IN THE SUPREME COURT OF NEVADA

JPMORGAN CHASE BANK, N.A., SUCCESSOR BY MERGER TO CHASE HOME FINANCE LLC, Appellant, v. SFR INVESTMENTS POOL 1, LLC, Respondent.	Supreme Court No. 71839

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APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable NANCY L. ALLF, District Judge
District Court Case No. A-12-672963-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, N.A. is wholly owned by JPMorgan Chase & Co. No publicly held company owns 10% or more of JPMorgan Chase & Co.'s stock.

The law firms SMITH LARSEN & WIXOM 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 21, 2017.

BALLARD SPAHR LLP

By: /s/ Matthew D. Lamb

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JURISDICTIONAL STATEMENT

The Court has jurisdiction under NRAP 3A(b)(1) because this is an appeal from a final judgment. Plaintiff SFR Investments Pool 1, LLC ("SFR") filed a complaint against seven defendants. Appellant's Appendix Volume 1 ("1AA") 001-011. Defendant JPMorgan Chase Bank, N.A., as successor by merger to Chase Home Finance LLC ("Chase") filed a counterclaim against SFR. 1AA 025-037. SFR later dismissed all of the defendants except Chase and Venta Realty Group ("Venta"). SFR filed a motion for summary judgment on the claims between itself and Chase, which the district court granted. 4AA 802-816. Pursuant to N.R.C.P. 54(b), the district court certified the order granting SFR's motion as a final judgment. 4AA 837-840.

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?

    a. Under the Supremacy and Property Clauses of the United States Constitution, can a foreclosure sale under NRS Chapter 116 extinguish a deed of trust securing a loan insured by the Federal Housing Administration?

    b. 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?

    c. 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)?

    d. Is there a genuine issue of fact as to whether the granting clause of the foreclosure deed conveys title to SFR, or whether it simply conveys the HOA's lien interest to SFR?

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

2. If, *arguendo*, the HOA foreclosure sale extinguished the deed of trust, did the district court err by entering summary judgment for SFR on Chase's counterclaim for unjust enrichment?

STATEMENT OF THE CASE

This is a quiet title action arising from a foreclosure sale under NRS Chapter 116. In 2008, Delaine L. Harned obtained a $159,497 mortgage loan from Venta Realty Group, DBA Venta Home Loan, a Nevada Corporation ("Venta"). The loan was insured by the Federal Housing Administration and secured by a Deed of Trust encumbering property at 1076 Slate Crossing Lane # 2, Henderson, Nevada 89002. The original beneficiary under the Deed of Trust was Mortgage Electronic Registration Systems, Inc., solely as nominee for Venta and its successors and assigns ("MERS"). MERS subsequently assigned the Deed of Trust to Chase.

In 2010, the Paradise Court Homeowners' Association (the "HOA") recorded notice of a delinquent assessment lien against the property. The HOA foreclosed under its lien in 2012. SFR, one of two bidders at the sale, purportedly bought the property with a bid of $6,100. At the time of the sale, the property's fair market value was $82,000 and the HOA's governing declaration stated that the enforcement of the HOA's lien would not affect a first security interest.

SFR then brought a quiet title action against Chase and the other defendants. Among other things, SFR sought a declaration that the foreclosure sale extinguished Chase's deed of trust. Chase denied SFR's allegation and filed a counterclaim for unjust enrichment. During discovery, Chase filed a motion to exclude SFR's rebuttal witness, which the district court denied. Chase also filed a

motion to compel deposition testimony from SFR, which the discovery commissioner recommended granting in part and denying in part. Chase filed an objection to the commissioner's report, but the district court never ruled on it. SFR filed a motion for summary judgment on all claims between SFR and Chase. The district court granted SFR's motion, and later certified its ruling as a final judgment. This appeal followed.

STATEMENT OF FACTS

I. The HOA foreclosed against the Property, which was encumbered by Chase's Deed of Trust.

On May 7, 2008, Delaine L. Harned obtained a $159,497 mortgage loan (the "Loan") from Venta Realty Group, DBA Venta Home Loan, a Nevada Corporation ("Venta"). 3AA 505-510. The Loan was evidenced by a Note, id., and secured by a Deed of Trust encumbering a residential property at 1076 Slate Crossing Lane # 2, Henderson, Nevada 89002 (the "Property"). 2AA 316-329. The Loan was insured by the Federal Housing Administration ("FHA"). 3AA 500-501, ¶¶ 5.a-b & 6; 3AA 512. The original beneficiary of the Deed of Trust was Mortgage Electronic Registration Systems, Inc., solely as nominee for Venta and its successors and assigns ("MERS"). 2AA 318. Venta subsequently endorsed the Note to Chase. 3AA 509. On December 6, 2010, an Assignment of Deed of Trust was recorded whereby MERS assigned the Deed of Trust to Chase. 4AA 772-774.

The Property is governed by Paradise Court, a common interest community (the "HOA"). Ms. Harned failed to pay assessments to the HOA beginning in June 2009. 2AA 355. On February 5, 2010, Nevada Association Services, Inc. ("NAS") recorded a Notice of Delinquent Assessment Lien on behalf of the HOA. 2AA 331. On March 7, 2012, NAS recorded a Notice of Default and Election to Sell under Homeowners Association Lien. 2AA 354-355. On August 30, 2012, NAS recorded a Notice of Foreclosure Sale. 2AA 430-431. Each of these notices

stated that the HOA had a lien against the Property pursuant to its Declaration of Covenants, Conditions & Restrictions and Reservation of Easements recorded May 18, 2004 (the "Declaration"). 2AA 331, 355, 431.

On September 21, 2012, NAS conducted a foreclosure sale of the Property (the "Sale"). 3AA 560-561. SFR, which was one of two bidders, 4AA 767-768, purportedly bought the Property for $6,100. 3AA 560. At the time of the Sale, the Property's fair market value was $82,000. 3AA 608, 611-612. Further, the HOA's recorded Declaration stated that the foreclosure of its lien would not affect a first security interest:

> Notwithstanding all other provisions hereof, no lien created under this Article 7, 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…The lien of the Assessments, including interest and costs, shall be subordinate to the lien of any First Mortgage upon the Unit.

4AA 736.

After the Sale, NAS issued a foreclosure deed to SFR which read, in relevant part:

> Nevada Association Services, Inc. as agent for Paradise Court does hereby grant and convey, but without warranty express or implied, to: SFR Investments Pool I, LLC (herein called Grantee)…all <u>its</u> right, title and interest in and to that certain property…

3AA 560 (emphasis added). Also after the Sale, Chase expended funds to maintain the Property by paying for taxes and insurance. 3AA 501-502 ¶ 8.a; 3AA 528-558. It made at least $6,277.06 in such payments between December 2012 and April 2016. Id.

II. SFR sued for a declaration that the Sale extinguished Chase's Deed of Trust, and Chase counterclaimed for unjust enrichment.

On December 4, 2012, SFR filed this action seeking a declaration that the Sale extinguished any interest in the property held by the defendants, including Chase's Deed of Trust. 1AA 001-011. SFR brought two claims for "Declaratory Relief/Quiet Title" and "Preliminary Injunction." 1AA 008-010. Chase denied SFR's allegations and filed a counterclaim for unjust enrichment. 1AA 025-037. If the district court held the Deed of Trust was extinguished, then through its unjust enrichment claim, Chase would seek reimbursement from SFR for the amounts it paid to maintain the Property. 1AA 034-035.

III. The district court denied Chase's motion to exclude SFR's rebuttal expert, and it never ruled on Chase's objection to the discovery commissioner's report on Chase's motion to compel.

During discovery, Chase disclosed Scott Dugan as an initial expert. 3AA 602-605. Dugan's expert report stated he would opine that the Property's fair market value was $82,000 on the date of the Sale. 3AA 608, 611-612. SFR then disclosed a "rebuttal" expert, Michael Brunson. 1AA 121-123. According to his report, Brunson would opine that (1) the finder of fact should use the Property's

forced sale value, rather than its fair market value, to determine if the $6,100 price SFR paid was sufficient; and (2) the Property's forced sale value, based on Brunson's "independent opinion of value," was $6,000. 1AA 126. Chase moved to exclude Brunson on the grounds that (1) Nevada law required the finder of fact to use the Property's fair market value to evaluate the $6,100 price, meaning Brunson's opinion of forced sale value was irrelevant; (2) Brunson's opinion exceeded the permissible scope of rebuttal expert testimony; and (3) Brunson's opinion failed to meet the reliability requirements for expert testimony. 1AA 109-115. SFR filed an opposition, 1AA 172-181, and Chase filed a reply, 2AA 238-257. After a hearing, 2AA 258-270, the district judge denied the motion, 4AA 775-776.

Also during discovery, Chase noticed a deposition of SFR pursuant to N.R.C.P. 30(b)(6). 1AA 047. When SFR indicated that it objected to several topics in the deposition notice on relevance grounds, the parties stipulated to extend discovery so they could try to resolve the dispute. Id. The stipulation noted that, if the parties could not reach an agreement, SFR would move for a protective order to prevent Chase from asking about the disputed topics. Id. Later, at SFR's request, the parties stipulated to extend discovery again to "provide sufficient time to meet and confer and, if necessary, brief a motion for protective order for the Court's consideration." 1AA 048.

When the parties were unable to resolve the dispute, Chase re-noticed the deposition. 1AA 065-073. However, SFR did not move for a protective order as it had promised. Instead, SFR informed Chase nine days before the deposition that it would instruct its Rule 30(b)(6) witness not to answer any questions on the disputed topics. 1AA 076 ¶ 6. SFR based this refusal on an oral ruling that a discovery commissioner had made in a different case before a different judge. Id. Chase held the deposition, and SFR instructed its witness not to answer questions related to the disputed topics. 1AA 049-050, 082. SFR's witness was also unprepared to answer questions on several other topics. 1AA 050.

Chase then filed a motion to compel, 1AA 043-100, and SFR filed an opposition with a counter-motion for a protective order, 1A 182-217. The discovery commissioner recommended barring Chase from inquiring into 5 topics. 2AA 460-461. The commissioner also recommended limiting Chase's inquiry into 4 other topics. Id. Since trial was approaching, the parties held a second Rule 30(b)(6) deposition to cover the topics the commissioner recommended allowing. However, SFR's witness was not even fully prepared to address those topics. 4AA 671-672, 704-714. Chase filed a timely objection with the district judge regarding the topics the commissioner had recommended prohibiting or limiting. 4AA 666-730. As explained below, the district court entered summary judgment for SFR without ruling on the objection.

IV. When SFR and Chase filed cross-motions for summary judgment, the district court granted SFR's motion before Chase's motion could be fully briefed.

Around the same time, SFR moved for summary judgment on all claims between SFR and Chase. 2 AA 271-457. Chase filed an opposition, 3 AA 466-494, and SFR filed a reply, 3 AA 645-665. Chase also filed a cross-motion for summary judgment. 4 AA 731-759. Chase argued that its Deed of Trust survived the Sale because, among other reasons: (1) the underlying Loan was FHA-insured; (2) the decision in SFR Investments did not apply retroactively to the Sale; (3) the Sale was void under Shadow Wood; (4) the Foreclosure Deed only conveyed the HOA's lien interest to SFR; and (5) the notice scheme of NRS Chapter 116 was facially unconstitutional. 3AA 475-491. At a hearing on SFR's motion held October 10, 2016, Chase asked the district court to defer ruling on SFR's motion so that (1) the court could rule on Chase's objection to the discovery commissioner's report, and (2) briefing could be completed on Chase's cross-motion. 4AA 782-783. The court declined to continue the matter, 4AA 787, and indicated it would grant SFR's motion, 4AA 799-800. An order granting SFR's motion was filed on October 26, 2016, 4 AA 802-816, and served on October 27, 2016, 4 AA 817-833. The district court later certified the order as a final judgment pursuant to N.R.C.P. 54(b). 4 AA 837-840. Chase filed a timely notice of appeal on November 22, 2016. 4 AA 834-836.

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 Property and Supremacy Clauses of the United States Constitution protected the Deed of Trust because the underlying Loan was insured by the FHA. Second, 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. Third, the Sale is void on equitable grounds under Shadow Wood. Under the Restatement approach followed in Shadow Wood, the grossly inadequate price invalidates the Sale even if the Sale was otherwise proper. At the very least, there is a genuine dispute on this issue given the additional defects in the Sale. Fourth, the plain language of the foreclosure deed only conveys the HOA's lien interest to SFR, and does not convey title to SFR. Fifth, the notice provisions of NRS Chapter 116 violate the Due Process Clauses of the Fourteenth Amendment and the Nevada Constitution. Therefore, the Court should overturn Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg., 388 P.3d 970 (Nev. 2017), and 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). A district court's decision to allow expert testimony is reviewed for abuse of discretion. See Leavitt v. Siems, 330 P.3d 1, 5 (Nev. 2014). "While review for abuse of discretion is ordinarily deferential, deference is not owed to legal error." AA Primo Builders, LLC v. Washington, 126 Nev. 578, 589 (2010).

ARGUMENT

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

A. A sale under NRS Chapter 116 cannot extinguish a deed of trust securing an FHA loan.

The Loan in this case is insured by the Department of Housing and Urban Development ("HUD") through its Single Family Mortgage Insurance Program. 3AA 500-501, ¶¶ 5.a-b & 6; 3AA 512. Under this program, which is commonly known as FHA insurance, HUD insures mortgages issued by private lenders on single family homes. Sky Meadow at 973. By insuring the mortgage, HUD encourages private lenders to make loans to individuals who would not otherwise qualify for a loan. Id. The program substantially increases the number of low to moderate income families who can purchase a home. Id. If the borrower defaults, the private lender may foreclose. Id. at 974. If the lender is the successful bidder at the sale, it may convey title to the property to HUD. Id. The lender then submits an insurance claim, known as a Single Family Application for Insurance Benefits, for payment of its losses. Id. HUD then disposes of the property pursuant to its property disposition program. Id.

For the reasons explained below, the Property and Supremacy Clauses of the U.S. Constitution prohibit a sale under NRS Chapter 116 from extinguishing a

deed of trust that secures an FHA loan. Therefore, the district court's summary judgment should be reversed.

1. The Property Clause protects HUD's interest in the Loan and Deed of Trust.

The Property Clause of the United States Constitution states that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States…" U.S. Const. art. IV, § 3, cl. 2. Accordingly, title to property owned by the United States can only be divested by act of Congress. Beaver v. United States, 350 F.2d 4, 8 (9th Cir. 1965). The term "property" used in the Property Clause includes all "personal and real property rightfully belonging to the United States." Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 331 (1936). Among other things, this includes a security interest in real property held by a federal agency. Cf. Rust v. Johnson, 597 F.2d 174, 179 (9th Cir. 1979) (mortgage held by Federal National Mortgage Association protected under Supremacy Clause).

The Loan in this case was insured through the Single Family Mortgage Insurance Program; thus, HUD had a property interest in the Loan, the Deed of Trust, and the Property. In the event that borrower Harned defaulted on her loan payments, Chase would be entitled to foreclose against the Property, purchase the Property with a credit bid, convey the Property to HUD, and submit an insurance

claim for payment of Chase's losses. HUD would take title to the Property in the event of a default by Harned and a foreclosure by Chase.

The fact that HUD's interest was contingent upon actions by Chase does not alter this analysis. Neither the Property Clause nor the cases applying it distinguish between present and contingent property interests. See Ashwander, 297 U.S. at 331 (Property Clause encompasses all "personal and real property rightfully belonging to the United States."); Washington & Sandhill Homeowners Ass'n v. Bank of Am., N.A., No. 2:13-cv-01845-GMN-GWF, 2014 U.S. Dist. LEXIS 136167, at *17 (D. Nev. Sep. 25, 2014) ("[B]ecause a mortgagee must act on default and then must convey title to HUD should it purchase the property, it would not be a significant extension of the Property Clause's protection to hold that HUD's insurance of a mortgage under the FHA insurance program created a federal property interest that can only be divested by an act of Congress."). Accordingly, the Property Clause prevented the Sale from extinguishing the Deed of Trust.

2. Under the Supremacy Clause, Nevada law is preempted to the extent it permits the Sale to extinguish the Deed of Trust.

The Supremacy Clause of the United States Constitution also protected the Deed of Trust. Under the Supremacy Clause, state legislation must yield to the interests of the federal government "when the legislation as applied interferes with

[a] federal purpose or operates to impede or condition the implementation of federal policies and programs." Rust, 597 F.2d at 179; accord Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000) ("[S]tate law is naturally preempted to the extent of any conflict with a federal statute"); Bernhardt v. Los Angeles Cnty., 339 F.3d 920, 929 (9th Cir. 2003) ("The Supremacy Clause of the Constitution, Art. VI, cl. 2, invalidates state laws that interfere with, or are contrary to federal law"). Federal law displaces local laws or regulations "where compliance with both federal and state regulations is a physical impossibility," or "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Bernhardt, 339 F.3d at 939.

For these reasons, "courts consistently apply federal law, ignoring conflicting state law, in determining rights related to federally-insured loans." Saticoy Bay, LLC v. SRMOF II 2012-1 Tr., No. 2:13-CV-1199 JCM (VCF), 2015 U.S. Dist. LEXIS 57461, at *6-7 (D. Nev. Apr. 30, 2015); accord United States v. Victory Highway Vill., Inc., 662 F.2d 488, 497 (8th Cir. 1981) ("[F]ederal law, not [state] law, governs the rights and liabilities of the parties in cases dealing with the remedies available upon default of a federally held or insured loan."); United States v. Stadium Apartments, Inc., 425 F.2d 358, 362 (9th Cir. 1970) (federal law applies to FHA-insured mortgages "to assure the protection of the federal program against loss, state law to the contrary notwithstanding").

The objective of FHA insurance is to "expand[] homeownership opportunities, strengthen[] neighborhoods and communities, and ensure[] a maximum return to the mortgage insurance funds." Sec'y of Hous. & Urban Dev. v. Sec'y of Hous. & Urban Dev., 117 F. Supp. 2d 970, 974 (C.D. Cal. 2000). State laws that impair HUD's ability to effectuate these objectives, or that "run the risk of substantially impairing [HUD's] participation in the home mortgage market," SRMOF II 2012-1 Tr., 2015 U.S. Dist. LEXIS 57461 at *6, defeat the purpose of FHA insurance.

Here, allowing an HOA foreclosure to extinguish an FHA-insured deed of trust would significantly impede the purpose of the FHA insurance program by reducing lenders' incentives to loan money to high-risk, low-income individuals. See Sec'y of Hous. & Urban Dev., 117 F. Supp. 2d at 980 ("[A] foreclosure sale of HUD's property will frustrate the purpose of the program, i.e. to insure home loans extended by private lenders to enable low to moderate income buyers to purchase a home."). Applying NRS Chapter 116 to preclude HUD's ability to obtain title to a property and then sell the property to replenish the available funds for FHA loans obstructs the objectives of the program. See Washington & Sandhill, 2014 U.S. Dist. LEXIS 136167 at *18-19 ("Because a homeowners association's foreclosure under [NRS] 116.3116 on a Property with a mortgage insured under the FHA insurance program would have the effect of limiting the effectiveness of the

remedies available to the United States, the Supremacy Clause bars such foreclosures sales.").

The FHA-insured Deed of Trust was protected under the Property and Supremacy Clauses; thus, the Sale did not extinguish the Deed of Trust. Therefore, the district court's summary judgment should be reversed.

B. 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 decide whether an opinion applies retroactively, 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 deed of trust 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 lender 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 lender's deed of trust.

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 bought. 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 $6,100 that SFR paid at the Sale was more than enough to satisfy the $5,068.57 owed to the HOA. 2AA 431. In addition, 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 is fair to speculators who bought HOA-foreclosed properties before the decision. Since these speculators typically rent out properties they buy at HOA foreclosures, they will likely 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.

C. 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, oppression, or unfairness. 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.

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 sale can be invalidated for gross price inadequacy.

Applying the Restatement approach here, SFR paid only $6,100 for the Property. 3AA 560. According to the appraisal obtained by Chase, the Property's fair market value at the time of the Sale was $82,000. 3AA 608, 611-612. SFR did not submit any contrary evidence of the Property's fair market value.[1] Therefore, it is undisputed that the $6,100 price was less than 8% of fair market value—well below the 20% threshold imposed by the Restatement. The price was grossly inadequate; thus, the Sale would be void even if it were otherwise properly conducted.

[1] As explained below, SFR's expert did not appraise the Property's fair market value, which is the metric used under Shadow Wood and the Restatement. Instead, SFR's expert appraised the Property's forced sale value.

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., In re Montierth, 354 P.3d 648, 650-651 (Nev. 2015) (adopting Restatement rule that holder of deed of trust may foreclose, even if it does not hold note, so long as it has agency relationship with holder of note); 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). Consistent with these prior decisions, the 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 stated 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 consistent 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 (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 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 not entitled to summary judgment.

Even if the Court believes there must be other defects in addition to the $6,100 price, the Sale is still void. In Shadow Wood, after the Court determined that the 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., Bank of N.Y. Mellon v. Fort Apache Homes, Inc., No. 69584, 2017 Nev. Unpub. LEXIS 241, at *1-2 (Apr. 14, 2017); 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).

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 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 two additional defects in the Sale which allow a reasonable trier of fact to find fraud, oppression, or unfairness.

First, the HOA's mortgage savings clause indicated the Sale would not extinguish the Deed of Trust. 4AA 736. NAS reiterated this point by referencing the Declaration in each of its foreclosure notices. 2AA 331, 355, 431. 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 attendees did not believe they would receive clear title. Second, SFR's $6,100 bid was one of only two bids submitted at the Sale. 4AA 767-768. 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 a foreclosure 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). 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.B.1 above, entities which bought HOA-foreclosed properties before SFR Investments thought a first deed of trust survived an HOA sale. In fact, Robert

Diamond—the individual who attended the sale on SFR's behalf—has specifically testified to this fact:

> Q. So you understood that if you purchased a property at an HOA foreclosure sale and then a bank foreclosed, you would lose the investment?
>
> A. To my knowledge.
>
> * * *
>
> Q. This question is: You just said that you thought you were getting a property free and clear.
>
> A. Well, I don't know about free and clear. I'll correct it. I felt that you were getting ownership of the property is really what I meant to say. So as you paid these attorneys handling these, then you'd have to come back and get your paperwork [e.g., the foreclosure deed] that you have new ownership. Okay. Is the loan still on the property? Yes. That I do know.

3AA 594-595, 597.

Further, as noted in Part I.B.1, entities which bought HOA-foreclosed properties before SFR 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 $6,100 investment regardless of whether the Sale is invalidated. In contrast, leaving the Sale in place would result in the entire security for the Loan being extinguished.

Lease agreements used by SFR reflect this strategy and SFR's belief that it acquired the Property subject to the Deed of Trust. A Foreclosure Addendum that

SFR used in 2012—the same year as the Sale in this case—advised tenants that lenders maintained a security interest in the property after an HOA foreclosure, and further, that a lender's foreclosure would divest SFR of ownership:

> 1. SFR'S PURCHASE AT HOMEOWNER'S ASSOCIATION FORECLOSURE SALE. Tenant(s) is notified that SFR Investments Pool I, LLC ("SFR" or "LANDLORD") purchased the Leased Property at a foreclosure auction conducted by a homeowner's association. SFR is the title owner of the Leased Property. If the previous owner of the Leased Property borrowed money from a lender and secured the loan with a deed of trust on the Leased Property, the lien holder/lender may have the right to foreclose on the Leased Property if the borrower does not pay on the loan. SFR is in the process of negotiating with any lien holder/lender that maintained its security interest in the property after the homeowner's association foreclosure sale.
>
> ***
>
> 3. TERMS OF LEASE AGREEMENT. During any foreclosure period [by a lien holder/lender], the Tenant(s) shall honor ALL CONDITIONS of the current Lease Agreement including, but not limited to, the timely payment of rent as stated in the Lease Agreement. Nevada law grants the title owner of a property a redemption period, and SFR remains as the legal owner of record until the actual time of the foreclosure sale.

3AA 600 (underlining added).

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.

3. If the Court remands for further proceedings under Shadow Wood, it should reverse the denial of Chase's motion to exclude Michael Brunson.

It appears Michael Brunson's analysis was not a major factor in the summary judgment order that is currently on appeal. The district court did not consider Brunson's analysis or otherwise address the sufficiency of the sale price because (a) it believed Chase had to demonstrate "fraud, unfairness, or oppression" in the Sale; (b) it did not believe gross price inadequacy constituted fraud, unfairness, or oppression; and (c) it did not believe there were any other instances of fraud, unfairness, or oppression. 4AA 812-812. If this Court affirms the Restatement view that gross price inadequacy invalidates a sale—or even if the Court simply holds that price must be considered as one relevant factor—then the admissibility of Brunson's opinion will be of central importance on remand. Therefore, if the Court remands the case for further proceedings under Shadow Wood, it should use this occasion to reverse the denial of Chase's motion to exclude Brunson. His opinion is inadmissible for three reasons.

First, Brunson's testimony is irrelevant. Substantive Nevada law requires the trier of fact to evaluate the price by comparing it to the property's fair market value. See Shadow Wood, 366 P.3d at 1112-13 (evaluating price using two

measurements of fair market value: appraisal of property's fair market value and price paid for property at earlier trustee's sale); Golden, 79 Nev. at 505 (evaluating price using property's "market value" of $200,000); Restatement § 8.3 cmt. b ("The standard by which "gross inadequacy" is measured is the fair market value of the real estate…not the fair 'forced sale' value of the real estate, but the price which would result from negotiation and mutual agreement, after ample time to find a purchaser, between a vendor who is willing, but not compelled to sell, and a purchaser who is willing to buy, but not compelled to take a particular piece of real estate.").

Brunson's report does not estimate the property's fair market value. Instead, it estimates the property's forced sale value—the amount a typical buyer would pay for a similar property in the context of an HOA foreclosure sale. 1AA 152-159. Since Brunson's report does not speak to the governing legal standard, the report is irrelevant, unhelpful to the trier of fact, and likely to confuse the issues. See NRS 48.025(2), 48.035(1), & 50.275.[2]

[2] To the extent Brunson intends to testify that the finder of fact should use forced sale value instead of fair market value to evaluate the price, he is impermissibly offering an opinion on a legal issue. See Aguilar v. Int'l Longshoremen's Union Local No. 10, 966 F.2d 443, 447 (9th Cir. 1992) (expert opinions on "matters of law" generally inappropriate); United States v. Poschwatta, 829 F.2d 1477, 1483 (9th Cir. 1987) ("The court acts as the jury's sole source of the law."); Weinstein's Federal Evidence § 704.04 (2015) ("An expert's statements may not invade the (continued...)

Second, even if Brunson's report is relevant, it exceeds the permissible scope of rebuttal expert testimony. Rebuttal testimony may be used "solely to contradict or rebut evidence on the same subject matter identified by another party…" N.R.C.P. 16.1(a)(2)(C)(ii). "If the purpose of expert testimony is to contradict an expected and anticipated portion of the other party's case-in-chief, then the witness is not a rebuttal witness or anything analogous to one." Amos v. Makita U.S.A., Inc., No. 2:09-cv-01304-GMN-RJJ, 2011 U.S. Dist. LEXIS 158103, at *4 (D. Nev. Jan. 6, 2011). "Where a party attempts to designate as a 'rebuttal' expert someone whose proposed testimony is beyond the scope of appropriate rebuttal, that witness may be viewed as an initial expert who was not timely designated and whose testimony may be struck by the Court…" Blake v. Securitas Sec. Servs., 292 F.R.D. 15, 18 (D.D.C. 2013).

Here, Brunson does not limit himself to responding to Chase's expert, Scott Dugan. Instead, Brunson provides what he himself describes as an "independent opinion of value." 1AA 152-159. He opines that the Property's forced sale value is $6,000, and does so in a separate section of his report that barely mentions the Dugan appraisal. Id. Although SFR disclosed Brunson as a "rebuttal" expert, it was clear from the beginning that the Property's value and the adequacy of the sale

(...continued)
province of the court to determine the applicable law and to instruct the jury as to that law").

price would be important considerations in this case. The fact that the sale price was only $6,100 would have tipped off even a rookie litigant to this fact. But of course, SFR is a party to hundreds of other quiet title actions where it has repeatedly litigated the sufficiency of HOA sale prices. It strains credibility for SFR to claim this was an unexpected issue that justified a rebuttal expert.

Third, Brunson's appraisal does not meet the reliability requirements for expert testimony. A court assessing the reliability of expert testimony should consider whether it is "(1) within a recognized field of expertise; (2) testable and has been tested; (3) published and subjected to peer review; (4) generally accepted in the scientific community (not always determinative); and (5) based more on particularized facts rather than assumption, conjecture, or generalization." Higgs v. State, 126 Nev. 1, 19 (2010).

As noted above, Brunson estimates the "value" of HOA-foreclosed properties using prices obtained at HOA foreclosures of purportedly similar properties. SFR offered no evidence that Brunson's testimony was testable, or that it has been tested, published, subjected to peer review, or generally accepted within the appraisal profession. Rather, it seems that Brunson developed this approach to HOA-foreclosed properties for purposes of litigation. See Hallmark v. Eldrige, 124 Nev. 492, 502 (2008) (court should consider whether technique "was developed by the proffered expert for purposes of the present dispute."). Further,

Brunson's technique is based on conjecture and generalization. Chase has identified 16 other lawsuits in which Brunson appraised the value of HOA-foreclosed properties, and in 15 of them, Brunson opined that the property's value was exactly the same as the foreclosure sale price. 1AA 115. Brunson seemingly started with the premise that the sale price was adequate, and then worked backward to find a methodology that would validate that premise. Accordingly, his analysis does not meet the reliability requirements of Higgs and Hallmark.

Therefore, if the Court remands this case for further consideration under Shadow Wood, it should reverse the district court's order denying Chase's motion to exclude Brunson.

D. The foreclosure deed to SFR only conveyed a lien interest.

The district court should also be reversed because the foreclosure deed does not transfer ownership of the Property to SFR. A deed's granting clause determines the interest conveyed. See Griffith v. Cloud, 764 P.2d 163, 165 (Okla. 1988); see also 23 Am. Jur. 2d Deeds § 237. A conveyance cannot transfer an interest greater than the interest identified in the granting clause. Griffith, 764 P.2d at 165; accord Coppermines Co. v. Comins, 38 Nev. 359, 375-76 (1915).

Relatedly, NRS 116.31164 requires that an HOA foreclosure deed grant all title of the unit's owner to the purchaser:

3. After the sale, the person conducting the sale shall:

> (a) Make, execute and, after payment is made, deliver to the purchaser, or his or her successor or assign, a deed without warranty which conveys to the grantee all title of the unit's owner to the unit…

NRS 116.31164(3)(a) (2012). If the sale complies with this requirement, it "vests in the purchaser the title of the unit's owner without equity or right of redemption." NRS 116.31166(3) (2012).

The deed in this case does not satisfy NRS 116.31164. It conveys the HOA's interest in the Property, rather than borrower Harned's ownership interest:

> Nevada Association Services, Inc. as agent for Paradise Court does hereby grant and convey, but without warranty express or implied, to: SFR Investments Pool I, LLC (herein called Grantee)…all its right, title and interest in and to that certain property…

3AA 560 (emphasis added). The HOA did not have an ownership interest in the Property at any point in the foreclosure process, and there was no trustee relationship by which NAS held any sort of title to pass to SFR. The HOA merely held a lien against the Property, while Harned continued owning the Property. Therefore, when the HOA conveyed "its" right, title, and interest in the Property to SFR, it transferred its assessment lien against the Property to SFR. This transfer of a mere lien interest did not extinguish the Deed of Trust.

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, and Saticoy Bay should be reversed.

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 consider if 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 in 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 based on the fact that a county sheriff had executed a prejudgment writ of attachment on the plaintiff's behalf. 457 U.S. at 926. The Lugar Court noted 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, SFR and Chase 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/Act Summary.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 regulates an existing, privately agreed 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. 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 if 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.

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). In Bourne Valley, the Ninth Circuit agreed 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 held, this scheme is unconstitutional under Mennonite.

a. NRS 116.31162-311635 expressly require lenders 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) (2012), 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 (2012). 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 (2012). 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 discussing 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) (2012).

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) contradicts itself on 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.

This interpretation 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 presume 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 believed 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 of the sale 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 lenders 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. "The phrase 'unjust enrichment' is used in law to characterize the result or effect of a failure to make restitution of, or for, property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor." LasePartners Corp. v. Robert L. Brooks Tr. Dated Nov. 12, 1975, 113 Nev. 747, 755 (1997) (quoting 66 Am. Jur. 2d Restitution § 3 (1973)). "The essential elements of quasi contract are a benefit conferred on the defendant by the plaintiff, appreciation by the defendant of such benefit, and acceptance and retention by the defendant of such benefit under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof." Id. (quoting Unionamerica Mtg. v. McDonald, 97 Nev. 210, 212 (1981)). Unjust enrichment occurs when "a person has and retains a benefit which in equity and good conscience belongs to another." Id. (quoting Unionamerica, 97 Nev. at 212).

Here, Chase conferred a benefit on SFR by paying for taxes and insurance after the Sale. SFR appreciated this benefit because SFR was saved from making the payments itself. SFR accepted and retained these benefits because it did not repay the funds to Chase. Further, Chase made these payments in order to protect the collateral for the Loan. If it turns out that Chase's Deed of Trust was extinguished by the Sale, it will be inequitable for SFR to retain these benefits as an additional windfall.

The district court entered summary judgment for SFR on this claim based on its 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 defense, SFR had to demonstrate as a matter of law that the voluntary payment doctrine applied. See id. at 1254 ("Because the voluntary payment doctrine is an affirmative defense, the defendant bears the burden of proving its applicability."). 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 relevant payees, it does not apply to Chase's claim against SFR.

Second, SFR offered no admissible evidence that Chase made the relevant payments voluntarily. Instead, SFR stated "it is presumed" the payments were voluntary. 2AA 291. 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 demonstrate 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 to protect the collateral for the Loan. SFR offered no admissible evidence on this issue. Chase made the payments because it believed the Deed of Trust survived the Sale and it wanted to protect its collateral.

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.

CONCLUSION

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

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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 13,759 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 21, 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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