Case No. 71822

IN THE SUPREME COURT OF NEVADA

JPMORGAN CHASE BANK N.A.,

Appellant,

vs.

SFR INVESTMENTS POOL 1, LLC,

Respondent.

APPEAL

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

RESPONDENT'S ANSWERING BRIEF

JACQUELINE A. GILBERT, ESQ.
Nevada Bar No. 10593
E-mail: jackie@kgelegal.com
DIANA CLINE EBRON, ESQ.
Nevada Bar No. 10580
E-mail: diana@kgelegal.com

KIM GILBERT EBRON
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139
Telephone: (702) 485-3300
Facsimile: (702) 485-3301

NRAP 26.1 DISCLOSURE

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

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

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

DATED this 21st day of June, 2016.

KIM GILBERT EBRON

/s/Jacqueline A. Gilbert
JACQUELINE A. GILBERT, ESQ.
Nevada Bar No. 10593
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139
Attorneys for SFR Investments Pool 1, LLC

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INTRODUCTION

Mortgage lenders and their agents, like JP Morgan Chase, N.A. ("the Bank"),[1] bet on their interpretation of NRS 116.3116(2) and refused to accept that their first deed of trust ("FDOT") was extinguished by a homeowners association's superpriority lien—something unanimously decided by this Court in *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. ___, 334 P.3d 408, 419 (2014). After mortgage borrowers defaulted on their loans, lenders delayed their own foreclosures at the expense of the associations, who went years without being paid any money for the services they provided. As such, the associations were forced to foreclose on their liens for unpaid assessments. It was the lenders' arrogance and (in)action that led to the loss of their collateral, not the state's actions, and certainly not the actions of third-party purchasers like SFR Investments Pool 1, LLC ("SFR").

Now, many years after the foreclosure sale, the Bank argues that it was merely a servicer of a loan held by Federal National Mortgage Association ("Fannie"), which it alleged had an interest in the Property. Yet, as articulated *Armstrong v. Exceptional Child Care Ctr., Inc.*, private litigants cannot use the Supremacy Clause to displace state law. 575 U.S. ___, 135 S.Ct. 1378, 1383-85 (2015). The Bank is a

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[1] Unless otherwise stated, the "Bank" includes JP Morgan Chase Bank, N.A. and its predecessors in interest, such as MERS.

private litigant. The District Court understood this when it granted SFR's Motion for Summary Judgment and denied the Bank's Motion for Summary Judgment.

When the beneficiary of an FDOT allows an association to foreclose on a lien for delinquent assessments pursuant to NRS 116.3116, and the property is sold at a publicly noticed and publicly held foreclosure sale, its remedies are not against a purchaser who subsequently purchased without any knowledge of a defect in the sale. If the first secured is injured due to some secret or undisclosed irregularity with the sale, its remedy is money damages against the association or its agent that conducted the sale, not unwinding the sale or causing the innocent third-party purchaser to take subject to a first deed of trust. The only way for the sale to be unwound against a third-party purchaser after the an association foreclosure sale is if the first secured has overcome all presumptions of validity and proved that the purchaser had, in some way, caused the irregularity in the sale or colluded with the association or its agent to cause an inadequate price at the auction. Taking subject to the first deed of trust is not an option where the sale was invalid or where the pre-sale irregularities or disputes, if any, are unknown to the purchaser. Here, the Bank did not allege that SFR's actions caused any irregularity in the sale, that SFR, or any other potential purchaser, colluded in any way with Eastbridge Gardens Condominiums ("the Association") or its agent, Nevada Association Services, Inc. ("NAS" or Association's Agent"), or did anything else to negatively affect the price

received at the public auction. Nor did it allege or prove any presale disputes of which the purchaser had knowledge. The District Court rightly granted SFR's Motion for Summary Judgment. This Court should affirm.

FACTUAL AND PROCEDURAL BACKGROUND

SFR sets forth the following chart of important undisputed facts:

DATE	FACTS
1991	Nevada adopted Uniform Common Interest Ownership Act as NRS 116, including NRS 116.3116(2).
April 21, 1995	Grant, Bargain, Sale Deed, transferring the Property to Bell, recorded as Instrument No. 199504210001512.[2]
February 6, 2002	Association perfected and gave notice of its lien by recording its Second Restated Declaration of Restrictions ("CC&Rs") as Instrument No. 200202060001001.[3]
November 25, 2002	Deed of Trust in favor of Republic Mortgage, LLC ("Republic" or "Lender") ("FDOT"), recorded as Instrument No. 200211250002874.[4] The FDOT contained a Condominium Rider that allowed the Lender to pay the Borrower's Association Assessment and add that amount to the Borrower's debt to Lender.[5] The FDOT also included language that allowed the lender to escrow funds for "(a) taxes and assessments and other items which can attain priority over [the FDOT] as a lien or encumbrance on the Property[,]"[6] and to "do and pay for whatever is reasonable or appropriate to protect [its] interest in the Property . . . [including] but . . . not limited to: (a)

[2] 1RA_0035.
[3] 1RA_0079-81.
[4] 1RA_0060-78.
[5] 1RA_0076-78.
[6] 1RA_0063.

	paying any sums secured by a lien which has priority over [the FDOT]; (b) appearing in court; and (c) paying reasonable attorney's fees to protect its interest." [7] FNMA is not mentioned as a lender or beneficiary in the FDOT.
March 4, 2011	The Association appointed Nevada Association Services, Inc. ("NAS") as the Association's agent for the purpose of collecting delinquent assessments, giving full power and authority to NAS to act on behalf of the Association, including to proceed with a non-judicial foreclosure. [8]
April 1, 2011	Association recorded Notice of Delinquent Assessment ("NODA") as Instrument No. 201104010001371.[9] The homeowner, Bell, was mailed the NODA.[10]
June 1, 2011	Bell became delinquent on her FDOT payments.[11]
September 21, 2011	After more than 30 days elapsed from the date of mailing of the operative NODA, Association recorded a Notice of Default as Instrument No. 201109210000506.[12] Within 10 days of recordation, the Notice of Default was thereafter mailed to numerous parties, including in pertinent part, Bell, and the Bank (including its agents) several times.[13] The Bank received the Notice of Default, and does not dispute receiving this notice. [14]

[7] 1RA_0066-67.
[8] 1RA_0115-118.
[9] 1RA_0082.
[10] 1RA_0119-130.
[11] 1RA_0043-49.
[12] 1RA_0112-113.
[13] 1RA_0131-167.
[14] See the deposition of Susan Lyn Newby, Rule 30(b)(6) witness for the Bank. See specifically, 1RA_00205, 28:10-29:9 and 1RA_0229-230.

May 31, 2012	After more than 90 days elapsed from the date of the mailing of the Notice of Default, Association mailed a Notice of Foreclosure Sale ("First Notice of Sale") to numerous parties, including in pertinent part, Bell, the Bank (including its agents) several times, and the Ombudsman's office.[15] The First Notice of Sale was thereafter recorded as Instrument No. 201206010001979.[16] The Bank received the First Notice of Sale.[17]
October 25, 2012	Assignment of First Deed of Trust, from Republic to JPMorgan Chase Bank, National Association, recorded as Instrument No. 201210250002057.[18] FNMA is not mentioned in the assignment.
October 25, 2012	Substitution of Trustee, substituting Pioneer National Title of Nevada, Inc. for National Default Servicing Corporation ("NDSC") under FDOT, recorded as Instrument No. 201210250002058.[19]
April 29, 2013	Assignment of First Deed of Trust to JPMorgan Chase Bank, National Association, re-recorded as Instrument No. 201304290002908.[20] FNMA is not mentioned in the assignment.
May 2, 2013	After more than 90 days elapsed from the date of the mailing of the Notice of Default, Association mailed a Notice of Foreclosure Sale ("Second Notice of Sale") to numerous parties, including in pertinent part, Bell, the Bank (including its agents) several times, and the Ombudsman's office.[21]

[15] 1RA_0169-173.
[16] 1RA_0036-37.
[17] 1RA_0175.
[18] 1RA_0038-39.
[19] 1RA_0040.
[20] 1RA_0083-85.
[21] 1RA_0178-184.

	The Bank received the Second Notice of Sale.[22] The Bank does not dispute receiving this notice.[23] The Bank took no action after it received the Second Notice of Sale.[24]
May 6, 2013	The Second Notice of Sale was posted on the Property in a conspicuous place.[25]
May 7, 2013	Association recorded the Second Notice of Sale as Instrument No. 201305070000894.[26]
May 9, 2013	The Second Notice of Sale was posted at **six** public places within Clark County for 20 consecutive days. [27]
May 9, 2013	A Notice of Breach and Election to Sell Under Deed of Trust is recorded by NDSC, as trustee on behalf of the Bank, as Instrument No. 201305090002867.[28]
May 10, 2013	The Second Notice of Sale was published in the Nevada Legal News for three consecutive weeks.[29]
May 31, 2013	Association foreclosure sale took place and SFR placed the winning bid of $10,100.00, which SFR paid.[30] [31] There were multiple bidders in attendance at the sale.[32] No one acting on behalf of the Bank attended the sale.[33] [34]
June 10, 2013	Foreclosure Deed vesting title in SFR recorded as Instrument No. 201306100002206.[35]

[22] 1RA_0100-111**;** 1RA_0186-187**]**.
[23] 1RA_0208, at 38:8-39:4, 65:4-12, and 1RA_0231.
[24] 1RA_0212, at 56:14-21.
[25] 1RA_0189, 0192.
[26] 1RA_0041-42.
[27] 1RA_0190-191.
[28] 1RA_0043-49.
[29] 1RA_0188.
[30] 1RA_0274-276.
[31] 1RA_0268, ¶ 11; 1RA_0270-272; 1RA_0193-195.
[32] 1RA_0268, ¶ 15; 1RA_0195.
[33] 1RA_0249, Responses to RFA No. 3.
[34] 1RA_0213, at 58:7-9.
[35] 1RA_0274-276.

	As recited in the Foreclosure Deed, the Association foreclosure sale all requirements of law were complied with, including but not limited the to the mailing of copies of the NODA and Notice of Default, the recording of the Notice of Default, and the posting and publication of the Notice of Sale. SFR has no reason to doubt the recitals in the Foreclosure Deed.[36] If there were any issues with delinquency or noticing, none of these were communicated to SFR.[37] Further, neither SFR, nor its agent, have any relationship with the Association besides owning property within the community.[38] Similarly, neither SFR, nor its agent, have any relationship with NAS, the Association's agent, beyond attending auctions, bidding, and occasionally purchasing properties at publically-held auctions conducted by NAS.[39]
Prior to May 31, 2013	The Bank never contacted NAS or the Association prior to the sale.[40] The Bank never paid or tried to pay any portion of the Association's lien.[41] The Bank did not challenge the foreclosure sale in any civil or administrative proceeding.[42]

[36] 1RA_0268, at ¶ 13.
[37] 1RA_0268, at ¶ 14.
[38] 1RA_0268, at ¶ 16.
[39] 1RA_0268, at ¶ 17.
[40] 1RA_0212, at 55:6-11; 1RA_0252
[41] 1RA_0212, at 56:12-17; 1RA_0252-252.
[42] 1RA_0212, at 55:18-56:12.

	No release of the superpriority portion of the Association's lien was recorded against the Property.[43] No lis pendens was recorded against the Property.[44]
June 12, 2013	The Bank recorded a Rescission of its Notice of Default and Election to Sell Under Deed of Trust. [45]
September 26, 2013	After the Association foreclosure sale, the Bank recorded another Notice of Breach and Election to Sell Under Deed of Trust as Instrument No. 201309260001088.[46]
March 3, 2014	SFR recorded its Notice of Lis Pendens on the Property. [47]
June 30, 2014	The Bank recorded a Notice of Lis Pendens on the Property. [48]
September 18, 2014	Nevada Supreme Court issued SFR Investments Pool 1, LLC v. U.S. Bank, N.A., opinion holding that a properly held association foreclosure sale pursuant to NRS 116.31162-116.31168 extinguishes a first deed of trust.[49]
May 4, 2015	The Bank recorded a Request for Notice against the Property.[50]
July 18, 2016	SFR has been paying the homeowner's association assessments since it acquired the Property.[51]

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[43] 1RA_0268, at ¶ 18.
[44] 1RA_0268, at ¶ 18.
[45] 1RA_0050-51.
[46] 1RA_0086-92.
[47] 1RA_0052-54.
[48] 1RA_0260-261.
[49] 334 P.3d at 419.
[50] 1RA_0263-265.
[51] 1RA_0268, at ¶ 19.

SUMMARY OF ARGUMENT

The property[52] in the case herein was subject to an NRS 116.3116 foreclosure. This foreclosure was properly noticed and conducted, and resulted in the extinguishment of the Bank's FDOT. As such, the District Court, in reviewing all the circumstances and evidence, properly granted SFR's Motion for Summary Judgment quieting title to SFR.

The District Court properly rejected the Bank's Supremacy Clause argument because that constitutional provision does not authorize private litigants to displace state law. Thus, the Bank lacks standing to assert the alleged rights, if any, of a federal agency, namely, Federal Housing Finance Agency ("FHFA"). That is because Congress gave that right exclusively to the FHFA. Neither the Bank nor the amicus brief filed by FHFA provided any statutory support to overcome the express provisions of HERA.[53]

The Bank and not the Borrower was the only party who could pay only the superpriority portion of the lien to save the Bank's FDOT. Accordingly, the Bank's argument, even though factually erroneous, that the superpriority portion of the lien was satisfied before the sale, fails as a matter of law.

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[52] The property is located at 2824 Begonia Court, Henderson, NV 89074; Parcel No. 177-12-410-074.

[53] Housing and Economic Recovery Act of 2008 ("HERA").

The Bank failed to prove any fraud, unfairness, or oppression that accounted for and brought about the allegedly low purchase price of which it complains. *Shadow Wood Homeowners Ass'n., Inc., v. New York Comm. Bancorp, Inc.*, 132 Nev. ___, ___, 366 P.3d 1105, 1115 (2016)(*citing Long v. Towne,* 98 Nev. 11, 13, 639 P.2d 528, 530 (1982) and *Golden v. Tomiyasu*, 79 Nev. 503, 514, 387 P.2d 989, 995 (1963)). Additionally, should this Court weigh equities under *Shadow Wood*, this Court has given strong favor to BFPs in quiet title matters, so strong that such a finding trumps any equitable relief being sought by a complaining party. *Shadow Wood,* 366 P.3d at 1115. Even where an alleged tender is involved, where the complaining party fails to avail itself of earlier remedies and allows a BFP to purchase the property equity should not interfere. *Id.* at 1116.

The Bank's argument that *SFR* should not be applied retroactively is misplaced because, generally, such retroactivity analyses are not applicable to civil cases. Furthermore, Nevada law supports the conclusion that *SFR*—which did not create but rather interpreted existing law—can and should be applied retroactively. *Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court in & for Cty. of Clark,* 132 Nev. ___, 383 P.3d 246 (2016).

The Bank's due process arguments similarly fail under Nevada law. The Bank seems to forget that this court determined that NRS 116 does not implicate due process in *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home*

Mortgage, a Division of Wells Fargo Bank, N.A., 133 Nev. ___, 388 P.3d 970, 975 (2017). Further, all seven of the Nevada Supreme Court Justices found that an association's foreclosure of its super-priority lien pursuant to NRS 116 extinguishes an FDOT. *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. ___, 334 P.3d 419 (2014) (majority opinion and Gibbons, C.J., concurring in part and dissenting in part). Moreover, all seven of the Nevada Supreme Court Justices found that NRS 116 provides a mandate for associations to mail notices to the first security holders pursuant to NRS 116.31168(1), which incorporates the whole of NRS 107.090. *Id*. at 410, 422. As such the Bank's due process argument fails.

The Bank brings to this Court no evidence raising a question of material fact, no new arguments, no reason to overturn the legal and fair association foreclosure sale, and certainly no reason to cloud SFR's title to the Property. As such the Court should Affirm.

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ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE BANK LACKS STANDING TO INVOKE THE SUPREMACY CLAUSE OR HERA.

The District Court properly determined that whether FNMA had any interest in the Property on the date of the Association foreclosure was immaterial[54] because the Bank lacks standing to assert either the Supremacy Clause or 12 U.S.C. § 4617(j)(3). 3AA_370, ¶O. Nothing in the law allows the Bank to ascend to rights given only to FHFA, not even some purported contract with FNMA.

A. The Bank Cannot Use the Supremacy Clause or HERA

The Bank contends that it has standing to invoke the Supremacy clause to enforce what it misleadingly labeled as the "Federal Foreclosure Bar" under 12 U.S.C. §4617(j)(3). However, the Bank is not the FHFA and, therefore, cannot invoke protection under 12 U.S.C. §4617(j)(3).

1. Armstrong *does not displace Congress's right to determine who may enforce federal laws*

The United States Supreme Court determined that private litigants cannot use the Supremacy Clause to displace state law. *Armstrong v. Exceptional Child Care*

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[54] The District Court made no findings as to whether FNMA had an interest. 3AA_370, ¶ O. However, FNMA had no recorded interest in the Property at any time prior to the sale. *See* 1RA_0060-78; 1RA_0038-39; 1RA_0083-85.

Ctr., Inc., 575 U.S. ___, 135 S.Ct. 1378, 1383-85 (2015). Only Congress, through a law's text, determines who can invoke a federal statute. *Id.* at 1383-84.

The *Armstrong* Court stated that the Supremacy Clause is not a "source of any federal rights" and that it is "silent regarding who may enforce federal laws in court, and in what circumstances they may do so." Id. at 1383. The Bank relies primarily on cases pre-dating *Armstrong*. *See* AOB p. 15 *citing Beal Bank, SSB v. Nassau Cty*., 973 F. Supp. 130, 133 (E.D.N.Y. 1997); citing also *Cambridge Capital Corp. v. Halcon Enterprises, Inc*., 842 F. Supp. 499, 499 (S.D. Fla. 1993); citing also *Grimsley v. Bd. of Cty. Comm'rs of Atoka Cty*., *Okla*., 9 F. App'x 970, 971 (10th Cir. 2001).

What the Bank forgets is that "Article I vests Congress with broad discretion over the manner of implementing its enumerated powers, giving it authority to 'make all Laws which shall be necessary and proper for carrying [them] into Execution.'" *Armstrong,* 135 S.Ct. at 1383 *citing* U.S. Const. Art. I, § 8. The *Armstrong* Court went on to say "[i]t is unlikely that the Constitution gave Congress such broad discretion with regard to the enactment of laws, while simultaneously limiting Congress's power over the manner of their implementation, making it impossible to leave the enforcement of federal law to federal actors." *Armstrong,* 135 S.Ct. at 1383-84. "If the Supremacy Clause includes a private right of action, *then the Constitution requires Congress to permit the enforcement of its laws by private*

actors, significantly curtailing its ability to guide the implementation of federal law. *Id.*., 135 S. Ct. at 1384 (emphasis added)." Thus, if possible at all, a private actor would need the express intent of Congress to enforce federal law as anything less would strip away the right from Congress to implement its own laws. *See Id.* "[T]he 'express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'" *Id.* at 1385 *citing Alexander v. Sandoval*, 532 U.S. 275, 290, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001).

As discussed below, Congress authorized only one party to invoke the statutory shield found in § 4617(j)(3): the FHFA. Therefore, according to the United States Supreme Court, this demonstrates Congress intended to preclude others—like the Bank—from attempting to invoke these protections.

2. Congress vested authority to enforce § 4617(j)(3) solely in FHFA, and then only when acting as conservator.

The Housing and Economic Recovery Act of 2008 ("HERA") demonstrates that Congress exclusively authorized only the FHFA, solely in its capacity as conservator, to enforce HERA and to protect Fannie's alleged "assets." Specifically, 12 U.S.C. § 4617(b)(2)(D)(ii) provides that, "the Agency may, as conservator, take such action as may be appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity [Fannie]" 12 U.S.C. § 4617(b)(2)(D)(ii)(emphasis added). Notably absent in this statute is any

ability for the Bank to exercise the authority provided to the conservator under 4617(b)(2)(D)(ii). In fact, FHFA's alleged succession means that *FHFA* has supposedly stepped into Fannie's shoes; it does not mean that the *Bank* has stepped into Fannie's shoes who has also then stepped into FHFA's shoes, somehow allowing the Bank, twice removed, to use § 4617(j)(3). *United States ex. rel Adams v. Aurora Loan Services, Inc.*, 813 F.3d 1259, 1261 (9th Cir. 2016). The Bank is but a private litigant and not entitled to enforce §4617(j)(3). Therefore, the Bank improperly relies on authority it has not been granted but has actually exclusively been granted only to FHFA by Congress.

FHFA's own regulations reinforce this authorization by stressing FHFA has "the **exclusive authority** to investigate and prosecute claims of any type **on behalf of [Fannie]**, or to **delegate to management of [Fannie] the authority** to investigate and prosecute claims." 12 C.F.R. § 1237.3(a)(7) (emphasis added). Nothing allows FHFA to delegate its exclusive authority to the Bank or any servicer. Here, the Bank is neither Fannie nor the FHFA, which has "exclusive authority to prosecute claims" for Fannie. This acknowledgment by the statute proves that Congress gave this authority to the FHFA. If direct delegation of this authority was not necessary, than it begs the question to why 12 C.F.R §1237.3(a)(7) needed to be promulgated in the

first place. Furthermore, the Bank advanced no evidence that FHFA "ha[d] delegated to management of [Fannie]" FHFA's authority.[55] *See* 3AA _358.

Lastly, 12 U.S.C. § 4617(j)(1) states "provisions of this subsection [4617(j)] **shall apply with respect to the Agency** in any case in which the Agency is acting as a conservator or a receiver." 12 U.S.C. § 4617(j)(1) (emphasis added). This provision establishes 4617(j)'s applicability; its heading, after all, is "applicability." Specifically, 4617(j)(3)—a "provision[] of this subsection"—applies "in any case in which the Agency is acting as a conservator . . . ." This phrase's plain meaning categorically limits 4617(j)(3) "to the Agency." It also requires that—in order for 4617(j)(3) to apply in a given case—FHFA must be "**in [that] case** acting as a conservator." *Id.* If FHFA ("the Agency") is not "acting as a conservator" in a case, then 4617(j)(3) does not apply to that case. Here, the Agency or FHFA is not a party to the case. Hence, this is not a "case in which the Agency is acting as a conservator[,]" thereby rendering 4617(j)(3) inapplicable; the fundamental requirement in §4617(b)(2)(D)(ii) & (j)(1), that the conservator must "act," to have the statutory scheme apply, has not been fulfilled.

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[55] The Bank asks this Court to take Notice of Fannie Guides available for viewing at Fannie's web page. AOB p. 17 fn. 5. These webpages are not part of the record and thus should be disregarded by this Court. To the extent this Court entertains any argument based on these Guides, the arguments are unavailing, as set forth in Sec. C, *infra*.

Even FHFA recognized the limits of anyone other than itself to assert HERA defenses. FHFA previously told a federal court that it "must be permitted to intervene in this action to assert unique statutory defenses provided by federal law that cannot be asserted by any other party to the litigation." Motion of FHFA to Intervene and Memorandum of Points and Authorities at 2:4-6, *Executive Trustee Services, LLC*, No. 3:09-cv-306-RCJ-PAL (D. Nev. 2015). 4617(j)(3) is allegedly a "unique statutory defense[] provided by federal law that cannot be asserted by any other party" including Fannie Mae or the Bank. These statements by FHFA itself contravene the Bank's position that it has the authority to use §4617(j)(3) as a defense. In sum, *Armstrong* and Congress's intent prevent the Bank from being able to use the Supremacy Clause or HERA.

Even if the FHFA had delegated appropriate authority to Fannie's management, the Bank is not Fannie and cannot raise claims entitled to Fannie or the FHFA. While many jurisdictions allow a servicer to enforce matters of payment, default of a loan and bankruptcy of the borrower in situations where both the servicer and principle are private entities, *Armstrong,* prevents private litigants from using the Supremacy Clause to displace state law. *Armstrong,* 135 S.Ct. 1383-85.

The Bank improperly relies on *Greer v. O'Dell*, 305 F.3d 1297, 1299 (11th Cir. 2002) for the proposition that it is entitled to the statutory shields afforded to FHFA by Congress. However, *Greer* was a case that addressed the relationship

between a private entity loan servicer and a private entity Bank. None of the parties in the *Greer* matter involved the FHFA or Fannie. Accordingly, this case is wholly inapplicable.

3. **Munoz *is inapposite because it does not deal with enforcement of federal statutes.***

The Bank's reliance on *Munoz v. Branch Banking* is misplaced. Nowhere in the *Munoz* decision does it indicate that this Court considered *Armstrong.* 131 Nev. Adv. Op. 23, 348 P.3d 689, 690 (2015). But if it had, this Court would have reached the same conclusion. *Munoz* dealt with whether NRS 40.459(1)(c), which placed limits on deficiency judgments, was preempted by the Federal Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA). *See id.* In coming to this holding, this Court wrote that "[t]o assist the FDIC in carrying out this duty, federal law provides special status to the FDIC's assignees so as to maintain the value of the assets they receive from the FDIC." *Munoz*, 348 P.3d at 692 (2015) *citing FDIC v. Bledsoe*, 989 F.2d 805, 809–11 (5th Cir.1993) (providing that FDIC assignees share the FDIC's statutory "super" holder-in-due-course status and are entitled to the benefit of a six-year statute of limitations under FIRREA rather than any shorter state statute of limitations). Ultimately, this Court found that Congress intended to allow a private actor to enforce FIRREA. But unlike *Munoz,* the Bank

cannot point to a single authority showing the express intent of Congress to allow banks to invoke HERA.

B. <u>The FHFA's Policy Arguments Contradict Express Federal Law.</u>

In the Brief of Amicus Curiae FHFA, the FHFA failed to provide a single supporting authority that would allow for the Bank to enforce 12 U.S.C. 4617(b)(2)(D). As stated earlier, the United States Supreme Court recently determined that private litigants cannot use the Supremacy Clause to displace state law. *Armstrong* at 1383-85. To allow the Bank to enforce federal law, including 12 U.S.C. §4617(j), would strip away a right entitled to Congress. *Armstrong,* 135 S.Ct. at 1383-84. Therefore, when the FHFA argues that "no condition precedent" exist in 12 U.S.C. §4617(j)(3), they have completely reversed the standard set forth in *Armstrong*. *See* FHFA's Amicus Brief p. 7. If a private right to enforce federal law can exist, "then the Constitution requires Congress to permit the enforcement of its laws by private actors." *Id.*

Just because FHFA's enterprises allegedly own millions of loans nationwide and because FHFA would prefer for private entities such as the Bank to invoke § 4617(j)(3), does not allow them to circumvent the law and the United States Constitution. After all it is Congress not the FHFA, Fannie or the Bank that has the power to implement federal law. *Id.* at 1384.

The fact that the Bank's defending Fannie's interest is an integral duty of a servicer of the loan, does not make these duties any more true or valid under the law. Simply calling something an integral duty does not mean Congress intended that FHFA could delegate every statutory power it has to another party. Clearly, the FHFA could have appeared to defend its purported interest in the property as it has done in dozens of cases.[56] Additionally, the net expenditure of litigation in hiring counsel would have been the same whether the FHFA was an actual party to this case or if the Bank participated. Thus, any argument regarding the costs of litigation that would need to be absorbed by taxpayers is simply sleight of hand. If litigations are being fronted by the taxpayers, then the taxpayer is no better off if FHFA retains counsel directly or if its pays a servicing fee to the Bank which covers litigation expenses.

The FHFA and the Bank rely on *Pharmaceutical Co. v. Bartlett*, 133 S. Ct. 2466 (2013) to support to proposition that private litigants can assert defenses

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[56] *See, e.g., Federal Nation Mortgage Ass'n et al v. SFR Investments Pool 1, LLC*, Case no. 2:14-cv-02046-JAD-PAL (D. Nev.); *Nationstar Mortgage, LLC, et al v. SFR Investments Pool 1, LLC*, 2:15-cv-00267-RFB-NJK (D.Nev.); *Federal Housing Finance Agency v. SFR Investments Pool 1, LLC*, 2:15-cv-02381-GMN-VCF (D.Nev.); *Federal Housing Finance Agency v. SFR Investments Pool 1, LLC*, 2:15-cv-01338-GMN-CWH (D.Nev.); *Federal National Finance Agency v. SFR Investments Pool 1, LLC*, 2:17-cv-00914-GMN-PAL. FHFA is a party in each of these cases.

grounded in preemption and assert that a "federal drug labeling law preempted state tor low." Amicus, p. 5. However, *Bartlett* is not applicable. In *Bartlett*, a state law conflicted with the text of a Federal law so the Supreme Court found that the state law was preempted. Here, there is no Federal conflict because there is no state law regarding FHFA. Instead, the issue is whether Congress by the text of § 4617 authorized the Bank to invoke the shields only afforded the FHFA. The text of the statute has not done so.

The Amicus Brief clouds the issue by citing to cases which all discuss federal preemption or when private servicers wish to enforce loans with private banks. The matter before this Court is not preemption or private servicing contracts but statutory rights which were granted by Congress exclusively to the FHFA. Regardless, for the FHFA policy concerns, nothing that has been presented justifies giving up Congress' right to implement its own laws by allowing private parties to invoke the Supremacy Clause.

C. The Bank Clouds the Issue of Standing by Raising Inapposite Cases Which Do not Pertain to HERA.

The Bank lacks any standing to raises defenses and claims under HERA. This should conclude the Court's analysis on this topic.

Neither *In re Montierth*, 131 Nev. ___, ___, 354 P.3d 648, 650-51 (2015) nor *Edelstein v. Bank of New York Mellon*, 128 Nev. ___, ___, 286 P.3d 249, 257-58

(2012) addresses the extent to which the Bank can make Supremacy Clause or 4617(j)(3) arguments. Specifically, nothing in *Montierth, Edelstein* or the Restatement circumvents the fact that Congress did not expressly allow the Bank to enforce HERA.

Furthermore, the Bank has failed to produce a valid contract between it and Fannie. Instead, the Bank asks this Court to take Judicial Notice of the Fannie web page. AOB p.17 at fn. 3. This Court can only take judicial notice of this document if the fact is "(a) Generally known within the territorial jurisdiction of the trial court; or (b) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to dispute." NRS 47.130(2). To the extent the Bank relies on the guidelines to establish that a contractual relationship exists between the Bank and Fannie, SFR challenges this fact.

Finally, upon an inspection of the website listed at AOB p.17 n.3—http://www.Fanniemae.com/content/gide/servicing/index.html —it is near impossible to tell how anything in this web page creates a contractual relation between the Bank and Fannie. The web page does not even mention this specific property nor does it identify the Bank as a servicer for Fannie properties. Thus, this Guide "of course, is not a contract. . . ." *Hinton v. Fed. Nat'l Mortg. Ass'n*, 945 F.Supp. 1052, 1058 (S.D. Tex. 1996)(discussing FNMA's Guide).

Assuming arguendo the Guide is a contract—which it is not—this still does not allow the Bank to step into FHFA's shoes. *United States ex rel. Adams*, 813 F.3d at 1261. Furthermore, to the extent the Bank and Amicus suggest that FHFA can delegate its authority to use § 4617(j)(3) to the Bank, this contravenes the Nondelegation Doctrine. This doctrine precludes federal agencies from delegating their powers to private entities. *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *ALA Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529, 537, 538 (1935); *Ass'n of Am. R.R. v. U.S. Dep't Transp.*, 821 F.3d 19, 31 (D.C. Cir. 2016) (addressing Due Process concerns implicated by the Nondelegation Doctrine). To suggest that an unelected—and thus poliltically unaccountable group of FHFA bureaucrats—can give their statutory power to a bank is to disregard rudimentary checks and balances enshrined in the Constitution. Congress, not the Bank and not FHFA, gets to decide who can use § 4617(j)(3) – under both the Nondelegation Doctrine and *Armstrong*. 135 S.Ct. at 1383.

The Bank's arguments about the Servicing Guide are irrelevant and do not override Congress's express language. The District Court's order should be affirmed.

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II. THE BORROWER CANNOT PAY ONLY A PORTION OF THELIEN TO SATISFY THE SUPERPRIORITY

The Bank expects everyone but itself to protect it from its own inaction. The Bank erroneously concludes that the prior homeowner "Borrower", satisfied the super-priority portion of the lien by making a partial payment before the sale. AOB 23. However, the Bank acknowledged in its own Motion for Summary Judgment that at the time the notice of sale was recorded, the Borrower owed 5 months of assessments. *See* RA_0306:26. The Bank also fails to state that any additional payments were made from the date of the recording of the notice of sale and the sale, or over a year later. Accordingly, an additional 12 months of assessments would have also been due and owing.

Additionally, under NRS 116.31166(1), the holder of a first deed of trust may pay off the superpriority portion of an HOA lien to prevent the foreclosure sale from extinguishing that security interest. *See* Nev. Rev. Stat. § 116.31166(1); *see also SFR Investments*, 334 P.3d at 414 ("But as a junior lienholder, U.S. Bank could have paid off the SHHOA lien to avert loss of its security ...."); *see also, e.g.*, *7912 Limbwood Ct. Trust v. Wells Fargo Bank, N.A., et al.*, 979 F. Supp. 2d 1142, 1149 (D. Nev. 2013) ("If junior lienholders want to avoid this result, they readily can preserve their security interests by buying out the senior lienholder's interest." (citing *Carillo v. Valley Bank of Nev.*, 734 P.2d 724, 725 (Nev. 1987); *Keever v.*

Nicholas Beers Co., 611 P.2d 1079, 1083 (Nev. 1980))). The statute confers the ability to pay only the superpriority portion of the lien to the first deed of trust holder but not the Borrower. Accordingly it is irrelevant that the Borrower made a few payments towards the whole of the Association lien, but did not pay the entire lien. The borrower owes the entire amount. Further, policy supports that only the first secured can protect the FDOT, otherwise a borrower has no incentive to pay beyond none months.

Additionally, "[f]or there to be an offer of an accord the offer must clearly indicate that the offeror seeks a total discharge, otherwise any such offer accepted merely constitutes a **partial payment**." *U.S. for Use of Las Vegas Bldg, Materials, Inc. v. Bernadot*, 719 F Supp. 936, 938 (D. Nev. 1989) (emphasis added). Because an accord and satisfaction is governed by general contract principles, there must be an effective acceptance of the compromise offer in order to discharge the original obligation. *Teledyne Mid-Am. Corp. v. HOH Corp.*, 486 F.2d 987, 993 (9th Cir. 1973) (citing 6 Corbin, Contracts § 1277 (1962). Here, it is clear that the Association did not accept the Borrower's partial payment as a discharge of the whole of the lien because it commenced foreclosure proceedings.

The Bank attempts to avoid this issue by citing *Wells Fargo Bank, N.A. c. Sky Vista Homeowners Ass'n,* 3:15-CV-00390-RCJ-VPC, 2017 WL 1364583 (D. Nev. Apr. 13, 2017). That case is completely irrelevant here because in that case the

purported payment was not made by the homeowner but by the first deed of trust holder, in accordance with the statute.

Finally, the Bank relies on the Restatement (Third) Property §6.4(a) which states "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." (Emphasis added). AOB_ 24-25. This portion of the restatement is not relevant here because we are not dealing with a contractual mortgage obligation but a covenant that runs with the land indefinitely. Additionally, the very text of the restatement actually supports SFR's position because the Borrower did not fully perform as she did not pay the lien in its entirety and the Association clearly did not accept the partial payment as performance in full because it continued with its authority to foreclose the lien.

As stated above, there were assessments due and owing at the time of the sale, as admitted by the Bank, and only the Bank, as purported holder of the FDOT, can pay off only the super priority portion of the lien to preserve the FDOT. Therefore, this argument fails as a matter of law and the FDOT was extinguished by the Association foreclosure sale.

III. SFR APPLIES RETROACTIVELY: IT INTERPRETED EXISTING LAW

The Bank argues that *SFR* should not be applied retroactively. Specifically, the Bank argues *Breithaupt v. USAA Prop & Case. Ins. Co.*,[57] *citing* to *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971) prevents this Court from "retroactively" applying *SFR*. However, this Court has "disagre[ed] with [*Breithaupt's*] reference to the *Chevron* Oil factors because the issue in *Breithaupt* involved whether a rule passes by statute –the heightened notice requirement− should apply retroactively." *Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 132 Nev. ___, 383 P.3d 246, 251 (2016). This Court found that it was "not the duty of this court to determine whether rules adopted in statutory amendments apply retroactively based on equitable factors." *Id.*

In *Nevada Yellow Cab* this Court considered the retroactivity of its decision in *Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. ___, 327 P.3d 518 (2014), which held that the Minimum Wage Amendment to the Nevada Constitution ("Amendment"), enacted in 2006, impliedly repealed NRS 608.250(2)(e), a statute which exempted taxicab drivers from statutory minimum wage laws. Following this Court's decision in *Thomas*, taxicab drivers sued taxicab companies for back wages, retroactive to the date of the Amendment. *Nevada Yellow Cab*, 383 P.3d at 246. The

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[57] 110 Nev. 31, 35 (1994).

taxicab companies argued that this Court's decision in *Thomas* should be applied prospectively only. *Id*.

This Court recognized the strong disapproval by the United States Supreme Court in concluding that it is inappropriate for civil courts to limit the retroactivity of its decisions. *Id.* at 250 (*citing Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 90, 94-97 (1993), *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 218-224 (1990) (Stevens, J. joined by Brennan, Marshall, and Blackmun, JJ., dissenting), and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 540 (1991)). The Court quoted Justice Scalia's concurrence in *American Trucking*, which agreed with the dissenters that:

> [P]rospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be. The very framing of the issue that we purport to decide today – whether our decision in Scheiner shall "apply" retroactively – presupposes a view of our decisions as creating the law, as opposed to declaring what the law already is. Such a view is contrary to that understanding of "the judicial power."

Nevada Yellow Cab, 383 P.3d at 250 (*quoting American Trucking*, 496 U.S. at 201 (Scalia, J., concurring)). This Court acknowledged that the Separation of Powers prevent it from exercising its prerogative to determine whether a rule of law is applied retroactively or prospectively. *Nevada Yellow Cab*, 383 P.3d at 250 (*citing Harper*, 509 U.S. at 95). Accordingly, this Court rejected the taxicab companies' argument, holding that:

> when we interpret a constitutional amendment and conclude that it impliedly repeals a statute, that decision applies retroactively to when the amendment was enacted regardless of the balancing of equities. Thus, in *Thomas* we simply declared what the law was upon enactment of the Amendment in 2006, we did not create the law in 2014.

Nevada Yellow Cab, 383 P.3d at 251. Put simply, this Court's interpretation of existing law applies retroactively to the date of enactment as a matter of course. A *Chevron Oil* analysis (the "balancing of equities") would not be necessary for such an instance.

This Court also recognized the strong disapproval by the United States Supreme Court of the application of *Chevron Oil* factors to federal civil law. *Nevada Yellow Cab*, 383 P.3d at 251.

Nothing changes the application of *Nevada Yellow Cab* to *SFR*; interpretation of both a constitutional amendment and enactment of a statute involve interpretation of existing law. In *SFR*, this Court interpreted the provisions of NRS 116.3116, *et seq*., enacted in 1991, as establishing a true superpriority lien, the proper foreclosure of which extinguishes a first deed of trust. *SFR*, 334 P.3d at 419. This Court did not "create" the law, but rather "declare[d]" what the law is and has been since enactment. *Nevada Yellow Cab*, 383 P.3d at 251. Thus, *Chevron Oil* analysis is inappropriate in interpreting NRS 116.3116 *et seq*. As a result of the Bank's misuse of *Chevron Oil*, this Court should reject this argument. NRS 116.3116 was the rule of law at the time it became effective in 1992, not when this Court interpreted it.

IV. IN NEVADA LOW PRICE IS NEVER ENOUGH TO UNWIND A FORECLOSURE SALE.

This Court has held 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'** (internal citations omitted) (emphasis added).

Golden v. Tomiyasu, 79 Nev. 503, 514, 387 P.2d 989, 995 (1963). This was applied to association foreclosures in *Long* and reaffirmed by *Shadow Wood. See Shadow Wood Homeowners Ass'n., Inc., v. New York Comm. Bancorp, Inc.*, 132 Nev. ___, ___, 366 P.3d 1105, 1115 (2016)(*citing Long v. Towne*, 98 Nev. 11, 13, 639 P.2d 528, 530 (1982); *Centeno v. JPMorgan Chase Bank, N.A.*, Case No. 67365 (Nev. Mar. 18, 2016) (unpublished Order Vacating and Remanding a denial of preliminary injunction based in part on the district court's determination that, based on price alone, the sale was commercially unreasonable).[58]

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[58] Available at http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=35567, as Doc. 16-08672.
In that case, the price paid at the homeowners association's auction was $5,950.00. While the district court did not establish a value for the property, on appeal the Bank argued that that the deed of trust secured a loan for $160,001.00 and the property later reverted to the Bank at its own auction for $145,550.00. (See Case No. 67365, Response to Appellant's Pro se Appeal Statement, filed Feb. 17, 2016, available at http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=35567, as Doc. 16-04982. . . .

In adopting this rule, this Court stated that

> **discuss[ing] the hundreds of cases involving attacks on public sales by trustees under the powers of a deed of trust** where inadequacy of price is claimed, with or without the additional elements of fraud, **would be neither necessary nor desirable**. We adopt the rule laid down in *Oller v. Sonoma County Land Title Company*, 137 Cal.App.2d 633, 290 P.2d 880.

Golden, 79 Nev. at 515, 387 P.3d at 994 (emphasis added.) And that rule is "that inadequacy of price, however gross, is not in itself a sufficient ground for setting aside a trustee's sale legally made." *Golden*, 79 Nev. at 504, 514, 387 P.2d at 995. *See also Golden*, 79 Nev. at 515, 387 P.3d at 994 *citing Oller v. Sonoma Cty. Land Title Co.,* 137 Cal. App. 2d 633, 634, 290 P.2d 880, 881 (1955).[59] This was reinforced by this Court when it stated that

> "[i]n approving the rule thus stated, we necessarily reject the dictum in *Dazet v. Landry*[60], … , implying that the rule requiring more than mere inadequacy of price will not be applied if 'the inadequacy be so great as to shock the conscience.'" *Golden* 79 Nev. at 514-15, 386 P.2d at 955.)(footnote added).

Thus, the price paid at the association's foreclosure sale in *Centeno* was approximately 4% of the credit bid by the Bank at its subsequent auction.

[59] A panel of this Court once on May 25, 2017, reaffirmed this rule. *PNC Bank, N.A. v. Saticoy Bay LLC Series 9320 Mt. Cash Ave. UT 103,* Case No. 69595 (Nev. May 25, 2017).

[60] 21 Nev. 291, 298, 30 P. 1064 (1892)

In insisting that this Court review multiple cases, including *Krohn,*[61] *Fenton*[62] and other cases that have adopted the Restatement (Third) Property: Mortgages, §8.3 cmt. b, the Bank is asking this Court to engage in an analysis that this Court has already described as "neither necessary nor desirable." While the Arizona Court may have adopted a rule that deals with a "grossly inadequate price" as a justification to overturn a foreclosure,[63] this Court acknowledged the "hundreds of cases involving attacks on public sales by trustees." And in so doing, rejected the very argument the Bank advances now.

A. The Price Paid at Auction was Commercially Reasonable.

The District Court properly determined that price paid at auction was immaterial because there was no evidence of fraud, oppression, or unfairness in the sale process and price alone is insufficient to invalidate the sale. 3AA_370. Even if the District Court would have considered the price paid by SFR at foreclosure, the Court would have found that the price paid was commercially reasonable. Fair market value has no applicability to a forced sale situation. *BFP v. Resolution Trust*

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[61] *In re Krohn*, 203 Ariz. 205, 207, 52 P.3d 774, 776 (2002).
[62] *Sec. Sav. & Loan Ass'n v. Fenton*, 167 Ariz. 268, 270, 806 P.2d 362, 364 (Ct. App. 1990).
[63] The Bank's analysis of *Krohn* is misleading since in *Krohn*, Arizona adopted the "shock the conscience" standard in 1886 and "gross inadequacy" in 1905. *Krohn*, 203 Ariz. at 207, 52 P.3d at 776. Nevada expressly rejected this standard.

Corporation, 511 U.S. 531, 542 (1994). In *BFP*, the United States Supreme Court analyzed whether the price received at a mortgage foreclosure sale was less than "reasonably equivalent value" under the bankruptcy code. Just like the Bank in this case, the Chapter 11 debtor argued that because the property sold for a fraction of its fair market value, the price paid was not reasonable. The Court held that "a 'reasonably equivalent value' for foreclosed real property is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with." *BFP*, 511 U.S. at 545. The Court explained that in a forced sale situation, "fair market value cannot—or at least cannot always—be the benchmark[]' used to determine reasonably equivalent value. *Id*. at 537. This is so because the market conditions that generally lead to "fair market value" do not exist in the forced sale context, where sales take place with significant restrictions:

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

Id. at 537-538 (quoting Black's Law Dictionary 971 (6th ed. 1990)(emphasis added)).

The Court recognized that property sold in a forced sale context, i.e. a foreclosure, "is simply worthless [because] [n]o one would pay as much to own such property as he would pay to own real estate that could be sold at leisure and pursuant to normal marketing techniques." *Id*. at 539. As the Court further noted,

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

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

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

NRS 116 ensures public notice and contains provisions for competitive bidding.

NRS 116 requires that an NOD is mailed to all interested parties and subordinate claim holders.[64] After 90 days of the recording of the NOD, the NOS must be mailed to all interested parties and subordinate claim holders.[65] Additionally, NRS 116 requires that the NOS must be posted in a public place as well as be published in a newspaper of general circulation for three consecutive weeks, at least once a week.[66] Additionally, NRS 116 requires that the sale takes place in the County in which the property is situated.[67]As a result, all subordinate interest holders, as well as the public as a whole, were made aware of an NRS 116 auction. These noticing and foreclosure provisions ensured the auction was publically noticed and would create competitive bidding.

Here, the Association did everything required of it under the law to foreclose on its lien including meeting all the requirements of NRS 116. The foreclosure was properly noticed including the recording and mailing of all applicable notices.[68] Additionally, the auction was publically held, [69] and SFR placed the winning bid of $10,100.00 at auction.[70]

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[64] NRS 116.31163; NRS 116.31168; *see also G & P Investment Enterprises*, Case No. 68842(stating notice is required to be sent to the deed of trust beneficiary.).
[65] NRS 116.311635(1)(b)(1); NRS 116.311635(1)(b)(3); 107.090(3)-(4).
[66] NRS 116.311635(c)
[67] NRS 116.31164
[68] *See* Factual Background ¶¶ 3-8.
[69] *Id.*
[70] 2AA_230.

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

B. There Were No Irregularities with the Foreclosure.

While previously established that price alone will never be enough to overturn a foreclosure, the Bank has attacked various aspects of this foreclosure. However, upon close review all of these attacks fall flat and do not support voiding the sale and certainly do not support any suggestion to cloud SFR's title.

4. The Mortgage Protection Clause in the CC&Rs does not amount to fraud, unfairness, or oppression.

The Bank asserts, without evidence, that the mortgage protection clause contained within the CC&Rs rendered the sale "unfair". (AOB p. 38.) The Nevada Supreme Court's holding in *SFR* considered a mortgage protection clause containing **identical**

language to the clause here, and held that the clause **wholly invalid:**

> U.S. Bank last argues that, even if NRS 116.3116(2) allows nonjudicial foreclosure of a superpriority lien, the mortgage savings clause in the Southern Highlands CC & Rs subordinated SHHOA's superpriority lien to the first deed of trust. **The mortgage savings clause states that 'no lien created under this Article 9 [governing nonpayment of assessments], nor the enforcement of any provision of this Declaration shall defeat or render invalid the rights of the beneficiary under any Recorded first deed of trust encumbering a Unit, made in good faith and for value.'** It also states that '[t]he lien of the assessments, including interest and costs, shall be subordinate to the lien of any first Mortgage upon the Unit.'

SFR, 334 P,3d at 418.

NRS 116.1104 defeats this argument. It states that Chapter 116's 'provisions may not be varied by agreement, and **rights conferred by it may not be waived** ... [e]xcept as *expressly* provided in' Chapter 116. (emphasis added.) "'Nothing in [NRS] 116.3116 expressly provides for a waiver of the HOA's right to a priority position for the HOA's super priority lien.' . . . The mortgage savings clause thus does not affect NRS 116.3116(2)'s application in this case." *Id.* (internal citations omitted) (emphasis added).

The Bank provided no evidence that the presence of the mortgage protection clause in any way affected the price paid by SFR at auction. The Bank also failed to provide any evidence that the Bank relied on or even read the CC&Rs.

But even if the Bank had been aware of the CC&Rs, the provisions of NRS 116

(including 116.3116 and NRS 116.1104) were enacted in 1991, and the Bank's DOT was recorded *after* the Association recorded its CC&R's. At the time the Bank took its interest in the DOT, the Bank was aware of the enactment of NRS 116. Any reliance on a provision strictly made unenforceable by statute is not fraud, oppression or unfairness.

5. The number of bids made on the Property is wholly irrelevant.

The Bank alleges that SFR's bid was only one of two bids as support for its allegation that there was fraud, oppression, or unfairness. AOB, p.39. As an initial matter it should be noted that the Bank wholly fails to cite to any document in the record which supports this allegation. Further, the number of bids made at the sale is irrelevant because there is no such requirement in the statute. In fact, the evidence shows two bidders and 20 witnesses to the sale. *See* RA_0193 *see also* RA_0268. Further, that no other qualified bidder chose to bid does not invalidate the sale.

V. BONA FIDE PURCHASER STATUS TRUMPS EQUITABLE CHALLENGES.

A. SFR is a Bona Fide Purchaser.

SFR has actual, legal title to the property pursuant to NRS 116.31164(3)(a). The Bank is seeking equitable "title" or "interest" in trying to keep its lien in place. Where a party is claiming equitable title, the burden is on the party claiming such equity to allege and prove that the person holding legal title is not a bona fide

purchaser ("BFP"). *See First Fidelity Thrift & Loan Ass'n v. Alliance Bank*, 60 Cal. App. 4th 1433, 71 Cal. Rptr. 2d 295 (Cal.Ct.App. 1998).

A BFP purchases real property: (i) for value; and (ii) without notice of a competing or superior interest in the same property. *Berge v. Fredericks*, 95 Nev. 183, 185, 591 P.2d 246, 247 (1979). A "purchaser for value" is one who has given "valuable consideration" as opposed to receiving the property as a gift. *Id*. at 187, 248; *Allen v. Webb*, 87 Nev. 261, 266, 485 P.2d 677, 680 (1971) ("A specific finding of what the consideration was may be implied from the record."). Even if a purchaser may purchase a property for lower than the property's value on the open market, the fact that SFR paid "valuable consideration" is undisputed. *Shadow Wood*, 366 P.3d at 1115 (*citing Fair v. Howard*, 6 Nev. 304, 308 (1871) ("the question is not whether the consideration is adequate, but whether it is valuable"); *see also Poole v. Watts*, 139 Wash, App. 1018 (2007)(unpublished disposition) (stating that the fact that the foreclosure sale purchaser purchased the property for a "low price" did not in itself put the purchaser on notice that anything was amiss with the sale).

In the present case, SFR paid valuable consideration for the Property at the foreclosure sale. This is undisputed as SFR paid $10,100.00 for the property. While SFR is a Bona Fide Purchaser ("BFP"), nothing under Nevada law requires a buyer at an NRS 116 sale to be a BFP. Instead, this is merely a defense alleged by SFR.

Shadow Wood stood for the proposition that if the Bank claims that a pre-sale dispute occurred between it and the Association/Foreclosure Agent, and SFR had no knowledge of this pre-sale dispute, then the sale cannot be unwound or SFR be forced to take subject to the DOT. As a result, even if there were any irregularities with the Association sale, as long as these irregularities were not known to SFR, they cannot be imputed to SFR, as SFR is a BFP. "Where the complaining party has access to all the facts surrounding the questioned transaction and merely makes a mistake as to the legal consequences of his act, equity should normally not interfere, especially where the rights of third parties might be prejudiced thereby." *Shadow Wood*, 366 P.3d at 1116 (*quoting Nussbaumer v. Sup. Ct. in & for Yuma Cty.*, 107 Ariz. 504, 489 P.2d 843, 846 (1971)). This is consistent with the Restatement's commentary regarding those non-judicial foreclosure jurisdictions where price alone is not enough to set aside a sale: the wronged junior lienholder must seek a remedy from someone other than the purchaser:

> If the real estate is unavailable because title has been acquired by a bona fide purchaser, the issue of price inadequacy may be raised by the [former title holder] or junior lienholder in a suit for wrongful foreclosure. . . . In addition, the [foreclosing lienholder] must be responsible for a defect in the foreclosure process of the type described in Comment *c* of this section.

Restatement (Third) Property: Mortgages, §8.3, Comment *b*, at 584. This is also consistent with California law that precludes unwinding a foreclosure sale once title

has transferred to a BFP. *See Melendrez v. D&I Investment, Inc.,* 127 Cal.App.4th 1238, 1258-1259, 26 Cal.Rptr.3d 413, 431-432 (2005) ("courts have sustained a number of foreclosure sale challenges where the actions have been brought before the transfer of the transfer of the trustee's deed to the buyer[]" but not after delivery of the trustee's deed) (internal citations omitted)).

Additionally, at the time of the sale, SFR had no notice of a competing or superior interest in the Property where the public records showed only that (1) a deed of trust was recorded after the Association perfected its lien by recording its declaration of CC&Rs, (2) there was a delinquency by the homeowner, which resulted in the Association instituting foreclosure proceedings and after complying with NRS Chapter 116, sold the Property at a public auction. Between the date the NOD was recorded and the date of the foreclosure sale the Bank never recorded a lis pendens or other documents alleging any problems with the foreclosure process or the foreclosure sale. (2RA_0267-0268) Additionally, SFR has no relationship with the Association or the Association's Agent, except as a purchaser of Property. (2RA_0267-0268). Therefore, nothing known to the Association or its agent about any purported irregularities in the foreclosure process could have been known by SFR.

The Bank has alleged that SFR was aware of its DOT. But notice by a potential purchaser that an association is conducting a sale pursuant to NRS 116,

and that the potential exists for challenges to the sale "post hoc[,]" does not preclude that purchaser from BFP status. *Shadow Wood*, 366 P.3d at 1116. Thus, SFR's knowledge of the Bank's DOT would have informed SFR that the Bank may make a "post hoc" challenge, nothing that defeats SFR's BFP status.

It is for these reasons that SFR is a BFP and why the Bank's arguments resoundingly fail.

B. This Court has Provided Strong Favor to BFPs in Deciding Equitable Challenges.

1. Shadow Wood *recognizes the superiority of BFP status over equitable relief.*

This Court recognized the superiority of a bona fide purchaser ("BFP") when it stated,

> When sitting in equity, however, courts must consider the entirety of the circumstances that bear upon the equities…This includes considering the status and actions of all parties involved, including whether an innocent party may be harmed by granting the desired relief.

Shadow Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc., 366 P.3d 1105, 1114 (Nev. 2016) citing *Smith v. United States*, 373 F.2d 419, 424 (4th Cir. 1966) ("Equitable relief will not be granted to the possible detriment of innocent third parties."); *In re Vlasek*, 325 F.3d 955, 963 (7th Cir. 2003) ("[I]t is an age-old principle that in formulating equitable relief a court must consider the effects of the relief on innocent third parties."); *Riganti v. McElhinney*, 56 Cal. Rptr.

195, 199 (Ct. App. 1967) ("[E]quitable relief should not be granted where it would work a gross injustice upon innocent third parties.")

This Court further stated that "[c]onsideration of harm to potentially innocent third parties is especially pertinent here where [the Bank] did not use the legal remedies available to it to prevent the property from being sold to a third party, such as seeking a temporary restraining order and preliminary injunction and filing a lis pendens on the property." *Shadow Wood,* 366 P.3d at 1114 fn. 7 citing *Cf. Barkley's Appeal. Bentley's Estate*, 2 Monag. 274, 277 (Pa. 1888)("in the case before us, we can see no way of giving the petitioner the equitable relief she asks without doing great injustice to other innocent parties who would not have been in a position to be injured by such a decree as she asks if she had applied for relief at an earlier day.").

In other words, this Court recognized that when a bona fide purchaser has no notice of a pre-sale dispute, such as an attempted tender, equity cannot be granted to the tendering party, particularly when the tendering party was in a position to seek relief earlier and defeat any bona fide purchaser status by putting the world on notice of their attempts to pay.

In emphasizing "the legal remedies available to prevent the property from being sold to a third party," this Court placed the burden on the party seeking equitable relief to prevent a potential purchaser from attaining BFP status. If that

party's inaction allows a purchaser to become a BFP, then equity cannot be granted to the detriment of the innocent third party.

2. ***In Nevada, even due process violations will not set aside sales to BFPs; the correct remedy is damages from those who caused the harm.***

This seemingly harsh result is reinforced by the fact that not even a due process violation is sufficient to overcome an individual's status as a BFP. *Swartz v. Adams*, 93 Nev. 240, 245–46, 563 P.2d 74, 77 (1977)(finding that where notice of sale was not given to owners, property still could not be returned to owners because property was purchased by a BFP). This Court remanded *Swartz* to allow the owners to seek compensatory relief against the person who initiated the sale rather than harm an innocent third party. *Id*. Therein lies the correct form of relief. The so-called harmed party (Bank) can seek money damages against the party who caused the harm (Association/Collection Company). But under no set of circumstances can equitable relief, to the detriment of the innocent purchaser, be granted to a party (Bank) who ignored earlier remedies and allowed a BFP to purchase the property.

This Court summed up this idea when it stated

> Where the complaining party has access to all the facts surrounding the questioned transaction and merely makes a mistake as to the legal consequences of his act, equity should normally not interfere, especially where the rights of third parties might be prejudiced thereby.

Shadow Wood, 366 P.3d at 1116.

This is not even a novel idea of jurisprudence. One of the most fundamental principles of law, whether it be civil or criminal, is that only the party that caused or contributed to the harm can be held responsible. If BFP status is treated as a mere consolation, then all sales lack finality and all statutory foreclosures schemes are jeopardized; effectively morphing a non-judicial foreclosure into a judicial foreclosure. *See Moeller v. Lien*, 25 Cal. App. 4th 822, 830, 30 Cal. Rptr. 2d 777, 782 (1994); *Melendrez v. D & I Investment, Inc.*, 26 Cal.Rptr.3d 413, 428 (Cal.Ct.App. 2005) (Creating finality to BFPs 'was to promote certainty in favor of the validity of the private foreclosure sale because it encouraged the public at large to bid on the distressed property…'")(internal citation omitted); *6 Angels, Inc. v. Stuart-Wright Mortgage, Inc.*, 85 Cal. App. 4th 1279, 102 Cal. Rptr. 2d 711 (2011); *McNeill Family Trust v. Centura Bank*, 60 P.3d 1277 (Wyo. 2003); *In re Suchy*, 786 F.2d 900 (9th Cir. 1985); and Miller & Starr, California Real Property 3d §10:210.

3. Failure to protect BFPs rewards those who sit on their rights.

What is more, by treating BFP status as a consolation, it effectively rewards the alleged harmed party who failed to protect itself by either invoking earlier remedies or defeating a BFP from purchasing the Property. It is a maxim, "he who seeks equity must do equity." No one is entitled to the aid of the court when that aid is only made necessary by that party's own inactions or self-created hardship. Equity

was not created to relieve a person of the consequences of his own inactions. This maxim holds true in this case.

Here, the Bank's own 30(b)(6) witness testified that the Bank received the Notice of Default and Notices of Sale. (1RA_204, 0208, 0215). The Bank did not (1) pay or attempt to pay the lien, (2) record a lis pendens, (3) attend the sale, or (4) seek judicial intervention to enjoin the sale. (See *Supra* Factual Background ¶¶ 7-8.) By allowing the sale to go forward, the Bank must have intended this consequence. NRS 47.250(2). On the other hand, SFR merely attended a publicly noticed, publicly held foreclosure sale, and placed the winning bid at the auction. The District Court did not even arrive at weighing the equities in this case because the Bank "presented no evidence, other than the alleged 'low price' paid by SFR, suggesting that the sale was anything other than properly conducted." rightly held. (AA_370.)

VI. THE DISTRICT COURT CORRECTLY GRANTED SFR'S MOTION FOR SUMMARY JUDGMENT AND DENIED THE BANK'S COUNTERMOTION FOR SUMMARY JUDGMENT.

While a party seeking quiet title must prove "his or her own claim to the property in question"[71] the District Court must make an evaluation of the arguments

[71] *Breliant v. Preferred Equities Corp.,* 112 Nev. 663, 669, 918 P.2d 314, 318 (1996).

and evidence presented through the lens of the presumption and burden-shifting provisions contained within Nevada law.

The District Court in granting Summary Judgment relied on a combination of the conclusive recitals contained in the Foreclosure Deed (AA_367-368), rebuttable presumptions pursuant to NRS 47.250, and a plethora of recorded documents, which were presented in SFR's Motion for Summary Judgment. (1RA_0034-264). The Bank could not present any evidence that would have raised a material question of facts as to overcome the overwhelming evidence presented by SFR and as such this Court can comfortably affirm the District Court's Order.

VII. THIS COURT HAS ALREADY DECIDED CONSTITUTIONALITY; REVISITING SFR AND SATICOY BAY IS UNNECESSARY.

The Bank acts as if this Court never issued the *SFR* or *Saticoy Bay* opinions. The NRS 116 foreclosure provisions do not involve a state actor. This decision was reached in a 5-0 decision by this Court. *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage, a Division of Wells Fargo Bank, N.A.,* 133 Nev. ___, 388 P.3d 970, 975 (2017). Further, *Saticoy Bay* acknowledged the Ninth Circuit's *Bourne Valley*[72] opinion and rejected its analysis regarding state actor. *Saticoy Bay*,

[72] *Bourne Valley Court Tr. v. Wells Fargo Bank, N.A.*, 832 F.3d 1154, 1159–60 (9th Cir. 2016). A petition for writ of certiorari is pending at the United States Supreme Court Case No. 16-1208.

388 P.3d at 972. Without a state actor, there cannot be a violation of due process. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n.*, 531 U.S. 288 (2001). As such, the Bank's argument regarding due process soundly fails.[73]

Additionally, as unanimously recognized by both the majority and dissent in the *SFR* Opinion, NRS 116.31168 fully incorporates NRS 107.090, including subsections (3) and (4) which mandate NRS 116 notices be sent to junior lienholders like the Bank. *SFR*, 334 P.3d at 411, 418, 422; see also *Las Vegas Dev. Group. v. Wells Fargo Fin. NV. 2*, Case No. 68991 (Nev. Mar. 17, 2017) (unpublished order vacating and remanding) (recognizing mandated notice to banks and citing SFR and Bourne Valley dissent); see also *JPMorgan Chase Bank v. Saticoy Bay LLC Series 10013*, Case No. 69583 (Nev. Apr. 14, 2017) (unpublished order vacating and remanding) (same). The Bank has not provided a single reason for this Court to rethink the *SFR* decision as the Court already denied a Motion for Rehearing in that matter.

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[73] The Bank states that a petition for writ of certiorari was expected in the *Saticoy Bay* case. AOB 41. That petition was never filed and remittitur has been issued in *Saticoy Bay*. *See Saticoy Bay*, Case no. 68630, Doc. No. 17-16405 (Nev. Jun. 6, 2017).

A. The Bank Cannot Raise a Facial or an As Applied Challenge because it Received Actual Notice.

Even if these issues were not already decided, the evidence shows that the Bank received notice of the foreclosure as it received the NOD and NOS. (1RA_204, 0208, 0215). Thus, the Bank lacks standing to assert a facial challenge. *Wiren v. Eide*, 542 F.2d 757, 762 (9th Cir. 1976) ("receipt of actual notice deprives [appellant] of standing to raise the claim" that the statutory notice scheme violated due process); *Green Tree Servicing, LLC v. Random Antics, LLC*, 869 N.E.2d 464, 470-71 (Ind. Ct. App. 2007) (where one receives actual notice cannot claim that the noticing provisions of the statute are unconstitutional). Any irregularity in notice does not violate due process where one has actual notice of the action to be taken. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 272 (2010) (debtor's failure to serve a summons and complaint does not violate due process where creditor received "actual notice of the filing and contents of [debtor's Chapter 13] plan."); *see also In re Medaglia*, 52 F.3d 451, 455-56 (2d Cir. 1995) ("[D]ue process is not offended by requiring a person with actual, timely knowledge of an event that may affect a right to exercise due diligence and take necessary steps to preserve that right.") (cited with favor in *SFR*, 334 P.3d at 418). Here, the Bank received the notices and chose to allow the Association sale to proceed. It cannot claim injury as a result of the noticing provisions of the statute.

B. The Bank's Attempt to do an End Run on *Saticoy Bay* is Unavailing.

As discussed above, the Bank has no standing to raise a due process challenge because it received actual notice. Additionally The Bank's attempt to have this Court conduct another state actor analysis in the wake of the *Saticoy Bay* decision is a waste of judicial resources.

The Bank attempts to have this Court distinguish *Saticoy Bay* by alleging that private entities such as associations are enforcing government created liens. Yet this is exactly what the *Bourne Valley*[74] court determined when it said enactment of the legislation met the state action requirement and what this Court rejected in *Saticoy Bay*.[75]

If the Association is a state actor it will significantly increase the amount of government intrusion into private decisions and relationships. *Brentwood*, 531 U.S. at 295 (state actor requirement preserves area of individual freedom); *Am. Mfr. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 53 (1999).; *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972) ("In 1883, this Court in the *Civil Rights Cases* . . . set forth the essential dichotomy between

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[74] *See Bourne Valley Court Tr. v. Wells Fargo Bank, N.A.*, 832 F.3d 1154, 1159–60 (9th Cir. 2016)

[75] *See Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage, a Div. of Wells Fargo Bank, N.A.,* 388 P.3d 970, 974 (Nev. 2017)

discriminatory action by the State, which is prohibited by the Equal Protection Clause [of the Fourteenth Amendment], and private conduct, 'however discriminatory or wrongful,' against which that clause 'erects no shield.'") (internal citations omitted). Indeed, eroding the state actor requirement will cause the government to become more involved in private decisions and relationships. *Id.*

For example, this "position would render every apartment complex, hotel, and resort throughout this country a state actor and open them to a whole new assault of litigation[.]" *Snowdon v. Preferred RV Resort Owners Ass'n*, 2:08-cv-01094-RCJ-PAL, at 13:12-13 (D. Nev. Apr. 1, 2009), *aff'd* No. 09-15877, 379 F. App'x 636, 2010 WL 1986189 (9th Cir. May 18, 2010) (unpublished).[76] Previously private relationships and decisions would be subjected to the rigors of due process. Such a move would increase litigation in Nevada and make corporate and private Nevadans extremely susceptible to liability. The absurdity of this position cannot be stressed enough; it would mean non-judicial foreclosures via NRS 107 would have to comport with due process, something the Ninth Circuit repudiated. *Charmicor, Inc. v. Deaner*, 572 F.2d 694, 696 (9th Cir. 1978).

The Bank's assertion that the Association's lien is a government- created lien

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[76] If the Bank has its way, then every alleged deprivation of property caused by a casino must satisfy due process, an impractical result that will burden, if not cripple, Nevada's most important industry.

is not compelling. While NRS 116 governs the creations of Associations, NRS governs the creation of all sorts of entities, including, but not limited to corporations (NRS Ch. 78-81), Limited-Liability Companies (NRS Ch. 86), Partnerships (NRS Ch. 87), and Professional Entities and Associations (NRS Ch. 89), Sole-Proprietorships, and other entities. And while, associations do often offer amenities to members of the association, many homes are not located in an associations. These excluded homes neither benefit from the associations services supporting the fact that these amenities are private services provided to the members only. Lastly, to the extent the Bank is saying the Association meets the public function test, it fails. A private entity can be treated as a state actor if the entity performed a function that has been traditionally the **exclusive** function of the state. *Flagg Bros.*, 436 U.S. at 158 ("While many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'") (emphasis added). Exclusivity is the test's *sine qua non*. *Rendell-Baker*, 457 U.S. at 842.

As one federal district court noted, "the power to impose fines or enforce liens are not traditional and exclusive governmental functions." *Snowdon*, 2:08-cv-01094-RCJ-PAL, at 14:14-15 ("[Association] did not perform the traditional and exclusive public function of municipal governance." (internal citation omitted)), aff'd *Snowdon*, 379 Fed. Appx. at 637.As this Court already indicated in *Saticoy,* "that an HOA acting pursuant to NRS 116.3116 *et seq.* cannot be deemed a state actor."

Saticoy Bay, 388 P.3d at 973.

VIII. THE BANK'S PAYMENT OF ASSESSMENTS AND INSURANCE PREMIUMS WERE MADE VOLUNTARILY AND THUS DID NOT UNJUSTLY ENRICH SFR.

The Bank is barred by the voluntary payment doctrine from prevailing on an unjust enrichment claim. The voluntary payment doctrine law "clearly provides that one who makes a payment voluntarily, cannot recover it on the ground that he was under no legal obligation to make the payment." *Best Buy Stores v. Benderson-Wainberg Assocs.*, 668 F.3d 1019, 1030 (8th Cir. 2012). The Nevada Supreme Court has weighed in on this issue on whether the voluntary payment doctrine applies in Nevada to bar a property owner from recovering fees that it paid to a community association and, if so, whether the property owners demonstrated an exception to this doctrine by showing that the payments were made under business compulsion or in defense of property. *Nevada Association Services, Inc. v. The Eighth Judicial District*, 130 Nev. ___, ___, 338 P.3d 1250 (2014). In *NAS* the Nevada Supreme Court ruled that the voluntary payment doctrine is a valid affirmative defense in Nevada. *Id*. at 1254. Because the voluntary payment doctrine is an affirmative defense, the defendant bears the burden of proving its applicability. *Schwartz v. Schwartz*, 95 Nev. 202, 206, 591 P.2d 1137, 1140 n. 2 (1979). Once a defendant shows that a voluntary payment was made, the burden shifts to the plaintiff to demonstrate that an exception to the voluntary payment doctrine applies. *Randazo*

v. Harris Palatine, N.A., 262 F.3d 663, 666 (7th Cir. 2001). There are two exceptions to the voluntary payment doctrine. These exceptions are (1) coercion or duress caused by a business necessity and (2) payment in the defense of property.

Despite the Bank's assertions otherwise, SFR can meet its initial burden of proving that the applicability of the doctrine and the Bank cannot show that it meets one of the exceptions to the doctrine. The Bank disingenuously argues that it believed the FDOT survived the sale and therefore continued to make payments toward taxes and insurance after the Association foreclosure sale. The fact is, NRS 116.3116 plainly establishes (and did so at the time of the relevant sale) that a portion of the association's lien is senior to the first deed of trust, that an association can non-judicially foreclose on its lien, and that said foreclosure would extinguish junior liens. The 2014 *SFR* decision simply confirmed the plain language of the statute. While there may not have been uniformity in the position that an association foreclosure would extinguish a first deed of trust, the notion that the Bank could not foresee that the first deed of trust would be extinguished under NRS 116.3116 is ludicrous and disingenuous; 116.3116 "clearly foreshadowed" this result. Accordingly, SFR can clearly show that any payment was a voluntary payment. As such, the burden shifts to the Bank to prove that one of the exceptions applies.

Here, the Bank was under no compulsion or obligation to pay any expenses on the Property. Just like any other homeowner, it was SFR's duty and obligation to

pay obligations such as the taxes, insurance and assessments, not the Bank's. Had the Bank simply paid the assessments prior to the sale, we would not be here today. Why it would pay post-sale is inexplicable.

Additionally, the Bank's payments were not in defense of the property. That is because the Bank cannot show that SFR failed or refused to pay any assessment, taxes or other expense of the property. Furthermore, to the extent the Bank voluntarily made payments for insurance, SFR has not benefitted from this unless the Bank made SFR an additional insured. Additionally, it is presumed that the Bank voluntarily paid the property taxes, which was unnecessary. Furthermore, the Bank has provided no evidence that SFR would not have paid the tax bill if given the opportunity.

Lastly, under Nevada law, in order to prevail on an unjust enrichment claim, the Bank must show that SFR retained the money or property of the Bank against fundamental principles of justice or equity and good conscience. *Asphalt Products v. All Star Ready Mix*, 111 Nev. 799, 802, 898 P.2d 699, 701 (1995). Here, the subject Property was never property belonging to the Bank. Instead, the Property merely represented collateral that secured the first deed of trust until that security interest was extinguished by the Association foreclosure sale. As such, SFR has not retained property belonging to the Bank. Even if this Court were to consider a collateral interest as ownership interest in the Property, for all the reasons stated

above, the Association foreclosure sale extinguished the deed of trust, and therefore there is no inequity or injustice as SFR has maintained possession of property it rightfully purchased at the Association sale. Therefore, SFR is entitled to summary judgment on the Bank's claim for unjust enrichment.

CONCLUSION

In granting SFR's Motion for Summary Judgment, the district court took into consideration all of the evidence to include the conclusive presumption, the disputable presumptions and the real evidence in the case. The Bank has not presented this Court any reason to disrupt the District Court's holding. As such, this Court should affirm.

DATED this 21st day of June, 2017.

KIM GILBERT EBRON

/s/Jacqueline A. Gilbert
JACQUELINE A. GILBERT, ESQ.
Nevada Bar No. 10593
DIANA CLINE EBRON, ESQ.
Nevada Bar No. 10580
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139
Telephone: (702) 485-3300
Facsimile: (702) 485-3301
Attorneys for Respondent SFR Investments Pool 1, LLC

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14 point, double-spaced Times New Roman font.
2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the pages of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, is 56 pages long, and contains 13,373 words.
3. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

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

Dated this 21st day of June, 2017.

KIM GILBERT EBRON

/s/Jacqueline A. Gilbert
JACQUELINE A. GILBERT, ESQ.
Nevada Bar No. 10593
DIANA CLINE EBRON, ESQ.
Nevada Bar No. 10580
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139
Telephone: (702) 485-3300
Facsimile: (702) 485-3301
Attorneys for Appellant SFR Investments Pool 1, LLC

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 21st day of June, 2017. Electronic service of the foregoing **Respondent's Answering Brief** and the **concurrently filed Volumes 1 and 2 of Respondent's Appendix** shall be made in accordance with the Master Service List as follows:

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Jacqueline Gilbert
Holly Priest
Matthew Lamb
Abran Vigil
Leslie Bryan-Hart
John Tennert

Dated this 21st day of June, 2017.

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