

1 MICHAEL F. BOHN, ESQ.  
Nevada Bar No.: 1641  
2 [mbohn@bohnlawfirm.com](mailto:mbohn@bohnlawfirm.com)  
LAW OFFICES OF  
3 MICHAEL F. BOHN, ESQ., LTD.  
2260 Corporate Circle, Ste. 480  
4 Henderson, Nevada 89074  
(702) 642-3113/ (702) 642-9766 FAX  
5 Attorney for Amicus Curiae  
Saticoy Bay LLC  
6

Electronically Filed  
Oct 11 2018 03:39 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

7  
8 SUPREME COURT  
9

10 STATE OF NEVADA

11 BANK OF AMERICA, N.A.,  
12 SUCCESSOR BY MERGER TO BAC  
HOME LOANS SERVICING, LP,  
13 F/K/A COUNTRYWIDE HOME  
LOANS SERVICING, LP,

No. 70501

14 Appellant,

15 vs.

17 SFR INVESTMENTS POOL 1, LLC,  
A NEVADA LIMITED LIABILITY  
18 COMPANY,

19 Respondent.  
20

21 **BRIEF OF AMICUS CURIAE SATICOY BAY IN SUPPORT OF**  
22 **RESPONDENT'S PETITION FOR REHEARING**

23 Michael F. Bohn, Esq.  
Law Office of  
24 Michael F. Bohn, Esq., Ltd.  
2260 Corporate Circle, Ste. 480  
25 Henderson, Nevada 89074  
(702) 642-3113/ (702) 642-9766 Fax  
26  
27 Attorney for Amicus Curiae  
Saticoy Bay LLC  
28

1                                    **NRAP 26.1 DISCLOSURE STATEMENT**

2                    Counsel for Saticoy Bay certifies that the following are persons and entities  
3 as described in NRAP 26.1(a), and must be disclosed. These representations are  
4 made in order that the judges of this court may evaluate possible disqualification  
5 or recusal.  
6

- 7                    1. Saticoy Bay LLC is a Nevada limited-liability company.  
8  
9                    2. The manager for Saticoy Bay LLC is Bay Harbor Trust.  
10                   3. The trustee for Bay Harbor Trust is Iyad Haddad a/k/a Eddie Haddad.  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1                   **STATEMENT OF INTEREST OF *AMICUS CURIAE***

2                   Counsel for *Amicus Curiae*, Saticoy Bay LLC (hereinafter “Saticoy Bay”),  
3  
4 states that Saticoy Bay is a Nevada limited-liability company. The manager for  
5 Saticoy Bay is Bay Harbor Trust. The trustee for Bay Harbor Trust is Iyad Haddad  
6 a/k/a Eddie Haddad.

7                   Saticoy Bay is the owner of more than one hundred houses purchased at HOA  
8  
9 foreclosure sales conducted pursuant to the pre-2015 version of NRS Chapter 116.  
10 Saticoy Bay is also a party to more than one hundred lawsuits involving the issue of  
11 whether the HOA foreclosure sale extinguished a prior recorded deed of trust. Many  
12 of these lawsuits involve an unrecorded claim by the lender that the HOA wrongfully  
13 rejected a tender of the superpriority lien amount prior to the HOA foreclosure sale.  
14

15                   Saticoy Bay is also a party to multiple appeals involving an unrecorded claim  
16 of tender that are currently pending before this Court and the Court of Appeals for the  
17 Ninth Circuit.  
18

19                   As provided by NRAP 29(a), Saticoy Bay has filed a motion for leave of court  
20 to file its amicus brief in support of respondent’s petition for rehearing.  
21  
22  
23  
24  
25  
26  
27  
28

## TABLE OF CONTENTS

NRAP 26.1 DISCLOSURE STATEMENT .....	ii
STATEMENT OF INTEREST OF <i>AMICUS CURAIE</i> .....	iii
TABLE OF CONTENTS .....	iv
TABLE OF AUTHORITIES .....	v
Cases .....	v
Statutes and rules .....	v
Other authorities .....	vi
I. SUMMARY OF THE ARGUMENT .....	1
II. ARGUMENT .....	1
1. A tender of the superpriority portion of an assessment lien made by a lender does not satisfy the superpriority lien, but instead assigns the HOA's superpriority lien rights .....	1
2. Bank of America's failure to record notice of its claim of tender made that claim void as to SFR .....	7
VII. CONCLUSION .....	9
CERTIFICATE OF COMPLIANCE .....	9

///

///

## **TABLE OF AUTHORITIES**

### **CASES:**

#### **Nevada cases**

Bank of America, N.A. v. Ferrell Street Trust, 416 P.3d 208 (Table),

2018 WL 2021560 (Nev. Apr. 27, 2018)(unpublished disposition) . . . . . 5

Bank of America, N.A. v. SFR Investments Pool 1, LLC,

134 Nev., Adv. Op. 72, 2018 WL 4403296 (Sept. 13, 2018). . . 1, 2, 5, 7-8

#### **Federal and other cases**

Henke v. First Southern Properties, Inc.,

586 W.W.2d 617 (Tex. App. 1979) . . . . . 7

Power Transmission Equip. Corp. v. Beloit Corp.,

201 N.W. 2d 13 (Wis. 1972) . . . . . 1

### **STATUTES AND RULES:**

NRS 111.315 . . . . . 6

NRS 111.325 . . . . . 8

NRS 116.1108 . . . . . 2, 4

NRS 116.3116 . . . . . 2, 6

///

**OTHER AUTHORITIES:**

Baxter Dunaway, *Interests and Conveyances Outside Acts – Recordable*

*Interests*, 4 L. of Distressed Real Est. § 40:8 (2018). . . . . 5-6

1 Grant S. Nelson, Dale A. Whitman, Ann M. Burkhart & R. Wilson

Freyermuth, *Real Estate Finance Law* (6th ed. 2014) . . . . . 7

Restatement (Third) of Prop.: Mortgages, § 6.4 (1997) . . . . . 2-3, 4, 5, 6, 8

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7

Because a tender made by a lender creates an assignment, that assignment is a conveyance that must be recorded before it can affect the rights of the purchaser at the HOA foreclosure sale.

- 1. A tender of the superpriority portion of an assessment lien made by a lender does not satisfy the superpriority lien, but instead assigns the HOA's superpriority lien rights.**

///

1 At page 6 of the opinion, this Court states that “a plain reading of NRS  
2 116.3116 indicates that at the time of Bank of America’s tender, tender of the  
3 superpriority amount by the first deed of trust holder was sufficient to satisfy that  
4 portion of the lien.” On the other hand, NRS 116.3116 does not include the word  
5 “tender” or the word “satisfy.”  
6

7  
8 At page 8 of the opinion, this Court states that “[t]endering the superpriority  
9 portion of an HOA lien does not create, alienate, assign, or surrender an interest in  
10 land.” On the other hand, NRS 116.1108 expressly provides that “the law of real  
11 property” supplements the provisions of NRS Chapter 116.  
12

13  
14 The established principles of real property law that govern performance or  
15 tender by a subordinate lienholder appear in Sections 6.4 (e), (f), and (g) of  
16 Restatement (Third) of Prop.: Mortgages (1997):  
17

- 18  
19 (e) **A performance in full of the obligation secured by a**  
20 **mortgage**, or a performance that is accepted by the mortgagee in  
21 lieu of payment in full, **by one who holds an interest in the real**  
22 **estate subordinate to the mortgage but is not primarily**  
23 **responsible for performance, does not extinguish the**  
24 **mortgage**, but redeems the interest of the person performing  
25 from the mortgage and **entitles the person performing to**  
26 **subrogation to the mortgage under the principles of §7.6.**  
27 Such performance may not be made until the obligation secured  
by the mortgage is due, but may be made at or after the time the  
obligation is due but prior to foreclosure.



1 (f) Upon receipt of performance as provided in Subsection (e), **the**  
2 **mortgagee has a duty to provide to the person performing,**  
3 **within a reasonable time, an appropriate assignment of the**  
4 **mortgage in recordable form.** If the mortgagee fails to do so  
5 upon reasonable request, **the person performing may obtain**  
6 **judicial relief ordering the mortgage assigned** and, unless the  
7 mortgagee acted in good faith in rejecting the request, awarding  
8 against the mortgagee any damages resulting from the delay.

9 (g) An unconditional tender of performance in full by a person  
10 described in Subsection (e), even if rejected by the mortgagee, **if**  
11 **kept good** has the effect of performance under Subsections (e)  
12 and (f) above. (emphasis added)

13 Comment a to Restatement (Third) of Prop.: Mortgages §6.4 (1997) explains  
14 the distinction between payment or tender by someone primarily liable for the debt,  
15 and payment or tender by a party seeking to protect its subordinate interest in the  
16 property:  
17

18 Equitable redemption is ultimately accomplished by performance in full  
19 of the obligation secured by the mortgage. **However, redemption has**  
20 **two quite distinct results, depending on whether the performance**  
21 **is made by a person who is primarily responsible for payment of**  
22 **the mortgage obligation, or by someone else who holds an interest**  
23 **in the land subordinate to the mortgage.** In the first of these  
24 situations, the mortgage is simply extinguished, as provided in  
25 Subsection (a) of this section. **In the second, the mortgage is not**  
26 **extinguished, but by virtue of Subsection (e) is assigned by**  
27 **operation of law to the payor under the doctrine of subrogation;** see  
§7.6. Subrogation does not occur in the first situation, since one who  
is primarily responsible for payment of a debt cannot have subrogation  
by performing that duty; see §7.6, Comment b. (emphasis added)

1           Comment g to Restatement (Third) of Prop.: Mortgages, §6.4 (1997) also  
2  
3 explains the effect of a payment made by a subordinate lienholder:

4           The second distinction, mentioned above, is that redemption by a  
5 person who is not primarily responsible for payment of the debt **does**  
6 **not extinguish the mortgage, but rather assigns both the mortgage**  
7 **and the debt to the payor by operation of law under the doctrine of**  
8 **subrogation**; See §7.6. In cases of this sort, the payor has paid, not out  
9 of duty, but to protect a real estate interest from foreclosure. Thus, the  
10 payor is entitled to reimbursement from whomever is primarily  
11 responsible for payment, and can enforce the mortgage against that  
12 person to aid in collection of the reimbursement. Subrogation in this  
context helps prevent the unjust enrichment of the party who is  
primarily responsible at the expense of the payor. See §7.6,  
Illustrations 1 and 2. (emphasis added)

13  
14           Subsection (f) of Restatement (Third) of Prop.: Mortgages, §6.4 (1997)  
15 provides that “[u]pon receipt of performance,” the mortgagee must provide to the  
16 person performing “an appropriate assignment of the mortgage in recordable form.  
17 Subsection (f) of Restatement (Third) of Prop.: Mortgages, §6.4 (1997) also provides  
18 that “[i]f the mortgagee fails to do so upon reasonable request, the person performing  
19 may obtain judicial relief ordering the mortgage assigned . . . .”  
20  
21

22           As a result, the law of real property, which supplements the provisions of NRS  
23 Chapter 116 pursuant to NRS 116.1108, expressly contemplates that Bank of  
24 America would record “an appropriate assignment” or “obtain judicial relief ordering  
25  
26  
27

1 the mortgage [superpriority lien] assigned.”

2  
3 At pages 8 and 9 of the opinion, this Court states: “Rather, it *preserves* a pre-  
4 existing interest, which does not require recording.” This statement, however, is  
5 contradicted by the law of real property in Restatement (Third) of Prop.: Mortgages,  
6 § 6.4 (1997). Although this Court refers to Section 6.4 of the Restatement at page 11  
7 of the opinion, this Court does not discuss the language in Section 6.4 of the  
8 Restatement that treats a tender made by a subordinate lienholder as an assignment.  
9

10  
11 In Bank of America, N.A. v. Ferrell Street Trust, 416 P.3d 208 (Table), 2018  
12 WL 2021560 (Nev. Apr. 27, 2018)(unpublished disposition), this Court stated that  
13 the district court did not rule on the bona fide purchaser issue and that “it does not  
14 appear that either party raised the subrogation issue at the district court.” Id. at \*2.  
15 This Court also stated that these issues “may warrant the district court’s  
16 consideration in light of whether Bank of America sufficiently tendered the  
17 superpriority portion of the lien.” Id.  
18  
19  
20

21 At page 9 of the opinion in Bank of America, N.A. v. SFR Investments Pool  
22 1, LLC, this Court quotes the following sentence: “[D]ocuments which do not create  
23 or transfer interests in land are often held to be nonrecordable; the records, after all,  
24 are not a public bulletin board.” See Baxter Dunaway, *Interests and Conveyances*  
25  
26  
27

1 *Outside Acts – Recordable Interests*, 4 L. of Distressed Real Est. § 40:8 (2018).

2  
3 Section 40:8, however, does not identify a tender made by a subordinate  
4 lienholder as a document that does not “create or transfer” an interest in land. The  
5 examples discussed in Section 40:8 include “short term leases” for less than a year  
6 and the contract that creates an installment land contract.  
7

8 This Court also italicizes the words “in the manner prescribed in this chapter”  
9 that appear in NRS 111.315. In order to be in “recordable form,” the assignment  
10 required by Section 6.4(f) of the Restatement must necessarily be “proved,  
11 acknowledged and certified” in the manner prescribed by NRS Chapter 111.  
12

13  
14 At page 10 of the opinion, this Court cites NRS 116.3116 to support the  
15 statement that “Bank of America’s tender discharged the superpriority portion of the  
16 HOA’s lien by operation of law,” but the word “discharge” does not appear  
17 anywhere in NRS 116.3116. This Court also cites NRS 116.3116(1)-(3) to support  
18 the statement that “NRS Chapter 116's statutory scheme allows banks to tender the  
19 payment needed to satisfy the superpriority portion of the HOA lien and maintain its  
20 senior interest as the first deed of trust holder.” No such language appears anywhere  
21 in NRS 116.3116. NRS 116.3116(3) instead provides for the creation of an escrow  
22 account or impound account to pay all of the assessments for common expenses.  
23  
24  
25  
26  
27

1     **2.     Bank of America’s failure to record notice of its claim of tender**  
2     **made that claim void as to SFR.**

3             At page 13 of the opinion in Bank of America, N.A. v. SFR Investments Pool  
4     1, LLC, this Court cites Henke v. First Southern Properties, Inc., 586 W.W.2d 617  
5     (Tex. App. 1979), where the foreclosing lender holding the first deed of trust agreed  
6     with the property owner to reinstate the loan if \$2,156 was paid by September 30,  
7     1974, and “the money was paid by the specified time (September 30, 1974) and  
8     accepted with the advice that Henke’s loan had been reinstated.” Id. at 618. No such  
9     agreement exists when an HOA rejects a lender’s demand that the HOA accept a  
10    specific amount as “payment in full” of the HOA’s superpriority lien.  
11

12            This Court also quotes from Section 7:21 in 1 Grant S. Nelson, Dale A.  
13     Whitman, Ann M. Burkhart & R. Wilson Freyermuth, Real Estate Finance Law (6th  
14     ed. 2014), that “[t]he most common defect that renders a sale void is that the  
15     mortgagee had no right to foreclose . . . .” None of the examples discussed in  
16     Section 7:21, however, involved a conditional tender made by a subordinate  
17     lienholder that had been rejected in good faith.  
18

19            At the bottom of page 13 of the opinion, this Court states that “[b]ecause Bank  
20     of America’s valid tender discharged the superpriority portion of the HOA’s lien, the  
21     HOA’s foreclosure on the entire lien resulted in a void sale as to the superpriority  
22     portion of the lien.”  
23  
24  
25  
26  
27

1 portion.” On the other hand, Restatement (Third) of Prop.: Mortgages, § 6.4(a)  
2  
3 (1997) states that a mortgage is extinguished only if “one who is primarily  
4 responsible for performance of the obligation” makes the payment.

5 In addition, comment d to Restatement (Third) of Prop.: Mortgages, §6.4  
6  
7 (1997) explains the significance of recording notice of the tender:

8 The rule extinguishing the mortgage when a tender is rejected has only  
9 limited modern significance. The reason is that mortgages are virtually  
10 always recorded, and the payor derives little benefit, merely from the  
11 theoretical extinction of the mortgage if it is in fact still present, and  
12 apparently undischarged in the public records.

13 This language contradicts this Court’s treatment of a rejected tender as a  
14 document that does not require recording.

15 A tender or purported tender must be recorded in order to put third parties,  
16  
17 such as bidders at a foreclosure sale, on notice of any claimed payment of the super  
18 priority portion of the lien. This is especially true when a lender tenders only the  
19  
20 super priority amount knowing that the property will be sold at a foreclosure sale.

21 Because a tender made by a subordinate lienholder acts as an assignment, it  
22  
23 is a “conveyance” that must be recorded prior to the foreclosure deed, or the tender  
24  
25 is “void” against the foreclosure sale purchaser pursuant to NRS 111.325.

26 Allowing a lender to enforce an unrecorded claim that the HOA wrongfully  
27

1 rejected an offer of payment violates the purpose of the recording laws.

2  
3 **CONCLUSION**

4 By reason of the foregoing, Saticoy Bay respectfully requests that this Court  
5 grant rehearing on the issue of whether a lender must record a claim of tender prior  
6 to an HOA foreclosure sale.  
7

8 DATED this 8th day of October, 2018.  
9

10 LAW OFFICES OF  
11 MICHAEL F. BOHN, ESQ., LTD.

12 By: / s / Michael F. Bohn, Esq. /  
13 Michael F. Bohn, Esq.  
14 2260 Corporate Circle, Ste. 480  
15 Henderson, Nevada 89074  
16 Attorney for Saticoy Bay

17 **CERTIFICATE OF COMPLIANCE**

18 1. I hereby certify that this brief complies with the formatting requirements  
19 of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style  
20 requirements of NRAP 32(a)(6) because this brief has been prepared in a  
21 proportionally spaced typeface using Word Perfect X6 14 point Times New Roman.  
22

23 2. I further certify that this brief complies with the type-volume limitations  
24 of NRAP 29(e) because, excluding the parts of the brief exempted by NRAP  
25  
26  
27

1 32(a)(7), it is proportionately spaced and has a typeface of 14 points and contains  
2  
3 2,292 words.

4 3. I hereby certify that I have read this appellate brief, and to the best of my  
5  
6 knowledge, information, and belief, it is not frivolous or interposed for any improper  
7  
8 purpose. I further certify that this brief complies with all applicable Nevada Rules  
9  
10 of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion  
11  
12 in the brief regarding matters in the record to be supported by a reference to the page  
13  
14 of the transcript or appendix where the matter relied on is to be found.

15 DATED this 8th day of October, 2018.

16  
17 LAW OFFICES OF  
18 MICHAEL F. BOHN, ESQ., LTD.

19 By: / s / Michael F. Bohn, Esq. /  
20 Michael F. Bohn, Esq.  
21 2260 Corporate Circle, Ste. 480  
22 Henderson, Nevada 89074  
23 Attorney for Saticoy Bay  
24  
25  
26  
27