Case No. 74532

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellant,

vs.

U.S. BANK, N.A., a National Banking Association as Trustee for the Certificate Holders of Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2006-AR4; and NV WEST SERVICING, LLC, a Nevada Limited Liability Company, as Trustee for Nashville Trust 2270, inclusive,

Respondents.

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APPEAL

from the Eighth Judicial District Court, Clark County

The Honorable JOANNA S. KISHNER, District Judge

District Court Case No. A-13-678814-C.

APPELLANT'S REPLY BRIEF

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NRAP 26.1 DISCLOSURE

In addition to those attorneys disclosed in the NRAP 26.1 Disclosure attached to SFR's opening brief, Athanasios Agelakopoulos, Esq. of the law firm of Kim Gilbert Ebron fka Howard Kim & Associates, represents Appellant.

DATED this 28th of September 2018.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

CONSTITUTIONAL PROVISIONS

INTRODUCTION

The District Court's order below should be reversed for lack of subject matter jurisdiction in three material respects. First, SFR, pursuant to this Court's instructions, obtained an order of the Bankruptcy Court retroactively annulling the automatic stay to the petition date in the underlying Bankruptcy Case (the "Annulment Order"). Therefore, there was no violation of the automatic stay for the District Court to consider.

Under black-letter Ninth Circuit law, the binding and dispositive legal effect of the Bankruptcy Court's proper entry of the Annulment Order is that SFR here did not commit any stay violation as a matter of law. *Schwartz v. United States (In re Schwartz)*, 954 F.2d 569, 573 (9th Cir. 1992) ("If a creditor obtains retroactive relief under section 362(d), ***there is no violation of the automatic stay***, and whether violations of the stay are void or voidable is not at issue.") (emphasis added)). Simply put, the District Court had neither the jurisdiction nor the power to disregard the Bankruptcy Court's Annulment Order. Once the Bankruptcy Court entered the Annulment Order, therefore, SFR could not be held responsible for an alleged stay violation in any court, including the District Court. This alone requires reversal of the order below.

Second, the District Court's order also constitutes an impermissible modification of the Bankruptcy Court's Annulment Order—an order long since final

on direct review in the federal court system. U.S. Bank, N.A. ("USB") and NV West Servicing, LLC ("NVW" and, with USB, collectively the "Bank") essentially sought appellate review of the Annulment Order through the District Court rather than by pursuing direct appellate review in the federal court system. This is wholly impermissible.

Third, the District Court's grant of summary judgment to the Bank did not address the Bank's lack of standing to raise a violation of the automatic stay, either in the District Court or the Bankruptcy Court. Under governing Ninth Circuit law, there are two—and only two—legal beneficiaries of the bankruptcy stay: the debtor and the bankruptcy trustee. *See, e.g., Lee v. Yan (In re Yan)*, 703 Fed. Appx. 582, 583 (9th Cir. Nov. 21, 2017) (*citing Tilley v. Vucurevich (In re Pecan Groves of Arizona)*, 951 F.2d 242, 245 (9th Cir. 1991)). The Bank is neither. As a result, the Bank does not have standing to raise alleged violations of the automatic stay.

Finally, without the imposition of a nonexistent stay violation, the Bank's claims regarding the alleged inadequacy of the sales price realized by the Association at the foreclosure sale of the Property are insufficient as a matter of law to overturn the foreclosure sale on commercial reasonableness grounds. *See, e.g., Nationstar Mtg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, ___ Nev. ___, 405 P.3d 641, 642 (Nev. 2017). For all these reasons, the decision of the District Court below should be reversed.

ARGUMENT

I. THE BANKRUPTCY COURT'S EXCLUSIVE CORE JURISDICTION OVER BOTH ENFORCEMENT AND ANNULMENT OF THE AUTOMATIC STAY RENDERS THE DISTRICT COURT'S ORDER VOID FOR LACK OF SUBJECT MATTER JURISDICTION.

A. SFR may raise the District Court's lack of subject matter jurisdiction and the Bank's lack of standing to raise automatic stay issues on appeal.

The District Court's lack of subject matter jurisdiction can be raised at any time, including on appeal. *See, e.g.*, *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 964-965, 194 P.3d 96, 105 (Nev. 2008). This is because the absence of subject matter jurisdiction on the part of the District Court renders any judgment it may enter under such circumstances void. *See State Indus. Ins. Sys. v. Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273, 1274 (Nev. 1984) ("There can be no dispute that lack of subject matter jurisdiction renders a judgment void."). Subject matter jurisdiction does not exist, as well, in instances where a litigant lacks standing to raise a claim initially. *See Wallace v. Smith*, 2018 WL 1426396, *3 (Nev. Mar. 5, 2018) (unpublished).

In *Wallace*, this Court linked a litigant's lack of standing to raise a claim in the first instance to a reviewing court's lack of subject matter jurisdiction as follows:

> If the court has no power to grant relief—either because it lacks jurisdiction over the subject matter, an indispensable party is absent from the litigation, the dispute is moot or not yet ripe, *or a party does not have the legal right to seek or receive the requested relief—then its ruling is legally void and not much more than a meaningless advisory*

> *opinion* whether or not any party raised a timely objection below.

Id. (emphasis added) (citation omitted). Therefore, a reviewing court's lack of subject matter jurisdiction cannot be waived, either by affirmative consent or through conduct of the parties to the litigation. *See, e.g., Vaile v. Eighth Judicial Dist. Court*, 118 Nev. 262, 276, 44 P.3d 506, 515-516 (Nev. 2002).

SFR's assertion here of the District Court's lack of subject matter jurisdiction is therefore properly before this Court for its consideration and review. SFR has separately offered to stipulate with the Bank to a supplemental briefing schedule so the Bank can properly be heard on these issues and to address these matters in an orderly way before this Court, but has received no response.

B. The Bankruptcy Court's exclusive core jurisdiction over enforcement and annulment the automatic stay renders the District Court's Order void.

In *SFR Investments Pool 1, LLC v. Green Tree Servicing, LLC,* 385 P.3d 52 (Nev. Oct. 18, 2016) (unpublished), this Court declined to entertain SFR's arguments regarding the lack of standing on the part of the bank under federal bankruptcy law in that case. *Id.* at *1. There, the bank sought to set aside an HOA foreclosure sale on the basis of an alleged violation of the automatic stay. *Id.* SFR argued the bank lacked standing to lodge such a challenge, and the Court declined to consider SFR's arguments. *Id.* This Court reasoned that the bank "clearly has

standing *under Nevada law to argue the sale was invalid as a means of protecting its deed of trust*…and [SFR] has not explained why this court or the district court would be bound by Ninth Circuit bankruptcy law in determining whether respondent has standing in a state court quiet title action." *Id.* (emphasis added).

The Bank lacks standing here because the substantive right it asserts—namely, that the sale was void based on an alleged violation of the automatic stay—stems from federal bankruptcy law. *See, e.g.*, 11 U.S.C. § 362(a). And it is federal bankruptcy law that governs which entity has standing to assert a right of action created under federal law. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). "Like substantive federal law itself, private rights of action to enforce federal law *must be created by Congress*… ([the] *remedies available are those 'that Congress enacted into law.*')." *Id.* (citation omitted) (emphasis added). The reason why this Court must follow federal bankruptcy law is because, to do otherwise, is to create a private right of action to enforce the automatic stay on the part of the Bank that Congress, in the exercise of its plenary power under Article I, Section 8, Clause 4, has not seen fit to create. This would constitute an extraordinary breach of both federalism and separation of powers principles, and this Court should decline any further invitations from the Bank to become a party to such breaches of constitutional magnitude. To allow otherwise, especially in a case such as here where the

Bankruptcy Court has already ruled, exacerbates the jurisdictional problems already present in this case.

Nevada's state courts, including the District Court, do not have concurrent jurisdiction over the automatic stay under 28 U.S.C. § 1334(b). *Gruntz v. County of Los Angeles (In re Gruntz)*, 202 F.3d 1074, 1082-1083 (2000) ("Because of the bankruptcy court's *plenary power over core proceedings*, the County's argument that states have concurrent jurisdiction over the automatic stay under 28 U.S.C. § 1334(b) is unavailing."). (emphasis added). The *Gruntz* Court further observed of the automatic stay, "Of course, *nothing in that section [28 U.S.C. § 1334(b)] vests the states with any jurisdiction over a core proceeding, including 'motions to terminate, annul, or modify the automatic stay*." *Id.* at 1083 (*citing* 28 U.S.C. § 157(b)(2)(G)) (emphasis added). To understand how large a jurisdictional breach was committed here by the District Court at the Bank's behest, a brief discussion of the Bankruptcy Court's core jurisdiction and the central role the automatic stay plays in that jurisdictional scheme is in order.

1. Deciding to enforce or annul the automatic stay is a core proceeding over which the Bankruptcy Court has exclusive jurisdiction.

Section 157(b) of the Federal Judicial Code sets forth a non-exhaustive list of matters denominated as "core" bankruptcy proceedings. 28 U.S.C. § 157(b). The designation of proceedings as "core" proceedings comes from Justice William

Brennan's plurality opinion in *Northern Pipeline Construction Co. v. Marathon Pipe Line Company*, 458 U.S. 50 (1982). The restructuring of a debtor's debts to creditors lies at the core of the federal bankruptcy power, "[b]ut the restructuring of debtor-creditor relations, *which is at the core of the federal bankruptcy power*, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case." *Id.* at 71 (emphasis added). The "core" designation continues into 28 U.S.C. § 157(b). Among the statute's core proceedings are: (i) matters concerning the administration of the estate, (ii) motions to terminate, condition, annul, or modify the automatic stay, and (iii) "other proceedings affecting the liquidation of the assets of the estate or *the adjustment of the debtor-creditor* or the equity security holder *relationship*, except personal injury and wrongful death claims[.]" *See* 28 U.S.C. §§ 157(b)(2)(A), 157(b)(2)(G), and 157(b)(2)(O) (emphasis added).

"The automatic stay provision of the Bankruptcy Code, § 362(a), has been described as 'one of the fundamental protections provided by the bankruptcy laws." *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 503 (1986). The Ninth Circuit amplified both *Midlantic* and *Marathon* on the automatic stay when its stated, "*Central to the bankruptcy 'case' as to which exclusive Article I federal jurisdiction lies is the automatic stay imposed by 11 U.S.C. § 362(a).*" *Gruntz*, 202 F.3d at 1081 (emphasis added).

The *Gruntz* Court's views in this regard were moored, in part, to the *in rem* nature of bankruptcy proceedings. *Id.* at 1082 ("Although *Donovan* discussed this rule as applied to *in personam* actions, its holding applies *even more strongly* to federal *in rem* proceedings under the Bankruptcy Code, in which a federal court having custody of such property *has exclusive jurisdiction to proceed*.") (emphasis added) (citation omitted). Since *Gruntz* was decided, the Supreme Court of the United States ("SCOTUS") has recognized the extraordinary powers committed to federal bankruptcy courts constituted under Article I, Section 8, Clause 4 of the Federal Constitution in the exercise of their exclusive *in rem* jurisdiction to defeat claims of State sovereign immunity. *See Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 372 (2007) (recognizing that the several States agreed "as part of the plan of the Convention" not to assert their sovereign immunity in connection with "orders ancillary to the bankruptcy courts' *in rem* jurisdiction"); *see also Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004) (noting the bankruptcy court's exclusive jurisdiction over property of the bankruptcy estate under 28 U.S.C. § 1334(e) triggered the recognized and established *in rem* exception to the doctrine of sovereign immunity.).

Following SCOTUS's decisions in *Katz* and *Hood*, the jurisdictional precepts upon which *Gruntz* is moored apply with even greater force. These principles should be applied vigorously by this Court to both (i) vindicate the Bankruptcy Court's

exercise of its exclusive jurisdiction in entering the Annulment Order and (ii) to prevent the District Court from wasting its precious time and scarce judicial resources adjudicating matters it is without jurisdiction to even consider. The automatic stay is inextricably intertwined with property of the bankruptcy estate over which the Bankruptcy Court here exercised exclusive jurisdiction under 28 U.S.C. § 1334(e)(1). Until they part ways under law, the automatic stay and property of the bankruptcy estate are fellow travelers. *See* 11 U.S.C. § 362(c)(1).

Indeed, the link between property of the bankruptcy estate and the operation of the automatic stay is evident from both (i) the inception of the bankruptcy case and (ii) the termination of the automatic stay when property is no longer deemed property of the bankruptcy estate by operation of 11 U.S.C. § 362(c)(1). The filing of a petition for relief under the Bankruptcy Code causes to spring into existence by operation of law (i) the bankruptcy estate under 11 U.S.C. § 541(a) and (ii) protection of the *res* of the bankruptcy estate through the imposition of the self-effectuating automatic stay under 11 U.S.C. § 362(a). The Bankruptcy Court's exercise of exclusive *in rem* jurisdiction is inextricably intertwined with the ability of the Bankruptcy Court to exercise exclusive oversight of the operation of the automatic stay—an injunction that issues by operation of law from the Bankruptcy Court itself.

Application of these principles demonstrates why efforts to enforce the automatic stay constitute core proceedings committed to the exclusive jurisdiction

of the Bankruptcy Court. *See, e.g., Johnson v. Smith (In re Johnson)*, 575 F.3d 1079, 1083 (10th Cir. 2009); *see also Amedisys, Inc. v. National Century Financial Enterprises, Inc.*, 423 F.3d 567, 573-574 (6th Cir. 2005). Likewise, motions brought under 11 U.S.C. § 362(d) seeking annulment of the automatic stay, like SFR's request that resulted in the Annulment Order, are also committed to the exclusive core jurisdiction of the Bankruptcy Court. *Gruntz*, 202 F.3d at 1083; *see also* 28 U.S.C. § 157(b)(2)(G).

2. The Bank asked the District Court to reject the Annulment Order and do its own analysis as to the acts taken before the Annulment Order – something the District Court had no jurisdiction to do.

The District Court was, therefore, without subject matter jurisdiction to entertain the Bank's alleged stay violation claims, whether that was done as part of its exercise of original jurisdiction under Nevada law; or, as sought by the Bank, appellate jurisdiction over the Bankruptcy Court's Annulment Order. *See Gruntz* 202 F.3d at 1084 ("Just as federal district court are not part of the state appellate system, *neither are state courts granted supervisory or appellate jurisdiction over federal courts*.") (emphasis added). But, that is exactly what took place in the District Court below.

Once the Bankruptcy Court entered its Annulment Order, the Bank knew that any efforts to appeal the Annulment Order were foreclosed under governing Ninth Circuit law. *In re Pecan Groves*, 951 F.2d at 245. In *Pecan Groves*, the Ninth

Circuit held that creditors, like the Bank, lack standing to appeal adverse determinations regarding alleged stay violations. *Id.* ("We therefore hold that a creditor has no independent standing to appeal an adverse decision regarding a violation of the automatic stay."). This explains why, for instance, USB's RAB goes to great lengths to assign error to the Bankruptcy Court here by characterizing that order as having worked a "legal fiction," (USB RAB at 1); but, USB did not appeal this alleged "legal fiction" in the federal court system. *Pecan Groves* explains why the USB had to find another way. USB then ran to the District Court.

Indeed, USB's RAB is dripping with disdain for the Annulment Order. Consider the opening passage from USB's RAB, "*It is beyond dispute that the HOA and its foreclosure agent violated the automatic stay* in the Bankruptcy Code when they foreclosed on the Parks' home during the Parks' bankruptcy." (USB RAB at 1). Now, the Court need only compare the Bank's position with the Ninth Circuit's authoritative pronouncement from *Schwartz*, "If a creditor obtains retroactive relief under section 362(d), *there is no violation of the automatic stay*, and whether violations of the stay are void or voidable is not at issue." 954 F.2d at 573 (emphasis added). Under governing Ninth Circuit law, no stay violation exists *as a matter of law*. Recollection that equity must follow, not operate in derogation of, the law makes plain the Bank's error here.

Indeed, the juxtaposition of these two passages from the USB RAB and *Schwartz* establishes clearly the Bank's characterization of the Annulment Order as a kind of rogue order. It also lays plain the Bank's forum shopping efforts to hold SFR accountable for conduct for which it has already been absolved through the Annulment Order. Again, the Bankruptcy Court, not the District Court, has exclusive core jurisdiction over enforcement and annulment of the automatic stay. And the District Court is without subject matter jurisdiction, either original or appellate, to countermand the Bankruptcy Court's Annulment Order. That is the exact reversible error that the Bank convinced the District Court to commit below.

By agreeing with the Bank, the District Court unfortunately brought its decision within the ambit of the *Gruntz* Court's worst fears over the exercise of concurrent jurisdiction by state courts over the automatic stay – forum shopping to get favorable relief through courts from which Congress withheld jurisdiction:

> *If state courts were empowered to issue binding judgments modifying the federal injunction created by the automatic stay, creditors would be free to rush into friendly courthouses around the country to garner favorable relief.* . . . *Such an exercise of authority would be inconsistent with and subvert the exclusive jurisdiction of the federal courts by allowing state courts to create their own standards as to when persons may properly seek relief in* ***cases Congress has specifically precluded those courts from adjudicating***…It is but slight hyperbole to say that chaos would reign in such a system.

Id. at 1083-1084 (emphasis added) (citation omitted).

The case at bar demonstrates exactly why Congress withheld from State courts concurrent jurisdiction over enforcement and annulment of the automatic stay. The jurisdictional breach committed by the District Court at the Bank's behest is great; and, the injustice visited upon SFR is severe. SFR has already been absolved of any alleged stay violation by the only Court with jurisdiction to grant such relief: the Bankruptcy Court. Now, the Bank seeks to hold SFR responsible in the District Court for the very same conduct which had previously been absolved. The Bank's argument is expressly foreclosed, again, by *Gruntz*:

> In sum, by virtue of the power vested in them by Congress, *the federal courts have the final authority to determine the scope and applicability of the automatic stay.* "*The States cannot, in the exercise over local laws and practice, vest State courts with power to violate the supreme law of the land.*"

Id. at 1083 (emphasis added) (citation omitted).

This Court must put a stop to the Bank's tactics that invite overburdened courts of general jurisdiction, like the District Court, to be pitted against the Bankruptcy Court in a jurisdictional skirmish the District Court cannot and should not win. That die was cast at the founding of the Republic in favor of the Bankruptcy Court by operation of the Federal Constitution's Supremacy Clause. Failure to reverse the District Court only invites further chaos into what Congress envisioned as a unified bankruptcy system. This Court must also put an end to the Bank's

impermissible forum shopping efforts. The District Court's order below should, therefore, be reversed as void for lack of subject matter jurisdiction over issues pertaining to the automatic stay. *See Sleeper*, 100 Nev. at 269, 679 P.2d at 1274 (recognizing under Nevada law that a reviewing court's lack of subject matter jurisdiction renders its order void).

II. THE DISTRICT COURT LACKED POWER AND JURISDICTION TO MODIFY, OR HEAR THE BANK'S IMPROPER COLLATERAL ATTACK ON, THE ANNULMENT ORDER.

A. The Bankruptcy Court's Annulment Order constitutes a final order that is not subject to collateral attack in the District Court.

The Annulment Order constitutes a final order for which the Bank could have sought direct appellate review in the federal court system. *See, e.g., Benedor Corp. v. Conejo Enterprises, Inc. (In re Conejo Enterprises, Inc.)*, 96 F.3d 346, 351 (9th Cir. 1996). For reasons SFR has already articulated, the Bank chose not to appeal the Annulment Order due to its lack of standing to prosecute such an appeal. Again, this prompted the Bank's impermissible collateral attack of the Annulment Order in the District Court.

As a result, the Annulment Order has long since gone final on direct appellate review. The need for finality of the Bankruptcy Court's Annulment Order prohibited the District Court, as the court that was called upon to enforce the Annulment Order, from refusing to do so. *See, e.g., Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 140

(2009) (holding that "the finality of the Bankruptcy Court's orders following the conclusion of direct review generally stands in the way of challenging the enforceability of the [orders]."). The finality that attached to the Annulment Order militated in favor of its vigorous application by the District Court; but, it was subjected to an impermissible collateral attack and appellate review, instead.

The Bankruptcy Court's Annulment Order was not subject to collateral attack in the District Court as a means to excuse the Bank's failure to seek direct appellate review in the federal court system. *See, e.g., Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995) (recognizing the primacy and respect to be accorded to decisions of courts of first instance, the importance of seeking direct review of court orders with which a litigant disagrees, and how impermissible collateral attacks on orders in lieu of direct review "seriously [undercut] the orderly process of law."). The decision of the District Court should, therefore, be reversed as an impermissible collateral attack on the Annulment Order pursued by the Bank in lieu of seeking direct appellate review of that final order through the federal court system.

B. The District Court's finding of unfairness based on a non-existent stay violation impermissibly modified the Bankruptcy Court's Annulment Order.

This Court has already held in an unpublished decision that bankruptcy court orders addressing automatic stay issues are not subject to modification in the Nevada

courts. *See Ditech Fin. LLC v. Teal Petals St. Trust*, 385 P.3d 52, *1 (Nev. Oct. 17, 2016) (unpublished). In *Teal Petals* this Court cited with approval the observation from *Gruntz* that, "The federal courts have the final authority to determine the scope and applicability of the automatic stay." *Id.* There, this Court also cited the Ninth Circuit's decision in *McGhan v. Rutz (In re McGhan)*, 288 F.3d 1172, 1179 (9th Cir. 2002), for the proposition that state courts "do not have the power *to modify* or dissolve the automatic stay…" *Teal Petals*, 385 P.3d at *1 (unpublished) (emphasis added). This is what the District Court's order predicating its finding of alleged unfairness on a non-existent stay violation accomplished.

In *Teal Petals*, this Court rejected a purchaser's impermissible collateral attack of a bankruptcy court's order that the automatic stay had been violated the association foreclosure sale, rendering the sale void. 385 P.3d 52, *1 (unpublished). Thus, the bank in that case prevailed based on the bankruptcy court's order. This Court expressly recognized that the bankruptcy courts have the final say on the scope and application of the automatic stay, *see Gruntz*, and that Nevada state courts lack the power to modify such orders, *see McGhan*. *See id.*

This case is no different and SFR should prevail. SFR, consistent with this Court's instructions in *LN Management*, obtained the Annulment Order from the

Bankruptcy Court.[1] Now, it is the Bank that mounted an impermissible collateral attack of the Annulment Order in the District Court below. For the very same reasons and based on the exact same logic of this Court's prior decision in *Teal Petals*, this Court must recognize the Bankruptcy Court's decision to annul the stay as inviolable and reverse the District Court's order.

The Annulment Order annulled the automatic stay retroactive to the petition date in the underlying bankruptcy case, a date that necessarily preceded the dates upon which the now non-existent stay violations allegedly took place. As the Bank would have it, the District Court can negate the exclusive jurisdiction and statutory prerogative of the Bankruptcy Court to grant retroactive relief by annulling the automatic stay, as it did when it entered the Annulment Order. According to the Bank, the District Court can, as part of its commercial reasonableness analysis of the underlying foreclosure sale of the Property, freeze matters in time on the date of the foreclosure sale and inquire into whether there was a stay violation on that specific date and disregard altogether the alleged "legal fiction" embodied in the Annulment Order. The Bank's legal position cannot be squared with Ninth Circuit's decisions in *Gruntz* and *McGhan*, as well as this Court's decision in *Teal Petals*.

[1] *LN Management LLC Series 5105 Portraits Place v. Green Tree Loan Servicing LLC*, ___ Nev. ____, 399 P.3d 359, 361 and n.3 (2017).

But, the decision that undercuts the Bank's position most is the Ninth Circuit's decision in *Schwartz*, a decision that is rendered even more conspicuous and salient by its relative absence from the Bank's RAB. One would expect the Bank to cite *Schwartz* with regularity. But, that is not the case. Perhaps the following passage taken directly from *Schwartz*, in addition to those already cited by SFR above, may help explain the Bank's sparse and selective reference to that decision here:

> Statements from leading authorities on bankruptcy generally support this conclusion: "The use of the word 'annulling' [in § 362(d)] permits the [court's] order to operate retroactively, thus validating actions taken by a party at a time when he was unaware of the stay. Such actions would otherwise be void." …***With that understanding, section 362(d) gives the court the power to ratify retroactively any violation of the automatic stay which would otherwise be void.*** Simply put, there is nothing remarkable or inconsistent about the normal operation of the automatic stay being subject to a specific statutory exception such as that found in section 362(d).

569 F.2d at 573 (citations omitted) (emphasis added).

It is the power to ratify, as well as to punish, that makes the Bankruptcy Court sovereign on matters of federal bankruptcy law. The District Court's inquiry into a non-existent stay violation essentially nullifies the Bankruptcy Court's exclusive jurisdiction and statutorily conferred prerogative to annul the automatic stay—to ratify conduct that might otherwise violate *the Bankruptcy Court's own injunction*.

In this manner, the District Court essentially sat as a court exercising appellate jurisdiction over, and engage in appellate review of, the Annulment Order. The District Court then modified the Annulment Order's retroactive ratification of SFR's acts to the petition date in the bankruptcy case to permit the District Court to make its finding of unfairness based on an otherwise non-existent stay violation. This constitutes an impermissible modification of the Annulment Order, and it is a modification that the District Court is without jurisdiction to make.

Furthermore, SFR followed this Court's own instructions from the *LN Management* case, and obtained the Annulment Order. *LN* Management, 399 P.3d at 361 and n.3 (2017). Allowing the Bank's collateral attack to stand negates the purpose of seeking retroactive annulment in the first place. The District Court's order should be reversed.

III. THE BANK'S LACK OF STANDING TO PROSECUTE STAY VIOLATION CLAIMS RENDERS THE ORDER BELOW VOID.

A. *LN Management* did not hold that creditors have standing to enforce automatic stay violations in derogation of governing Ninth Circuit Law.

LN Management, provides no support for a standing claim. There, this Court determined only that the appellant's standing challenge in that particular case lacked merit. *See* 399 P.3d at 360 n.1 This Court did not rule as a matter of law that all creditors have standing to bring automatic stay enforcement actions in the Nevada courts. *See id.* SFR's counsel has reviewed the briefing of the standing issues in *LN*

Management. SFR submits that the standing challenge here is fundamentally different from that in *LN Management*. SFR's standing challenge here is based on Ninth Circuit authorities that were not raised in *LN Management.*

Indeed, prior to *LN Management*, this Court stated in *Teal Petals* that it did not need to decide "whether [the] appellant has standing under federal bankruptcy law to assert a violation of the automatic stay as a basis for invalidating an HOA foreclosure sale." 385 P.3d 52, *1 n.2 (unpublished). Based on the foregoing, this Court has not yet ruled as a matter of law that creditors, like the Bank, have standing to raise alleged violations of the automatic stay to challenge foreclosure sales. If the Court decides, however, that its decision in *LN Management* grants creditors such standing, that decision is then erroneous and cannot be squared with governing Ninth Circuit law. In that event, *LN Management* should be reversed.

B. The Bank is not a legal beneficiary of the automatic stay and, therefore, lacks standing to raise alleged stay violations against SFR.

As recently as November 21, 2017, the Ninth Circuit recognized "[T]he debtor and the trustee are *the only legal beneficiaries of the automatic stay*[.]" *Lei v. Yan (In re Yan)*, 703 Fed. Appx. 582, 583 (9th Cir. Nov. 21, 2017) (emphasis added). "As a general rule, the automatic stay protects *only* the debtor, property of the debtor or property of the estate … The stay 'does not protect non-debtor parties or their property.'" *Baucher v. Shaw*, 572 F.3d 1087, 1092 (9th Cir. 2009) (emphasis in

original) (internal citations omitted). Courts in the Ninth Circuit have long recognized that junior lienholders and parties in interest claiming an adverse interest in a bankrupt debtor's property, like the Bank, do not have any procedural or substantive rights under the automatic stay. *See Magnoni v. Globe Inv. & Loan Co. (In re Globe Inv. & Loan Co.)*, 867 F.2d 556, 560 (9th Cir. 1989) (framing the standing argument in that case as a request for "*extending the protection of the automatic stay to creditors*…") (emphasis added)); *see also Bryce v. Stivers (In re Stivers)*, 31 B.R. 735, 735 (Bankr. N.D. Cal. 1983) (cited with approval in both *Globe* and *Pecan Groves)*.

The *Stivers* Court drew a careful and well-reasoned distinction between a creditor's alleged interest(s) in estate property protected by the automatic stay versus the creditor's claim to a procedural or substantive right under the automatic stay itself. 31 B.R. at 737. "The action here related not to property but to a stay of foreclosure of an interest in property… *The bank's claim of interest in the real property is therefore not relevant. Its claim of interest in the transaction—in Bryce's request for relief from stay—is unsupported in law*." *Id.* (emphasis added). The *Stivers* Court then carefully distinguished between the creditor's practical interests in opposing stay relief with that creditor's nonexistent legal interests concerning the Court's grant of stay relief to a senior secured creditor. "The bank confuses its practical interest in the stay, which undoubtedly exists, *with a legal interest, which*

does not." *Id.* (emphasis added). Therefore, the junior lienholder did not have standing challenge the senior lienholder's request for stay relief. *Id.* Again, *Stivers* is cited with approval in *Pecan Groves*. *See* 951 F.2d at 245.

The reasoning of the *Stivers* Court echoes loudly in the United States Bankruptcy Appellate Panel for the Ninth Circuit's decision in *California Thrift & Loan Assoc. v. Downey Savings & Loan Assoc. (In re Eagles)*, 36 B.R. 97, 98 (B.A.P. 9th Cir. 1984). There, the BAP held that the automatic stay did not protect the interests of a junior encumbrancer in the debtor's property. *Id.* The BAP held that the junior encumbrancer's claims to protection under the automatic stay were without support in law:

> …Congress simply did not intend for the automatic stay to protect junior lien holders from a tolling of the reinstatement period. Similarly, *we can find no explicit statutory basis, under 11 U.S.C. § 362 or elsewhere, for extending the protections afforded by the automatic stay—whatever these might entail—to a non-debtor junior encumbrancer*.

Id. at 98 (emphasis added).

The BAP in *Eagles*, therefore, reversed the bankruptcy court's declaratory judgment in favor of the junior encumbrancer based on the lower court's "overly expansive assessment of the effect" of the automatic stay. *Id.* at 98-99.

In *Pecan Groves*, the Ninth Circuit's holding was clear and unequivocal, "We therefore hold that *a creditor has no independent standing to appeal an adverse*

decision regarding a violation of the automatic stay." 951 F.2d at 245 (emphasis added). Importantly, the Ninth Circuit in *Pecan Groves* supported its holding by recognizing, "The trustee is charged with the administration of the estate for the debtor's and creditor's benefit. *Allowing unsecured creditors to pursue claims the trustee abandons could subvert the trustee's powers.*" 951 F.2d at 245 (emphasis added).

SFR now calls this Court's attention to the Ninth Circuit's unpublished decision in *Associate Financial Services Company v. First-Federal Savings & Loan Association (In re Franck)*, 19 F.3d 1440 (9th Cir. Mar. 23, 1994) (unpublished disposition).[2] The *Franck* Court framed the issue as follows, "The issue for decision is whether a secured creditor may bring an adversary action *in the United States Bankruptcy Court to challenge another creditor's violation of the automatic stay*." *Id.* at *1. (emphasis added). The *Franck* Court then set out the following analysis under *Pecan Groves* in denying standing to the secured creditor to enforce stay violation claims:

[2] Consistent with the requirements of Ninth Circuit Rule 36-3, SFR does not cite this decision as precedent; rather, SFR cites this case to illustrate how the Ninth Circuit is likely to apply existing precedents in assessing whether the Bank has standing to assert stay violation claims generally, especially in non-bankruptcy forums, such as this Court. *See, e.g.*, *Williams v. Daszko*, 2018 WL 2684314, *2 (E.D. Cal. June 5, 2018).

> As the BAP correctly recognized, the disposition of this appeal is controlled by this court's decision in *Pecan Groves, supra.* In that case, this court confronted, for the first time, "the question of whether a creditor can attack violations of the automatic stay." …Its conclusion was unambiguous:
>
> > The trustee is charged with the administration of the estate for the debtor's and creditor's benefit.... Here, the trustee has not appealed the adverse ruling of the trial court. No other party may challenge this ruling. *We therefore hold that a creditor has no independent standing to appeal an adverse decision regarding a violation of the automatic stay.*
>
> Notwithstanding the fact that a violation of the automatic stay is indeed void, as opposed to merely voidable, … a party must have standing to bring an alleged violation of the stay to the bankruptcy court's attention. In order for a federal court to act, some party must appear before it, explain what has occurred, and ask the court to do something about it. That party must, in all cases, have standing.

Id. (underscore emphasis added) (internal citations omitted) (italics in original).

Relying on *Pecan Groves*, the *Franck* Court then observed, once again, that the only two recognized beneficiaries of the automatic stay are the debtor and the bankruptcy trustee. *Id.* at *3. The *Franck* court then echoed *Stivers* and *Eagles*, "[h]owever, the fact that individual creditors incidentally benefit from the automatic stay or be injured in some way by its violation *does not give creditors standing under the Bankruptcy Code to bring an action claiming the stay was violated*." *Id.*

(emphasis added). Such claims need to be brought to the bankruptcy court's attention through the bankruptcy trustee. *See id.*

The *Franck* Court, applying *Pecan Groves*, held "*that creditors do not have standing to challenge other creditors' alleged violations of the automatic stay* in an adversary action before the bankruptcy court…" *Id.* (emphasis added). SFR submits that the Ninth Circuit will likely apply the precedents cited by SFR here to rule in line with its prior unpublished decision in *Franck*. Indeed, lower federal courts in the Ninth Circuit continue to apply *Pecan Groves* vigorously in denying creditor claims of standing to enforce the automatic stay. *See, e.g., In re Layfield & Barrett, APC*, 2018 WL 1935801, *1-2 (Bankr. C.D. Cal. Apr. 23, 2018) (applying *Pecan Groves* and recognizing that in instances where a creditor seeks to enforce the automatic stay generally there is no such standing on the part of the creditor).

SFR now closes its argument in this section as it began by calling the Court's attention to the following established legal principle, "the debtor and the trustee are the only *legal* beneficiaries of the automatic stay." *In re Yan*, 703 Fed. Appx. at 583. The Bank's lack of standing is now manifest. This renders the District Court's decision void for lack of subject matter jurisdiction due to the Bank's lack of standing to assert violations of the automatic stay under governing Ninth Circuit law. The decision of the District Court below should, therefore, be reversed.

C. The Bank's prosecution of alleged stay violations solely for Its own benefit bars the Bank's standing claims and renders the Judgment below void.

In *Globe*, the Ninth Circuit denied standing to enforce the automatic stay to entities that raised stay violation claims for their own benefit and as outsiders to, not creditors of, the bankruptcy estate. *See* 867 F.2d at 560. In identical fashion to the Bank's conduct here, the outsider entities in *Globe* invoked the bankruptcy stay solely for their own, not the bankruptcy estate's, benefit. *Id.* at 559-560. The Ninth Circuit then disregarded alleged claims to creditor status, stating, "By seeking to obtain title to the property free and clear of Globe's estate, it is obvious that the appellants are not bringing this action as creditors of Globe's estate." *Id.* at 560.

With such self-serving conduct plainly in its sights, the Ninth Circuit viewed stay enforcement efforts by outsiders with a jaundiced eye:

> The appellants' cause of action under section 362 *is a disingenuous attempt to use the Bankruptcy Code to their advantage*. The appellants' request for relief shows them to be aggrieved property owners with interests adverse to the estate, not creditors. Whatever argument may be made for extending the protection of section 362 to creditors, *it clearly does not confer any rights to outside parties*…The appellants have attempted to use section 362 *as a weapon against the estate*.

Id. (emphasis added).

SFR respectfully submits that the principles enunciated in *Globe* should be applied with even greater force here. The Bank pursued stay violation claims in the

District Court below to both (i) evade the application of established federal law that denies the Bank standing to bring such claims and (ii) to collaterally attack the Bankruptcy Court's Annulment Order.

Indeed, what makes the Bank's failure here all-the-more inexcusable was the fact that it was squarely presented with an opportunity to bring SFR's alleged stay violations to the attention of the Bankruptcy Court in connection with the Bankruptcy Court's entry of the Annulment Order. And yet, for all of the assignments of error on the Bankruptcy Court's part set forth in the RAB, the Bank did not summon the courage to bring a countermotion to enforce the automatic stay in the Bankruptcy Court. The Bank failed to do so precisely because it knew it lacked standing to do so. The Bank, therefore, took its claims to what it perceived to be a more favorable forum: the District Court.

Not only has the Bank engaged in impermissible forum shopping; but, it also invited the District Court below, a court of general jurisdiction with heavy civil and criminal dockets, to commit reversible error because it is not a specialized court, like the Bankruptcy Court. The Bank undoubtedly knows that the Bankruptcy Court would not have been detained long in dismissing such standing claims in derision. After all, the Bankruptcy Court entered the Annulment Order. The foregoing discussion demonstrates why the Bank needed to find a more favorable forum to

which it could take its alleged stay violation claims because such claims would have fallen on deaf ears before the Bankruptcy Court.

Making matters worse still for the Bank, here the Bank does not even purport to act in the capacity of a creditor of the bankruptcy estate or even put on the pretense that the bankruptcy estate and general creditors stand to benefit in any way from the Bank's efforts. This course of conduct brings into sharp relief the fact that the Bank has cast off its status as a creditor of the bankruptcy estate and, along with it, any potential claim to have standing to enforce the automatic stay—a position that was already foreclosed by the governing authorities discussed by SFR above.

This Court should, therefore, find that the Bank lacks standing under *Globe* to raise alleged violations of the automatic stay. The District Court's decision should therefore be reversed as having been entered in the absence of appropriate subject matter jurisdiction due the Bank's lack of standing and is, therefore, void

IV. THE ABSENCE OF UNFAIRNESS BASED ON A NON-EXISTENT STAY VIOLATION MAKES THE ASSOCIATION'S SALE OF THE PROPERTY VALID AS A MATTER OF LAW.

As SFR has already explained above, once the non-existent stay violation is severed from the District Court's analysis of commercial reasonableness, the Bank is left without the necessary additional factor it needs to establish to challenge the Association's sale of the Property successfully for lack of commercial

reasonableness. *See, e.g., Nationstar Mtg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, ___ Nev. ___, 405 P.3d 641, 642 (Nev. 2017). The Bank's alleged inadequacy of the sales prices realized for the Property, standing alone, is insufficient to challenge the Association's sale of the Property. The decision of the District Court should be reversed on this basis, as well.

CONCLUSION

For all the foregoing reasons, the District Court's decision below should be reversed and remanded with instruction to enter summary judgment in favor of SFR.

DATED this 28th day of May 2018.

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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, and is contains 6983 words in 29 pages.
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 21st day of May 2018.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 28th day of May 2018. 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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Case Category Civil Appeal
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Electronic notification will be sent to the following:

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Dated this 28th day of May 2018.

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