IN THE SUPREME COURT OF NEVADA

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, a national association, Appellant, v. SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company, Respondent.	Supreme Court No. 71822

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable JIM CROCKETT, District Judge
District Court Case No. A-13-692202-C

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

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

Appellant JPMorgan Chase Bank, National Association is wholly owned by JPMorgan Chase & Co. No publicly held company owns 10% or more of JPMorgan Chase & Co.'s stock.

The law firms TIFFANY & BOSCO, P.A. and BALLARD SPAHR LLP appeared on appellant's behalf in the district court. BALLARD SPAHR LLP is expected to appear on appellant's behalf in this Court.

Dated: April 19, 2017.

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JURISDICTIONAL STATEMENT

The Court has jurisdiction over this appeal from a final judgment under NRAP 3A(b)(1). Chase's operative complaint includes claims for Declaratory Relief, Quiet Title, and Unjust Enrichment against defendant SFR Investments Pool 1, LLC ("SFR"). Appellant's Appendix Volume 1 ("1AA") 049-051. SFR filed an answer, counterclaim, and cross-claim with claims against Chase and Kyleen T. Bell for Declaratory Relief/Quiet Title and Preliminary and Permanent Injunction. 1AA 011-021. SFR stipulated to dismiss its claims against Ms. Bell. The district court later entered summary judgment for SFR on the claims between SFR and Chase. 3AA 351-360. Notice of entry of the summary judgment was served on October 26, 2016. 3AA 361-372. Chase filed a timely notice of appeal on November 22, 2016. 3AA 373-375.

ROUTING STATEMENT

This appeal is presumptively retained by the Nevada Supreme Court because it raises questions of first impression involving the United States Constitution, the Nevada Constitution, and the common law. See NRAP 17(a)(13). It also raises questions of statewide public importance. See NRAP 17(a)(14).

STATEMENT OF THE ISSUES

1. Did the district court err by holding, at the summary judgment stage, that the HOA foreclosure sale extinguished the deed of trust owned by the Federal National Mortgage Association ("Fannie Mae") and serviced by Chase?

    a. May Chase assert 12 U.S.C. § 4617(j)(3) (the "Federal Foreclosure Bar") as the rule of decision governing claims of quiet title on the property securing Fannie Mae's mortgage loan?

    b. Did borrower Kyleen Bell's payments to the HOA satisfy the portion of the HOA's lien, if any, that was entitled to a super-priority over the deed of trust?

    c. Does the holding of SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 334 P.3d 408 (Nev. 2014), apply retroactively to foreclosure sales conducted before September 18, 2014?

    d. Is there a genuine issue of fact as to the validity of the sale under Shadow Wood Homeowners Ass'n v. N.Y. Cmty. Bancorp. Inc., 366 P.3d 1105 (Nev. 2016)?

    e. Do the provisions of NRS Chapter 116 governing notice to purported junior lienholders satisfy the requirements of due process?

2. Alternatively, did the district court err by entering summary judgment for SFR on Chase's alternative claim for unjust enrichment?

STATEMENT OF THE CASE

This is a quiet title action arising from a foreclosure sale under NRS Chapter 116. In 2002, Kyleen Bell obtained a $68,000 mortgage loan from Republic Mortgage LLC ("Republic"). The loan was secured by a deed of trust encumbering property at 2824 Begonia Court, Henderson, Nevada 89074. The original beneficiary under the deed of trust was Mortgage Electronic Registration Systems, Inc., solely as nominee for Republic and its successors and assigns ("MERS"). The Federal National Mortgage Association ("Fannie Mae") purchased the loan in 2003 and continues to own it today. In 2008, Fannie Mae was placed under the conservatorship of the Federal Housing Finance Agency ("FHFA") pursuant to the Housing and Economic Recovery Act of 2008. In 2012, MERS assigned the Deed of Trust to Chase, which was servicing the loan on behalf of Fannie Mae. Chase continues servicing the loan today.

In 2011, Eastbridge Gardens Condominiums (the "HOA") recorded notice of a delinquent assessment lien against the property. Ms. Bell then made a total of $1,838.12 in payments against the delinquent assessments. The HOA ultimately foreclosed under its lien in 2013. SFR purportedly bought the property with a bid of $10,100; only one other person submitted a bid. At no time did FHFA consent to Fannie Mae's interest being extinguished or foreclosed. At the time of the sale, the property's fair market value was $70,000 and the HOA's governing declaration

stated that the enforcement of the HOA's lien would not affect a first security interest.

Chase brought a quiet title action seeking a declaration that the Deed of Trust survived the foreclosure sale. SFR denied Chase's allegation and filed a counterclaim to establish the Deed of Trust was extinguished. After discovery, SFR moved for summary judgment on all claims between SFR and Chase. The district court granted SFR's motion, and this appeal followed.

STATEMENT OF FACTS

On November 14, 2002, Kyleen Bell executed a $68,000 Note in favor of Republic Mortgage LLC ("Republic"). 2AA 099-102. The Note was secured by a Deed of Trust encumbering a residential property at 2824 Begonia Court, Henderson, Nevada 89074 (the "Property"). 2AA 104-122. The Note and Deed of Trust are together referred to as the "Loan." The original beneficiary of the Deed of Trust was Mortgage Electronic Registration Systems, Inc., solely as nominee for Republic and its successors and assigns ("MERS"). 2AA 105.

The Federal National Mortgage Association ("Fannie Mae") purchased the Loan on or about February 1, 2003. 2AA 125 ¶ 5; 129. Fannie Mae has never sold the Loan to another entity, and it continued owning the Loan at the time of the HOA sale. 2AA 095-096 ¶ 4.c; 126 ¶¶ 8-9; 132-140. Chase began servicing the Loan on behalf of Fannie Mae on or about February 14, 2003 and has continued to do so through the present. 2 AA 096 ¶ 4.d; 126 ¶ 10; 132-140; 294. On September 6, 2008, pursuant to the Housing and Economic Recovery Act of 2008, the director of the Federal Housing Finance Agency ("FHFA") placed Fannie Mae into conservatorship. See In Re Conservatorship of: Federal Home Loan Mortgage Corporation, Notice Regarding Determination and Appointment of Conservator

(Sep. 18, 2008).[1] On October 25, 2012, MERS assigned the Deed of Trust to Chase. 2AA 145-146.

The Property is located in and governed by the Eastbridge Gardens Condominiums (the "HOA"). Ms. Bell failed to pay assessments to the HOA beginning in November 2010. 2AA 225. At the time, the monthly assessment for the Property was $180. 2AA 220. On April 1, 2011, Nevada Association Services, Inc. ("NAS") recorded a Notice of Delinquent Assessment Lien ("Notice of Lien") on behalf of the HOA. 2AA 184. Ms. Bell subsequently made three payments against the delinquent assessments: a $1,053.94 payment on May 5, 2011 and two $392.09 payments on June 15, 2011 and July 1, 2011. 2AA 220. On September 21, 2011, NAS recorded a Notice of Default and Election to Sell under Homeowners Association Lien ("Notice of Default"). 2AA 224-225. On May 7, 2013, NAS recorded a Notice of Foreclosure Sale ("Notice of Sale"). 2AA 227-228. Each foreclosure notice stated that the HOA had a lien against the Property pursuant to its declaration of covenants, conditions, and restrictions recorded February 5, 2003 (the "Declaration"). 2AA 184, 225, 228.

On May 31, 2013, NAS conducted a foreclosure sale of the Property (the "Sale"). 2AA 230. SFR, one of two bidders, purportedly bought the Property for

[1] Available at: http://www.fhfa.gov/SupervisionRegulation/LegalDocuments/Documents/Litigation/NoticeregardingconservatorFHLMC_508.pdf

$10,100. Id. At no point did FHFA consent to the Sale extinguishing or foreclosing Fannie Mae's interest in the Property. 2AA 254. At the time of the Sale, the Property's fair market value was $70,000. 2AA 261. Further, the HOA's recorded Declaration stated the foreclosure of its lien would not affect a first security interest:

> The lien assessments provided for herein shall be subordinate to the lien of any first mortgage now or hereafter placed upon the property subject to assessment…
>
> [I]n the event that any one or more of these covenants shall be violated, the Association or any Owner of a Condominium in the Project, may commence a legal action in any court of competent jurisdiction to enjoin or abate said violation and/or to recover damages; provided, however, that any such violation shall not defeat or render invalid the lien of any mortgage or deed of trust made in good faith and for value as to said Condominium…

2AA 206 § 10.1(b); 208 § 10.2.

After the Sale, Chase expended funds to maintain the Property by paying taxes and insurance. 2AA 233-252.

On November 26, 2013, Chase filed this action seeking a declaration that the Deed of Trust survived the Sale. 1AA 001-007. Chase's operative complaint against SFR included claims for Declaratory Relief and Quiet Title. 1AA 049-050. It also included an alternative claim for Unjust Enrichment: if the district court held the Deed of Trust was extinguished, Chase would seek to recover from SFR

the amounts it paid to maintain the Property. 1AA 050-051. SFR asserted that the Sale extinguished the Deed of Trust and filed counterclaims for Declaratory Relief/Quiet Title and Preliminary Injunction. 1AA 011-021. After discovery, SFR moved for summary judgment on all claims between SFR and Chase. 1AA 064-088. Chase filed an opposition, 2AA 295-333, and SFR filed a reply, 3AA 334-350. The district court granted SFR's motion, 3AA 351-360, and this appeal followed.

SUMMARY OF ARGUMENT

For five reasons, the district court erred when it held at the summary judgment stage that the Sale extinguished the Deed of Trust.

First, the Federal Foreclosure Bar prohibited the Sale from extinguishing Fannie Mae's Deed of Trust without FHFA's consent. As Fannie Mae's servicer and record beneficiary of the Deed of Trust, Chase has standing to raise the Federal Foreclosure Bar as a rule of decision governing the parties' quiet title claims.

Second, Ms. Bell's three payments satisfied the portion of the HOA lien (if any) that was entitled to a super-priority. The remaining portion of the lien, under which the HOA foreclosed, was junior to the deed of trust.

Third, the holding of SFR Investments does not apply retroactively to the Sale in this case. All three factors outlined in Breithaupt v. USAA Prop. & Cas. Ins. Co., 110 Nev. 31 (1994), favor limiting SFR Investments to prospective effect.

Fourth, the Sale is void on equitable grounds under Shadow Wood. Under the Restatement, which Shadow Wood followed, the grossly inadequate price invalidates the Sale even if the Sale was otherwise proper. At the very least, there is a genuine dispute as to the Sale's validity given the additional defects in the Sale.

Fifth, the notice provisions of NRS Chapter 116 violate the Due Process Clauses of the Fourteenth Amendment and the Nevada Constitution. The Court

should overturn Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg., 388 P.3d 970 (Nev. 2017), which held that a non-judicial HOA sale does not implicate due process. The Court should further hold that Chapter 116 violates due process by requiring purported junior lienholders to opt in for notice.

For any one of these reasons, the Court should reverse the district court's holding that the Sale extinguished the Deed of Trust. However, if the Court affirms that holding, it should at least permit Chase's unjust enrichment claim to proceed to trial.

STANDARD OF REVIEW

A district court's order granting summary judgment is reviewed de novo. See Physicians Ins. Co. of Wis., Inc. v. Williams, 128 Nev. 324, 326 (2012).

ARGUMENT

I. The district court erred by holding at the summary judgment stage that the Sale extinguished the Deed of Trust.

A. Chase has standing to invoke the Federal Foreclosure Bar.

Congress enacted the Housing and Economic Recovery Act ("HERA"), Pub. L. No. 110-289, 122 Stat. 2654 (codified as 12 U.S.C. § 4511 et seq.), in response to the financial crisis of 2008. HERA created FHFA to regulate Fannie Mae and the Federal Home Loan Mortgage Corporation ("Freddie Mac," and together with Fannie Mae, the "Enterprises"). HERA provides FHFA with powers and protections that Congress deemed necessary to preserve the nation's housing-finance market. See City of Spokane v. Fannie Mae, 775 F.3d 1113, 1114 (9th Cir. 2014); Cty. of Sonoma v. FHFA, 710 F.3d 987, 989-90 (9th Cir. 2013). One such statutory protection provides that while an Enterprise is under FHFA conservatorship, none of its property "shall be subject to…foreclosure…without the consent of [FHFA]." 12 U.S.C. § 4617(j)(3) (the "Federal Foreclosure Bar").

The Federal Foreclosure Bar expressly circumscribes the effect of state-law foreclosures—preserving conservatorship interests that state law would otherwise extinguish. See NRS 116.3116(2) ("State Foreclosure Statute"). Indeed, nineteen decisions by six federal judges in the District of Nevada,[2] and ten decisions in

[2] See Skylights v. Byron, 112 F. Supp. 3d 1145 (D. Nev. 2015); Elmer v. Freddie Mac, No. 2:14-cv-01999-GMN-NJK, 2015 WL 4393051 (D. Nev. July 14, 2015); (continued...)

Nevada state courts,[3] have all held that an HOA foreclosure sale cannot extinguish the property interests of Fannie Mae or Freddie Mac while they are in conservatorship.

(...continued)

Premier One Holdings, Inc. v. Fannie Mae, No. 2:14-cv-02128-GMN-NJK, 2015 WL 4276169 (D. Nev. July 14, 2015); Williston Inv. Grp., LLC v. JP Morgan Chase Bank, NA, No. 2:14-cv-02038-GMN-PAL, 2015 WL 4276144 (D. Nev. July 14, 2015); My Glob. Vill., LLC v. Fannie Mae, No. 2:15-cv-00211-RCJ-NJK, 2015 WL 4523501 (D. Nev. July 27, 2015); 1597 Ashfield Valley Trust v. Fannie Mae, No. 2:14-cv-02123-JCM, 2015 WL 4581220 (D. Nev. July 28, 2015); Saticoy Bay, LLC Series 1702 Empire Mine v. Fannie Mae, No. 2:14-CV-01975-KJD-NJK, 2015 WL 5709484 (D. Nev. Sept. 29, 2015); Berezovsky v. Moniz, No. 2:15-cv-01186-GMN-GWF, 2015 WL 8780198 (D. Nev. Dec. 15, 2015); Opportunity Homes, LLC v. Freddie Mac, 169 F. Supp. 3d 1073 (D. Nev. 2016); FHFA v. SFR Investments Pool 1, LLC, No. 2:15-cv-1338-GMN-CWH, 2016 WL 2350121 (D. Nev. May 2, 2016); G & P Inv. Enters., LLC v. Wells Fargo Bank, N.A., No. 2:15-cv-0907-JCM-NJK, 2016 WL 4370055 (D. Nev. Aug. 4, 2016); Saticoy Bay LLC, Series 2714 Snapdragon v. Flagstar Bank, FSB, No. 2:13-CV-1589-JCM-VCF, 2016 WL 1064463 (D. Nev. Mar. 17, 2016); Koronik v. Nationstar Mortg. LLC, No. 2:13-CV-2060-GMN-GWF, 2016 WL 7493961 (D. Nev. Dec. 30, 2016); Nevada Sand Castles, LLC v. Green Tree Servicing LLC, No. 2:15-cv-0588-GMN-VCF, 2017 WL 701361 (D. Nev. Feb. 22, 2017); Alessi & Koenig, LLC v. Dolan, No. 2:15-cv-00805-JCM-CWH, 2017 WL 773872 (D. Nev. Feb. 27, 2017); FHFA v. Nevada New Builds, LLC, No. 2:16-cv-1188-GMN-CWH, 2017 WL 888480 (D. Nev. Mar. 6, 2017); LN Mgmt. LLC v. Pfeiffer, No. 2:13-cv-1934-JCM-PAL, 2017 WL 955184 (D. Nev. Mar. 9, 2017); Order, Vita Bella Homeowners Ass'n v. Fannie Mae, No. 2:15-cv-0515-JCM-VCF (D. Nev. Mar. 9, 2017) (ECF No. 54); JP Morgan Chase Bank, N.A. v. Las Vegas Dev't Grp., LLC, No. 2:15-cv-1701-JCM-VCF, 2017 WL 937722 (D. Nev. Mar. 9, 2017).

[3] See Saticoy Bay LLC Series 9641 Christine View vs. Fannie Mae, No. A-13-690924-C (Nev. Dist. Ct. Dec. 8, 2015); 5312 La Quinta Hills LLC, vs. BAC Home Loans Serv'g LP, No. A-13-693427-C (Nev. Dist. Ct. Jan. 6, 2016); NV West Servicing LLC v. Bank of America, N.A., No. A-14-705996-C (Nev. Dist.

(continued...)

The district court's order did not address the preemptive effect of the Federal Foreclosure Bar; the district court also explicitly stated that it had not "ma[d]e a determination as to Fannie Mae's interest in the property." 3A 358 ¶ O. Instead, the district court's ruling was based solely on its holding, made without explanation, that Chase lacks standing to assert the Federal Foreclosure Bar. See id.

This holding is incorrect for three reasons. First, there is no prohibition against private parties invoking the protections of the Federal Foreclosure Bar as a rule of decision. Second, under the Restatement principles adopted by this Court (and ignored by the district court), Chase is fully entitled to assert defenses on Fannie Mae's behalf to protect Fannie Mae's interests in the Loan. Third, Chase has its own interest—albeit one derivative of and dependent upon Fannie Mae's interest—at stake in this litigation.

(...continued)
Ct. Jan. 25, 2016); Fort Apache Homes, Inc. vs. JPMorgan Chase Bank, N.A., No. A-13-691166-C (Nev. Dist. Ct. Feb. 5, 2016); RLP-Buckwood Court, LLC, v. GMAC Mortg., LLC, No. A-13-686438-C, (Nev. Dist. Ct. May 24, 2016); A&I LLC Series 3 v. Lowry, No. A-13-691529-C (Nev. Dist. Ct. May 31, 2016); Gavirati v. Washington Mutual Bank, FA, No. A-13-690263-C (Nev. Dist. Ct. Sept. 1, 2016); Nevada New Builds, LLC v. Nationstar Mortg. LLC, No. A-14-704924-C (Nev. Dist. Ct. Sept. 27, 2016); SFR Invs. Pool 1, LLC v. Green Tree Servicing, LLC, No. A-13-680704 (Nev. Dist. Ct. Nov. 17, 2016); Honeybadgers Holdings LLC v. Karimi, No. A-15-718824-C (Nev. Dist. Ct. Mar. 22, 2017).

1. Like any private party, Chase may invoke the preemptive effect of federal law to provide a rule of decision.

Chase invoked the Federal Foreclosure Bar as the rule of decision for resolving a quiet-title claim unquestionably within the district court's jurisdiction, arguing that, under the Supremacy Clause, the federal statute superseded any contrary state law. 2AA 305.

While the district court cited no authority and offered no explanation for its holding that Chase lacks standing to invoke the Federal Foreclosure Bar, SFR's briefing below claimed that "private parties cannot use the Supremacy Clause to displace state law[.]" 3AA 340. To the extent that the district court based its holding on SFR's characterization of Armstrong v. Exceptional Child Care Ctr., Inc., 135 S. Ct. 1378 (2015), that conclusion was in error. Armstrong confirms rather than undermines Chase's ability to assert a defense grounded in the preemptive effect of federal law.

The Armstrong Court held that while the Supremacy Clause does not establish an independent cause of action, it does "create[] a rule of decision: Courts 'shall' regard the 'Constitution,' and all laws 'made in Pursuance thereof,' as 'the supreme Law of the Land.' They must not give effect to state laws that conflict with federal laws." 135 S. Ct. at 1383 (quoting U.S. Const. Art. IV cl. 2). Accordingly, "once a case or controversy properly comes before a court, judges are bound by federal law." Id. at 1384.

Indeed, Armstrong favorably cites Mutual Pharmaceutical Co. v. Bartlett, 133 S. Ct. 2466 (2013), a tort case in which a private defendant successfully argued that federal law preempted state doctrine, thereby defeating the private plaintiff's claim. See Armstrong, 135 S. Ct. at 1384. If a private litigant cannot invoke the Supremacy Clause to displace state law that would otherwise govern a claim within the court's jurisdiction—a position that would effectively negate the Supremacy Clause[4]—the Armstrong Court would have had to distinguish, limit, or overturn Bartlett, not cite it approvingly.

To the same effect, this Court recently reaffirmed that private parties can invoke federal statutes that prescribe the interests of federal financial-institution receivers or conservators in particular property. In Munoz v. Branch Banking & Trust Co., 348 P.3d 689 (Nev. 2015), this Court held that a Nevada statute was

[4] The Supremacy Clause itself expressly provides that state judges must recognize the binding effect of federal law:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI Cl. 2 (emphasis added). That text cannot be squared with an interpretation that would preclude parties before a state court from ever invoking the clause.

preempted because it "frustrate[d] the purpose" of federal law, notwithstanding the fact that the party asserting preemption was a private bank. 348 P.3d at 691-92. Munoz makes clear that Nevada law allows a private party to assert a defense of federal preemption.

Moreover, federal courts in Nevada have reached the same conclusion. See, e.g., Thunder Props., Inc. v. Wood, No. 3:14-cv-00068, 2015 WL 1926768, at *4 (D. Nev. Apr. 28, 2015) (citing Armstrong) ("[W]hether N.R.S. 116.3116 as applied to federally insured mortgages conflicts with [the Supremacy Clause] is a question of law that may be raised by any party, and not just a government agency."). There is no case law "limiting federal preemption arguments to government parties." Saticoy Bay LLC v. SRMOF II 2012-1 Trust, No. 2:13-CV-1199, 2015 WL 1990076, at *4 (D. Nev. Apr. 30, 2015). Indeed, private parties have several times asserted claims to protect their property interests by invoking the operation of the property-protection statute, similar to the Federal Foreclosure Bar, that applies to FDIC receiverships. See, e.g., Grimsley v. Bd. of Cty. Comm'rs of Atoka Cty., Okla., 9 F. App'x 970, 973 n.3 (10th Cir. 2001); Beal Bank, SSB v. Nassau Cty., 973 F. Supp. 130, 133 (E.D.N.Y. 1997); Cambridge Capital Corp. v. Halcon Enterps., Inc., 842 F. Supp. 499 (S.D. Fla. 1993).

Chase does not seek to bring a cause of action under the Supremacy Clause in this case; rather, Chase and SFR have each asserted state law quiet-title claims

against the other—claims that the district court had jurisdiction to adjudicate. The Federal Foreclosure Bar and Supremacy Clause are therefore not invoked here as "cause[s] of action," but rather serve as the "rule of decision" which the district court should have followed in resolving these quiet-title claims so as to "not give effect to state laws that conflict with federal laws." Armstrong, 135 S. Ct. at 1383.

2. Chase has standing to protect Fannie Mae's interest.

The district court did not address Chase's argument that this Court's ruling in In re Montierth, 354 P.3d 648 (Nev. 2015), recognized the role that entities acting on a lender's behalf, like servicers, play in the mortgage market, supporting their standing to bring claims on behalf of loan owners. Chase, as Fannie Mae's contractually authorized servicer, has standing to represent and defend Fannie Mae's interests in this case. Montierth confirms that Nevada has adopted the Restatement, including the section specifically recognizing that a record beneficiary of a deed of trust (here, Chase) may enforce the deed of trust when it is contractually or otherwise authorized to do so by the note's owner (here, Fannie Mae). See 354 P.3d at 651 (citing Restatement § 5.4 cmt. c). *A fortiori*, a contractually authorized servicer has standing to litigate prerequisite issues related to the enforceability of the Deed of Trust. See, e.g., Wood v. Germann, 331 P.3d 859, 862 (Nev. 2014) (adopting servicer's argument that pooling and servicing agreement did not impair servicer's ability to enforce deed of trust).

Similarly, the United States Supreme Court has recognized that Article III standing may be conferred by contract or assignment. See, e.g., Sprint Comm'ns Co., L.P. v. APCC Servs., Inc., 554 U.S. 269, 271-72 (2008) (third-party assignee has standing to litigate on behalf of its assignor, even if the assignee has no interest in litigation aside from fee it is paid for its service). The Restatement counsels that "[c]ourts should be vigorous in seeking to find" an agency or contractual relationship between the owner of a mortgage and one purporting to enforce it "since the result is otherwise likely to be a windfall for the mortgagor and the frustration of [the mortgage owner]'s expectation of security." Restatement § 5.4 cmt. e.

Here, Chase is in a contractual relationship with Fannie Mae to service the Loan, which Fannie Mae purchased on or about February 1, 2003. 2AA 095-096 ¶ 4.c-d; 125-126 ¶¶ 5, 8-10; 294. Fannie Mae's Single-Family Servicing Guide ("Guide") serves as a central document governing the contractual relationship between Fannie Mae and its servicers nationwide, including Chase. 2AA 150-157 (Guide at A1-1-03).[5] Pursuant to the terms of the Guide, the relationship between

[5] The Guide is also publicly available on Fannie Mae's website. An interactive version is available at https://www.fanniemae.com/content/guide/servicing/index.html, and archived prior versions of the Guide are available at that URL by clicking "Show All" in the left hand column of that site. While some sections of the Guide have been amended over the course of Fannie Mae's ownership of the Loan, none of these amendments have materially changed the relevant sections. A (continued...)

Chase and Fannie Mae satisfies the requirements of Montierth: Chase was authorized to foreclose on Fannie Mae's behalf and Fannie Mae could at any point "compel an assignment of the deed of trust." Montierth, 354 P.3d at 651.

For example, the Guide provides that:

> The servicer ordinarily appears in the land records as the mortgagee to facilitate performance of the servicer's contractual responsibilities, including (but not limited to) the receipt of legal notices that may impact Fannie Mae's lien, such as notices of foreclosure, tax, and other liens. However, Fannie Mae may take any and all action with respect to the mortgage loan it deems necessary to protect its…ownership of the mortgage loan, including recordation of a mortgage assignment, or its legal equivalent, from the servicer to Fannie Mae or its designee. In the event that Fannie Mae determines it necessary to record such an instrument, the servicer must assist Fannie Mae by
>
> - preparing and recording any required documentation, such as mortgage assignments, powers of attorney, or affidavits; and
>
> - providing recordation information for the affected mortgage loans.

2AA 158 (emphasis added); see also 2AA 170-182 (Guide at F-1-14). The Guide also provides that:

(...continued)
static, PDF copy of the most recent version of the Guide is available at https://www.fanniemae.com/content/guide/svc021517.pdf. The Court may take judicial notice of the Guide. See, e.g., Charest v. Fannie Mae, 9 F. Supp. 3d 114, 118 & n.1 (D. Mass. 2014); Cirino v. Bank of Am., N.A., No. CV 13-8829, 2014 WL 9894432, at *7 (C.D. Cal. Oct. 1, 2014).

> In order to ensure that a servicer is able to perform the services and duties incident to the servicing of the mortgage loan, Fannie Mae temporarily gives the servicer possession of the mortgage note whenever the servicer, acting in its own name, represents the interests of Fannie Mae in foreclosure actions, bankruptcy cases, probate proceedings, or other legal proceedings.
>
> This temporary transfer of possession occurs automatically and immediately upon the commencement of the servicer's representation, in its name, of Fannie Mae's interests in the foreclosure, bankruptcy, probate, or other legal proceeding.

2AA 161 (emphasis added). Indeed, the Guide includes a chapter regarding how and when servicers should pursue foreclosure. See Guide at E-3 ("Managing Foreclosure Proceedings"). Nevertheless, "Fannie Mae is at all times the owner of the mortgage note," and "[a]t the conclusion of the servicer's representation of Fannie Mae's interests in the foreclosure…possession [of the mortgage note] automatically reverts to Fannie Mae." 2AA 160, 162.

The relationship between Fannie Mae and its servicer Chase, established by the Guide, obligates Chase to protect Fannie Mae's interests in court proceedings such as the quiet-title action Chase brought in the district court. Defending Fannie Mae's legal interests, especially in cases involving individual mortgage loans, is an integral part of the servicer's duties. Fannie Mae and Freddie Mac own millions of loans nationwide. FHFA and the Enterprises can more efficiently fulfill their

federal statutory mission of supporting the national secondary mortgage market by contracting with servicers to manage loans.

A similar relationship was acknowledged to provide standing to a servicer in Greer v. O'Dell, 305 F.3d 1297 (11th Cir. 2002). In that case, a loan servicer entered into an "Interim Servicing Agreement" with MBNA bank that delegated authority to it over credit card accounts. 305 F.3d at 1299. The court found that such an agreement established a relationship between MBNA and the loan servicer that "obligated" the servicer to protect MBNA's interests "in proceedings involving loans which it services." Id. at 1302. The court held that "a loan servicer is a 'real party in interest' with standing to conduct, through licensed counsel, the legal affairs of the investor relating to the debt that it services." Id. at 1299. Here, the Guide, like the servicing agreement in Greer, delegates authority to Chase to be "able to perform the services and duties incident to the servicing of the mortgage loan." 2AA 161.

Moreover, FHFA, Fannie Mae's conservator, has specifically stated that it supports invocation of the Federal Foreclosure Bar by "authorized servicers," such as Chase, in litigation involving the issues presented here: "FHFA supports the reliance on Title 12 United States Code Section 4617(j)(3) in litigation by authorized servicers of [Fannie Mae] to preclude the purported involuntary extinguishment of [Fannie Mae]'s interest by an HOA foreclosure sale." FHFA's Statement on

Servicer Reliance on the Housing and Economic Recovery Act of 2008 in Foreclosures Involving Homeownership Associations, http://www.fhfa.gov/Media /PublicAffairs/PublicAffairsDocuments/Authorized-Enterprise-Servicers-Reliance. pdf. Accordingly, FHFA has supported parties like Chase in bringing cases like this one raising the Federal Foreclosure Bar. Indeed, FHFA will submit an amicus brief supporting Chase's position in this appeal.

Though the parties extensively briefed the issue in the proceedings below, the district court expressly "did not make a determination as to Fannie Mae's interest in the property." 3AA 358, ¶ O. However, this Court's ruling in Montierth settles the issue; Fannie Mae's ownership of the Loan and contractual relationship with Chase ensured that it maintained ownership over the Deed of Trust and an interest in the underlying collateral at the time of the May 2013 HOA Sale. Montierth, 354 P.3d at 651. Because the district court failed to address the question, Chase respectfully requests that this Court remand the case for resolution of this issue.

3. Chase has standing to protect its own interest as servicer and beneficiary of record.

Chase also has its own property interest derived from Fannie Mae's interest, which the Federal Foreclosure Bar protects unambiguously. Chase's interest is concrete and not speculative. If the Federal Foreclosure Bar were determined to preempt the State Foreclosure Statute, the Deed of Trust would be preserved and,

accordingly, Chase's interest as beneficiary of record would similarly be preserved. See Order, Saticoy Bay, LLC Series 1702 Empire Mine v. Fannie Mae, No. 2:14-CV-01975-KJD-NJK, slip op. at 3 (D. Nev. Sept. 29, 2015) (ECF No. 129) (granting Fannie Mae's servicer summary judgment because, when the "Court determined that Fannie Mae's interest in the Property was not extinguished," this meant that the servicer's interest also "was not affected" by the HOA Sale). Conversely, if the federal statute were held not to preempt the State Foreclosure Bar, Chase's property interest would be extinguished along with Fannie Mae's interest.

Courts have recognized that a servicer like Chase, who is the record beneficiary of a deed of trust but does not own the corresponding loan, has constitutional and prudential standing to bring an action regarding that loan. See, e.g., Greer, 305 F.3d at 1299; GMAC Mortg., LLC v. McKeever, 651 F. App'x 332, 337-38 (6th Cir. 2016) (holding that loan servicer had standing and was real party in interest because claims in case would affect its compensation as servicer); BAC Home Loans Serv., LP v. Texas Realty Holdings, LLC, 901 F. Supp. 2d 884, 905-09 (S.D. Tex. 2012) (similar); TFG-Illinois, L.P. v. United Maint. Co., Inc., 829 F. Supp. 2d 1097, 1111 (D. Utah 2011) (similar).[6] A servicer, by virtue of its

[6] See also In re Carssow-Franklin, No. 15-CV-1701 (KMK), 2016 WL 5660325, at *11 (S.D.N.Y. Sept. 30, 2016) (holding that Wells Fargo, as Freddie Mac's (continued...)

contractual relationship with the owner of the loan and deed of trust, has a pecuniary interest in protecting the owner's rights that is sufficient to confer standing to litigate on the owner's behalf. See, e.g., CWCapital Asset Mgmt., LLC v. Chicago Props., 610 F.3d 497, 501 (7th Cir. 2010) (noting a servicer's "personal stake in the outcome of the lawsuit because it receives a percentage of the proceeds of a defaulted loan that it services.").

Thus, Chase, having an interest as beneficiary of record of the Deed of Trust and as the contractually authorized servicer for Fannie Mae, may protect its property interest by raising the preemptive effect of federal law.

B. Ms. Bell's payments to the HOA satisfied the portion of the lien, if any, entitled to a super-priority over the Deed of Trust.

The trial court should also be reversed because Ms. Bell's payments satisfied the portion of the lien entitled to a super-priority over the Deed of Trust. An HOA's lien is senior to a first security interest "to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent

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(...continued)
servicer, had standing to bring claims regarding mortgage loan); CitiMortgage, Inc. v. Country Gardens Owners' Ass'n, No. 2:13-CV-2039-GMN, 2013 WL 6409951, at *1, *4 (D. Nev. Dec. 5, 2013) (granting servicer preliminary injunction to enjoin foreclosure sale under HOA lien); Kiah v. Aurora Loan Serv., LLC, No. 10-46161-FDS, 2011 WL 841282, at *5 (D. Mass. Mar. 4, 2011) (noting that Fannie Mae often requires servicers to initiate legal proceedings in servicer's name if servicer or MERS is mortgagee of record); In re Merritt, 555 B.R. 471, 476–77 (E.D. Pa. 2016) (holding that "even though Freddie Mac is the owner of the Note…PNC [Freddie Mac's servicer] has standing" to assert claims involving mortgage).

of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien…" NRS 116.3116(2) (2013). "As to first deeds of trust, NRS 116.3116(2) thus splits an HOA lien into two pieces, a superpriority piece and a subpriority piece." SFR Investments, 334 P.3d at 411. "The superpriority piece, consisting of the last nine months of unpaid HOA dues and maintenance and nuisance-abatement charges, is 'prior to' a first deed of trust." Id. "The subpriority piece, consisting of all other HOA fees or assessments, is subordinate to a first deed of trust." Id.

When the super-priority portion of the lien is paid off, the foreclosure of the remaining, sub-priority portion will not extinguish a first security interest. See Wells Fargo Bank, N.A. v. Sky Vista Homeowners Ass'n, No. 3:15-cv-00390-RCJ-VPC, 2017 U.S. Dist. LEXIS 56928, at *8 (D. Nev. Apr. 13, 2017) ("[T]ender of the superpriority piece of an HOA lien (whether accepted or rejected) extinguishes that portion of the lien such that a resulting HOA foreclosure does not extinguish a first deed of trust."); see also Restatement § 6.4(a) ("[A] performance in full of the obligation secured by a mortgage, or a performance that is accepted by the mortgagee in lieu of performance in full, by one who is primarily responsible for performance of the obligation, redeems the real estate from the

mortgage, terminates the accrual of interest on the obligation, and extinguishes the mortgage.").

Here, the HOA's lien only had a super-priority over the Deed of Trust to the extent of nine months of HOA dues. See NRS 116.3116(2) (2013); SFR Investments, 334 P.3d at 411. This nine-month period is measured backward from the date the HOA recorded its Notice of Lien. See NRS 116.3116(2) (2013) (super-priority applies to "9 months immediately preceding institution of an action to foreclose the lien…"); cf. Saticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan Chase Bank, N.A., 388 P.3d 226, 231 (Nev. 2017) ("[A] party has instituted 'proceedings to enforce the lien' for purposes of NRS 116.3116(6) when it provides the notice of delinquent assessment."). When the HOA recorded its Notice of Lien on April 1, 2011, the monthly HOA dues for the Property were $180. 2AA 220. Therefore, the super-priority piece of the HOA's lien totaled (at most) $1,620, or nine times $180.

After the HOA recorded its notice of lien, but before the Sale, Ms. Bell made three payments to the HOA totaling $1,838.12. Id. The HOA accepted these payments and applied them against the delinquent monthly assessments. Id. Therefore, these payments satisfied the $1,620 super-priority lien. When the HOA foreclosed against the Property, only the sub-priority lien (which was junior to the

Deed of Trust) remained. Accordingly, the Sale did not extinguish Fannie Mae's interest.

C. SFR Investments does not apply retroactively to the Sale.

The Court should also reverse the district court's summary judgment because SFR Investments does not apply retroactively to the Sale. In SFR Investments, the Court held that a properly conducted HOA foreclosure can extinguish a first security interest. 334 P.3d at 419. Nevada judicial precedents usually apply both prospectively and retroactively; however, they are sometimes limited to prospective effect. To make this determination, the Court considers (1) whether the decision establishes a new rule of law, such as by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) the prior history of the rule in question, the purposes and effect of the rule, and whether retroactive application of the rule will further its purpose; and (3) whether retroactive application could produce substantial inequitable results. See Breithaupt v. USAA Prop. & Cas. Ins. Co., 110 Nev. 31, 35 (1994).

1. SFR Investments decided an issue of first impression whose resolution was not clearly foreshadowed.

Prior to SFR Investments, most state and federal courts in Nevada held that a first mortgage survived an HOA foreclosure. See, e.g., Bayview Loan Servicing v. Alessi & Koenig, 962 F. Supp. 2d 1222, 1226 (D. Nev. 2013); Beverly v. Weaver-Farley, No. 3:13-cv-00348-LRH-VPC, 2013 WL 5592332, at *2 (D. Nev. Oct. 9,

2013); Freedom Mortgage Corp. v. Trovare Homeowners Ass'n, No. 2:11-cv-01403-MMD-GWF, 2013 U.S. Dist. LEXIS 106442, at *5 (D. Nev. July 29, 2013); Kal-Mor-USA, LLC v. Bank of America, N.A., No. 2:13-cv-0680-LDG-VCF, 2013 U.S. Dist. LEXIS 98375, at *6-7 (D. Nev. July 8, 2013); Weeping Hollow Avenue Trust v. Spencer, No. 2:13-cv-00544-JCM-VCF, 2013 U.S. Dist. LEXIS 74065, at *14-17 (D. Nev. May 24, 2013); Diakonos Holdings, LLC v. Countrywide Home Loans, Inc., No. 2:12-cv-00949-KJD-RJJ, 2013 U.S. Dist. LEXIS 18718, at *5-8 (D. Nev. Feb. 11, 2013).

These courts, as well actors in the Nevada real estate market, believed that NRS 116.3116(2) created a payment priority in favor of an HOA. They believed the statute required a foreclosing mortgagee to pay off the super-priority portion of any HOA lien. However, if the HOA conducted a sale under its lien, the sale would not extinguish the mortgagee's security interest.

This view of the statute was reflected in the extremely small prices obtained at HOA foreclosures—and in the business strategy of buyers who quickly rented out properties they bough. They did so because they believed lenders' deeds of trust survived. See Hubble Smith, Shrewd Investors Snap Up HOA Liens, Rent Out Houses, L.V. Rev.-J. (Mar. 18, 2013), http://www.reviewjournal.com/business/housing/shrewd-investors-snap-hoa-liens-rent-out-houses ("The HOA writes a 'dirty deed' on the home and its collection agency proceeds with

foreclosure ahead of the mortgage-holding bank…If the buyer gets the lien cheap enough and can rent the property long enough, their investment makes money."); Brentt Tyler, Las Vegas Investors Buy HOA Liens and then Rent Out Homes, Community Ass'n Network (Apr. 23, 2013), http://communityassociations.net/las-vegas-investors-buy-hoa-liens-and-then-rent-out-homes/print ("When the bank finally forecloses on the property, the lien must be paid for them to assume control, so the investor has collected rent on the property and then has the lien amount repaid by the bank.").

2. Giving retroactive effect to SFR Investments would not further its purpose.

According to SFR Investments, the reason for treating an assessment lien as a true super-priority lien is to force lenders to pay off delinquent assessments under the threat of losing their security. 334 P.3d at 414. With respect to future sales, this rationale arguably makes sense: now that lenders know an HOA foreclosure can extinguish a first deed of trust, they know to pay off the super-priority portion of the assessment lien. However, it is too late for lenders and servicers to pay off liens that were foreclosed before SFR Investments. Allowing a pre-2014 sale to extinguish a lender's security interest therefore serves no discernible public policy.

3. Giving retroactive effect to SFR Investments would produce substantial inequitable results.

Giving retroactive effect to SFR Investments would produce substantial inequitable results. For example, it would make residential borrowers personally liable for the full balance of their loans. See Krohn v. Sweetheart Props, LTD (In re Krohn), 203 Ariz. 205, 211 (2002) ("[P]ublic policy and the courts should not endorse extraordinary bargains at the expense of already troubled debtors."). It would also provide real estate speculators an enormous windfall. See id. at 210 ("Windfall profits, like those reaped by bidders paying grossly inadequate prices at foreclosure sales, do not serve the public interest and do no more than legally enrich speculators."). It would also allow lenders' security interests to be extinguished for pennies on the dollar.

Further, retroactive application would confer no benefit on HOAs. Any HOA that conducted a sale before SFR Investments has already been made whole, assuming the sale price was enough to cover the HOA's relatively small lien. Here, for example, the $10,100 that SFR paid at the Sale was more than enough to satisfy the amounts owed to the HOA. The HOA will keep these proceeds if the Court limits SFR Investments to prospective effect. The Sale will remain in place and SFR will continue to own the Property—the only difference will be that SFR's ownership interest will be subject to the Deed of Trust.

Finally, limiting SFR Investments to prospective effect would be perfectly fair to speculators who bought HOA-foreclosed properties before the decision. Because these speculators typically rent out the properties they buy at HOA foreclosures, they will make a profit through rental income even if SFR Investments is limited to prospective effect. The only question at this point is whether they should receive a new windfall over and above their existing profits.

Accordingly, SFR Investments does not apply retroactively to the Sale in this case, and the district court should be reversed.

D. The Sale is void under Shadow Wood, or at the very least, there is a genuine factual dispute on this issue.

The district court should also be reversed because the Sale is invalid under Shadow Wood. The Restatement, which this Court followed in Shadow Wood, allows a court to invalidate a sale where the price is grossly inadequate. As explained below, this approach is consistent with the traditional Nevada rule that a foreclosure sale may be set aside on a showing of "fraud, oppression, or unfairness" because a grossly inadequate price is fraud, unfairness, or oppression. Even if Chase must show irregularities in the Sale beyond the price, summary judgment for SFR is still inappropriate. The grossly inadequate price, the HOA's mortgage savings clause, and the fact that only two bids were submitted at the Sale permit a reasonable trier of fact to find fraud, unfairness, or oppression. Further, SFR is not a bona fide purchaser and the equities favor Chase.

1. Even by itself, the grossly inadequate price invalidates the Sale.

a. Under the Restatement, which this Court followed in Shadow Wood, the Sale is void for gross price inadequacy.

Under the Restatement, "[a] foreclosure sale price obtained pursuant to a foreclosure proceeding that is otherwise regularly conducted in compliance with applicable law does not render the foreclosure defective unless the price is grossly inadequate." Restatement § 8.3. A price is generally considered "grossly inadequate" if it is less than 20% of fair market value. Id. § 8.3 cmt. b.

Applying these principles, this Court noted that the property in Shadow Wood sold for $11,018.39. 366 P.3d at 1108. The Court also noted that an appraisal of the property showed its fair market value was $53,000, id. at 1113 n.3, and that the lender in Shadow Wood had previously credit bid $45,900 for the property, id. at 1112. The Court then analyzed the price using the Restatement framework. See id. at 1112-13. It noted the $11,018.39 price was more than 20% of the property's $53,000 appraised value and more than 20% of the $45,900 credit bid. Id. at 1112 & 1113 n.3. Therefore, the Court held the price was not "grossly inadequate as a matter of law." Id. at 1112. The Court then proceeded to consider the other aspects of the sale, including the lender's attempts to tender payment to the HOA and the third-party buyer's purported status as a bona fide purchaser. See id. at 1113-16.

Therefore, while Shadow Wood does not address what occurs when a sale price is grossly inadequate within the meaning of the Restatement, it does follow the Restatement approach for determining if the price is grossly inadequate in the first instance. Having adopted the first half of the Restatement rule, the Court should now follow the Restatement to its logical conclusion and hold that a district court may invalidate a sale for gross price inadequacy.

Applying the Restatement approach here, SFR paid only $10,100 for the Property. 2AA 230. According to an appraisal obtained by Chase—which was the only evidence of the Property's fair market value presented to the district court—the Property's fair market value at the time of the Sale was $70,000. 2AA 261. Therefore, the price was roughly 14% of the Property's value—below the 20% threshold imposed by the Restatement. Even if the Sale was otherwise proper, it is void for gross inadequacy of price.

b. The Restatement approach is consistent with common law foreclosure principles, including those expressed in Golden.

The Restatement approach embodies the longstanding common law rule that a court may invalidate a sale where the price is grossly inadequate or where it shocks the conscience. See, e.g., Armstrong v. Csurilla, 112 N.M. 579, 591 (1991) (sale may be set aside "when the disparity is so great as to shock the court's conscience"); United Okla. Bank v. Moss, 1990 OK 50, ¶ 20 (1990) (setting aside

sale for approximately 20% of fair market value, noting that court may refuse to confirm sale where "the sale price is so grossly inadequate that it shocks the conscience of the court…"); 4 Powell on Real Property § 37.42[6] (2017) (sale may be attacked on ground of price inadequacy where price is "so low as to shock the conscience of the court").

Further, Shadow Wood follows a long line of Nevada cases adopting other provisions of the Restatement. See, e.g., Montierth, 354 P.3d at 650-51; Edelstein v. Bank of N.Y. Mellon, 128 Nev. 505, 517-21 (2012) (adopting Restatement § 5.4, governing assignments of promissory notes and deeds of trust); Houston v. Bank of Am., 119 Nev. 485, 490 (2003) (adopting Restatement § 7.6, governing equitable subrogation). It is therefore no surprise that this Court signaled in Shadow Wood that it supports the Restatement approach to foreclosure sale prices.

Nevertheless, SFR may argue the Restatement is inconsistent with older Nevada case law such as Golden v. Tomiyasu, 79 Nev. 503 (1963). Shadow Wood did cite a portion of Golden which states 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 1111 (citing Golden, 79 Nev. at 514). This passage in Golden was taken from Oller v. Sonoma Cty. Land Title Co., 137 Cal. App. 2d 633, 635 (1955).

The Restatement is easily reconciled with Golden, as illustrated by Krohn v. Sweetheart Props, LTD (In re Krohn), 203 Ariz. 205 (2002). In Krohn, the Arizona Supreme Court adopted Section 8.3 of the Restatement and held that a court may invalidate a sale based solely on gross inadequacy of price. 203 Ariz. at 214. At the time Krohn was decided, Arizona case law suggested that price inadequacy would not singlehandedly invalidate a sale. See Sec. Sav. & Loan Ass'n v. Fenton, 167 Ariz. 268, 270 (Ariz. Ct. App. 1990) ("The setting aside of a trustee sale for inadequacy of price has no basis in either Arizona case law or statute."). Fenton, a prior decision by the Arizona Court of Appeals, was based on the same California precedent as this Court's decision in Golden. See Fenton, 167 Ariz. at 270 (citing Oller, 137 Cal. App. 2d at 635).

In Krohn, the Arizona Supreme Court explained that "[t]he policy articulated in Fenton is correct as to inadequacy of price…[b]ut Fenton did not involve a price found to be grossly inadequate, one that shocked the conscience of the court." 203 Ariz. at 209. "[N]either we nor our court of appeals has ever considered the particular issue of setting aside a deed of trust sale for gross inadequacy of price." Id. (emphasis original). Krohn went on to address the rule from Oller, Fenton, and Golden that there must be "fraud, unfairness, or oppression" before a court may void a sale. It explained that "gross inadequacy is proof of unfairness, and as we have seen, gross inadequacy, as defined in comment b to RESTATEMENT § 8.3,

is more than inadequacy." Id. at 212 (emphasis original). "Thus, a rule allowing limited judicial oversight does not conflict with Fenton—it is still the law in Arizona that trustee's sales will not be set aside for inadequacy of price without more." Id.

For the same reason, the Restatement is fully consistent with the traditional Nevada rule expressed in Golden. The sale price in Golden was roughly 28.5% of subject property's fair market value. 79 Nev. at 511. Therefore, neither Golden nor Shadow Wood involved a price that was grossly inadequate within the meaning of the Restatement. The law distinguishes between a price that is less than market value, on one hand, and a price that is so small as to be grossly inadequate, on the other hand. In the former case, a court typically will not invalidate the sale; but in the latter case, the grossly inadequate price constitutes "fraud, unfairness, or oppression" within the meaning of Golden and Shadow Wood.

The Restatement approach was endorsed in Shadow Wood and is fully consistent with the common law principles expressed in cases such as Golden. Therefore, the Court should fully adopt the Restatement and invalidate the Sale for gross inadequacy of price.

2. Even if there must be additional defects, SFR is still not entitled to summary judgment.

Even if the Court believes there must be other defects in addition to the $10,100 price, the Sale is still void. In Shadow Wood, after the Court determined that the sale price was not grossly inadequate, it proceeded with a broader equitable analysis of whether to invalidate the sale:

> In [Shadow Wood], this court recognized that a quiet title action is equitable in nature and, as such, a court must consider the "entirety of the circumstances that bear upon the equities." In particular, we discussed the following factors as potentially bearing on the equities of an HOA's foreclosure sale: (1) a grossly inadequate sale price; (2) a showing of fraud, unfairness, or oppression leading to the sale; (3) the extent to which a complaining party's inaction led to the sale; and (4) the presence of a bona fide purchaser. Additionally, we noted that a deed of trust beneficiary's tender of the purported superpriority portion of an HOA's lien is a relevant consideration when determining whether an HOA foreclosure sale extinguishes the deed of trust.

Bank of N.Y. Mellon v. Star Golden Enters. Series 6, No. 68345, 2017 Nev. LEXIS 10, at *1-2 (Jan. 25, 2017) (citing Shadow Wood, 366 P.3d at 1112-16).

Applying this Shadow Wood framework, the Court has regularly reversed summary judgments against mortgage lenders. See, e.g., Star Golden Enters., 2017 Nev. LEXIS 10 at *2; Ditech Financial, LLC v. Kal-Mor-USA, LLC, No. 68389 (Nev. Dec. 22, 2016); Nationstar Mortg., LLC v. Messina, No. 68603, 2016 Nev. Unpub. LEXIS 1007 (Dec. 2, 2016); Nationstar Mortg., LLC v. Premier One

Holdings, Inc., No. 67722, 2016 Nev. Unpub. LEXIS 327, at *1 (Mar. 18, 2016); see also Select Portfolio Servicing, Inc. v. SFR Invs. Pool 1, LLC, No. 68009, 2016 Nev. Unpub. LEXIS 812 (Sep. 30, 2016) (citing Shadow Wood and permitting lender to file amended complaint); Wells Fargo Bank, N.A. v. SFR Invs. Pool 1, LLC, No. 67489, 2016 Nev. Unpub. LEXIS 331 (Mar. 18, 2016) (same).

Such a reversal is appropriate here, assuming the Court does not invalidate the Sale based on price alone. As explained below, a proper application of Shadow Wood would have led the district court to invalidate the Sale. At the very least, it would have precluded summary judgment for SFR.

a. The sale price, the payments by Ms. Bell, the mortgage savings clause, and the lack of bidding permit a finding of fraud, oppression, or unfairness.

"Even where the foreclosure price for less than fair market value cannot be characterized as 'grossly inadequate,' if the foreclosure proceeding is defective under local law in some other respect, a court is warranted in invalidating the sale and may even be required to do so." Restatement § 8.3 cmt. c. "[E]ven a slight irregularity in the foreclosure process coupled with a sale price that is substantially below fair market value may justify or even compel the invalidation of the sale." Id.; accord Golden, 79 Nev. at 515. For example, a court may invalidate a sale where the price is substantially below fair market value and where notice of the

sale is published 16 times, instead of the 20 times required by governing law. Restatement § 8.3 ill. 10. Here, there were at least three additional defects in the Sale which allow a reasonable trier of fact to find fraud, oppression, or unfairness.

First, as noted above, Ms. Bell made three separate payments totaling $1,838.12 against the HOA's lien. 2AA 220. Even if these payments did not extinguish the super-priority portion of the HOA's lien, they are relevant for purposes of a Shadow Wood analysis. These payments satisfied all the delinquent assessments Ms. Bell owed at the time, and they resulted in her having a negative balance on her account. Id. Apparently, the only reason the foreclosure process continued is that the HOA and NAS also charged Ms. Bell for collection costs. Second, the HOA's mortgage savings clause indicated the Sale would not extinguish the Deed of Trust. 2AA 206 § 10.1(b); 208 § 10.2. NAS reiterated this point by referencing the Declaration in each of its foreclosure notices. 2AA 184, 225, 228. Prior to SFR Investments, community associations in Southern Nevada routinely adopted mortgage savings clauses to induce lending in HOA neighborhoods. The district court was allowed—indeed, required—to consider this reality when deciding whether to invalidate the Sale. Although this Court held such clauses unenforceable in SFR Investments, they are still relevant for purposes of a Shadow Wood analysis. Since SFR Investments was not decided until after the Sale, a bidder at the Sale could have reasonably believed the mortgage savings

clause was enforceable. In turn, this could have led to smaller bids for the Property because the bidders did not believe they would receive clear title. Third, SFR's $10,100 bid was one of only two bids submitted at the Sale. This lack of competitive bidding also helps explain why the Property sold for such a small price.

b. SFR is not a bona fide purchaser.

Further, SFR is not a bona fide purchaser under Shadow Wood. A bona fide purchaser is a person who is unaware of the particular defects that allegedly invalidate the sale. See Nguyen v. Calhoun, 105 Cal. App. 4th 428, 442 (2003) ("A bona fide purchaser is one who pays value for the property without notice of any adverse interest or of any irregularity in the sale proceedings."); see also Shadow Wood, 366 P.3d at 1116 (buyer not aware of lender's attempts to pay off lien, or association's exaggeration of amount owed). Here, SFR had notice of (1) the grossly inadequate price that SFR itself submitted; (2) the mortgage savings clause in the HOA's publicly recorded Declaration; and (3) the lack of bidding at the Sale SFR attended. Therefore, SFR is not a bona fide purchaser.

c. The equities favor invalidating the Sale.

Shadow Wood also requires a court to "consider the entirety of the circumstances that bear upon the equities." 366 P.3d at 1114. As explained in Part I.C.1 above, entities which bought HOA-foreclosed properties before SFR

Investments thought a first mortgage survived an HOA sale. Therefore, they rented out these properties to profit off their investment before a mortgage lender could foreclose. If SFR, like most purchasers, has been renting out the Property, it will likely make a profit on its $10,100 investment regardless of whether the Sale is invalidated. In contrast, leaving the Sale in place would result in the entire security for Fannie Mae's loan being extinguished. Therefore, the equities favor voiding the Sale.

At a minimum, the grossly inadequate price, the additional defects in the Sale, SFR's knowledge of these defects, and the balance of the equities create a genuine issue as to the Sale's validity. Therefore, the district court's summary judgment should be reversed.

E. The notice scheme of NRS Chapter 116 is facially unconstitutional.

The trial court should also be reversed because the provisions of NRS Chapter 116 governing notice to purported junior lienholders are facially unconstitutional. As explained below, a sale under Chapter 116 involves sufficient state action to implicate due process. Therefore, even if the U.S. Supreme Court denies certiorari in Saticoy Bay, this Court should overturn Saticoy Bay on its own initiative. Further, the Court should hold that Chapter 116 violates due process by requiring junior lienholders to opt in for notice.

1. The state action requirement is met.

Saticoy Bay held that a non-judicial HOA foreclosure sale does not involve enough state action to implicate due process. 388 P.3d at 972-74. Therefore, Saticoy Bay declined to reach the issue of whether NRS Chapter 116 requires a mortgage lender to "opt in" for notice of the sale. Id. at 974. The non-prevailing party in Saticoy Bay has indicated it will petition the U.S. Supreme Court for certiorari. Further, the non-prevailing party in Bourne Valley Court Tr. v. Wells Fargo Bank, NA, 832 F.3d 1154 (9th Cir. 2016), which reached the opposite result, has already filed a certiorari petition. In any event, this Court should overrule Saticoy Bay on its own initiative for the reasons explained below.

a. Courts have routinely held that the private foreclosure of a government-created lien implicates due process.

It is true that the private enforcement of a privately created lien usually does not implicate due process. See, e.g., Apao v. Bank of N.Y., 324 F.3d 1091, 1095 (9th Cir. 2003) (non-judicial sale under deed of trust). However, Saticoy Bay failed to appreciate that the private enforcement of a government-created lien does implicate due process. State and federal courts have routinely held that when the government creates a statutory lien, any procedures for privately enforcing the lien must satisfy due process. See Culberston v. Leland, 528 F.2d 426, 431-32 (9th Cir. 1975) (private enforcement of statutory lien in favor of hotel owners); Hall v.

Garson, 430 F.2d 430, 439 (5th Cir. 1970) (private enforcement of statutory lien in favor of landlords); Johnson v. Riverside Hotel, Inc., 399 F. Supp. 1138, 1140 (S.D. Fla. 1975) (private seizure of guest's property under innkeeper's lien); Adams v. Joseph F. Sanson Inv. Co., 376 F. Supp. 61, 68-69 (D. Nev. 1974) (private enforcement of statutory landlord lien); Collins v. Viceroy Hotel Corp., 338 F. Supp. 390, 396-98 (N.D. Ill. 1972) (statute creating innkeeper's lien and empowering innkeeper to foreclose lien); Klim v. Jones, 315 F. Supp. 109, 120-24 (N.D. Cal. 1970) (invalidating innkeeper's lien statute); Klem v. Wash. Mut. Bank, 176 Wash. 2d 771, 790 n.11 (2013) ("Certainly, there are…'self help' statutes for creditors that are subject to constitutional limitations despite the State's limited involvement.").

For example, Culberston involved the private foreclosure of a government-created lien in favor of hotel owners. The lien in Culbertson attached to a guest's baggage and other property and secured the guest's rent owed to the hotel owner. 528 F.2d at 427 n.1. If a guest failed to pay rent, the governing Arizona statute permitted the hotel owner to sell the guest's belongings non-judicially. See id. The Ninth Circuit analyzed the history of the lien, since "state action is more likely found where the common law did not permit the action in question." Id. at 431. It noted that "hotel and rooming house keepers have no common law lien against the belongings of their guests in Arizona." Id. at 431. "Whatever lien exists is purely

statutory." Id. Since the Arizona statute "was the *sine qua non* for the activity in question, the state's involvement through that statute [was] not insignificant." Id. at 432. The court therefore held that Arizona had "significantly involved itself" in the seizure of the tenants' property. Id. It also "disagree[d] with the proposition that lien statutes which create new rights in favor of creditor landlords have only a minimal impact on private ordering, especially when the parties themselves have failed to agree on a like ordering in the particular case." Id.

Here, as in Culbertson, the state has created a new lien which did not exist under common law. HOAs did not exist in meaningful numbers until the 1960's, see Unif. Common Interest Ownership Act (1982) (prefatory note), and the Nevada Legislature did not enact NRS Chapter 116 until 1992. Only then did the assessment lien of NRS 116.3116 come into existence. Further, the parties to this case (like the parties in Culbertson) did not create the lien; it arose automatically by operation of law. The assessment lien is a modern creation of the Nevada government, as opposed to a common-law remedy voluntarily agreed by the parties; thus, the lien implicates due process.

Joseph F. Sanson is also directly on point. This case involved a Nevada statute which created a lien in favor of landlords. See 376 F. Supp. at 63 n.1 (quoting NRS 108.510(1)). The lien, which secured a tenant's rent and certain other charges, attached to the tenant's baggage and other personal property. Id.

(quoting NRS 108.510(1)). If a tenant failed to pay charges for more than 60 days, the landlord could non-judicially sell the property. Id. (quoting NRS 108.510(3)). The court held the Nevada statute unconstitutional because it did not require preliminary notice and a hearing before the landlord seized the tenant's property. Id. at 68-69. The court further noted that "statutory schemes" which create and govern such liens are "sufficient state action" to subject them to the requirement of due process. Id. at 68.

As another example, the court in Klim examined a California landlord lien statute nearly identical to the one in Joseph F. Sanson. The Klim court agreed that the private foreclosure of the lien satisfied the state action requirement:

> Not only does California Civil Code § 1861 outline the conditions applicable to the lien in question here, but it is only by virtue of Section 1861 that defendant Jones had the power to impose a lien on the plaintiff's belongings, and it is only by virtue of Section 1861 that defendant Jones could impose such lien without subjecting himself to the forms of civil liability excluded by Section 1861. This is not just action against a backdrop of an amorphous state policy, but is instead action encouraged, indeed only made possible, by explicit state authorization.

315 F. Supp. at 114 (emphasis original).

b. The private foreclosure of a government-created lien also meets the U.S. Supreme Court's flexible test for state action.

Saticoy Bay heavily relied on the discussion of state action from Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922 (1982). Lugar examined whether a plaintiff in a state court lawsuit was a state actor where a county sheriff executed a prejudgment writ of attachment on the plaintiff's behalf. 457 U.S. at 926. The Lugar Court held that "the party charged with the deprivation must be a person who may fairly be said to be a state actor." Id. at 937. "This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." Id. (emphasis added). Therefore, Lugar did not provide any specific rules for determining whether state action is present. It acknowledged that the circumstances "which would convert the private party into a state actor might vary with the circumstances of the case." Id. at 939. It further described state action as a "necessarily fact-bound inquiry" and noted five separate "tests" the U.S. Supreme Court had previously used to determine if a person was a state actor. Id.

In a more recent, comprehensive review of state action, the U.S. Supreme Court confirmed that the inquiry turns on all the circumstances of a given case:

> What is fairly attributable [to the state] is a matter of normative judgment, and the criteria lack rigid simplicity. From the range of circumstances that could point toward the State behind an individual face, no one fact can

> function as a necessary condition across the board for finding state action…

Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n, 531 U.S. 288, 295-96, (2001). The Brentwood Court further explained:

> Amidst such variety, examples may be the best teachers, and examples from our cases are unequivocal in showing that the character of a legal entity is determined neither by its expressly private characterization in statutory law, nor by the failure of the law to acknowledge the entity's inseparability from recognized government officials or agencies.

Id. at 296 (citations omitted).

Applying these principles, the Brentwood Court held that an athletic association of public and private high schools was a state actor because it was intertwined with the Tennessee government. In so holding, the Court warned against over-relying on a single "test" or "formula" for state action. See id. at 303 ("When…the relevant facts show pervasive entwinement to the point of largely overlapping identity, the implication of state action is not affected by pointing out that the facts might not loom large under a different test.").

Under the comprehensive approach described in Lugar and Brentwood, a sale under NRS Chapter 116 clearly implicates due process. Through Chapter 116, the State of Nevada created the entire legal framework under which HOAs exist and operate. The state empowered HOAs to provide services that were traditionally the sole prerogative of the government. The state then empowered

HOAs to levy assessments to fund these services. The state also conferred a statutory lien on HOAs which did not exist under common law and which automatically arose without any agreement by the affected parties. The state then provided a specific procedure to foreclose the lien. Additionally, in this case, Chase and SFR involved the state by filing seeking a judicial declaration of their rights arising from the Sale. As explained below, these facts are more than enough to establish state action.

i. Chapter 116 creates the entire legal framework under which associations exist and operate.

The U.S. Supreme Court has held that state action can be found where "the State creates the legal framework governing the conduct" or "it delegates its authority to the private actor." Nat'l Collegiate Ath. Ass'n v. Tarkanian, 488 U.S. 179, 192 (1988) (citations omitted). Here, NRS Chapter 116 creates the entire legal framework under which HOAs exist and operate. See Uniform Law Commission, Common Interest Ownership Act Summary ("UCIOA is a comprehensive act that governs the formation, management, and termination of a common interest community, whether that community is a condominium, planned community, or real estate cooperative."), http://www.uniformlaws.org/ActSummary.aspx?title=Common%20Interest%20Ownership%20Act. Among other things, Chapter 116 authorizes and governs the creation of HOAs, see NRS 116.2101; empowers HOAs to provide public services to homeowners and to

charge assessments for such services, see NRS 116.3102(1)(b); creates a statutory lien to secure the assessments, see NRS 116.3116(1); and describes the process an HOA must follow to foreclose the lien, see NRS 116.31162-31168. Unlike with a sale under a deed of trust—where the government simply regulates an existing relationship—here the government has created the relationship itself.

ii. An HOA's lien secures assessments for traditionally governmental services.

The U.S. Supreme Court has also held that an entity can be a state actor where it exercises powers "traditionally exclusively reserved to the State." Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974); see also Evans v. Newton, 382 U.S. 296, 300-02 (1966); Pub. Utilities Comm'n v. Pollak, 343 U.S. 451, 461-63 (1952); Marsh v. Alabama, 326 U.S. 501 (1946). HOAs collect assessments in the same manner that local governments collect property taxes—by levying assessments against individual properties. They then spend these assessments to provide traditionally governmental services, including roads, sidewalks, security, parks, and public utilities. In substance, they serve as private local governments. See generally Barbara C. McCabe, Homeowners Associations as Private Governments: What We Know, What We Don't Know, and Why It Matters, 71 Pub. Admin. Rev. 535 (2011); Barbara C. McCabe & Jill Tao, Private Governments and Private Services: Homeowners Associations in the City and Behind the Gate, 23 Rev. of Pol'y Res. 1143 (2006); Brief for Community

Associations Institute as Amicus Curiae Supporting Appellee's Petition for Rehearing at 4, Bourne Valley Court Tr. v. Wells Fargo Bank, N.A., 832 F.3d 1154 (9th Cir. 2016) (No. 15-15233) (noting that HOAs "[h]ave assumed many functions historically provided by local governments…").

The legislative history of NRS Chapter 116 confirms that HOAs are largely meant to replace local governments by providing public services. See Minutes of Hearing on A.B. 612 before the Assembly Committee on Judiciary, 1993 Leg., 67th Sess., 51 (Nev. 1993) (testimony of M. Buckley that "UCIOA basically establishes the method by which small groups can exercise quasigovernmental powers over themselves…"); Minutes of Hearing on A.B. 221 before the Assembly Committee on Judiciary, 1991 Leg., 66th Sess., 34 (Nev. 1991) (testimony of S. Harman noting "abdication by local government" of services like streets, parks, and recreational facilities and expressing goal that associations "operate and actually function as…government[s]").

iii. The parties sought a judicial declaration of their claims arising from the Sale.

Finally, even where a transaction is private, state action can be found when a party brings a lawsuit to enforce rights arising from the transaction. See Shelley v. Kraemer, 334 U.S. 1, 20-21 (1948) (judicial enforcement of private, racially restrictive covenants constituted state action, even though covenants themselves did not). Under Shelley, the parties' decision to seek a judicial declaration of their

rights arising from the Sale helps support a finding of state action. See US Bank, N.A. v. SFR Invs. Pool 1, LLC, 124 F. Supp. 3d 1063, 1078 (D. Nev. 2015).

State and federal courts have routinely held that the non-judicial enforcement of a statutory lien implicates due process, which is consistent with the U.S. Supreme Court's flexible approach to state action. State action is present here because (1) the State of Nevada creates HOAs through NRS Chapter 116; (2) the state authorizes HOAs to provide traditionally governmental services; (3) the state authorizes HOAs to fund such services through mandatory assessments; (4) the state confers a statutory lien on HOAs that does not exist under common law and that is not voluntarily agreed by the affected parties; (5) the state enforces a mandatory procedure for enforcing the lien; and (6) the parties to this case requested a governmental declaration of their rights arising from the Sale.

2. Foreclosure statutes which require purported junior lienholders to opt in for notice violate due process.

Moving to the substance of Chase's constitutional challenge, due process requires that "[the] deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). Notice must be "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to

present their objections." Tulsa Prof'l Collection Services, Inc. v. Pope, 485 U.S. 478, 484 (1988).

In Mennonite Bd. of Missions v. Adams, the U.S. Supreme Court held that a mortgagee had a due process right to notice before its mortgage could be extinguished by a tax sale. It held that "[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice...." 462 U.S. 791, 800 (1983).

Numerous courts have applied Mennonite to strike down foreclosure statutes that require an affected party to request notice. See Small Engine Shop, Inc. v. Cascio, 878 F.2d 883, 890 (5th Cir. 1989); Island Fin., Inc. v. Ballman, 92 Md. App. 125, 136 (1992); Twp. of Jefferson v. Block 447A, Lot 10, 228 N.J. Super. 1, 7-8 (App. Div. 1988); Alliance Prop. Mgmt. & Dev., Inc. v. Andrews Ave. Equities, Inc., 133 A.D.2d 30, 31-32 (N.Y. App. Div. 1987); Seattle-First Nat'l Bank v. Umatilla Cnty., 77 Or. App. 283, 289-90 (1986); Wylie v. Patton, 111 Idaho 61, 65-66 (Ct. App. 1986). Likewise, in Bourne Valley, the Ninth Circuit held that opt-in notice "does not pass [constitutional] muster." 832 F.3d at 1158.

3. Chapter 116 requires purported junior lienholders to opt in for notice.

Four separate provisions of Chapter 116 govern notice of an association's sale. However, each provision operates on a request-notice basis. Therefore, as the Ninth Circuit has held, this scheme is unconstitutional under Mennonite.

a. NRS 116.31162-311635 expressly require mortgagees to opt in.

The first statute discussing notice is NRS 116.31162, which governs the association's notice of delinquent assessment. The association must mail this notice to the property's owner or his or her successor in interest, NRS 116.31162(1)(a) (2013), but is not required to mail the notice to other lienholders.

NRS 116.31163 governs the association's notice of default and election to sell. An association must mail this notice to: (1) anyone who has requested notice under NRS 116.31168 or 107.090; (2) any holder of a recorded security interest who notifies the association of its interest 30 days before recordation of the notice; (3) certain purchasers of the unit; and (4) the owner of the unit. See NRS 116.31162(3)(b) & 116.31163 (2013). NRS 116.31163 therefore requires a lienholder to opt in before receiving the notice of default.

NRS 116.311635 governs the association's notice of sale, which provides the date, time, and location of the foreclosure sale. An association must mail this notice to: (1) the homeowner; (2) anyone entitled to receive a notice of default

under NRS 116.31163; (3) certain purchasers; (4) any holder of a recorded security interest who notifies the association prior to the mailing of the notice; and (5) the Ombudsman for Owners in Common-Interest Communities and Condominium Hotels. See NRS 116.311635 (2013). Therefore, this statute also requires a lienholder to opt in for notice.

b. NRS 116.31168 also operates on an opt-in basis.

The final statute governing notice is NRS 116.31168(1). HOA sale purchasers often claim this provision makes notice to junior lienholders mandatory. The statute provides:

> 116.31168. Foreclosure of liens: Requests by interested persons for notice of default and election to sell; right of association to waive default and withdraw notice or proceeding to foreclosure.
>
> > 1. 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.

NRS 116.31168(1) (2013).

NRS 107.090 ordinarily governs noticing of trustee's sales. Relevant here, NRS 107.090(1) defines the term "person with an interest" to mean a person who claims a right in the property evidenced by a recorded instrument. NRS 107.090(2) allows a "person with an interest" to affirmatively request notice of foreclosure proceedings. NRS 107.090(3) provides that the entity conducting the

sale must mail a notice of default to (1) each "person with an interest" who has requested notice under NRS 107.090(2); and (2) any other "person with an interest" whose interest in the property is junior to the lien being foreclosed. Finally, NRS 107.090(4) requires the entity conducting the sale to mail a notice of sale to each person described in NRS 107.090(3).

i. NRS 116.31168 is ambiguous.

At issue is whether NRS 116.31168(1) incorporates NRS 107.090(3)-(4) (which would require an association to mail its foreclosure notices to all junior lienholders) or whether NRS 116.31168(1) simply incorporates NRS 107.090(2) (which would require the association to send these documents only to lienholders who request them). As the Ninth Circuit correctly held in Bourne Valley, NRS 116.31168(1) does not incorporate NRS 107.090(3)-(4). 832 F.3d at 1159.

A court "may not look past the language of a facially clear statute to determine the legislature's intent." Int'l Game Tech., Inc. v. Second Judicial Dist. Court, 122 Nev. 132, 152 (2006). "An ambiguous statute, however, which contains language that might be reasonably interpreted in more than one sense…may be examined through reason and considerations of public policy to determine the legislature's intent." Id. When deciding if a statute is ambiguous, a court examines the statute as a whole. See Clark County v. S. Nev. Health Dist.,

128 Nev. 651, 656-58 (2012) (rejecting plain language arguments focusing on subparts of statute).

NRS 116.31168(1) is self-contradictory as to whether it incorporates NRS 107.090(3)-(4)'s mandatory notice requirements. At one point it generally states that "[t]he provisions of NRS 107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed." However, the title of NRS 116.31168 indicates that it governs "[r]equests by interested persons" for notice of the foreclosure sale. Also, immediately after NRS 116.31168(1) states that the provisions of NRS 107.090 apply to an HOA foreclosure, it states that "[t]he request must identify the lien by stating the names of the unit's owner and the common-interest community." This suggests the preceding sentence only relates to affirmative requests for notice, like those authorized by NRS 107.090(2). Therefore, NRS 116.31168(1) is ambiguous, and the Court must use rules of statutory construction to resolve this ambiguity.

ii. NRS 116.31168 does not incorporate NRS 107.090's mandatory notice provisions.

Chase's reading of NRS 116.31168 is supported by at least five principles of statutory construction. First, "when the Legislature substantially amends a statute, it is ordinarily presumed that the Legislature intended to change the law." Pub. Emples. Benefits Program v. Las Vegas Metro. Police Dep't, 124 Nev. 138, 156-57 (2008). When NRS 116.31168(1) was originally enacted, the third sentence of

the statute read: "The association must also give reasonable notice of its intent to foreclose to all holders of liens in the unit who are known to it." NRS 116.31168(1) (1992). The Legislature did not believe the first sentence of the statute, which SFR relies on here, incorporated the mandatory notice provisions of NRS 107.090(3)-(4). If it had, it would not have separately required an association to notify all known "holders of liens" in the third sentence of the statute. The third sentence of NRS 116.31168(1)—not the first—mandated that all lienholders receive notice. In 1993, the Legislature deleted the third sentence. See A.B. 612, 67th Leg., 1993 Nev. Stat. 573, § 40. At the same time, it enacted NRS 116.31163 and 116.311635, the provisions discussed above. Id. §§ 6-7. Thus, the legislature removed a provision requiring notice to all lienholders and replaced it with two request-notice provisions.

Second, the Legislature amended NRS Chapter 116 in 2015 to explicitly require notice to any holder of a recorded security interest. See S.B. 306, 78th Leg., 2015 Nev. Stat. 266, §§ 3-4. Based on this major revision, the Court must assume that the pre-amendment version of Chapter 116 had a different meaning, i.e., that it operated on a request-notice basis. See Bourne Valley, 832 F.3d at 1159 n.4 ("If the Statute already required homeowners' associations affirmatively to provide notice, there would have been no need for the amendment."); see also Pub. Emples. Benefits Program, 124 Nev. at 156-57. Further, as this Court has noted,

"the legislative history regarding the 2015 amendment to [Chapter 116] indicates on many occasions that the change was a revision, not simply a clarification." Horizons at Seven Hills Homeowners Ass'n v. Ikon Holdings, LLC, 373 P.3d 66 n.7 (Nev. 2016). Both sponsors of the 2015 amendments noted the pre-amendment version of Chapter 116 operated on a request-notice basis. Senator Hammond described "situations in which homes were being sold for $5,000" because "home foreclosure sales were being made without notification." Hearing on S.B. 306 before the S. Comm. on Jud., 2015 Leg., 78th Sess., at 6 (Nev. 2015). Senator Ford stated the bill "eliminates the current requirement that security holders must notify the association of their interest in order to receive notice." Hearing on S.B. 306 before the Assemb. Comm. on Jud., 2015 Leg., 78th Sess., at 42 (Nev. 2015).

Third, "the title of [a] statute may be considered in construing the statute." Minor Girl v. Clark Cnty. Juvenile Court Servs., 87 Nev. 544, 548 (1971). "Further, if the title of an act is restricted to certain purposes, the purview or body of the act must also be restricted to that subject expressed in the title." Id. The title of NRS 116.31168 states that it governs "[r]equests by interested persons for [the] notice of default and election to sell." This is a reference to affirmative requests for notice, such as those discussed in NRS 107.090(2). The title also limits the scope of the statute by referring to the association's "notice of default and election to sell." The title does not address the association's notice of sale,

which is the document that actually gives the date, time, and location of the sale. Therefore, the title indicates that NRS 116.31168 only requires an association to send a mortgage lender a notice of default—and only if the lender affirmatively requests it.

Fourth, a statute "must be construed as a whole, and phrases may not be read in isolation to defeat the purpose behind the statute." State Tax Comm'n ex rel. Nev. Dep't of Taxation v. Am. Home Shield of Nev., Inc., 127 Nev. 382, 386 (2011). Immediately after NRS 116.31168(1) states that "[t]he provisions of NRS 107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed," it further provides, "[t]he request must identify the lien by stating the names of the unit's owner and the common-interest community." The second sentence only makes sense as a reference to the first. It clarifies that the first sentence only incorporates the opt-in notice provisions of NRS 107.090(2), not the mandatory notice provisions of NRS 107.090(3)-(4).

Fifth, "no part of a statute should be rendered nugatory, nor any language turned to mere surplusage, if such consequences can properly be avoided." Paramount Ins. v. Rayson & Smitley, 86 Nev. 644, 649 (1970). Here, NRS 107.090(3)-(4) requires notice to any holder of a recorded junior lien. In contrast, NRS 116.31163 and 116.311635 only require notice to a holder of a recorded security interest who requests notice. Thus, the same lienholders SFR claims

receive mandatory notice under NRS 107.090(3)-(4) are permitted to "opt in" for notice under NRS 116.31163-311635. Reading NRS 107.090(3)-(4) to govern HOA sales would therefore "render the express notice provisions of Chapter 116 entirely superfluous." Bourne Valley, 832 F.3d at 1159.

Since the notice provisions of NRS Chapter 116 require mortgagees to opt in for notice, they facially violate due process. Therefore, the Sale did not extinguish the Deed of Trust and the district court's summary judgment should be reversed.

II. If the Court affirms the district court's holding that the Deed of Trust was extinguished, Chase's unjust enrichment counterclaim should proceed to trial.

The district court also granted SFR summary judgment on Chase's alternative claim for unjust enrichment. It did so based on SFR's affirmative defense under the voluntary payment doctrine. See Nev. Ass'n Servs. v. Eighth Judicial Dist. Court of Nev., 338 P.3d 1250, 1253 (Nev. 2014) ("[O]ne who makes a payment voluntarily cannot recover it on the ground that he was under no legal obligation to make the payment."). In order to win summary judgment on this claim, SFR had to demonstrate as a matter of law that the voluntary payment doctrine applied. For three reasons, SFR failed to do so.

First, the only Nevada cases discussing the voluntary payment doctrine all involved payors who were attempting to recover funds from the relevant payee. See Nev. Ass'n Servs., 338 P.3d at 1252 (payment by property owner to

community association); Berrum v. Otto, 127 Nev. 372, 379 n.5 (2011) (payment by property owner to taxing authority); Randall v. Cnty. of Lyon, 20 Nev. 35, 38 (1887) (erroneous overpayment by county to jailor). The voluntary payment doctrine is meant to "encourage stability and certainty for the taxing entity." Berrum, 127 Nev. at 379 n.5 (emphasis added). While the doctrine might apply if Chase were attempting to recover payments directly from the payee(s), it does not apply to Chase's claim against SFR.

Second, "[b]ecause the voluntary payment doctrine is an affirmative defense, the defendant bears the burden of proving its applicability." Nev. Ass'n Servs., 338 P.3d at 1254. In its motion, SFR offered no admissible evidence that Chase made the relevant payments voluntarily. Instead, SFR stated "it is presumed" the payments were voluntary. As the party raising an affirmative defense, SFR cannot presume that the defense applies; it must provide admissible evidence to support its position. See Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986).

Third, the voluntary payment doctrine only applies to payments made "with full knowledge of all the facts…" Nev. Ass'n. Servs., 338 P.3d at 1254. As the party raising this defense, SFR must show that Chase had full knowledge of the relevant facts when it paid the charges. Specifically, SFR must demonstrate that Chase knew the Deed of Trust had been extinguished, and therefore, that Chase knew there was no need to make the payments. SFR offered no admissible

evidence on this issue, and it certainly did not offer sufficient evidence to preclude any genuine issue of fact. In reality, of course, Chase made the payments because it believed the Deed of Trust survived the Sale and it wanted to protect the collateral for the Loan.

Therefore, if the Court agrees with the district court that the Deed of Trust was extinguished, the Court should at least permit Chase's alternative claim for unjust enrichment to proceed to trial.

CONCLUSION

For the foregoing reasons, Chase respectfully requests that the Court reverse the summary judgment in favor of SFR.

Dated: April 19, 2017.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in normal Times New Roman 14 point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points or more, and contains 13,929 words excluding the parts of the brief exempted by NRAP 32(a)(7)(C).

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of Nevada Rules of Appellate Procedure.

/ / /

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CERTIFICATE OF SERVICE

I certify that on April 19, 2017, I filed **Appellant's Opening Brief**. Service will be made on the following through the Court's electronic filing system:

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