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

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 REPLY 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: September 22, 2017.

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

A. The Property Clause of the United States Constitution barred the Sale from extinguishing the Deed of Trust.

In its opening brief, Chase[1] argued that the Property and Supremacy Clauses barred the Sale from extinguishing the Deed of Trust because the underlying Loan was insured by the Federal Housing Administration ("FHA"). The Court has since held that the Supremacy Clause does not apply under these circumstances. However, the Court has not addressed whether the Property Clause applies. For the reasons explained below, the Court should hold that the Property Clause protected the Deed of Trust from extinguishment.

1. Renfroe v. Lakeview Loan Servicing does not address the application of the Property Clause.

After SFR filed its answering brief, the Court issued its opinion in Renfroe v. Lakeview Loan Servicing, LLC, 398 P.3d 904 (Nev. 2017). Renfroe addressed "whether the provisions of NRS 116.3116 are preempted by federal law when the first deed of trust on the property is insured through the Federal Housing Administration (FHA)." 398 P.3d at 905. The Court held that "because the FHA insurance program specifically contemplates that lenders may be subject to

[1] Unless otherwise defined, all capitalized terms have the meanings given in Chase's opening brief.

superpriority liens such as those provided in NRS 116.3116, the preemption doctrine does not apply in these circumstances." Id. The Renfroe opinion began by quoting the Supremacy Clause. Id. at 906. It then explained the various forms of preemption under the Supremacy Clause, id., and ultimately held that federal law does not preempt NRS 116.3116 under a theory of conflict preemption, id. at 908-09. Thus, while Renfroe held that the Supremacy Clause does not apply under these circumstances, Renfroe did not address whether the Property Clause does. Because the application of the Property Clause remains an issue of first impression, Chase will reply to SFR's arguments involving the Property Clause.

2. SFR's "standing" arguments fail.

Among other things, SFR claims that Chase lacks "standing" to argue that the Property Clause protected the Deed of Trust. Ans. Br. 10-13, 19-21. It is not entirely clear what SFR means by "standing," but in any event this argument fails.

a. As a defendant, Chase need not establish standing to sue, but it can in any event.

In another recent case, this Court held that a loan servicer has standing to argue that the Housing and Economic Recovery Act of 2008 ("HERA") preempts NRS 116.3116. See Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC, 396 P.3d 754, 755 (Nev. 2017). The servicer in Nationstar claimed that NRS 116.3116 was preempted to the extent it would permit an HOA foreclosure to extinguish a deed of trust securing a Freddie Mac loan while Freddie Mac was under the

conservatorship of the Federal Housing Finance Agency ("FHFA"). Id. In discussing standing, Nationstar explained that "the party seeking relief must have a sufficient interest in the litigation, so as to ensure the litigant will vigorously and effectively present his or her case against an adverse party." Id. at 756 (quotation marks and citation omitted). Since a loan servicer "administers a mortgage on behalf of the loan owner," the Court reasoned, the servicer "is entitled to take action to protect the loan owner's interests." Id. at 757 (citations omitted).

Here, Chase's interest in the Loan and Deed of Trust is even more direct than the servicer's interest in Nationstar. Chase is the named beneficiary of the Deed of Trust and it owns the underlying Loan. Therefore, Chase obviously has legal and constitutional standing to litigate to protect the Deed of Trust.[2] But even if Chase lacked standing to affirmatively sue—which is what SFR seems to be arguing—that fact would be irrelevant. Because Chase is the defendant in this case, it is not required to show that it has standing to sue. That particular form of "standing" is simply not relevant here.

[2] The federal statutes cited by SFR merely describe the general powers of the FHA and the Department of Housing and Urban Development ("HUD"). They say nothing about whether owners of HUD-insured loans may engage in related litigation.

b. Like any other litigant, Chase can invoke federal law as a rule of decision.

Therefore, what SFR may be arguing is that Chase lacks "standing" to raise arguments under the Property Clause as a defense to SFR's complaint. There is no authority for this contention, either. SFR claims that various federal statutes prohibit Chase from arguing that the Property Clause protected the Deed of Trust. Ans. Br. 19-21. SFR made functionally identical arguments in Nationstar, and the Court rejected them. For example, SFR relied on a provision of HERA which states that FHFA "may, as conservator, take such action as may be…appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity." 396 P.3d at 757 (quoting 12 U.S.C. § 4617(b)(2)(D)). Citing this statute, SFR argued by negative implication that only FHFA (and not a loan servicer) could raise arguments under HERA. The Court quickly disposed of this argument. See id. SFR also relied on a regulation that gave FHFA the power to "[p]reserve and conserve the assets and property of the regulated entity (including the exclusive authority to investigate and prosecute claims of any type on behalf of the regulated entity, or to delegate to management of the regulated entity the authority to investigate and prosecute claims)." Id. (quoting 12 C.F.R. § 1237.3(a)(7)). The Court held that this provision also did not prohibit loan servicers from raising arguments under HERA. See id.

SFR now engages in a similar line of reasoning by citing a handful of statutes that describe the general powers of the FHA and HUD. Among other things, SFR cites statutes which empower the secretary of HUD to exercise powers conferred by the National Housing Act, sue or be sued, and commence actions to protect or enforce rights conferred on the secretary. Ans. Br. 19. But none of these statutes addresses whether the owner of a HUD-insured loan named as a defendant in a quiet title action may defend itself by invoking the Property Clause. As it did in Nationstar, SFR has simply cited a list of statutes which describe the general powers of a government agency and then argued that these statutes prohibit private litigants from making specific legal arguments. There is no logical nexus between SFR's argument and the statutes cited to support it. The Court should therefore reject SFR's "standing" argument, the same way it rejected the "standing" argument in Nationstar.[3] Absent some contrary provision of law which

[3] SFR tries to distinguish Nationstar by arguing that the loan in Nationstar was directly owned by Freddie Mac, whereas the loan in this case was owned by Chase and insured by HUD. Ans. Br. 10-11. This is a distinction without a difference. If anything, the fact that Chase directly owns the Loan gives Chase a greater degree of latitude to protect the Deed of Trust. SFR also claims that Nationstar relied on federal statutes and regulations allowing FHFA to enter contracts with third parties, i.e., loan servicers. Ans. Br. 11. But no such contract is needed here, since Chase directly owns the Loan and Deed of Trust. Chase does not need statutory or contractual permission to defend its own property or to present related arguments under federal law.

SFR has not cited, Chase can invoke federal law as a rule of decision in this case or any other case.

3. The Property Clause protected HUD's statutory and contractual interest in the Property.

SFR further claims that the Property Clause did not protect the Deed of Trust. Ans. Br. 13-19. As this Court explained in Renfroe, when an HUD-insured mortgage loan goes into default, a private lender has two options. First, "the lender may assign the first-position mortgage interest to HUD before foreclosure and make a claim for the remaining principal amount[.]" Renfroe, 398 P.3d at 907 (internal citations and quotation marks omitted). "[S]econd, the lender may initiate foreclosure and make a claim for the deficiency." Id. Therefore, upon default, HUD has a statutory and contractual right to obtain title to the property in exchange for paying the remaining balance of the loan. This right is a property interest protected by the Property Clause. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 331 (1936); cf. Rust v. Johnson, 597 F.2d 174, 179 (9th Cir. 1979) (mortgage held by Fannie Mae, which was then a federal instrumentality, was protected under Supremacy Clause).

In its answering brief, SFR claims that "HUD owns no more interest in the Property than an automobile insurer holds in a consumer's car." Ans. Br. 14. The obvious problem with this statement is that HUD insurance guarantees repayment of the underlying loan, and in return, HUD receives a contractual and statutory

right to acquire the subject property in the event of default. In contrast, an automobile insurer does not guarantee repayment of an automobile loan—it insures the vehicle itself—and the insurer does not have a right to acquire the vehicle if the owner defaults on the loan.

Not only does SFR fail to consider this aspect of FHA insurance, but so do the two federal court orders cited in SFR's brief: Freedom Mortgage Corp. v. Las Vegas Dev. Grp., LLC, 106 F. Supp. 3d 1174 (D. Nev. 2015), and U.S. Bank, N.A. v. SFR Investments Pool 1, LLC, No. 2:15-cv-00287-APG-GWF, 2016 U.S. Dist. LEXIS 40339 (D. Nev. Mar. 28, 2016). For example, Freedom Mortgage asserts that HUD's status with respect to an HOA-foreclosed property "will likely never be anything more than a former insurer of the…loan, which collected premium payments but never incurred a claim-payment obligation." 106 F. Supp. 3d at 1182. But the relevant issue is not HUD's status after an HOA foreclosure sale, but rather HUD's status at the time of the sale. If, at the time of an HOA sale, HUD owns a property interest, then that interest is protected by the Property Clause. HUD does indeed hold a property interest because, as this Court explained in Renfroe, HUD has an enforceable right to acquire the subject property in exchange for paying the lender the remaining balance of the loan. If the lender's deed of trust is extinguished by the HOA sale, then HUD's right to acquire the

property will be eliminated (in violation of the Property Clause) because neither the lender nor HUD will be able to acquire title.

The fact that HUD's right to acquire the property is contingent on the lender submitting a claim is irrelevant. The Property Clause unambiguously protects all property interests of the United States. Neither the Property Clause nor the cases interpreting it exclude contingent property interests. Since the Property Clause speaks in absolute terms, it is incumbent upon SFR to provide specific legal authority for its position that contingent property interests are not protected. SFR does not, and neither did the courts in Freedom Mortgage and U.S. Bank. For example, the U.S. Bank order claims that HUD "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, 2016 U.S. Dist. LEXIS 40339 at *6. But this merely begs the underlying question of whether a conditional property interest held by HUD is property of the United States under the Property Clause. Thus, U.S. Bank implicitly concludes that contingent interests are not protected by the Property Clause but gives no actual authority for this conclusion.

Since the Property Clause protects a deed of trust securing a HUD-insured loan, the Court should vacate the district court's summary judgment that the Deed of Trust was extinguished.

B. The Court should adopt the Restatement, under which the grossly inadequate price invalidates the Sale.

In its opening brief, Chase urged the Court to adopt the Restatement's treatment of grossly inadequate prices obtained at foreclosure sales. Op. Br. 22-27. Under the Restatement approach, the Sale in this case is void because the $6,100 price was grossly inadequate. Op. Br. 23. As explained below, none of SFR's arguments against application of the Restatement approach is persuasive.

1. SFR cites no binding precedent rejecting the Restatement or prohibiting a court from cancelling a sale for gross price inadequacy.

Rather than debate the merits of the Restatement approach, SFR avoids the issue by arguing that the Court previously rejected the Restatement. Ans. Br. 25-28. SFR mainly relies on Golden v. Tomiyasu, 79 Nev. 503 (1963). However, Golden does not reject the Restatement approach and does not prohibit a court from voiding a sale for gross price inadequacy. The sale price in Golden was roughly 28.5% of the subject property's fair market value. 79 Nev. at 511. Therefore, Golden did not involve a price that was grossly inadequate within the meaning of the Restatement. To the extent that SFR reads Golden to hold that a court may not void a sale for gross price inadequacy, Golden is dicta. SFR also claims that Shadow Wood Homeowners Ass'n v. N.Y. Cmty. Bancorp. Inc., 366 P.3d 1105 (Nev. 2016), rejected the Restatement approach. This is despite the fact that Shadow Wood cited the Restatement approvingly when discussing the

price in that case. Op. Br 22-23. In any case, Shadow Wood involved a price that was between 20.8% and 24.0% of fair market value. 366 P.3d at 1112-13. Shadow Wood, like Golden, did not involve a price that was grossly inadequate within the meaning of the Restatement. Therefore, Shadow Wood is also dicta if read to hold that a court may not invalidate a sale for gross price inadequacy.

SFR also relies on Centeno v. J.P. Morgan Chase Bank, N.A., No. 67365, 2016 Nev. Unpub. LEXIS 342 (Mar. 18, 2016). Because Centeno is unpublished, it has no precedential value. See NRAP 36(c)(2). Further, the circumstances of Centeno undermine any persuasive value it would otherwise have. The pro se plaintiff in Centeno moved for a preliminary injunction and argued the defendant lender's deed of trust was extinguished by an HOA sale. The district court denied the requested injunction, and the plaintiff appealed. The panel hearing Centeno reversed the district court's denial of a preliminary injunction. In doing so, the panel left most of the substantive issues in the case unanswered. See generally Response to Appellant's Pro Se Appeal Statement at 9-17, Centeno (No. 67365).

The Centeno panel only briefly addressed the impact of Shadow Wood. It stated that "a low sales price is not a basis for voiding a foreclosure sale absent 'fraud, unfairness, or oppression.'" 2016 Nev. Unpub. LEXIS 342 at *2. But as Chase explained in its opening brief, the relevant question is not whether the price is "low," but whether it is so low as to be grossly inadequate. Centeno did not

address whether the relevant price was grossly inadequate, nor did it address whether gross price inadequacy was a basis for invalidating a sale. If the true intent of Centeno was to expand on Shadow Wood by holding that gross price inadequacy does not invalidate a sale, the Court presumably would have heard Centeno en banc and then issued a published opinion.[4]

SFR also responds to the Arizona case that Chase cited as persuasive authority: Krohn v. Sweetheart Props., Ltd., 203 Ariz. 205 (2002). In Krohn, the Arizona Supreme Court adopted the Restatement approach to foreclosure sale prices even though certain older Arizona cases suggested that inadequacy of price would not invalidate a sale. Op. Br. 25-26. The court explained that these older cases did not involve prices that were grossly inadequate within the meaning of the Restatement. Op. Br. 26. In the same vein, neither of the Nevada decisions in Golden and Shadow Wood involved a grossly inadequate price. Therefore, this Court can adopt the Restatement without overruling any holding from Golden or Shadow Wood—the same way the Arizona Supreme Court adopted the Restatement without overruling any prior Arizona case law. SFR responds to Krohn by arguing (again) that Golden rejected gross price inadequacy as a basis for invalidating a sale. Ans. Br. 26-27. This argument fails because, as explained

[4] SFR also cites an unpublished order in PNC Bank, Nat'l Ass'n v. Saticoy Bay LLC Series 9320 Mt. Cash Ave. UT 103, No. 69595, 2017 Nev. Unpub. LEXIS 395 (May 25, 2017). This order is irrelevant for the same reasons.

above, Golden did not involve a price that was grossly inadequate. To the extent that SFR reads Golden to reject the Restatement approach, SFR's reading is dicta.

For these reasons, the Court should adopt the Restatement to govern prices obtained at non-judicial HOA foreclosure sales. Under the Restatement, the Sale in this case is void because the $6,100 price is grossly inadequate in relation to the Property's $82,000 fair market value. Op. Br. 23. At the very least, there is a genuine dispute as to whether the price is grossly inadequate, which precludes summary judgment for SFR.

2. Fair market value is the appropriate metric for evaluating a sale price.

SFR also argues against using fair market value as the metric for evaluating the $6,100 price. Ans. Br. 31-33. Fair market value is "the price which a purchaser, willing but not obliged to buy, would pay an owner willing but not obliged to sell, taking into consideration all the uses to which the property is adapted and might in reason be applied." Unruh v. Streight, 96 Nev. 684, 686 (1980). SFR's argument that the Court should not utilize fair market value places SFR virtually alone in the world of real estate law. The Restatement, Golden, and Shadow Wood all use market value to evaluate a sale price.

For example, the Restatement provides:

> The standard by which "gross inadequacy" is measured is the fair market value of the real estate. For this purpose the latter means, 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.

Restatement § 8.3 cmt. b.

This Court also utilized fair market value to evaluate the price in Shadow Wood. It compared the $11,018 price to two measurements of the subject property's fair market value. First, it considered a $45,900 bid placed for the property at an earlier trustee's sale. 366 P.3d at 1112. Second, it considered an appraisal which stated the property's fair market value was $53,000. Id. at 1113 n.3. Because the $11,018 price was greater than 20% of each of these amounts, the Court held the price was not "grossly inadequate." Id. at 1112. Thus, the Court adopted fair market value as the comparator for evaluating an HOA sale price. Similarly, in Golden, the Court compared the sale price to the property's "market value" of $200,000. 79 Nev. at 505.

To support its position, SFR primarily relies on BFP v. Resolution Trust, 511 U.S. 531 (1994). In BFP, the United States Supreme Court held that a price obtained at a properly conducted trustee's sale was "reasonably equivalent value" under the fraudulent transfer provisions of the Bankruptcy Code. Thus, the Supreme Court held for purposes of bankruptcy law that a court must treat a price obtained a properly conducted sale as reasonably equivalent value. But this says

nothing about whether, under Nevada state law, a court may invalidate an HOA sale because the price is grossly inadequate. It also says nothing about whether, under Nevada state law, a court should use fair market value or some other metric to judge the price. Regardless of what bankruptcy law may provide, state foreclosure law has long permitted courts to void sales where the price is extremely small in relation to fair market value. BFP itself acknowledged this fact. See 511 U.S. at 542 (noting that sale may be set aside under "state foreclosure law" where "the price is so low as to shock the conscience or raise a presumption of fraud or unfairness.").

C. Even if there must be other defects in addition to the grossly inadequate price, Chase has established a genuine question as to the Sale's validity.

Even if the Court declines to adopt the Restatement, and if Chase must demonstrate some additional defect beyond the $6,100 price, SFR is not entitled to summary judgment.

1. Even if they applied here, the presumptions cited by SFR would not alter the outcome of the appeal.

SFR argues at length that it was not required to prove the Sale was valid. SFR is incorrect. As a plaintiff moving for offensive summary judgment, SFR had to "present evidence that would entitle it to a judgment as a matter of law in the absence of contrary evidence." Cuzze v. Univ. & Cmty. Coll. Sys., 123 Nev. 598, 602 (2007) (citation omitted); see also Breliant v. Preferred Equities Corp., 112

Nev. 663, 669 (1996) ("In a quiet title action, the burden of proof rests with the plaintiff to prove good title in himself."). SFR tries to reverse the normal operation of Rule 56 by arguing that Chase—a non-moving defendant—must affirmatively disprove that the Sale was valid. Ans. Br. 6, 9-10. SFR claims that certain formulaic recitals in the Foreclosure Deed are prima facie evidence that the Sale was valid and that they shift the burden of proof to Chase. Ans. Br. 6. However, the Court rejected this argument in Shadow Wood. See 366 P.3d at 1107 ("[Appellants] argue that NRS 116.31166 (2013), which says that certain recitals in an HOA trustee's sale deed are 'conclusive proof of the matters recited,' renders such deeds unassailable. We disagree and reaffirm that, in an appropriate case, a court can grant equitable relief from a defective HOA lien foreclosure sale."). Like any other plaintiff, SFR bears the burden of proof on its own quiet title claim.

SFR also cites the disputable presumptions listed in NRS 47.250 (16), (17), (18)(b), and (18)(c). Those presumptions are:

> 16. That the law has been obeyed.
>
> 17. 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.
>
> 18. In situations not governed by the Uniform Commercial Code…

> (b) That private transactions have been fair and regular.
>
> (c) That the ordinary course of business has been followed.

NRS 47.250 (16)-(18). There are several reasons why these presumptions do not apply here.

First, the presumptions are so generic that they do not appear to govern foreclosure sales at all. A presumption that the "the law has been obeyed" or that "private transactions have been fair and regular" could be stretched to fit virtually any civil lawsuit. It is not at all clear that the Nevada Legislature intended these presumptions to have such a sweeping effect. Indeed, there appear to be only two published cases where this Court has actually applied NRS 47.250(16), (17), (18)(b), or (18)(c). In both cases, the Court used one or more of the presumptions to reject frivolous arguments by inmates in criminal cases. See Hogan v. Warden, Ely State Prison, 112 Nev. 553, 560-61 (1996); Paine v. State, 110 Nev. 609, 618 (1994). No published decision of the Court has applied these presumptions to a foreclosure sale or any other commercial transaction.

Second, even if the cited presumptions apply to HOA sales in general, they do not apply to the specific defects of which Chase complains. None of the presumptions addresses the sufficiency of the $6,100 price, the effect of the mortgage savings clause in the HOA's declaration, or the lack of competitive

bidding at the Sale. Cf. Shadow Wood, 366 P.3d at 1110 ("As a textual matter, the deed recitals to which NRS 116.31166 accords conclusive effect do not relate to the deficiencies NYCB alleges.")

Third, even if the cited presumptions apply—meaning that Chase must prove at trial that the Sale is void—Chase has established a jury question on this issue. Chase has "transcend[ed] the pleadings and, by affidavit or other admissible evidence, introduce[d] specific facts that show a genuine issue of material fact." Cuzze, 123 Nev. at 603. As explained below, Chase provided evidence that the sale price was grossly inadequate, that the HOA represented through its declaration that the Sale would not extinguish the Deed of Trust, and that the bidding at the Sale was not competitive. Therefore, regardless of whether the cited presumptions shift the burden of proof to Chase, the district court erred by entering summary judgment.

2. A reasonable trier of fact could find fraud, unfairness, or oppression in the Sale.

As explained in Chase's opening brief, there were at least two defects surrounding the Sale in addition to the grossly inadequate price: the lack of competitive bidding and the HOA's mortgage savings clause. Op. Br. 28-30.

Therefore, even if the $6,100 price does not itself constitute "fraud, unfairness, or oppression," the validity of the Sale is genuinely in dispute.[5]

SFR claims that the mortgage savings clause is irrelevant because it is allegedly unenforceable under SFR Investments. Ans. Br. 28-29. But this is beside the point: regardless of whether the clause was legally enforceable, it represented to the public at large (including potential bidders like SFR) that the Sale would not extinguish the Deed of Trust. SFR Investments had not been decided at the time of the Sale, meaning that potential bidders could reasonably believe that the clause was valid and that the Property would remain encumbered by the Deed of Trust. Therefore, the clause could (and likely did) reduce the price obtained at the Sale. This permits a reasonable trier of fact to find fraud, unfairness, or oppression within the meaning of Shadow Wood. See HSBC Bank USA, N.A. v. SFR Invs. Pool 1, LLC, No. 69437, 2017 Nev. App. Unpub. LEXIS

[5] In its answering brief, SFR claims that Chase "failed to prove any fraud, unfairness or oppression that accounted for and brought about the allegedly low purchase price of which it complains." Ans. Br. 6. But Chase did not have to "prove" anything in the context of a summary judgment motion. At most, it had to produce evidence allowing a reasonable trier of fact to find the Sale invalid under Shadow Wood. See Cuzze, 123 Nev. at 603; see also Rasmusson v. Copeland Lumber Yards, 988 F. Supp. 1294, 1297 (D. Nev. 1997) ("[T]he opposing party need not establish a material issue of fact conclusively; only that the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial.") (citation and quotation marks omitted).

471, *3 (Jul. 11, 2017) (vacating summary judgment for SFR where district court failed to consider how mortgage savings clause bore upon equities).

SFR also claims that Chase "provided no evidence that the presence of the mortgage protection clause in any way affected the price paid by SFR at auction." Ans. Br. 29. SFR further claims that Chase "failed to provide any evidence that [Chase] has relied on or even read the CC&Rs." Ans. Br. 30. However, Chase is not required to prove a direct causal relationship between the mortgage savings clause and the grossly inadequate price. A court may invalidate a sale where the inadequate price is attended by other defects without the need of proving a strict cause-and-effect relationship between the two. See, e.g., Restatement § 8.3 ill. 9 (if property sells at judicial foreclosure for 30% of fair market value, and if sheriff fails to read foreclosure notice aloud as required by law, court is warranted in refusing to confirm sale); ill. 10 (if property sells at non-judicial foreclosure for 30% of fair market value, and if notice of sale is published only 16 times instead of 20 times as required by law, court is warranted in voiding sale). As a practical matter, it is almost impossible to prove that a given defect in a sale caused those in attendance to bid less than they would have otherwise bid. The law does not impose such a requirement.[6]

[6] Chase also argued in its opening brief that there was a lack of competitive bidding, since SFR's bid was one of only two placed at the Sale. It is unclear if
(continued...)

3. SFR is not a bona fide purchaser, but even if it were, this would not preclude the district court from voiding the Sale.

Chase argued in its opening brief that SFR is not a bona fide purchaser. At the time of the Sale, SFR had actual or record notice of the three relevant defects in the Sale: the grossly inadequate price, the mortgage savings clause, and the lack of competitive bidding. Op. Br. 30. SFR claims in its answering brief that it qualifies for bona fide purchaser status because (1) SFR paid valuable consideration for the Property, (2) there was no lis pendens recorded against the Property, and (3) SFR has no relationship with the HOA except as a purchaser of Property. Ans. Br. 37-38. But this has nothing to do with SFR's purported status as a bona fide purchaser. SFR only qualifies as a bona fide purchaser if it was unaware of the three specific defects at issue. 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). Because SFR does not deny that it knew about the grossly inadequate price, the mortgage savings clause, and the lack of competitive bidding, SFR is not a bona fide purchaser.

(...continued)

SFR disputes this assertion. SFR states at one point that it "was not the only qualified bidder at the auction," Ans. Br. 34, but this seems consistent with Chase's claim that two bids were placed.

Even if SFR were a bona fide purchaser—and it is not—this would not bar the district court from voiding the Sale. SFR claims that a court can never invalidate a sale where the purported buyer is a bona fide purchaser, regardless of any other circumstances of the sale. Ans. Br. 35-41. SFR does not cite any Nevada authority to support this claim, and no such authority exists. SFR claims at one point that Shadow Wood treated bona fide purchaser status as an absolute bar to voiding a sale. However, Shadow Wood necessarily rejected SFR's argument. The Shadow Wood Court held that bona fide purchaser status is a relevant consideration when deciding the validity of a sale. See 366 P.3d at 1116 ("Because the evidence does not show Gogo Way had any notice of the pre-sale dispute between NYCB and Shadow Wood, the potential harm to Gogo Way must be taken into account…"). In fact, the Court actually treated the buyer in Shadow Wood as a bona fide purchaser, see id., but this did not prevent the lender from challenging the sale. While the Court ultimately reversed the summary judgment in favor in the lender, it noted that "perhaps [the lender] could prove its claim at trial by presenting sufficient evidence to demonstrate that the equities swayed so far in its favor as to support setting aside [the HOA's] foreclosure sale." Id. Thus, the Court confirmed that a sale can be void even when the buyer is a bona fide purchaser.

4. The equities of the case favor invalidating the Sale.

a. For purposes of summary judgment, SFR cannot question the weight or credibility of Chase's evidence.

In its opening brief, Chase argued that the equities lie in its favor because SFR believed the Deed of Trust would survive the Sale. Op. Br. 30-32. Chase relied partly on deposition testimony from Robert Diamond, who attended the Sale for SFR. Diamond testified that he did not believe an HOA foreclosure sale would extinguish a first security interest. Op. Br. 31. In its answering brief, SFR responds by questioning the credibility of Diamond's testimony. It asserts that Diamond's opinion is "immaterial" because he was "an employee of SFR in charge of purchasing foreclosure properties" and "not responsible for providing legal analysis to SFR." Ans. Br. 30.

These arguments may be appropriate if SFR presented them to a jury, but in the context of summary judgment, they are irrelevant. The question of whether Diamond's view of NRS Chapter 116 also represented the view of SFR (as a company) is a question for the trier of fact. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). If "divergent ultimate inferences may reasonably be drawn from the undisputed facts," Fresno Motors, Ltd. Liab. Co. v. Mercedes Benz

USA, Ltd. Liab. Co., 771 F.3d 1119, 1125 (9th Cir. 2014), then a court must deny summary judgment. Here, Diamond's opinion is admissible to show that SFR believed a first security interest would survive an HOA sale. SFR cannot eliminate Diamond's testimony for purposes of summary judgment merely because SFR feels Diamond is incorrect.

Chase's opening brief also cited a lease that SFR entered in connection with another HOA-foreclosed property. In a "Foreclosure Addendum" attached to the lease, SFR informed its tenant that SFR was "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." 3AA 600. Chase argues that this provision indicates that SFR believed a first security interest survived an HOA sale. Op. Br. 31-32. Once again, SFR responds by inappropriately questioning the weight and credibility of Chase's evidence. It claims that "[t]he key word [sic] in the lease agreement is that a previous owner 'may have a right to foreclose.'" Ans. Br. 38. SFR claims that the lease merely "show[s] the cautious approach SFR took with its tenants" and that "nothing in this lease shows that SFR was aware of any surviving superior or competing interest of [Chase]." Id.

But even if the lease is ambiguous on this point, the district court had to accept Chase's interpretation for purposes of summary judgment. See Anderson, 477 U.S. at 255. As the party opposing summary judgment, Chase was not

required to conclusively prove that its interpretation of the lease was correct. It only had to demonstrate that a reasonable trier of fact could adopt Chase's interpretation and find that SFR believed a first security interest survived an HOA sale. To reiterate, SFR cannot use a summary judgment motion to litigate the weight or credibility of Chase's evidence. See id.

b. Under the prevailing view of NRS Chapter 116, there was no reason for Chase to pay off delinquent HOA assessments.

Throughout its brief, SFR attacks Chase for not paying the delinquent HOA assessments that gave rise to the Sale. The problem with this argument is that none of the affected parties believed an HOA foreclosure sale would extinguish a first security interest. Indeed, SFR's own business model was predicated on the belief that SFR would not receive clear title to HOA-foreclosed properties. Op. Br. 18-19. Thus, under the view of NRS 116.3116 that prevailed among the affected parties, there was no reason for Chase to pay off the assessments. SFR's vaguely moralistic argument that Chase "took a gamble" or "made a bad business decision," Ans. Br. 1, ignores this basic reality. The district court must consider the view of NRS 116.3116 that prevailed among the affected parties in 2012 as a "circumstance[] that bear[s] upon the equities." Shadow Wood, 366 P.3d at 1114.

In summary, any harm to SFR from losing its $6,200 investment would be dwarfed by the harm to Chase from losing the security for its $159,497 loan and

the harm to Ms. Harned from being subjected to a six-figure deficiency judgment. Neither Shadow Wood nor any other provision of Nevada law requires the Court to ignore this common-sense reality. Therefore, the equities of the case favor invalidating the Sale, and SFR is not entitled to summary judgment.

D. The language of the Foreclosure Deed also creates a genuine question as to whether the Sale extinguished Chase's Deed of Trust.

SFR claims that Chase waived its argument that the Foreclosure Deed only conveyed a lien interest to SFR. Ans. Br. 43. However, Chase specifically raised this argument in a cross-motion for summary judgment it filed before the district court entered summary judgment for SFR. 4AA 757. Therefore, Chase preserved this argument for purposes of appeal.

Further, SFR's arguments on the merits of this issue misunderstand the governing statutes. NRS 116.31162-31164 impose various requirements on the person conducting the sale. Relevant here, NRS 116.31164(3)(a) requires the person conducting the sale to "[m]ake, 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[.]" In turn, NRS 116.31166(3) provides that "[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." Thus, the foreclosure deed conveys title to

the property (and extinguishes junior interests) only if the sale complies with NRS 116.31162, 116.31163 and 116.31164. The sale in this case did not comply with NRS 116.31164(3)(a) because the foreclosure deed did not convey all of Ms. Harned's title to the Property. It only purported to convey the HOA's lien interest. Therefore, it did not convey title to SFR or extinguish the Deed of Trust.

II. If the Court vacates the district court's holding that the Sale extinguished the Deed of Trust, the Court should also reverse the order denying Chase's motion to exclude Brunson.

If the Court vacates the district court's summary judgment ruling that the Sale extinguished the Deed of Trust—and remands the case for further proceedings—the Court should also reverse the denial of Chase's motion to exclude Michael Brunson. In its answering brief, SFR claims that Brunson's opinion meets the reliability requirements for expert testimony from Hallmark v. Eldridge, 124 Nev. 492 (2008), and Higgs v. State, 126 Nev. 1 (2010). SFR is wrong on this point, but in any case, SFR fails to respond to Chase's two other arguments for excluding Brunson: (1) that his opinion does not speak to the governing legal standard; and (2) that his opinion exceeds the permissible scope of rebuttal testimony. Op. Br. 33-36. The Court should treat this as a concession that Brunson's opinion should be excluded on these grounds.

SFR also claims that the district court "did not make a finding" about Brunson's opinion and that the district court "should be afforded such an

opportunity[.]" This is factually incorrect. Chase filed a motion to exclude Brunson's opinion which the district judge denied. 4AA 775-776. The issue was fully briefed below and is now fully ripe for a decision by this Court.[7]

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

Finally, if the Court affirms the district court's holding that the Sale extinguished the Deed of Trust, the Court should allow Chase's alternative claim for unjust enrichment to proceed to trial. Chase argued in its opening brief that the voluntary payment doctrine does not bar this claim because Chase did not have full knowledge of the relevant facts. Specifically, Chase did not know that its Deed of Trust had (allegedly) been extinguished. It continued making payments for the Property because it believed the Deed of Trust survived and the payments were necessary to preserve its collateral. SFR claims that Chase (for some reason) made the payments while knowing that the Deed of Trust had been extinguished. Ans. Br. 51. This argument defies common sense, but at the very least, there is a genuine dispute as to whether Chase believed the Deed of Trust remained intact.

[7] The Court may review the order denying Chase's motion to exclude Brunson because it merged into the district court's final judgment. See Consol. Generator-Nevada v. Cummins Engine Co., 114 Nev. 1304, 1312 (1998) ("Although these orders are not independently appealable, since [appellant] is appealing from a final judgment the interlocutory orders entered prior to the final judgment may properly be heard by this court.").

Therefore, there is a genuine dispute as to whether SFR's voluntary payment defense is valid, meaning that SFR is not entitled to summary judgment on Chase's claim.

CONCLUSION

For the foregoing reasons, Chase respectfully requests that the Court (1) vacate the district court's summary judgment ruling that the Sale extinguished the Deed of Trust and (2) reverse the district court's order denying Chase's motion to exclude Michael Brunson. Alternatively, Chase requests that the Court vacate the summary judgment ruling in favor of SFR on Chase's unjust enrichment claim.

Dated: September 22, 2017.

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CERTIFICATE OF COMPLIANCE

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

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points or more, and contains 6,903 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 September 22, 2017, I filed **Appellant's Reply Brief**. Service will be made on the following through the Court's electronic filing system:

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