Case No. 71325

IN THE SUPREME COURT OF NEVADA

SFR INVESTMENTS POOL 1, LLC, Appellant, vs. FIRST HORIZON HOME LOANS, A DIVISION OF FIRST TENNESSEE BANK, N.A., Respondent.	Electronically Filed Apr 27 2017 08:07 a.m. Elizabeth A. Brown Clerk of Supreme Court

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable GLORIA STURMAN, District Judge
District Court Case No. District Court Case No. A-13-679329-C

APPELLANT'S REPLY BRIEF

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SUMMARY OF ARGUMENT

If an Association complies with NRS 116 when perfecting its lien, then the Association has a valid superpriority lien which can serve to extinguish all junior interest if that lien is foreclosed on, including a first deed of trust. *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. ___, 334 P.3d 408, 419 (2014). Nothing in NRS 116 requires an Association to restart its foreclosure proceedings if an interest in a property changes hands prior to the association's foreclosure, especially at the eleventh hour before an association's foreclosure. Since NRS 116.31162 requires the Association to record their Notice of Default ("NOD") and the Notice of Sale ("NOS"), anyone acquiring property during the NRS 116 foreclosure process would be constructively aware of the association's lien and intent to foreclose by a casual scan of the recorded documents. The purchaser at the Bank's foreclosure sale would also know it had to pay all senior liens remaining on the property which could otherwise divest it of its title.

The situation herein is that the party which acquired the property in the middle of the Association's foreclosure was the Bank who was also a previous junior lien holder. The Bank admits receipt of the NOD and NOS.[1] Thus, it not only had constructive notice, it had actual notice that the Association foreclosure was imminent.

[1] 2JA_439 at 51:1-12; 53:1-3.

NRS 116's foreclosure provisions do not involve a state actor. This decision was reached in a 5-0 decision by this Court. *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage, a Division of Wells Fargo Bank, N.A.*, 133 Nev. ___, 388 P.3d 970, 975 (2017). Further, *Saticoy Bay* acknowledged that the Ninth Circuit's *Bourne Valley*[2] ruling that found the NRS 116 foreclosure provisions did involve a state actor, but rejected such analysis. *Saticoy Bay*, 388 P.3d at 974 n. 4. Without a state actor, there cannot be a violation of due process. Since the District Court found that the notice provisions were unconstitutional "as-applied"[3] because they did not give proper due process to the Bank, this Court should reverse and remand this case back to the District Court.

While not directly appealed by SFR, the Bank has raised arguments regarding the commercial reasonableness of the sale and FHA insurance. These issues were not addressed by SFR in its opening brief because the District Court never made a finding as to these matters. First, neither of these arguments provide this Court with alternative reasons to affirm. Second, the Bank has failed to provide any evidence of fraud, oppression or unfairness that accounted for and brought about the allegedly low purchase price of which it complains. *Shadow Wood HOA., v. New York Cmty.. Bancorp, Inc.*, 132 Nev. ___, ___, 366 P.3d 1105, 1115 (2016)(*citing Long v. Towne,*

[2] *Bourne Valley Court Trust v. Wells Fargo Bank*, 832 F.3d 1154 (9th Cir. 2016).
[3] (4JA_795)

98 Nev. 11, 13, 639 P.2d 528, 530 (1982);*Golden v. Tomiyasu*, 79 Nev. 503, 514, 387 P.2d 989, 995 (1963). Thus, any commercial reasonableness argument brought by the Bank soundly fails.

Lastly, the Bank does not have the standing to raise the Supremacy Clause. The United States Supreme Court has already determined that private litigants cannot use the Supremacy Clause to displace state law. *Armstrong v. Exceptional Child Care Ctr., Inc.*, 575 U.S. ___, ___, 135 S.Ct. 1378, 1383-85 (2015). Thus, if a cause of action exists, Congress enactment of the National Housing Act (which deals with FHA insured properties) expressed its intent that HUD's Secretary ─ rather than private litigants such as the Bank ─ would be able to enforce the NHA and protect HUD's interests. But, if this Court finds the Bank has the standing to make an argument that belongs to HUD, this Court must still remand the case because the District Court never made a factual determination that the Bank's loan was FHA insured.

ARGUMENT

I. THE DISTRICT COURT'S ORDER SHOULD BE OVERTURNED AS NRS 116 DOES NOT INVOKE DUE PROCESS.

The NRS 116 foreclosure provisions do not involve a state actor. This decision was reached in a 5-0 decision by this Court. *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage, a Division of Wells Fargo Bank, N.A.*, 133 Nev.

___, 388 P.3d 970, 975 (2017).[4] Further, *Saticoy Bay* acknowledged that the Ninth Circuit in a previous holding found that the NRS 116 foreclosure provisions did involve a state actor[5], but rejected such analysis. *Saticoy Bay*, 388 P.3d at 974 n. 5. Without a state actor, there cannot be a violation of due process. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n.*, 531 U.S. 288 (2001).

Herein, the District Court found that the noticing provisions of NRS 116 are unconstitutional "as-applied." (4JA_795.) Based on this Court's clear, binding precedent, the noticing provisions of NRS 116 do not involve a state actor, and thus, NRS 116 cannot be "unconstitutional "as-applied." Under these grounds alone, this Court must remand back to the District Court for further proceedings that are not clouded with the false notion that constiutional due process is implicated.

II. SFR IS A BONA FIDE PURCHASER.

A Bona Fide Purchaser ("BFP") is one who "takes the property for a valuable consideration and without notice of the prior equity, and without notice of facts which upon diligent inquiry would be indicated and from which notice would be imputed to him, if he failed to make such inquiry." *Shadow Wood HOA., v. New*

[4] While SFR argued extensively in its opening brief ("AOB") that the Association did not violate NRS 116 and that NRS 116 gave adequate notice to lenders such as the Bank, *Saticoy Bay* was published a day after SFR filed its opening brief and soundly resolves the constitutionality portion of this appeal.

[5] *Bourne Valley Court Trust v. Wells Fargo Bank,* 832 F.3d 1154 (9th Cir. 2016).

York Cmty.. Bancorp, Inc., 132 Nev. ___, ___, 366 P.3d 1105, 1116 (2016)(internal citation omitted).

In regards to the burden of proof of SFR's BFP status, it is the Bank that sought equitable relief from the "conclusive" foreclosure deed. Thus it is the Bank's burden to allege and prove that SFR was not a BFP. *See In First Fidelity Thrift & Loan Ass'n v. Alliance Bank*, 60 Cal. App. 4th 1433, 71 Cal. Rptr. 2d 295, 301 (1998)(" If the prior party claims an equitable rather than a legal title, however, the burden of proof is upon the person asserting that title.").

A "purchaser for value" is one who has given "valuable consideration" as opposed to receiving the property as a gift. *Id*. at 187, 248; *Allen v. Webb*, 87 Nev. 261, 266, 485 P.2d 677, 680 (1971) ("A specific finding of what the consideration was may be implied from the record."). Even if a purchaser may purchase a property for lower than the property's value on the open market, the fact that SFR paid "valuable consideration" is undisputed. *Shadow Wood*, 366 P.3d at 1115 (citing *Fair v. Howard*, 6 Nev. 304, 308 (1871)("the question is not whether the consideration is adequate, but whether it is valuable"); *see also Poole v. Watts*, 139 Wash, App. 1018 (2007)(unpublished disposition)(stating that the fact that the foreclosure sale purchaser purchased the property for a "low price" did not in itself put the purchaser on notice that anything was amiss with the sale). Since SFR paid $7,000.00 at

auction, and $7,000.00 clearly has value, no one can dispute SFR's purchase was made with valuable consideration.

In regards to prior notice of a competing interest, the Bank's mere existence of its Deed of Trust does not stand to defeat SFR's BFP status. Further, notice by a potential purchaser that an association is conducting a sale pursuant to NRS 116, and that the potential exists for challenges to the sale "post hoc[,]" do not preclude that purchaser from BFP status. *Shadow Wood*, 366 P.3d at 1116. Similarly, prior litigation instigated by the Bank does not put SFR on notice of a "legitimate" claim to the property. While the Bank is correct to point out that the Bank recorded its interest before SFR, the Bank acknowledges that it did not record its deed until after the Association foreclosure sale. *See* RAB p.16. Thus, SFR was not on notice of the Bank's interest prior to SFR's purchase of the property at public auction.

As stated in its opening brief, SFR's status as a BFP is paramount when the District Court weighs the equities on the property. (*See* AOB p. 15.) As stated by this Court, "equitable relief should not be granted where it would work a gross injustice upon innocent third parties." *See Shadow Wood*, 366 P.3d at 1115 *quoting Riganti v. McElhinney,* 248 Cal.App.2d 116, 56 Cal.Rptr. 195, 199 (1967). The facts of this case indicate that two valid sales took place within short proximity of each other. The first sale was the Bank's foreclosure. This sale extinguished the Association's sub-priority lien. Shortly after, the Association's surviving

superpriority lien was foreclosed on which extinguished the Bank's newly begotten interest in the property. (*See* AOB pp. 7-10.) In light of this, the Bank has presented no evidence of anything that would prevent SFR from being a BFP in regards to the Association's foreclosure. The alleged harm of not receiving two sets of notices, as the Bank claims it was entitled too, would not have been known to SFR as it did not conduct the foreclosure. Therefore, this fact cannot defeat SFR's BFP status.

Despite being aware of the Association's foreclosure, the Bank chose to do nothing to actually stop the sale. This is not because the Bank lacked notice of the sale: the Bank admits notice of the sale. This is because the Bank willfully chose to ignore the Association's foreclosure and not contact the Association immediately to pay off the superpriority portion of the lien. Regardless of the Bank's blatant inaction in response to the Association's foreclosure, the Bank's unrecorded interest in the property should not be effective in defeating SFR's claim to the property if a procedural defect existed in the foreclosure that required this Court to balance the equities under *Shadow Wood*.

III. THE ASSOCIATION'S FORECLOSURE COMPLIED WITH THE CC&RS AND NRS 116 AND EXTINGUISHED THE BANK'S INTEREST IN THE PROPERTY.

Nothing in the CC&Rs required the Association to send further notices to the Bank. The CC&Rs required written notice of default to be sent to a member prior to foreclosure, and this was done. Per the CC&Rs the rights and obligations of

membership "*transfer*" with the transfer of the ownership of the property. (1JA_149)(CC&Rs stating that membership "transfers"). Further, while new members are not **personally** liable for past due assessments per the CC&Rs, (1JA_155-156) nothing in the CC&Rs stated that the Association was obligated to release its lien against the property for the past due assessments that remained unpaid. *Id.*

When the Bank acquired its interest in the property derived from its own foreclosure of the property on February 26, 2013, the rights, obligations, and responsibilities of membership *transferred* to the Bank. As this membership transferred; it logically follows that the notices given to the previous member transferred as well. (1JA_149)(*See* § 6.9 -Transfer of Membership). The facts of this case show that there is no dispute that the Notice of Delinquent Assessments, Notice of Default or Notice of Sale were sent to the original unit owner. (2JA_415.) Thus, when the Bank obtained its interest in the property, membership transferred to the Bank, including the fact that the member of that unit was noticed of the pending association foreclosure.

In addition to the CC&Rs transferring membership, NRS 116.31162 requires that an association's NOD and NOS be recorded. "Under Nevada law, a purchaser of real property with notice of a prior interest takes subject to that interest." *In re Crystal Cascades Civil, LLC*, 398 B.R. 23, 29 (Bankr. D. Nev. 2008), aff'd, 415 B.R.

403 (B.A.P. 9th Cir. 2009) *citing* NRS 111.320. Before foreclosure, any prospective purchaser interested in the property only had to review the recorded documents to see if an association had a recorded lien on the property and if the lien was close to being foreclosed upon. Based on the recorded documents on the property, notice was given to the Bank for the Association's lien and pending foreclosure. Per NRS 111.320, the Bank took the property subject to the Association's lien.

The Association also complied with the CC&Rs because the Bank admits to receiving the NOD and the NOS prior to obtaining its interest in the property during its own foreclosure. (2JA_439 at 52:9-53:3.) The Bank's foreclosure prior to the Association's foreclosure did not in this instance require further disclosures. In this scenario, the Bank was sent and admitted receipt of the same NOD and NOS −due to their status as a junior interest holder− that an Association unit holder/member would have received. In other words, the Bank did receive the notices entitled to a member. Therefore, the Bank did receive the notices as required by the CC&Rs.

Here, the Bank acknowledges that the Bank's foreclosure was not able to wipe the superpriority lien. (RAB p.10.) This admission calls into question the Bank's claim that the total amount of the Association's lien was significantly different after the Bank's foreclosure and justified restarting the foreclosure process. (*Id.*) The superpriority portion of the lien was what the Bank needed to pay prior to the Bank's foreclosure to not lose their security interest in the property. Also, if the superpriority

portion of the lien was the only portion of the lien to survive the Bank's foreclosure, then by the Bank's own logic, what the Bank needed to pay the Association to protect its interest was the same before and after the Bank's foreclosure. This negates any policy reasons to require the Association to restart its foreclosure process as the amount the Bank could have paid to maintain its interest were the same both before and after the Bank's foreclosure.

For these reasons, the Association's notices complied with NRS 116 and its own CC&Rs. This foreclosure was a legal and fair foreclosure with the consequence of the Bank losing its legal title to the property based on the Association's foreclosure.

IV. THE BANK'S ARGUMENTS REGARDING COMMERCIAL REASONABLENESS AND FHA INSURANCE ARE NOT PROPER BEFORE THIS COURT.

SFR has not appealed a District Court order regarding the commercial reasonableness of the foreclosure nor any issue relating to the property being allegedly insured by the FHA, because these issues were not reached by the District Court. Thus, SFR did not include arguments on the topics in its opening brief. While it is recognized that the Nevada Supreme Court can uphold a District Court's order on alternative grounds, this does not allow the Court to make findings of fact that belong exclusively to the fact finder.

The Nevada Supreme Court is a court of limited jurisdiction and only has original jurisdiction in certain matters. *Stephens v. First Nat. Bank of Nev*., 64 Nev. 292, 304, 182 P.2d 146, 151 (1947)("[W]rits of mandamus, certiorari, prohibition, quo warranto and habeas corpus; also all writs necessary or proper to the complete exercise of its appellate jurisdiction."). The rest of this Court's jurisdiction is appellate. *Id.* As stated by this Court, "we have no jurisdiction to try cases, either civil or criminal. That jurisdiction is original, and, in cases of the class of the instant case, is conferred only upon the state district courts." *Stephens*, 64 Nev. at 304, 182 P.2d at 151 *citing* Nev. Const., Sec. 4, Art. VI.

Here, any findings on commercial reasonableness would have to have been done by the District Court. The same is true for the factual question of if the property was FHA insured. After hearing arguments on the matter, the Court never made factual findings as to the commercial reasonableness of the sale or if the property was FHA insured. (*See* 4JA_790-796.) If the Bank wished to appeal the final order that did not address commercial reasonableness or the FHA issue, they could have done so. However, they did not. If this Court finds the commercial reasonableness of the foreclosure to be germane to this appeal, a remand is necessary to further develop the factual records. If the Court determines that the facts relating to FHA insurance on this property are germane to the case, it must remand on that issue.

However, the question of law raised by potential FHA insurance does not require remand because as a matter of law, the Bank lacks standing to raise the FHA issue.

V. THE BANK'S COMMERCIAL REASONABLENESS ARGUMENTS FAIL.[6]

A. The Bank Presented No Admissible Evidence to Challenge the Commercial Reasonableness of the Association 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). Subsequently, 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.*, Case No. 67365 (Nev. Mar. 18, 2016) (unpublished Order Vacating and Remanding).[7] To that extent, *Golden* went on to say that even when the

[6] Without waiving its defense that these items were never appealed, SFR in an abundance of caution and because space permits, includes arguments regarding the commercial reasonableness of the foreclosure.

[7] 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-

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*,[8]… , 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.'")(footnote added).

B. <u>The Price Paid at Auction Was Commercially Reasonable.</u>

Fair market value has no applicability to a forced sale situation. *BFP v. Resolution Trust Corporation*, 511 U.S. 531 (1994); *SFR Investments Pool 1, LLC v. Wells Fargo Bank, N.A.*, Case A-13-682296-C, 2015 WL 4501851 (Nev. Dist. Ct. July 21, 2015) ("*SFR v. WF Bank*"). In doing a thorough analysis on the issue, the Hon. Linda Bell noted 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:

> [T]he commercial reasonableness of the HOA foreclosure sale must be assessed at the time the sale occurred. The sale here took place prior to the Nevada Supreme Court issuing *SFR v. U.S. Bank*. Prior to *SFR v. U.S. Bank*, purchasing property at an HOA foreclosure sale was likened to purchasing a lawsuit. Because Nevada's state and federal courts were divided on the issue of whether HOA liens were true priority liens, purchasers risked buying homes subject to a lender's first deed of trust.

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.

[8] 21 Nev. 291, 298, 30 P. 1064 (1892)

> The concerns raised by the unsteady foundation of the law, coupled with the fact that title insurance was nearly impossible to obtain on HOA foreclosed properties, drove the purchase prices of HOA foreclosed homes far lower than "fair market value." The HOA foreclosure sale of the High Dormer property was no different in that sense. Thus, the low price paid may have in fact been the reasonable price considering the questionable nature of the interest purchased.

SFR v. WF Bank, 2015 WL 4501851 at *11.

This is consistent with the holding in *BFP*, where the United States 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*, 503 B.R. 804, 815-818 (9th Cir. B.A.P. 2014); *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.

Here the NRS 116 ensures public notice and contains provisions for competitive bidding. NRS 116 requires that a Notice of Default be mailed to all interested parties and subordinate claims holders.[9] After 90 days of the recording of the Notice of Default, the Notice of Sale must be mailed to all interested parties and subordinate claims holders.[10] Additionally, NRS 116 requires that the Notice of Sale must be posted in a public place as well as be published in a newspaper of general circulation for three consecutive weeks, at least once a week.[11] Additionally, NRS 116 requires that the sale takes place in the County in which the property is situated.[12]As a result, all subordinate interest holders, as well as the public as a whole, were made aware of an NRS 116 auction. These noticing and foreclosure provisions ensured the auction was publically noticed and would create competitive bidding.

The above-cited provisions of NRS 116 make the Bank's citation to *Runkle*, meritless. (*See* RAB p. 12 *quoting Runkle v. Gaylord,* 1 Nev. 123, 129 (1865).) Unlike

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[9] NRS 116.31163; NRS 116.31168; *see also G & P Investment Enterprises, LLC v. Mortgage Electronic Registration Systems, Inc.*, Case No. 68842 (Nev. Mar. 17, 2017)(stating notice is required to be sent to the deed of trust beneficiary.).
[10] NRS 116.311635(1)(b)(1); NRS 116.311635(1)(b)(3); NRS 116.31168(1); NRS 107.090(3)-(4).
[11] NRS 116.311635(c)
[12] NRS 116.31164

Runkle, nothing in the facts indicates that the Association went off and sold the property to the first person willing to pay the lien amount as was done by the seller in *Runkle*. Instead, the Association did everything required of it under the law to foreclose on its lien including meeting all the requirements of NRS 116. The foreclosure was properly noticed including the recording of all applicable notices.[13] Additionally, the auction was publically held,[14] and SFR placed the winning bid of $7,000.00 at auction.[15]

Also, no unfairness was had by the Bank due to the fact it did not receive the *second* set of notices prior to the Association's foreclosure. The Bank admits to receiving notice prior to the foreclosure sale. Further, it was the Bank that failed to even contact the Association despite being aware of a validly noticed foreclosure sale. "Where the complaining party has access to all the facts surrounding the questioned transaction and merely makes a mistake as to the legal consequences of his act, equity should normally not interfere, especially where the rights of third parties might be prejudiced thereby," *Shadow Wood,* 132 Nev. ____, 366 P.3d at 1116 *quoting Nussbaumer v. Superior Court in & for Yuma Cty.,* 107 Ariz. 504, 489 P.2d 843, 846 (1971).

While the Bank may complain about the total amount received during the

[13] 2JA_402, 457, 3JA_509.
[14] 3JA_522.
[15] *Id*.

auction, the market conditions that existed, largely created by the Bank, significantly lowered the value of the property. As stated in *BFP* "the only legitimate evidence of the property's value at the time it is sold is the foreclosure-sale price itself." *BFP*, 511 U.S. at 549. But given that this was a public auction, if the Bank disagreed with the collective public's valuation of the property it should have bought the property at the auction itself. However, it cannot be contested that the amount paid by SFR was commercially reasonable given that the Association foreclosure complied with all requirements of NRS 116 and that this auction was a public auction open to all entities, including the Bank.

VI. THE BANK DOES NOT HAVE STANDING TO RAISE THE SUPREMACY CLAUSE REGARDING FHA INSURANCE.[16]

The Bank's FHA insurance arguments preclude affirmance on alternative grounds. First, assuming *arguendo* that the Bank's loan was FHA insured, the Bank lacks standing to litigate on behalf of HUD. But even if it did, which it does not, whether the loan was actually insured is a question of fact not reached by the district court.

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[16] Without waiving its defense that these items were never appealed, SFR in an abundance of caution and because space permits, includes its arguments regarding FHA insurance.

A. The Bank Cannot Enforce the National Housing Act.

Whether the Bank has the standing to make an argument regarding FHA insured properties is a legal question that can be properly addressed by this Court. For the following reasons, the Bank lacks standing to make a Supremacy Clause argument regarding FHA insured properties.

The United States Supreme Court has already determined that private litigants cannot use the Supremacy Clause to displace state law. *Armstrong v. Exceptional Child Care Ctr., Inc.,* 575 U.S. ___, ___, 135 S.Ct. 1378, 1383-85 (2015). In Armstrong, providers of habilitation services claimed that the Supremacy Clause authorized them to sue Idaho officials for violating the Medicaid Act. The United States Supreme Court rejected the providers' invocation of the Supremacy Clause, determining that the "Supremacy Clause is not the 'source of any federal rights' [and] certainly does not create a cause of action." *Id.* at 1383. Here, like the health care providers in *Armstrong,* the Bank is a private litigant and therefore cannot assert a cause of action under the Supremacy Clause.

What the Bank forgets is that "Article I vests Congress with broad discretion over the manner of implementing its enumerated powers, giving it authority to 'make all Laws which shall be necessary and proper for carrying [them] into Execution.'" *Armstrong,* 135 S.Ct. at 1383, *citing* U.S. Const. Art. I, § 8. The *Armstrong* Court went on to say "[i]t is unlikely that the Constitution gave Congress such broad

discretion with regard to the enactment of laws, while simultaneously limiting Congress's power over the manner of their implementation, making it impossible to leave the enforcement of federal law to federal actors." *Armstrong,* 135 S.Ct. at 1383-84. "If the Supremacy Clause includes a private right of action, *then the Constitution requires Congress to permit the enforcement of its laws by private actors*, significantly curtailing its ability to guide the implementation of federal law. *Id.*., 135 S. Ct. at 1384 (emphasis added)." Thus, if possible at all, a private actor would need the express intent of Congress to enforce federal law as anything less would strip away the right from Congress to implement its own laws. *See Id.*

The National Housing Act, ("NHA") governs HUD's insurance and potential ownership of mortgages. 12 U.S.C. §§ 1708, 1709, 1710. Congress expressly authorized HUD's Secretary to enforce the NHA. 12 U.S.C. §§ 1701c(a), 1702, 1708(a)(1), 1709(r), 1710(g), 1710(i); 42 U.S.C. § 3535(i)(1). For example, "[t]he powers conferred by [the NHA] shall be exercised by the Secretary[.]" 12 U.S.C. § 1702. In "carrying out the provisions of" the NHA, the Secretary is "[a]uthorized, in his official capacity, to sue and be sued[.]" *Id.* The Secretary is also "[a]uthorized to . . . commence any action to protect or enforce any right conferred upon him[.]" 42 U.S.C. § 3535(i)(1). Put simply, the NHA conveys Congress's intent that HUD's Secretary ─ rather than private litigants such as the Bank ─ will enforce the NHA and protect HUD's interests.

The Ninth Circuit and other courts in the United States District Court, District of Nevada agree that the NHA lacks a private cause of action. *City of Rohnert Park v. Harris*, 601 F.2d 1040, 1045 (9th Cir. 1979); *Stabley v. Bank of Am., N.A.*, No. 2:11–cv–00635–GMN–CWH, 2014 WL 3645327, at *4 (D.Nev. July 22, 2014); *Weatherford v. Nevada Rural Hous. Auth.*, 946 F. Supp. 2d 1101, 1111 (D. Nev. 2013). Here, the Bank alleges that HUD has an "interest" in the first deed of trust, and the Bank seeks to protect this "interest" from extinguishment. However, HUD "is the best advocate of its own rights." *Freedom Mortg. Corp. v. Las Vegas Dev. Grp., LLC*, 106 F. Supp. 3d 1174, 1180 (D.Nev. 2015). HUD is not a party to this action. The Bank lacks standing to enforce the NHA.

B. The Bank's Reliance on *Washington & Sandhill* is Misplaced.

The court in *Washington & Sandhill Homeowners Ass'n, v. Bank of Am., N.A.*,[17] **did not** determine that HUD insurance was a federal property interest. Id. at *6. The court expressly never reached the issue. *Id.* Furthermore, *Washington & Sandhill* relied heavily on Ninth Circuit cases distinguishable from the present case: *United States v. View Crest Garden Apartments, Inc.*, 268 F.2d 380 (9th Cir. 1959) and *United States v. Stadium Apartments, Inc.*, 425 F.2d 358 (9th Cir. 1970). In each of those cases, borrowers defaulted on HUD-insured mortgages, which were

[17] No. 2:13-cv-01845-GMN-GWF, 2014 WL 4798565 (D.Nev. Sept. 25, 2014).

assigned to HUD **before** foreclosure proceedings began. *Stadium*, 425 F.2d at 360-61; *View Crest*, 268 F.2d at 382. The Ninth Circuit opted to apply judge-made federal law because those cases involved: (i) federal question jurisdiction, (ii) HUD as a party, (iii) mortgages assigned to HUD, (iv) borrowers trying to use the NHA's definition of "mortgage" to impose state-created remedies on HUD, (v) federal law applied because it was the source of law for "relations between" HUD and "parties to the mortgage," and (vi) state law could not supply a "rule of decision" because it would erode HUD's post-assignment remedies, diminish the NHA's "purpose," and impact HUD's insurance fund. *Stadium*, 425 F.2d at 358-361; *View Crest*, 268 F.2d at 381-383.

Here, HUD is not a party, and the Bank has not shown that it assigned the deed of trust to HUD, differentiating the instant matter from *View Crest* and *Stadium Apartments*. Furthermore, the U.S. Supreme Court has curtailed, if not rejected, *View Crest* and *Stadium Apartments'* robust rule of decision analyses, because "rule of decision" determinations—instances when judges engage in common law rule-making—are "few and restricted," limited to "conflicts" between state and federal policy. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87-88 (1994). Here, this lawsuit involves private litigants, not the government. The government interest here is too remote or speculative to require a "uniform" judge-made federal rule. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 642 (1981); *Miree v. DeKalb Cnty.*,

433 U.S. 25, 31 (1977); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Parnell,* 352 U.S. 29, 33 (1956); *Pankow Constr. Co. v. Advance Mortg. Corp.,* 618 F.2d 611, 613-14 (9th Cir. 1980). Ultimately, the Bank's reliance on *Washington & Sandhill* is misplaced.

C. Questions of Fact Exists as to if the Loan is FHA Insured.

To the extent this Court opts to not reach the legal issue—or determines the standing issue in the Bank's favor, which it should not—questions of fact remain as to whether the property was actually FHA insured at the time of the association foreclosure sale. That question is a factual determinations that must be left to the trial court. *Stephens*, 64 Nev. at 304, 182 P.2d at 15. The District Court never made a determination that the subject loan was FHA insured or the consequences of such insurance in regards to the foreclosure. *See* (4JA_780-785). A cursory scan of the record shows that a factual dispute exists as to whether this loan was insured at all. The only evidence the Bank has introduced to prove FHA actually insured the loan, or that HUD had an interest at the time of the Association foreclosure sale, is an FHA Case Number on the Deed of Trust.[18] However, the fact that the Deed of Trust has an FHA case number does not prove that it was actually insured as ¶ 9(e) of the Deed of Trust contemplates possible rejection. *Id.* Thus, even if this argument is

[18] 1JA_74-85.

germane to the appeal, or the case as a whole, this Court must remand for a factual determination as to if this loan was insured at all.

CONCLUSION

Based on the foregoing, this Court should reverse the District Court's Order Granting the Bank's Motion for Summary Judgment and Remand back to the District Court to Grant Judgment in Favor of SFR as the Association foreclosed on a valid superpriority lien.

DATED this 26th day of April 2017.

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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)(A)(ii) because, excluding the pages of the brief exempted by NRAP 32(a)(7)(C), it is 26 pages long and contains 5999 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.

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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 26th day of April, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 26th day of April 2017. Electronic service of the foregoing **APPELLANT'S REPLY BRIEF**, filed concurrently herewith, shall be made in accordance with the Master Service List as follows:

Docket Number and Case Title: 71325 - SFR INV.'S POOL 1, LLC VS. FIRST HORIZON HOME LOANS
Case Category Civil Appeal
Information current as of: Apr 26 2017 10:44 a.m.

Electronic notification will be sent to the following:

Jacqueline Gilbert
Melanie Morgan
Brett Coombs
Christine Parvan

Dated this 26th day of April 2017.

/s/Jacqueline A. Gilbert
An employee of KIM GILBERT EBRON