Case No. 70501

IN THE SUPREME COURT OF NEVADA

BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP, fka COUNTRYWIDE HOME LOANS, LP, a national association,

Appellant,

vs.

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

Respondent.

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APPEAL

From the Eighth Judicial District Court, Department XXI, Clark County
The Honorable VALERIE ADAIR, District Judge
District Court Case No. A-13-684501-C

RESPONDENT'S PETITION FOR REHEARING

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Respondent SFR Investments Pool 1, LLC hereby Petitions this Court for rehearing of the Opinion released on September 13, 2018: *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 134 Nev. Adv. Op. 72, 2018 WL 4403296 (Nev. Sept. 13, 2018) ("*SFR III*"). NRAP 40(b)(2).

This Court may grant review if the Court has misapprehend a material question of law or has overlooked, misapplied or failed to consider controlling authority. NRAP 40(a)(2). SFR submits that this Court misapprehended a material mixed question of fact and law in determining that there was no "instrument" which would bring a bank's attempt to make a partial payment of the Association's lien within the gambit of the recording statutes. Additionally, SFR submits that this Court misapplied NRS 116.3116(2) and therefore misapplied NRS 106.220 and NRS 111.315.[1]

SUMMARY OF THE ARGUMENT

The Court erred in finding NRS 111.315 is not applicable because there is no conveyance nor instrument as required under the statutes. However, the Court reads the definitions of these terms too narrowly in looking at the plain meaning of the text. The definitions of "discharge," "surrender," and "release" are synonymous, as set forth in Black's Law Dictionary. Further, the Court's construction of

[1] SFR limits its Petition for Rehearing to the issues raised herein.

"instrument" is also erroneously narrow. This is especially true when the definition of "conveyance" under NRS 111.010 is extremely broad in its use of instrument: "in writing . . . whatever may be its form, and by whatever name it may be known in law. . . ." Further, the very nature of the Miles Bauer letter and accompanying check meet the meaning of "instrument" as set forth in Black's. Thus, the Court erred when it determined the recording statutes do not apply to the Bank's purported "tender" and "discharge."

Finally, the Court erred on in finding that NRS 106.220 does not apply. First, the Court erred in finding that when the super-priority portion is paid, no subordination of the Association's lien occurs. In reality, subordination does occur because the rule set forth in NRS 116.3116(2) controls, not the exception to the exception to the rule. The banks have encouraged the Court to treat an association lien as two separate liens when it is not; an association has but one lien, as recognized by this Court in the *SFR* Decision.[2] Second, the Court erred in finding that a discharge occurred without the use of an instrument. Based on the on the definition adopted and relied on by the Court and for the same reasons discussed above, the Miles Bauer letter with the enclosed check constitutes an instrument.

…

[2] *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 334 P.3d 408 (2014).

I. THE COURT'S OPINION DRAWS AN UNTENABLE DISTINCTION BETWEEN THE PLAIN MEANINGS OF "DISCHARGE" AND "SURRENDER" AND CONSTRUES N.R.S. § 111.315 CONTRARY TO ITS TEXT TO AVOID ITS APPLICATION.

The Court's opinion makes clear in multiple instances that its analysis of NRS 111.315 turns on the plain meaning of the statute's text. *SFR III*, at p.8, 2018 WL 4403296, *4 (Nev. Sept. 13, 2018). "If the statute is unambiguous, *this court does not look beyond its plain language in interpreting it…By its plain text, NRS 111.315 does not apply to Bank of America's tender*." *Id.* (emphasis added). The Court's holding in this regard is in error.

The Court's conclusion here is based on an untenable distinction between the concepts of "discharge" of a lien, which the Court uses to describe the legal effect of Bank of America's presentment of a valid tender to the Association, with the "surrender" of the Association's lien, which is legally and definitionally indistinguishable from the lien's discharge. At bottom, the Court's pronouncement that a valid tender of payment discharges an Association's lien by operation of law, *Id.* at p. 10, 2018 WL 4403296, *5, cannot be squared with the Court's construction of NRS 111.315 that no "surrender" of the Association's lien took place.

Beginning with the statutory text, NRS 111.010(1) defines a conveyance as follows:

> "Conveyance" ***shall be construed*** *to embrace every instrument in writing*, except a last will and testament,

> *whatever may be its form, and by whatever name it may be known in law, by which any* estate or *interest in lands is* created, aliened, assigned or *surrendered.*

Id. (emphasis added).

At the outset, the Court will note that the Nevada Legislature's use of the term "construed" constitutes an express direction to this Court to construe the statute broadly and expansively to reach the widest set of conveyances possible consistent with the legislative aims apparent on the face of the statute. *See id.* The conclusion that the Nevada Legislature intended the statute to be construed broadly is reinforced by the statute's use of the concepts "every instrument," "whatever may be its form," and "by whatever name it may be known in law"—including alleged tenders of payment. *See id.* So, from the outset it becomes clear that the Court's cabined definition of a "conveyance" under NRS 111.010(1) cannot be reconciled with the Nevada Legislature's selection of the mandatory auxiliary verb "shall" and the legislative command embodied therein that the statute be construed broadly.

The broad construction to be given to the concept of a conveyance under NRS 111.010(1) is amplified by NRS 111.315 and its express goal of providing notice to third persons. To that end, NRS 111.315 provides as follows:

> *Every conveyance* of real property, and *every instrument of writing* setting forth an agreement to convey any real property, or *whereby any real property* ***may be affected****, proved*, acknowledged and certified in the manner prescribed in this chapter, ***to operate as notice to third***

> ***persons***, shall be recorded in the office of the recorder of the county in which the real property is situated or to the extent permitted by NRS 105.010 to 105.080, inclusive, in the Office of the Secretary of State, but shall be valid and binding between the parties thereto without such record.

Id. at (emphasis added).

NRS 111.315's use of the concepts "*Every conveyance*," "*every* instrument of writing," and "whereby *any real property may be affected*" lays to rest any argument that the N.R.S. §§ 111.010(1) and 111.315 are to be construed narrowly, as these statutes were construed in the Court's opinion. Quite the contrary. In order to effectuate the Nevada Legislature's express statutory aim of providing notice to third parties, both N.R.S. §§ 111.010(1) and 111.315 must be construed broadly to reach the widest set of transactions and conveyances possible in order to provide meaningful notice to third parties. Again, that did not happen here in two material respects.

First, the Court narrowly construed the concept of an "instrument in writing" in contravention of the Nevada Legislature's command that the statute be construed broadly. The second, and perhaps the more problematic error in statutory construction, involves the untenable distinction drawn by the Court between the plain meanings of the "discharge" of the Association's lien brought about by operation of law as a result of a valid tender with the absence of any "surrender" of the Association's lien within the meaning of N.R.S. § 111.315.

Black's Law Dictionary defines "Release" to include both "surrender" and "discharge" synonymously. *Release, Black's Law Dictionary* at 1292 (7th ed. 1999). "Release" is defined as, "1. Liberation from an obligation, duty, or demand; the act of giving up a right or claim to the person against whom it could have been enforced <the employee asked for release from the noncompete agreement>.—Also termed *discharge*; *surrender*." *Release, Id.*(emphasis in original). Black's Law Dictionary defines "discharge," in turn, to include, "1. The payment of a debt or satisfaction of some other obligation. 2. The release of a debtor from monetary obligations upon adjudication of bankruptcy; RELEASE[.]" *Discharge*, *Id.* Finally, Black's Law Dictionary defines "surrender" as follows, "2. The giving up of a right or claim; RELEASE [.]" *Surrender*, *Id.*

With the established definitions of "surrender" and "discharge" in mind, and their synonymous use in Black's Law Dictionary under the concept of "Release," the coexistence of the Court's two most pivotal legal conclusions in its opinion becomes untenable.

II. THE MILES BAUER LETTER WITH THE ACCOMPANYING CHECK ARE AN "INSTRUMENT" FOR PURPOSES OF NRS 111.010(1), 111.315 AND 106.220

This Court mistakenly determined that there was no "instrument" which needed to be recorded to effectuate the "tender" and discharge of the superpriority portion of the Association's lien. *SFR III*, at 9-10, 2018 WL 4403296, *3. In doing

so, the Court cited Black's law dictionary for the definition of "instrument," which provides, "[a] written legal document that defines rights, duties, entitlements, or liabilities, such as a statute, contract, will, promissory note, or share certificate." *See Id.* at p. 9, 2018 WL 4403296, *4 (citing *Instrument*, Black's Law Dictionary (10th Ed. 2014).[3]

But, the Miles Bauer letter, coupled with the accompanying payment instrument that collectively form the basis of Bank of America's alleged tender, purport to define the rights, duties, and liabilities of the Association and Bank of America through Bank of America's proffered unilateral contract. Judged against the background legal rules that apply to both N.R.S. § 111.010(1) and 111.315 discussed above, such a cabined and narrow definition cannot be reconciled with the Nevada Legislature's command that these statutes be construed broadly to effectuate their collective purpose of providing notice to third parties. Given the Court's decision to give these two documents a legal effect upon presentment, without even requiring acceptance—discharge of the superpriority portion of the lien as a matter of law—they fall squarely within the definition of "instrument."

[3] The first time any reference to whether the letter and check constituted an "instrument" was in the Bank's Reply Brief, to which SFR had no opportunity to address. The Court of Appeals Order did not address the issue of recording or "instrument," thus, SFR did not directly address the "instrument" issue it in its Petition. The next time "instrument is addressed is in the Bank's Answer to the Petition which, again, SFR had no opportunity to address.

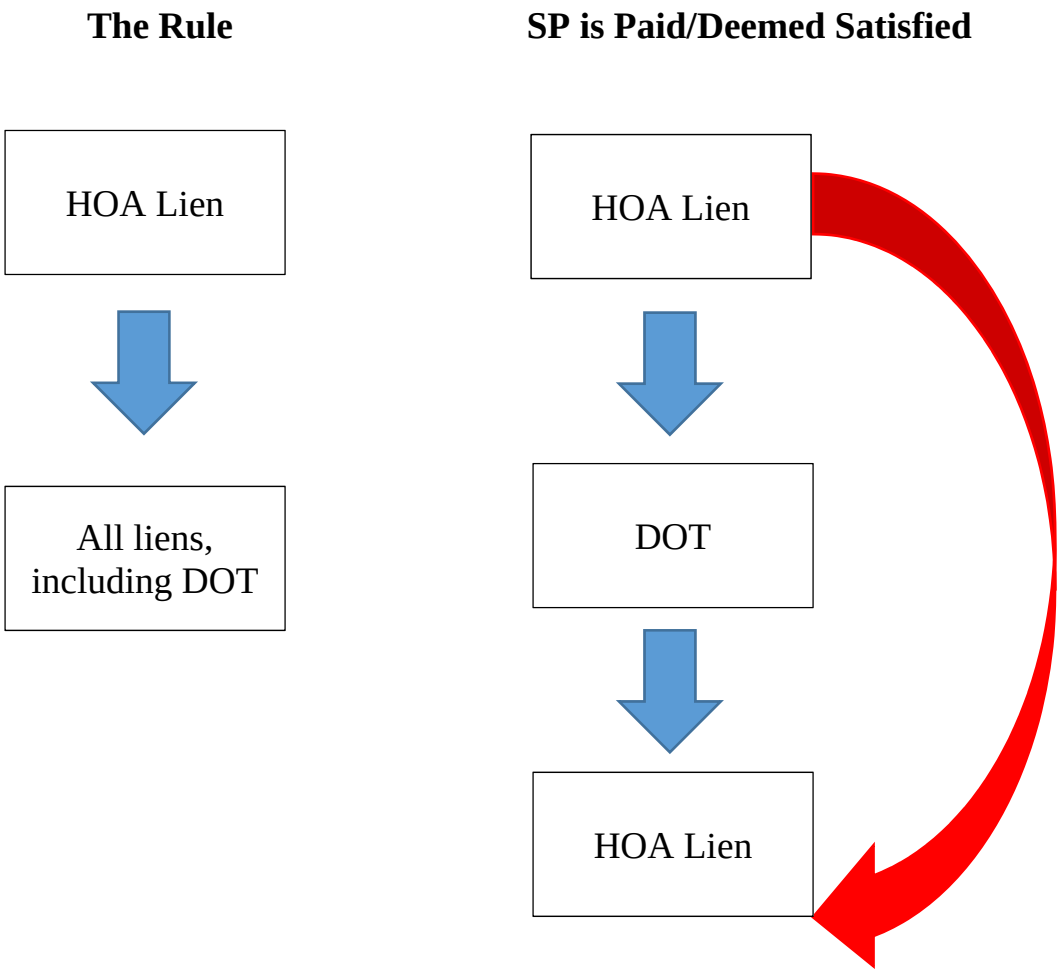
For these reasons, the Court's decision with respect to what constitutes an "instrument" is in error, as well. This is equally true for the documents being an "instrument" the recording requirements of NRS 106.220, as to subordination.

III. SUBORDINATION DOES OCCUR, THEREFORE NRS 106.220 APPLIES

As this Court previously interpreted NRS 116.3116, an association has "a lien" that is prior to all other liens and encumbrances on the unit." *SFR Investments Pool 1, LLC v. U.S. Bank*, 130 Nev. 742, 745, 334 P.3d 408, 410 (2014) (citing NRS 116.3116(2)). This is the rule. The Legislature then carved out a narrow exception to the rule for a first security interest, stating "except: … (b) [a] first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent. . . ." *Id.* (citing NRS 116.3116(2)(b)). As this Court noted, "[i]f subsection 2 ended there, a first deed of trust would have complete priority over an HOA lien." *Id.* But, NRS 116.3116(b) provides an exception to that exception, namely, the Association's lien is prior to the first deed of trust to the extent of any maintenance and nuisance/abatement charges incurred and "to the extent of the assessments for common expenses…which would have become due… during the nine months immediately preceding institution of an action to enforce the lien." *Id.* (citing NRS 116.3116(b)). This is the exception to the exception.

The error in this Court's decision is the Court has made the exception to the exception the rule. In other words, the Court has treated the Association as having two separate liens, when the law provides the Association has but one lien. Below is an illustration of how the rule operates and what happens in relation to the HOA lien when the super-priority portion is fully paid or deemed satisfied.

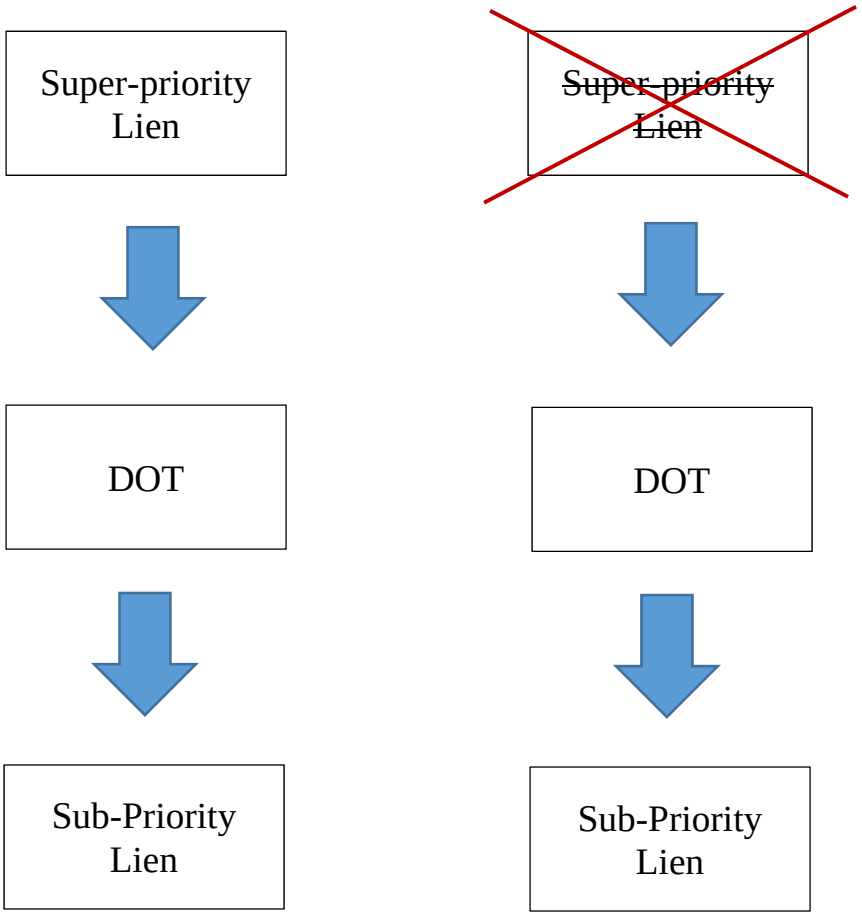
DIAGRAM NO. 1[4]



[4] For purposes of this brief, the diagram does not reflect the exceptions to the rule found in 116.3116(2)(a) and (c) as they are not implicated here.

In *SFR III*, however, as well as many other unpublished orders,[5] while the Court uses the correct terminology for an association lien, referring to the superpriority *portion*, its application treats the association as having two liens, rather than one, which is illustrated bellow.

DIAGRAM NO. 2:



[5] *BAC Home Loans Servicing, LP v. Aspinwall Court Trust*, Case No. 69885, 422 P.3d 709 (Nev. Jul. 20, 2018)(unpublished disposition), *Ferrell Street Trust v. JPMorgan Chase, N.A.*, Case No. 66547, 2018 WL 132872 (Nev. Jan. 17, 2015)(unpublished disposition).

By conceptualizing the exception to the exception as the rule, it allowed this Court to incorrectly find that Bank of America's tender did not invoke NRS 106.220's recording requirements. *See SFR III*, at 10, 201.) In other words, this Court found no change in priority occurred because of how it was conceptualizing the super-priority portion of the lien as a separate lien in and of itself, and therefore any payment of this lien simply acted as a discharge, rather than a subordination of the Association's lien. (*See* Diagram No. 2). But this is not what happens when the super-priority portion is satisfied. What really happens is the Association's lien is subordinated to the deed of trust. (*See* Diagram No. 1). With Diagram No. 1 in mind, it is plain to see how NRS 106.220 does apply. Specifically, NRS 106.220 states, "[a]ny instrument by which any…lien upon or interest in real property is subordinated or waived as to priority, must…be recorded in the office of the recorder of the county in which the property is located…The instrument is not enforceable…unless and until it is recorded." As illustrated by Diagram No. 1, it is readily apparent that when the super-priority portion is paid, the Association's lien moves from its superior position to one of a subordinate position. It is this act of subordination that NRS 106.220 mandates recording.

IV. BECAUSE THE DISCHARGE (RELEASE, SURRENDER) OF THE SUPERPRIORITY PORTION OF THE LIEN, RESULTING IN SUBORDINATING THE ASSOCIATION'S LIEN TO THE FIRST DEED OF TRUST, WITHOUT RECORDING IT IS UNENFORCEABLE AGAINST SFR, A BONA FIDE PURCHASER FOR VALUE

In *SFR III*, the Court determined that SFR's status as a BFP was irrelevant because the sale as to the superpriority portion of the lien was "void." *SFR III* at 13, 2018 WL 4403296, *6. However, as set forth supra, the instruments which discharge the lien and ultimately subordinate the Association's lien must be recorded to enforce the action, especially against a third party.[6] NRS 111.315 states that "Every . . . instrument of writing . . . whereby any real property may be affected . . . to operate as notice to third persons, shall be recorded in the office of the recorder of the county in which the real property is located. . . ." NRS 111.320 provides that recording of the conveyance or instrument defeats bona fide purchaser status. NRS 111.325 provides, however, that the failure to record makes the conveyance "**void** as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real property, or any portion thereof, where his or her own conveyance shall be first duly recorded." NRS 111.325 (emphasis added). Thus, without recording the discharge of the superpriority portion of the association lien, the Bank

[6] SFR raised this issue in its Answering Brief on Appeal at pp. 13-16 and 50-52 and in its Petition for Review at pp. 18-20.

cannot enforce the effect of that act against third-party purchasers at foreclosure sales, like SFR.

Similarly, NRS 106.220(1) provides that a recorded instrument by which a lien or interest in real property is subordinated "operates as constructive notice of the content thereof to all persons." Absent recording, however, "[t]he instrument **is not enforceable** under this chapter or chapter 107 of NRS unless and until it is recorded." NRS 106.220(1)(emphasis added).

Applying the BFP doctrine in "tender" cases is consistent with *Shadow Wood HOA v. N.Y. Cmty. Bancorp*, 132 Nev. ___, 366 P.3d 1105 (2016), wherein this Court recognized the BFP doctrine and the need to consider the harm to a BFP in crafting relief when there was a purported "tender." *See id*. at 1115-1116. Accordingly, the Court should not offer the Bank safe harbor when it chose to keep the act of its discharge, resulting in the subordination of the Association's lien, secret and allowed the sale to a third-party without notice. The Court erred in determining that recording and BFP doctrine were irrelevant to the purported "tender."

CONCLUSION

Based on the foregoing, this Court should grant rehearing on the issues of recording, including what constitutes an instrument, and on the relevance of BFP status based on the recording statutes.

DATED this 1st day of October, 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 40(b)(3) because, excluding the pages of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, is 21 pages long, and contains 2,815 words.
3. I hereby certify that I have read this 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 19th day of June, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 1st day of October, 2018. Electronic service of the foregoing **Respondent's Petition for Rehearing** shall be made in accordance with the Master Service List as follows:

Docket Number and Case Title:	70501 – BANK OF AMERICA, N.A., v. SFR INV.'S POOL 1, LLC
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Electronic notification will be sent to the following:

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Dated this 1st day of October 2018.

/s/Jacqueline A. Gilbert
An employee of KIM GILBERT EBRON