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 REPLY BRIEF

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INTRODUCTION

"In the midst of chaos, there is also opportunity"[1]

The Bank does not want this Court to answer the Certified Question because it knows that this Court's unequivocal affirmance of its prior unpublished and published[2] holdings that NRS 116.31168 incorporates NRS 107.090 requiring homeowners' associations to provide notices of default to junior lien holders even when those lien holders do not request notice, would mean the end to the Bank's exploits. However, this make-believe world of two alternate realities where a Nevada statute means one thing in one court and means entirely opposite in an another court must end. The Bank's failure to articulate to this Court why the certified question should be answered in the negative is a concession that the certified question should be answered in the affirmative.[3]

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[1] Sun Tzu, A Arte da Guerra (The Art of War).

[2] On November 22, 2017, this Court issued a published opinion addressing the subject matter of the Certified Question. *See Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Adv. Op. 91, Case No. 70382, 2017 WL 5633293, at *6 n.11 (Nev. Nov. 22, 2017) ("*see SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev., Adv. Op. 75, 334 P.3d 408, 418 (2014) (observing that NRS 116.31168 incorporates NRS 107.090, which requires that notices be sent to a deed of trust beneficiary"). *See also* Appellant's Opening Brief ("AOB") at 15 n.12.

[3] When that party's answering brief effectively fails to address a significant issue raised in the appeal, the party has confessed error. *See Bates v. Chronister*, 100 Nev. 675, 681–82, 691 P.2d 865, 870 (1984) (treating the respondent's failure to respond to the appellant's argument as a confession of error); *A Minor v. Mineral Co. Juv. Dep't*, 95 Nev. 248, 249, 592 P.2d 172, 173 (1979) (determining that the answering brief was silent on the issue in question, resulting in a confession of error)

ARGUMENT

I. NEVADA STATUTES SHOULD HAVE THE SAME MEANING REGARDLESS OF WHICH COURT INTERPRETS IT

The Bank has one purpose in seeking to have this Court not fully and completely resolve the Certified Question: maintain the ambiguity so that the Bank can continue its improper efforts to undermine this Court's authority to interpret its own law as it should be applied in **both** state and federal court.

According to the Bank, the fact that NRS 116.3116 could mean entirely different things—it mandates the notice to the first deed beneficiary or it doesn't, depending on which court reads the statute—is not important. According to the Bank, the state courts do not have to bother with the notice provision because there is no state actor in an Association foreclosure, at least not in the state courts; it is "relevant only in the limited number of cases pending in federal courts." Respondent's Answering Brief ("RAB") page 19. After all, according to the Bank, the Legislature fixed the statute in 2015. (RAB_20.) The Bank essentially argues that there is no reason to answer the Certified Question because the state courts would follow *Saticoy Bay*[4] and the federal courts would follow *Bourne Valley*[5]. *Id.*

[4] *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Mortgage*, 133 Nev. Adv. Op. 5, 388 P.3d 970 (2017).

[5] *Bourne Valley Court Tr. v. Wells Fargo Bank, N.A.*, 832 F.3d 1154, 1158 (9th Cir. 2016).

Incredulously, the Bank wants this Court to believe that consistency in the meaning of a Nevada statute in Nevada courts, as well as in federal court, is not important. Let the chaos reign, it argues. Yet, they concede that "[t]he question will affect some cases pending in federal court." (RAB_19.)

SFR respectfully submits that it would affect more than "some" cases; it would affect hundreds of cases and millions of dollars. The Bank obviously does not want this Court to articulate the incorporation of NRS 107.090 because it would force the Bank to litigate each cases in federal courts on its merit and overcome the conclusive presumption that the foreclosure sale was valid. The Bank would rather rely on what it believes to be a silver bullet: that the statute was unconstitutional and therefore the sale was invalid as to its extinguishment. The Court's answer will be the law of the land. And the Bank knows it.

A. The Nevada Supreme Court has Sovereignty over the Interpretation of Nevada Laws

In the *SFR* decision, both the majority and dissent recognized the full incorporation of NRS 107.090 into NRS Chapter 116, a ruling this Court reaffirmed in a host of unpublished opinions and has once again reaffirmed as early as last week in a published decision. *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. ___, 334 P.3d 408 (2014); *see also* n.2, *supra*. Nevertheless, the Ninth Circuit Court of Appeals still held that NRS 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*, 832 F.3d at 1159. *Bourne Valley* represents an egregious misinterpretation of Nevada law which the Bank simply does not wish to be corrected. However, since the Bank insists that *SFR* did not address the question (RAB_26), then its argument that this Court need not answer this question defies reason.

The Bank is fully aware that *Bourne Valley's* interpretation of 116.31168(1) is "only binding in the absence of any subsequent indication from the [Nevada] courts that [the Ninth Circuit's] interpretation was incorrect." *Owen v. United States*, 713 F.2d 1461, 1464 (9th Cir.1983). The Bank wishes for this Court to not answer the Certified Question so that it can continue to use *Bourne Valley* to undermine Nevada law in the federal courts.

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 (9th 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. The Bank wants this overt flouting of Nevada law to continue. This Court should put a stop to this chicanery once and for all and issue an "intervening decision on controlling state law by a state court of last resort[,]" which the federal courts must apply. *Miller v. Gammie*, 335 F.3d 889, 892-893 (9th Cir. 2003).

B. The Court Should Put an End to *Bourne Valley's* Erroneous Conclusion that NRS 116.31163(2)'s Notice Provisions are "Superfluous" in the Face of Incorporation of NRS 107.090

It is clear that this Court has found that NRS Chapter 116 fully incorporated NRS 107.090, and that *Bourne Valley* ruled otherwise. *See* n.2, *supra*. But the devil is in the details. The foundation of *Bourne Valley's* undercutting of Nevada law is its erroneous conclusion that incorporation of NRS 107.090 into NRS Chapter 116

would "render the express notice provisions of Chapter 116 [NRS 116.31163(2)] entirely superfluous." *Bourne Valley*, 832 F.3d at 1159. This is the devil that must be exorcised. Without a robust and direct correction of this distortion of the law as passed by the Nevada Legislature, even if this Court answers the Certified Question in the affirmative, the door will still be open for the banks to continue their campaign of undermining Nevada law in the federal courts. The Bank's attempts to convince this Court to actually adopt *Bourne Valley's* fatally flawed reasoning in this regard makes its nefarious intentions clear. (RAB 11, 27-28.)

The Bank is so hell-bent on undermining Nevada law that it is already setting the stage to undermine this Court's answer to the Certified Question even before a decision has been rendered. The Bank fully intends to mischaracterize an affirmative answer as some sort of ruse by this Court designed to avoid federal review of a constitutional question.[6] In light of the fact that *Bourne Valley* declared NRS Chapter 116's notice provisions unconstitutional, the Bank is not even being subtle in this regard.[7]

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[6] *See, e.g.*, *Butler v. Curry*, 528 F.3d 624, 642 (9th Cir. 2008) (*quoting Knapp v. Cardwell*, 667 F.2d 1253, 1260 (9th Cir.1982), and citing *Mullaney v. Wilbur*, 421 U.S. 684, 691 n. 11 (1975)) ("We are bound to accept a state court's interpretation of state law, except in the highly unusual case in which the 'interpretation is clearly untenable and amounts to a subterfuge to avoid federal review' of a constitutional violation.")

[7] RAB_5 ("the sole purpose of the requested opinion would be to call into question the binding Ninth Circuit precedent and impact only cases pending in federal court.";

In 2014 *SFR* decision, this Court interpreted the 1993 amendments and held that notice to the Banks was mandated based on the fact that NRS 107.090 is fully incorporated into NRS Chapter 116 and mandates notice to the Banks. Obviously, this was long before the Ninth Circuit's 2016 *Bourne Valley* ruling. The Certified Question involves a pure issue of interpretation of Nevada that predates the *Bourne Valley* ruling. The only way to ensure that the Bank's scheme of undermining this Court's interpretation of Nevada law is not crowned with success is for this Court to directly address Bourne Valley's erroneous holding: that NRS Chapter 116's express notice provisions are somehow rendered superfluous by this Court's long-standing recognition that NRS 107.090 is incorporated into NRS Chapter 116.

As set forth in SFR's Opening Brief, there is nothing superfluous about NRS Chapter 116's express notice provisions in the face of the incorporation of NRS 107.090. AOB 18-25. The different notice provisions at play in NRS Chapter 116 address different types of parties. NRS 116.31163 and 116.311635 require notice to interested parties who formally request notice pursuant to NRS 116.31168 and NRS 107.090 such as those who may be co-signers on the note but not on the deed of trust

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RAB_11 ("the sole purpose . . . would be to confuse hundreds of federal court cases already subject to binding federal appellate precedent."; RAB_18 ("The sole effect of responding to the certified question would be to call the Ninth Circuit's decision into doubt—and to do so only in cases pending in federal court. This court would simply insert itself as an appellate authority over the Ninth Circuit.")

(NRS 116.31163(1), NRS 116.311635(b)(1)), to any holder of a recorded security interest who may not be the beneficiary of record such as a loan servicer or Fannie Mae and Freddie Mac, as they like to claim but refuse to record (NRS 116.31163(2), NRS 116.311635(b)(2)-(3)), and recorded interest holders.[8] NRS 116.31163 and 116.31168 also include all recorded lienholders because the notification is accomplished through recording. In other words, any lienholder whose lien was recorded prior to the Declaration of Covenants, Conditions,and Restrictions ("CC&Rs") would have to be sent notice since the Association had been "notified" by the prior recording.

By contrast, NRS 107.090(3) and 107.090(4) focus on junior lienholders, those whose interests are subordinate to an Association's lien. These provisions require an Association to look to interests recorded after CC&Rs to find those interests that would be extinguished by foreclosure of the Association's lien.

While there may be some overlap of the statutes, the focus on junior lienholders in NRS 107.090 by incorporation provides additional protection for first deed holders like the Bank, who are affected by NRS 116.3116(2). In other words,

[8] The Bank's argument regarding the deletion of the last sentence in NRS 116.31168 by the 1993 amendment is misleading. (RAB_27 n.6.) As set forth in the legislative history, the deletion was to conform language with the addition of NRS 116.31163 and NRS 116.311635. AOB_20; AA_57 (Sec. 40 addressing NRS 116.31168); AA_73 (Section 40's reference to "conforming language".)

the addition of NRS 116.31163 and NRS 116.311635 made more explicit some of the provisions of NRS 107.090, something the Bank always seems to clamor for. Finally, the addition of NRS 116.31163 and 116.311635 added notice to a purchaser of a unit if the association is notified in advance that the unit is in contract for sale, something that is not in NRS 107.090 and notice to the unit owner. Nev. Stat. ch. 573, sec. 6-7, at 2355.

Bourne Valley's conclusion that incorporation of 107.090 into NRS Chapter 116 renders the latter's express notice provisions superfluous is incorrect, ignores the Legislature's careful thought and structuring in crafting the 1993 amendments, and wholly undermines Nevada law. AOB 18-25. In addition to answering the Certified Question in the affirmative and holding that NRS 116.31168 fully incorporates NRS 107.090, the Court should take the opportunity to clarify that this determination is simply what the law has always meant since adoption by the Legislature. This Court should clarify that this incorporation does not, and never did, render Chapter 116's express notice provisions "superfluous."

II. AFFIRMATIVELY ANSWERING THE CERTIFIED QUESTION PROMOTES JUDICIAL ECONOMY.

The Bank also argues that this Court should not answer the certified question because this matter cannot satisfy the standard set forth in *Volvo Cars of N. Am., Inc. v. Ricci,* 122 Nev. 746, 137 P.3d 1161 (2006) ("*Volvo*"). The Bank further

argues that this Court's response would not be determinative of any federal action, nor would it resolve an important question of state law.

However, *Volvo* stated that certified questions of law turn on the interpretation of "may be determinative." *Id.* at 749, 1163. The *Volvo* Court declined to answer the certified question that was presented to it because it involved pretrial issues that may or may not impact the case at hand:

> We are not prepared to be called upon to resolve pretrial state law evidentiary issues that will have, at best, a speculative impact in determining the underlying case. To answer the question here, essentially to resolve a motion in limine before the federal trial, would not promote judicial efficiency either for this court or for the federal courts."

Id. at 751, 1164.

What distinguishes the instant case from *Volvo* is that the Certified Question before this Court is one of law, directly impacting hundreds of cases and properties, thereby promoting judicial efficiency. 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 of law, thus allowing for judicial economy.

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…

III. This Court Need Not Rewrite the Question

Finally, the Bank wants this Court to rephrase the Certified Question to include "what was the content necessary for notice of default and/or sale to include?" if NRS 116.31168 mandated notice. The Bank argues is that notice, if mandated, was constitutionally inadequate because it didn't specify how much the first trust deed holders would had to pay to cure a default. RAB_29. This argument is akin to arguing that a phone call from a neighbor, police, or fire department that one's house is on fire is not sufficient enough to warn the homeowner she is in real danger to lose her property; as if providing the exact location of the fire within the house is necessary to let the homeowner know there is a danger. This is rehashing of an old argument this Court has already dismissed.

In *SFR*, this Court held that "it was appropriate to state the total amount of the lien and noted that "nothing appears to have stopped [the Banks] from determining the precise superpriority amount in advance of the sale or paying the entire amount and requesting a refund of the balance." *SFR*, 334 P.3d at 418. Further, "nothing appears to have stopped the Bank from determining the amount of nine months of assessments in advance of the sale or paying the entire amount and requesting a refund of the balance." *SFR*, 334 P.3d at 418. Even the dissent in *SFR* acknowledges that "the first security holder could prevent the extinguishment of its interest by purchasing the property at the association's foreclosure sale" *Id.* at 422. Similarly,

nothing stopped the Bank from seeking injunctive and declaratory relief from the courts if the associations failed to cooperate. Alas, some first trust deed holders didn't wait for the neighbor to tell them the specific location of the fire. In many cases, both in federal and state district courts, the former first deed holders are arguing vigorously that upon receiving the notice of default or sale, they calculated the 9 months of the assessments based on the periodic budget of the homeowner's association and they have "tendered" the amount and therefore they successfully preserved their security interests.[9] While SFR disagrees that the question of preserving a deed of trust is as simple as sending a trust account check for nine months of assessments that is a question for another day. Here, banks know they

[9] *See, e.g., Prop. Plus Investments, LLC v. Mortg. Elec. Registration Sys., Inc.*, 133 Nev., Adv. Op. 62, 401 P.3d 728, 729, 2017 WL 4077406 (Nev. 2017) ("[Bank's counsel] sent to AK a $522 check intended to satisfy the maximum nine months of $58 common assessments."); *Bank of Am., N.A. v. Tapestry at Town Ctr. Homeowners Ass'n*, No. 216CV255JCMNJK, 2017 WL 2882700, at *4 (D. Nev. July 6, 2017) ("The superpriority lien portion, however, consists of 'the last nine months of unpaid HOA dues and maintenance and nuisance-abatement charges,' while the subpriority piece consists of 'all other HOA fees or assessments.' *SFR Investments*, 334 P.3d at 411 (emphasis added); *see also 7912 Limbwood Ct. Trust v. Wells Fargo*, 979 F.Supp.2d 1142, 1150 (D.Nev. 2013) . . . . **BANA offered $594.00 based on its calculation of the nine months of unpaid HOA dues,** without adequately accounting for the maintenance and nuisance-abatement charges.")(emphasis added).

have to take action of some sort. Being told the exact amount, especially for something that was still an open question during the time of most of these cases, was not the only means available to protect the first security interest. To be sure, the banks could have and should have timely foreclosed on their liens, avoiding the whole issue. Instead, they waited to see what the market would do, thereby creating the injustice of which they now complain. This Court should not take the Bank's bait. This Court should affirmatively answer the question as written and put an end to the chaos caused by the Ninth Circuit's failure to recognize this Court's right to provide binding authority and final say on the interpretation of Nevada law.

CONCLUSION

SFR respectfully asks this Court to put an end to the conflict between *SFR, Saticoy Bay,* and *Bourne Valley, and now Shadow Canyon.* The banks' due process challenges in federal court should fail because the Legislature clearly intended full incorporation of NRS 107.090, and the statutory construction clearly supports it. As such, this Court must affirm the incorporation.

Additionally, SFR respectfully requests this Honorable Court put an end to the distortion set forth in *Bourne Valley* and perpetuated by the Banks that NRS Chapter 116's express notice provisions would be rendered superfluous by such incorporation.

If the *SFR* and *Shadow Canyon* opinions on these issues are not enough for the federal courts to change course—which they should be—answering the question in the affirmative will provide an "intervening decision on controlling state law by a state court of last resort." It will finally remove the conflict that plagues our current legal landscape in NRS 116 matters.

DATED this 27th day of November 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 less than 15 pages long.
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.

///

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 27th day of November, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 27th day of November, 2017. Electronic service of the foregoing **Appellant's Reply Brief** shall be made in accordance with the Master Service List as follows:

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Dated this 27th day of November 2017.

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