Case No. 71839
IN THE SUPREME COURT OF NEVADA

JPMORGAN CHASE BANK, N.A., SUCCESSOR BY MERGER TO CHASE HOME FINANCE LLC,

Appellant,

vs.

SFR INVESTMENTS POOL 1, LLC,

Respondent.

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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

RESPONDENT'S ANSWERING BRIEF

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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, SFR Investments Pool 1, LLC was represented by Howard C. Kim, Esq., Jacqueline A. Gilbert, Esq., Diana Cline Ebron, Esq., Karen L. Hanks, Esq., Katherine C.S. Carstensen, Esq., and Zachary Clayton, Esq. of Kim Gilbert Ebron fka Howard Kim & Associates. Ms. Gilbert, Mr. Kim, Ms. Ebron, and Mr. Clayton, Esq. of Kim Gilbert Ebron, represent Respondent on appeal.

DATED this 24th day of July 2017.

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INTRODUCTION

The Bank took a gamble when it allowed the Association to foreclose on its lien for common assessments, thereby extinguishing the first deed of trust. The Bank had actual notice of its borrower's delinquency to the Association and still did nothing. Other than complaining about the price paid by SFR, the highest bidder at the publicly noticed, public auction, the Bank points to nothing that would allow this Court to unwind the sale or otherwise encumber SFR's legal title to the Property. The Bank's attempt to use federal law to get itself out of a problem of its own making also fails – the Bank is not HUD and has no right to act on HUD's behalf.

The Bank made a bad business decision, did nothing to stop the sale, and now asks this Court to save it from its own inaction. This Court should affirm the District Court's grant of summary judgment in favor of SFR, quieting title free of the first deed of trust.

FACTUAL BACKGROUND

DATE	FACTS
1991	Nevada adopted Uniform Common Interest Ownership Act as NRS 116, including NRS 116.3116(2).
May 18, 2004	Paradise Court Homeowners' Association's (the "Association") perfected and gave notice of its lien by recording its Declaration of Covenants, Conditions and Restrictions ("CC&Rs").[1]
May 14, 2008	Grant, Bargain, Sale Deed is recorded transferring the

[1] 2JA_304-306.

	Property[2] to Delaine L. Harned[3]
May 14, 2008	Deed of Trust ("DOT") is recorded naming Mortgage Electronic Registration Systems, Inc. ("MERS") as the beneficiary under the DOT.[4] DOT contained a Planned Unit Development Rider that allowed the Lender to pay the Borrower's Association Assessments and add that amount to the Borrower's debt to Lender.[5] The DOT also included language that stated "the Lender may do and pay whatever is necessary to protect the value of the Property and the Lender's rights in the Property, including payment of taxes, hazard insurance, and other items mentioned in paragraph 2."[6]
February 5, 2010	The Association recorded Notice of Delinquent Assessment ("NODA"). [7] The homeowner, Delaine L. Harned, was mailed the NODA.[8]
December 6, 2010	An Assignment of Deed of Trust was recorded wherein MERS transfers its interest in the property to Chase Home Finance LLC (the "Bank").[9]
December 6, 2010	Substitution of Trustee is recorded wherein MERS, substitutes California Reconveyance Company as new trustee.[10]
December 6, 2010	A Notice of Default and Election to Sell Under Deed of Trust is recorded by California Reconveyance Company as an agent of the Bank. [11]

[2] 1076 Slate Crossing #2, Henderson, Nevada 89002; Parcel No. 179-34-713-236 (the "Property").
[3] 2JA_307-315.
[4] 2JA_316-329.
[5] 2JA_328-329.
[6] 2JA_318-322.
[7] 2JA_330-331.
[8] 2JA_332-334.
[9] 2JA_335-336.
[10] 2JA_337-339.
[11] 2JA_340-342.

June 1, 2011	A Notice of Trustee's Sale is recorded by California Reconveyance Company as an agent of the Bank.[12]
September 29, 2011	A second Notice of Trustee's Sale is recorded by California Reconveyance Company as an agent of the Bank.[13]
March 7, 2012	After more than 30 days elapsed from the date of mailing of the operative NODA, The Association, through its agent Nevada Association Services, Inc. ("NAS"), recorded a Notice of Default ("NOD").[14] The Bank received the Notice of Default. The Bank does not dispute receiving this notice.[15] [16] The Bank did not make any attempts to pay the Association's lien after it received the Notice of Default. [17]
May 25, 2012	The Bank sent a letter to the homeowner advising that the Association sent the Bank the NOD. In that letter, the Bank advised the homeowner that if she did not "take action to correct this situation, Chase may initiate the appropriate actions" to bring her account current with the "association, pursuant to the terms of your mortgage."[18]
August 30, 2012	After more than 90 days elapsed from the date of the mailing of the NOD, NAS, as an agent for the Association, recorded a Notice of Trustee's Sale ("NOS").[19] The NOS was mailed to numerous parties, including Harned, Venta Realty Group, the Bank, California Reconveyance Company, and MERS.[20] The Bank received the NOS.[21] The Bank does not dispute receiving this notice.[22]

[12] 2JA_345-348.
[13] 2JA_349-352.
[14] 2JA_353-355.
[15] 2JA_389:7-14.
[16] *See* Deposition of Susan Newby; Ex. 9 at 2JA_427.
[17] 2JA_406 at 22:7-14.
[18] *See* 2JA_427, Deposition of Susan Newby; Ex. 9.
[19] 2JA_429-431.
[20] 2JA_432-437.
[21] 2JA_407 at 25:5-20; 2JA_420-426.
[22] 2JA_407 at 24:12-25:8

	The Bank took no action after it received the NOS. [23]
Prior to September 21, 2012	The NOS was posted on the Property in a conspicuous place.[24] The NOS was thereafter posted in three public places in Clark County for 20 consecutive days. [25] The NOS was published in the Nevada Legal News for three consecutive weeks.[26] The Bank never exercised its right under the DOT to set up an escrow account from which to pay the Association's assessments.[27] The Bank never paid or tried to pay any portion of the Association's lien.[28] The Bank did not challenge the foreclosure sale in any civil or administrative proceeding.[29] No release of the superpriority portion of the Association's lien was recorded against the Property.[30] No lis pendens was recorded against the Property.[31]
September 21, 2012	The Association foreclosure sale took place and SFR placed the winning bid of $6,100.00.[32] There were multiple qualified bidders in attendance at the sale.[33] No one acting on behalf of the Bank attended the sale.[34]
September 25, 2012	The Trustee's Deed Upon Sale) vesting title in SFR is

[23] 2JA_407 at 26:5-20.
[24] 2JA_438-443.
[25] *Id.*
[26] *Id.*
[27] 2JA_406 at 22:7-14
[28] *Id.*
[29] *Id.*
[30] 2JA_453-455 at ¶ 20.
[31] 2JA_453-455 at ¶ 21.
[32] 2JA_456-457
[33] 2JA_453-455 at ¶ 14.
[34] 2JA_389-390.

	recorded.[35] As recited in the Foreclosure Deed, all requirements of law were complied with, including the mailing of copies of notices, the recording of the Notice of Default, and the posting and publication of copies of the Notice of Sale regarding the 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] Neither SFR, nor its agent, have any relationship with NAS, the Association's agent, beyond attending auctions, bidding, and occasionally purchasing properties at publicly-held auctions conducted by NAS, or having purchased some reverted properties through arm's-length negotiations.[39]

SUMMARY OF ARGUMENT

It has been made clear by this Court that a first deed of trust could be extinguished by a homeowners association's superpriority lien sale. *See SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. ___, 334 P.3d 408, 419 (2014). In this appeal, the subject foreclosure was properly noticed, conducted and resulted in the extinguishment of the DOT. As such, the District Court, in reviewing all the circumstances and evidence, was correct in granting summary judgment in favor of SFR.

[35] 2JA_456-457.
[36] 2JA_453-455, at ¶ 16.
[37] 2JA_453-455 at ¶ 17.
[38] 2JA_453-455 at ¶ 18.
[39] 2JA_453-455 at ¶ 19.

First, the burden of proof regarding deed recitals or statutory presumption is on the challenging party. In this case, this burden rested with the Bank.

Second, the District Court correctly determined that the Bank, a private litigate, lacked standing to rely on the Supremacy Clause to challenge NRS 116. Congress expressly authorized HUD's Secretary to enforce the National Housing Act ("NHA"), the United States Supreme Court has determined that private litigants, such as the Bank, cannot use the Supremacy Clause to displace state law. *Armstrong v. Exceptional Child Care Ctr., Inc.*, 575 U.S. ___, 135 S.Ct. 1378, 1383-85 (2015). Further, this concept was recognized in *Freedom Mortg. Corp. v. Las Vegas Dev. Grp., LLC* when the Court stated that "the federal government is the best advocate of its own interests." 106 F.Supp.3d 1174, 1180 (D.Nev. 2015).

Moreover, HUD's interest in the property was nothing more than an insurer to the Bank who owned the Deed of Trust. This interest is "too attenuated" to be "Property" under the Property Clause. *Freedom Mortg. Corp. v. Las Vegas Dev. Grp., LLC*, 106 F.Supp.3d 1174, 1182 (D.Nev. 2015). Further, upon foreclosure, no federal entity was divested of a property interest as it was the Bank who had its Deed of Trust extinguished at the foreclosure, not HUD.

Third, 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)).

Fourth, 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. 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.

Fifth, the Bank waived any arguments regarding what type of interest the Association conveyed to SFR at the foreclosure as this argument was not raised below. However, in Nevada, a homeowners association has a lien for delinquent assessments, a portion of which has priority over a first deed of trust. NRS 116.3116(2); *SFR*, 334 P.3d at 419. Furthermore, when an association forecloses on its lien for delinquent assessments, the purchaser at the foreclosure sale receives "a deed without warranty which conveys to the grantee all *title of the unit's owner to the unit*[.]" NRS 116.31164(3)(a) (emphasis added). Thus statute dictates the title conveyed to a purchaser. NRS 116.3116(3) specifically provides, "[t]he sale of a unit pursuant to NRS 116.31162, 116.31163 and 116.31164 vests in the purchaser the title of the unit's owner without equity or right of redemption."(emphasis added).

Sixth, NRS 116's foreclosure provisions do not involve a state actor making

the Bank's constitutional challenge to NRS 116 meritless. 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). In any case, the Bank had actual notice which would preclude a facial challenge. (2AA_356-383; 2AA_432-437.)

Seventh, the Bank's cited authority in support of its argument that *SFR* should not be applied retroactively, is neither binding on this Court nor is it generally applicable to civil cases. 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).

Lastly, the Bank is barred by the voluntary payment doctrine from making an unjust enrichment claim. The voluntary payment doctrine law "clearly provides that one who makes a payment voluntarily, cannot recover it on the grounds 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).

In sum, the District Court did not error in any way that would allow this Court to overturn its decision granting Summary Judgment in favor of SFR.

STANDARD OF REVIEW

This Court reviews "summary judgment de novo, without deference to the findings of the lower court." *Wood v. Safeway*, 121 Nev. 724, 729, 121 P.3d 1026, 1030 (2005). However, the Nevada Court of Appeals stated that the burden was on the Bank to challenge the conclusive deed recitals. *See Nationstar Mortgage, LLC v. SFR Investments Pool 1, LLC*, Case No. 70653, 2017 WL 1423938 (Nev. Ct. App. Apr. 17, 2017)(unpublished Order of Affirmance).

This is consistent with Nevada law under which the foreclosure sale deed is presumed valid. Pursuant to NRS 47.250(16)-(18) it is presumed "that the law has been obeyed"; "that a trustee or other person, whose duty it was to convey real property to a particular person, has actually conveyed to that person, when such presumption is necessary to perfect the title of such person or a successor in interest"; "that private transactions have been fair and regular"; and "that the ordinary course of business has been followed." As a result, it is presumed that: (1) the Association and NAS obeyed the law; (2) the Property was conveyed to SFR; (3) the Association non-judicial foreclosure sale was "fair and regular;" and (4) the Association foreclosure proceedings were conducted in the "ordinary course of business." Further, a recorded title is presumed valid. *Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 670, 918 P.2d 314, 319 (1996). A presumption,…, imposes on the party against whom it is directed the burden of proving that the nonexistence of the

presumed fact is more probable than its existence." NRS 47.180. Thus, the Bank bore all the burden to show the sale should have been unwound. SFR simply had to show its title to the property.

ARGUMENT

I. THE BANK'S ARGUMENT SURROUNDING FHA INSURANCE FAILS.

A. *Nationstar Mortgage v. SFR Investments Pool 1, LLC* is Distinguishable and Does Not Affect the District Court's Conclusion that the Bank Lacked Standing to Rely on the Supremacy and the Property Clause.

The District Court correctly determined that the Bank, a private litigant, lacked standing to rely on the Supremacy Clause to challenge NRS 116. (4AA_802-816.) In doing so, the District Court was also correct in not determining whether the property was insured under the National Housing Act ("NHA"). *Id.*

It is expected that the Bank will argue that *Nationstar Mortgage, LLC v. SFR Investments Pool 1, LLC,* 133 Nev. ___, 396 P.3d 754 (2017) is dispositive of this issue and that the District Court erred in finding that the Bank lacked standing to raise the Supremacy Clause and Property Clause in defense of its alleged property interest. However, *Nationstar* is easily distinguished.

Nationstar found that a servicer of a loan owned by the FHFA had standing to assert causes of actions on behalf of the FHFA. *Id*. at 756. This case simply does not involve a servicer to a federal government entity. Instead, this case deals with HUD's insurance per the National Housing Act ("NHA") 12 U.S.C. §§ 1708, 1709,

1710. And while the NHA deals with the **potential** transfer of mortgages to HUD by private banks, at no time did HUD ever claim an interest in the extinguished Deed of Trust. Instead, at all times relevant, it was the Bank that claimed an interest in the Deed of Trust. (2AA_335-336.)

Moreover, *Nationstar* dealt with 12 USC 4617(b)(2)(B)(v) and its surrounding provisions that allowed the FHFA to place Fannie Mae and Freddie Mac into conservatorship of its property interests. *Nationstar*, 396 P.3d at 757. *Nationstar* also dealt with CFR 1237.3(a)(8) which allowed FHFA to seek assistance in protecting its interest. *Id.* Yet, this case deals with HUD, not the FHFA, and the Bank has been unable to articulate what law or regulation allows HUD to seek assistance in protecting their alleged contingent property interest nor has the Bank shown that the law allows HUD to contract for assistance in fulfilling any function of HUD. In fact, unlike the FHFA which owns Deeds of Trusts, HUD merely insured the Deed of Trusts owned by the Bank. It is not until a Bank meets certain conditions can the Bank transfer the Deed of Trust over to HUD in exchange for insurance proceeds. In addition to the fact that the Bank has failed to present any law allowing such a contract between HUD and the Bank, the Bank has not provided any evidence to suggest that such a contract exists.

Further, this Court's precedent in *Munoz v. Branch Banking & Trust Co., Inc.*, 131 Nev., ___, 348 P.3d 689 (2015) has no effect on the analysis of this case.[40] 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 because a failure to do so would make the value the FDIC assets significantly depreciate thereby making FDIC's objectives impossible. Yet, HUD's goals are not compromised by the event of an NRS 116 foreclosure as HUD does not have an actual property interest in the Deed of Trust. Thus when an Association forecloses on an HUD insured loan, neither HUD nor any other federal entity is divested of any property interest. While these topics will be discussed in more completion below,[41] for now it suffices to say

[40] Because *Nationstar*, determined that that servicer of a loan owned by a regulated entity had standing to assert 12 U.S.C. 4617(j)(3) based on statute and regulation and did not reach the preemption issue, the analysis regarding preemption, *Armstrong*, and *Munoz* were not germane to the result and represent dicta. *See Nationstar* 396 P.3d at 758-59.

[41] *See* §I(D)

that this Court has never found that allowing the Bank to enforce HUD's rights in Court was intended by Congress.

B. HUD's Interest in Insurance Premiums From the Bank is "too Attenuated" to be Consider Property under the Property Clause.

Even if the loan was insured by FHA, it was the Bank that owned the Deed of Trust and not HUD. Thus, the Bank's challenge to the foreclosure" under the Property Clause is meritless. The Property Clause provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belong[ing] to the United States." U.S. Const. art. IV, § 3, cl. 2. Simply put, "it precludes states and private individuals from divesting the federal government—through state laws or otherwise—of title to property without congressional consent." *Freedom Mortg. Corp. v. Las Vegas Dev. Grp., LLC,* 106 F.Supp.3d 1174, 1179 (D.Nev. 2015).[42]

Here the Bank was the owner of the Deed of Trust until it was extinguished in the foreclosure. HUD merely was an insurer of such an interest. As stated by *Freedom Mortgage*:

> HUD's status with respect to this property will likely never be anything more than a former insurer of the Castro loan, which collected premium payments but never incurred a claim-payment obligation. That interest is far too attenuated to reasonably consider the HOA's foreclosure as

[42] The District Court here adopted the reasoning set forth by the Hon. Judge Jennifer Dorsey in *Freedom Mortg. Corp. v. Las Vegas Dev. Grp.*, LLC, 106 F.Supp.3d 1174, 1180 (D. Nev. 2015). (4AA_811:28-812:1.)

> disposing of '[p]roperty belong[ing] to the United States' in contravention of the Property Clause.

106 F.Supp.3d at 1182. As another court noted, HUD's interest is contingent on the servicer protecting the deed of trust:

> [T]o the extent HUD had some contingent interest in the property prior to the HOA foreclosure sale, the HOA foreclosure sale did not extinguish that interest in contravention of federal rights under the Property Clause. Rather, HUD long ago decided that any interest it would have in the property through its loan insurance program would be conditioned on the insured lender delivering good, marketable title.

U.S. Bank, N.A. v. SFR Investments Pool 1, LLC, No. 2:15–cv–00287–APG–GWF, 2016 WL 1248704, at *2 (D.Nev. Mar. 28, 2016).

Therefore, HUD owns no more interest in the Property than an automobile insurer holds in a consumer's car. Further, to be able to determine whether FHA/HUD would suffer any loss due to the foreclosure of the Property, the Bank would have to show that it fully complied with the terms and conditions and is eligible to receive funds from the FHA insurance policy. For example, if the FHA policy requires that a beneficiary or servicer pay off HOA dues prior to an HOA foreclosure sale to preserve the Deed of Trust, and the Bank failed to do so (as it did in this case), then FHA is under no obligation to reimburse the Bank for any of its losses regarding the Property. If the Bank failed to comply or is unable to comply with its obligations to FHA/HUD, then **HUD has no obligation to pay the insurance payment** and this foreclosure sale has no effect on HUD or the FHA.

Finally, it is the Bank's own failure to protect the deed of trust by failing to pay the lien or any portion thereof. Therefore, the HUD was never divested of property interest as the property belonged to the Bank not HUD. Since no federal entity was divested of property, the Bank's Property Clause arguments fail.

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

The court in *Washington & Sandhill Homeowners Ass'n, v. Bank of Am., N.A.*, No. 2:13-cv-01845-GMN, 2014 WL 4798565 (D. Nev. Sept. 25, 2014), **did not** determine that HUD insurance was a federal property interest. *Washington & Sandhill*, 2014 WL 47989565, at *6. It expressly never reached the issue. *Id.* Furthermore, *Washington & Sandhill* relied heavily on distinguishable Ninth Circuit cases: *United States v. View Crest Garden Apartments, Inc.*, 268 F.2d 380 (9th Cir. 1959) and *United States v. Stadium Apartments, Inc.*, 425 F.2d 358 (9th Cir. 1970). In each of those cases, borrowers defaulted on HUD-insured mortgages, which were assigned to HUD before foreclosure proceedings began. *Stadium*, 425 F.2d at 360-61; *View Crest*, 268 F.2d at 382. The Ninth Circuit opted to apply judge-made federal law[43] because those cases involved: (i) federal question jurisdiction,[44] (ii) HUD as a party,[45] (iii) mortgages assigned to HUD, (iv) borrowers trying to use the NHA's

[43] *Stadium*, 425 F.2d at 361; *View Crest*, 268 F.2d at 382-83.
[44] *Stadium*, 425 F.2d at 359; *View Crest*, 268 F.2d at 382.
[45] *Stadium*, 425 F.2d at 359; *View Crest*, 268 F.2d at 381.

definition of "mortgage" to impose state-created remedies on HUD,[46] (v) federal law applied because it was the source of law for "relations between" HUD and "parties to the mortgage,"[47] and (vi) state law could not supply a "rule of decision" because it would erode HUD's post-assignment remedies, diminish the NHA's "purpose," and impact HUD's insurance fund.[48]

Here, HUD is not a party and the Bank has not alleged that it assigned the Deed of Trust to HUD, differentiating the instant matter from *View Crest* and *Stadium Apartments*. Furthermore, the U.S. Supreme Court has curtailed, if not rejected, *View Crest* and *Stadium Apartments'* robust rule of decision analyses, because "rule of decision" determinations—instances when judges engage in common law rule-making—are "few and restricted," limited to "conflicts" between state and federal policy. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87-88 (1994). If there is no "conflict," then state law controls. *Id.* Here, Nevada and HUD have the same policy: banks should pay association dues. *SFR*, 334 P.3d at 414; HUD Handbook 4310.5, Rev-2, Ch. 4, § 4-37(A), p. 4-12. Moreover, this lawsuit involves private litigants, not the government. The government interest here is too remote or speculative to require a "uniform" judge-made federal rule. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 642 (1981); *Miree v. DeKalb Cnty.*, 433 U.S.

[46] *Stadium*, 425 F.2d at 360-61; *View Crest*, 268 F.2d at 382.
[47] *Stadium*, 425 F.2d at 360; *View Crest*, 268 F.2d at 382.
[48] *Stadium*, 425 F.2d at 361; *View Crest*, 268 F.2d at 383.

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

2. ***Sky Meadow & Rust are Distinguishable***

The Bank's reliance on *Sky Meadow* is bewildering. In that case, HUD stated that it "[d]oes not dispute that against any other party, [an association] could properly collect unpaid assessment fees by foreclosing . . . ." *Sec'y of Hous. & Urban Dev. v. Sky Meadow Ass'n*, 117 F. Supp. 2d 970, 976 (C.D. Cal. 2000). Hence, HUD's position in *Sky Meadow* directly rejects the Bank's misguided contentions in this case. By HUD's own account, it "does not dispute" that the Association could foreclose against the Bank. As for *Rust*, that case was a "[d]ispute over the power of the City of Los Angeles to foreclose on property in which the United States holds an interest." *Rust v. Johnson*, 597 F.2d 174, 176 (9th Cir. 1979). The issue was whether Los Angeles' foreclosure of street improvement assessments could extinguish a HUD-insured DOT, which was held by the Federal National Mortgage Association ("Fannie"). *Id.* The Ninth Circuit determined extinguishment did not occur, a determination influenced by the following considerations: (i) HUD was a party,[49] (ii) a mortgage held by a federal instrumentality is federal "property,"[50] (iii) the *City*

[49] *Rust*, 597 F.2d at 176-78.
[50] *Id.* at 177.

of New Brunswick case prohibited extinguishment of federal interests,[51] and (iv) the Supremacy Clause prevented state law from depriving the federal government of its "property."[52]

Here, HUD is not a party to this case. Next, the Bank does not allege that HUD or a "federal instrumentality" holds the DOT, a factual difference between the instant matter and *Rust*. Finally, *Rust's* Supremacy Clause analysis concentrated on the relationship between state law and the federal government, scrutinizing how a state law impacted the government. *Rust*, 597 F.2d at 179. Here, the relationship at issue is between state law and a private entity ─ the Bank. Indeed, this country's highest court has determined that state law can prevent a private entity from giving property to the federal government. *United States v. Burnison*, 339 U.S. 87, 91 (1950); *United States v. Fox*, 94 U.S. 315, 320-21 (1876); *see also FDIC v. Former Officers & Directors of Metro. Bank*, 884 F.2d 1304, 1309 n.4 (9th Cir. 1989) ("If the state statute of limitations has expired before the government acquires a claim, that claim is not revived by transfer to a federal agency."). From the law of wills to statutes of limitations, neither the Supremacy nor the Property Clause is offended by state law prohibiting private individuals from giving property to the federal government. *Id.* The Supreme Court has even gone so far as to state that the federal government

[51] *Id.* at 179.
[52] *Id.* at 179-80.

"[m]ay place itself in a position where its rights necessarily are determinable by state law, as when it purchases real estate from one whose title is invalid by that law in relation to another's claim." *United States v. Standard Oil Co.*, 332 U.S. 301, 308-09 (1947). In the end, *Sky Meadow* and *Rust* are distinguishable.

C. The Bank Lacks Standing to Enforce Federal Statutes Specifically Authorized by Congress to be Enforced by HUD.

This Court can affirm the District Court's Order finding that the Bank, a private litigant, does not have standing to raise arguments belonging to HUD. Only Congress through a law's text determines who can enforce a federal statute. *Armstrong v. Exceptional Child Care Ctr., Inc.*, 575 U.S. ___, 135 S.Ct. 1378, 1383-85 (2015). Here, Congress expressly authorized HUD's Secretary to enforce the NHA. 12 U.S.C. §§ 1701c(a), 1702, 1708(a)(1), 1709(r), 1710(g), 1710(i); 42 U.S.C. § 3535(i)(1). For example, "[t]he powers conferred by [the NHA] shall be exercised by the Secretary[.]" 12 U.S.C. § 1702. In "carrying out the provisions of" the NHA, the Secretary is "[a]uthorized, in his official capacity, to sue and be sued[.]" *Id.* The Secretary is also "[a]uthorized to . . . commence any action to protect or enforce any right conferred upon him[.]" 42 U.S.C. § 3535(i)(1). Moreover, the Bank has been unable to articulate what law or regulation allows HUD to seek assistance in protecting their alleged property interest nor has the Bank shown that the law allows HUD to contract for assistance in fulfilling any function of HUD.

What needs to be remembered 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. "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 of Congress to implement its own laws. *See Id.* Here, the Bank is a private litigant and therefore cannot assert a cause of action under the Supremacy Clause.

Further support is provided by *Freedom Mortgage*. when the Court stated that "the federal government is the best advocate of its own interests." 106 F.Supp.3d 1174, 1180 (D.Nev. 2015). In coming to this conclusion, *Freedom Mortgage* stated:

> We 'must hesitate before resolving a controversy on the basis of the rights of third persons not parties to the litigation" for two reasons. "First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights do not wish to assert them.' ... 'Second, third parties themselves usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them.'

Freedom Mortg. 106 F. Supp. 3d at 1180 quoting *The Wilderness Soc'y v. Kane Cnty., Utah*, 632 F.3d 1162, 1171-72 (10th Cir.2011).

Therefore, the District Court was correct in its determination that the Bank lacked standing to invoke the Supremacy Clause to defeat NRS 116.

D. NRS 116 does not Conflict with the FHA Insurance Program.

Assuming the Bank could assert the Supremacy Clause, NRS 116 is not preempted by federal law because there is no actual conflict between NRS 116 and HUD/FHA's policies. As noted in *Freedom Mortgage,* the purpose of HUD is not frustrated by NRS 116 because Nevada homeowners association laws "are entirely consistent with [HUD's] goals of improving residential community development, eliminating blight, and preserving property values." 106 F.Supp.3d at 1188. In fact, HUD's policy is not only consistent with Nevada homeowners association laws; it is harmonious because "[i]n superpriority lien states, the HUD-insured lenders' obligation to prevent foreclosure by satisfying HOA liens in not an aspirational goal; it's a requirement." *Id.* at 1184.

In *Freedom Mortgage,* the loan was insured by the FHA by HUD. The borrower defaulted on the association assessments, and the association conducted a proper non-judicial foreclosure sale. *Id.* at 1177. The property was then sold to an investor. *Id.* Following the *SFR* decision, the lender filed a complaint and claimed that the property could not have been extinguished by the foreclosure sale because

the loan was insured by HUD. *Id.* The Court concluded that there was no conflict preemption because a lender has the ability to comply with Nevada law **and** HUD's policies and procedures. *Id.* at 1183-1186. In fact, "[n]othing prevents a lender from simultaneously complying with HUD's program and Nevada's HOA-foreclosure laws." *Id.* at 1184. HUD provides that lenders must make sure that all assessments (including HOA assessments) are paid so that liens do not attach to the property. *Id.* HUD specifically directs lenders to pay outstanding liens, which includes HOA fees and assessments, in order to prevent foreclosure in superpriority lien states – a directive that is in line with Nevada's HOA lien law. *Id.* at 1185-1186.

As such, the Court found that the bank's loss was a result of its own failure to follow HUD's policies and procedures. *Id.* at 1186. Thus, the Court ultimately concluded that the association foreclosure sale was not barred by the Supremacy Clause and that the foreclosure sale extinguished the lender's security interest in the property. *Id.* at 1189. Like the bank in *Freedom Mortgage*, the Bank here ignored HUD's directive when it failed to pay the past due assessments owed on the subject property. Now the Bank can only blame itself for the loss. In short, NRS Chapter 116 does not conflict with FHA/HUD policies; instead, it comports with FHA/HUD policies, and therefore summary judgment in favor of SFR was warranted.

II. NO RETROACTIVITY ANALYSIS IS REQUIRED WHERE A STATUTE IS BEING INTERPRETED.

The Bank argues that *SFR* should not be applied retroactively, specifically

that *Breithaupt v. USAA Prop & Case. Ins. Co.*,[53] *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 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 a statute which exempted taxicab drivers from statutory minimum wage laws. *Nevada Yellow Cab*, 383 P.3d at 246. The taxicab companies argued that this Court's decision regarding the statutory minimum wage should be applied prospectively only. *Id.* However, 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 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

[53] 110 Nev. 31, 35, 867 P.2d 402, 405 (1994).

> 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 Ass'ns, Inc. v. Smith*, 496 U.S. 167, 218-224 (1990)(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.

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.

III. THE BANK'S COMMERCIAL REASONABLENESS ARGUMENTS FAIL.

Although not required under the statutes, the sale and the price paid by SFR was commercially reasonable. Commercial reasonableness arises from the UCC, Article 9 (secured transactions), adopted in Chapter 104 of the Nevada Revised Statutes. *See* NRS 104.9101; *see also Levers v. Rio King Land & Inv. Co.*, 93 Nev. 95, 98, 560 P.2d 917, 919-920 (1977). The factors include the method, manner, time, place, and terms of the sale. *Id.* This makes sense under Article 9 where the secured goods differ. Here, Nevada State Legislature specifically provided the method, manner, time, place and terms of the non-judicial foreclosure sale by homeowners' associations. NRS 116.3162-116.31168. Thereafter, the Nevada Supreme Court went through a full analysis of the statutes *See SFR*, 334 P.3d at 411-412, 416 (describing the "specific aspect of the non-judicial foreclosure process NRS 116.31162 authorizes for HOA liens."). So long as the NRS is followed, the sale is presumptively reasonable and in good faith. *BFP v. Resolution Trust Corporation*, 511 U.S. 531, 542 (1994).

A. In Nevada, a Low Price is Never Enough to Overturn 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*, 366 P.3d at 1112 *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).[54]

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.

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[54]*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. 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.

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).[55] 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*[56], … , 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).

The Bank in insisting that this Court review multiple cases, including *Krohn,*[57] *Fenton*[58] and other cases that have adopted the Restatement (Third) Property: Mortgages, §8.3 cmt. b, 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

[55] 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).
[56] 21 Nev. 291, 298, 30 P. 1064 (1892)
[57] *In re Krohn*, 203 Ariz. 205, 207, 52 P.3d 774, 776 (2002).
[58] *Sec. Sav. & Loan Ass'n v. Fenton*, 167 Ariz. 268, 270, 806 P.2d 362, 364 (Ct. App. 1990).

to overturn a foreclosure,[59] 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.

B. <u>There Were No Irregularities with the Foreclosure.</u>

Since price alone can never be enough to overturn a sale, the Bank has attacked various aspects of this foreclosure. However, upon closer inspection, all of these attacks fall flat and do not support overturning the foreclosure.

1. <u>The mortgage protection clause in the CC&Rs does not amount to fraud, unfairness or oppression.</u>

The Bank asserts, without evidence, that the mortgage protection clause contained within the CC&Rs caused the sale to lack competitive bidding. (AOB p. 30.) The Nevada Supreme Court's holding in *SFR* considered a mortgage protection clause containing **<u>identical</u>** 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

[59] The Bank's analysis of *Krohn* and *Fenton* 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 rejected that standard.

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).

Further, the Bank has provided no evidence that the Association made any announcements or reliance relating to the mortgage saving clause contained in the CC&Rs. Similarly, the Bank provided no evidence that the presence of the mortgage protection clause in any way affected the price paid by SFR at auction.

In regards to specifically the Bank, it has failed to provide any evidence that the Bank has 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.

2. ***The deposition testimony of Robert Diamond and the lease agreement do not amount to any fraud, unfairness or oppression.***

This Court concluded that a Bank's First Deeds of Trust could be extinguished after a homeowner's association sale because NRS 116 "gives an HOA a true superpriority lien." *SFR* 334 P.3d at 419. Thus, Mr. Diamond's incorrect legal conclusions regarding the extinguishment of first deeds of trust are wholly immaterial. Additionally, Mr. Diamond's legal conclusions are immaterial as Mr. Diamond was an employee of SFR in charge of purchasing foreclosure properties at NRS 116 sales. Mr. Diamond was not responsible for providing legal analysis to SFR. Therefore, it is unsurprising that the Bank has not been able to present evidence that SFR either valued or considered Mr. Diamond's incorrect legal conclusion. Further, and as discussed more fully below, the experience of the purchaser, or how many properties Mr. Diamond purchased, does not defeat SFR's bona fide purchaser status. *Melendrez v. D & I Inv., Inc.*, 26 Cal.Rptr.3d 413, 425 (Ct. App. 2005).

In regards to any lease agreement, the Bank has not provided any evidence regarding the lease agreement between SFR and its renter regarding this specific property. The cited agreement relates to a wholly different property. (*See* 3AA_600.) But looking at the lease agreement cited by the Bank, the agreement never acknowledges that the Bank has a security interest. Instead, the agreement contemplates the existence of a surviving interest. To say what you planned on doing if an interest survived is far different from acknowledging the survival of an interest. Based on this, the lease agreement and

Mr. Diamond's incorrect legal conclusions cannot be the fraud, oppression or unfairness needed to overturn this foreclosure sale.

C. The Price Paid at Auction was Commercially Reasonable.

As no irregularities existed with the foreclosure, the District Court did not need to consider the price paid by SFR at foreclosure. However, if the District Court would have engaged in such analysis, the Court would have found that the price paid by SFR was commercially reasonable. Fair market value has no applicability to a forced sale situation. *BFP,* 511 at 531. In *BFP*, the United States Supreme Court was analyzing whether the price received at a mortgage foreclosure sale was less than "reasonably equivalent value" under the bankruptcy code. Just like the Bank in this case, the Chapter 11 debtor argued that because the property sold for a fraction of its fair market value, the price paid was not reasonable. The Court held that "a 'reasonably equivalent value' for foreclosed real property is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with." *BFP*, 511 U.S. at 545. The Court explained that in a forced sale situation, "fair market value cannot—or at least cannot always—be the benchmark[]' used to determine reasonably equivalent value. *Id.* at 537. This is so because the market conditions that generally lead to "fair market value" do not exist in the forced sale context, where sales take place with significant restrictions:

…

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

Id. at 537-538 (quoting Black's Law Dictionary 971 (6th ed. 1990)(emphasis added)). The Court recognized that property sold in a forced sale context, i.e. a foreclosure, "is simply worthless [because] [n]o one would pay as much to own such property as he would pay to own real estate that could be sold at leisure and pursuant to normal marketing techniques." *Id*. at 539. As the Court further noted,

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

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

While *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.[60] After 90 days of the recording of the NOD, the NOS must be mailed to all interested parties and subordinate claim holders.[61] 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.[62] Additionally, NRS 116 requires that the sale takes place in the County in which the property is situated.[63]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.

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[60] 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.).
[61] NRS 116.311635(1)(b)(1); NRS 116.311635(1)(b)(3); NRS 116.31168(1); NRS 107.090(3)-(4).
[62] NRS 116.311635(c)
[63] NRS 116.31164

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.[64] Additionally, the auction was publically held,[65] and SFR placed the winning bid of $6,100.00 at auction.[66] Despite any allegations otherwise, SFR was not the only qualified bidder at the auction. (2AA_453-455 at ¶ 14.)

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.

…

…

[64] 2AA_332-334; 356-383; 438-443
[65] 2AA_438-443
[66] 2AA_438-443; 453-455.

IV. BONA FIDE PURCHASER STATUS TRUMPS EQUITABLE CHALLENGES.

A. SFR is a Bona Fide Purchaser.

While SFR is a Bona Fide Purchaser ("BFP") as to this Property, 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. In other words, *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)).

Here, SFR has actual 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. *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 "claiming title to the land by a subsequent conveyance must show that the purchase was made in good faith, for a valuable consideration; and that the conveyance of the legal title was received before notice of any equities of the prior grantee." *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 $6,100.00 for the property.

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. (2AA_406 at 22:7-14; 2AA_407 at 25:5-20.) Additionally, SFR has no relationship with the Association or the Association's Agent, except as a purchaser of Property. (2AA_453-455 at ¶¶ 18-19.) Therefore, nothing known to the Association or its agent about any purported irregularities in the foreclosure process could have been known by SFR.

Neither did SFR have notice of "prior equities" at the time it purchased the Property. 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.

Additionally, the lease agreement of a completely different property than the property herein is mischaracterized by the Bank. (2AA_600.) In that lease agreement, SFR never acknowledged that the DOT survived the foreclosure. The key word in the lease agreement is that a previous owner "*may* have a right to foreclose." *Id.* SFR certainly did not acknowledge that the Bank has the right to foreclose. While the language of the lease may show the cautious approach SFR took with its tenants, nothing in this lease shows that SFR was aware of any surviving superior or competing interest of the Bank's.

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, 366 P.3d at 1114 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 n. 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 failed to bring any evidence that the Association foreclosure notices were not sent to it as required by statute. (2AA_356-383; 2AA_432-437.) 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 nn. 28-32.) The Bank knew that without taking action to stop the sale, the Association's foreclosure would extinguish all junior interests. 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. As the District Court rightly held, the equities swayed in favor of SFR. (4AA_814.)

V. THE FORECLOSURE DEED VESTED TITLE IN SFR AND NOT A LIEN INTEREST.

For the first time on appeal, the Bank argues that the Foreclosure Deed did not transfer ownership of the property. (*See* AOB p. 37.) Due to the untimely nature of this argument, this argument is waived. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

However, considering the merits of such an argument, the Bank's claim that SFR did not obtain title to the Property, but rather only a lien interest, is absurd because the title interest conveyed is defined by statute. NRS 116.3116(3) specifically provides, "[t]he sale of a unit pursuant to NRS 116.31162, 116.31163 and 116.31164 vests in the purchaser the title of the unit's owner without equity or right of redemption." In Nevada, a homeowners association has a lien for delinquent assessments, a portion of which has priority over a first deed of trust. NRS 116.3116(2); *SFR*, 334 P.3d at 419. Furthermore, when an association forecloses on its lien for delinquent assessments, the purchaser at the foreclosure sale receives "a deed without warranty which conveys to the grantee all *title of the unit's owner to the unit*[.]" NRS 116.31164(3)(a) (emphasis added). The undisputed facts show that SFR purchased the property at a foreclosure sale. The Association foreclosure sale

in this case was conducted pursuant to NRS 116, and therefore there is no doubt that SFR obtained title to the Property and not merely a lien interest. Pursuant to the very text of the statute, SFR, as the purchaser, received "title of the unit's owner." Any argument to the contrary is just utter nonsense.

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

The NRS 116 foreclosure provisions do not involve a state actor. This decision was reached in a 5-0 decision by this Court.[67] *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage, a Division of Wells Fargo Bank, N.A.*, 133 Nev. ___, 388 P.3d 970, 975 (2017). Further, *Saticoy Bay* acknowledged that the Ninth Circuit in a previous holding found that the NRS 116 foreclosure provisions did involve a state actor,[68] but rejected such analysis. *Saticoy Bay*, 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.

[67] A petition for writ of certiorari is currently pending at the United States Supreme Court. Case No. 16-1208. *Saticoy Bay* remains binding law in Nevada state courts and a full discussion of statutory interpretation is not needed at this time. However, if the Supreme Court disagrees with this Court's analysis in *Saticoy Bay* and holds that due process is implicated, then SFR reserves its rights to move to supplement its briefing on the issue of the construction of the statute.

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

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.

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

The Bank claims that the failure of NRS 116 is that it did not require actual notice to holders of Deeds of Trust. However, this is contradicted by the recent unpublished orders signed by six of the seven Justices on this Court in which this Court stated that "NRS 116.31168 (2013) incorporates NRS 107.090 (2013), which requires that notices be sent to a deed of trust beneficiary."[69]

[69] *Las Vegas Dev. Group. v. Wells Fargo Fin. NV. 2*, Case No. 68991 (Nev. Mar. 17, 2017)(unpublished order vacating and remanding); *JPMorgan Chase Bank v.*

Additionally, the evidence shows that the Bank received notice of the foreclosure as it received the NOD and NOS. (2AA_356-383; 2AA_432-437.) 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.

Saticoy Bay LLC Series 10013, Case No. 69583 (Nev. Apr. 14, 2017)(unpublished order vacating and remanding).

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*[70] court determined when it said enactment of the legislation met the state action requirement and what this Court rejected in *Saticoy Bay*.[71]

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 discriminatory action by the State, which is prohibited by the Equal Protection

[70] *See Bourne Valley Court Tr. v. Wells Fargo Bank, N.A.*, 832 F.3d 1154, 1159–60 (9th Cir. 2016)
[71] *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)

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).[72] 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 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

[72] 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.

(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 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.

…

VII. 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). This 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* this 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 met 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 did not have "full knowledge" that its Deed of Trust had been extinguished and therefore reasonably 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 showed that any payment was a voluntary payment. As such, the burden shifted to the Bank to prove that one of the exceptions applied.

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 did not 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 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 needed to 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 was entitled to summary judgment on the Bank's claim for unjust enrichment and this Court should affirm.

VIII. THE BANK HAS NOT PRESENTED A COMPELLING REASON TO EXCLUDE MICHAEL BRUNSON.

Mr. Brunson's testimony relates to the disputation value of the property. Yet the District Court did not make a finding on the admissibility of Mr. Brunson's testimony because the Bank failed to prove any fraud, unfairness or oppression surrounding the foreclosure making the actual amount paid by SFR irrelevant.[73] Yet, even considering the merits of this argument, the Bank's arguments fail.

An expert witness's specialized knowledge must "assist the trier of fact to understand the evidence or to determine a fact in issue." NRS 50.275; *Hallmark v. Eldridge*, 124 Nev. 492, 498, 501, 198 P. 3d 646, 650 (2008). Expert testimony is said to assist the trier of fact "only when it is relevant and the product of reliable methodology." *Hallmark*, 124 Nev. at 501, 198 P.3d at 650. While there are a number of factors a court may consider when determining whether a particular methodology is reliable, "those factors may be afforded varying weights and may not apply equally in every case. It is up to the district court judge to make the determination regarding the varying factors as he or she is the gatekeeper." *Higgs v. State*, 126 Nev. 1, 20, 222 P.3d 648, 660 (2010).

[73] *See Supra* § III(A).

Here, the Bank does not dispute that Brunson's opinion is "within a recognized field of expertise." (1AA_114:19-20.) Additionally and importantly, contrary to the Bank's contentions, Brunson's methodology is indeed based on the **particularized** facts of this case, and is not the product of "assumption, conjecture or generalization." *Hallmark*, 124 Nev. at 501, 198 P.3d at 652. Specifically, Brunson critiqued Dugan's analysis using the **specific circumstances** surrounding **this particular Property**. (*See* 1AA_123.) Further, Mr. Brunson analyzed properties similar to the subject Property, that also sold at NRS 116 sales, and compared the prices paid for those properties to the price **specifically paid by SFR for this subject Property**. *Id.* at pp. 34-35.

Mr. Brunson used the property disposition value in crafting his rebuttal report. Disposition value is a widely recognized methodology of value, and indeed its definition is contained in the Dictionary of Real Estate Appraisal, Fifth Edition. (*See* 1AA_123 at pp. 7, 30.) To that end, the disposition value, as a methodology of value in the appraisal world, has arguably been "tested[,]" has been "subject to peer review[,]" and is generally accepted in the appraisal community. *Hallmark*, 124 Nev. at 501, 198 P.3d at 652.

In sum, it is clear that Brunson's opinion and testimony meet the reliability requirements as dictated by *Hallmark* and *Higgs*. However, as the District Court did

not make a finding either regarding Brunson's opinion, in the case of remand, the District Court should be afforded such an opportunity to make this decision.

CONCLUSION

SFR took title to the Property free and clear of the Bank's extinguished deed of trust. Based on the foregoing, the District Court properly granted summary judgment in SFR's favor and this Court should Affirm.

DATED this 24th day of July 2017.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14 point, double-spaced Times New Roman font.
2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the pages of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, is 53 pages long and contains 13,830 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 24th day of July 2017.

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I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 24th day of July 2017. Electronic service of the foregoing **Respondent's Answering Brief** shall be made in accordance with the Master Service List as follows:

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