**IN THE SUPREME COURT OF THE STATE OF NEVADA**

SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company.,

Appellants,

v.

MARCHAI BT, a Nevada business trust,

Respondents.

Case No. 74416

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From the Eighth Judicial District Court, Department VII, The Hon. Linda Bell,

District Court Case No. A-13-689461-C, Consolidated With A-16-742327-C

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# APPELLANT'S REPLY BRIEF

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## INTRODUCTION

Marchai B.T.'s ("Marchai") nearly 55-page answering brief is an effort by Marchai to obfuscate the main, salient fact in this case: neither Marchai nor their predecessor in interest, U.S. Bank, NA took any action to protect the deed of trust from extinguishment, despite actual knowledge of the Association's foreclosure proceedings. In reviewing this case, and considering the relative equities, this inaction should not be ignored. No lender (or deed of trust beneficiary) should be given the windfall of bootstrapping on a homeowner's less than successful attempt to pay the entirety of the lien when the lender, itself, did nothing, and only learned of the payments post hoc.

Marchai asks this Court to ignore a plethora in defects in the lower court's ruling. **First**, Marchai asks this court to ignore the procedural defect in the lower court's order, where the lower court *sua sponte* granted summary judgment on claims Marchai never asserted, based on an affirmative defense Marchai never raised, and then *sua sponte* expanded its summary judgment order to include an order of judicial foreclosure. **Second**, Marchai asks this Court to ignore the most recent assessment lien on the subject property – the lien that was actually foreclosed on – because of the non-existent requirement imagined by Marchai that an Association must rescind a prior notice of lien before recording a new one. **Third**, Marchai ignores this Court's order in *SFR Investments Pool 1, LLC v. Wells Fargo Bank*, *NA*,[1] in which this Court specifically stated that this Court has made no affirmative finding that a homeowner can extinguish a superpriority lien. **Lastly**, Marchai's counterarguments to SFR's public policy arguments are nonsensical. Marchai claims that homeowners would not be hurt by allowing homeowner payments to extinguish a superpriority lien when – in this very case – the former homeowner would have no liability to Marchai *unless* this Court rules that her payments extinguished the superpriority portion of the lien. Marchai also seems to acquiesce to the fact that SFR would have been unable to find out about the amount and timing of payments made by the former homeowner, but suggest that the solution would have been to simply ask the Association's agent "if the superpriority portion of the lien was satisfied." Marchai's proposed solution - where the Association's non-lawyer agents would have been forced to issue a complex legal opinion to every purchaser who inquired "if the superpriority portion of the lien was satisfied" – would essentially destroy any notion of reliability in recorded title, and bidders like SFR would have no right to rely upon the legal opinion of the Association or its agent.

Rather than engage in the legal contortionism that Marchai asks, this Court should recognize that Marchai and its predecessor U.S. Bank, with actual notice of the foreclosure and ample time to act, failed to pay the superpriority amount—the

[1] 432 P.3d 172 (Table) (Nev. Dec. 13, 2018).

amount the Nevada Legislature determined was a lender's fair share—and allowed the foreclosure to proceed. The decision of the lower court should be reversed, with instructions to enter judgment in favor of SFR.

## ARGUMENT

### I. SFR HAD NO NOTICE MARCHAI'S CLAIMS WOULD BE AT ISSUE ON SUMMARY JUDGMENT

Marchai does not dispute that the lower court granted summary judgment in its favor on a quiet title claim it never asserted without a motion or other notice to SFR. Additionally, Marchai does not appear to dispute the judgment was later amended, without any motion for summary judgment, to include additional terms for the judgment for judicial foreclosure. In an effort to brush these procedural defects under the rug, Marchai imagines that perhaps the lower court actually reconsidered its prior denial of earlier motions for summary judgment. (AOB at p. 23.) Marchai can point to nothing in the record that would support this unlikely conclusion. Indeed, the order does not mention reconsideration. (5JA_1484-1497.) Rather, the order simply mentions the earlier motions for summary judgment were denied. (5JA_1487-1488.) Marchai fails to point out any part of the record where SFR may have received notice Marchai could be granted summary judgment on a quiet title or declaratory relief claim it never asserted, based on a tender theory Marchai never pled as an affirmative defense, and therefore waived. (1JA_0003-0009. 0098-0102.) Additionally, the lower court granted summary judgment in favor of Marchai, ostensibly on its judicial foreclosure claim, without any evidence submitted to prove the necessary elements required for judicial foreclosure. Even if the district court did reconsider its previous denial of Marchai's 2016 motion for summary judgment, it did so without notice to SFR and without any hint it was the court's intention to reconsider the long-since disposed of motion. Machai never filed a motion for summary judgment following the consolidation of the cases. Marchai claims SFR failed to object to the *sua sponte* grant of summary judgment—but SFR did just that; SFR filed a timely notice of appeal. (7JA_1156.) The decision of the lower court should be reversed on this procedural defect alone, the issue be deemed waived and judgment entered in favor of SFR.

## II. NOTHING REQUIRES RECORDING OF THE NOTICE OF DELINQUENT ASSESSMENTS, AND WITHOUT PAYMENT OF THE SUPERPRIORITY PORTION OF THE LIEN BY THE FIRST SECURED OR FULL SATISFACTION OF THE ENTIRE LIEN, NO RESCISSION IS REQUIRED

Marchai knows it cannot prove the homeowner made sufficient payments to discharge the superpriority portion of the 2011 Notice of Delinquent Assessment Lien that the Association foreclosed upon in this case or that any such payments were actually applied to satisfy that portion of the lien. Therefore, Marchai argues the Association failed to comply with a non-existent requirement to rescind a prior NODA before recording a new one. Marchai also argues the penalty for the Association's failure to comply with the non-existent requirement is that any subsequently recorded notice of lien, for the rest of time, fails to attain its statutory priority. Marchai cannot offer any statutory support for this proposition, because none exists. Marchai cannot offer any proof of legislative intent to create such a requirement, because none exist. Instead, Marchai mistakenly relies upon a single word in the *Property Plus* opinion, in which this Court stated, “when an HOA rescinds a superpriority lien on a property, the HOA may subsequently assert a separate superpriority lien on the same property…” *Property Plus Investments, LLC v. Mortgage Electronic Registration Systems, Inc.*, 133 Nev. Adv. Op. 62, 401 P.3d 728, 731–32 (2017). However, in the *Property Plus* case, this Court was merely reciting the particular facts of the case before it, not legislating a new requirement for a lien under NRS 116.3116. Reviewing the entirety of NRS 116 as it existed at the time of the liens in question (and even as it exists now), there is no requirement an Association rescind a notice of delinquent assessment lien at any time, and rescission is certainly not a prerequisite to the recording of a new lien. That is because, in the pre-2015 statutes, the Association was not required to record the NODA at all. Thus, it has no duty, real or imagined, to rescind and re-record. There is simply no statutory support for Marchai’s position that prior liens must be rescinded or released before a newly recorded lien can attain the statutory priority it is guaranteed. For instance, NRS Ch. 107 requires releases of deeds of trust be recorded within 90 calendar days after the underlying debt has been repaid. NRS 107.077. Similarly, liens recorded pursuant to NRS Ch. 108 must be released no later than 10 days after the lien has been "fully satisfied or discharged." NRS 108.2437. Under both NRS 107.077 and NTS 108.2437, the penalty for filing to record a release as required is that the beneficiary or lien claimant may be liable to the owner of the encumbered property for actual or statutory damages – **not** that any subsequently recorded lien loses its statutorily guaranteed priority or any other lien right.

This Court did not create any new statutory requirements in *Property Plus*. The lien that was foreclosed upon in this case, according to each and every foreclosure notice and document presented, was the 2011 NODA. Marchai did not and cannot show that the former homeowner made payments following the recordation of the 2011 NODA in an amount sufficient to satisfy the superpriority amount of that lien. Therefore, the judgment of the lower court must be reversed with instructions to enter judgment in favor of SFR.

## III. THERE IS NO SUCH THING AS A COMMON LAW PAYMENT APPLICATION DOCTRINE

Even if this court were to accept Marchai's invented requirement a NODA must be rescinded before a new one may be recorded, Marchai's claim still fails because it failed to demonstrate the payments made by the homeowner were actually applied to the superpriority portion of the lien.

As a preliminary matter, and as discussed in further detail *infra*, SFR asserts that a superpriority portion of an Association's lien is a static amount that may only be satisfied by (1) payment by the beneficiary of a first deed of trust or (2) full satisfaction of a delinquent assessment lien by the homeowner. In fact, in *SFR Investments Pool 1, LLC v. Wells Fargo Bank*, this Court noted it has never affirmatively decided that a homeowner's partial payments may satisfiy the superpriority portion. 432 P.3d 172 at *1.[2] But this Court noted if the lien *could* be satisfied by such payments, the beneficiary of the first deed of trust must establish the Association applied the payment to the superpriority portion of the lien or "had an obligation to allocate the former homeowner's payment in that manner.". Thus, in order to even get to the discussion of whether or not a homeowner's partial payments may absolve a bank of its obligations to pay off the superpriority lien, Marchai must establish that the homeowner's payments were applied, or were required to be applied to the superpriority portion of the lien.

[2] In its response brief, Marchai inexplicably states "[d]espite this Court's conclusion in *Saticoy Bay LLC Series 2141 Golden Hill* that a homeowner can pay the superpriority portion of an association's lien, SFR spends almost half its opening brief arguing against the decision which this Court decided just over one year ago." (RAB at p. 32.) The Nevada Supreme Court, in a three-judge panel decision signed by Justice Hardesty, who authored the *Golden Hill* order expressly stated that the Nevada Supreme Court has never made a determination on whether or not a homeowner's partial payments may satisfy the superpriority portion of an association's lien. Rather, the *Golden Hill* decision was merely premised on that assumption, where the issue was not timely nor coherently briefed. *Id.*at n.2.

Marchai failed to offer any proof of application. Instead, Marchai argues for the first time on appeal,[3] that the "common law" for payment application is to apply the payments to the oldest outstanding amounts first. To support its assertion that this is the "common law" for payment application, Marchai offers 2 citations: a bankruptcy order from the Eastern District if Texas, and a bankruptcy order from the Northern District of Iowa. There are three problems with Marchai's argument. **First**, if, as Marchai argues, this was truly the well-established "common law" of payment application, there would be better citations than obscure bankruptcy orders. **Second**, a review of the cases cited by Marchai indicate that applying payments to the oldest amounts due is the practice of the bankruptcy court in the absence of an agreement or other instructions on how payments are to be applied *for the purposes of determining which charges are barred for recovery by an applicable statute of limitations*. These cases have nothing to do with how a creditor may or must actually apply payments. **Third**, Marchai never established an absence of instructions or an agreement on how the homeowner's partial payments were to be applied by the Association in this case.[4] Indeed, Marchai states that the homeowner had a "single

[3] Arguments may not be asserted for the first time on appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P. 2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed waived and will not be considered on appeal."). SFR objects to Marchai's failure to raise this argument in the proceedings below.

[4] Marchai argues in their Answering Brief that "[b]ecause SFR has not demonstrated that Wyeth Ranch or Perez directed payment to a specific charge, as a matter of law

account" with the Association – that is incorrect. The homeowner had two liens on the property – one for delinquent assessments (Document No. 201112200001246), and another for violations (Document No. 201104220000098).[5] The Association could have elected to apply payments to either of these accounts. Marchai also failed to submit any evidence that the "oldest amounts due" were the amounts entitled to superpriority. The oldest amounts due may have also included late fees, violations, special assessments, etc.

This Court has instructed trust-deed beneficiaries who wish to rely on homeowner payments to escape the consequences of their inaction to, at a minimum, demonstrate the homeowner payments were applied to the superpriority amounts by the Association. Marchai failed to do so here, and simply cannot do so. This Court should reject Marchai's attempt to manufacture a "Common Law Payment

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Wyeth Ranch applied the payments to the oldest amounts." (ARB at p. 21.) Marchai confuses the applicable burden of proof here. Tender is an affirmative defense. NRCP8(c)(listing "payment" as an affirmative defense which must be specifically pled or waived). Marchai failed to assert tender as an affirmative defense to SFR's claims, and therefore waived the defense and the district court should not have entertained the arguments. Even if Marchai did not waive the defense, it is Marchai's burden to prove each and every element of its affirmative defense. *Schwartz v. Schwartz*, 95 Nev. 202, 206 n.2, 591 P.2d 1137, 1140 n.2 (1979) (stating that a defendant bears the burden of proving each element of an affirmative defense).

[5] This Court may take judicial notice of publically recorded documents such as foreclosure notices. *See Niles v. National Default Servicing Corp.*, 128 Nev. 742, 367 P.3d 804 (table) at *2 (Dec. 20, 2010) (gathering cases).

Application Doctrine" where one simply does not exist. The decision of the lower court should be rejected on this additional basis.

## IV. THE 9-MONTH PORTION OF THE SUPERPRIORITY AMOUNT IS A STATIC CALCULATION THAT MAY ONLY BE SATISFIED BY THE TRUST DEED BENEFICIARY OR FULL SATISFACTION OF THE ENTIRE LIEN.

In pertinent part for this case, the Pre-2015 version of NRS 116.3116(2) defines the portion of the HOA lien that is senior to Marchai's deed of trust (the "superpriority" portion) as follows:

> The lien is also prior to all security interest described in paragraph (b) to the extent of . . . and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 ***which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien***... (emphasis added)

To determine what the pre-2015 superpriority lien is, the Court must examine what the statute actually says and what it does not say.

First, the superpriority portion is an amount which "would have" become due. It is not an amount that "became" or "was" or "is" due. It is a hypothetical 9-month delinquency, not an actual 9-month delinquency. The actual delinquency could be one month, six months, nine months, or any number of months. It could even be another type of assessment that is delinquent.

Second, it is "absent acceleration" – meaning in the normal course. Assessments are annual per NRS 116.3115 but can be paid monthly, quarterly or annually. By not allowing for acceleration, the legislature is keeping it to the hypothetical, as by law the entire year's assessment would actually be owed at the beginning of the fiscal year.

Having determined what the statute actually says, the Court should next consider what the statute DOES NOT say. The Pre-2015 Amendment version of NRS 116.3116(2) DOES NOT say:

1. the super-priority is an amount that is "actually delinquent."
2. the amount is nine months of assessments.
3. the super-priority is the "unpaid portion" of delinquent assessments up to nine months.
4 the amount actually due.
5. past due.
6. unpaid amount.

The argument presented by Marchai here is that the super-priority is established by measuring back from the date of the recording of the notice of delinquency and any amounts received by the HOA from the owner subsequent thereto must first be applied first to the super-priority portion of the lien. As shown above, there are no such provisions in the pre-2015 version of NRS 116.3116(2), applying to this case. Rather, Marchai argues for the application of the 2015 amended version of the statute suggesting that payments made might be subtracted from the super-priority. The 2015 version of NRS 116.3116(3) states:

> A lien under this section is prior to all security interests described in paragraph (b) of subsection 2 to the extent of:
>
> (a) Any charges incurred by the association on a unit pursuant to NRS 116.311312;
>
> **(b) The unpaid amount of assessments**, not to exceed an amount equal to assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 **which would have become due in the absence of acceleration during the 9 months immediately preceding the date on which the notice of default** and election to sell is recorded pursuant to paragraph (b) of subsection 1 of NRS 116.31162... (emphasis added)

There is a very clear distinction between the pre-2015 version of the statute and the 2015 amended version of the statute. There is no provision in the pre-2015 version of NRS 116.3116(2) that even mentions "unpaid" or "paid" or even "past due" portions of the Association's lien. The pre-2015 statute is simply silent in this regard. As this Court noted in *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, the Nevada Legislature knows how to write a statute. 130 Nev. 742, 334 P.3d 408. (2014). This Court cited *State v. Javier C.*, 128 Nev. 536, 541, 289 P.3d 1194, 1197 (2012), stating:

> Nevada follows the maxim 'expressio unius est exclusio alterius.' the expression of one thing is the exclusion of another. Given this statutory text, we cannot agree with our dissenting colleagues that NRS Chapter 116 requires judicial foreclosure of the superpriority piece of an HOA lien but authorized nonjudicial foreclosure of everything else.

*SFR*, 130 Nev. at 751, 334 P.3d at 414. The same reasoning applies here. The pre-2015 statute does not define the super-priority in terms of a portion of the unpaid amount. Thus, without payment of the entire lien, it must be presumed any payments made by the prior owner have no effect on the super-priority. In addition, such an interpretation flies in the face of the purpose of the super-priority lien, which as noted below was intended to strike a balance between the HOA and the lenders holding a first deed of trust. In making material changes in the language of a statute, the legislature can neither be assumed to have regarded such changes as without significance,[6] nor to have committed an oversight or to have acted inadvertently.[7] To the contrary, the general rule is that a change in phraseology indicates[8] persuasively,[9] and raises a presumption, that a departure from the old law was intended,[10] particularly where the wording of the statute is radically different.[7]

Likewise, under the maxim *in pari materia* the legislature is presumed to have adopted a new statute in light of, and with reference to, earlier acts on the same subject.[11] Therefore, in the construction of a statute, reference may be made to earlier

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[6] *Graffell v. Honeysuckle*, 191 P.2d 858 (Wash. 1948).

[7] *Spring City Foundry Co. v. Commissioner of Internal Revenue*, 292 U.S. 182 (1934).

[8] *Board of Com'rs of Creek County v. Sever*, 318 U.S. 705 (1943).

[9] *Bugajewitz v. Adams*, 228 U.S. 585 (1913).

[10] *Graffell, see* n.4 *supra.*

[11] *St. Louis, I.M. & S. Ry. Co. v. U.S.*, 251 U.S. 198 (1920)

statutes on the subject which are regarded as *in pari materia* with the later statute.[12] Thus, when the legislature amends a statute by omitting words, it is to be presumed the legislature intended the statute to have a different meaning than that accorded it before the amendment. Here, there is a radical difference between the pre-2015 statutory language and the 2015 amended statute. Therefore, it must be presumed that the pre-2015 version of the statute applicable to this case did not identify the superpriority lien as being a portion of the "unpaid" assessments. Rather, the pre-2015 version of the statute defined the superpriority as a static calculation or fixed amount always exists as long as there is a delinquency in the payment of assessments.

## V. THE SUPER PRIORITY PORTION ALWAYS EXISTS SO LONG AS THE OWNER IS IN DEFAULT AND THE TRUST DEED BENEFICIARY HAS NOT PAID.

Per NRS 116.3116(5) the Association's lien is perfected upon the recording of the declaration of CC&Rs. *7912 Limbwood Court Trust v. Wells Fargo Bank, N.A.*, 979 F.Supp.2d 1142, 1152 (D. Nev. 2013). The lien always exists. The amount of the lien however is dependent on how much the property owner owes in assessments and other charges allowed under the statute. As noted above, the portion

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[12] *Lewis Pub. Co. v. Morgan*, 229 U.S. 288 (1913); *SAIF Corporation v. Walker*, 996 P.2d 979 (Or. 2000),

of the lien that is referred to as the super-priority portion of the lien is an amount "to the extent of. . . nine months" of monthly payments and is always superior to the first deed of trust unless the holder of that security interest pays it. Thus, it does not matter whether the full amount of the Association's lien is $100 or $10,000, or how much or how little the property owner pays, the super-priority portion of the lien is always going to exist as long as there are delinquencies in the payment of assessments.

Here, it is undisputed there were outstanding amounts owed on the lien at the time of the sale and Marchai never made any payment to the Association to satisfy the superpriority potion of the lien. There is no support for the contention that Marchai and its predecessor, after receiving both the notice of default and notice of sale, can take absolutely no action to satisfy the super-priority lien, then years later when it is discovered through litigation that a homeowner made payments under a payment plan, hijack those payments and claim its own obligations have been met. Such a scheme would decimate the reliability of recorded title, decimate the ability of Associations to foreclose on their liens, and also does nothing to serve the equitable balance the Legislature sought to strike between the obligations of banks and the needs of homeowners associations.

In *SFR* this Court conducted and extensive analysis of the provision of the pre-2015 version of NRS 116.3116, et seq. This Court reviewed the statutes, along with the Uniform Common Interest Ownership Act ("UCIOA") and the official comments of the National Conference of Commissioners on Uniform State Laws, which drafted the UCIOA, upon which NRS Chapter 116 is based. This Court stated:

> ...the official comments to UCIOA § 3-116 forthrightly acknowledge that the split-lien approach represents a "significant departure from existing practice." 1982 UCIOA § 3-113 cmt. 2. **It is a specially devised mechanism designed to "strike [] an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders."** *Id*. The comments continued. "As a practical matter, secured lenders will most likely pay the 6 [in Nevada nine, see supra [**12] note 1] months assessments demanded by the association rather than having the association foreclose on the unit." *Id.* (emphasis in original). **If the superpriority piece of the HOA lien just established a payment priority, the reference to the first security holder paying off the superpriority piece of the lien to stave off foreclosure would make no sense.**

334 P.3d at 412-413 (emphasis added).

This Court recognized that the super-priority lien is intended to strike a balance between secured lenders and the HOA by requiring the secured lender to pay the nine months in order to protect the priority of its deed of trust. This Court expressed that otherwise "the reference to a first security holder paying off the superpriority piece of the lien to save off foreclosure would make no sense." The same logic applies here. If payments by the owner were intended to be applied to the super-priority portion, which is specifically intended to apply only to first security interests, the reference to the lender paying them would also "make no sense" because the sole purpose of the statute is to strike a balance between the lender and the HOA and ensure the lender take steps to protect its interests.

Extinguishing a deed of trust is most certainly a powerful tool provided to associations by the Legislature. It was provided because without it the holders of a deed of trust would have no incentive to ever pay their borrowers' overdue assessments. The very goal was to bring the lender to the table, so "the first mortgage lender would promptly institute foreclosure proceedings and pay the prior six months of unpaid assessments to the association to satisfy the limited priority lien – thus permitting the mortgage lender to preserve its first lien position and deliver clear title in its foreclosure sale." *See* Report of the Joint Editorial Board for Uniform Real Property Acts, The Six-Month "Limited Priority Lien" for Association Fees Under the Uniform Common Interest Ownership Act at p.4 (June 1, 2013), on which this Court relied on in *SFR.*

If this Court were to adopt Marchai's analysis, holders of a deed of trust would be disincentivized to protect their deed of trust if a homeowner's partial payment can satisfy the super-priority amount. A lender could sit back, wait for a foreclosure sale by the HOA, then challenge the sale in hopes the association tried to work out a payment plan with the homeowner, thereby rendering a sub- priority sale. That is what happened in this case and is what happened in the *Golden Hill* case as well. In both cases, only after the fact, during litigation – when constitutional, commercial reasonableness, and similar arguments failed—did the bank learn of the prior owner's partial payment and argue those payments absolve the bank of its inaction. As clearly established above, that is not how the statutes were intended to work. In fact, working out a payment plan is encouraged by the statute without any mention of the owner's payments being applied to the super-priority. *See*, NRS 116.31162(4), stating that the Association must provide the owner with a proposed payment plan.

There is no evidence that the Legislature intended a deed of trust beneficiary could sit idly and by sheer windfall find the presumptively extinguished deed of trust somehow survived the foreclosure sale. The only way for the statute to properly work and meet the drafters' and Legislature's intent, is to make the lender the only person who can satisfy the super-priority amount, without paying of the entire lien.

## VI. ALLOWING HOMEOWNER PAYMENTS TO SATISFY SUPERPRIORITY PORTIONS DECIMATES THE RELIABILITY OF RECORDED TITLE

In its answering brief, Marchai appears to acquiesce to the fact that a bidder at an Association lien foreclosure sale would never be able to obtain the account information of a homeowner to ascertain whether or not any post-lien payments may have arguably satisfied the superpriority portion of the lien. The FDCPA indisputably prohibits any such disclosure. If the homeowners' partial payments could absolve banks of their obligation to pay their fair share of the Association lien, bidders at NRS 116 foreclosure sales, both pre and post-2015 would have no idea what interest in the property they were actually bidding on.

In a last-ditch effort to revive its flawed legal theory, Marchai proposes a solution: bidders don't actually need to know what payments have been made or when, *all the bidders needed to do was ask the Association whether the superpriority lien had been satisfied*. This solution is unworkable for a number of reasons. First, and perhaps most importantly, asking an Association or its collection agent at the time of this 2013 foreclosure "whether the superpriority portion of a foreclosing lien had been satisfied" would be comparable to asking a kindergartener what the meaning of life is. In that time frame, banks (and Marchai itself) did not believe that the lien had any priority over a deed of trust, since they spent years arguing as much. There is simply no way that Marchai could suggest that a bidder in 2012, 2013, 2014 or 2015 would have been able to get a straight, reliable answer. Second, Association representatives and collection agency employees are non-lawyers. The Legislature could not have intended to require bidders to seek a legal opinion as to the priority of a foreclosing lien from non-lawyers. Further, even if the Association were to hazard a guess as to the priority of the lien, or whether the superpriority portion had been satisfied, bidders, such as SFR would have no right to rely on that legal opinion as the association sale conveys title without warranty.

If SFR could not obtain information from the association as to the amount, timing, and application of the former homeowner's payments, and could not rely on the legal opinion of the Association and could not rely on the accuracy of recorded title, there was simply no way for SFR to ascertain what, if anything, it was bidding on at the sale. Marchai's position would decimate the reliability of recorded title and effectively prohibit associations from conducting non-judicial foreclosures on their liens – a right that was granted to them by the Nevada legislature in 1991.

Even with the 2015 amendments to NRS 116's lien foreclosure scheme, allowing homeowners to satisfy the superpriority lien would be problematic. NRS 116.21164(2) only requires that a notice of superpriority satisfaction be recorded *if the holder of a first deed of trust* satisfies the superpriority portion of the lien. If a homeowner could satisfy the superpriority portion, no notice of satisfaction would be required, and a purchaser would buy the property without notice that, years later, a bank could challenge the sale on the basis that the superpriority portion of the lien had been satisfied by homeowner payments. Such grave uncertainty in title was not intended by the Nevada Legislature. The more obvious and simple answer is that the Legislature intended banks to be responsible for a small portion of an association's lien – recognizing that banks benefit from association's facilities and maintenance activities, which maintain and raise the value of the banks' collateral.

## VII. HOMEOWNERS ARE SEVERELY HARMED BY ALLOWING THEIR PAYMENTS TO REVIVE AN EXTINGUISHED DEED OF TRUST

Marchai attempts to undercut the broad public policy arguments advanced by SFR in its opening brief by distinguishing the facts unique to this case. For instance, Marchai frequently decries that it is "not a bank." Admittedly, Marchai is a business trust that purchase pools of defaulted loans. Nonetheless, it is a distinction without a difference, and even if there were a difference, Marchai cannot dispute that the vast majority of cases in litigation involving NRS 116 foreclosures are banks or their servicers. Marchai's also argues that, in this case, an anti-deficiency statute would not apply, so the fact that the homeowner in this case would not be entitled to those protections does not matter. However, in virtually all other cases, the foreclosed homeowners would be entitled to the protections of the anti-deficiency statute, so Marchai's assertion that the statute would not apply in this specific case has no bearing on SFRs public policy argument. Allowing a homeowner's payment to revive a putatively extinguished deed of trust would, in most cases, deprive the homeowner themselves of the protection of the anti-deficiency statute and expose them to personal liability years after they lost their home to foreclosure.

Additionally, Marchai cannot reasonably dispute homeowners are damaged by the effect of a second foreclosure on their credit. In this case, the second foreclosure happened approximately 6 years after the first foreclosure. During that time, the homeowner may have improved their credit and financial well-being, only to unexpectedly be subject to a second foreclosure due to the fact of their own goodfaith payments to their Association made nearly a decade ago. Marchai argues the second foreclosure is actually a benefit to the homeowner, who would otherwise be liable on the entirety of the amount on the note. This ignores the fact that most of these cases are now close to a decade after the homeowners defaulted, and their mortgages were accelerated. The applicable 6-year breach of contract statute of limitations would generally apply to bar the banks from personally pursuing homeowners for the total value of their notes following post-default acceleration. In this case, and in most others, the homeowner would have absolutely no liability to the foreclosing beneficiary *but for* the lower court's decision the homeowner's payments rescued the deed of trust from extinguishment.

Finally, Marchai attempts to downplay the fact that, in addition to foreclosing upon the homeowner whose payments allegedly saved their deed of trust from extinguishment, **Marchai also obtained a cash judgment against the homeowner for its fees and costs totaling over $127,000**. Marchai argues Cristela Perez should have foreseen this consequence because more than a decade ago, she became unable to pay her monthly assessment obligations, and therefore should have known that Marchai would later be forced to defend the validity of its deed of trust in litigation. This is absurd – Perez, not any other homeowner, could not have foreseen that her lender would elect to not pay the superpriority portion of the Association lien (consisting of a few hundred dollars) prior to foreclosure, and instead spend over a hundred thousand dollars litigating the legal effect of the foreclosure. Marchai's cash judgment against Perez illustrates yet another way Nevadans are harmed by allowing trust deed beneficiaries rely, post-hoc, on homeowner payments to satisfy the superpriority portion of an association's lien. In sum, because of her attempts, albeit unsuccessful, to pay her association what she owed, Peres has been subjected to: not one but two foreclosures, personal liability on any deficiency, and a cash judgment against her personally exceeding $127,000.

There is simply no way for Marchai or the banks to deny that homeowners are being subjected to a second round of financial ruin by allowing homeowners payments to extinguish superpriority liens. Marchai's position should be rejected on these important public policy considerations.

## VIII. SFR's Status as a Bona Fide Purchaser is Relevant Under *Shadow Wood*

In its response brief, Marchai fails to address the numerous arguments presented by SFR in its opening brief regarding its status as a bona fide purchaser. Rather, Marchai states, in conclusory fashion, that SFR's status as a bona fide purchaser is irrelevant. ARB at p. 50. What Marchai ignores, and which was not briefed in the *Golden Hill* case, is the *Shadow Wood* opinion actually compels consideration of SFR's status as a bona fide purchaser.

In *Shadow Wood Homeowner's Association v. New York Community Bancorp, Inc.*, 132 Nev. ___, ___, 366 P. 3d 1105, 1114-1116 (2016), this Court provided a wellreasoned explanation as to whether or not the purchaser at an HOA foreclosure sale is a bona fide purchaser. The Court answered this question in the **affirmative**. In *Shadow Wood* the purchaser (Gogo Way) paid $11,018.39 in cash to buy the property at the association foreclosure sale. NYCB, to whom the property had reverted at its own prior foreclosure sale, sought to have the association sale set aside. This Court held that a bona fide purchaser's rights must be weighed against the equitable claims of the bank and deemed that the potential for harm against a bona fide purchaser defeat any equitable claims by the bank. The Court defined a bona fide purchaser as follows:

> A subsequent purchaser is bona fide under common-law principles if it takes the property "for a valuable consideration and **without notice of the prior equity, and without notice of facts which upon diligent inquiry would be indicated and from which notice would be imputed to him**, if he failed to make such inquiry." *Bailey v. Butner*, 64 Nev. 1, 19, 176 P.2d 226, 234 (1947) (emphasis omitted; *see also Moore v. De Bernardie*, 47 Nev. 33, 54, 220 P. 544, 547 (1923) ("the decisions are uniform that the bona fide purchaser of a legal title is not affected by any **latent equity** founded either on a trust, [e]ncumbrance, or otherwise, of which he has no notice, actual or constructive."). . .
>
> . . .
>
> 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 and further defeats NYCB's entitlement to judgment as a matter of law.

366 P.3d at 1115-1116(emphasis added).

By definition a "latent" equity one that it not visible. In *Shadow Wood* this

Court concluded that when the purchaser pays valuable consideration for a property, **without notice of any dispute** between the bank and the Association, the purchaser is an innocent bona fide purchaser, which **defeats the bank's claims**. *See id.* at 1116. This Court ruled that the district court must consider the effect setting aside the sale would have on the purchaser. *Id.* This Court's holding in *Golden Hill* is contrary to *Shadow Wood* in that *Golden Hill* failed to consider that the purchaser had no notice that the sale did not include the super-priority.

The same situation exists here. There is no evidence that SFR was aware of any payment by the former owner at all. To the extent that the former owner's payment could be applied in a manner that would redeem Marchai's deed of trust, such a redemption would constitute a latent equity, of which SFR was not aware and could have even ascertained based on the content of the recorded notices. To the contrary, this Court has held that the recorded notices are *prima facie* evidence of the existence of the super-priority lien. *PNC BANK, N.A. v. Saticoy Bay, LLC Series 4208 Rolling Stone Drive Trust*, 398 P.3d 290 (Table) (Nev. June 15, 2017) (unpublished order of affirmance)( "[W]e conclude that the language in the notices constituted prima facie evidence that the HOA was foreclosing on a lien comprised of monthly assessments.") Additionally, this Court has also held that a foreclosure deed is prima facie evidence that the foreclosure included the super-priority lien. In *Bank of New York Mellon v. K&P Homes*, 404 P.3d 403 (Table) (Nev. Oct. 20, 2017) (unpublished order vacating and remanding) this Court stated "the Foreclosure Deed unambiguously stated that the HOA … conveyed 'all its right, title and interest in' the subject property … Therefore, we conclude that respondent produced prima facie evidence that the HOA foreclosed on the superpriority portion of its lien." *Id.* Here, both the Notice of Default and the Trustee's deed contain prima facie evidence that the Association foreclosed on the superpriority portion of the lien. No information that SFR had at the time of the sale would have refuted that belief. SFR has undoubtably established itself as a bona fide purchaser – a status that the *Shadow Wood* opinion mandated consideration of in the case of latent property interests.

Marchai lastly claims that SFR was "at least on inquiry notice" that the homeowner made payments following the recording of the 2008 notice of lien. Even if that could be accepted as true, SFR would be charged with notice only of what a reasonable investigation would have revealed. Here, the FDCPA barred the association and Alessi & Koenig from revealing information to SFR about the timing, amount or application of payments submitted by the homeowner – Marchai concedes this. Similarly, SFR could not have known whether or not homeowner payments could have satisfied the superpriority amount as that is still an undetermined question of law, where the statutes are, at best, ambiguous. SFR could also not have known that the lower court would, years after the foreclosure sale, impose a non-existent requirement that notices of delinquent assessment liens be rescinded before recording a new lien, which (according to the lower court) operated to change the foreclosure from a foreclosure on the 2011 lien to a foreclosure on the 2008 lien. There is simply no way that SFR could have learned of the borrower payments, nor the legal effect of those payment. The lower court erred in entering judgment against SFR when SFR demonstrated it was a BFP.

## CONCLUSION

In considering the various equities at play in this case, this Court should not lose sight of the fact that Marchai, and its predecessor U.S. Bank, armed with actual notice of the Association lien and impending foreclosure sale, **took no action to protect the deed of trust from extinguishment**. Instead, years after the foreclosure, and with the benefit of extensive discovery, Marchai has attempted to hijack payments made by the former homeowner, Cristela Perez, to excuse its own inaction. The thanks it offers Ms. Perez for her payments is a second foreclosure, and a $127,000 attorney's fee judgment against her. This Court should not permit such an inequitable result for Ms. Perez or any other homeowner, or SFR which indisputably had no way to learn of the homeowner payments.

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This Court should reverse and remand with instructions to enter judgment in favor of SFR.

DATED this 1st day of April, 2019.

KIM GILBERT EBRON

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## CERTIFICATE OF COMPLIANCE

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 this opening brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14 point font size.

I FURTHER CERTIFY that this Opening Brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and 6965 words.

FINALLY, I CERTIFY that I have read this Opening 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 answering 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 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 answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 1st day of April, 2019.

**KIM GILBERT EBRON**

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## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 1st day of April, 2019, I filed the foregoing Appellant's Reply Brief to be served via the Court's ECF system in accordance with NRAP 25(a)(2)(b)(vi) and NRFCR 8 pursuant to the Court's Master Service List as follows:

Master Service List

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|---|---|
| **Docket Number and Case Title:** | 74416 - SFR INV.'S POOL 1, LLC VS. MARCHAI B.T. |
| **Case Category** | Civil Appeal |
| **Information current as of:** | Apr 01 2019 06:57 p.m. |

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

Jacqueline Gilbert
Karen Hanks
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*/s/Jacqueline A. Gilbert*
An employee of Kim Gilbert Ebron