IN THE SUPREME COURT OF THE STATE OF NEVADA

SFR INVESTMENTS POOL 1, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND COPPER RIDGE COMMUNITY ASSOCIATION,

Appellants,

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,

Respondents.

Case No. 74532

District Court No. A-13-678214-C
A-13-688754-C

APPEAL
From the Eighth Judicial District Court
The Honorable Joanna S. Kishner

RESPONDENT'S SUR-REPLY BRIEF

Andrew M. Jacobs (Nevada Bar No. 12787)
Kelly H. Dove (Nevada Bar No. 10569)
Holly E. Cheong (Nevada Bar No. 11936)
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169
Telephone: (702) 784-5200
Facsimile: (702) 784-5252
ajacobs@swlaw.com
kdove@swlaw.com
hcheong@swlaw.com
Attorneys for Respondent 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

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Introduction

SFR argues for the first time in its Reply Brief that U.S. Bank lacked "standing" to reference the fact that the HOA foreclosure sale occurred while a bankruptcy stay was in place. SFR's brand new argument claims that the district court lacked subject matter jurisdiction to consider that fact as part of its commercial reasonableness analysis.

But SFR's argument fails before it even begins, because SFR's argument has nothing to do with "standing" or subject matter jurisdiction. SFR's argument is really just another argument going to the merits of its appeal, and because it failed to raise the argument in its Opening Brief, SFR's new argument is waived. And even if it were not waived, SFR's argument still fails, because U.S. Bank did not ask the district court to enforce any right under bankruptcy law—instead, U.S. Bank simply asked the district court to follow Nevada law in considering all the facts to determine if the HOA foreclosure sale was commercially reasonable. The sale was not reasonable, even considering SFR's new argument, and this Court should thus affirm.

Argument

I. SFR's New Argument Fails Because It Rests Entirely on the False Premise That Its Argument Goes to Constitutional "Standing."

SFR characterizes its new argument as challenging U.S. Bank's "standing." Reply Br. 3–4. According to SFR, U.S. Bank lacked "standing" to assert a "substantive right" under bankruptcy law—"namely, that the [HOA's foreclosure] sale was void based on an alleged violation of the automatic stay." Reply Br. 5. SFR argues that, because U.S. Bank has no "standing," the district court had no subject matter jurisdiction, and thus its order voiding the HOA foreclosure sale is invalid. Reply Br. 5–14. But SFR's argument is based on the false premise that its argument goes to U.S. Bank's standing. It does not. SFR's argument is nothing more than an additional argument going to whether the district court properly found the HOA's foreclosure sale unreasonable.

This Court already explained that SFR's argument does not really challenge standing in *SFR Investments Pool 1, LLC v. Green Tree Servicing, LLC*, 385 P.3d 582 (Nev. Oct. 18, 2016) (unpublished). There, this Court declined to consider nearly the exact same argument SFR raises in its Reply Brief here. *Id.* at *1. This Court expressed confusion

in SFR framing this argument as one of "standing," when there was no doubt that the "respondent clearly had standing under Nevada law to argue that the HOA sale was invalid as a means of protecting its deed of trust." *Id.* (citing *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986); *Szilagyi v. Testa*, 99 Nev. 834, 838, 673 P.2d 495, 498 (1983)). This Court further noted that it was unclear how federal bankruptcy law affects a party's standing to challenge a foreclosure sale in state court. *Id.* Put differently, the district court has subject matter jurisdiction to hear a quiet title action brought by a party with an interest in the subject property, and federal bankruptcy law has no bearing on "standing in a state court quiet title action." *Id.*

And, this Court's analysis in *Green Tree Servicing, LLC* comports with the general principles of standing. The main purpose of standing is to ensure that parties before a court have "an actual justiciable controversy," as opposed to some hypothetical issue for which the parties seek an advisory opinion. *See In re Amerco Derivative Litig.*, 127 Nev. 196, 213, 252 P.3d 681, 694 (2011). SFR cannot reasonably argue that the parties here do not have an actual, justiciable controversy—the parties both claim title to the same property, which is

a quintessential controversy between parties requiring court resolution. SFR's argument thus has nothing to do with "standing" at all.

This Court was correct in *Green Tree Servicing, LLC*, and the same analysis applies here. U.S. Bank's "standing" in this case has nothing to do with bankruptcy law because, contrary to SFR's newly-raised argument, U.S. Bank has not asserted any "substantive right" under bankruptcy law. Reply Br. 5. Rather, U.S. Bank has challenged the HOA's foreclosure sale, and U.S. Bank undoubtedly has standing to challenge that sale to protect its deed of trust. *Bryan*, 102 Nev. at 525, 728 P.2d at 444; *Szilagyi*, 99 Nev. at 838, 673 P.2d at 498. Because SFR has not shown (or even argued) that U.S. Bank does not have standing to protect its deed of trust by challenging the HOA foreclosure sale, SFR has not in fact challenged U.S. Bank's "standing" at all. *See Green Tree Servicing, LLC*, 385 P.3d at *1.[1]

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[1] SFR's reliance on the Court of Appeals' decision in *Wallace v. Smith*, No. 70574, 2018 WL 1426396 (Nev. Ct. App. Mar. 5, 2018) is misplaced. According to SFR, "*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." Reply Br. 3–4 (emphasis added) (citing *Wallace*, 2018 WL 1426396, at *3 (Tao, J., concurring)). SFR is wrong in four ways. First, "this Court" did not decide *Wallace*, the Court of Appeals did, and it does not bind this Court. Second, SFR cites a concurring opinion, not the majority opinion, and the majority found no issue with standing in

II. SFR Waived Its New Argument by Not Raising It in Its Opening Brief.

Arguments not raised in an opening brief are generally waived. *Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 671 n.7, 262 P.3d 705, 715 n.7 (2011). By waiting until the Reply Brief to raise this new argument, SFR has waived it. *Id.*

SFR anticipates the waiver issue and tries to paint the issue as one of general "standing," which is a non-waivable issue. Reply Br. 3–4. But a party cannot get around an otherwise waived issue by labeling that issue "standing"—this Court decides cases based on substance, not labels. *Otak Nev., L.L.C. v. Eighth Jud. Dist. Ct.*, 129 Nev. 799, 809, 312 P.3d 491, 498 (2013). Appellants often try to avoid waiver by characterizing a waived argument as going to "standing," and courts routinely reject this tactic. *See, e.g.*, *Ensley v. Cody Res., Inc.*, 171 F.3d 315, 320 (5th Cir. 1999) (rejecting an appellant's attempt to frame an

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resolving the case. *Wallace*, 2018 WL 1426396, at *2. Third, *Wallace* is entirely distinguishable, because the case involved a breach of contract case brought by non-party to the contract, *id.* at *3, whereas here U.S. Bank holds the deed of trust upon which it challenges the HOA foreclosure sale. In other words, U.S. Bank is not seeking to protect some other party's deed of trust, which was the issue the concurrence focused on in *Wallace*. Fourth, SFR's argument fails, regardless of *Wallace*, as discussed above.

issue as one of constitutional standing when the issue was really whether a certain party was "the real party in interest" under Fed. R. Civ. P. 17(a)).

As noted above, SFR's argument does not challenge U.S. Bank's standing at all—it is merely another argument SFR could have and should have raised in its Opening Brief to challenge the district court's decision that the HOA foreclosure sale was commercially unreasonable. Because the argument is not based on "standing," it is waivable. And because SFR failed to raise the argument in its Opening Brief, SFR indeed waived it. *Francis*, 127 Nev. at 671 n.7, 262 P.3d at 715 n.7.

III. Even If SFR's New Argument Were Not Waived, It Still Fails Because U.S. Bank Has Not Asserted Any "Right" Under Bankruptcy Law, Nor Did the District Court Exceed Its Jurisdiction.

Finally, to the extent this Court were to consider the merits of SFR's new Reply Brief argument, it still fails badly because it still depends on faulty premises.

First, SFR's argument misconstrues what U.S. Bank argued below and what the district court ultimately did. SFR claims that U.S. Bank "disdain[ed]" the bankruptcy court's annulment order and that U.S. Bank asked the district court to "reject" it. Reply Br. 10. But SFR cites

to nothing in the record showing U.S. Bank made any such request. And that is because U.S. Bank did not. Instead, U.S. Bank simply stated the undisputed facts that, at the time of the foreclosure sale, the bankruptcy stay was in place, and the HOA never sought permission from the bankruptcy court to go through with the sale despite the stay. Answering Br. 1. While the bankruptcy court's annulment order means that a creditor cannot file a claim in bankruptcy court to void a transaction that occurred in violation of the stay, that has exactly nothing to do with what factors a state district court may consider in deciding the unrelated issue of whether a sale was commercially unreasonable under state law at the time it occurred.

Second, U.S. Bank violated no "standing" or federalism principles in pointing the district court to the facts surrounding the HOA foreclosure sale, including that the sale occurred when the bankruptcy stay was in place. As noted above, the issue is not about U.S. Bank's "standing" to raise these facts, but rather whether the district court properly considered them. Nothing in SFR's newly raised "standing" argument goes to that more fundamental issue, and indeed, this Court has already indicated that the district court may consider such facts

without running afoul of Ninth Circuit bankruptcy law. *See Green Tree Servicing, LLC*, 385 P.3d at *1. Thus, this Court should reject SFR's argument that the district court somehow had no subject matter jurisdiction to consider simple facts about which there is no dispute.

Conclusion

SFR raises no real concern about "standing" or subject matter jurisdiction. In the end, SFR simply seeks to raise a new argument in its Reply Brief that it should have raised in its Opening Brief and hopes to avoid the obvious waiver problem by labeling its argument as going to "standing." This SFR cannot do. This Court should ignore or reject SFR's new Reply Brief argument and affirm the district court.

DATED: October 31, 2018

SNELL & WILMER L.L.P.

/s/ Kelly H. Dove

ANDREW M. JACOBS (NV Bar No. 12787)
KELLY H. DOVE (NV Bar No. 10569)
HOLLY E. CHEONG (NV Bar No. 11936)
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169
Attorneys for Respondent 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

CERTIFICATE OF COMPLIANCE

I hereby certify that the **RESPONDENT'S SUR-REPLY BRIEF** complies with the typeface and type style requirements of NRAP 32(a)(4)-(6), because this brief has been prepared in a proportionally spaced typeface using a Microsoft Word 2010 processing program in 14-point Century Schoolbook type style. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because it contains approximately 1,662 words.

Finally, I hereby certify that I have read the **RESPONDENT'S SUR-REPLY BRIEF**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: October 31, 2018

SNELL & WILMER L.L.P.

/s/ Kelly H. Dove

ANDREW M. JACOBS (NV Bar No. 12787)
KELLY H. DOVE (NV Bar No. 10569)
HOLLY E. CHEONG (NV Bar No. 11936)
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169
Attorneys for Respondent 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

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On October 31, 2018, I caused to be served a true and correct copy of the foregoing **RESPONDENT'S SUR-REPLY BRIEF** upon the following by the method indicated:

☐ **BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail addresses set forth below and/or included on the Court's Service List for the above-referenced case.

☐ **BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.

☐ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below:

☒ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

/s/Ruby Lengsavath
An Employee of SNELL & WILMER L.L.P.

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