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 SERVICING, LP, a National Association, Appellant, vs. SFR INVESTMENTS POOL 1, LLC, a Nevada Limited Liability Company, Respondent.	Electronically Filed Nov 01 2018 12:36 p.m. Elizabeth A. Brown Clerk of Supreme Court Case No. 70501

APPEAL

from the Eighth Judicial District Court, Department XXI
The Honorable Valerie Adair, District Judge
District Court Case No. A-13-684501-C

AMICUS BRIEF IN SUPPORT OF BANK OF AMERICA, N.A.'S RESPONSE TO PETITION FOR REHEARING

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NRAP 26.1 DISCLOSURE

The following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

- Shellpoint Mortgage Servicing
- New Penn Financial, LLC d/b/a Shellpoint Mortgage Servicing
- Shellpoint Partners LLC
- NRM Acquisition LLC
- NRM Acquisition II LLC
- New Residential Mortgage LLC
- New Residential Investment Corporation
- New Residential Investment Corporation
- Akerman LLP

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STATEMENT OF *AMICUS* PARTY'S INTEREST

Shellpoint has an interest in the outcome of the rehearing petition. Shellpoint is in the business of servicing residential mortgage loans. Shellpoint's servicing portfolio includes loans secured by real property in Nevada. Shellpoint services numerous loans that are currently in litigation over the impact of a Chapter 116 foreclosure sale. Many of these litigated loans include pre-sale tenders that were not recorded in the county recorders' offices. The outcome of SFR's rehearing petition will affect all of these loans.

ARGUMENT

The *amicus* briefs rely on the same error as SFR: that the *bona fide* purchaser rule applies even though the bank's tender made the sale void as to the superpriority component.[1] Even if the *bona fide* doctrine could apply based on NRS 111.010, NRS 111.315, NRS 111.325, or NRS 106.220, the pro-SFR *amici* fail to understand that equitable subrogation does not apply to a unique statutory lien like the superpriority lien that arises under NRS Chapter 116. Under this Court's precedent on equitable subrogation and the text of Chapter 116, superpriority liens cannot be equitably assigned from an HOA to any other party.

The pro-SFR *amici* also misconstrue Section 6.4 of the Restatement. Equitable subrogation is inapplicable because the lender is "primarily responsible"

[1] Bank of America addressed this error in its response to SFR's rehearing petition.

for paying the superpriority component. The purpose of equitable subrogation is to protect the party paying the senior encumbrance; it makes no sense turn it into a tool to enrich buyers that cannot rely on the *bona fide* purchaser doctrine.

Equitable subrogation under the Restatement (Third) of Property: *Mortgages* § 6.4 (1997) does not apply. Section 6.4 says:

> (e) A performance in full of the obligation secured by a mortgage, or a performance that is accepted by the mortgagee in lieu of payment in full, by one who holds an interest in the real estate subordinate to the mortgage ***but is not primarily responsible for performance***, does not extinguish the mortgage, but ***redeems the interest of the person performing*** from the mortgage and ***entitles*** the person performing to subrogation to the mortgage under the principles of § 7.6. Such performance may not be made until the obligation secured by the mortgage is due, but may be made at or after the time the obligation is due but prior to foreclosure.

Restatement (Third) of Property: *Mortgages* § 6.4 (1997) (emphasis added). The *amici* twist this language to argue subrogation is mandatory, attaching by operation of law. The *amici* are wrong—they incorrectly assume the superpriority portion is not "primarily payable" by the deed of trust holder, and they ignore language making clear subrogation is permissive and unnecessary in the HOA context.

1. Equitable Subrogation Does Not Apply to NRS Ch. 116 Liens

Equitable subrogation does not apply to statutory liens. *See In re Fontainebleau Las Vegas Holdings, LLC,* 289 P.3d 1199, 1208 (Nev. 2012). In *Fontainebleau*, this Court held equitable subrogation cannot apply to mechanics' liens. *Id.* at 1212. Like an HOA superpriority lien, a mechanics' lien is part of a

"specific statutory scheme whereby [the] lien is afforded priority" to further a policy of the Legislature: "to safeguard payment for work and materials provided for construction or improvements on land." *See id.* Because mechanics' liens are part of a "specific statutory scheme," this Court held they have "no place in equity jurisprudence." *Id.*

The statement in *Fontainebleau* that equitable subrogation cannot be applied against statutory liens also applies to HOA liens. This Court has noted that the split-lien system of NRS 116.3116 is "a specially devised mechanism designed to strike[] an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders." *SFR Invs. Pool 1 v. U.S. Bank, N.A.*, 130 Nev. 742, 334 P.3d 408, 412 (Nev. 2014). Equitable subrogation of the superpriority portion of an HOA lien would not advance those priorities, helping neither the HOA nor the lender while creating the confusing situation where one part of the lien was held by the HOA while the other part was held by a tendering party.

The text of Chapter 116 indicates the Legislature intended only the HOA to hold superpriority liens. *See* NRS 116.3116(1) (“[t]he ***association*** has a lien on a unit . . . .”) (emphasis added). This language is clear—only HOAs can have superpriority liens. *Id.* If equitable subrogation applied, any tendering party would end up holding an HOA superpriority lien after tendering the superpriority amount,

as the lien would be "equitably assigned." *American Sterling Bank v. Johnny Mgmt. LV, Inc.*, 245 P.3d 535, 539 (Nev. 2010). The plain language of Chapter 116 simply does not support that outcome.

2. Subrogation Does Not Apply If the Payer Is Primarily Responsible

Section 6.4(e) applies only if the payer is not "primarily responsible" for performance. Restatement (Third) of Property: *Mortgages* § 6.4(e) (1997). If the payer is "primarily responsible" for performance, tender extinguishes the lien under § 6.4(a). "'Primarily responsible' is a concept of critical importance in this section, since upon it turns the distinction between a payment that extinguishes a mortgage (Subsection (a)) and one that assigns the mortgage to the payor through subrogation (Subsection (e)). As that term is used here, primary responsibility does not necessarily imply personal liability." Restatement (Third) of Property: *Mortgages* § 6.4 at cmt. a. The *amici* assume, without explanation or justification, that the deed of trust holder is not "primarily responsible" for paying the superpriority component. The *amici's* tacit assumption fails.

The Uniform Common Interest Ownership Act, the 2013 report of the Uniform Law Commission's Joint Editorial Board for Uniform Real Property Acts, and this Court's 2014 *SFR Investments* opinion all make clear that the first deed of trust holder is primarily responsible for paying the superpriority component. *See, e.g., SFR Invst. Pool 1, LLC v. U.S. Bank N.A.*, 130 Nev. 742, 748, 334 P.3d 408,

412-13 (2014) ("'As a practical matter, secured lenders will most likely pay the 6 [in Nevada, nine, see supra note 1] months' assessments demanded by the association *rather than have the association foreclose on the unit*.'") (citing 1982 UCIOA § 3—116 cmt. 1; 1994 & 2008 UCIOA § 3—116 cmt. 2) (emphasis in original). The Court also found that "as a junior lienholder, ***U.S. Bank*** could have paid off" the superpriority lien to avert loss of its security." *Id.* at 750, 334 P.3d at 414 (emphasis added). These authorities all assume the deed of trust holder—rather than the homeowner—would pay the superpriority component because the deed of trust was at risk. The statutory language subordinating the deed of trust to the superpriority component expressly singles out the deed of trust; it is not a generally-applicable rule of priority. NRS 116.3116(2)(c) (2014). There is no basis for the *amici's* unstated but critical assumption that a deed of trust holder is not "primarily responsible" for paying the superpriority component. Assuming the Restatement applies, Section 6.4(a) would govern.

3. Equitable Subrogation is Inapplicable in the HOA Context

Even if the deed of trust holder was not "primarily responsible" for paying the suprepriority lien, nothing in the Restatement says subrogation is mandatory. Instead, subsection (f) entitles the payer to an assignment, saying it has the right to seek judicial relief ordering the assignment only if the mortgagee fails to deliver the assignment "upon reasonable request." Restatement (Third) of Property:

Mortgages § 6.4(f) (1997). The payer may invoke subrogation or request an assignment; there is nothing in the Restatement obligating it to do so.

Subrogation under § 6.4 is intended to prevent the unjust enrichment of the primary obligor. "In cases of this sort, the payor is entitled to reimbursement from whomever is primarily responsible for payment, and can enforce the mortgage against that person to aid in collection of reimbursement. Subrogation in this context helps prevent the unjust enrichment of the party who is primarily responsible for payment at the expense of the payor." Restatement (Third) of Property: Mortgages § 6.4 (1997) at cmt. g. In the HOA context, subrogation would allow the deed of trust holder to enforce its right of reimbursement by subrogating it into the position of the HOA. This is awkward, because the HOA retains a lien against the homeowner for the subpriority component. The deed of trust holder would own the superpriority lien, while the HOA would own the subpriority component—and the homeowner would presumably face simultaneous foreclosure on both. Compounding this awkwardness, the *amici* fail to explain how the deed of trust can be extinguished by a superpriority lien that the deed of trust holder owns.

Not only is the *amici's* argument unworkable, it is also unnecessary. Deeds of trust typically allow the lender to include amounts advanced on behalf of the borrower in the lien of the deed of trust. *See, e.g.*, Deed of Trust at ¶ 7 and

Planned Unit Development Rider (1JA_174; 1JA_182-83). In this context, applying subrogation by operation of law would give the deed of trust holder a right it already has.

Finally, the *amici's* argument would penalize a deed of trust holder even if it paid the obligation. Section 6.4 is intended to help the junior lienholder, not impose obligations upon it or penalize it. One of the *amicus* briefs says a tender "at the expense" of a buyer creates an unearned windfall to the lender. Even if that were true (it is not), it misses the point. The Restatement is concerned with avoiding an unearned windfall *by the defaulted homeowner*. The concern is muted in an HOA context, where the homeowner remains obligated to the HOA on the subpriority component and to the lender on the superpriority component (through the deed of trust). The Restatement does not express any concern over avoiding a windfall to a junior lienholder at the expense of the foreclosure purchaser. Even if the Court were to indulge the *amici's* absurd claim that Bank of America would reap an unearned windfall at SFR's expense if the deed of trust is deemed to have survived, that would be beyond the scope of Section 6.4 of the Restatement.

CONCLUSION

The Restatement (Third) of Property: Mortgages § 6.4 (1997) is a shield that protects a junior lienholder that satisfied a senior obligation. Saticoy Bay and

TRP Fund propose to turn it into a sword to behead the very interests the rule protects. The Court should reject their argument.

DATED this 29th day of October, 2018.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this opening brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14 point font size.

I FURTHER CERTIFY that this opening brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C) it is proportionally spaced, has a typeface of 14 points or more and contains 1,731 words.

FINALLY, I CERTIFY that I have read this **Amicus Brief In Support Of Bank Of America, N.A.'s Response To Petition For Rehearing**, 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 of the transcript or appendix where the matter relied on is to be found.

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…

I understand that I may be subject to sanctions in the event that the accompanying answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 29th day of October, 2018.

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CERTIFICATE OF SERVICE

I certify that I electronically filed on the 31st day of October, 2018, the foregoing **AMICUS BRIEF IN SUPPORT OF BANK OF AMERICA, N.A.'S RESPONSE TO PETITION FOR REHEARING** with the Clerk of the Court for the Nevada Supreme Court by using the CM/ECF system. I further certify that all parties of record to this appeal either are registered with the CM/ECF or have consented to electronic service.

[ ] By placing a true copy enclosed in sealed envelope(s) addressed as follows:

[X] (By Electronic Service) Pursuant to CM/ECF System, registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. The Court's CM/ECF systems sends an e-mail notification of the filing to the parties and counsel of record listed above who are registered with the Court's CM/ECF system.

[X] (Nevada) I declare that I am employed in the office of a member of the bar of this Court at whose discretion the service was made.

/s/Jill Sallade
An employee of Akerman LLP