

**Case No. 72931**

IN THE SUPREME COURT OF NEVADA

SFR INVESTMENTS POOL 1, LLC;  
and STAR HILL HOMEOWNERS  
ASSOCIATION,

Appellant,

vs.

THE BANK OF NEW YORK  
MELLON F/K/A/ THE BANK OF  
NEW YORK, AS TRUSTEE FOR THE  
CERTIFICATEHOLDERS OF THE  
CWABS, INC., ASSET-BACKED  
CERTIFICATES, SERIES 2006-6,

Respondent.

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Certified Question From the United States District Court, District of Nevada  
The Honorable RICHARD F. BOULWARE, II, UNITED STATES District Judge  
Case No. 2:16-cv-02561-RFB-PAL

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

DATED this 13th day of July, 2017.

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### **JURISDICTIONAL STATEMENT**

This Court may answer questions of law certified to it by a federal court when the answer will help settle important questions of law. *Kaplan v. Chapter 7 Trustee*, 132 Nev. Adv. Op. 80, 384 P3d 491, 493 (2016). Questions of law are certified to the Nevada Supreme Court pursuant to Nevada Rule of Appellate Procedure 5 which states, in relevant part:

(a) Power to Answer. The Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States or of the District of Columbia, a United States District Court, or a United States Bankruptcy Court when requested by the certifying courts, if there are involved in any proceeding before those courts questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of this state.

(b) Method of Invoking. This Rule may be invoked by an order of any of the courts referred to in Rule 5(a) upon the court's own motion or upon the motion of any party to the cause.



### **ROUTING STATEMENT**

This matter is presumptively retained by the Nevada Supreme Court pursuant to Nevada Rule of Appellate Procedure 17(a)(7) as this is a question of law certified by a Federal District Court for the District of Nevada. The certification was accepted by the Supreme Court via order filed on June 13, 2017.

**STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

Does NRS 116.31168 incorporate NRS 107.090 requiring homeowners' associations to provide notices of default to junior lien holders even when those lien holders do not request notice?

## STATEMENT OF THE CASE

While SFR believes this Court has already answered the certified question on multiple occasions, some failed to hear and others have conveniently ignored the answer. Nevertheless, the answer is unequivocal: “NRS 116.31168(1) does incorporate NRS 107.090, including subsections (3) and (4) which requires notice be sent to all junior lienholders of record, without the need for any formal request.” However, despite both the majority and dissent recognizing the full incorporation of NRS 107.090 in *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. \_\_\_, 334 P.3d 408 (2014), the Ninth Circuit Court of Appeals still held that 116.31168(1)’s incorporation of 107.090 does not require associations “to provide notice of default to mortgage lenders even absent a request, (because) section 116.31163 and section 116.311635 would have been meaningless.” *Bourne Valley Court Trust v. Wells Fargo Bank, N.A.*, 832 F.3d 1154, 1159 (9th Cir. 2016). To clear the air once and for all, SFR respectfully implores this Court to state the answer in a published opinion and make it the law of the land. Without it, constitutionality of the statute would depend solely on the employer of the judges. Without this Court’s clear and unmistakable pronouncement that NRS 116.31168 fully incorporates NRS 107.090, and mandates notice to junior lienholders of record, federal judges are bound to follow the Ninth Circuit’s holding and this has led to forum shopping across Nevada’s state and federal courts, including bankruptcy courts.

Ultimately, a Nevada statute should have the same meaning regardless of which court interprets it. This Honorable Court is the authority on the interpretation of Nevada law. A published opinion stating clearly that NRS 107.090 is fully incorporated, and that associations are mandated to provide notice of their non-judicial foreclosures to junior lienholders without additional requests, will cure the conflict between the Nevada's courts and provide a singular, binding authority.

## LEGAL BACKGROUND

Before 1989, NRS 107.090 required entities conducting deed of trust foreclosures to notify only those who had recorded requests to receive notice. In 1989, the Legislature amended the statute to require notice to all recorded junior or subordinate lienholders, regardless of whether they requested notice. Assembly Bill No. 440- Assemblyman Callister, 1989 Nev. Stat., ch.306, §1, at 644, s1.<sup>1</sup>

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<sup>1</sup> **Section 1. NRS 107.090** is hereby amended to read as follows:

107.090 1. As used in this section, “person with an interest” means any person who has or claims any right, title or interest in, or lien or charge upon, the real property described in the deed of trust and as evidenced by any document or instrument filed or recorded in the office of the county recorder of the county in which any part of the real property is situated.

2. A person with an interest desiring a copy of a notice of default or notice of sale under a deed of trust with power of sale upon real property may at any time *after* recordation of *the* deed of trust file in the office of the county recorder of the county in which any part of the real property is situated an acknowledged request for a copy of [such] *the* notice of default or sale. The request *must* state the name and address of the person requesting copies of *the* notices and identify the deed of trust by stating the names of the parties thereto, the date of recordation and the book and page where it is recorded.

3. The trustee or person authorized to record the notice of default shall, within 10 days *after the notice of default is recorded*, cause to be deposited in the United States mail an envelope, registered or certified and with postage prepaid, containing a copy of *the* notice, addressed to:

- (a) *Each* person who has filed a request for a copy of *the* notice; and
- (b) *Each other person with an interest whose interest or claimed interest is subordinate to the deed of trust.*

4. The trustee or person authorized to make the sale shall, at least 20 days before the date of sale, cause to be deposited in the United States mail an envelope, registered or certified and with postage prepaid, containing a copy of the notice of time and place of sale, addressed to each person *described in subsection 3.*

The homeowner association lien statute, NRS 116.3116, is a creature of the Uniform Common Interest Ownership Act of 1982, § 3–116, 7 U.L.A., part II 121–24 (2009) (amended 1994, 2008) (UCIOA), which Nevada adopted in 1991.<sup>2</sup> *See* NRS 116.001.

In 1991, the Legislature enacted statutes incorporating NRS 107.090 into NRS 116.31168 as follows:

The provisions of NRS 107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed. The request must identify the lien by stating the names of the unit's owner and the common-interest community. *The association must **also** give reasonable notice of its intent to foreclose to all holders of liens in the unit who are known to it.*<sup>3</sup>

Assembly Bill No. 221, 1991 Nev. Stat., ch.245, §104, at 570-71 (codified as NRS 116.31168) (emphasis added).<sup>4</sup> Based on the plain language, NRS 116.31168 required associations to provide notice to: (1) **all recorded junior or subordinate lienholders** in the same manner as deed-of-trust foreclosures under NRS 107.090; and (2) all holders of liens in the unit who were known to the association. This direct application of NRS 107.090 is what requires associations to provide notice to all

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*See* Appellant's Rule 28(f) Statutory Addendum filed under NRAP 28(f) hereinafter referred to as ("AA\_") at AA\_0002.

<sup>2</sup> *See* AA\_0010.

<sup>3</sup> *See* AA\_0041.

<sup>4</sup> *Id.*

subordinate claim holders, including recorded first deed of trust beneficiaries. Specifically, NRS 107.090(3) stated that “[t]he trustee or person authorized to record the notice of default shall, within 10 days after the notice of default is recorded, cause to be deposited in the United States mail an envelope, registered or certified and with postage prepaid, containing a copy of *the* notice, addressed to :*(a)* Each person who has filed a request for a copy of; *and (b) Each person with an interest whose interest or claimed interest is subordinate to the deed of trust.*<sup>5</sup> 107.090(4) stated: “[t]he trustee or person authorized to make the sale shall, at least 20 days before the date of sale, cause to be deposited in the United States mail an envelope, registered or certified and with postage prepaid, containing a copy of the notice of time and place of sale, addressed to each person *described in subsection 3.*”<sup>6</sup> Read together with NRS 116.31168,<sup>7</sup> which stated “[t]he provisions of NRS 107.090 apply to the foreclosure of an association’s lien as if a deed of trust were being foreclosed” evidence that the statutes text required notice to parties who recorded an interest, such as a deed of trust.

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<sup>5</sup> See AA\_0006.

<sup>6</sup> *Id.*

<sup>7</sup> See AA\_0010.

In 1993, the Legislature amended NRS 116, repealing a portion of NRS 116.31168, and enacting NRS 116.31163 and 116.311635.<sup>8</sup> The repealed portion of NRS 116.31168 struck out that the “association must also give reasonable notice of its intent to foreclose to all holders of liens in the unit who are known to it.” However, because by incorporation of NRS 107.090, the statute already required notice to all recorded junior or subordinate lienholders of record, the newly enacted statutes only provided additional categories of interested parties who could “opt-in” for notice. The table below demonstrates the amendment of NRS Chapter 116.31168 after the 1993 legislative session.

| Before 1993 Amendment <sup>9</sup>  | After 1993 Amendment <sup>10</sup>  |
|---|---|
| <p>116.31168 1. The provisions of NRS 107.090 apply to the foreclosure of an association’s lien as if a deed of trust were being foreclosed. The request must identify the lien by stating the names of the unit’s owner and the common-interest community. <i>The association must also give reasonable notice of its intent to foreclose to all holders of liens in the unit who are known to it.</i></p> <p>2. An association may, after recording a notice of default and election to sell, waive the default and</p> | <p>116.31168 1. The provisions of NRS 107.090 apply to the foreclosure of an association’s lien as if a deed of trust were being foreclosed. The request must identify the lien by stating the names of the unit’s owner and the common-interest community. <del>[The association must also give reasonable notice of its intent to foreclose to all holders of liens in the unit who are known to it.]</del></p> <p>2. An association may, after recording a notice of default and election to sell, waive the default and withdraw the notice or any proceeding to foreclose. The</p> |

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<sup>8</sup> See AA\_0166-0172.

<sup>9</sup> See AA\_0041.

<sup>10</sup> See AA\_0170.



|  |  |
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| withdraw the notice or any proceeding to foreclose. The association is thereupon restored to its former position and has the same rights as though the notice had not been recorded. | association is thereupon restored to its former position and has the same rights as though the notice had not been recorded. |
|--|--|

The legislative history shows that the change in NRS 116.31168 was made to “conform” with the other amendments and language.<sup>11</sup> The deleted text was redundant since NRS 107.090 already required notice to subordinate lienholders of record and the newly added provisions of NRS 116.31163 and 116.31168 required notice to all others who made themselves known to the association.

On September 18, 2014, this Court entered a landmark decision in *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. adv Op. 75, 334 P.3d 408 (2014). This Court definitively stated that:

**“The provisions of NRS 107.090,” governing notice to junior lienholders and others in deed-of-trust foreclosure sales, “apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed.”** NRS 116.31168(1). The HOA must provide the homeowner notice of default and election to sell; it also must notify “[e]ach person who has requested notice pursuant to NRS 107.090 or 116.31168” and “[a]ny holder of a recorded security interest encumbering the unit's owner's interest who has notified the association, 30 days

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<sup>11</sup> See AA\_0073.

before the recordation of the notice of default, of the existence of the security interest.” NRS 116.31163(1), (2).

*SFR* at 411. (Emphasis added).

Even the *dissent* agreed with the incorporation of NRS 107.090: “[a]s the majority points out, by incorporating certain notice provisions from Chapter 107, Chapter 116 appears to mandate that the association mail the notice of default and notice of sale to the first security holders who have recorded their interest when the association is foreclosing on its lien.” *Id.* at 422. So, all seven justices determined that incorporation of 107.090 required notice to junior lienholders,

On August 12, the Ninth Circuit Court of Appeals held that NRS chapter 116's "opt-in" notice scheme violates the Fourteenth Amendment's Due Process Clause because it allows a lender to be stripped of its deed of trust without requiring notice of the intent to foreclose. *Bourne Valley Court Tr. v. Wells Fargo Bank, N.A.*, 832 F.3d 1154, 1157-58 (9th Cir. 2016), *reh'ng denied* (9th Cir. Nov. 4, 2016). The Court in *Bourne Valley* held that Nevada law did not mandate notice to mortgage lenders whose rights are subordinate to a homeowner's association super priority lien. *See id.* at 1159

Subsequently, this Court, on January 26, 2017, issued its opinion in *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage, a Div. of Wells Fargo Bank, N.A.*, 388 P.3d 970 (Nev. 2017). In the opinion, this Court disagreed

with the Ninth Circuit Court on the issue of whether due process was implicated, holding that due process was not implicated in an association non-judicial foreclosure sale for lack of state action. *Id.* at 974, n.5. Because this Court had concluded due process was not implicated, it stated that it “need not determine whether NRS 116.3116 et seq. incorporates the notice requirements set forth in NRS 107.090.” *Id.* at 974. This disinclination to revisit the incorporation of NRS 107.090 in the *Saticoy Bay* case, although this Court expressly reaffirmed the incorporation in many subsequent orders, is being used as though, this Court has not ruled on the issue. Thus, this leaves room for conflicting dual interpretations of the same statute between Nevada state courts and federal district courts. These contradicting interpretations are untenable as NRS 116.3116 should have the same meaning and effect regardless of which court interprets it. This is why SFR respectfully requests that this Court again answer the certified question in the affirmative that NRS 116 incorporates NRS 107.090 requiring notice of association foreclosure to first deed of trust holders. After all, “it is solely within the province of the state courts to authoritatively construe state legislation.” *Cal. Teachers Ass’n v. State Bd. of Educ.*, 271 F.3d 1141, 1146 (9th Cir. 2001).

### **FACTUAL BACKGROUND**

This case arises out of a non-judicial foreclosure sale conducted by a homeowners association on September 14, 2012 pursuant to NRS 116. (JA\_0008.) On November 4, 2016, the respondent, the Bank of New York Mellon F/K/A the Bank of New York, as Trustee for the Certificateholders of the CWABS, Inc. Asset-Backed Certificates, Series 2006-6 (“BNY Mellon”) filed its Complaint, requesting a declaration that the foreclosure sale did not extinguish the deed of trust and alleged that the foreclosure was unconstitutional in that it denied due process because NRS 116 “lacks any pre-deprivation notice requirements.” (JA\_0001, JA\_00010.)

On January 3, 2017, SFR filed its answer and brought counter-claims against BNY Mellon for declaratory relief and quiet title. (JA\_0034.) SFR alleges that BNY Mellon had actual notice and received the notice of default and notice of sale. *Id.* Therefore, SFR requests a declaration that the deed of trust was extinguished by the sale pursuant to the Nevada Supreme Court decision in *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408,419 (Nev. 2014), and SFR has title free and clear of the deed of trust.

On January 4, 2017, SFR filed a motion to certify a question of law to this Honorable Court on whether “NRS 116.31168 incorporates NRS107.090 which required homeowners associations to provide notices of default to banks even when

a bank does not request notice.” (JA\_0055.) The Motion was granted by order on April 21, 2017. (JA\_0062.)

## SUMMARY OF ARGUMENT

As both the majority and dissent noted in the *SFR* decision, NRS 116.31168(1) mandates associations to mail notices to the first security holders through incorporation of NRS 107.090. Yet, the Banks continue to argue that notice is not required, thus depriving them of due process. The Banks rely on the Ninth Circuit's incorrect interpretation of Nevada law in *Bourne Valley* which stated that incorporation of NRS 107.090 would "render superfluous" the notice provision of NRS 116.31163(2) and that the statute could not be read to require notice. *Bourne Valley* is wrong. The plain language of the statutes, and the rules of statutory construction clearly supports the incorporation of NRS 107.090. Moreover, this Court has reaffirmed the incorporation of NRS 107.090 and mandated notice on many occasions since *Bourne Valley*, albeit in unpublished orders.<sup>12</sup> This Court,

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<sup>12</sup>This Court has cited to the *SFR* decision and the *Bourne Valley* dissent, stating “**NRS 116.31168 (2013) incorporates NRS 107.090 (2013), which requires that notices to be sent to a deed of trust beneficiary.**” See *G & P Inv. Enterprises, LLC v. Mortgage Elec. Registration Sys., Inc.*, 391 P.3d 101, fn.1 (Table) (Nev. March 17, 2017) (unpublished order); see also *LN Mgmt. LLC Series 877 Veranda View v. Wells Fargo Bank, N.A.*, 391 P.3d 102, fn 1 (Table) (Nev. March 17, 2017) (unpublished order); *Holm Int'l Properties, LLC v. Bank of New York Mellon*, 391 P.3d 103 (Table) (Nev. March 17, 2017) (unpublished order); *Saticoy Bay LLC Series 5710 E. Tropicana 2077 v. SRMOF II 2012-1 Trust*, 391 P.3d 102, fn 1 (Table) (Nev. March 17, 2017) (unpublished order); *Las Vegas Dev. Group, LLC v. Wells Fargo Fin. Nevada 2, Inc.*, 391 P.3d 101, fn 1 (Table) (Nev. March 17, 2017) (unpublished order); *Bank of New York Mellon for Certificate Holders CWABS, Inc., Asset-Backed Certificates, Series 2006-22 v. Fort Apache Homes*,

and not the Ninth Circuit is the ultimate arbiter of what Nevada statutes say and mean. A clear and unequivocal opinion from this Court, reaffirming the incorporation of NRS 107.090 and the mandate to send notice to junior lienholders of record, without additional “opt-in” requirements, will end the forum shopping and unnecessary litigation over this issue.

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*Inc.*, 393 P.3d 660, fn 2 (Table) (Nev. April 14, 2017) (unpublished order); *JPMorgan Chase Bank, Nat'l Ass'n v. Saticoy Bay LLC Series 10013 Alegria*, 393 P.3d 1073, fn 2 (Table) (Nev. April 14, 2017) (unpublished order); *PNC Bank, N.A., Successor By Merger To National City Mortgage Co D/B/A Commonwealth United Mortgage Company, v. Saticoy Bay, LLC Series 4208 Rolling Stone Dr. Trust*, 69201, 2017 WL 2628535, at \*1 (Nev. June 15, 2017) slip copy fn1; *PNC Bank, Nat'l Ass'n v. Saticoy Bay LLC Series 9320 Mt. Cash Ave. UT 103*, 395 P.3d 511 fn 1 (Table) (Nev. May 25, 2017); *JPMC Specialty Mortgage LLC v. Saticoy Bay LLC*, 70993, 2017 WL 2628934, at \*1 (Nev. June 15, 2017). (Emphasis added).

## ARGUMENT

### I. THE RULE OF STATUTORY CONSTRUCTION

Statutory interpretation begins with the plain language of the statute, and “[w]hen the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go behind it.” *City Counsel of Reno v. Reno Newspapers*, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989) (“Boulder Oaks”); *see also Carson–Tahoe Hosp. v. Bldg. & Constr. Trades*, 122 Nev. 218, 220, 128 P.3d 1065, 1066-1067 (2006) (courts should not look further if the words have definite and ordinary meaning or it is clear the meaning was not intended); *City of Reno v. Bldg. & Constr. Trades*, 127 Nev. —, —, 251 P.3d 718, 722 (2011) (“When a statute uses words that have a definite and plain meaning, the words will retain that meaning unless it clearly appears that the Legislature did not intend such a meaning.”). Nevada courts “will interpret a rule or statute in harmony with other rules and statutes,” *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006) (*quoting Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 993, 860 P.2d 720, 723 (1993)); *see also Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007) (“[T]his court considers the statute's multiple legislative provisions as a whole ... [and will] not render any part of a statute meaningless.”). If “a statute is ambiguous, because it is susceptible to more than one reasonable interpretation, this court will construe a statute by considering reason and public policy to determine



legislative intent.” *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 125 Nev. 449, 456, 215 P.3d 697, 702 (2009) (citing *Cable v. EICON*, 122 Nev. 120, 124–25, 127 P.3d 528, 531 (2006)). “This court also assumes that, when enacting a statute, the Legislature is aware of related statutes.” *Id.*

## **II. NRS 116.3116 INCORPORATES NRS 107.090, REQUIRING NOTICE TO THE FIRST SECURED**

From the very beginning, at the enactment of NRS 116, the Legislature included specific language in NRS 116 stating that the noticing requirements of NRS 107.090 apply to an Association non-judicial foreclosure: “**The provisions of NRS 107.090 apply to the foreclosure of an association’s lien as if a deed of trust were being foreclosed.**” **NRS 116.3116(1).**<sup>13</sup> NRS 107.090(3)(b) requires notice of default be sent to all subordinate claim holders of record:

3. The trustee or person authorized to record the notice of default shall, within 10 days after the notice of default is recorded and mailed pursuant to NRS 107.080, cause to be deposited in the United States mail an envelope, registered or certified, return receipt requested and with postage prepaid, containing a copy of the notice, addressed to:

(a) Each person who has recorded a request for a copy of the notice; and

**(b) Each other person with an interest whose interest or claimed interest is subordinate to the deed of trust.**

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<sup>13</sup> See AA\_0041.

NRS 107.090(3)(a)-(b) (emphasis added).<sup>14</sup> NRS 107.090(4) requires the notice of sale be sent to all persons entitled to notice under NRS 107.090(3).

The second sentence of NRS 116.31168, which states “[t]he request must identify the lien by stating the names of the unit’s owner and the common-interest community[.]”<sup>15</sup> is meant to replace an almost identical language in NRS 107.090(2),<sup>16</sup> which states “[t]he request must . . . identify the deed of trust by stating the names of the parties thereto, the date of recordation, and the book and page where it is recorded.” Put simply, if an otherwise unrecorded or unknown interested party chooses to record or makes a formal request for notice, the notice must clearly identify the property and interest for which it is seeking notice. Nothing in that sentence is meant to limit NRS 107.090’s incorporation to only certain subsections and eliminate others. This broader focus expands the number of entities who receive notice. For instance, due process, if it applies, would not necessarily require notice to a senior lienholder whose interest was unaffected. Consider the real estate taxing authority alluded to in NRS 116.3116(2)(c). Under NRS 116.3116(2)(c), “liens for real estate taxes” are senior to an association lien. Yet, under NRS 116.31163 and 116.311635, the real estate taxing authority can request notice, even if it has not

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<sup>14</sup> See AA\_0006.

<sup>15</sup> See AA\_0041.

<sup>16</sup> See AA\_0006.

recorded a lien against the property at that time, and would receive notice if it had mailed a notice of lien to the association.

The legislative history shows that the change in NRS 116.31168 was made to “conform” with the other amendments and language.<sup>17</sup> The deleted text was redundant since NRS 107.090 already required notice to subordinate lienholders of records and the newly added provisions of NRS 116.31163 and 116.31168 required notice to all others who made themselves known to the association. As demonstrated in the table above, the 1993 amendments to NRS 116.31168 required notice to all holders of a recorded interest, to any other interested party who has formally requested notice, and allowed any holder of a recorded security interest to otherwise notify the association of its interest and request notice, such as loan servicers or those with otherwise ‘hidden’ interests who chose to otherwise remain anonymous and avoid the recording statutes (like Fannie Mae or FHFA). This broader focus expands the number of entities who receive notice from those who are recorded interest holders to others. It does not limit notice only to those who request notice.

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<sup>17</sup> See AA\_0073.

### **III. THE STATUTES WORK TOGETHER IN HARMONY**

The non-judicial foreclosure requirements found in NRS 116.31162-116.31168 closely track the requirements of NRS 107.080 in place at the time NRS 116.31163 and 116.311635 were adopted and NRS 116.31168 was amended, in 1993.<sup>18</sup> As shown in the table below, the Legislature included almost the same requirements for an Association non-judicial foreclosure sale as it did for non-judicial foreclosure sales by banks.

| <b>Association Foreclosure</b>           | <b>Statutory Requirement</b>              | <b>Bank Foreclosure</b>  |
|--|---|--|
| <b>NRS 116.31162(1)(a)</b> <sup>19</sup> | Delinquency by homeowner                  | NRS 107.080(1) <sup>20</sup>   |
| <b>NRS 116.31162(1)(a)</b> <sup>21</sup> | Mail notice of delinquency to homeowner   | No statutory requirement; generally required by terms of deed of trust |
| <b>NRS 116.31162(1)(b)</b> <sup>22</sup> | Execute Notice of Default and Election to | NRS 107.080(2)(b) <sup>23</sup>  |

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<sup>18</sup>NRS 107.080 was amended in 2005 when the Legislature began making significant changes to the requirements to address the bank's abuse of the system, predatory lending and robo-signing. The changes to NRS 107.080 since then include the implementation of the foreclosure mediation program, special requirements designed to give extra information to those in owner-occupied properties, and provisions to address concerns about which bank owns the note underlying the deed of trust being foreclosed.

<sup>19</sup> See AA\_0146.

<sup>20</sup> See AA\_0176.

<sup>21</sup> See AA\_0146.

<sup>22</sup> *Id.*

<sup>23</sup> See AA\_0176.

|   |   |                                 |
|---|---|---------------------------------|
|   | Sell (NOD) that describes deficiency in performance or payment                  |                                 |
| <b>NRS 116.31162(1)(a)</b> <sup>24</sup>  | Record NOD  | NRS 107.080(3) <sup>25</sup>    |
| <b>NRS 116.31162(2)(b)</b> <sup>26</sup>  | Mail NOD by certified or registered mail, return receipt requested to homeowner | NRS 107.080(3) <sup>27</sup>    |
| <b>NRS 116.31163</b> <sup>28</sup> and <b>NRS 116.31168</b> <sup>29</sup> (incorporating <b>NRS 107.090</b> ) <sup>30</sup> | Mail NOD to interested parties who request notice                               | NRS 107.090(3)(a) <sup>31</sup> |
| <b>NRS 116.31168</b> <sup>32</sup> (incorporating <b>NRS 107.090</b> )  | Mail NOD to subordinate claim holders   | NRS 107.090(3)(b) <sup>33</sup> |
| <b>NRS 116.31162(1)(c)</b> <sup>34</sup>  | Failure to pay for 90 days after NOD is recorded and mailed                     | NRS 107.080(4) <sup>35</sup>    |
| <b>NRS 116.311635(1)(a)</b> <sup>36</sup>   | Give notice of the time and place of the sale in                                | NRS 107.080(4) <sup>37</sup>    |

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<sup>24</sup> See AA\_0146.

<sup>25</sup> See AA\_0176.

<sup>26</sup> See AA\_0146.

<sup>27</sup> See AA\_0176.

<sup>28</sup> See AA\_0169.

<sup>29</sup> See AA\_0170.

<sup>30</sup> See AA\_0162, See also AA\_0169-170.

<sup>31</sup> See AA\_0006.

<sup>32</sup> See AA\_0170.

<sup>33</sup> See AA\_0006.

<sup>34</sup> See AA\_0146.

<sup>35</sup> See AA\_0176.

<sup>36</sup> See AA\_0169.

<sup>37</sup> See AA\_0176.

|  |   |                              |
|--|---|------------------------------|
|  | the manner and for a time not less than that required by law for the sale of real property upon execution/posting in a public place and on property |                              |
| <b>NRS 116.311635(1)(a)(1)</b> <sup>38</sup>                             | Mail Notice of Sale (NOS) to homeowner  | NRS 107.080(4) <sup>39</sup> |
| <b>NRS 116.311635(1)(b)(1) and NRS 116.311635(1)(b)(3)</b> <sup>40</sup> | Mail NOS to interested parties who request notice   | NRS 107.090(4) <sup>41</sup> |
| <b>NRS 116.311635(1)(b)(1)</b> <sup>42</sup> (incorporating NRS 107.090) | Mail NOS to subordinate claim holders   | NRS 107.090(4) <sup>43</sup> |
| <b>NRS 116.311635(1)(b)(3)</b> <sup>44</sup>                             | Mail NOS to Ombudsman   | No statutory requirement     |
| <b>NRS 116.311635(2)</b> <sup>45</sup>                                   | Post NOS on property or personally deliver to homeowner   | NRS 107.080(4) <sup>46</sup> |

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<sup>38</sup> See AA\_0169.

<sup>39</sup> See AA\_0176.

<sup>40</sup> See AA\_0169.

<sup>41</sup> See AA\_0006.

<sup>42</sup> See AA\_0169.

<sup>43</sup> See AA\_0006.

<sup>44</sup> See AA\_0169.

<sup>45</sup> See AA\_0169.

<sup>46</sup> See AA\_0176.

The harmonious interplay between NRS 107.090, 116.31163, 116.311635, 107.090(3) and 107.090(4) is important because it focuses on junior lienholders; these provisions required notice to all known junior lienholders. However, NRS 116.31163 and 116.311635 require notice to all holders of a recorded interest, to other interested parties who formally request notice pursuant to NRS 116.31168 and NRS 107.090 (NRS 116.31163(1); NRS 116.311635(b)(1)), **and** to any holder of a recorded security interest who otherwise notifies the association of its security interest (NRS 116.31163(2); NRS 116.311635(b)(2)).

These statutes go beyond what is required under NRS 107.090(3)-(4) requirement to notify junior lienholders of record; these statutes include persons who might otherwise be unknown to the association. For example, a co-signer or guarantor of a loan who is an interested party but not of record, may formally request notice under NRS 116.31163(1) and NRS 116.311635(b)(1). Those contemplated by NRS 116.31163(2) and 116.311635(b)(2)—holders of a recorded security interest—include those “holders” or “shadow owners” who are not the holder of record. For example, under the Mortgage Electronic Registration System (“MERS”), the interest in the deed of trust may be transferred any number of times among members, with only MERS being the recorded beneficiary.

If the actual “holder” wanted to keep informed as to anything affecting its interest, it could otherwise inform the association of its interest and be entitled to

notice of the non-judicial foreclosure under the statutes. Similarly, where a loan is being serviced by a bank that is not the recorded beneficiary, but who has responsibility to protect the interest, that servicer could otherwise notify the association and be entitled to notice.

Finally, Fannie Mae, Freddie Mac, and FHFA have been before this Court claiming some type of unrecorded interest in property in Nevada.<sup>47</sup> If these entities wanted to keep abreast of their interests, they, too, could notify the associations pursuant to NRS 116.31163(2) and 116.311635(b)(2) and be entitled to notice. Put simply, NRS 116.31163, 116.311635, 116.31168, and 107.090 provide notice to all interested parties of record and those who have chosen to ignore Nevada's recording laws and hide their interests.

The statutes all work in harmony. They do not limit notice only to those who have requested it.

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<sup>47</sup> See, e.g., *Federal National Mortgage Ass'n et al v. SFR Investments Pool 1, LLC*, No. 2:14-cv-02046-JAD-PAL (D. Nev. filed Dec. 5, 2014); *Nationstar Mortgage, LLC, et al v. SFR Investments Pool 1, LLC*, No. 2:15-cv-00267-RFB-NJK (D. Nev. filed Feb. 13, 2015); *Federal Housing Finance Agency v. SFR Investments Pool 1, LLC*, No. 2:15-cv-02381-GMN-VCF (D. Nev. filed December 14, 2015); *Federal Housing Finance Agency v. SFR Investments Pool 1, LLC*, 2:15-cv-01338-GMN-CWH (D. Nev.); *Federal National Finance Agency v. SFR Investments Pool 1, LLC*, No. 2:17-cv-00914-GMN-PAL (D. Nev. filed Mar. 31, 2017.) FHFA is a party in each of these cases and claimed an unrecorded interest in those properties.



**IV. THIS COURT ALREADY STATED THAT NRS 116 INCORPORATES NRS 107.090**

On September 18, 2014, this Court held that:

“The provisions of NRS 107.090,” governing notice to junior lienholders and others in deed-of-trust foreclosure sales, “apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed.” NRS 116.31168(1).

*SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. Adv Op. 75, 334 P.3d 408, 411 (2014) (citing NRS 107.090(3)(b) and (4)) The dissent agreed, stating “[a]s the majority points out, by incorporating certain notice provisions from Chapter 107, Chapter 116 appears to mandate that the association mail the notice of default and notice of sale to the first security holders who have recorded their interest when the association is foreclosing on its lien.” *Id.* at 422 (citing NRS 116.31168(1); NRS 107.090) (Gibbons, C.J., dissenting). All seven justices determined that incorporation of 107.090 required notice to junior lienholders.

Recently, in at least 10 subsequent unpublished decisions, this Court has cited to the *SFR* decision and the *Bourne Valley* dissent, stating “**NRS 116.31168 (2013) incorporates NRS 107.090 (2013), which requires that notices to be sent to a deed of trust beneficiary.**” *See G & P Inv. Enterprises, LLC v. Mortgage Elec. Registration Sys., Inc.*, 391 P.3d 101, fn.1 (Table) (March 17, 2017) (unpublished order); *see also LN Mgmt. LLC Series 877 Veranda View v. Wells Fargo Bank, N.A.*,

391 P.3d 102, fn 1 (Table) (March 17, 2017) (unpublished order); *Holm Int'l Properties, LLC v. Bank of New York Mellon*, 391 P.3d 103 (Table) (March 17, 2017) (unpublished order); *Saticoy Bay LLC Series 5710 E. Tropicana 2077 v. SRMOF II 2012-1 Trust*, 391 P.3d 102, fn 1 (Table) (March 17, 2017) (unpublished order); *Las Vegas Dev. Group, LLC v. Wells Fargo Fin. Nevada 2, Inc.*, 391 P.3d 101, fn 1 (Table) (March 17, 2017) (unpublished order); *Bank of New York Mellon for Certificate Holders CWABS, Inc., Asset-Backed Certificates, Series 2006-22 v. Fort Apache Homes, Inc.*, 393 P.3d 660, fn 2 (Table) (Nev. April 14, 2017); *JPMorgan Chase Bank, Nat'l Ass'n v. Saticoy Bay LLC Series 10013 Alegria*, 393 P.3d 1073, fn 2 (Table) (April 14, 2017) (unpublished order); *PNC Bank, N.A., Successor By Merger To National City Mortgage Co D/B/A Commonwealth United Mortgage Company, v. Saticoy Bay, LLC Series 4208 Rolling Stone Dr. Trust*, 69201, 2017 WL 2628535, at \*1 (Nev. June 15, 2017) slip copy fn1; *PNC Bank, Nat'l Ass'n v. Saticoy Bay LLC Series 9320 Mt. Cash Ave. UT 103*, 395 P.3d 511 fn 1 (Table) (May 25, 2017); *JPMC Specialty Mortgage LLC v. Saticoy Bay LLC*, 70993, 2017 WL 2628934, at \*1 (Table) (Nev. June 15, 2017) slip copy. (Emphasis added).

Yet, despite the repeated holdings from justices of this Court, in both Southern and Northern Panels, confusion and reluctance to accept this Court's interpretation persists. This Court should make this mandated notice through

incorporation clear for both litigants and all courts interpreting the notice provisions of NRS 116.3116 et seq.

**V.    THE NEVADA SUPREME COURT HAS SOVEREIGNTY OVER THE  
INTERPRETATION OF NEVADA LAWS**

When interpreting state statutes, federal courts must apply the state's rules of statutory interpretation. *In re First T.D. & Inv.*, 253 F.3d 520, 527 (9<sup>th</sup> Cir.2001). Based on Nevada's rules of statutory interpretation in light of plain language and legislative history, the pre-amendment statutes—which expressly incorporated the deed-of-trust foreclosure procedures from NRS 107.090—required associations to provide lenders with notice that satisfied procedural due process.

If a state law is challenged as being facially unconstitutional, then “a federal court must, of course, consider any limiting construction that a state court . . . has proffered.” *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982). After all, “it is solely within the province of the state courts to authoritatively construe state legislation.” *Cal. Teachers Ass’n v. State Bd. of Educ.*, 271 F.3d 1141, 1146 (9th Cir. 2001). These principles are so important that the Supreme Court has reminded courts that “it is not our function to construe a state statute contrary to the construction given it by the highest court of a State.” *O’Brien v. Skinner*, 414 U.S. 524, 531 (1974). *Bourne Valley* ignored these principles.

## CONCLUSION

SFR respectfully asks this Court to put an end to the conflict between *SFR*, *Saticoy Bay*, and *Bourne Valley*. The banks' due process challenges fail because the statutory construction clearly support incorporation of NRS 107.090. As such, this Court must affirm the incorporation.

Accordingly, SFR respectfully requests that this Honorable Court definitively states that NRS 116 incorporates NRS 107.090 in a binding, published order which will provide an "intervening decision on controlling state law by a state court of last resort." *Miller v. Gammie*, 335 F.3d 889, 892-893 (9th Cir. 2003). Such a decision will remove the conflict that plagues our current legal landscape in NRS 116 matters.

DATED this 13<sup>th</sup> 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 or more, is 29 pages long, and contains 5,487 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 13<sup>th</sup> day of July, 2017.

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## **CERTIFICATE OF SERVICE**

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 13<sup>th</sup> day of July, 2017. Electronic service of the foregoing **Appellant's Opening Brief, Appellant's Statutory Addendum, and Joint Appendix** shall be made in accordance with the Master Service List as follows:

**Docket Number and Case Title:** 72931 - SFR INVESTMENTS POOL 1, LLC VS. BANK OF NEW YORK MELLON

**Case Category** Original Proceeding

**Information current as of:** Jul 13 2017 07:36 p.m.

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**Electronic notification will be sent to the following:**

Ariel Stern  
Jacqueline Gilbert  
Darren Brenner  
Kurt Bonds  
Rex Garner

Dated this 13th day of July, 2017.

/s/Jherna Shahani  
An employee of KIM GILBERT EBRON