IN THE SUPREME COURT OF THE STATE 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, Respondent.	CASE NO. 70501

APPEAL

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

BRIEF OF AMICUS CURIAE OF TRP FUND IV, LLC, IN SUPPORT OF RESPONDENT SFR INVESTMENTS POOL 1, LLC'S PETITION FOR REHEARING

JOHN HENRY WRIGHT
Nevada Bar No. 6182
CHRISTOPHER B. PHILLIPS
Nevada Bar No. 14600
THE WRIGHT LAW GROUP, P.C.
2340 Paseo Del Prado, Suite D-305
Las Vegas, NV 89102
Telephone: (702) 405-0001
Facsimile: (702) 405-8454
Email: john@wrightlawgroupnv.com
chris@wrightlawgroupnv.com
Attorney for Amicus Curiae
TRP FUND IV, LLC

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and/or entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusals.

1. Attorneys John Henry Wright, Esq., Christopher B. Phillips, Esq., and Amicus Curiae TRP FUND IV, LLC, state that TRP FUND IV, LLC is a Nevada Limited Liability Company, who's parent corporation is TWINROCK PARTNERS, LLC, a Nevada Limited Liability Company. I certify that there are no publicly held companies owning 10% or more stock or other interest in TRP FUND IV, LLC.

2. The undersigned counsel is the only counsel expected to appear in this Court;

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

3. The Amicus Curiae is not using a pseudonym.

DATED this 8th day of October, 2018.

/s/ John Henry Wright
JOHN HENRY WRIGHT
Nevada Bar No. 6182
CHRISTOPHER B. PHILLIPS
Nevada Bar No. 14600
THE WRIGHT LAW GROUP, P.C.
2340 Paseo Del Prado, Suite D-305
Las Vegas, NV 89102
Telephone: (702) 405-0001
Facsimile: (702) 405-8454
Email: john@wrightlawgroupnv.com
chris@wrightlawgroupnv.com
Attorneys for Amicus Curiae
TRP FUND IV, LLC

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

TABLE OF CONTENTS

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

TABLE OF AUTHORITIES

CASES:

---

[1]In order to avoid confusion with other similarly captioned cases, the matter of *Bank of America, N.A. Successor by Merger to BAC Home Loans Servicing, LP, F/K/A Countrywide Home Loans Servicing, LP v. SFR Investments Pool 1, LLC,* Nevada Supreme Court Case No. 70501 (Sept. 13, 2018) is referred to as "*Diamond Spur*" through this brief.

STATUTES:

COURT RULES:

OTHER:

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

I. INTERESTS OF THE AMICUS CURIAE

TRP purchased properties at HOA non-judicial foreclosure sales. Nearly all of the properties are the subject of litigation in Nevada. Some are currently on appeal before this Court. In at least one case (Nevada Supreme Court Case No. 73669), Bank of America maintains that an attempted tender discharged the superpriority portion of the HOA's lien, even though the attempted tender was never recorded. In such case, the property was sold to an innocent third party that had no knowledge of the lender's tender or the Association's rejection thereof. The present petition for rehearing by SFR presents similar issues and has similar facts, and a decision by this Court will have a significant impact on TRP. Because this Court's decision will have a significant impact on the interests of TRP, Amicus Curiae respectfully request this Court allow the filing of this brief.

DATED this 8th day of October, 2018.

/s/ John Henry Wright
JOHN HENRY WRIGHT
Nevada Bar No. 6182
CHRISTOPHER B. PHILLIPS
Nevada Bar No. 14600
THE WRIGHT LAW GROUP, P.C.
2340 Paseo Del Prado, Suite D-305
Las Vegas, NV 89102
Telephone: (702) 405-0001
Facsimile: (702) 405-8454
Attorneys for Amicus Curiae
TRP FUND IV, LLC

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

II. ARGUMENT

A. Failure to Record Tender is Fatal

In *Bank of America, N.A., Successor by Merger to BAC Home Loans, LP, F/K/A Countrywide Home Loans Servicing, LP v. SFR Investments Pool 1, LLC* , this Court incorrectly opined that:

> [t]endering the superpriority portion of an HOA lien does not create, assign, or surrender an interest in land. Rather, it *preserves* a pre-existing interest, which does not require recording.

134 Nev. Adv. Op. 72 at *9 (Nev. Sep. 13, 2018)[2] In drafting Chapter 116, the Legislature specifically incorporated the law of real property. NRS 116.1108 states:

> The principles of law and equity, including ... the **law of real property** ... supplement the provisions of this chapter, except to the extent inconsistent with this chapter.

(Emphasis added).

i. Tender does not "Preserve" a Priority Position. Tender Results in a Change in Priority that must be Recorded

This Court's pronouncement that a tender "preserves" a pre-existing interest is not correct, as this Court failed to consider priority. In *SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.,* 334 P.3d 408 (Nev. 2014), this Court explained:

> NRS 116.3116(2) does not speak in terms of payment priorities. It states that the HOA 'lien ... is *prior to'* other liens and encumbrances *'except* ... [a] first security interest,' then adds that, 'The lien is *also prior* to [first] security interests' to the extent of nine months of unpaid HOA dues and maintenance and nuisance-abatement charges.

---

[2] Referred to hereinafter as "*Diamond Spur."*

SFR, 334 P.3d at 412 (emphasis in original). Moreover, NRS 116.3116 plainly and repeatedly says that "[a] lien under this section *is prior* to all other liens..." (NRS 116.3116(2)(emphasis added)), and that "[t]he lien is *also prior* to all security interests..." (NRS 116.3116(2)(c)(emphasis added). Thus, it cannot be the case that a tender preserves a pre-existing lien position.

Because the HOA's lien is a true priority lien, the order of lien priority is as follows: (1) HOA's super-priority lien, (2) First Deed of Trust, (3) subpriority lien, (4) Second Deed of Trust, and so on. When a bank tenders the superpriority portion of the lien, its is not to preserve its second position interest in the property - that would do it no good. Instead, the bank's tender operates to move the HOA's lien out of first position, such that the Bank's first deed of trust becomes the first position encumbrance on the property.

NRS 106.220(1) provides as follows:

> Any instrument by which any mortgage or deed of trust of, lien upon or interest in real property is subordinated or waived as to priority, must ... be recorded... The instrument is not enforceable ... unless and until it is recorded.

In the absence of a valid tender, the HOA's superpriority lien remains in first priority position. By tendering the superpriority portion of the lien, the bank's existing first deed of trust changes priority, which necessarily means that the bank's interest was not preserved, but rather it was elevated from second position to first

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

position and the HOA's superpriroty lien was lowered (subordinated) from first position to second position. (In fact, the HOA lien is actually assigned to the bank as discussed *infra*.) Because of this change in priority, any such tender must be recorded pursuant to NRS 106.220 in order to be effective. Otherwise, a subsequent purchaser may come along, purchase the property based on the reasonable understanding that the first deed of trust was extinguished by the HOA foreclosure sale, only to later find out during litigation that the bank tendered the superpriority; and despite all public records indicating otherwise, the first deed of trust had become the first encumbrance on the property and was therefore not extinguished. To say that a tender preserves a *second position* ignores the effect and purpose of tendering altogether - to reverse the position of the HOA's lien to the Bank's so the Bank's lien cannot be extinguished.

ii. By Virtue of Equitable Subrogation, the HOA's Superpriority lien is conveyed to the Bank, thus Requiring Recording[3]

"[E]quitable subrogation arises when one party has been compelled to satisfy an obligation that is ultimately determined to be the obligation of another." *American*

[3] This argument is adopted from Bank of America, N.A.'s Answering Brief in *Telegraph Rd Trust v. Bank of America, N.A.,* ("BANA") Nevada Supreme Court Case No. 67787 (Nev. 2016) wherein BANA argued in support of its equitable subrogation, and won its argument before this Court. Thus, any argument by BANA in opposition to subrogation would be all together disingenuous and barred by the doctrine of judicial estoppel. *See Brock v. Premier Trust, Inc., (In re Frei Irrevocable Trust),* 133 Nev. 8, 390 P.3d 646 (Nev. 2017).

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

Surety Co., v. Bethlehem National Bank, 314 U.S. 314, 317 (1941); *AT&T Technologies, Inc., v. Reid*, 109 Nev. 592*, 595*-96 (1993). This doctrine applies when one person, not acting as a mere volunteer pays the debt of another. *Han v. U.S.* , 944 F.2d 526, 529 (9th Cir. 1991).

This Court first recognized the doctrine of equitable subrogation more than 100 years ago in *Laffranchini v. Clark*, 39 Nev. 48, 153 P. 250 (1915). The *Laffranchini* Court summarized equitable subrogation as follows:

> Subrogation is, in point of fact, simply a means by which equity works out justice between man and man. Judge Peckham says, in *Pease v. Egan,* 131 NY 262, 30 NE. 102, that it is a remedy which equity seizes upon in order to accomplish what is just and fair as between the parties'; and the courts incline rather to extend than to restrict the principle, and the doctrine has been steadily growing and expanding in importance.

Laffranchini, 39 Nev. at 252. In *Laffranchini*, this Court explained that the remedy of equitable subrogation is to be broadly applied to "every instance in which one party pays a debt for which another is primarily liable, and when in equity and good conscience should have been discharged by the latter. *Id.*

This Court later gave clarity to the effect of equitable subrogation on lien priority:

> **"[e]quitable subrogation permits 'a person who pays off an encumbrance to assume the same priority position as the holder of the previous encumbrance.'"**

Houston v. Bank of America Fed. Sav. Bank, 119 Nev. 485, 488, (2003) (emphasis

added). The fact that subrogation allows a party to "assume the same priority position" unquestionably indicates a change in priority, which again, must be recorded pursuant to NRS 106.220 as discussed *supra*.

Equitable subrogation is thus a remedy designed to avoid a person or entity from receiving an unearned windfall at the expense of another. "Preservation" of a lender's lien by way of tender (*see Diamond Spur*) creates a situation where a lender's deed of trust, which is the second encumbrance on the property, survives a foreclosure sale. However, when that is at the expense of a subsequent purchaser who purchased the property absent any knowledge of the unrecorded and undisclosed tender, this scenario creates an unearned windfall for the lender and an inequitable result for the unknowing purchaser. Unquestionably, when a lender pays the superpriority portion of the lien, the lender becomes subrogated to the rights of the Association and assumes the same priority position as the HOA. *See Houston*, *supra*.

Equally as important as the shift in priority is the transfer of the security interest in the property itself. More specifically, the lien is not extinguished, but assigned. A subrogated claim is not diminished or extinguished by the subrogation; it is merely taken over by another who stands in the place of the original claimant. *Pep'e v. McCarthy*, 249 A.D.2d 286, 672 N.Y.S.2d 350 (2d Dep't 1998). Payment

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

by the guarantor does not create a new debt by extinguishing the original debt, rather the payment preserves the original debt by substituting the guarantor for the creditor, i.e., the payment operates as a conveyance. *Putnam v. C.I.R.*, 352 U.S. 82 (1956).

Under Nevada law a conveyance is defined as follows:

> "Conveyance" shall ... embrace **every instrument** in writing... by which any estate or **interest in lands is created, alienated, assigned** or surrendered.

NRS 111.010(1) (emphasis added).

This Court has explained the practical effect of subrogation as follows:

> The practical effect of equitable subrogation is a revival of the discharged lien and underlying obligation and **assignment to the payor or subrogee**, **permitting the subrogee to enforce the seniority of the satisfied lien against junior lien holders.**

Am. Sterling Bank v. Johnny Mgmt. LV, Inc., 126 Nev. 423, 429, 245 P.3d 535, 539 (2010). Clearly, the assignment of a security interest (lien) in real estate, is a conveyance under Nevada law. Conveyances must be recorded to be effective against subsequent purchasers, or else they are void. NRS 111.325 states:

> Every conveyance of real property within this State hereafter made, which shall not be recorded as provided in this chapter, shall be 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.

The bank's tender, in order to have any legal effect on the purchaser at an HOA auction, must have been recorded prior to the purchaser's foreclosure deed.

The banks may argue that subrogation requires that the entire obligation (lien)

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

to be paid. Lenders often point to the Restatement (Third) of Mortgages Section 7.6 which explains that the whole debt must be paid off in order to get subrogation, otherwise there will be the problematic situation of split priorities in the lien. However, this argument fails because the HOA lien is already split into two portions. This Court recognized in *SFR*, 334 P.3d 408, that the HOA lien is split into two separate parts that can be enforced separately.

Here, we have a recognized split lien to begin with, so subrogation will not lead to the undesirable split lien situation. The fact that there is a separate mechanism in the statute that provides for the payment, and extinguishment, of the superpriority lien suggests that the superpriority portion is treated as a separate lien in the context of its payment and discharge. Thus, payment of the "entire" HOA lien, consisting of the superpriority and subpriority, is not required in order for subrogation to be applicable. Under these circumstances, the extinguishment of the separate superpriority portion of the lien satisfies the rule of subrogation.

The recording of the tender, which operates as a conveyance in the form of an equitable assignment of the lien, is required because a purchaser who bids on the property is relying on the information contained in the public records when determining whether or not to bid and how much to pay for the property, *see Firato v. L.B. Tuttle*, 48 Cal.2d 136, 308 P.2d 333 (1957).

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

To this point, lenders may argue that it was the Association's responsibility to record a release of the superpriority lien. However, whether the conveyance of the superpriority is recorded by the bank or the Association is of no consequence to a purchaser; it can be recorded by anyone. The fact that nothing was recorded is the operative fact and is sufficient to protect a subsequent purchaser.

III. CONCLUSION

This Court is presented with two possibilities: Upon tender, either the HOA's superpriority lien changes position with the Bank's first deed of trust, thereby waiving or subordinating the HOA's first priority position and requiring recording under NRS 106.220; or, by way of equitable subrogation, the Bank acquires the HOA's superpriority lien via assignment (a conveyance under NRS 111.110) and the first deed of trust merges with the superpriority lien in both priority and interest, requiring recording under NRS 111.325. In either scenario, the tender - be it a check or accompanying letter, whichever instrument the bank claims gives its act of tendering legal effect - must be recorded.

/ / /

/ / /

/ / /

/ / /

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

Based on the foregoing, SFR's petition for rehearing should be granted, and this Court's decision in *Diamond Spur* should be reversed.

DATED this 8th day of October, 2018.

/s/ John Henry Wright
JOHN HENRY WRIGHT
Nevada Bar No. 6182
CHRISTOPHER B. PHILLIPS
Nevada Bar No. 14600
THE WRIGHT LAW GROUP, P.C.
2340 Paseo Del Prado, Suite D-305
Las Vegas, NV 89102
Telephone: (702) 405-0001
Facsimile: (702) 405-8454
Attorney for Amicus Curiae
TRP FUND IV, LLC

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32 (a)(4), the typeface requirement of NRAP 32(a)(5) and the type style requirement of NRAP 32(a)(6) because this brief has been prepared in proportionately spaced typeface using WordPerfect X6 in 14 point and Times New Roman.

2. I further certify that this brief complies with the page- or typed-volume limitations of NRAP 32(a)(7) because excluding the parts of the brief that are exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 2,252 words.

3. Finally, 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)(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 found.

. . .

. . .

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

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 this 8th day of October, 2018.

/s/ John Henry Wright
JOHN HENRY WRIGHT
Nevada Bar No. 6182
CHRISTOPHER B. PHILLIPS
Nevada Bar No. 14600
THE WRIGHT LAW GROUP, P.C.
2340 Paseo Del Prado, Suite D-305
Las Vegas, NV 89102
Telephone: (702) 405-0001
Facsimile: (702) 405-8454
Attorney for Amicus Curiae
TRP FUND IV, LLC

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454