence to requirements of state law where the statutes include requirements for public noticing of the auction and provisions for competitive bidding. *See In re Tracht Gut, LLC*, 836 F.3d 1146, 1153-1154 (9th Cir. 2016); *T.F. Stone v. Harper*, 72 F.3d 466 (5th Cir. 1995); *Kojima v. Grandote Int'l Ltd. Co.*, 252 F.3d 1146 (10th Cir. 2001). Regardless of the type of sale, however, the analysis still aptly explains how market value cannot be compared to a forced sale transaction.

In the present matter, the District Court ruled there was no evidence of improper notice, suppression of bidding, or evidence of fraud, collusion or impropriety in the sales process, and thus commercial reasonability was not implicated. (4JA_793.) Absent such a finding, there is no general requirement to prove commercial reasonability in a foreclosure sale. The Bank alleges no facts that would suggest any such finding, pointing instead to its expert's report on "fair market value" that the sales price was below this value, and that SFR manager Christopher Hardin ("Hardin") stated he had a general policy not to bid on homes where the lender offered tender. (AOB 40-41.) For the reasons stated above, fair market value has no applicability to a forced sale, as was the case in the present matter. Further, the Bank has not

demonstrated that it has offered tender, much less that there was a duty for SFR to discover the alleged payment. Thus, there are no outstanding genuine issues of material fact remaining, and the claim should be rejected.

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

If this Court finds a defect in the sale, including the Association rejection of tender, SFR is entitled to the protections of being a BFP. A BFP is one who "takes the property 'for a valuable consideration and without notice of the prior equity. . .'" *Shadow Wood*, 366 P.3d at 1115 (internal citations omitted). The fact that SFR "paid 'valuable consideration' cannot be contested.'" *Id*. Furthermore, when, as here, it is uncontested that "the foreclosure sale complie[d] with the statutory foreclosure rules, as evidenced by the recorded notices, … and without any facts to the contrary," then the mere knowledge that an interested party could bring a suit in equity does not defeat SFR's BFP status. *Id*. at 1115-1116.

If this Court finds a defect in the sale, then it must consider the "entirety of the circumstances that bear upon the equities." *Shadow Wood* at 1115. "This includes considering the status and actions of all parties involved, including whether an innocent party may be harmed by granting the desired relief." *Shadow Wood at 1115, citing Riganti v. McElhinney,* 248 Cal.App.2d 116, 56 Cal.Rptr. 195, 199 (1967) ("[E]quitable relief should not be granted where it would work a gross injustice upon innocent third parties."). In other words, it is not the amount of the liens or the price

paid at auction, but the actions or inactions of the parties in creating the alleged inequity that must be considered. This is particularly important where the lender had all the facts and failed to avail itself of the legal remedies available to it to prevent the foreclosure sale to a third party. *Shadow Wood*, at 1115, n.7.

This is also consistent with the Restatement approach which states:

> If the real estate is unavailable because title has been acquired by a bona fide purchaser, the issue of price inadequacy may be raised by the mortgagor or a junior interest holder in a suit against the foreclosing mortgage for damages for wrongful foreclosure.

Restatement (Third) of Property: Mortgages § 8.3, cmt. b; *see Melendrez v. D&I Investment, Inc.*, 26 Cal.Rptr. 3d 413, 428 (Cal. Ct. App. 2005) (stating absent fraud, the sale to a BFP cannot be set aside "based on irregularities in the foreclosure sale"). The policy underlying this is to give finality to foreclosure sales so as to protect the sanctity of title to BFPs so they are not charged with the misdeeds of their predecessors. *See Moeller*, 25 Cal.App.4th at 832. Any other policy would chill participation at foreclosure sales and result in depressing sales prices at foreclosure. *Melendrez*, 26 Cal.Rptr. at 426.

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

Here, as in *Shadow Wood*, the Bank "points to no evidence indicating that

[SFR] had notice before it purchased the property, either actual, constructive, or inquiry, as to [the Bank's] attempts to pay the [superpriority amount]." 366 P.3d at 1116. The Bank merely states that SFR may have not purchased the property if they were aware of the Bank's purported payment. (AOB at 40.) However, the Bank provided no evidence that SFR knew of a superior interest or any purported irregularities of the foreclosure sale. SFR has no relationship with the Association or foreclosure agent that would preclude it from being a BFP. (JA_319 at ¶ 8-9.) Neither did SFR have any duty to inquire, because there was no release of the super-priority portion of the lien. In sum, the Bank provided no evidence that SFR was anything other than a BFP.

In weighing equities, the Court must consider that (i) the Bank did not attend either sale to ensure that the price bid was adequate (to its standards); (ii) the Bank did nothing to put a third-party purchaser on notice that it had any dispute with the Association; and (iii) the Bank did not exercise any legal remedies to stop the Association's sale. Thus, **the Bank chose to do nothing to actually stop the sale**, and because SFR would be harmed by any belated claim by the Bank to set aside the sale on equitable grounds, the district court properly quieted title in SFR's favor.

…

…

…

## CONCLUSION

Based on the foregoing, this Court should Affirm the District Court's summary judgment.

DATED this 7th day of December, 2016.

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## CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14-point, double-spaced Times New Roman font.
2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the pages of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, is 53 pages long, and contains 13,173 words.
3. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

///

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

Dated this 7th day of December, 2016.

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## CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 7th day of December, 2016. Electronic service of the foregoing **Respondent's Answering Brief** shall be made in accordance with the Master Service List as follows:

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| **Docket Number and Case Title:** | 70501 – BANK OF AMERICA, N.A., v. SFR INVESTMEN LLC |
| **Case Category** | Civil Appeal |
| **Information current as of:** | Dec 07 2016 6:27 p.m. |

**Electronic notification will be sent to the following:**

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Dated this 7th day of December, 2016.

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