IN THE SUPREME COURT OF THE STATE OF NEVADA

SFR INVESTMENTS POOL I, LLC, a Nevada Limited Liability Company,
Appellant

v.

U.S. BANK, A NATIONAL BANKING ASSOCIATION AS TRUSTEE FOR THE CERTIFICATE HOLDERS OF THE BANC OF AMERICA MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2008-A, Respondent

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CASE NO.: 63078

District Court Case No.: A-13-673671-C

Appeal from the Eighth Judicial District Court
of the State of Nevada
In and For the County of Clark

AMICUS BRIEF IN SUPPORT OF THE RESPONDENT U.S. BANK, N.A. AS TRUSTEE FOR THE CERTIFICATE HOLDERS OF THE BANC OF AMERICA MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2008-A'S PETITION FOR REHEARING SEEKING AFFIRMANCE

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STATEMENT OF INTEREST

The United Trustees Association ("UTA") and American Legal & Financial Network ("ALFN") (collectively, "Amici") hereby submit this Amicus Brief in support of the Respondent's Petition for Rehearing. The UTA is a national organization that, since 1968, has been the source for information, expertise, continuing education and opinion on foreclosure issues and practices for its members. UTA membership is comprised of those acting as foreclosure trustees under real property deeds of trust, along with title companies, financial institutions, auctioneers, posting and publication companies, computer service firms, and other independent companies. UTA members also work in allied and support organizations, including posting and publishing companies and computer service firms. Many of the UTA's members transact business and live in the State of Nevada.

As the largest national organization of its kind, the ALFN is a professional organization created to bring residential mortgage industry professionals together with lawyers that provide services to the industry. ALFN membership includes loan servicers, mortgage bankers, title companies, investors and other loan origination and servicing businesses, as well as the attorneys that support these groups. Like the UTA, many of the ALFN's members live and work in the state of Nevada.

The Amici request that the Court grant Respondent U.S. Bank's Petition for Rehearing, reconsider its decision and adopt the Dissent's view that a HOA must foreclose judicially to trigger the super-lien priority.

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INTRODUCTION

The Majority decision in this case misapprehends various components of NRS 116.3116 et seq., and strays from the expressed legislative intent and two decades of practice with the Act. Application of the Majority opinion, if not revised, will have numerous, far-reaching consequences on the entire mortgage lending industry in this State, from the existing and future hopeful borrowers, the HOAs and the existing and future (reluctant) lenders. If the Dissent's view is adopted such that the HOA lien attains super-priority status and can extinguish a first mortgage only through a judicial action, the application of the Act will conform to the legislative intent and practice and will avoid the adverse consequences to the industry.

The importance of HOAs and the need for them to lien properties to fund their operation for the good of the entire community is not questioned. The suggestion by the Majority that the HOAs must be able to extinguish the first deeds of trust in a non-judicial foreclosure sale to accomplish those goals is not supported by the Act. Actually, the HOAs can accomplish their goals by several means contemplated by the Act: (1) sue the unit's owner[1]; (2) institute a judicial action and name the unit's owner and all lienholders[2]; (3) assert its super-priority lien when the first mortgagee forecloses[3]; (4) per the Dissent, at p. 3, commence a non-

[1] NRS 116.3116(7).

[2] NRS 116.3116(2)(c).

[3] When the first mortgagee forecloses, the sub-priority portion of any HOA lien would be extinguished but the most recent nine months would not, so in order for the mortgagee to convey title free and clear of any liens, the nine month portion was paid. This option represents the clear intent of the Legislature. Extending the priority period in 2009 from six to nine months to protect the HOAs would have been unnecessary if HOAs could simply non-judicially foreclose on a super-priority lien before a senior deed of trust. See also, Hearing on SB 174 Before Senate Comm. on the Judiciary, 76th Legislature (2011), Statement of Michael Buckley, May 17, 2011, p. 12 ("The association can only get the super priority lien

judicial foreclosure under NRS 116.31162-116.31168 where the buyer takes subject to that first mortgage.[4] Per the Majority, the HOA can eliminate any first mortgage via a non-judicial foreclosure under NRS 116.31162-116.31168, giving a windfall to the purchaser who takes title free and clear. These options should be viewed in accordance with the Official Comments to UCIOA § 3-116 (1982): "[T]he 6 months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and *the obvious necessity for protecting the priority of the security interests of lenders*." (Emphasis added.) By initially adopting UCIOA (1982), the Legislature implicitly recognized this equitable balance. The four options preserve this equitable balance; the Majority abandons the balance and advances only the interests of the HOA – and more particularly, the interests of the investors or speculators like SFR. To restore the balance, the Majority should adopt the Dissent's view. (The existing practice permitting the HOA to assert its super-priority lien when the first mortgagee forecloses should continue.)

The Dissent's view avoids the questions of actual versus statutory notice in a non-judicial foreclosure raised by the Majority decision and ensures due process rights are preserved. Requiring the HOA to judicially foreclose to establish a super-priority will reduce the horrific impact that the Majority's opinion will shortly have on borrowers, HOAs, property values and sales, first mortgagees, the courts, investors, and new loan originations in Nevada.

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if there is a foreclosure by the first mortgage."); Statement of Michael Buckley, February 24, 2011, p. 4; and Statement of Senator Allison Copening, June 4, 2011, pp. 21-22.

[4] This was standard practice until only the last few years, as the buyers would collect rents from the unit's owner or evict and collect them from a new tenant **until the first deed of trust foreclosed**. See Las Vegas Review Journal, "Shrewd investors snap up HOA liens, rent out houses," March 18, 2013. AMICI's Addendum UTA/ALFN01-04.

A. NRS 116.3116 SHOULD REQUIRE THE HOA TO INSTITUTE A JUDICIAL "ACTION" TO TRIGGER A "SUPER-PRIORITY" LIEN THAT COULD EXTINGUISH A FIRST MORTGAGE.

1. A national trend exists, requiring the HOA to file a lawsuit to trigger the super-priority lien.

The Majority purportedly relies on the legislative history of the UCIOA to establish that a non-judicial foreclosure extinguishes a deed of trust. However, no UCIOA state has concluded that a non-judicial HOA foreclosure sale can eliminate a senior deed of trust. Seven of the other eight UCIOA jurisdictions (Colorado, Connecticut, Delaware, Vermont, Alaska, Massachusetts and West Virginia) only allow an HOA to foreclose its super-priority lien judicially[5] and Minnesota only in a foreclosure by the mortgage holder.[6] While the Majority, at 3, recognizes a benefit of adopting a uniform act, it fails to acknowledge the jurisprudence in these other UCIOA states requiring judicial foreclosures (or lender foreclosure) to trigger and foreclose super-priority liens. The Majority should reconsider, and instead adopt the Dissent's interpretation of NRS 116.3116.

2. The requirement that an HOA institute a judicial foreclosure to trigger the "super-priority" lien protects homeowners, HOAs and lienholders and prevents the administration nightmares created by the Majority's opinion.

Requiring the words "institution of an action" to mean a judicial foreclosure action would require the service of a summons and complaint on all interested parties in the case, including homeowners and *all* lienholders. This affords the first mortgagee an opportunity to appear and protect its interest in the property with the supervision of the court. However, the Majority's analysis runs afoul of due process protections because the statutes do not absolutely require the HOA in a

[5] Colo. Rev. Stat. § 38-33.3-316 (11)(b); Conn. Gen. Stat. § 47-258 (j); Del. Code Ann. Tit. 25, § 81-316(j); Vt. Stat. Ann. Tit. 27A, § 3-116(j); Alaska Stat. § 34.08.470 (j); Mass. Gen. Laws ch. 183A, § 6(c) and ch. 254, § 5; and W.Va. Code § 36B-3-116 (f).

[6] Minn. Stat. § 515B.3-116.

non-judicial foreclosure to send notice of the lien or sale to the first mortgagee[7] and do not afford the mortgagee the opportunity to cure. When, in 1993, the Legislature modified the requirement of notice to all lienholders of the non-judicial sale to only require notice to the unit's owner and *lienholders subordinate to the first deed of trust*.[8] The mortgagee would then suffer a violation of its due process rights if the first mortgage can be extinguished by the HOA non-judicial sale. **If the right to receive notice is removed but the first mortgage cannot be extinguished, the due process rights are not threatened.**

The Majority's view creates administration problems under NRS 116.31164(3)(c) avoided by the Dissent's view. That statute does not account for the fact that the HOA's lien may include super-priority and sub-priority portions through NRS 116.3116(2). That statute also provides for reimbursement of expenses which do not enjoy super-priority under NRS 116.3116(2)(c), before satisfaction of the first mortgage. The Dissent's view avoids both these problems since a non-judicial sale does not trigger the super-priority and the entire HOA lien is superior to all lienholders subordinate to the first mortgage so all the expenses are properly recoverable against them. An HOA sale *under the administration of the court* would properly result in payment of the nine months of assessments (rather than the HOA's entire lien and non-priority expenses), then the first security interest mortgage, and then the remainder to the HOA and other lienholders in their order of priority.

The Majority, at 18-19, relies on NRS 116.310312 (for maintenance or abatement expenses) as a basis to conclude that the super-priority in NRS 116.3116 must be "read to encompass judicial and non-judicial foreclosure." The Majority however failed to recognize that **the first security interest is given no priority**

[7] See NRS 116.311635(1)(b)(2) and 116.31168.
[8] When NRS 116.31168(1) is read with NRS 107.090(3) and (4), how can any first deed of trust be subordinate to any deed of trust?

over the maintenance and abatement lien under NRS 116.310312; only liens recorded prior to the declaration and "Liens for real estate taxes and other governmental assessments or charges" are afforded such priority. NRS 116.310312 therefore lends no support to the Majority's interpretation of NRS 116.3116.

The Majority, at 13, scolds the lenders because they "could have established an escrow for []HOA assessments to avoid having to use its own funds to pay delinquent dues," thereby protecting themselves from extinguishment. However, the Majority fails to recognize that the right to "establish an escrow account, loan trust account or other impound account for advance contributions for the payment of assessments" was not created until October 1, 2013, upon the adoption of NRS 116.3116(3). Moreover, the unit's owner must consent to the establishment of such an account. Collecting one month at a time provides the mortgagee only one month's protection, but imagine the owner's surprise – and fury! – getting a bill for an entire year on his next statement.

The problems of due process and administration are avoided if the non-judicial foreclosure cannot extinguish the first mortgage, as the Dissent argued.

3. Since the non-judicial foreclosure scheme does not mandate notice and an opportunity to cure, the HOAs face crippling liability for wrongful foreclosure if they guess wrong.

The Majority suggests a lender can prevent extinguishment by paying any delinquent assessments incurred by the homeowner. But when the first mortgagee is not required to get notices of delinquency, default and sale and is not expressly permitted to cure the deficiency that analysis must fail. While the Majority accepted as true, at this stage of the pleadings, the allegation in the Complaint that the subject HOA gave all statutory notices, many HOAs did not and are exposed to enormous liability to the first mortgagees whose interests were extinguished. Such liability may often exceed the E&O insurance carried by the HOA, putting the cost of defense and liability on the individual members of the HOA.

It was not until October 1, 2013, when NRS 116.4109(7) went into effect that the first mortgagee even had a right to request a statement of demand of the amount of the monthly assessment and fees and costs currently due. Previously, the HOAs regularly refused to provide the information to lenders, citing the Fair Debt Collections Practices Act, the borrower's right to privacy, and numerous other excuses.[9] Still, the HOAs refuse to provide the lenders the 9-month super-priority amount and even refuse the lender's offer to cure.[10] The Majority, at 23, says "nothing appears to have stopped U.S. Bank from determining the precise superpriority amount in advance of the sale *or paying the entire amount and requesting a refund of the balance*." Is it reasonable to expect the HOA that refused to provide the 9-month payoff turn around and refund the difference just because the holder asks for it back?

If the Nevada Legislature intended for the non-judicial foreclosure to extinguish a first mortgage, it would have required the HOA to give the notices, provide the 9-month amount and accept the amount from the holder *in every instance*. The lack of guidance by the Legislature puts the burden on HOAs to choose whether to give notice, give the 9-month quote, and accept the 9-month payoff. And if the HOA was inclined to provide a 9-month quote, when does the 9 months start? Before the Notice of Delinquent Assessment? Notice of Default? Notice of Sale? Sale? The Majority's opinion now exposes HOAs who choose wrong to significant liability for wrongfully foreclosing out the first mortgagee's interest, as well as the cost of defending those suits. Requiring the HOA judicially foreclose to enforce its super-priority lien will rescue the HOAs from liability for *past* non-judicial foreclosures and protect them from having to answer these confusing questions as they will be resolved by the court's supervision. But if an HOA non-judicial sale cannot extinguish a first mortgage, there is no need for the

[9] See for example, UTA/ALFN05, 06-07.
[10] See for example, UTA/ALFN08-10, 11-12 and 13.

HOA to give notice of its sale to the first mortgagee or provide it with or accept the 9-month payoff amount, and the HOAs who did not are then not exposed to liability to the first mortgagees.

The Dissent's view avoids these problems and should be adopted. Any judicial foreclosure requires notice and any judgment can clearly spell out which lien is being foreclosed, putting homeowners, first mortgagees and prospective bidders on notice so they can make educated decisions on how to protect their interests.

B. IMPORTANT PUBLIC POLICIES ARE SEVERELY IMPACTED BY THE RECENT MAJORITY OPINION.

1. The Majority opinion would substantially impact the borrowers on deeds of trust that have been extinguished by a non-judicial HOA sale.

On several levels, the Majority opinion has far-reaching and potentially devastating consequences for borrowers whose deeds of trust were extinguished by an HOA's non-judicial foreclosure.

First, requiring the HOA to enforce its super-priority lien via a judicial foreclosure may provide the homeowners a one-year right of redemption. Petition, at 5-6.

Second, the Majority opinion exposes Nevada borrowers to litigation by the first mortgagees to recover deficiency judgments for the amounts owed on the underlying Note which would otherwise have been offset in a judicial foreclosure by the value of the property. Petition, at 7. Thousands of Nevada borrowers are thus exposed to damages and attorneys' fees in lawsuits by the first mortgagees, causing many to file bankruptcy, creating a downward spiral and making it harder for the borrowers and Nevada's housing market to get back on their feet.

Third, an unintended result of the Majority is that it eliminates the important borrower protections designed to help borrowers stay in their homes under the

FMP, Homeowner Bill of Rights ("HOBR") and CFPB[11] regulations, with which the HOAs need not comply. The Majority, at 11, mentioned first security holders "strategically delay[ing] foreclosure," without at the same time recognizing the months of delays stem[ing] from first mortgagees' attempts to help the borrowers keep their homes under these rules. The Majority undermines the intent of these rules by allowing an HOA to foreclose ahead of a deed of trust and eliminate the very thing the lender is working with the borrower to preserve.

Fourth, the Majority opinion encourages opportunistic first mortgagees to completely bypass the borrower-friendly protections with the FMP, HOBR and CFPB Regulations by simply buying the property at the HOA's sale.

Fifth, an unintended result may also be to force first mortgagees to abandon their loan modification or loss mitigation efforts with the borrower beyond what is required of them by the consumer protection programs and rush to record a notice of default to stop a HOA sale through NRS 116.31162(6).[12]

Granting rehearing and adopting the Dissent's view of NRS 116.3116 et seq. will avoid or mitigate the harsh impact of the decision on homeowners.

2. The Majority opinion creates legal uncertainty regarding the validity of prior HOA sales.

Opportunistic investors buying properties at HOA non-judicial sales with the hope that the first mortgage is wiped out arose over the last four years. For nearly two decades, HOAs and first mortgagees jointly believed that the first mortgage

[11] 12 C.F.R. 1024.41(f), concerning "dual-tracking," prohibits a servicer from making the first notice or filing required for a foreclosure process until a mortgage loan account is more than 120 days delinquent.

[12] The statute, effective October 1, 2013, precludes a HOA from proceeding with a foreclosure while the borrower and lender are in the FMP exploring the borrower staying in his home through loan modification, among other options. The FMP can take close to 360 days before the time to appeal has run and the certificate must issue, if there is no appeal. It makes no sense for the Legislature to expressly preclude the HOA from foreclosing during FMP unless the mortgage would survive the eventual HOA non-judicial sale.

survived the HOA's non-judicial foreclosure – as evidenced by many CC&Rs providing "mortgagee protection clauses" to this day. What happens to older sales now? Does the purchaser at an HOA sale in 1993 now hold title or does the person who bought the same property from the foreclosing first mortgagee? Large numbers of properties sold at HOA non-judicial sales over the last couple of decades could now be tied up in title disputes. The massive impending litigation will impact Nevada's already fragile housing market, as well as innocent homeowners and lenders.

Granting rehearing and adopting the Dissent's view that HOAs must judicially foreclosure on their super-priority lien will eliminate this risk.

3. The Majority decision negatively impacts the origination of new loans in Nevada.

In the short-term, any lender will have to weigh enormous risks before making a loan on a property subject to a Nevada HOA. Prospective homebuyers' access to money will be significantly impacted, harming Nevada's rebounding housing market.

In the long-term, prospective lenders would undoubtedly have to increase costs, fees, and out of pocket expenses to make up for the additional risk associated with lending money to individuals on properties located in HOAs. Many borrowers would be unable to qualify for new loans due to the increases. Market values would decrease due to a glut of unsellable properties.

Requiring HOAs to judicially foreclose to enforce their super-priority liens would lead to predictability from the court's supervision and reduce the risk to prospective lenders, decreasing the cost of new loans and stabilizing or improving the housing market.

CONCLUSION

Based on the above, this Court should reverse its decision, render a ruling in favor of the preservation of a first mortgage after a HOA non-judicial sale, and affirm the dismissal.

DATED this 15th day of October, 2014.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of N.R.A.P. 32(a)(4), the typeface requirements of N.R.A.P. 32(a)(5) and the type style requirements of N.R.A.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point, Times New Roman style. I further certify that this brief complies with the page- or type-volume limitations of N.R.A.P. 32(a)(7) because, excluding the parts of the brief exempted by N.R.A.P. 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 3,353 words. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 15th day of October, 2014.

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PROOF OF SERVICE

I certify that I electronically filed on the 15th day of October, 2014, the foregoing **AMICUS BRIEF IN SUPPORT OF THE RESPONDENT U.S. BANK, N.A. AS TRUSTEE FOR THE CERTIFICATE HOLDERS OF THE BANC OF AMERICA MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2008-A'S PETITION FOR REHEARING SEEKING AFFIRMANCE** with the Clerk of the Court for the Nevada Supreme Court by using the CM/ECF system. I further certify that all parties of record to this appeal either are registered with the CM/ECF or have consented to electronic service.

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

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