

IN THE SUPREME COURT OF THE STATE OF NEVADA

WYETH RANCH COMMUNITY
ASSOCIATION,

Appellant,

vs.

MARCHAI, B.T., a Nevada business
trust,

Respondent.

Electronically Filed
Supreme Court Case No. 83069
Jan 14 2022 06:18 p.m.
Elizabeth A. Brown
Clerk of Supreme Court
District Court Case No. A-16-742327-C
C, Consolidated with A-16-742327-C

APPEAL

From the Eighth Judicial District Court
The Honorable Elizabeth Gonzalez

Respondent's Appendix

David J. Merrill
Nevada Bar No. 6060
David J. Merrill, P.C.
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145
(702) 566-1935
david@djmerrillpc.com
Attorney for Respondent Marchai, B.T.

Volume	Document	Pages
1	Affidavit of Service (Alessi & Koenig)	34–36
1	Affidavit of Service (Cristela Perez)	6
1	Affidavit of Service (SFR Investments Pool 1, LLC)	37–39
1	Affidavit of Service (U.S. Bank)	3
1	Affidavit of Service (U.S. Bank)	4
1	Affidavit of Service (U.S. Bank)	5
1	Affidavit of Service (Wyeth Ranch Community Association)	40–42
1	Decision and Order	9–33
1	Joint Pre-Trial Memorandum	43–71
1	Return of Service (Cristela Perez)	7–8
1	Return of Service (SFR Investments Pool 1, LLC)	1–2
1	SFR Investments Pool 1, LLC's Trial Brief Re: Bona Fide Purchaser	72–76
1	Trial Exhibit No. 45	77

RETURN OF SERVICE

State of Nevada

County of Clark

Electronically Filed DISTRICT Court
11/01/2013 09:40:02 AM

Case Number: A-13-689461-C

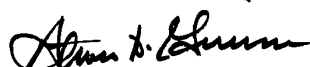
Plaintiff:

MARCHAI B.T., A BANK TRUST

vs.

Defendant:

**CRISTELA PEREZ, AN INDIVIDUAL; SFR INVESTMENTS POOL 1, LLC,
A LIMITED LIABILITY COMPANY; U.S. BANK NATIONAL
ASSOCIATION, N.D., A NATIONAL ASSOCIATION; DOES 1 THROUGH
10, INCLUSIVE, AND ROES 1 THROUGH 10, INCLUSIVE**



CLERK OF THE COURT

For:

Les Zieve

LAW OFFICES OF LES ZIEVE

3753 Howard Hughes Parkway, Suite 200

Las Vegas, NV 89169

Received these papers on the 10th day of October, 2013 at 1:38 pm to be served on **SFR INVESTMENTS POOL1, LLC C/O PARACORP INCORPORATED AS REGISTERED AGENT, 318 N. CARSON ST. #208, CARSON CITY, NV 89701.**

I, Frank Cleveland, do hereby affirm that on the **21st day of October, 2013 at 2:49 pm, I:**


served a **CORPORATION** by delivering a true copy of the **SUMMONS; CIVIL CASE COVER SHEET; COMPLAINT; NOTICE OF PENDENCY OF ACTION** with the date and hour of service endorsed thereon by me, to: **MICHELE CALKINS** as **AUTHORIZED REPRESENTATIVE** for **SFR INVESTMENTS POOL1, LLC**, at the address of: **318 N. CARSON ST. #208, CARSON CITY, NV 89701**, Individual is a person of suitable age and discretion at the above address, which is the address of the register agent as shown on the current certificate of designation filed with the Secretary of State.

Description of Person Served: Age: 50, Sex: F, Race/Skin Color: CAUCASIAN, Height: 5'9, Weight: 170, Hair: BROWN, Glasses: N



RETURN OF SERVICE for A-13-689461-C

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct. I do hereby affirm, I am a citizen of the United States, over the age of 18 and not a party to nor interested in the proceedings in this case.


Frank Cleveland

Our Job Serial Number: ZAN-2013005235
Ref: 888000604

IN THE DISTRICT COURT, EIGHTH JUDICIAL DISTRICT, CLARK COUNTY, NEVADA

MARCHAL B.T., A BANK TRUST

Plaintiff/Petitioner

vs.

CRISTELA PEREZ, AN INDIVIDUAL; SFR
INVESTMENTS POOL 1, LLC, A LIMITED
LIABILITY COMPANY; U.S. BANK NATIONAL
ASSOCIATION, N.D., A NATIONAL
ASSOCIATION;

Defendant/Respondent

Hearing Date:

CASE NO:
A-13-689461-CAFFIDAVIT OF SERVICE OF:
NOTICE OF PENDENCY OF ACTION; CIVIL
COVER SHEET; COMPLAINT FOR JUDICIAL
FORECLOSURE OF DEED OF TRUST; EXHIBITS;
AFFIDAVIT OF SERVICE; SUMMONS - CIVIL

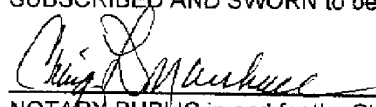
CLERK OF THE COURT

The undersigned, being first duly sworn, on oath deposes and says: That s(he) is now and at all times herein mentioned was a citizen of the United States, over the age of eighteen, not an officer of a plaintiff corporation, not a party to nor interested in the above entitled action, has the authority to serve pleadings in the State named below, and is competent to be a witness therein.

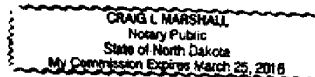
On the **4th** day of **November**, 2013, at **11:10 AM**, at the address of **US Bank Service Center, 4325 17TH Avenue SW, FARGO, Cass County, ND 58103**; this affiant served the above described documents upon **U.S. BANK NATIONAL ASSOCIATION N.D.** by then and there personally delivering **1** true and correct copy(ies) thereof, by then presenting to and leaving the same with **Amy Bachmeier, VICE PRESIDENT, REGISTERED AGENT, A white female approx. 40-45 years of age 5'6"-5'8" in height weighing 160-180 lbs with blonde hair and glasses.**

No Information was provided or discovered that indicates that the subjects served are members of the U.S. military.

DATED this 4 day of Nov., 2013.

 Mark A. Mazaheri, Cass, ND
SUBSCRIBED AND SWORN to before me this 4 day of Nov., 2013

 NOTARY PUBLIC in and for the State of North Dakota

Residing at:

My Commission Expires: 3-25-16FOR: Zieve, Les Law Offices
REF: 888000604ORIGINAL AFFIDAVIT OF
SERVICE

Tracking #: 30078120 SEA FIL



IN THE DISTRICT COURT, EIGHTH JUDICIAL DISTRICT, CLARK COUNTY, NEVADA

MARCHAI B.T., A BANK TRUST

Plaintiff/Petitioner

vs.

CRISTELA PEREZ, AN INDIVIDUAL; SFR
INVESTMENTS POOL 1, LLC, A LIMITED
LIABILITY COMPANY; U.S. BANK NATIONAL
ASSOCIATION, N.D., A NATIONAL
ASSOCIATION;

Defendant/Respondent

Hearing Date:

CASE NO:
A-13-689461-CAFFIDAVIT OF SERVICE OF:
NOTICE OF PENDENCY OF ACTION; CIVIL
COVER SHEET; COMPLAINT FOR JUDICIAL
FORECLOSURE OF DEED OF TRUST; EXHIBITS;
AFFIDAVIT OF SERVICE; SUMMONS - CIVIL

FILED

NOV 12 2013

Clerk of Court

The undersigned, being first duly sworn, on oath deposes and says: That s(he) is now and at all times herein mentioned was a citizen of the United States, over the age of eighteen, not an officer of a plaintiff corporation, not a party to nor interested in the above entitled action, has the authority to serve pleadings in the State named below, and is competent to be a witness therein.

On the 4th day of November, 2013, at 11:10 AM, at the address of US Bank Service Center, 4325 17TH Avenue SW, FARGO, Cass County, ND 58103; this affiant served the above described documents upon U.S. BANK NATIONAL ASSOCIATION N.D. by then and there personally delivering 1 true and correct copy(ies) thereof, by then presenting to and leaving the same with Amy Bachmeier, VICE PRESIDENT, REGISTERED AGENT, A white female approx. 40-45 years of age 5'6"-5'8" in height weighing 160-180 lbs with blonde hair and glasses.

No Information was provided or discovered that indicates that the subjects served are members of the U.S. military.

DATED this 4 day of Nov., 2013.

[Signature]

Mark A. Mazaheri, Cass, ND

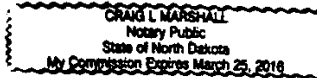
SUBSCRIBED AND SWORN to before me this 4 day of Nov., 2013

[Signature]

NOTARY PUBLIC in and for the State of North Dakota

Residing at:

My Commission Expires: 3-25-16



FOR: Zieve, Les Law Offices
REF: 888000604

ORIGINAL AFFIDAVIT OF
SERVICE

Tracking #: 30078120 SEA FIL



RECEIVED

NOV 12 2013

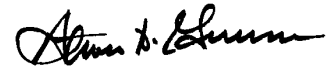
CLERK OF THE COURT

A-13-689461-C
AOS
Affidavit of Service
3145856



AFFT

Howard Kim & Associates, Attorneys at Law
Diana S. Cline, Esq.
1055 Whitney Ranch Dr., Suite 110
Henderson, NV 89014
State Bar No.: 10580
Attorney(s) for: Plaintiff(s)



CLERK OF THE COURT

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Marchai B.T., a Bank Trust

vs

Cristela Perez, an individual; et al

Plaintiff(s)

Defendant(s)

Case No.: A-13-689461-C

Dept. No.: XXVI

Date:

Time:

AFFIDAVIT OF SERVICE

Jack R. Latham, Jr., being duly sworn deposes and says: That at all times herein affiant was and is a citizen of the United States, over 18 years of age and not a party to or interested in the proceeding in which this affidavit is made. The affiant received 1 copy(les) of the Summons: Notice of Lis Pendens : Answer, Counterclaim, and Cross claim; Initial Appearance Fee Disclosure (NRS Chapter 19) on the 10th day of December, 2013 and served the same on the 11th day of December, 2013 at 2:06 pm by serving the Defendant(s), U.S. Bank National Association, N.D., a national association by personally delivering and leaving a copy at Corporate Office, 425 Walnut Street, Cincinnati, OH 45202 with Jessica Hopkins as Banker an agent lawfully designated by statute to accept service of process.




CELINE M. ESTILL
NOTARY PUBLIC
STATE OF OHIO
Recorded in
Clermont County
My Comm. Exp. 7/11/15

State of Ohio, County of Clermont

SUBSCRIBED AND SWORN to before me on this

12th day of Dec. 2013

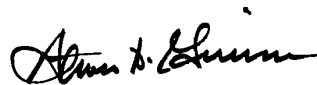

Notary Public


Affiant: Jack R. Latham, Jr.

WorkOrderNo 1310946

1 **AFFT**
2 Howard Kim & Associates, Attorneys at Law
3 Diana S. Cline, Esq.
4 1055 Whitney Ranch Dr., Suite 110
5 Henderson, NV 89014
6 State Bar No.: 10580
7 Attorney(s) for: Counterclaimant/Cross-Claimant

Electronically Filed
12/27/2013 01:04:39 PM



CLERK OF THE COURT

8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

10 **Marchai B.T., a Bank Trust**
11 **vs**
12 **Cristela Perez, an individual, et al.**

Plaintiff(s)

Defendant(s)

Case No.: **A-13-689461-C**

Dept. No.: **XXVI**

Date:

Time:

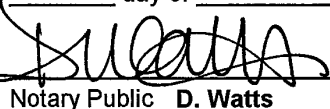
13 **AFFIDAVIT OF SERVICE**

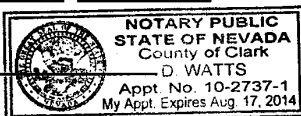
14
15 I, Lana Paige, being duly sworn deposes and says: That at all times herein affiant was and is a citizen of the United
16 States, over 18 years of age, licensed to serve civil process in the State of Nevada under license #604, and not a
17 party to or interested in the proceeding in which this affidavit is made. The affiant received 1 copy(ies) of the:
18 Summons; Notice of Lis Pendens ; Answer, Counterclaim, and Cross Claim; Initial Appearance Fee
19 Disclosure (NRS Chapter 19) on the 13th day of December, 2013 and served the same on the 23rd day of
20 December, 2013 at 10:00 am by serving to Defendant, Cristela Perez, an individual by personally delivering and
21 leaving a copy with Bob, Boyfriend (White, Male, Brown Hair age 35, 230 lbs., 6'2"), a person of suitable age and
22 discretion residing at the Defendant's usual place of abode located at 7107 Saddle Back Dr.,
23 Las Vegas, NV 89166.

24
25
26
27
28
29
30
31
32
33 **State of Nevada, County of Clark**

34 **SUBSCRIBED AND SWORN to before me on this**

35 **23rd day of December 2013**

36 
Notary Public **D. Watts**



Affiant **Lana Paige**

#: **R-067806**

Legal Process Service License # 604
WorkOrderNo 1310947

NOT A VALID DOCUMENT UNTIL THE 11TH DAY OF JANUARY 2014

RETURN OF SERVICE

State of Nevada

County of Clark

DISTRICT Court

Case Number: A-13-689461-C

Electronically Filed
03/11/2014 12:57:18 PM

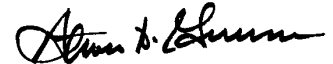
Plaintiff:

MARCHAI B.T., A BANK TRUST

vs.

Defendant:

CRISTELA PEREZ, AN INDIVIDUAL; SFR INVESTMENTS POOL 1, LLC,
A LIMITED LIABILITY COMPANY; U.S. BANK NATIONAL
ASSOCIATION, N.D., A NATIONAL ASSOCIATION; DOES 1 THROUGH
10, INCLUSIVE, AND ROES 1 THROUGH 10, INCLUSIVE



CLERK OF THE COURT

For:

Les Zieve

LAW OFFICES OF LES ZIEVE

3753 Howard Hughes Parkway, Suite 200

Las Vegas, NV 89169

Received these papers on the 6th day of March, 2014 at 7:30 pm to be served on CRISTELA PEREZ, 7107
SADDLE BACK PEAK ST., LAS VEGAS, NV 89166.

I, Ted Wright NV # R-000968, do hereby affirm that on the 7th day of March, 2014 at 7:45 pm, I:

SUBSTITUTE served by delivering a true copy of the SUMMONS; CIVIL CASE COVER SHEET; COMPLAINT;
NOTICE OF PENDENCY OF ACTION with the date and hour of service endorsed thereon by me, to: ROBERT
ROSE as HUSBAND at the address of: 7107 SADDLE BACK PEAK ST., LAS VEGAS, NV 89166, the within
named person's usual place of Abode, who resides therein, who is eighteen (18) years of age or older and
informed said person of the contents therein, in compliance with state statutes.

Military Status: Based upon inquiry of party served, Defendant is not in the military service of the United States of
America.

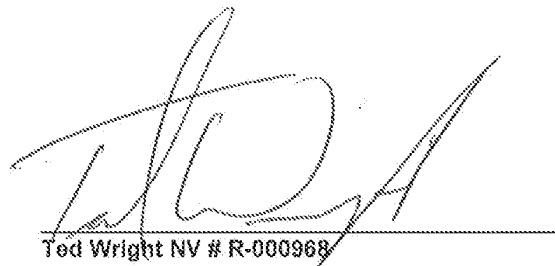
Marital Status: Based upon inquiry of party served, Defendant is married.

Description of Person Served: Age: 45, Sex: M, Race/Skin Color: CAUCASIAN, Height: 6'1, Weight: 185, Hair:
BLACK, Glasses: N



RETURN OF SERVICE for A-13-689461-C

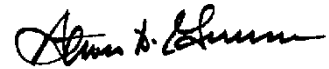
I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct. I do hereby affirm, I am a citizen of the United States, over the age of 18 and not a party to nor interested in the proceedings in this case.

A handwritten signature in black ink, appearing to read 'Ted Wright', is written over a horizontal line.

Ted Wright NV # R-000968

Our Job Serial Number: ZAN-2014000994

Ref: 888000604



CLERK OF THE COURT

1
2 DAO

3 EIGHTH JUDICIAL DISTRICT COURT

4 CLARK COUNTY, NEVADA

5
6 MARCHAI B.T.,

7 Plaintiff,

8 us.

9 CRISTELA PEREZ; SFR INVESTMENTS POOL 1, LLC;
10 U.S. BANK NATIONAL ASSOCIATION, N.D.; DOES I
through X; and ROE CORPORATIONS 1 through 10,
inclusive,

11 Defendants.

Case No. A-13-689461-C

Dep't No. VII

12
13 And all related actions.

14
15 **DECISION AND ORDER**

16 This case arises from a homeowners' association's (HOA) non-judicial foreclosure
17 sale of residential real property located at 7119 Wolf Rivers Avenue in Las Vegas, Nevada.
18 Now before the Court are Defendant SFR Investments Pool 1 ("SFR") and Plaintiff
19 Marchai's Motions for Summary Judgment and SFR's Motion to Strike. These matters
20 came before the Court on February 16, 2015. The Court denies SFR and Marchai's Motions
21 for Summary Judgment and SFR's Motion to Strike.

22 **I. Factual Background**

23 The residential property in this case, the Wolf Rivers property, is subject to the terms
24 of the Wyeth Ranch Community Association's ("the HOA") Declaration of Covenants,
25 Conditions and Restrictions (CC&Rs). In 2004, Cristela Perez entered into two loan
26 agreements with Countrywide Home Loans in order to purchase the property. The loans
27 were secured by two deeds of trust on the Wolf Rivers property. Perez refinanced these two
28

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

1 loans through an agreement with CMG Mortgage. CMG Mortgage recorded a deed of trust
2 against the property on November 9, 2005.

3 **A. First Notice of Delinquent Assessment Lien**

4 The HOA recorded its first Notice of Delinquent Assessment Lien on October 8,
5 2008. At that time, the HOA collected \$140.00 per month in association dues. At the
6 beginning of 2009, the HOA increased its monthly dues to \$152.50. The HOA recorded a
7 Notice of Default and Election to Sell on January 7, 2009. The HOA recorded a Notice of
8 Trustee's Sale on January 14, 2010. In 2010, the HOA increased its monthly dues to
9 \$159.50.

10 On February 3, 2010, the HOA sent a demand letter to Perez. On February 12, 2010,
11 Perez paid the HOA \$900.00. On April 13, 2010, the HOA proposed a payment plan to
12 Perez. On May 11, 2010, Perez paid the HOA \$300.00. Perez failed, however to comply
13 with the payment plan.

14 On July 13, 2010, the HOA mailed a Pre-Notice of Trustee Sale and Notice of Default
15 and Election to Sell to Perez. Perez paid the HOA \$645.00 between August 2 and
16 November 30, 2010. The HOA recorded a Rescission of Notice of Sale on March 9, 2011.
17 Perez paid the HOA \$160.00 on March 10, 2011.

18 On March 29, 2011, the HOA recorded a second Notice of Sale. On July 27, 2011, the
19 HOA sent Perez a letter stating Perez was in breach of the payment plan. On August 4,
20 2011, Perez paid the HOA \$165.00.

21 **B. Second Notice of Delinquent Assessment Lien**

22 On December 20, 2011, the HOA recorded a second Notice of Delinquent
23 Assessment lien. The HOA recorded a Notice of Default and Election to Sell on February
24 28, 2012. Perez paid the HOA \$760.00 between March 19 and July 26, 2012. CMG
25 Mortgage assigned its deed of trust to CitiMortgage in May of 2012. CitiMortgage assigned
26 the deed to U.S. Bank in July of 2012. The HOA recorded a Notice of Trustee's Sale on
27 October 31, 2012. Perez paid the HOA \$300.00 on November 13, 2012.
28

1 In March of 2013, U.S. Bank assigned its deed of trust to Marchai. Neither U.S.
2 Bank nor Marchai recorded the transfer of interest for approximately five months. During
3 this gap, U.S. Bank did not inform Marchai of the HOA's foreclosure proceedings. The
4 HOA mailed a Notice of Trustee's sale to CMG Mortgage, CitiMortgage, and U.S. Bank on
5 July 29, 2013. Marchai recorded its interest in the Wolf Rivers property on August 12,
6 2013. Marchai's loan servicer received notice of the trustee's sale on August 27, 2013, the
7 day before the sale was scheduled to take place. The servicer contacted the HOA's trustee
8 conducting the sale, Alessi & Koenig, to ask that the sale be postponed. The HOA declined.

9 Alessi & Koenig as trustee for the HOA conducted a foreclosure sale of the Wolf
10 Rivers property on August 28, 2013. SFR purchased the property for \$21,000.00. SFR
11 recorded a trustee's deed upon sale on September 9, 2013 identifying SFR as the grantee
12 and the HOA as the foreclosing beneficiary. The trustee's deed states:

13 Alessi & Koenig, LLC (herein called Trustee), as the duly appointed
14 Trustee under that certain Notice of Delinquent Assessment Lien...
15 does hereby grant, without warranty expressed or implied to: SFR... all
16 its right, title and interest in the property...

17 This conveyance is made pursuant to the powers conferred upon the
18 Trustee by NRS 116 et seq... All requirements of law regarding the
19 mailing of copies of notices and the posting and publication of the
20 copies of the Notice of Sale have been complied with.

21 At the time of sale, Perez owed the HOA \$14,677.80. As of January 14, 2016, Perez owes
22 Marchai \$489,372.77 based the agreement secured by the deed of trust. Marchai asserts
23 Perez is now in default on the agreement between Perez and Marchai.

24 **II. Procedural History**

25 On September 30, 2013, Marchai filed a complaint against Perez, SFR, and U.S.
26 Bank. Marchai seeks to judicially foreclose on the Wolf Rivers property based on Perez's
27 breach of the agreement secured by the deed of trust. On November 13, 2013, SFR filed an
28 answer, counterclaim, and crossclaim. SFR brought counterclaims and crossclaims for
declaratory relief/quiet title and injunctive relief. Specifically, SFR alleges Marchai's

1 interest in the Wolf Rivers property was extinguished by the non-judicial foreclosure of the
2 HOA's super-priority lien established pursuant to NRS Chapter 116. The super-priority lien
3 brands certain HOA liens as "prior to all other liens and encumbrances," excluding those
4 recorded before the applicable CC&Rs. See NRS 116.3116(2)(a)-(b). The Court has entered
5 defaults against Perez and U.S. Bank in this case.

6 On July 9, 2014, the Court ordered that the case be stayed pending a ruling from the
7 Nevada Supreme Court on an HOA foreclosure's effect on a first deed of trust. The Nevada
8 Supreme Court issued its ruling in SFR Investments Pool 1 v. U.S. Bank, 334 P.3d 408
9 (Nev. 2014) on September 18, 2014. The Nevada Supreme Court denied a rehearing on
10 October 16, 2014. The Court lifted the stay in the instant case on January 28, 2015.

11 Both Marchai and SFR filed motions for summary judgment on January 14, 2016.
12 The parties dispute whether NRS Chapter 116 is constitutional and whether the HOA
13 foreclosure procedure in the instant case complied with NRS Chapter 116. The parties filed
14 oppositions to each other's motions on February 3 and 4, 2016. The parties filed replies on
15 February 8 and 9, 2016. SFR's reply contained a countermotion to strike portions of
16 Marchai's motion for summary judgment and opposition. SFR asserts Marchai's motion
17 exceeded the appropriate page limit. SFR also argues Marchai's opposition contains
18 evidence not properly disclosed in the discovery process.

19 III. Discussion

20 A. Motion to Strike

21 The parties do not dispute that Marchai violated EDCR 2.20(a) by failing to obtain
22 leave of Court before filing a brief in support of its motion for summary judgment that
23 exceeded thirty pages. The parties also agree that Marchai's person most knowledgeable
24 failed to appear at a properly noticed deposition on December 2, 2015. Marchai asserts that
25 its failure to request leave of the Court to file an over-length brief was inadvertent. Marchai
26 argues its failure to provide a person most knowledgeable for deposition was the result of
27 miscommunication between substituted counsel. The parties have communicated
28 regarding rescheduling the deposition. SFR argues these irregularities necessitate the

1 Court striking the excess pages in Marchai's motion for summary judgment and certain
2 declarations submitted in support of Marchai's opposition to SFR's motion for summary
3 judgment.

4 The Court finds the interests of deciding this motion on its merits outweigh the need
5 to sanction Marchai for technical violations of Court rules. The Court also finds that SFR
6 will not be prejudiced by the Court's decision to deny its motion. The table of contents in
7 Marchai's motion for summary judgment uses extremely descriptive headings containing
8 the factual and legal assertions Marchai makes throughout its motion. Using just these
9 headings and Marchai's exhibits, the Court would be able to evaluate Marchai's arguments.
10 In addition, though Marchai's person most knowledgeable failed to attend the scheduled
11 December 2, 2015 deposition, Marchai has presented an explanation to the Court. The
12 substitution of counsel created confusion regarding the deposition. This does not excuse
13 Marchai from presenting its person most knowledgeable at a subsequent deposition, which
14 the parties are working towards.

15 Failure to ask for leave, which would have been granted, and to attend one
16 deposition does not justify the level of sanctions contemplated by SFR's motion to strike.
17 The Court and the parties are benefitted by the Court considering all relevant, appropriate
18 material in rendering a decision. Therefore, the Court denies SFR's motion to strike.

19 **B. Motions for Summary Judgment**

20 Summary judgment is appropriate "when the pleadings and other evidence on file
21 demonstrate that no genuine issue as to any material fact remains and that the moving
22 party is entitled to a judgment as a matter of law." Wood v. Safeway, Inc., 121 P.3d 1026,
23 1029 (Nev. 2005) (internal quotation marks and alterations omitted). "If the party moving
24 for summary judgment will bear the burden of persuasion at trial, that party 'must present
25 evidence that would entitle it to a judgment as a matter of law in the absence of contrary
26 evidence.'" Francis v. Wynn Las Vegas, LLC, 262 P.3d 705, 714 (Nev. 2011) (citing Cuzze v.
27 Univ. & Cmty. Coll. Sys. of Nev., 172 P.3d 131, 134 (Nev. 2007)). "When requesting
28 summary judgment, the moving party bears the initial burden of production to

1 demonstrate the absence of a genuine issue of material fact. If the moving party meets its
2 burden, then the nonmoving party bears the burden of production to demonstrate that
3 there is a genuine issue of material fact. Las Vegas Metro. Police Dep't v. Coregis Ins. Co.,
4 256 P.3d 958, 961 (Nev. 2011) (internal citations omitted).

5 Marchai and SFR seek summary judgment on each of their claims. SFR argues the
6 HOA foreclosure sale extinguished Marchai's interest in the Wolf Rivers property. Marchai
7 argues its interest survived the foreclosure sale and is superior to SFR's interest. To
8 determine what interests remain on the Wolf Rivers property and the interests' priority, the
9 Court must evaluate NRS Chapter 116 and the foreclosure process in this particular case.

10 **1. Retroactive Application of the SFR Decision**

11 Marchai argues the decision in SFR Investments Pool 1 v. U.S. Bank, 334
12 P.3d 408 (Nev. 2014), reh'g denied (Oct. 16, 2014) should only be applied prospectively.
13 SFR was decided on September 18, 2014. In the instant case, the foreclosure sale took place
14 on August 28, 2013.

15 The Nevada Supreme Court has ruled that:

16 In determining whether a new rule of law should be limited to
17 prospective application, courts have considered three factors: (1) "the
18 decision to be applied nonretroactively must establish a new principle
19 of law, either by overruling clear past precedent on which litigants may
20 have relied, or by deciding an issue of first impression whose resolution
21 was not clearly foreshadowed;" (2) the court must "weigh the merits
22 and demerits in each case by looking to the prior history of the rule in
23 question, its purpose and effect, and whether retrospective operation
24 will further or retard its operation;" and (3) courts consider whether
25 retroactive application "could produce substantial inequitable results."

26 Breithaupt v. USAA Prop. & Cas. Ins. Co., 867 P.2d 402, 405 (Nev. 1994) (quoting
27 Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971)).

28 In the SFR decision, the Nevada Supreme Court noted, "Nevada's state and federal
district courts are divided on whether NRS 116.3116 establishes a true priority lien." SFR
Investments Pool 1 v. U.S. Bank, 334 P.3d 408, 412 (Nev. 2014), reh'g denied (Oct. 16,
2014). There was no clear past precedent on the issue. The superpriority of HOA liens was

1 a matter of first impression for the Nevada Supreme Court, but the resolution was
2 foreshadowed. The Nevada Supreme Court relied on the language of NRS Chapter 116 and
3 official comments to the Uniform Common Interest Ownership Act of 1982. Id. The
4 language establishing the nature of the superpriority lien was amended in 2009, several
5 years before the foreclosure sale in this case. The SFR decision also relied on a December
6 2012 Nevada Real Estate Division advisory opinion holding an HOA could enforce its
7 superpriority lien through a non-judicial foreclosure. 334 P.3d at 416-417.

8 In addition, the Court finds that applying the SFR decision to the facts of this case
9 does not interfere with the prior history of the rule in question and will not produce
10 substantial inequitable results. NRS 116.3116 was adopted in 1991. The original 1991
11 language states that an HOA lien is prior to a first security interest on the property “to the
12 extent of the assessments for common expenses based on the periodic budget adopted by
13 the association pursuant to section 99 of this act which would have become due in the
14 absence of acceleration during the 6 months immediately preceding institution of an action
15 to enforce the lien.” At this point, holders of first deeds of trust were on notice of a potential
16 priority conflict.

17 The Court finds that applying SFR to the facts in this case does not implicate any
18 concerns about retroactive application of a new principle of law. Therefore, in evaluating
19 the constitutionality and application of NRS Chapter 116, the Court will refer to the decision
20 in SFR.

21 **2. Constitutionality of NRS Chapter 116**

22 Marchai argues the HOA foreclosure provisions of NRS Chapter 116 are
23 unconstitutional, which would prevent the HOA sale from extinguishing Marchai’s interest
24 in the Wolf Rivers property. Specifically, Marchai cites the due process clause, takings
25 clause, and void for vagueness doctrine.

26 **a. Procedural Requirements of NRS Chapter 116**

27 Nevada Revised Statute Chapter 116 provides the procedural
28 requirements for homeowners’ associations seeking to secure a lien for unpaid assessments

1 and fees. “NRS 116.3116(2)... splits an HOA lien into two pieces, a superpriority piece and a
2 subpriority piece. The superpriority piece, consisting of the last nine months of unpaid
3 HOA dues and maintenance and nuisance-abatement charges, is ‘prior to’ a first deed of
4 trust.” SFR Investments Pool 1 v. U.S. Bank, 334 P.3d 408, 411 (Nev. 2014), reh’g denied
5 (Oct. 16, 2014). That super-priority portion of the lien was held by the Nevada Supreme
6 Court to be a true super-priority lien, which will extinguish a first deed of trust if foreclosed
7 upon pursuant to Chapter 116’s requirements. Id. at 419. Specifically, “[t]he sale of a unit
8 pursuant to NRS 116.31162, 116.31163 and 116.31164 vests in the purchaser the title of the
9 unit’s owner without equity or right of redemption.” NRS 116.31166(3); see also SFR v. U.S.
10 Bank, 334 P.3d at 412.

11 For an HOA foreclosure sale to be valid, Chapter 116 requires the foreclosing HOA
12 and its agent comply with several requirements related to notifying interested parties,
13 including junior lienholders, of the impending foreclosure sale. To initiate foreclosure
14 under Chapter 116, a Nevada HOA must first notify the owner of the delinquent
15 assessments. See NRS 116.31162(1)(a). If the owner does not pay within thirty days, the
16 HOA must then provide the owner a notice of default and election to sell. See NRS
17 116.31162(1)(b).

18 After recording the notice of default and election to sell, Chapter 116 requires the
19 HOA to mail a copy of the notice of default and election to sell to “[e]ach person who has
20 requested notice pursuant to NRS 107.090 or 116.31168.” NRS 116.31163(1). At closer look,
21 this provision of Chapter 116 requires the HOA to mail the notice of default to “[e]ach
22 person who has recorded a request for a copy of the notice” and “[e]ach other person with
23 an interest whose interest or claimed interest is subordinate to the [association’s lien].”
24 NRS 107.090(2)-(4) (reading NRS 107.090 and 116.31168 together, “deed of trust” has been
25 replaced with “association’s lien”); see NRS 116.31168(1) (“NRS 107.090 appl[ies] to the
26 foreclosure of an association’s lien as if a deed of trust were being foreclosed”). In addition
27 to noticing those interested persons, Chapter 116 requires the HOA to mail notice to “[a]ny
28 holder of a recorded security interest encumbering the unit’s owner’s interest who has

1 notified the association, 30 days before the recordation of the notice of default, of the
2 existence of the security interest.” NRS 116.31163(2); see NRS 111.320 (“record[ing]...
3 must from the time of filing... impart notice to all persons of the contents thereof”); see
4 also First Nat. Bank v. Meyers, 161 P. 929, 931 (Nev. 1916) (“One need but revert to the fact
5 that recordation is for the purpose of giving notice to the world”). In sum, a foreclosing
6 HOA must mail the notice of default and election to sell to (1) persons who have recorded a
7 request for notice, (2) persons holding or claiming a subordinate interest, and (3) holders of
8 security interests recorded at least 30 days before notice of default.

9 Then, if the lien has not been paid off within 90 days, the HOA may continue with
10 the foreclosure process. See NRS 116.31162(1)(c). The HOA must next mail a notice of sale
11 to all those who were entitled to receive the prior notice of default and election to sell, as
12 well as the holder of a recorded security interest if the security interest holder “has notified
13 the association, before the mailing of the notice of sale of the existence of the security
14 interest.” See NRS 116.311635(1)(a)(1), (b)(2). As this Court interprets the “notified-the-
15 association” provision, this additional notice requirement simply means the HOA must
16 mail the notice of sale to any holder of a security interest who has recorded its interest prior
17 to the mailing of the notice of sale.

18 **b. Due Process Clause**

19 Marchai alleges NRS 116.3116 is unconstitutional because Chapter 116’s
20 express notice provisions do not require HOAs to provide mandatory notice to lenders of an
21 impending non-judicial foreclosure; rather, Chapter 116 requires lenders to request notice
22 in advance of foreclosure in order to receive notice of foreclosure. Marchai argues Chapter
23 116’s notice provisions, on their face, fail to meet the notice requirements of the due process
24 clause and therefore render Chapter 116’s non-judicial foreclosure scheme unconstitutional
25 on its face.

26 **i. Constitutional Notice Requirement**

27 “[P]rior to an action which will affect an interest in life, liberty,
28 or property protected by the Due Process Clause of the Fourteenth Amendment, a State

1 must provide 'notice reasonably calculated, under all circumstances, to apprise interested
2 parties of the pendency of the action and afford them an opportunity to present their
3 objections.'" Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 795 (1983) (holding
4 statutory notice requirements posting and publishing announcement of pending tax sale
5 did not meet requirements of the Due Process Clause of the Fourteenth Amendment)
6 (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)). "In
7 Mennonite, the Supreme Court applied this principle and found that mere constructive
8 notice afforded inadequate due process to a readily ascertainable mortgage holder." Cont'l
9 Ins. Co. v. Moseley, 683 P.2d 20, 21 (Nev. 1984). The Court held that personal service or
10 mailed notice is required: "Notice by mail or other means as certain to ensure actual notice
11 is a minimum constitutional precondition to a proceeding which will adversely affect the
12 liberty or property interests of any party, whether unlettered or well versed in commercial
13 practice, if its name and address are reasonably ascertainable." Mennonite, 462 U.S. at
14 800 (emphasis in original).

15 Under NRS 116.31162, HOAs are required to give actual notice of their impending
16 lien foreclosures to record owners of the property at issue. Although Chapter 116 requires
17 actual notice be given to the property owner, the United States Supreme Court has long
18 held, "[n]otice to the property owner, who is not in privity with his creditor and who has
19 failed to take steps necessary to preserve his own property interest, also cannot be expected
20 to lead to actual notice to the mortgagee." Mennonite, 462 U.S. at 799. The question here
21 becomes, does Chapter 116 provide mortgage holders actual notice — "notice mailed to the
22 mortgagee's last known available address, or by personal service." See Mennonite, 462 U.S.
23 at 798.

24 Marchai argues Nevada law shifts the burden of giving notice to the mortgagee
25 because associations need only give actual notice to a lienholder "who has notified the
26 association, 30 days before the recordation of the notice of default, of the existence of [its]
27 security interest." NRS 116.31163(2). Statutory provisions that require a party to give
28 notice in order to get notice are often referred to as "opt-in" or "request-notice" provisions.

1 In Small Engine Shop, Inc. v. Cascio, the Fifth Circuit Court of Appeals held that
2 Louisiana's "request-notice" statute "prospectively shift[ed] the entire burden of ensuring
3 adequate notice to an interested property owner regardless of the circumstances." 878 F.2d
4 883, 884 (5th Cir. 1989). Such a shift in the burden of ensuring adequate notice, the Small
5 Engine Court held, does not afford a defaulting property owner facing foreclosure adequate
6 notice under Menonite and therefore violates the Due Process Clause. Id. at 890; see also
7 USX Corp. v. Champlin, 992 F.2d 1380, 1385 (5th Cir. 1993) ("[second mortgagee]'s
8 interest, even though terminable by foreclosure of the superior loan was sufficient to trigger
9 due process"). For that reason, the court held the "request-notice" statute only serves to
10 supplement the preexisting notice scheme, to allow creditors who are not otherwise
11 reasonably ascertainable to become ascertainable. Small Engine, 878 F.2d at 892-3.

12 Chapter 116, if read in a vacuum, could lead to the erroneous interpretation that a
13 mortgage holder is only entitled to receive notice of a homeowners' association's impending
14 foreclosure if that mortgage holder requests such notice from the association; however, this
15 reading would ignore the well-established canon of statutory interpretation—
16 constitutional avoidance. "It is elementary when the constitutionality of a statute is
17 assailed, if the statute be reasonably susceptible of two interpretations, by one of which it
18 would be unconstitutional and by the other valid, it is our plain duty to adopt that
19 construction which will save the statute from constitutional infirmity." U S ex rel Attorney
20 Gen. v. Delaware & Hudson Co, 213 U.S. 366 (1909); see also State v. Curler, 67 P. 1075,
21 1076 (Nev. 1902) ("it is a well-established rule of this and other courts that constitutional
22 questions will never be passed upon, except when absolutely necessary to properly dispose
23 of the particular case").

24 The reading of Chapter 116's notice requirements in a way to be constitutionally valid
25 requires that a foreclosing homeowners' association must provide notice to the following
26 parties:

27 (1) Any interested person who has recorded a request for notice with the proper
28 county recorder must be mailed copies of the notice of default and election to sell and the

1 notice of sale. See NRS 116.31163(1) (notice of default must be given to “[e]ach person who
2 has requested notice pursuant to NRS 107.090 or 116.31168”), NRS 107.090(2) (a “request
3 for a copy of the notice of default or of sale” must be “record[ed] in the office of the county
4 recorder of the county in which any part of the real property is situated”), and NRS
5 116.31168(1) (“The request must identify the lien by stating the names of the unit’s owner
6 and the common-interest community.”); see also NRS 116.311635(1)(b)(1) (notice of sale
7 must be mailed to all persons entitled to receive a copy of the notice of default). This
8 request-notice provision exists to allow interested parties who are not otherwise
9 ascertainable an opportunity to receive notice and protect their interest.

10 (2) Any other person holding or claiming an interest subordinate to the association’s
11 lien must be mailed copies of the notice of default and election to sell and the notice of sale.
12 See NRS 116.31163(1) and .311635(1)(b)(1), supra; see also NRS 116.31168(1) (incorporating
13 requirements of NRS 107.090 to HOA foreclosures) and NRS 107.090(3)(b) (notice must
14 be mailed to “[e]ach other person with an interest whose interest or claimed interest is
15 subordinate to the [association’s lien].”). This catch-all provision exists to provide notice to
16 any other interested party whose identity is reasonably ascertainable.

17 (3) Any holders of a recorded security interest that encumbers the homeowner’s
18 interest must be mailed copies of (a) the notice of default and election to sell, if the security
19 interest was recorded at least 30 days before notice of default was recorded, and (b) the
20 notice of sale, if the security interest was recorded prior to the mailing of the notice of sale.
21 See NRS 116.31163(2), supra, and NRS 116.311635(1)(b)(2) (HOA must mail notice of sale
22 to security interest holder that “has notified the association, before the mailing of the notice
23 of sale of the existence of the security interest.”); see also NRS 111.320, supra, and First Nat.
24 Bank v. Meyers, 161 P. at 931 (recording of the security interest gives notice to the world of
25 that interest).

26 This actual notice provision explicitly requires the foreclosing homeowners’
27 association to provide notice to mortgage holders that have timely recorded interest in the
28 subject property. Therefore, Marchai’s facial challenge of Chapter 116’s notice

1 requirements fails because the provisions of Chapter 116 read as a whole and in conjunction
2 with well-established related law ensures mortgage holders and other interested parties
3 receive actual notice of a homeowners' association's impending non-judicial foreclosure
4 sale.

5 **b. State Action Requirement**

6 Although Chapter 116, on its face, provides for notice firmly grounded
7 within the boundaries of the Due Process Clause of the Fourteenth Amendment, the Court
8 questions whether the mandates of the Due Process Clause are in fact triggered. Marchai
9 must identify some "state action" that runs afoul of the Fourteenth Amendment. See Lugar
10 v. Edmondson Oil Co., 457 U.S. 922, 930 (1982) ("the Due Process Clause protects
11 individuals only from governmental and not from private action, plaintiffs had to
12 demonstrate that the sale of their goods was accomplished by state action"); see also
13 S.O.C., Inc. v. Mirage Casino-Hotel, 23 P.3d 243, 247 (Nev. 2001) ("The general rule is that
14 the Constitution does not apply to private conduct."). "Embedded in our Fourteenth
15 Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny
16 under the Amendment's Due Process Clause, and private conduct, against which the
17 Amendment affords no shield, no matter how unfair that conduct may be." Nat'l Collegiate
18 Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988) (holding state university's imposition
19 of sanctions against legendary basketball coach Jerry Tarkanian in furtherance of the
20 NCAA's rules and recommendations did not transform NCAA's private conduct into state
21 action).

22 In analyzing the state-action issue where a private party's decisive conduct has
23 caused harm to another private party, the question becomes "whether the State was
24 sufficiently involved to treat that decisive conduct as state action." Tarkanian, 488 U.S. at
25 192. In general, the State's involvement may transform private conduct into state action
26 when the State delegates its authority to the private actor; the State knowingly accepts
27 benefits derived from unconstitutional behavior; or when the State creates the legal
28 framework governing the private conduct. Id. (citing for each proposition, respectively,

1 West v. Atkins, 487 U.S. 42 (1988); Burton v. Wilmington Parking Authority, 365 U.S. 715,
2 722 (1961); and North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975)
3 (holding state's garnishment statute, which permitted writ of garnishment to be issued in
4 pending actions by court clerk, denied due process of law)).

5 The conduct at issue in this case, a non-judicial foreclosure authorized by Nevada
6 law, centers the state-action analysis on the Nevada's creation of the legal framework
7 governing HOA non-judicial foreclosure actions. The inquiry here turns on whether the
8 Nevada Legislature's enactment of the legal framework governing non-judicial foreclosure
9 of homeowners' association liens constitutes sufficient state action to trigger the due
10 process protections of the Fourteenth Amendment for mortgage holders. This Court finds
11 it is not.

12 The "State is responsible for the... act of a private party when the State, by its law,
13 has compelled the act." Adickes v. S. H. Kress & Co., 398 U.S. 144, 170 (1970). However,
14 a State's mere acquiescence in a private action does not convert that action into that of the
15 State. See Flagg Bros. v. Brooks, 436 U.S. 149, 164 (1978).

16 In Flagg Bros. v. Brooks, Ms. Brooks had fallen on hard times, faced eviction, and
17 was forced by circumstance to place her belongings in storage. Ms. Books filed a lawsuit
18 against the storage company, Flagg Brothers, alleging a violation of her Fourteenth
19 Amendment rights. Specifically, the issue centered on Flagg Brothers's threat to sell Ms.
20 Brooks's belongings pursuant to New York Uniform Commercial Code unless she paid her
21 storage fee. Id., 436 U.S. at 153. Ms. Brooks argued that "Flagg Brothers' proposed action
22 [wa]s properly attributable to the State because the State ha[d] authorized and encouraged
23 it in enacting [the statutory framework authorizing the sale of her property to satisfy the
24 storage lien]." Id., 436 U.S. at 164. The Court held that the state statute, together with
25 private action conforming to the statute, was insufficient to establish state action,
26 reasoning:

27 Here, the State of New York has not compelled the sale of a
28 bailor's goods, but has merely announced the circumstances
under which its courts will not interfere with a private sale.

1 Indeed, the crux of respondents' complaint is not that the State
2 has acted, but that it has refused to act. This statutory refusal to
3 act is no different in principle from an ordinary statute of
4 limitations whereby the State declines to provide a remedy for
5 private deprivations of property after the passage of a given
6 period of time.

7 Flagg Bros., 436 U.S. at 166 (emphasis in original).

8 Here, the State of Nevada, by enacting the provisions of Chapter 116, has merely
9 announced the requirements a homeowners' association must fulfill to legally foreclose on a
10 lien; the State of Nevada has not compelled homeowners' associations to act. Like the State
11 of New York in Flagg Bros., here the State of Nevada has announced circumstances in
12 which it will not interfere with the foreclosure of homeowners' association liens. Therefore,
13 because the State of Nevada has merely acquiesced to, and not compelled, the non-judicial
14 foreclosure of homeowners' association liens, this Court finds state action does not exist in
15 this situation sufficient to implicate the protections of the due process clause.

16 Marchai cannot show that legislative enactment of Chapter 116 is a due process
17 violation. Therefore, the Court denies Marchai's motion for summary judgment on this
18 ground.

19 **b. Taking Clause**

20 Marchai argues that NRS Chapter 116 effects a regulatory taking. The
21 Fifth Amendment to the United States Constitution prohibits "private property be[ing]
22 taken for public use without just compensation." U.S. Const. amend. V. Article One of the
23 Nevada Constitution correspondingly provides that "[p]rivate property shall not be taken
24 for public use without just compensation having been first made, or secured." Nev. Const.
25 art. I, § 8(6). The Nevada Supreme Court clarified regulatory taking jurisprudence as
26 follows: "a per se regulatory taking occurs when a public agency seeking to acquire property
27 for a public use... fails to follow the [statutory eminent domain] procedures... and
28 appropriates or permanently invades private property for public use without first paying
just compensation." See McCarran Int'l Airport v. Sisolak, 137 P.3d 1110, 1127 (Nev. 2006).
"In deciding whether a particular governmental action has effected a taking, this Court

1 focuses... both on the character of the action and on the nature and extent of the
2 interference with rights in the parcel as a whole.” Tahoe-Sierra Pres. Council, Inc. v.
3 Tahoe Reg'l Planning Agency, 535 U.S. 302, 327 (2002) (quoting San Diego Gas & Elec.
4 Co. v. San Diego, 450 U.S. 621, 636 (1981)).

5 The Nevada Legislature’s enactment of the statutory framework encompassing HOA
6 liens and non-judicial foreclosures does not rise to the level of a government taking for a
7 public purpose. The enactment of the statutory framework alone is insufficient government
8 action to establish such a taking. The character of the legislative action is simply to create a
9 legal framework for private conduct to operate within, and because the foreclosure action is
10 non-judicial, the nature of the government interference in private property is minimal,
11 possibly even non-existent. In fact, one of the many complaints about Chapter 116’s
12 framework, is the prescription that HOA liens may be foreclosed upon without government
13 intervention or judicial approval. That being so, the foreclosure of an HOA lien is not an
14 action of the government, but instead is that of a private party — the HOA and its
15 foreclosure agent.

16 In SFR v. U.S. Bank, the Court found the private interest at stake here was “essential
17 for common-interest communities,” stating, “Otherwise, when a homeowner walks away
18 from the property and the first deed of trust holder delays foreclosure, the HOA has to
19 ‘either increase the assessment burden on the remaining unit/parcel owners or reduce the
20 services the association provides (e.g., by deferring maintenance on common amenities).”
21 SFR v. U.S. Bank, 334 P.3d 408, 414 (Nev. 2014), reh'g denied (Oct. 16, 2014) (quoting
22 Uniform Law Commission’s Joint Editorial Board for Uniform Real Property Acts, The Six-
23 Month “Limited Priority Lien” for Association Fees Under the Uniform Common Interest
24 Ownership Act, at 5-6). The Court noted that the true super-priority lien was created “[t]o
25 avoid having the community subsidize first security holders who delay foreclosure, whether
26 strategically or for some other reason.” Id. A homeowners’ association is a private entity
27 that serves an exclusively private interest; therefore, any taking that occurs as a result of a
28 foreclosure of an HOA lien is a private action to benefit a private interest.

1 Marchai cannot show that legislative enactment of Chapter 116 is a government
2 taking by regulation or that a private foreclosure of an HOA lien serves to further a public
3 purpose. Therefore, the Court denies Marchai's motion for summary judgment on this
4 ground.

5 **c. Void for Vagueness Doctrine**

6 Marchai argues NRS Chapter 116 is unconstitutionally vague. Nevada's
7 two-factor test for vagueness examines whether the statute, "(1) fails to provide notice
8 sufficient to enable persons of ordinary intelligence to understand what conduct is
9 prohibited and (2) lacks specific standards, thereby encouraging, authorizing, or even
10 failing to prevent arbitrary and discriminatory enforcement." Flamingo Paradise Gaming,
11 LLC v. Chanos, 217 P.3d 546, 553-54 (Nev. 2009) (quoting Silvar v. Eighth Judicial Dist.
12 Court ex rel. County of Clark, 129 P.3d 682, 684-85 (Nev. 2006). "A statute which does not
13 impinge on First Amendment freedoms... may be stricken as unconstitutionally vague only
14 if it is found to be so in all its applications. Additionally, the standard of review is less strict
15 under a challenge for vagueness where the review is directed at economic regulations."
16 State v. Rosenthal, 819 P.2d 1296, 1300 (Nev. 1991). "Enough clarity to defeat a vagueness
17 challenge may be supplied by judicial gloss on an otherwise uncertain statute, by giving a
18 statute's words their well settled and ordinarily understood meaning, and by looking to the
19 common law definitions of the related term or offense." Busefink v. State, 286 P.3d 599,
20 605 (Nev. 2012) (quoting Holder v. Humanitarian Law Project, 130 S.Ct. 2705, 2718
21 (2010)).

22 For the purposes of this Order, the Court will not dispute Marchai's assertion that
23 NRS Chapter 116 is inartfully drafted; however, this is not enough for the Court to refuse to
24 apply NRS Chapter 116. See Fairbanks v. Pavlikowski, 423 P.2d 401, 404 (Nev. 1967). The
25 Court finds that NRS Chapter 116 is not unconstitutionally vague. As previously discussed
26 in the Court's decision to apply the decision of SFR in this case, Chapter 116's original 1991
27 language put holders of first deeds of trust on notice of a potential priority conflict. Though
28 there were conflicting interpretations of Chapter 116 prior to the SFR decision, judicial

1 enforcement was not arbitrary or discriminatory. The decision in SFR has clarified some
2 ambiguities in the statutes. Because this statute does not infringe on constitutionally
3 protected rights, as previously discussed, the standard for the Court to find
4 unconstitutional vagueness is high. The language of Chapter 116 and the SFR decision is
5 sufficient for this Court to find NRS Chapter 116 is not unconstitutionally vague.

6 Marchai cannot show that NRS Chapter 116 is unconstitutionally vague. Therefore,
7 the Court denies Marchai's motion for summary judgment on this ground.

8 **3. Alleged Issues Prior to Sale**

9 Marchai asserts there are issues with the HOA's foreclosure process prior to
10 the foreclosure sale. Marchai argues issues regarding notice and tender prevent the HOA
11 foreclosure sale from extinguishing Marchai's deed of trust.

12 **a. Notice**

13 Marchai argues that the HOA failed to comply with several notice
14 provisions of NRS Chapter 116, including requirements that notices be mailed via first class
15 mail and notices be mailed to all parties with an interest in the property. SFR argues the
16 foreclosure deed conclusively establishes that the notice provisions of NRS Chapter 116
17 were met.

18 The foreclosure deed's recitals are conclusive evidence of compliance with the notice
19 provisions of NRS 116.31162 through 116.31168. NRS 116.31166(2). The deed in this case
20 states all statutory notices were given. SFR can rely on the deed's recitals as proof that the
21 HOA fulfilled the notice provisions of NRS Chapter 116.

22 The foreclosure deed's recitals are not unassailable, however. The Nevada Supreme
23 Court recently held:

24 The long-standing and broad inherent power of a court to sit in equity
25 and quiet title, including setting aside a foreclosure sale if the
26 circumstances support such action, the fact that the recitals made
27 conclusive by operation of NRS 116.31166 implicate compliance only
28 with the statutory prerequisites to foreclosure, and the foreign
precedent cited under which equitable relief may still be available in

1 the face of conclusive recitals, at least in cases involving fraud, lead us
2 to the conclusion that the Legislature, through NRS 116.31166's
3 enactment, did not eliminate the equitable authority of the courts to
consider quiet title actions when an HOA's foreclosure deed contains
conclusive recitals.

4 Shadow Wood HOA v. N.Y. Cmty. Bancorp., 132 Nev. Adv. Op. 5 at *6 (2016).

5 Based on the language in Shadow Wood and the Court's equitable powers, the Court
6 is not persuaded that sending notices via certified mail as opposed to first class mail would
7 justify setting aside a foreclosure sale or its effect if the parties actually received notice in a
8 timely manner. Absent some further showing that notice was not actually received, recitals
9 in the foreclosure deed are sufficient to establish that the HOA complied with NRS Chapter
10 116.

11 Marchai only provides evidence that notice was not received by an interested party
12 in one case. Marchai asserts it did not receive the notice of trustee's sale mailed on July 29,
13 2013. At the time, Marchai had an interest in the Wolf Rivers property; however, Marchai
14 did not have a recorded interest in the property. Though U.S. Bank transferred its deed of
15 trust to Marchai in March of 2013, neither party recorded the transfer until August 12,
16 2013. U.S. Bank did receive the notice of trustee's sale mailed on July 29, 2013. Marchai's
17 failure to receive notice can be attributed to its own actions and the actions of U.S. Bank.
18 The HOA mailed notices to all parties that it could have known had an interest in the
19 property.

20 Marchai failed to show the HOA violated the notice provisions of NRA Chapter 116.
21 Therefore, the Court denies Marchai's motion for summary judgment on this ground.

22 **b. Tender**

23 Marchai asserts the homeowner tendered the HOA lien's superpriority
24 amount prior to the HOA foreclosure sale. Marchai argues this tender causes Marchai's
25 deed of trust to survive the HOA foreclosure sale.

26 The Court is faced with a novel set of facts in this case. The foreclosure process,
27 from the first notice of delinquent assessment to the actual foreclosure sale, spanned
28

1 almost five years. During this period, Perez, the homeowner, paid the HOA \$3,230.00.
2 This is definitely more than the value of nine months of assessment fees, regardless of
3 which year's rate is applied. At the end of the period, however, Perez still owed the HOA
4 \$14,677.80.

5 The Court must determine whether the homeowner's payments to an HOA in this
6 case constitute tender of the superpriority amount. NRS 116.3116(2) states the HOA lien is
7 prior to first deeds of trust "to the extent of the assessments for common expenses based on
8 the periodic budget adopted by the association... which would have become due in the
9 absence of acceleration during the 9 months immediately preceding institution of an action
10 to enforce the lien..." The statute does not state who can satisfy the superpriority portion of
11 the lien.

12 The Court finds the answer relies on the definition of "tender" rather than
13 distinguishing between homeowners and first deed of trust holders. A party's tender of the
14 super-priority amount is sufficient to extinguish the super-priority character of the lien,
15 leaving only a junior lien. See SFR Investments Pool 1 v. U.S. Bank, 334 P.3d 408, 414
16 (2014), reh'g denied (Oct. 16, 2014) and Sears v. Classen Garage & Serv. Co., 612 P.2d 293,
17 295 (Okla. Civ. App. 1980) ("a proper and sufficient tender of payment operates to
18 discharge a lien"). The common law definition of tender is "an offer of payment that is
19 coupled either with no conditions or only with conditions upon which the tendering party
20 has a right to insist." Fresk v. Kraemer, 99 P.3d 282, 286-7 (Or. 2004); see also 74 Am.
21 Jur. 2d Tender § 22. Tender is satisfied where there is "an offer to perform a condition or
22 obligation, coupled with the present ability of immediate performance, so that if it were not
23 for the refusal of cooperation by the party to whom tender is made, the condition or
24 obligation would be immediately satisfied." 15 Williston, A Treatise on the Law of
25 Contracts, § 1808 (3d. ed. 1972).

26 In the case of a first deed of trust holder offering to pay the HOA nine months of
27 assessments, a tender is undoubtedly taking place in order to satisfy the superpriority
28 amount. The deed of trust holder offers to perform a specific condition that the HOA is

1 clearly aware of. In the case of a homeowner paying an HOA, the case is not so clear. The
2 homeowner has a responsibility to pay the HOA fees every month. Payments to the HOA
3 could be directed towards old or new monthly fees. The homeowner paying the HOA is not
4 a clear offer to satisfy the HOA's superpriority lien amount. It could be an offer to satisfy
5 the homeowner's newer debts to the HOA.

6 The Court finds that further factual development is needed to determine whether
7 Perez's payments to the HOA constituted a valid tender. Marchai is careful in its motion for
8 summary judgment to phrase Perez's payments to the HOA during the foreclosure process
9 as continually being in response to the HOA's notices of delinquent liens and sales. If this
10 was the intent of Perez, Marchai can make the case that Perez's payments to the HOA were
11 designed to satisfy the HOA lien's superpriority amount. This would potentially protect
12 Perez, as Marchai would be able to sell the Wolf Rivers property to collect Perez's debt
13 rather than directly pursue Perez under the agreement secured by the deed of trust. On the
14 other hand, SFR could prove Perez was attempting to keep up with her monthly dues and
15 had no intent of directing her payments towards the HOA's superpriority amount. The
16 foreclosure process's length of time in this case further complicates the issue for both sides.

17 The Court finds genuine issues of material fact exist on the issue of tender.
18 Therefore, the Court denies both Marchai and SFR's motion for summary judgment on this
19 ground.

20 **4. Alleged Issues With Foreclosure Sale**

21 Marchai asserts there are also issues with the HOA's foreclosure sale.
22 Marchai argues issues regarding the wording in the foreclosure deed and commercial
23 reasonableness prevent the foreclosure sale from extinguishing Marchai's interest in the
24 property. SFR argues any issues in the foreclosure process cannot impact SFR's interest in
25 the property as a bona fide purchaser.

26 //

27 //

1 **a. Alessi & Koenig's Interest in the Property**

2 Marchai argues SFR actually purchased Alessi & Koenig's interest in
3 the Wolf Rivers property rather than the HOA's interest. Marchai bases its argument on a
4 sentence in the foreclosure deed:

5 Alessi & Koenig, LLC (herein called Trustee), as the duly appointed
6 Trustee under that certain Notice of Delinquent Assessment Lien...
7 does hereby grant, without warranty expressed or implied to: SFR... all
8 its right, title and interest in the property...

9 While the Court agrees this sentence is inartfully drafted, the Court does not agree
10 that it conclusively establishes that Alessi & Koenig were the grantors at the HOA
11 foreclosure sale. At most, this sentence creates an ambiguity in the deed. The deed
12 identifies the HOA as the foreclosing beneficiary. The deed also states:

13 This conveyance is made pursuant to the powers conferred upon the
14 Trustee by NRS 116 et seq... All requirements of law regarding the
15 mailing of copies of notices and the posting and publication of the
16 copies of the Notice of Sale have been complied with.

17 This ambiguity cannot be resolved in favor of Marchai on a motion for summary judgment.
18 Therefore, the Court denies Marchai's motion for summary judgment on this ground.

19 **b. Commercial Reasonableness**

20 Marchai argues the HOA foreclosure sale was commercially
21 unreasonable. SFR argues that there is no requirement that the sale be reasonable or, in
22 the alternative, there is not sufficient proof to demonstrate that the sale was unreasonable.

23 The decision in SFR did not address what commercial reasonableness was required
24 in HOA foreclosure sales. SFR Investments Pool 1 v. U.S. Bank, 334 P.3d 408, 418 n.6
25 (Nev. 2014), reh'g denied (Oct. 16, 2014). NRS Chapter 116, however, states, "[e]very
26 contract or duty governed by this chapter imposes an obligation of good faith in its
27 performance or enforcement." NRS 116.1113.

28 It used to be clear that "[m]ere inadequacy of price is not sufficient to justify setting
aside a foreclosure sale, absent a showing of fraud, unfairness or oppression." Long v.

1 Towne, 639 P.2d 528, 530 (Nev. 1982). The Nevada Supreme Court recently created room
2 for debate on this issue in its Shadow Wood decision. The Nevada Supreme Court states,
3 “demonstrating that an association sold a property at its foreclosure sale for an inadequate
4 price is not enough to set aside that sale; there must also be a showing of fraud, unfairness,
5 or oppression. Shadow Wood HOA v. N.Y. Cmty. Bancorp., 132 Nev. Adv. Op. 5 at *6
6 (2016). In the next sentence, the Nevada Supreme Court appears to distinguish a merely
7 inadequate price from a price that is “grossly inadequate as a matter of law” and indicates
8 that gross inadequacy may be sufficient grounds to set aside a sale. Id.

9 The Court finds that some other evidence of fraud, unfairness or oppression is still
10 required to set aside an HOA foreclosure sale, regardless of the price. Shadow Wood cites
11 Golden v. Tomiyasu, 387 P.2d 989, 995 (Nev. 1963) which required some showing of fraud
12 “in addition to gross inadequacy of price” for a court to set aside a transaction. Though a
13 sales price may be extremely low, as in the instant case before the Court, the price alone is
14 insufficient proof of commercial unreasonableness.

15 The Court finds Marchai has established that there are material issues of fact
16 regarding whether the HOA foreclosure sale was commercially reasonable. Price is one
17 factor the Court may consider. Marchai also argues the HOA sale was conducted after the
18 homeowner tendered the superpriority amount to the HOA. Arguments regarding notice
19 that the Court negated in this Order could also be relevant on the issue of commercial
20 reasonableness with further factual development.

21 Marchai fails to establish as a matter of law that the HOA sale was commercially
22 unreasonable. Therefore, the Court denies Marchai’s motion for summary judgment on
23 this ground.

24 **c. Bona Fide Purchaser**

25 SFR argues that any alleged deficiencies with the HOA foreclosure sale in this
26 case do not impact SFR’s quiet title claim because SFR is a bona fide purchaser for value.
27 The Nevada Supreme Court recently held that potential harm to alleged bona fide
28 purchasers must be evaluated, but it is possible to “demonstrate that the equities swayed so

1 far in [the homeowner's] favor as to support setting aside [the] foreclosure sale." Shadow
2 Wood HOA v. N.Y. Cmty. Bancorp., 132 Nev. Adv. Op. 5 at *10 (2016).

3 Questions as to SFR's bona fide purchaser status and the balance of equities in this
4 case are questions of fact. This is especially true in the instant case. The HOA's foreclosure
5 proceedings lasted almost five years. Multiple notices of delinquency, default, and sale
6 were recorded. The Court cannot rule on whether a reasonable purchaser would be put on
7 notice by these circumstances at the summary judgment stage.

8 SFR fails to establish as a matter of law that it was a bona fide purchaser and that the
9 equities in this case prevent setting aside the foreclosure sale. Therefore, the Court denies
10 SFR's motion for summary judgment on this ground.

11 IV. Conclusion

12 The Court finds that genuine issues of material fact remain in this case. The Court
13 denies SFR and Marchai's Motions for Summary Judgment and SFR's Motion to Strike.

14
15
16 DATED this 18th day of March, 2016.

17
18
19
20 

21 LINDA MARIE BELL
22 DISTRICT COURT JUDGE
23
24
25
26
27
28

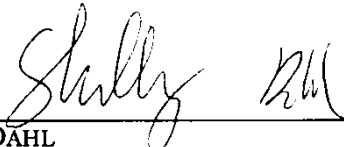
LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date of filing, a copy of this Order was electronically served through the Eighth Judicial District Court EFP system or, if no e-mail was provided, by facsimile, U.S. Mail and/or placed in the Clerk's Office attorney folder(s) for:

Name	Party
David J. Merrill, Esq. David J. Merrill, P.C.	Counsel for Marchai, B.T.
Diana Cline Ebron, Esq. Jacqueline A. Gilbert, Esq. Karen L. Hanks, Esq. Kim Gilbert Ebron	Counsel for SFR Investments Pool 1, LLC



SHELBY DAHL
LAW CLERK, DEPARTMENT VII

AFFIRMATION

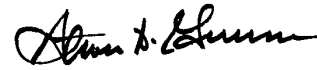
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Decision and Order filed in District Court case number A689461 DOES NOT contain the social security number of any person.

/s/ Linda Marie Bell Date 3/21/2016
District Court Judge

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

1 AFFT
2 David J. Merrill, P.C.
3 David J. Merrill, Esq
4 10161 Park Run Drive, Suite 150
5 Las Vegas, NV 89145
6 State Bar No.: 6060
7 Attorney(s) for: Plaintiff(s)



CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

8
9
10 Marchai, B.T., a Nevada business trust

11 vs

Plaintiff(s)

12 SFR Investments Pool 1, LLC, a Nevada limited liability company, et. al.

Defendant(s)

Case No.: A-16-742327-C

Dept. No.: XXXI

Date:

Time:

AFFIDAVIT OF SERVICE

15 I, Leonard Jay Hirschhorn, being duly sworn deposes and says: That at all times herein affiant was and is a citizen
16 of the United States, over 18 years of age, licensed to serve civil process in the State of Nevada under license #604,
17 and not a party to or interested in the proceeding in which this affidavit is made. The affiant received 1 copy(ies) of
18 the: Summons-Civil: Complaint: Initial Appearance Fee Disclosure: District Court Civil Cover Sheet on the 8th
19 day of September, 2016 and served the same on the 9th day of September, 2016 at 9:28 AM by serving the
20 Defendant(s), Alessi & Koenig, LLC, a Nevada limited liability company by personally delivering and leaving a
21 copy at Registered Agent, Robert Koenig, 9500 W. Flamingo Road, #101, Las Vegas, NV 89147 with Jade
22 Lepona pursuant to NRS 14.020 as a person of suitable age and discretion at the above address, which address is
23 the address of the registered agent as shown on the current certificate of designation filed with the Secretary of
24 State.

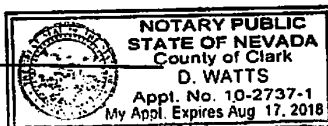
25
26
27
28
29
30
31
32
33 State of Nevada, County of Clark

34 SUBSCRIBED AND SWORN to before me on this

35 9th day of September 2016


Affiant - Leonard Jay Hirschhorn # R-070386

36 
Notary Public D. Watts



Legal Process Service License # 604

WorkOrderNo 1606572



1 **SUMM**
2 **DAVID J. MERRILL**
3 Nevada Bar No. 6060
4 **DAVID J. MERRILL, P.C.**
5 10161 Park Run Drive, Suite 150
6 Las Vegas, Nevada 89145
7 Telephone: (702) 566-1935
8 Facsimile: (702) 993-8841
9 E-mail: david@djmerrillpc.com
10 Attorney for MARCHAI, B.T.

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DISTRICT COURT
CLARK COUNTY, NEVADA

MARCHAI, B.T., a Nevada business trust,

Plaintiff,

vs.

SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company;
WYETH RANCH COMMUNITY ASSOCIATION, a Nevada non-profit corporation; ALESSI & KOENIG, LLC, a Nevada limited liability company;
DOES 1 through 10, inclusive, and
ROES 1 through 10, inclusive.

Defendants.

Case No.: A-16-742327-C
Dept. No. XXXI

SUMMONS - CIVIL

NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.

Alessi & Koenig, LLC

TO THE DEFENDANT(S): A civil Complaint has been filed by the Plaintiff against you for the relief set forth in the Complaint.

CLERK OF THE COURT

SEP 1 - 2015

RECEIVED

- 1 1. If you intend to defend this lawsuit, within 20 days after this
2 Summons is served on you, exclusive of the day of service, you must do
3 the following:
- 4 (a) File with the Clerk of this Court, whose address is shown below,
5 a formal written response to the Complaint in accordance with
6 the rules of the Court, with the appropriate filing fee.
- 7 (b) Serve a copy of your response upon the attorney whose name
8 and address is shown below.
- 9 2. Unless you respond, your default will be entered upon application of
10 the Plaintiff and failure to so respond will result in a judgment of
11 default against you for the relief demanded in the Complaint, which
12 could result in the taking of money or property or other relief
13 requested in the Complaint.
- 14 3. If you intend to seek the advice of an attorney in this matter, you
15 should do so promptly so that your response may be filed on time.
- 16 4. The State of Nevada, its political subdivisions, agencies, officers,
17 employees, board members, commission members and legislators each
18 have 45 days after service of the Summons within which to file an
19 Answer or other responsive pleading to the Counterclaim.

20 Submitted by:

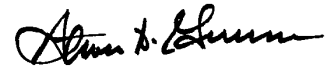
STEVEN D. GRIERSON
CLERK OF COURT

IRISH LAPRA

21 By: David J. Merrill
22 DAVID J. MERRILL
23 DAVID J. MERRILL, P.C.
24 10161 Park Run Drive, Suite 150
25 Las Vegas, Nevada 89145
26 (702) 566-1935
Attorney for Plaintiff

By: [Signature] SEP 1 - 2016
Deputy Clerk Date
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155

27 NOTE: When service is by publication, add a brief statement of the
28 object of the action. See Nevada Rules of Civil Procedure 4(b).



CLERK OF THE COURT

1 **AFFT**
2 David J. Merrill, P.C.
3 David J. Merrill, Esq
4 10161 Park Run Drive, Suite 150
5 Las Vegas, NV 89145
6 State Bar No.: 6060
7 Attorney(s) for: Plaintiff(s)

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Case No.: A-16-742327-C

Dept. No.: XXXI

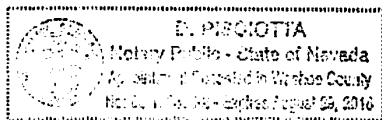
Date:

Time:

9 **Marchai, B.T., a Nevada business trust**
10 **vs** **Plaintiff(s)**
11 **SFR Investments Pool 1, a Nevada limited liability company; et al**
12 **Defendant(s)**

AFFIDAVIT OF SERVICE

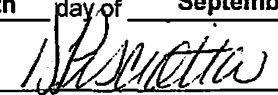
14 I, Richard Janes, being duly sworn deposes and says: That at all times herein affiant was and is a citizen of the
15 United States, over 18 years of age, licensed to serve civil process in the State of Nevada under license #604, and
16 not a party to or interested in the proceeding in which this affidavit is made. The affiant received 1 copy(ies) of
17 the: Summons - Civil; Complaint; Initial Appearance Fee Disclosure; District Court Civil Cover Sheet on the
18 8th day of September, 2016 and served the same on the 12th day of September, 2016 at 3:13pm by serving the
19 Defendant(s), SFR Investments Pool 1, a Nevada limited liability company by personally delivering and
20 leaving a copy at Registered Agent: Paracorp Incorporated, 318 N. Carson St. #208, Carson City, NV, 89701
21 with Ashley Bougherbi, Administrative Assistant pursuant to NRS 14.020 as a person of suitable age and
22 discretion at the above address, which address is the address of the registered agent as shown on the current
23 certificate of designation filed with the Secretary of State.




33 State of Nevada, County of Washoe

34 SUBSCRIBED AND SWORN to before me on this

35 13th day of September 2016

36 
Notary Public **D. Pisciotta**


Affiant - Richard Janes
Legal Process Service -

#: R-083121
License # 604

WorkOrderNo 1606571



1 **SUMM**
2 **DAVID J. MERRILL**
3 **Nevada Bar No. 6060**
4 **DAVID J. MERRILL, P.C.**
5 **10161 Park Run Drive, Suite 150**
6 **Las Vegas, Nevada 89145**
7 **Telephone: (702) 566-1935**
8 **Facsimile: (702) 993-8841**
9 **E-mail: david@djmerrillpc.com**
10 **Attorney for MARCHAI, B.T.**

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DISTRICT COURT
CLARK COUNTY, NEVADA

11 **MARCHAI, B.T., a Nevada business**)
12 **trust,**)
13 **Plaintiff,**)
14 **vs.**)
15 **SFR INVESTMENTS POOL 1, LLC, a**)
16 **Nevada limited liability company;**)
17 **WYETH RANCH COMMUNITY**)
18 **ASSOCIATION, a Nevada non-profit**)
19 **corporation; ALESSI & KOENIG, LLC,**)
20 **a Nevada limited liability company;**)
21 **DOES 1 through 10, inclusive, and**)
22 **ROES 1 through 10, inclusive.**)
23 **Defendants.**

Case No.: A-16-742327-C
Dept. No. XXXI

SUMMONS - CIVIL

NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.

SFR Investments Pool 1, LLC

TO THE DEFENDANT(S): A civil Complaint has been filed by the Plaintiff against you for the relief set forth in the Complaint.

CLERK OF THE COURT
SEP 1 - 2016
RECEIVED

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1. If you intend to defend this lawsuit, within 20 days after this Summons is served on you, exclusive of the day of service, you must do the following:
 - (a) File with the Clerk of this Court, whose address is shown below, a formal written response to the Complaint in accordance with the rules of the Court, with the appropriate filing fee.
 - (b) Serve a copy of your response upon the attorney whose name and address is shown below.
2. Unless you respond, your default will be entered upon application of the Plaintiff and failure to so respond will result in a judgment of default against you for the relief demanded in the Complaint, which could result in the taking of money or property or other relief requested in the Complaint.
3. If you intend to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time.
4. The State of Nevada, its political subdivisions, agencies, officers, employees, board members, commission members and legislators each have 45 days after service of the Summons within which to file an Answer or other responsive pleading to the Counterclaim.

Submitted by:

STEVEN D. GRIERSON
CLERK OF COURT

RUSH LAPRA

SEP 1 - 2016

By:

David J. Merrill
DAVID J. MERRILL
DAVID J. MERRILL, P.C.
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145
(702) 566-1935

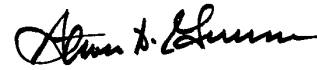
By:

Deputy Clerk Date
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155

Attorney for Plaintiff

NOTE: When service is by publication, add a brief statement of the object of the action. See Nevada Rules of Civil Procedure 4(b).

1 AFFT
2 David J. Merrill, P.C.
3 David J. Merrill, Esq
4 10161 Park Run Drive, Suite 150
5 Las Vegas, NV 89145
6 State Bar No.: 6060
7 Attorney(s) for: Plaintiff(s)



CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY NEVADA

8
9
10 Marchai, B.T., a Nevada business trust
11 vs Plaintiff(s)
12 SFR Investments Pool 1, LLC, a Nevada limited liability company, et. al.
13 Defendant(s)

Case No.: A-16-742327-C

Dept. No.: XXXI

Date:

Time:

AFFIDAVIT OF SERVICE

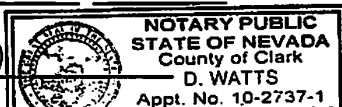
14
15 I, Leonard Jay Hirschhorn, being duly sworn deposes and says: That at all times herein affiant was and is a citizen
16 of the United States, over 18 years of age, licensed to serve civil process in the State of Nevada under license #604,
17 and not a party to or interested in the proceeding in which this affidavit is made. The affiant received 1 copy(ies) of
18 the: Summons-Civil; Complaint; Initial Appearance Fee Disclosure; District Court Civil Cover Sheet on the 8th
19 day of September, 2016 and served the same on the 9th day of September, 2016 at 9:16 AM by serving the
20 Defendant(s), Wyeth Ranch Community Association, a Nevada non-profit corporation by personally delivering
21 and leaving a copy at Registered Agent, Complete Association Management Company, LLC, 5980 S. Durango
22 Dr., Ste. 131, Las Vegas, NV 89113 with Dawn Alexander pursuant to NRS 14.020 as a person of suitable age
23 and discretion at the above address, which address is the address of the registered agent as shown on the current
24 certificate of designation filed with the Secretary of State.

25
26
27
28
29
30
31
32
33 State of Nevada, County of Clark

34 SUBSCRIBED AND SWORN to before me on this

35 9th day of September 2016

36 Notary Public D. Watts



37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000

Legal Process Service License # 604
WorkOrderNo 1606573

NOTARIES PUBLIC ARE REQUIRED TO SIGN AND DATE THEIR AFFIDAVITS OF SERVICE

1 **SUMM**
2 **DAVID J. MERRILL**
3 **Nevada Bar No. 6060**
4 **DAVID J. MERRILL, P.C.**
5 **10161 Park Run Drive, Suite 150**
6 **Las Vegas, Nevada 89145**
7 **Telephone: (702) 566-1935**
8 **Facsimile: (702) 993-8841**
9 **E-mail: david@djmerrillpc.com**
10 **Attorney for MARCHAI, B.T.**

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DISTRICT COURT
CLARK COUNTY, NEVADA

11 **MARCHAI, B.T., a Nevada business**
12 **trust,**

13 **Plaintiff,**

14 **vs.**

15 **SFR INVESTMENTS POOL 1, LLC, a**
16 **Nevada limited liability company;**
17 **WYETH RANCH COMMUNITY**
18 **ASSOCIATION, a Nevada non-profit**
19 **corporation; ALESSI & KOENIG, LLC,**
20 **a Nevada limited liability company;**
21 **DOES 1 through 10, inclusive, and**
22 **ROES 1 through 10, inclusive.**

23 **Defendants.**

Case No.: A-16-742327-C
Dept. No. XXXI

24
25
26
27
28

SUMMONS - CIVIL

29 **NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST**
30 **YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN**
31 **20 DAYS. READ THE INFORMATION BELOW.**

32 **Wyeth Ranch Community Association**

33 **TO THE DEFENDANT(S): A civil Complaint has been filed by the Plaintiff**
34 **against you for the relief set forth in the Complaint.**

CLERK OF THE COURT
SEP 1 - 2016
RECEIVED


- 1 1. If you intend to defend this lawsuit, within 20 days after this
2 Summons is served on you, exclusive of the day of service, you must do
3 the following:
- 4 (a) File with the Clerk of this Court, whose address is shown below,
5 a formal written response to the Complaint in accordance with
6 the rules of the Court, with the appropriate filing fee.
- 7 (b) Serve a copy of your response upon the attorney whose name
8 and address is shown below.
- 9 2. Unless you respond, your default will be entered upon application of
10 the Plaintiff and failure to so respond will result in a judgment of
11 default against you for the relief demanded in the Complaint, which
12 could result in the taking of money or property or other relief
13 requested in the Complaint.
- 14 3. If you intend to seek the advice of an attorney in this matter, you
15 should do so promptly so that your response may be filed on time.
- 16 4. The State of Nevada, its political subdivisions, agencies, officers,
17 employees, board members, commission members and legislators each
18 have 45 days after service of the Summons within which to file an
19 Answer or other responsive pleading to the Counterclaim.

20
21 Submitted by:

STEVEN D. GRIERSON
CLERK OF COURT

IRISH LAPRA

22
23 By:


DAVID J. MERRILL
DAVID J. MERRILL, P.C.
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145
(702) 566-1935

24
25 Attorney for Plaintiff

By:

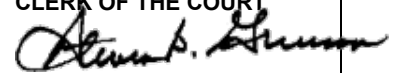

Deputy Clerk

SEP 1 - 2016

Date

Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155

26
27 NOTE: When service is by publication, add a brief statement of the
28 object of the action. See Nevada Rules of Civil Procedure 4(b).



1 **JPTM**

2 David J. Merrill
3 Nevada Bar No. 6060
4 David J. Merrill, P.C.
5 10161 Park Run Drive, Suite 150
6 Las Vegas, Nevada 89145
7 Telephone: (702) 566-1935
8 Facsimile: (702) 993-8841
9 E-mail: david@djmerrillpc.com
10 Attorney for Marchai, B.T.

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 MARCHAI, B.T., a Nevada business trust,

14 Plaintiff,

15 vs.

16 CRISTELA PEREZ, an individual; *et al.*

17 Defendants.

Case No.: A-13-689461-C

Dept. No. XI

Consolidated with: A-16-742327-C

18 **AND ALL RELATED CLAIMS AND**
19 **ACTIONS**

20 **Joint Pre-Trial Memorandum**

21 Under EDCR 2.67(b), Marchai, B.T., SFR Investments Pool 1, LLC, and Wyeth Ranch
22 Community Association submit their joint pretrial memorandum.

23 **(1) A brief statement of the facts of the case.**

24 In 2004, Cristela Perez acquired the property at 7119 Wolf Rivers Avenue, Las Vegas,
25 Nevada 89131. To purchase the property, Perez entered into two loans secured by deeds of trust.
26 In 2005, Perez refinanced her loans and entered into one InterestFirst Adjustable Rate Note,
27 secured by a first deed of trust. After a few transfers of the note and assignments of the deed of
28 trust that secured the note, Marchai, B.T. became the holder of the note and deed of trust.

In January 2008, Perez became delinquent on the assessments owed to Wyeth Ranch
Community Association. On September 30, 2008, Wyeth Ranch instituted an action to enforce

1 its assessment lien. After Wyeth Ranch instituted an action to enforce its lien, Perez made
2 payments towards her assessments.

3 On August 28, 2013, Wyeth Ranch foreclosed its lien. SFR Investments Pool 1, LLC
4 submitted the winning bid of \$21,000.00. Perez owed Wyeth Ranch \$10,679.12 in assessments,
5 late fees, and interest at the time of the foreclosure. From the foreclosure proceeds, Wyeth
6 Ranch received \$10,679.12 and applied the payment to Perez's account.

7 **(2) A list of all claims for relief designated by reference to each claim or paragraph of a pleading**
8 **and a description of the claimant's theory of recovery with each category of damage**
9 **requested.**

10 **Marchai's Claims for Relief**

11 1. Judicial Foreclosure of Deed of Trust (Compl. 1st Cause of Action (Sept. 30,
12 2013).) Marchai asks the Court to order that its deed of trust be foreclosed, for a sale of the
13 property, and an award of any deficiency against the borrower.

14 2. Wrongful Foreclosure (Compl. 3d Claim for Relief (Aug. 25, 2016).) To the extent
15 Wyeth Ranch or SFR claims that Wyeth Ranch foreclosed upon a superpriority lien, then that
16 foreclosure was wrongful because Perez's payments satisfied the superpriority portion of Wyeth
17 Ranch's lien.¹

18 3. Violation of NRS § 116.1113 (Compl. 4th Claim for Relief (Aug. 25, 2016).) To the
19 extent Wyeth Ranch claims it foreclosed upon a superpriority lien, then Wyeth Ranch did not act
20 in good faith because Perez's payments satisfied the superpriority portion of Wyeth Ranch's lien.
21 Also, if the Court concludes that Perez did not satisfy the lien's superpriority part, then Wyeth
22 Ranch did not act in good faith when it accepted the proceeds of the foreclosure to which it was
23 not entitled.

24 4. Intentional Interference with Contractual Relations (Compl. 5th Claim for Relief
25 (Aug. 25, 2016).) To the extent Wyeth Ranch or SFR claims that Wyeth Ranch foreclosed upon a
26 superpriority lien, then Wyeth Ranch and SFR intentionally interfered with Marchai's

27 ¹ The Court previously granted summary judgment against Marchai on its First and Second Claims for Relief
28 for declaratory relief under the takings and due process clauses of the United States and Nevada Constitutions. *See*
Decision & Order at 6:23-28 (Oct. 3, 2017); *see also* Decision & Order at 7:21-18:7 (Mar. 22, 2016).

1 contractual relationship with Perez because Perez's payments satisfied the superpriority portion
2 of Wyeth Ranch's lien.

3 5. Quiet Title (Compl. 6th Claim for Relief (Aug. 25, 2016).) Marchai seeks an order
4 quieting title and concluding that Marchai's deed of trust remains as a valid encumbrance against
5 the property.²

6 **SFR's Claims for Relief**

7 1. Declaratory Relief/Quiet Title (Answer, Countercl. & Crosscl. 1st Claim for
8 Relief (Nov. 13, 2013).) SFR seeks an order quieting title to the property and declaring that
9 Wyeth Ranch's foreclosure extinguished Marchai's deed of trust.

10 2. Preliminary and Permanent Injunction (Answer, Countercl. & Crosscl. 2nd Claim
11 for Relief (Nov. 13, 2013).) SFR seeks an order enjoining Marchai from foreclosing upon its deed
12 of trust.

13 **(3) A list of affirmative defenses.**

14 **SFR's affirmative defenses to Marchai's judicial foreclosure claim**

15 1. Plaintiff fails to state a claim upon which relief may be granted.

16 2. Plaintiff is not entitled to relief from or against SFR, as Plaintiff has not sustained
17 any loss, injury, or damage that resulted from any act, omission, or breach by SFR.

18 3. The occurrence referred to in the Complaint, and all injuries and damages, if any,
19 resulting therefrom, were caused by the acts or omissions of Plaintiff.

20 4. The occurrence referred to in the Complaint, and all injuries and damages, if any,
21 resulting therefrom, were caused by the acts or omissions of a third party or parties over whom
22 SFR had no control.

23 5. SFR did not breach any statutory or common law duties owed to Plaintiff.

24 6. Plaintiff's claims are barred because SFR complied with applicable statutes and
25 with the requirements and regulations of the State of Nevada.

26
27 ² The Court previously dismissed Marchai's quiet title claim against Wyeth Ranch. *See* Order Denying, in
28 Part, and Granting, in Part, Def. Wyeth Ranch Cmty. Ass'ns Mot. to Dismiss at 2:6-7 (Jan. 24, 2017).

1 7. Plaintiff's causes of action are barred in whole or in part by the applicable statutes
2 of limitations or repose, or by the equitable doctrine of laches, waiver, estoppel, and ratification.

3 8. Plaintiff is not entitled to equitable relief because it has an adequate remedy at law.

4 9. Plaintiff has no standing to enforce the first deed of trust and the underlying
5 promissory note.

6 10. The first deed of trust and other subordinate interests in the property were
7 extinguished by the Association foreclosure sale held in accordance with NRS Chapter 116.

8 **Marchai's affirmative defenses to SFR's counterclaim**

9 1. Defendant fails to state a claim on which relief can be granted.

10 2. All causes of action alleged by Defendant are barred by the applicable statute of
11 limitations.

12 3. All causes of action alleged by Defendant are barred by the doctrine of waiver,
13 laches, and estoppel.

14 4. All causes of action alleged by Defendant are barred by the doctrine of unclean
15 hands.

16 5. All causes of action alleged by Defendant are barred by the applicable statute of
17 frauds.

18 6. The conduct of Defendant bars any relief under the principles of equitable
19 estoppel.

20 7. Marchai incorporates by reference all affirmative defenses enumerated in Rule 8
21 of the Nevada Rules of Civil Procedure as though fully set forth herein.

22 8. All injuries or damages alleged by Defendant, if any, are a direct and proximate
23 cause of intervening or supervening acts of a person or persons other than Plaintiff and over
24 which Plaintiff did not nor reasonably could have exercised control.

25 9. Defendants failed to satisfy conditions precedent to bring an action against
26 Plaintiff.

27 10. There is no basis for recovery of attorney's fees or costs from Marchai.
28

11. Any lien interest purportedly held by Defendant in the property that is the subject of this litigation is inferior to Marchai's first deed of trust interest in the property.

Wyeth Ranch's affirmative defenses

1. Defendant denies that by reason of act, omission, fault, conduct or liability on Defendant's part, whether negligent, careless, unlawful or whether as alleged or otherwise, Plaintiff was injured or damaged in any of the amounts alleged, or in any manner whatsoever.

2. Defendant is informed and believes, and thereon alleges, that the complaint, and each and every cause of action therein, fails to state facts sufficient to constitute a cause of action against Defendant.

3. Defendant is informed and believes, and thereon alleges, that the Complaint is barred by issue preclusion and/or claim preclusion (*i.e.* the Doctrine of Res Judicata).

4. Defendant is informed and believes, and thereon alleges, that if Plaintiff suffered or sustained any loss, damage, or detriment, the same is directly and proximately caused or contributed to, in whole or in part, breach of warranty, breach of contract, or the acts, omissions, activities, recklessness, negligence, and/or intentional misconduct of Plaintiff, thereby completely or partially barring his recovery herein.

5. Defendant is informed and believes, and thereon alleges, that it is not legally responsible in any fashion with respect to the damages and injuries claimed by Plaintiff; however, if Defendant is subjected to any liability to Plaintiff, it will due, in whole or in part, to the breach of warranty, breach of contract omissions, activities, carelessness, recklessness, or negligence of others; wherefore any recovery obtained by Plaintiff against Defendant should be reduced in proportion to the respective negligence, fault, and legal responsibility of all other parties, persons, or entities who contributed to or caused any such injury or damage, in accordance with the laws of comparative negligence.

6. Defendant is informed and believes, and thereon alleges, that at the time of the incident alleged in Plaintiff's claims, Plaintiff knew of and fully understood the danger and risk incident to its undertaking, but despite such knowledge, freely and voluntarily assumed and

1 exposed itself to all risk of harm and the consequent injuries or damages, if any, resulting
2 therefrom.

3 7. Plaintiff is informed and believes, and thereon alleges, that the cross-claims, and
4 each and every cause of action in the cross-claims, is barred by the applicable Statutes of Repose.

5 8. Defendant is informed and believes, and thereon alleges, that as to each alleged
6 cause of action, Plaintiff has failed, refused, and neglected to take reasonable steps to mitigate his
7 own alleged damages, if any, thus barring or diminishing Plaintiff's recovery.

8 9. Defendant is informed and believes, and thereon alleges, that the crossclaims, and
9 each and every cause of action contained therein, is barred by the applicable Statutes of
10 Limitation.

11 10. Defendant is informed and believes, and thereon alleges, that Plaintiff
12 unreasonably delayed by the filing of the crossclaims, and notification of the alleged causes of
13 action, and the basis for the causes of action alleged against Defendant, all of which has unduly
14 and severely prejudiced Defendant in its defense of this action, thereby barring or diminishing
15 Plaintiff's recovery under the Doctrine of Estoppel.

16 11. Defendant is informed and believes, and thereon alleges, that Plaintiff
17 unreasonably delayed both the filing of the crossclaims and notification or the alleged cause of
18 action, and the basis for the causes of action alleged against this answering Defendant, all of
19 which has unduly and severely prejudiced Defendant, thereby barring or diminishing Plaintiff's
20 under the Doctrine of Laches.

21 12. Defendant is informed and believes, and thereon alleges, that Plaintiff failed to
22 join all necessary and indispensable parties to this lawsuit.

23 13. Defendant is informed and believes, and thereon alleges, that the injuries and
24 damages of which Plaintiff complains were proximately caused by, or contributed by, the acts of
25 other Defendants, Cross-Defendants, Third-Party defendants, persons and/or other entities, and
26 that said acts were an intervening and superseding cause of the injuries and damages, if any, for
27 which the crossclaims complains, thus barring Plaintiff from recovering against Defendant.
28

14. Defendant is informed and believes, and thereon alleges, that the crossclaims are barred by the Statute of Frauds.

15. It has been necessary for this Defendant to retain the services of an attorney to defend this action, and this Defendant is entitled to a reasonable sum for attorney's fees and costs.

16. Defendant is informed and believes, and thereon alleges, that the claims of Plaintiff are reduced, modified, or barred by the Doctrine of Unclean Hands.

17. Defendant is informed and believes, and thereon alleges, that Plaintiff's claims are reduced, modified, and/or barred because Counterclaimant received payment.

18. Defendant is informed and believes, and thereon alleges, that Plaintiff's claims are reduced, modified, and/or barred because of changed circumstances.

19. Defendant is informed and believes, and thereon alleges, that Plaintiff's claims are reduced, modified, and/or barred because Plaintiff released its claims.

20. Defendant is informed and believes, and thereon alleges, that Plaintiff's claims are reduced, modified, and/or barred because of the Parol Evidence Rule.

21. Defendant is informed and believes and thereon alleges that Plaintiff's performance was excused because of cardinal change.

22. Defendant is informed and believes that Plaintiff's first and second causes of action are barred by the Nevada Supreme Court's decision in *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage*, Case No. 68630.

23. Defendant is informed and believes and thereon alleges that Plaintiff failed to comply with the mediation requirements set forth in NRS Chapter 38.

SFR's affirmative defenses to Marchai's remaining claims

1. The Bank fails to state a claim upon which relief may be granted.

2. The Bank is not entitled to relief from or against SFR, as the Bank has not sustained any loss, injury, or damages that resulted from any act, omission, or breach by SFR.

3. The occurrence referred to in the Counterclaim, and all injuries and damages, if any, resulting therefrom, were caused by the acts or omissions of the Bank.

1 4. The occurrence referred to in the Counterclaim, and all injuries and damages, if
2 any, resulting therefrom, were caused by the acts or omissions of a third party or parties over
3 whom SFR had no control.

4 5. SFR did not breach any statutory or common law duties allegedly owed to the
5 Bank.

6 6. The Bank failed to mitigate its damages, if any.

7 7. The Bank's claims are barred because SFR complied with applicable statutes and
8 with the requirements and regulations of the State of Nevada.

9 8. The Banks' claims are barred because the Association and its agents complied
10 with applicable statutes and regulations.

11 9. The Bank's causes of action are barred in whole or in part by the applicable
12 statutes of limitations or repose, or by the equitable doctrines of laches, waiver, estoppel,
13 ratification, and unclean hands.

14 10. The Bank is not entitled to equitable relief because it has an adequate remedy at
15 law.

16 11. The Bank has no standing to enforce the first deed of trust and/or the underlying
17 promissory note.

18 12. The Bank has no standing to enforce the statutes and regulations identified in the
19 Counterclaim.

20 13. The first deed of trust and other subordinate interests in the property were
21 extinguished by the Association foreclosure sale held in accordance with NRS Chapter 116.

22 14. The Bank has no standing to challenge the constitutionality of NRS 116.

23 15. The Banks claims are barred because the Association and its agents complied with
24 the foreclosure noticing requirements outlined in the CC&Rs.

25 16. The Bank has no remedy against SFR because, pursuant to NRS 116.31166, SFR is
26 entitled to rely on the recitals contained in the Association foreclosure deed that the sale was
27 properly noticed and conducted.

28

1 17. The bank has no remedy against SFR because SFR is a bona fide purchaser for
2 value.

3 18. The Bank has no remedy against SFR because the amounts owed under the first
4 deed of trust have been satisfied.

5 **(4) A list of all claims or defenses to be abandoned.**

6 **Marchai's claims or defenses to be abandoned**

7 None.

8 **SFR's claims or defenses to be abandoned**

9 None.

10 **Wyeth Ranch's claims or defenses to be abandoned**

11 None.

12 **(5) A list of all exhibits, including exhibits which may be used for impeachment, and a**
13 **specification of any objections each party may have to the admissibility of the exhibits of an**
14 **opposing party. If no objection is stated, it will be presumed that counsel has no objection to**
15 **the introduction into evidence of these exhibits.**

16 *See the attached Joint Exhibits List.*

17 **(6) Any agreements as to the limitation or exclusion of evidence.**

18 None.

19 **(7) A list of the witnesses (including experts), and the address of each witness which each party**
20 **intends to call. Failure to list a witness, including impeachment witnesses, may result in the**
21 **court's precluding the party from calling that witness.**

22 **Marchai's witnesses**

- 23 1. Chaim Freeman
24 c/o David J. Merrill, P.C.
25 10161 Park Run Drive, Suite 150
26 Las Vegas, Nevada 89145
- 27 2. Scott Sawyer
28 Sebastian Investment Corporation
6320 Canoga Avenue, Suite 1500
Woodland Hills, California 91367
3. R. Scott Dugan
R. Scott Dugan Appraisal Company, Inc.
8930 West Tropicana Avenue, Suite 1
Las Vegas, Nevada 89147

1 Mr. Dugan is an expert witness who will opine on the value of the property as of the day
2 Wyeth Ranch foreclosed.

3 4. Yvette Saucedo
4 Complete Association Management Company
4775 West Teco Avenue, Suite 140
5 Las Vegas, Nevada 89118

6 5. Marchai reserves the right to call any witnesses necessary for the authentication of
7 any exhibits.

8 **SFR's witnesses**

9 1. Chris Hardin
c/o Kim Gilbert Ebron
7625 Dean Martin Drive, Suite 110
10 Las Vegas, Nevada 89139

11 **Wyeth Ranch's witnesses**

12 1. Yvette Saucedo
c/o Lipson Neilson P.C.
9900 Covington Cross Drive, Suite 120
13 Las Vegas, Nevada 89144

14 **(8) A brief statement of each principal issue of law which may be contested at the time of trial.**
15 **This statement shall include with respect to each principal issue of law the position of each**
16 **party.**

17 **1. Whether Wyeth Ranch treated the lien's superpriority and subpriority portions as separate**
18 **accounts or one running account.**

19 **Marchai's position**

20 Wyeth Ranch treated the superpriority and subpriority portions of its lien as one running
21 account, not separate accounts. When Wyeth Ranch charged an assessment, interest, or fee to
22 Perez, it noted the charge on one account ledger. And when Wyeth Ranch received payment
23 towards Perez's account, it noted it on the same account ledger. Although Wyeth Ranch
24 maintained separate ledgers for assessments and fines, it did not keep a different account for its
25 lien's superpriority and subpriority portions.
26
27
28

SFR and Wyeth Ranch's position

Cranesbill does not limit the review of multiple accounts to the superpriority portion or subpriority portions of the lien, but also includes costs of foreclosure, and therefore allows payments to be applied separately to cost of foreclosure. *See Cranesbill* at 231-232, stating: "[t]he resolution of this issue may vary depending on whether the district court considers the unpaid HOA assessments and other costs the homeowner is required to pay to the HOA, such as the costs of foreclosure, to be on a running account, and therefore a single debt, or whether it considers there to be multiple accounts. *Compare* 60 Am. Jur. 2d *Payment* § 72 [*232] (2019) (addressing a single running account), *with* [**12] *Able Elec.*, 104 Nev. at 33, 752 P.2d at 220 (addressing multiple accounts)."

2. Whether Wyeth Ranch and Perez had an agreement directing the application of Perez's payments.

Marchai's position

Wyeth Ranch and Perez did not have any agreement directing the application of Perez's partial payments to any specific charges on her account. Although Perez and Wyeth Ranch entered into a payment plan in March 2010, which specified how Wyeth Ranch would apply each payment, that payment plan required Perez to make monthly payments of \$669.87 starting on April 1, 2010. Perez *never* made a payment of \$669.87 on or after April 1. And the payment plan terminated on July 2, 2010.

SFR and Wyeth Ranch's position

Cranesbill does not require an agreement between a homeowner and the homeowner's association on how to apply the homeowner's partial payments. *Cranesbill* instead states: [i]n general, "[w]hen a debtor partially satisfies a judgment, that debtor has the right to make an appropriation of such payment to the particular obligations outstanding." *Id.* at 30-31, 32, 752 P.2d at 219, 220. The debtor must direct that appropriation "at the time the payment is made." [**10] *Id.* at 32, 752 P.2d at 220. If the debtor does not direct how to apply the payment to her account, the creditor may determine how to allocate the payment. *Id.* at 32, 752 P.2d at

220. But, in that circumstance, once the creditor applies the partial payment, "the creditor may not thereafter change the application to another debt." *Id.*

3. How Wyeth Ranch applied Perez's payments.

Marchai's position

For each payment Perez made after April 2008, Alessi & Koenig first removed a portion of each payment for its collection costs. Wyeth Ranch then applied the remaining amount to Perez's account. Wyeth Ranch has not produced any document (and its witness testified that no such record exists), demonstrating how Wyeth Ranch applied each of Perez's partial payments made after April 2008. But the documents reveal that Wyeth Ranch applied partial payments *first* to assessments (as opposed to interest or late fees). And, a September 2008 report produced by Wyeth Ranch reflects that it applied payments to the *oldest* association dues first.

SFR's position

Here, the evidence will establish the Association directed the payments as follows: First, a portion of each payment paid collections costs and fees. Second, the remaining portion was forwarded to the Association who then applied the funds to the most recent past due assessments, and then if any remained, to the oldest debt due. With the exception of two payments, the borrower never made any further payments that could both cover the collection costs and fees and the then-most recent past due assessment, such that when the Association foreclosed, the lien still contained super-priority amounts.

Wyeth Ranch's position

If a homeowner does not direct payments to a superpriority portion, under *Cranesbill* an HOA (or Wyeth here) can decide how to direct payments. In choosing how to direct those payments the HOA has no obligation to guarantee a superpriority sale or protect from a superpriority sale. *Id.*, and See also Nev. Rev. Stat. § 116.31164(3)(a) ("Make, execute and, after payment is made, deliver to the purchaser, or his or her successor or assign, a **deed without warranty** . . .") The HOA either conducted a valid superpriority or a valid subpriority sale and should prevail on Marchai's alternative claims for damages.

1 **4. Whether Perez's payments satisfied the superpriority portion of Wyeth Ranch's lien.**

2 **Marchai's position**

3 Because the documentary evidence suggests that Wyeth Ranch applied payments first to
4 the oldest assessments, Perez's payments satisfied the lien's superpriority portion. But even if
5 the Court receives conflicting evidence on how Wyeth Ranch applied payments, under the
6 common law, it is presumed that payments are applied to the oldest amounts first when the
7 parties have a running account.

8 **SFR's position**

9 No. Here, the evidence will establish the Association directed the payments as follows:
10 First, a portion of each payment paid collections costs and fees. Second, the remaining portion
11 was forwarded to the Association who then applied the funds to the most recent past due
12 assessments, and then if any remained, to the oldest debt due. With the exception of two
13 payments, the borrower never made any further payments that could both cover the collection
14 costs and fees and the then-most recent past due assessment, such that when the Association
15 foreclosed, the lien still contained super-priority amounts.

16 **Wyeth Ranch's position**

17 If a homeowner does not direct payments to a superpriority portion, under *Cranesbill* an
18 HOA (or Wyeth here) can decide how to direct payments. In choosing how to direct those
19 payments the HOA has no obligation to guarantee a superpriority sale or protect from a
20 superpriority sale. *Id.*, and See also Nev. Rev. Stat. § 116.31164(3)(a) ("Make, execute and, after
21 payment is made, deliver to the purchaser, or his or her successor or assign, **a deed without**
22 **warranty . . .**" The HOA either conducted a valid superpriority or a valid subpriority sale and
23 should prevail on Marchai's alternative claims for damages.

24 **5. Whether the equities weigh in favor of applying Perez's partial payments towards the lien's superpriority portion.**

25 **Marchai's position**

26 If the Court weighs the equities, it should conclude that Perez's payments satisfied the
27 lien's superpriority portion. SFR acquired its interest in the property for a mere \$21,000. Yet the
28

1 property had a market value of \$360,000. SFR has rented the property for seven years and
2 received (or had the right to receive) far above \$21,000. If Wyeth Ranch's foreclosure
3 extinguished Marchai's deed of trust, it loses its security for the loan. And, it subjects Perez to a
4 deficiency judgment of the *entire amount* of the loan. Further, if Wyeth Ranch foreclosed upon a
5 superpriority lien, then it must disgorge any excess proceeds it retained, plus interest, costs, and
6 potentially attorney's fees.

7 **SFR's position**

8 Under *Cranesbill*, because the Association directed the payment at the time it received it,
9 this Court does not reach the equitable analysis. This analysis only comes into play when neither
10 the homeowner nor the Association directed payment. The evidence here will show the
11 Association did direct the payment, first to collection costs and fees, then to the most recent past
12 due assessments then to the oldest debt. With the exception of two payments, the borrower never
13 made any further payments that could both cover the collection costs and fees and the then-most
14 recent past due assessment, such that when the Association foreclosed, the lien still contained
15 super-priority amounts.

16 **Wyeth Ranch's position**

17 If a homeowner does not direct payments to a superpriority portion, under *Cranesbill* an
18 HOA (or Wyeth here) can decide how to direct payments. In choosing how to direct those
19 payments the HOA has no obligation to guarantee a superpriority sale or protect from a
20 superpriority sale. *Id.*, and See also Nev. Rev. Stat. § 116.31164(3)(a) ("Make, execute and, after
21 payment is made, deliver to the purchaser, or his or her successor or assign, **a deed without**
22 **warranty . . .**" The HOA either conducted a valid superpriority or valid subpriority sale and
23 should prevail on Marchai's alternative claims for damages, that do not include a claim for
24 proceeds after the sale or disgorgement damages.

1 **6. Whether a rebuttable presumption applies that Wyeth Ranch followed the law when it**
2 **applied the foreclosure sale proceeds to Perez's account.**

3 **Marchai's position**

4 NRS § 47.250(16) creates a rebuttable presumption that "the law has been obeyed."
5 Here, Wyeth Ranch applied \$10,679.12 to Perez's account following the foreclosure. It could
6 only have received and applied that amount to Perez's account if Perez's payments had satisfied
7 the lien's superpriority portion.

8 **SFR's position**

9 There is no law that governs how an Association must apply funds to any given
10 delinquent account. Thus, the presumption that the Association followed the law does not apply
11 to the Association's application of payments. Here, the Court must abide by how the Association
12 applied the payments at the time the payments were received. This application cannot be
13 changed after the fact.

14 SFR is unclear as to what Marchai means when it talks about application of the sales
15 proceeds to the Association's lien, but under NRS 116.31164, the order of payment is as follows:

- 16 1. reasonable expenses of sale;
- 17 2. reasonable expenses of securing possession before sale;
- 18 3. satisfaction of the association's lien;
- 19 4. satisfaction of junior liens;
- 20 5. remittance of excess to unit's owner.

21 Most importantly, NRS 116.31166(9) provides, "[t]he receipt for the purchase money
22 contained in such a deed is sufficient to discharge the purchaser from obligation to see to the
23 proper application of the purchase money." Thus, even if the Association applied the sale
24 proceeds incorrectly (something SFR does not believe happened), this misapplication would not
25 affect SFR's title or that the sale extinguished the deeds of trust.

26 **Wyeth Ranch's position**

27 Even assuming a superpriority sale, Marchai would have the burden of demonstrating that
28 proceeds of the sale were applied incorrectly, that cannot be presumed. Nev. Rev. Stat. Ann. §

47.250(5) has a disputable presumption "that money paid by one to another was due to the latter." Here, SFR paid to purchase the property, some of those funds were paid to Alessi as collection costs, some went to Wyeth Ranch, and the remainder were interplead. Marchai does not have a claim that proceeds from the sale were misapplied to seek those proceeds.

7. Whether Wyeth Ranch foreclosed upon a superpriority or subpriority lien.

Marchai's position

As discussed above, because Perez's partial payments satisfied the superpriority portion of Wyeth Ranch's lien, Wyeth Ranch foreclosed upon a subpriority lien.

SFR's position

The Association foreclosed upon its lien which at the time of the sale contained superpriority amounts.

Wyeth Ranch's position

If a homeowner does not direct payments to a superpriority portion, under *Cranesbill* an HOA (or Wyeth here) can decide how to direct payments. In choosing how to direct those payments the HOA has no obligation to guarantee a superpriority sale or protect from a superpriority sale. *Id.*, and See also Nev. Rev. Stat. § 116.31164(3)(a) ("Make, execute and, after payment is made, deliver to the purchaser, or his or her successor or assign, **a deed without warranty . . .**" The HOA either conducted a valid superpriority or valid subpriority sale and should prevail on Marchai's alternative claims for damages.

8. Whether SFR acquired its interest in the property subject to Marchai's deed of trust.

Marchai's position

Because Perez's payments satisfied the superpriority portion of Wyeth Ranch's lien, Wyeth Ranch foreclosed upon a subpriority lien. Hence, Marchai's deed of trust survived the foreclosure, and SFR acquired its interest in the property subject to Marchai's deed of trust.

SFR's position

No. SFR acquired title to the Property free and clear of the Deeds of Trust.

Wyeth Ranch's position

If a homeowner does not direct payments to a superpriority portion, under *Cranesbill* an HOA (or Wyeth here) can decided how to direct payments. In choosing how to direct those payments the HOA has no obligation to guarantee a superpriority sale or protect from a superpriority sale. *Id.*, and See also Nev. Rev. Stat. § 116.31164(3)(a) ("Make, execute and, after payment is made, deliver to the purchaser, or his or her successor or assign, **a deed without warranty . . .**" The HOA either conducted a valid superpriority or valid subpriority sale and should prevail on Marchai's alternative claims for damages.

(9) An estimate of the time required for trial.

Two-three days.

(10) Any other matter which counsel desires to bring to the attention of the court prior to trial.

The parties are working on a stipulated statement of facts that may significantly curtail the trial's length.

Wyeth Ranch has a pending Motion for Summary Judgment.

SFR objects to Scott Dugan's report and testimony as the issue of commercial reasonableness is not an issue before this Court on remand. If that issue did exist, it was waived when it was not raised on appeal. Because the remand is limited to the homeowner payment

1 issue, SFR objects to Mr. Dugan's report and testimony regarding the retrospective market value
2 of the Property on the date of the sale as it has no bearing on the issues being tried.

3 Dated this 6th day of November 2020.

4 David J. Merrill, P.C.

Kim Gilbert Ebron

6 By: /s/ David J. Merrill
7 David J. Merrill
8 Nevada Bar No. 6060
9 10161 Park Run Drive, Suite 150
10 Las Vegas, Nevada 89145
11 (702) 566-1935
12 Attorney for Marchai, B.T.

By: /s/ Karen L. Hanks
Karen L. Hanks
Nevada Bar No. 9578
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139
(702) 485-3300
Attorneys for SFR Investments Pool 1, LLC

10 Lipson Neilson P.C.

12 By: /s/ David T. Ochoa
13 David T. Ochoa
14 Nevada Bar No. 10414
15 9900 Covington Cross Drive, Suite
16 120
17 Las Vegas, Nevada 89144
18 (702) 382-1500
19 Attorneys for Wyeth Ranch Community
20 Association
21
22
23
24
25
26
27
28

EXHIBIT(S) LIST

Case No.: A-13-689461-C

Trial Date: November 16, 2020

Dept. No.: 11

Judge: Honorable Elizabeth Gonzalez

Court Clerk: _____

MARCHAI, B.T.

Recorder: _____

Plaintiff,

Counsel for Plaintiff: David J. Merrill, David J. Merrill, P.C. for Marchai, B.T.

vs.

CRISTELA PEREZ, *et al.*

Counsel for Defendants: Karen Hanks, Kim Gilbert Ebron for SFR Investments Pool 1, LLC and David Ochoa, Lipson Neilson P.C. for Wyeth Ranch Community Association

Defendants.

TRIAL BEFORE THE COURT

JOINT EXHIBITS

Exhibit Number	Bates Number(s)	Exhibit Description	Date Offered	Objection ¹	Date Admitted
1	MBT0001	Legal Description			
2	MBT0675	Peak Loan Servicing Spreadsheet		X	
3	MBT0679	SFR Delinquency Review		X	
4	WY000386 – WY000390	Log			
5	WY000001 – WY000055	Declaration of Covenants, Conditions and Restrictions for Wyeth Ranch (Oct. 4, 2002)			
6	WY000056 – WY000063	Amendment to Declaration of Covenants, Conditions and Restrictions for Wyeth Ranch (Nov. 14, 2002)			
7	WY000064 – WY000069	Amendment to Declaration of Covenants, Conditions and Restrictions for Wyeth Ranch (Feb. 28, 2003)			

¹ Unless objected to, the parties stipulate to the admissibility of the exhibits.

EXHIBIT(S) LIST

Case No. A-13-689461-C

Marchai, B.T. v. Cristela Perez, et al.

Exhibit Number	Bates Number(s)	Exhibit Description	Date Offered	Objection¹	Date Admitted
8	WY000070 – WY000073	Amendment to Declaration of Covenants, Conditions and Restrictions for Wyeth Ranch (May 20, 2003)			
9	WY000074 – WY000077	Amendment to Declaration of Covenants, Conditions and Restrictions for Wyeth Ranch (Aug. 25, 2003)			
10	WY000078 – WY000081	Amendment to Declaration of Covenants, Conditions and Restrictions for Wyeth Ranch (Nov. 10, 2003)			
11	WY000082 – WY000086	Amendment to Declaration of Covenants, Conditions and Restrictions for Wyeth Ranch (Feb. 10, 2004)			
12	WY000087 – WY000090	Amendment to Declaration of Covenants, Conditions and Restrictions for Wyeth Ranch (May 4, 2004)			
13	WY000432 – WY000444	Deed of Trust (July 15, 2004)			
14	WY000445 – WY000471	Deed of Trust (July 15, 2004)			
15	WY000591 – WY000593	Grant, Bargain, Sale Deed (July 16, 2004)			
16	WY000587 – WY000590	Grant, Bargain, Sale Deed (July 19, 2004)			
17	WY000091 – WY000094	Amendment to Declaration of Covenants, Conditions and Restrictions for Wyeth Ranch (July 22, 2004)			

EXHIBIT(S) LIST

Case No. A-13-689461-C

Marchai, B.T. v. Cristela Perez, et al.

Exhibit Number	Bates Number(s)	Exhibit Description	Date Offered	Objection¹	Date Admitted
18	WY000095 – WY000098	Amendment to Declaration of Covenants, Conditions and Restrictions for Wyeth Ranch (Nov. 4, 2004)			
19	MBT0002– MBT0010	InterestFirst Adjustable Rate Note (Oct. 19, 2005)		X	
20	MBT0011– MBT0032	Deed of Trust (Oct. 19, 2005)			
21	MBT0754– MBT0769	Loan Policy of Title Insurance (Nov. 9, 2005)			
22	6–7	Substitution of Trustee and Full Reconveyance (Nov. 4, 2005)			
23	9–10	Substitution of Trustee and Full Reconveyance (Nov. 7, 2005)			
24	WY000402 – WY000409	Deed of Trust (Dec. 26, 2006)			
25	WY000339	Email from Rose to Parker (Dec. 28, 2006)			
26	MBT0058	Letter from Cristela Perez (Jan. 23, 2007)			
27	MBT0270	Letter from Roses to Wyeth Ranch (Jan. 24, 2007)			
28	MBT0279	Email from Johnson to Crystal Parker (Jan. 24, 2007)			
29	WY000327	Letter from Perez to Wyeth Ranch (Jan. 24, 2007)			
30	WY000336	Email from Parker to Johnson (Jan. 24, 2007)			
31	WY000337	Email from Johnson to Rose (Jan. 25, 2007)			
32	WY000338	Email from Parker to Johnson (Jan. 25, 2007)			

EXHIBIT(S) LIST

Case No. A-13-689461-C

Marchai, B.T. v. Cristela Perez, et al.

Exhibit Number	Bates Number(s)	Exhibit Description	Date Offered	Objection¹	Date Admitted
33	WY000334	Email from Rose to Johnson (Jan. 30, 2007)			
34	WY000335	Email from Rose to Johnson (Jan. 30, 2007)			
35	WY000116	Letter from Wyeth Ranch to Perez (Apr. 4, 2007)			
36	WY000329	Email from Rose to Johnson (May 24, 2007)			
37	WY000330	Email from Ritchey to Johnson (June 1, 2007)			
38	WY000331	Email from Rossol to Johnson (June 1, 2007)			
39	WY000333	Email from Chris to Johnson (June 1, 2007)			
40	WY000332	Email from Christians to Johnson (June 2, 2007)			
41	WY000324	Letter from Wyeth Ranch to Perez (Aug. 21, 2007)			
42	WY000323	Letter from Wyeth Ranch to Perez (Sept. 18, 2007)			
43	WY000322	Letter from Wyeth Ranch to Perez (Oct. 5, 2007)			
44	WY000284	Letter from Wyeth Ranch to Perez (Sept. 11, 2008)			
45	WY000392	Account Statement (Sept. 17, 2008)			
46	WY000477 – WY000478	Lien Letter (Sept. 30, 2008)			
47	WY000628	Notice of Delinquent Assessment (Lien) (Sept. 30, 2008)			
48	WY000108 – WY000109	Retainer Agreement (Oct. 28, 2008)			

EXHIBIT(S) LIST

Case No. A-13-689461-C

Marchai, B.T. v. Cristela Perez, et al.

Exhibit Number	Bates Number(s)	Exhibit Description	Date Offered	Objection¹	Date Admitted
49	WY000476	Notice of Default and Election to Sell Under Homeowners Association Lien (Dec. 17, 2008)			
50	WY000472 – WY000475	Certified Mail Receipts (Jan. 7, 2009)			
51	WY000099 – WY000100	Delinquent Collection Policy (Sept. 10, 2009)			
52	WY000350	Authorization to Conclude Non-Judicial Foreclosure and Conduct Trustee Sale (Nov. 5, 2009)			
53	WY000505	Notice of Trustee's Sale (Dec. 18, 2009)			
54	WY000493 – WY000498	Record Property Information Report (Dec. 21, 2009)			
55	WY000507 – WY000509	Certified Mail Receipts (Jan. 25, 2010)			
56	WY000511 – WY000512	Certified Mail Receipts (Jan. 25, 2010)			
57	WY000504	Facsimile Cover Letter (Feb. 3, 2010)			
58	WY000506	Payment Receipt (Feb. 18, 2010)			
59	WY000521 – WY000522	Payment Plan Detail (Mar. 11, 2010)			
60	WY000523 – WY000524	Letter from Alessi & Koenig to Perez (Apr. 13, 2010)			
61	WY000533	Payment Receipt (May 11, 2010)			

EXHIBIT(S) LIST

Case No. A-13-689461-C

Marchai, B.T. v. Cristela Perez, *et al.*

Exhibit Number	Bates Number(s)	Exhibit Description	Date Offered	Objection¹	Date Admitted
62	MBT0504	Pre-Notice of Trustee Sale Notification (July 13, 2010)			
63	WY000539 – WY000540	Facsimile Cover Letter (July 27, 2010)			
64	WY000541	Payment Receipt (Aug. 4, 2010)			
65	WY000542 – WY000543	Payment Plan Detail (Aug. 6, 2010)			
66	WY000544	Payment Receipt (Sept. 29, 2010)			
67	WY000545	Payment Receipt (Nov. 30, 2010)			
68	WY000136	Letter from Wyeth Ranch to Perez (Dec. 27, 2010)			
69	MBT0628– MBT0629	Email from Charlene Fan to Branko Jeftic (Mar. 8, 2011)			
70	14	Rescission of Notice of Trustee's Sale (Mar. 8, 2011)			
71	WY000631	Notice of Trustee's Sale (Mar. 8, 2011)			
72	WY000546	Payment Receipt (Mar. 11, 2011)			
73	MBT0513– MBT0517	Certified Mail Receipts (Apr. 4, 2011)			
74	MBT0286– MBT0287	Notice of Delinquent Violation Lien (Apr. 21, 2011)			
75	MBT0519	Payment to Alessi & Koenig (May 25, 2011)			
76	WY000110	Authorization to Conclude Non-Judicial Foreclosure and Conduct Trustee Sale (June 2, 2011)			

EXHIBIT(S) LIST

Case No. A-13-689461-C

Marchai, B.T. v. Cristela Perez, et al.

Exhibit Number	Bates Number(s)	Exhibit Description	Date Offered	Objection¹	Date Admitted
77	MBT0526	Breach of Payment Plan Letter (July 27, 2011)			
78	WY000562	Payment Receipt (Aug. 4, 2011)			
79	WY000101 – WY000102	Delinquent Collection Policy Wyeth Ranch Homeowners Association (Nov. 10, 2011)			
80	WY000657	Lien Letter (Nov. 29, 2011)			
81	WY000658 – WY000659	Lien Letter (Nov. 29, 2011)			
82	WY000727	Notice of Delinquent Assessment (Lien) (Nov. 29, 2011)			
83	MBT0539	Pre-Notice of Default (Jan. 25, 2012)			
84	WY000646	Notice of Default and Election to Sell Under Homeowners Association Lien (Feb. 14, 2012)			
85	WY000570 – WY000581	Real Estate Listing Report (Feb. 15, 2012)			
86	WY000582 – WY000584	Real Property Parcel Record (Feb. 23, 2012)			
87	WY000645	Certified Mail Receipts (Mar. 5, 2012)			
88	WY000753 – WY000754	First Class Mail Envelopes (Mar. 5, 2012)			
89	WY000352 – WY000353	Email from O'Connor to Rose (Mar. 9, 2012)			
90	MBT0744– MBT0745	Corporate Assignment of Deed of Trust (Mar. 14, 2012)			

EXHIBIT(S) LIST

Case No. A-13-689461-C

Marchai, B.T. v. Cristela Perez, et al.

Exhibit Number	Bates Number(s)	Exhibit Description	Date Offered	Objection¹	Date Admitted
91	WY000649	Payment Receipt (Mar. 19, 2012)			
92	MBT0719– MBT0720	Corporate Assignment of Deed of Trust (May 5, 2012)			
93	WY000680	Payment Receipt (May 8, 2012)			
94	MBT0710– MBT0711	Corporate Assignment of Deed of Trust (May 25, 2012)			
95	MBT0576	Pre-Notice of Trustee Sale Notification (July 18, 2012)			
96	MBT0577	Pre-Notice of Trustee Sale Notification (July 18, 2012)			
97	WY000672 – WY000673	Assignment of Mortgage (July 26, 2012)			
98	WY000681	Payment Receipt (July 28, 2012)			
99	MBT0047– MBT0049	Notice of Intent to Foreclose (Oct. 3, 2012)			
100	WY000719	Notice of Trustee's Sale (Oct. 10, 2012)			
101	WY000691 – WY000694	Certified Mail Receipts (Oct. 25, 2012)			
102	MBT0297– MBT0299	Email from Eden to O'Connor (Oct. 30, 2012)			
103	MBT0300	Letter from Perez to Wyeth Ranch (Oct. 31, 2012)			
104	WY000103 – WY000104	Delinquent Collection Policy (Nov. 15, 2012)			
105	WY000107	Executive Session Meeting (Nov. 15, 2012)			

EXHIBIT(S) LIST

Case No. A-13-689461-C

Marchai, B.T. v. Cristela Perez, et al.

Exhibit Number	Bates Number(s)	Exhibit Description	Date Offered	Objection¹	Date Admitted
106	WY000696 – WY000697	Affidavit of Service (Nov. 26, 2012)			
107	MBT0590	Payment to Alessi & Koenig (Nov. 27, 2012)			
108	MBT0037– MBT0038	Assignment of Deed of Trust (Mar. 12, 2013)			
109	WY000720 – WY000721	Letter from Alessi & Koenig to Perez (Apr. 11, 2013)			
110	MBT0702– MBT0705	Transfer of Servicing Letter (June 17, 2013)			
111	MBT0699– MBT0701	Loan Master Report (July 3, 2013)		X	
112	MBT0697	Letter from Peak Loan Servicing to Perez (July 10, 2013)			
113	MBT0698	Affiliated Business Arrangement Disclosure Statement (July 10, 2013)		X	
114	MBT0617	Notice of Trustee's Sale (July 11, 2013)			
115	MBT0691– MBT0694	Peak Loan Servicing Financial Statement (July 15, 2013)		X	
116	MBT0636– MBT0637	Email from Bates to Nicole Gaudin (July 29, 2013)			
117	MBT0638– MBT0639	Email from Fran Brockett to Bates (July 29, 2013)			
118	WY000722 – WY000724	Certified Mail Receipts (July 29, 2013)			
119	WY000760	Affidavit of Posting Notice of Sale (July 30, 2013)			

EXHIBIT(S) LIST

Case No. A-13-689461-C

Marchai, B.T. v. Cristela Perez, et al.

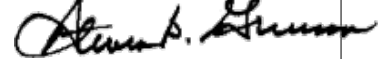
Exhibit Number	Bates Number(s)	Exhibit Description	Date Offered	Objection¹	Date Admitted
120	MBT0640– MBT0643	Email from Nevada Legal Support Services to Bates (July 31, 2013)			
121	MBT0696	Loan Reinstatement Calculation (Aug. 7, 2013)		X	
122	WY000762	Affidavit of Publication (Aug. 16, 2013)			
123	WY000105 – WY000106	Collection Policy (Aug. 21, 2013)			
124	MBT0645	Email from Bates to Maximum Financial (Aug. 28, 2013)			
125	WY000358 – WY000360	Email from Michaels to O'Connor (Aug. 28, 2013)			
126	MBT0050– MBT0051	Trustee's Deed Upon Sale (Aug. 29, 2013)			
127	MBT0627	Cashier's Check (Aug. 29, 2013)			
128	WY000766	Payment Receipt (Aug. 29, 2013)			
129	WY000361	Check Stubs (Sept. 3, 2013)			
130	MBT0673– MBT0674	Letter from Peak Loan Servicing to Cristela Perez (Sept. 5, 2013)			
131	WY000365	Adjustment Register (Oct. 1, 2013)			
132	MBT0680– MBT0690	Preliminary Report for Title Insurance (Oct. 9, 2013)			
133	MBT0651– MBT0670	Complaint for Interpleader (Oct. 23, 2013)			
134	MBT0676	Letter from Peak Loan Servicing to Cristela Perez (Nov. 8, 2013)			

EXHIBIT(S) LIST

Case No. A-13-689461-C

Marchai, B.T. v. Cristela Perez, et al.

Exhibit Number	Bates Number(s)	Exhibit Description	Date Offered	Objection¹	Date Admitted
135	MBT0695	Evidence of Lender Place Insurance (Feb. 15, 2015)			
136	MBT0052– MBT0053	Certificate of Custodian of Records Pursuant to NRS 52.260 (Oct. 9, 2015)			
137	MBT0678	Insurance Coverage Notification (Oct. 13, 2015)			
138	WY000377 – WY000380	Resident Transaction Detail (Oct. 16, 2015)			
139	WY000381 – WY000385	Resident Transaction Detail (Oct. 16, 2015)			
140	MBT0329– MBT0332	Affidavit of David Alessi (Nov. 10, 2015)			
141	18–20	Records Search & Order System (Jan. 11, 2016)			
142		Appraisal of Real Property Expert Report Prepared by Scott Dugan (Apr. 14, 2017)		X	
143		Notice of Accounting for Injunction Pending Appeal: September 2020 (Oct. 13, 2020)			
144		Second Amended Notice of Taking Deposition of Wyeth Ranch Community Association			



1 KAREN L. HANKS, ESQ.
Nevada Bar No. 9578
2 E-mail: karen@kgelegal.com
JASON G. MARTINEZ, ESQ.
3 Nevada Bar No. 13375
E-mail: jason@kgelegal.com
4 KIM GILBERT EBRON
7625 Dean Martin Drive, Suite 110
5 Las Vegas, Nevada 89139
Telephone: (702) 485-3300
6 Facsimile: (702) 485-3301
Attorneys for SFR Investments Pool 1, LLC
7

8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

10 MARCHAI B.T., a Bank Trust,
11 Plaintiff,
12 vs.

Case No. A-13-689461-C

Consolidated with A-16-742327-C

Dept. No. XI

13 CRISTELA PEREZ, an individual; SFR
INVESTMENTS POOL 1, LLC, a limited
14 liability company; U.S. BANK NATIONAL
ASSOCIATION, N.D., a national
15 association; DOES I through X; and ROE
CORPORATIONS I through 10, inclusive,
16 Defendants.
17

**SFR INVESTMENTS POOL 1, LLC'S
TRIAL BRIEF RE: BONA FIDE
PURCHASER**

18
19 ALL RELATED MATTERS

20 **SFR'S STATUS AS A BONA FIDE PURCHASER OVERRIDES ANY HOMEOWNER PAYMENT**

21 The concept of a bona fide purchaser has long been recognized in Nevada,¹ but in 2013,
22 the Legislature codified the definition in NRS 111.180(1). NRS 111.180(1) defines a BFP as

23 Any purchaser who purchases an estate or interest in any real property in good
24 faith and for valuable consideration and who does not have actual knowledge,
constructive notice of, or reasonable cause to know that there exists a defect in, or
25 adverse rights, title or interest to, the real property is a bona fide purchaser.

26 NRS 111.180(1).

27 ¹ *Swartz v. Adams*, 93 Nev. 240, 246, 563 P.2s 74, 77 (1977) (finding that where notice of sale
28 was not given to owners, property still could not be returned to owners because property was
purchased by a BFP); *see also*, NRS 111.325, NRS 645F.440 and NRS 205.372.

1 Additionally, NRS 111.180(2) has long protected BFPs even where fraud is involved.
2 The Legislative minutes which brought about codification of BFP support the notion that BFPs
3 were always intended to be protected from any challenge to a foreclosure sale. As Sylvia Smith,
4 President of Nevada Land Title Association testified, BFP “is vital if the former owner shows up
5 to claim title, since the BFP will keep the asset and the former owner or party who claims to have
6 an interest would have to look to the fraudulent seller for financial compensation.” *See* SB 295
7 Minutes of the Senate Committee on Judiciary 77th Session (April 1, 2013). This is not to say a
8 party cannot challenge a foreclosure sale, but that party “cannot kick out the new purchaser from
9 the property who in good faith bought the property as a BFP.” *Id.* at p. 28. As Russell Dalton,
10 Chairman of Nevada Land Title Association testified,

11 This bill protects an innocent party who buys a property at a foreclosure sale...It
12 requires that the former borrower or any other party that claims a defect in the
13 foreclosure process to seek monetary damages against the bank or those parties
14 who wronged that borrower as opposed to disrupting the title, interest and
 ownership of the buyer after the foreclosure sale.

15 *Id.* at p. 28.

16 When Senator Ford questioned the need for codification given the concept of BFP has
17 been in existence forever, Zachary Ball of Nevada Land Title Association testified, “the concept
18 is not secured. That is what we are attempting to do.” *Id.* at 28-29. Mr. Ball further noted that
19 while the concept of BFP appears in other parts of the Nevada Revised Statutes,² those statutes
20 protect a BFP only from a specific group of wrongdoers. As Mr. Ball testified,

21 It will be greatly strengthened by codification within the statute. We are looking
22 at a specific court function. In order to prevent those lawsuits, this gives the title
 industry the ability to better rely on the Nevada statutes and law at the
 transactional phase.

23 *Id.* at 30.

24 Finally, as Senator Hutchison questioned, “I assume you want to strengthen the BFP
25 status to provide the subsequent purchasers some certainty and let them move on with life” to
26 which Mr. Ball responded, “[t]hat is correct.” *Id.* at p. 31.

27
28

² *See* NRS 111.325, NRS 645F.440 and NRS 205.372.

1 What is clear from the legislative history of NRS 111.180(1) is the driving force was to
2 strengthen BFP status in Nevada such that Courts understood this status cloaked every real estate
3 transaction in Nevada, including all foreclosure sales. And this is irrespective of whether the
4 particular statute mentioned BFP because NRS 111.180(1) applies whole cloth to any and all real
5 estate transactions. Most importantly, this status is intended to insulate BFPs from lawsuits
6 which challenge foreclosure sales; the idea being a BFP's title will not be affected by any such
7 challenge because the remedy for the aggrieved party is limited to money damages.

8 In that regard, when the Nevada Supreme Court issued *Diamond Spur*,³ and held SFR's
9 status as a BFP was irrelevant because the sale was void, this was repudiated by the legislature
10 through the enactment of NRS 111.180(1) because the application of NRS 111.180(1) does not
11 depend on any such distinction. Instead, BFP status overrides any challenge to a foreclosure sale
12 unless otherwise specified in a separate statute.⁴ There being no such statute/limitation governing
13 a challenge to an NRS 116 sale, BFP status is always relevant. *See In re Fountainbleu Las Vegas*
14 *Holdings*, 128 Nev. 556, 577, 289 P.3d 1199, 1212 (2012) ("We have recognized that...equitable
15 principles will not justify a court's disregard of statutory requirements."); *see also Hamm v.*
16 *Carson City Nugget, Inc.*, 85 Nev. 99, 100, 450 P.2d 358, 359 (1969) ("The common law is the
17 rule of decision in our courts unless in conflict with constitutional or statutory commands.")
18 (citing NRS 1.030 and *Davenport v. State Farm Mutual*, 81 Nev. 361, 404 P.2d 10 (1965).)
19 Additionally, "[w]hen a statute is clear, unambiguous, not in conflict with other statutes and is
20 constitutional, the judicial branch may not refuse to enforce the statute on public policy grounds.
21 That decision is within the sole purview of the legislative branch." *Id.*

22 In that regard, *Diamond Spur*'s holding which found BFP status irrelevant in the context
23 of a void sale,⁵ which occurred on February 20, 2013, has an expiration date on its application

24 ³ *Bank of America, N.A. v. SFR Investments Pool I, LLC*, 134 Nev. 604, 427 P.3d 113 (2018).

25 ⁴ *See* NRS 107.080(7) enacted in 2015 and which gives a limited time period (30-90 days) for
26 noticing challenges where BFP will not be insulated. After the expiration of these time periods,
27 however, a BFP is fully insulated. *See also*, NRS 116.31166(10) enacted in 2015 and which
28 insulates a BFP after the expiration of the 60-day redemption period.

⁵ It bears noting the Nevada Supreme Court cited no law in Nevada for this proposition, but
rather Texas law. *Diamond Spur*, 134 Nev. at 612, 427 P.3d at 121.

1 i.e. it only applies to sales which occurred prior to July 1, 2013, the date NRS 111.180(1) became
2 effective.⁶ Also, by extension, the Nevada Supreme Court's identical holding regarding BFP in
3 *9352 Cranesbill Tr. v. Wells Fargo Bank, N.A.*, 136 Nev. 76, 82, 459 P.3d 227, 232 (2020) is
4 similarly flawed as it relies on *Diamond Spur*. For all sales that occurred after July 1, 2013, a
5 buyer's BFP status overrides any challenge, void or otherwise, to a foreclosure sale. This point is
6 made abundantly clear by the legislative minutes. Here, the sale occurred on August 28, 2013.
7 Thus, the Bank does not get the benefit of *Diamond Spur's/Cranesbill's* holding regarding BFP
8 status. There being no dispute SFR is a BFP, even if the borrower's payments were applied to the
9 superpriority portion, which they were not, SFR's status as BFP overrides this challenge, and
10 thus SFR cannot take subject to the deed of trust.

11 DATED this 22nd day of February, 2021.

12 **KIM GILBERT EBRON**

13
14 /s/ Karen L. Hanks
15 KAREN L. HANKS, ESQ.
16 Nevada Bar No. 9578
17 JASON G. MARTINEZ, ESQ.
18 Nevada Bar No. 13375
19 7625 Dean Martin Drive, Ste 110
20 Las Vegas, Nevada 89139
21 (702) 485-3300
22 (702) 485-3301
23 *Attorneys for SFR Investments Pool 1, LLC*
24
25
26
27

28 ⁶ 2013 Nev. Stat., ch. 400, sec. 4, at 2173.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of February, 2021, pursuant to NRCP 5(b)(2)(E), I caused a true and correct copy of the foregoing **SFR INVESTMENTS POOL 1, LLC'S TRIAL BRIEF RE: BONA FIDE PURCHASER** to be delivered via the Eighth Judicial District Court Electronic Filing System to the following:

Dochoa@lipsonneilson.com

david@djmerillpc.com

/s/ Karen L. Hanks

An Employee of Kim Gilbert Ebron

WYETH RANCH CA
P. O. BOX 12117
LAS VEGAS, NV 89112

CRISTELA PEREZ
7119 WOLF RIVERS AVE
LAS VEGAS, NV 89131

Property Address: 7119 WOLF RIVERS AVE
Account #: 64081

11632

Code	Date	Amount	Applied	Remaining	Balance	Check#	Memo
LF	1/30/2008	8.30	0.00	6.30	6.30		Late Fee Processed
LF	1/30/2008	75.00	0.00	75.00	81.30		Late Fee Processed
LF	2/29/2006	8.30	0.00	6.30	87.80		Late Fee Processed
LF	3/30/2008	8.30	0.00	6.30	93.90		Late Fee Processed
MA	4/1/2008	420.00	87.60	332.40	428.30		MA
MA	7/1/2008	420.00	0.00	420.00	848.30		MA
LF	7/30/2008	11.29	0.00	11.29	857.59		Late Fee Processed
LF	7/30/2008	75.00	0.00	75.00	932.59		Late Fee Processed
Intent	8/13/2008	50.00	0.00	50.00	982.59		INTENT TO LIEN
LF	8/30/2008	11.29	0.00	11.29	993.88		Late Fee Processed
MA	10/1/2008	420.00	0.00	420.00	1,413.88		MA

Current	30 - 59 Days	60 - 69 Days	>90 Days	Balance:	1,413.88
431.29	136.29	420.00	428.30		

9/08 1129 LF
10/08 1129 LF
10/08 75.00 LF

Complete Association Management Co., LLC | P. O. BOX 12117 | LAS VEGAS, NV 89112 | 702-531-3362

Make check payable to: WYETH RANCH COMMUNITY ASSOCIATION

9/17/2008

RECEIVED
SEP 17 2008

BY: _____ WY000392

45-001

Certificate of Service

I certify that I filed the Respondent's Appendix electronically with the Nevada Supreme Court on the 14th day of January 2022, and each of the registered users of the Court's electronic filing system shall receive notice.

Dated this 14th day of January 2022.

David J. Merrill, P.C.

By: /s/ David J. Merrill
David J. Merrill
Nevada Bar No. 6060
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145
(702) 566-1935
Attorney for Marchai, B.T.