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Jan 15 2014 11:25 a.m.

Tracie K. Lindeman
Clerk of Supreme Court

VS.

Respondent.

**RESPONDENT'S ANSWERING BRIEF IN RESPONSE TO APPELLANT
GOGO WAY TRUST'S OPENING BRIEF**

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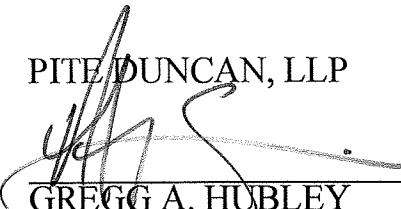
1 **NRAP 26.1 DISCLOSURE**

2 The undersigned counsel of record certified that the following are persons and
3 entities as described in NRAP 26.1(a), and must be disclosed. These representations
4 are made in order that the judges of this court may evaluate possible disqualification
5 or recusal.

6 Respondent, NEW YORK COMMUNITY BANK ("NYCB"), is a New York
7 State chartered savings bank. NYCB is a wholly (100%) owned subsidiary of New
8 York Community Bancorp, Inc., which is formed under the laws of the state of
9 Delaware and is a publicly traded corporation. No corporation owns 10% or more of
10 New York Community Bancorp, Inc.'s stock.

11 DATED this 13th day of January, 2014.

12 PITE DUNCAN, LLP

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14 
15 GREGG A. HUBLEY
16 ANTHONY R. SASSI
17 *Attorneys for Respondent*
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25
26
27
28

TABLE OF CONTENTS

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

 A. SHADOW WOOD’S FORECLOSURE SALE WAS NOT LEGITIMATE
 AND ATTEMPTED TO COLLECT INFLATED AMOUNTS IT WAS NOT
 STATUTORILY ENTITLED TO COLLECT 2

 1. New York Community Bank Obtains Its Interest Via A Foreclosure By
 The Beneficiary Of A Prior-Recorded First Deed of Trust 2

 2. Shadow Wood Attempts To Extort NYCB Into Paying An Extinguished
 Debt 3

 a. Shadow Wood and Alessi and Koenig refuse to provide an
 accurate, updated payoff amount 5

 b. Shadow Wood rebuffs NYCB’s attempt to pay off the lien and
 forecloses on the Subject Property 7

 B. THE DISTRICT COURT CORRECTLY HELD THAT GOGO WAY WAS
 NOT ENTITLED TO PROTECTION AS A BONA FIDE PURCHASER . 8

SUMMARY OF THE ARGUMENT 10

LEGAL ARGUMENT 13

 A. STANDARD OF REVIEW 13

 B. THE BONA FIDE PURCHASER PROTECTIONS PROVIDED FOR IN NRS
 CHAPTER 645F DO NOT APPLY TO GOGO WAY 14

 1. Chapter 645F does not apply to HOA Foreclosure Sales conducted
 pursuant to NRS 116.3116 16

 2. Gogo Way does not fall within the definition of bona fide
 purchaser 17

 C. GOGO WAY’S NEW ARGUMENTS ON APPEAL DO LITTLE TO AID IN
 ACQUIRING BONA FIDE PURCHASER STATUS 19

 1. The Court should not consider any of Gogo Way’s new theories .. 19

 2. Even Under Its New Theories, Gogo Way Cannot Establish That It Is A
 Bona Fide Purchaser 21

 D. IN YET ANOTHER NEW ARGUMENT THAT WAS NOT MADE IN
 DISTRICT COURT, GOGO WAY MISTAKENLY ARGUES THE HOA
 SALE CANNOT BE SET ASIDE BECAUSE NYCB DID NOT MAKE A
 PROPER TENDER 25

CONCLUSION 26

1	CERTIFICATE OF COMPLIANCE	27
2	CERTIFICATE OF SERVICE	28
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		

TABLE OF AUTHORITIES

Cases Cited:

25 Corp. Inc. v. Eisenman Chem. Co., 101 Nev. 664, 675, 709 P.2d 164, 172	
(1985)	21
Allison Steel Mfg. Co. v. Bentonite, Inc., 86 Nev. 494, 498, 4701 P.2d 666,668	
(1970)	22
Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986)	14
Berge v. Frederick, 95 Nev. 183, 186-87, 591 P.2d 246, 247-48 (1973)	21
Bird v. Casa Royale W., 97 Nev. 67, 70-71, 624 P.2d 17,19 (1981)	14
Bond v. Stardust, Inc., 82 Nev. 47, 50, 410 P.2d 472, 473 (1966)	14
Butler v. Bogdanovich, 101 Nev. 449, 451, 705 P.2d 662, 663 (1985)	13
Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)	13
Dermody v. City of Reno, 113 Nev. 207, 210-11, 931 P.2d 1354, 1357 (1997)13,19	
Force v. Peccole, 77 Nev. 143, 150, 360 P.2d 362, 365 (1961)	19
Gaffney v. Downey Savings & Loan Ass'n, 200 Cal.App.3d 1154, 1165 (1988) .	22
Huntington v. Mila, Inc., 119 Nev. 355, 357, 75 P.3d 354, 356 (2003)	22,23
Powers v. Powers, 105 Nev. 514, 516, 779 P.2d 91, 92 (1989)	19
Schuck v. Signature Flight Support of Nevada, Inc., 126 Nev. ___, ___, 245 P.3d 542,	
544, (2010)	20
Thomas v. Bokelman, 86 Nev. 10, 14 462 P.2 1020, 1023 (1970)	14
Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005)	13

Statutes Cited:

NRS 14.010	11,15,16,17,18
NRS 107.080	11,15,16,17,18
Chapter 116A	16
NRS 116.3116	1,15
NRS 116.31162	11
NRS 116.3116(2)	26

1	Chapter 645F	11,14,15,16,17,20
2	NRS 645F.300	20
3	NRS 645F.330	16,17
4	NRS 645F.360	16
5	NRS 645F.370	18,19
6	NRS 645F.470	16
7	NRS 645F.440	1,10,11,15,16,17,18,20,21,22
8	NRS 645F.440(5)	20
9	NRS 645F.440(6)	17
10	<u>Rules Cited:</u>	
11	NRCP 56(c)	13
12		
13		
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STATEMENT OF THE ISSUES

1
2 1. Does NRS Chapter 645F apply to foreclosure sales conducted pursuant
3 to NRS 116.3116 despite the fact that Chapter 645F is titled, "Mortgage Lending and
4 Related Professions," repeatedly references mortgage lenders, specifically references
5 foreclosure sales conducted by mortgage lenders, and fails to even mention
6 homeowners associations or foreclosures conducted pursuant to NRS 116.3116?

7 2. Do the bona fide purchaser protections afforded by NRS 645F.440 apply
8 to the purchaser at a foreclosure sale conducted pursuant to NRS 116.3116 when the
9 purchaser does not meet the statutory definition of "bona fide purchaser?"

10 3. Can an appellant bring new legal arguments and theories on appeal,
11 when those arguments were not presented to the District Court?

12 4. Does the common law bona fide purchaser doctrine apply to the
13 purchaser at a foreclosure sale, when the purchaser knows that the owner being
14 foreclosed upon has a recorded, senior interest in the property?

15 5. Can a foreclosure sale conducted pursuant to NRS 116.31162 be set
16 aside when the owner being foreclosed upon tenders an offer greater than the amount
17 owed to the foreclosing entity but less than the amount the foreclosing entity claims
18 that it is owed?

1 **I. STATEMENT OF THE CASE**

2 This appeal is the second of two challenges to the Eighth Judicial District
3 Court's Findings of Facts, Conclusions of Law and Order granting Respondent New
4 York Community Bank's ("NYCB") Motion for Summary Judgment. The District
5 Court's Order set aside a foreclosure sale conducted by Shadow Wood Homeowners
6 Association ("Shadow Wood") at which Appellant Gogo Way Trust ("Gogo Way")
7 purportedly purchased the subject property. Shadow Wood conducted the foreclosure
8 sale pursuant to NRS 116.3116, *et seq.*, to enforce a lien for unpaid assessments and
9 collection costs charged while non-party Virginia V. Fedel owned the relevant
10 property. However, as the District Court found, the lien Shadow Wood attempted to
11 foreclose upon included amounts that had been extinguished when NYCB foreclosed
12 on the same property nearly nine months earlier. Moreover, Shadow Wood ignored
13 NYCB's efforts to satisfy the claimed lien and, when it did respond, provided
14 inconsistent and ever-varying figures.

15 Gogo Way argued below that the foreclosure sale could not be set aside
16 because Gogo Way fit within the definition of a bona fide purchaser as defined in
17 Nevada Revised Statute ("NRS") 645F.440. The District Court disagreed and
18 instead held that the provisions of NRS Chapter 645F do not apply to homeowner
19 association foreclosure sales conducted pursuant to NRS 116.3116, *et seq.* Therefore,
20 regardless of whether Gogo Way had notice of any adverse interests or paid adequate
21 consideration, Gogo Way could find no relief in NRS 645F.440. Ultimately, the
22 District Court set Shadow Wood's foreclosure sale aside and title was restored in
23 NYCB's name. Gogo Way, which had already put a tenant in the subject property
24 and had been collecting rent, lost title and its tenant vacated, and NYCB has retaken
25 possession of the property.

26 The District Court's correctly concluded, as a matter of law, that the provisions
27 of Chapter 645F, which relate to "Mortgage Lending and Related Professions," do not
28 apply to foreclosure sales conducted by homeowners associations attempting to

1 enforce liens for delinquent assessments. This Court should affirm the Findings of
2 Fact, Conclusions of Law and Order granting NYCB's Motion for Summary
3 Judgment and set aside Shadow Wood's foreclose sale.

4 **II. STATEMENT OF FACTS**

5 **A. SHADOW WOOD'S FORECLOSURE SALE WAS NOT LEGITIMATE 6 AND ATTEMPTED TO COLLECT AMOUNTS IT WAS NOT 7 STATUTORILY ENTITLED TO COLLECT.**

8 **1. New York Community Bank Obtains Its Interest Via A Foreclosure 9 By The Beneficiary Of A Prior-Recorded First Deed of Trust.**

10 On May 9, 2011, NYCB purchased real property located at 3923 Gogo Way,
11 #109, Las Vegas, Nevada, 89103 ("Subject Property"), at a foreclosure sale
12 conducted pursuant to NRS 107.080 ("NYCB Foreclosure Sale"). (APP000012)
13 NYCB, the beneficiary of the first deed of trust encumbering the Subject Property,
14 initiated the NYCB Foreclosure Sale to collect amounts owed by the former owner,
15 Virginia V. Fedel. (Id.)

16 Ms. Fedel originally borrowed \$127,500.00 from CCSF, LLC, d/b/a Greystone
17 Financial Group ("CCSF"), to purchase the Subject Property. (APP000022) As part
18 of that transaction, Ms. Fedel executed a Promissory Note secured by a Deed of Trust
19 (collectively "Loan Agreement."). (Id.) The Deed of Trust was recorded in the
20 Official Records of Clark County, Nevada, as Instrument No. 20070427-0004835.
21 (Id.) Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for
22 CCSF, was the original beneficiary of the Deed of Trust, but MERS assigned that
23 beneficial interest to NYCB. (APP000052) The Assignment of Deed of Trust was
24 recorded on July 7, 2010, in the Official Records of Clark County, Nevada, as
25 Instrument No. 20100707-0003641. (Id.)

26 After making payments for a number of years, Ms. Fedel stopped making
27 payments and defaulted on the Loan Agreement. (APP000048) As a result of that
28 default, MTC Financial Inc. d/b/a Trustee Corps ("Trustee Corps"), as Trustee of the
Deed of Trust, initiated the NYCB Foreclosure Sale. (APP000048-49) Trustee Corps

1 first recorded a Notice of Breach and Default and of Election to Cause Sale of Real
2 Property Under Deed of Trust ("NYCB NOD") in the Official Records of Clark
3 County, Nevada as Instrument No. 201006020003706. (AP000048). The NYCB
4 NOD indicated that if Ms. Fedel did not cure the default, the Subject Property would
5 be sold. (APP000048-49) Ms. Fedel failed to cure the default and, after receiving a
6 Certificate from the Nevada Foreclosure Mediation Program, NYCB recorded a
7 Notice of Trustee Sale ("NYCB NOS"). (APP000055; APP000057-58) The NYCB
8 NOS scheduled the NYCB Foreclosure Sale for May 9, 2011 at 10:00 a.m.
9 (APP000057)

10 The NYCB Foreclosure Sale went forward as scheduled, and NYCB was the
11 winning bidder, purchasing the Subject Property for \$45,900,99. (APP000012-13)
12 Following the NYCB Foreclosure Sale, Trustee Corps recorded a Trustee's Deed
13 Upon Sale conveying the Subject Property to NYCB, and this conveyance was
14 recorded in the Official Records of Clark County, Nevada as Instrument No.
15 201105240003017. (APP000012)

16 **2. Shadow Wood Attempts To Extort NYCB Into Paying An**
17 **Extinguished Debt.**

18 In addition to failing to make payments under the Loan Agreement, Ms. Fedel
19 also apparently failed to pay Shadow Wood's regular monthly assessments. (See
20 APP000248-57) To attempt to collect these amounts, Shadow Wood recorded
21 documents threatening sale, but always accepted small payments from Ms. Fedel as
22 "partial payments" that were sufficient - to Shadow Wood - to cancel the sale.
23 Shadow Wood recorded a Notice of Delinquent Assessment (Lien), two Notices of
24 Default and Election to Sell Under Homeowners Association Lien, and a Notice of
25 Trustee's Sale. (APP000583-84; APP000591) Although the Notice of Trustee's Sale
26 was recorded on April 22, 2010, and scheduled a sale for May 12, 2010, the sale
27 never took place. (APP000583-84; APP000591) Instead, Shadow Wood accepted
28 small partial payments (of as little as \$250.00), and Ms. Fedel continued to miss

1 assessment payments thereafter without Shadow Wood taking any action. (See, Id.)

2 In contrast, Shadow Wood seized upon the opportunity to collect on Ms.
3 Fedel's account almost immediately after NYCB purchased the property. A little
4 more than a month after the NYCB Foreclosure Sale, Alessi & Koenig executed a
5 Notice of Delinquent Assessment (Lien) ("Notice of Lien") on June 29, 2011.
6 (APP000017) Indeed, Shadow Wood initiated foreclosure proceedings in the same
7 month that NYCB's first monthly assessment came due.¹ (*See* APP000248-57;
8 APP000017) At the time Shadow Wood recorded the Notice of Lien, NYCB only
9 owed Shadow Wood \$168.81 for the June, 2011, monthly assessment. (APP000254).
10 However, Shadow Wood's Notice of Lien claimed a lien against the Subject Property
11 in the amount of \$8,238.87, consisting of "Collection and/or attorney fees,
12 assessments, interest, late fees, service charges" as well as collection costs. (Id.)

13 Two months later, on August 29, 2011, Alessi & Koenig *executed* a Notice of
14 Default and Election to Sell under Homeowners Association Lien ("HOA NOD")
15 (APP000060) However, Alessi & Koenig recorded the HOA NOD almost two (2)
16 months later, on October 13, 2011, in the Official Records of Clark County, Nevada
17 as Instrument No. 20111013-0001665. (Id.) In the HOA NOD, Shadow Wood now
18 claimed that, as of August 29, 2011, it was owed \$6,608.34. (Id.) However, by the
19 time that the HOA NOD was recorded, this "new" payoff figure was already two
20 months stale/out of date. (Id.)

21 /././

22 /././

23 /././

24

25 ¹ Shadow Wood's monthly assessments come due on the first of each
26 month, and specifically, the May, 2011, monthly assessments were
27 posted to the Subject Property's account on May 1, 2011.
28 (APP000254; see generally, APP000248-57) Therefore, the first
assessment charged while NYCB owned the property was for the
June, 2011, assessment. (APP000254)

1 **a. Shadow Wood and Alessi & Koenig refuse to provide**
2 **an accurate, updated payoff amount.**

3 On November 2, 2011, NYCB, through its representative, Dianna Palmer-
4 Hopkins, made the first of many requests to Alessi & Koenig for a statement
5 identifying all past due amounts. (APP000716-17) Alessi & Koenig did not respond.
6 (Id.) Ms. Palmer-Hopkins made a second request for an updated payoff amount on
7 December 2, 2011. (Id.) Once again, Alessi & Koenig failed to respond.² (Id.)
8 Unable to obtain a current payoff demand from Alessi & Koenig, NYCB contacted
9 its realtor on December 12, 2011, seeking assistance to obtain a payoff statement and
10 a W-9. (APP000358)

11 On December 28, 2011, at the request of NYCB's realtor, Ticor Title of
12 _____

13 ² It appears that Alessi & Koenig attempted to respond to NYCB's
14 December 2, 2011, request, but responded to an internal email
15 address (i.e., to another Alessi & Koenig employee) rather than to Ms.
16 Palmer-Hopkins. (APP000716; see also, Shadow Wood's Appellate
17 Brief p. 5, lns. 23-25). Additionally, Alessi & Koenig did submit the
18 Affidavit of Naomi Eden in support of its Opposition to Motion for
19 Summary Judgment. (APP000682-86) In it, Ms. Eden avers that she
20 responded to both the November 2, 2011, request as well as the
21 December 2, 2011, request. (APP000684) However, based on the
22 supporting documents, it appears that Ms. Eden was mistaken. First,
23 it does not appear that Ms. Eden was aware of the fact that her
24 December 5, 2011, email response to NYCB's request was
25 improperly addressed and sent internally. (APP000716) Second, Ms.
26 Eden claims that she sent a fax in response to the email request.
27 (APP000684) However, in support of the Affidavit, Ms. Eden
28 failed/refused to attach confirmation that the fax was delivered, or
even that delivery was attempted. (See, APP000708-10) Moreover,
nowhere in Ms. Palmer-Hopkins' request does she provide a fax
number for NYCB, thus making it highly unlikely that Ms. Eden was
able to provide the payoff via fax. (See, APP000716) The District
Court properly exercised its discretion, and, in light of all of these
inconsistencies/admissions, determined that Shadow Wood
attempted, in good faith, to pay off the claimed lien, but that these
efforts were frustrated by Shadow Wood's (or its agents') actions.

1 Nevada, Inc., sent an escrow demand to Shadow Wood's management company, MP
2 Association Management. (APP000360) Later that same day, Gerald Marks, the
3 owner of MP Association Management completed, signed and returned the Demand
4 Form to Ticor Title of Nevada, Inc. (APP000364-365) The executed Demand Form
5 stated that the monthly dues on the Subject Property had been paid through November
6 31, 2011, and that the account was due for the December 1, 2011, assessment
7 payment. (Id.) The Demand Form also indicated that there was only a delinquency
8 of \$328.94, but more importantly, that the account had not been sent to a collection
9 agency and no liens had been recorded against the Subject Property. (Id.)

10 Baffled and frustrated by the inconsistent information and refusal to respond,
11 NYCB made a final request to Alessi & Koenig for a "detailed statement...[to] pay the
12 past due amount[,]" on January 19, 2012. (APP000367) After nearly three months
13 and numerous requests for a payoff statement, Alessi & Koenig finally provided
14 NYCB with a ledger of past due amounts on January 23, 2012. (APP000371-72) The
15 ledger claimed an outstanding balance of \$6,445.54,³ which was good through
16 February 28, 2012. (APP000372) In response, NYCB prepared and submitted a
17 check in the amount of \$6,783.16 (\$6,445.54 for the past due assessments plus
18 \$337.62 as payment for two future assessments) to Alessi & Koenig on January 31,
19 2012, one month before the amount on the ledger expired. (APP000257) Based on
20 the very ledger provided by Alessi & Koenig, this should have been more than
21 enough to bring NYCB's account current and have Shadow Wood release its lien.
22 (Id.)

23 Unbeknownst to NYCB, Alessi & Koenig *executed* a Notice of Trustee Sale
24 ("HOA NOS") on January 18, 2012, the day **before** NYCB's final payoff request but
25 five days **before** Alessi & Koenig actually provided the ledger. (See, APP000062)

26
27 ³ Incomprehensibly, this payoff demand was less than the amount
28 claimed in the HOA NOD, which had been signed roughly five
months earlier (on August 29, 2011), and which claimed \$6,608.34.
(APP000060)

1 Amazingly, the amount claimed on the NOS was not \$6,445.54 - the amount on the
2 ledger provided to NYCB. (Id.) Instead, the NOS claimed that Shadow Wood was
3 owed \$8,539.77. (Id.) Obviously, when Alessi & Koenig provided the ledger in
4 response to NYCB, it knew it had executed the NOS, which means that Alessi &
5 Koenig knew it would not accept \$6,445.54 to payoff the lien. (See id.; APP000372)

6 Despite the fact that the amount of the ledger was good through February 28,
7 2012, Alessi & Koenig recorded the HOA NOS on January 27, 2012, in the Official
8 Records of Clark County, Nevada as Instrument No. 20120127-0002208.
9 (APP000062) The HOA NOS set the Subject Property for foreclosure sale on
10 February 22, 2012. (Id.)

11 **b. Shadow Wood rebuffs NYCB's attempt to pay off the**
12 **lien and forecloses on the Subject Property.**

13 In light of the fact that Alessi & Koenig provided a meaningless ledger
14 indicating an amount Shadow Wood knew it would not accept, it comes as no surprise
15 that Alessi & Koenig rejected NYCB's \$6,783.16 payment. (See APP000245) On
16 February 8, 2012, Alessi & Koenig's agent, Naomi Eden, informed NYCB that the
17 payment had been rejected and for the first time informed NYCB that the actual
18 payoff amount was now \$9,017.39. (Id.) Two days later, NYCB responded and
19 explained that the ledger Alessi & Koenig provided on January 23, 2012, indicated
20 that the outstanding balance was only \$6,445.54, and more importantly, that the
21 amount was good through February 28, 2012.⁴ (Id.) Without providing any
22 explanation as to why the ledger amount differed so drastically from the HOA NOS
23 amount, Ms. Eden merely repeated that the amount owed was \$9,017.39. (Id.) To
24 evaluate the legitimacy of that amount, NYCB requested a statement reflecting the
25 account. (Id.) Even though NYCB had been dealing directly with Alessi & Koenig,

26
27 ⁴ In her response, NYCB's representative, Dianna Palmer-Hopkins ,
28 mistakenly stated that the ledger was good through February 1, 2012.
(APP000245) However, the ledger itself represents a "BALANCE
AS OF: 2/28/12." (APP000257)

1 Alessi & Koenig did not provide the statement directly to NYCB. Instead, on
2 February 14, 2012, Ms. Eden provided Michael Moretti - NYCB's listing agent - with
3 a breakdown of the fees, eight days before the scheduled foreclosure sale and almost
4 four months after NYCB's initial request. (Id.)

5 On February 22, 2012, Shadow Wood purported to sell the Subject Property
6 to Gogo Way for \$11,018.39 at a trustee's sale ("HOA Sale"). (APP000019) A
7 Trustee's Deed Upon Sale ("HOA TDUS") documenting the alleged transfer was
8 recorded in the Official Records of Clark County, Nevada on March 1, 2012, as
9 Instrument No. 20120301-0004775. (Id.) Interestingly, the HOA TDUS indicated
10 that "the amount of unpaid debt together with costs" totaled the exact amount Gogo
11 Way paid for the Subject Property. (See, id.) Apparently, in eight days, the unpaid
12 debt and cost had increased by more than \$2,000.00.⁵ (See, id.)

13 **B. THE DISTRICT COURT CORRECTLY HELD THAT GOGO WAY**
14 **WAS NOT ENTITLED TO PROTECTION AS A BONA FIDE**
15 **PURCHASER.**

16 On April 18, 2012, NYCB commenced this action against Shadow Wood and
17 Gogo Way and filed a First Amended Complaint ("FAC") on October 5, 2012.
18 (APP0002; APP000119) In its FAC, NYCB alleged two causes of action, one for
19 Quiet Title pursuant to NRS 40.010 and another for Declaratory Relief.
20 (APP000125-26). The foundation for both causes of action was that Shadow Wood
21 failed to conduct the HOA Sale in good faith and that NYCB's title interest was

22 ⁵ Neither Alessi & Koenig nor Shadow Wood have ever produced any
23 support for the fact that debt and costs at the time of the HOA Sale
24 totaled \$11,018.39. However, counsel for Alessi & Koenig did
25 identify on March 12, 2013, for the first time (in its Reply to
26 NYCB's Opposition to its Motion for Summary Judgment) that it was
27 holding \$2,001.00 "...in excess proceeds." (See, APP000914)
28 Neither Alessi & Koenig nor Shadow Wood have ever explained why
it retained more than \$2,000.00 more than one (1) year after its
foreclosure sale without informing NYCB of these funds, even during
active litigation.

1 superior, and as a result, the HOA Sale was invalid. (See, APP000119-26) NY
2 thus alleged that it remained the rightful owner of the Subject Property. (See,
3 Shadow Wood and Gogo Way filed their Answer on October 30, 2012,
4 Gogo Way added a Counter Claim, alleging a single cause of action for Declarat
5 Relief and Quiet Title. (APP000181-88). Shadow Wood and Gogo Way claimed
6 that the HOA Sale was conducted properly, and therefore NYCB's interest in
7 Subject Property was extinguished. (Id.) In its counter claim, Gogo Way alleged that
8 the HOA Sale extinguished NYCB's interest in the Subject Property. (Id.)
9 After conducting discovery related to the HOA Sale, NYCB and Appellants
10 submitted competing Motions For Summary Judgment. (APP000258; APP000196)
11 In Appellants' Opposition to NYCB's Motion for Summary Judgment, Gogo Way
12 argued that it was entitled to protection as a bona fide purchaser pursuant to NRS
13 Chapter 645F. (APP000678) Both Motions were extensively briefed, and, on March
14 13, 2013, the District Court heard oral argument on NYCB's Motion for Summary
15 Judgment and Shadow Wood and Gogo Way's Motion for Summary Judgment.
16 (APP000917)
17 Ultimately, the District Court granted NYCB's Motion for Summary Judgment
18 and entered judgment in favor of NYCB. The Notice of Entry of Findings of Fact,
19 Conclusions of Law, and Order Granting Plaintiff's Motion for Summary Judgment
20 was filed on April 16, 2013. (APP000918) In granting NYCB's Motion for
21 Summary Judgment, the District Court specifically found that "Shadow Wood's lien
22 was entitled to super priority status ... only to the extent of '... the assessments for
23 common expenses based on the periodic budget adopted by the association ... which
24 would have become due in the absence of acceleration during the 9 months
25 immediately preceding institution of an action to enforce the lien[.]'" (APP000923)
26 (quoting NRS 116.3116(2)) Accordingly, the District Court found that the HOA Sale
27 was based, in part, on collection costs, attorney's fees and fines that had been
28 extinguished by the NYCB Foreclosure Sale, and that these costs/fees/fines cannot

1 properly be used to make up the super priority portion of the HOA lien in any event.
2 (Id.) In overturning the HOA Sale, the District Court specifically stated that NYCB
3 made good faith efforts to pay off the lien, but that these “...were frustrated by the
4 **unreasonable and oppressive actions** of Shadow Wood,” and Shadow Wood was
5 “attempting to profit off of the subject HOA foreclosure sale by including **exorbitant**
6 **fees and costs.**” (Emphasis Supplied) (APP000924).

7 The District Court also specifically concluded that Gogo Way was not a bona
8 fide purchaser and was not entitled to any protections granted pursuant to NRS
9 645F.440. (Id.) The District Court concluded as a matter of law that NRS 645F.440
10 did not apply to Gogo Way, regardless of the facts presented. (See, id.) In the end,
11 the Court set aside the HOA Sale and awarded immediate possession of the Subject
12 Property to NYCB. (APP000925)

13 After the Court awarded judgment in NYCB’s favor, NYCB filed a Motion for
14 Attorney’s Fees. (APP000950) After further extensive briefing, the Court granted
15 NYCB’s motion, finding that Shadow Wood and Gogo Way “had no reasonable
16 ground” to base their defense and that “their conduct was indicative of bad faith and
17 an attempt to harass” NYCB. (APP001087) Specifically, the Court stated that
18 Shadow Wood and Gogo Way based their defense on an “erroneous interpretation”
19 of NRS 116.3116, and the Court apparently believed that Appellants refused to
20 reasonably consider and discuss settlement. (Id.)

21 III. SUMMARY OF THE ARGUMENT

22 On appeal, Gogo Way has abandoned the arguments it raised before the District
23 Court and is attempting to subtly change legal theories. In its Opening Brief it
24 completely ignores the fact that the basis of the District Court’s ruling was a legal
25 conclusion of the only ground/argument that Gogo Way put before the District Court
26 (i.e., that NRS 645F.440 does not apply to HOA foreclosure sales). Gogo Way
27 completely fails to explain to this Court why that legal conclusion was in error.
28 Instead, it attempts to disguise its new argument by alleging that the District Court

1 failed to make necessary factual findings, and, in doing so, substitutes its doomed
2 statutory theory for newly-contemplated common law theories. Notably, Gogo Way,
3 through its counsel, also moved for summary judgment, proclaiming that there were
4 no genuine issues of material fact that would inhibit an entry of judgment as a matter
5 of law.

6 Now, tacitly admitting that NRS 645F.440 cannot save it, Gogo Way asks this
7 Court to consider arguments that were not raised to the District Court. This Court
8 should not entertain these new arguments raised for the first time on appeal, and
9 should limit its review to the same question posed to the District Court, which is
10 whether NRS 645F.440 prevents the District Court from setting aside the HOA Sale.

11 The District Court correctly concluded that the statute did not apply to the
12 HOA Sale. As the name of the chapter indicates, Chapter 645F relates only to
13 mortgage lenders. It follows logically that the statutory provisions of Chapter 645F
14 only relate to foreclosure sales conducted by mortgage lenders. Throughout, Chapter
15 645F repeatedly discusses mortgage lenders, but is completely devoid of any
16 reference to homeowners associations. Additionally, several provisions specifically
17 reference judicial foreclosure sales pursuant to NRS 14.010 and non-judicial
18 foreclosure sale pursuant to NRS 107.080 (non-judicial foreclosures to enforce a deed
19 of trust). Yet, none of statutes mention foreclosure sales pursuant to NRS 116.31162.
20 In fact, there is nothing in any of the relevant statutes that indicates the provisions of
21 Chapter 645F should be applied to homeowners associations or homeowners
22 association foreclosure sales. With this simple conclusion, the District Court was
23 able to dispatch Gogo Way's argument without having to review any relevant facts.

24 Even if the District Court had considered Gogo Way's newly-raised legal
25 theories, Gogo Way would have fared no better. It claims that it should be entitled
26 to bona fide purchaser protection based on common law doctrine. It erroneously
27 believes it is a good faith purchaser because it had no knowledge of any potential
28 flaws in the HOA Sale. However, Gogo Way completely fails to understand, or

1 simply misconstrues, the notice requirement. To attain status as a bona fide
2 purchaser, it must be unaware of any senior claims to title. The fact that Gogo Way
3 purchased the Subject Property from a HOA trustee at a foreclosure sale rather than
4 the record title holder (NYCB) provides all the notice necessary to establish that
5 NYCB had a prior recorded, superior claim. Knowing it cannot challenge its
6 constructive notice that NYCB was a senior interest holder, Gogo Way's only resort
7 is to misconstrue the notice requirement and claim ignorance of any flaws the
8 foreclosure process. Regardless of whether it had knowledge of the fact that the HOA
9 Sale was the product of oppression and fraud - which is questionable given its close
10 and historical relationship with Alessi & Koenig - it still had notice that NYCB had
11 a superior claim to title.

12 Finally, Gogo Way adds a second new theory related to the amount NYCB
13 tendered to Shadow Wood. It essentially argues that because NYCB offered less than
14 the amount Shadow Wood claimed, the HOA Sale could not be set aside. However,
15 the entire argument relies on a faulty assumption, which is that the amount Shadow
16 Wood *claimed* was equal to the amount that Shadow Wood was actually *owed*.
17 NYCB tendered far more than Shadow Wood was entitled to collect, yet it still
18 rejected the offer. Shadow Wood's actions throughout this debacle were certainly
19 oppressive, and the HOA sale was improperly held as a result of its actions. If Gogo
20 Way was indeed an innocent purchaser that was harmed by a seller or trustee's
21 improper handling of a HOA foreclosure sale, Gogo Way has every right and
22 opportunity to demand that it be made whole from Shadow Wood and Alessi &
23 Koenig. If it is simply an innocent purchaser, Gogo Way is not without recourse
24 because of the improprieties committed by Shadow Wood and/or Alessi & Koenig.

25 In the end, Gogo Way has thrown many arguments at the proverbial wall, both
26 in the proceedings before the District Court and now before this Court.
27 Unfortunately, for Gogo Way, none stick. This Court should affirm the District
28 Court's Findings of Facts, Conclusions of Law and Order granting NYCB's Motion

1 for Summary Judgment and hold that Gogo Way was not a bona fide purchaser.

2 **IV. LEGAL ARGUMENT**

3 **A. STANDARD OF REVIEW**

4 The Nevada Supreme Court reviews a district court's grant of Summary
5 Judgment de novo and does not give deference to the lower court's findings. *Wood*
6 *v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Therefore, the
7 Court will determine for itself whether a genuine issue of material fact exists and
8 whether the moving party was entitled to summary judgment as a matter of law. *Id.*
9 Summary judgment is appropriate if the "...pleadings, depositions, answers to
10 interrogatories, and admissions on file, together with the affidavits, if any, show that
11 there is no genuine issue as to any material fact and that the moving party is entitled
12 to judgment as a matter of law." NRCP 56(c). A "...genuine issue as to any material
13 fact" exists "...where the evidence is such that a reasonable jury could return a verdict
14 for the non-moving party." *Dermody v. City of Reno*, 113 Nev. 207, 210-11, 931 P.2d
15 1354, 1357 (1997). In considering a motion for summary judgment, the Court must
16 examine all the evidence in the light most favorable to the non-moving party. *Butler*
17 *v. Bogdanovich*, 101 Nev. 449, 451, 705 P.2d 662, 663 (1985). One of the principal
18 purposes of the rule is to dispose of factually unsupported claims or defenses. *See*
19 *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (interpreting the federal rule).

20 This Court has abrogated the "slightest doubt" standard previously applied to
21 motions for summary judgment. *Wood*, 121 Nev. at 731, 121 P.3d at 1031. To
22 survive a Motion for Summary Judgment, the nonmoving party must show that there
23 is more than just a "metaphysical doubt" as to the operative facts to avoid summary
24 judgment, but must, "...by affidavit or otherwise, set forth specific facts
25 demonstrating the existence of a genuine issue for trial[.]" *Id.* at 732, 121 P.3d at
26 1031.

27 Once the moving party demonstrates that either no genuine issue of material
28 fact remains or that there is an absence of evidence to support the non-moving party's

1 case, the burden shifts to the party resisting the motion, who must set forth specific
2 facts showing there is a genuine issue for trial. *Thomas v. Bokelman*, 86 Nev. 10, 14
3 462 P.2d 1020, 1023 (1970); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256
4 (1986). Neither general allegations nor conclusory statements satisfy the requirement
5 to show genuine material facts in dispute, and the non-moving party must provide
6 specific facts to avoid the entry of summary judgment. *See Bird v. Casa Royale W.*,
7 97 Nev. 67, 70-71, 624 P.2d 17,19 (1981); *See also Bond v. Stardust, Inc.*, 82 Nev.
8 47, 50, 410 P.2d 472, 473 (1966). Thus, when the non-moving party presented an
9 affidavit in response to a motion for summary judgment that consisted of bald
10 assertions and conclusory contentions, the Nevada Supreme Court held that this
11 affidavit did "...not give rise to a material issue of fact[.]" *Casa Royale W.*, 97 Nev.
12 at 71, 624 P.2d at 19. Likewise, an affidavit of the non-moving party that simply, and
13 in conclusory terms, stated that labor and materials had been furnished for a certain
14 agreed-upon price did "...not create an issue of material fact." *Bond*, 82 Nev. at 50,
15 410 P.2d at 473. As this Court has previously held, a non-movant must do more than
16 restate his/her pleadings in an Affidavit, or generally aver that he/she did nothing
17 wrong to avoid summary judgment. *Id.*

18 **B. THE BONA FIDE PURCHASER PROTECTIONS PROVIDED FOR IN**
19 **NRS CHAPTER 645F DO NOT APPLY TO GOGO WAY.**

20 Gogo Way now, for the first time on appeal, beats the proverbial drum that
21 there are genuine issues of fact that remain, even though it moved for summary
22 judgment and implicitly agreed before the District Court that the application of NRS
23 645F was solely a legal issue. It is impossible to properly consider Gogo Way's
24 argument now without putting its argument to the District Court into the proper
25 context. In a nutshell, in desperation Gogo Way seeks to introduce new arguments
26 on appeal that it failed to make or preserve below.

27 ///
28 ///

1 The only basis Gogo Way provided for claiming bona fide purchaser status
2 before the District Court was through the protections afforded by NRS 465F.440.⁶
3 In its Opposition to NYCB's Motion for Summary Judgment, Gogo Way claimed that
4 Summary Judgment should be denied because the bona fide purchaser protection
5 outlined in NRS 645F.440 prevented the sale from being set aside. (APP000678-79).

6 However, as noted above, NRS Chapter 645F does not apply to Gogo Way for
7 two reasons. First Chapter 645F is not applicable to HOA foreclosure sales
8 conducted pursuant to NRS 116.3116. Instead it regulates only foreclosure sales
9 pursuant to NRS 14.010 and non-judicial foreclosure sales pursuant to NRS 107.080.
10 See e.g. NRS 645F.360 (defining "Homeowner"); NRS 645F.370 (defining
11 "Residence in foreclosure"). Second, even assuming *arguendo* that the Court were
12 to find that Chapter 645F applied, Gogo Way does not fall within the limited
13 definition of "bona fide purchaser." See NRS 645F.440.

14 The District Court concluded as a matter of law that NRS 645F.440 did not
15 apply to Gogo Way following the HOA Sale. (APP000924). Therefore, the District
16 Court did not need to engage in any further fact finding to enter judgment in NYCB's
17 favor. All that was necessary to dismiss Gogo Way's argument was a simple factual
18 finding that Gogo Way purchased the Subject Property at a foreclosure sale
19 conducted pursuant to NRS 116.3116 (which was undisputed) and a conclusion of
20 law that the bona fide purchaser protections provided by NRS 645F.440 do not apply
21 to foreclosure sale conducted pursuant to NRS 116.3116. The District Court did
22 both. (APP000917-25) This Court should affirm, as statutory and common law

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24
25 ⁶ Gogo Way implicitly concedes that NRS Chapter 645F is not
26 applicable to the current matter by failing to even mention NRS
27 Chapter 645F or the District Court's conclusion that, as a matter of
28 law, NRS 645F.440 was not applicable to Gogo Way following the
HOA Sale. Instead, it attempts to confuse the issue by trying to shift
the blame to the District Court for failing to include any of the
findings of facts it desires. Gogo Way App. Brief pg. 5, lns 2-4.

1 demonstrate that NRS 645F does not apply to HOA foreclosure sales and that Gogo
2 Way is not entitled to the bona fide purchaser protection provided in NRS 645F.440.

3 **1. Chapter 645F Does Not Apply To HOA Foreclosure Sales**
4 **Conducted Pursuant To NRS 116.3116.**

5 Chapter 645F only applies to foreclosures conducted by a mortgagee under a
6 deed of trust against the mortgagor. The name of chapter alone, “Mortgage Lending
7 and Related Professions” defines the limits of the chapter’s application, and evinces
8 that HOAs were never intended to be regulated by these statutory provisions.⁷ See
9 NRS Chapter 645F. It logically follows that any foreclosure referenced in Chapter
10 645F is meant to be a foreclosure sale initiated by a mortgage lender. See NRS
11 645F.330 (“‘Foreclosure sale’ means the sale of real property to enforce an obligation
12 secured by a **mortgage** or lien on the property, including the exercise of a **trustee’s**
13 **power of sale pursuant to NRS 107.080** [i.e. non-judicial foreclosures pursuant to
14 a deed of trust].”) (emphasis added).

15 While the definition of “foreclosure sale” itself is not specifically limited to
16 judicial and non-judicial foreclosures, other definitions in the same section of the
17 statute do specifically limit the scope of the statute. See, e.g. NRS 645F.360
18 (defining “Homeowner”). For instance, “Residence in foreclosure,” is defined as
19 “residential real property...against which there is an outstanding notice of the
20 pendency of an action for foreclosure recorded **pursuant to NRS 14.010** [i.e., judicial
21 foreclosure action] or notice of default and election to sell recorded **pursuant to NRS**
22 **107.080.**” NRS 645F.370 (emphasis added). Accordingly, any provision of this
23 Chapter that uses this defined term (i.e., “Residence in foreclosure”) further
24 reinforces that the Legislature meant it only to apply to foreclosure sales pursuant to
25 either NRS 14.010 or NRS 107.080. While references to mortgage lenders and
26

27 ⁷ Homeowners associations are regulated by an entirely separate
28 chapter, Chapter 116A, entitled “Common-Interest Communities;
Regulation of Community Managers and Other Personnel.”

1 foreclosures pursuant to NRS 14.010 and NRS 107.080 abound throughout Chapter
2 645F, there is not a single reference to “homeowners associations” or NRS 116.3116.
3 In the end, nothing in the entire Chapter gives any support to the notion that any
4 provision of Chapter 645F is meant to apply across the board to other Nevada
5 statutes. To the contrary, all indications are that it would only apply to foreclosures
6 initiated by mortgage lenders pursuant to either NRS 14.010 or NRS 107.080.

7 Shadow Wood is not a mortgage lender and was not attempting to foreclose
8 pursuant to NRS 14.010 or NRS 107.080. Instead, Shadow Wood initiated its
9 foreclosure to collect unpaid homeowners assessments. (APP000017) In fact, the
10 HOA NOD was specifically titled “Notice of Default and Election to Sell Under
11 Homeowners Association Lien.” (APP000060) Moreover, the HOA NOD references
12 Shadow Wood’s purported right to foreclose as stemming from “...the terms
13 contained in the Declaration of Covenants, Conditions, and Restrictions (CC&Rs)[,]”
14 and is based upon payments that had not been made “...of homeowners assessments
15 due from [blank in original] and all subsequent assessments, late charges, interest,
16 collection and/or attorney fees and costs.” (*Id.*) The District Court correctly rejected,
17 therefore, Gogo Way’s argument that this HOA Sale somehow implicated the
18 provisions of Chapter 645F, or afforded the protections provided thereby. Nothing
19 about this HOA Sale would allow Gogo Way to claim bona fide purchaser protection
20 pursuant to NRS 645F.440.

21 **2. Gogo Way Does Not Fall Within The Definition Of Bona Fide**
22 **Purchaser.**

23 Even if the Court were to interpret that Chapter 645F could potentially apply
24 to a HOA foreclosure sale, Gogo Way was not a bona fide purchaser as that term is
25 defined in the statute. Pursuant to NRS 645F.440(6), “‘bona fide purchaser’ means
26 any person who purchases an interest in a residence in foreclosure⁸ from a foreclosure

27
28 ⁸ A “residence in foreclosure” is defined as “residential real

1 purchaser⁹ in good faith and for valuable consideration and who does not know or
2 have reasonable cause to believe that the foreclosure purchaser engaged in conduct
3 which violates subsection 1.” (Emphasis added). The relevant provision uses two
4 statutorily defined terms to limit the available protection to very specific
5 circumstances. *Id.* Thus, to claim bona fide purchaser status, an entity must do more
6 than simply buy a property in good faith for valuable consideration. *See id.* It must
7 purchase a “...residence in foreclosure from a foreclosure purchaser.” *Id.*

8 Gogo Way did not purchase a residence in foreclosure (as that term is strictly
9 defined in the statute), and it certainly did not purchase the Subject Property from a
10 foreclosure purchaser. Even assuming *arguendo* that Gogo Way purchased the
11 property in good faith and for valuable consideration, it cannot satisfy either portion
12 of this key phrase. Again, the Subject Property was not a “residence in foreclosure”
13 as the HOA Sale was conducted pursuant to NRS 116.3116, not NRS 14.010 or NRS
14 107.080. (APP000019) Second, Gogo Way did not purchase the Subject Property
15 from a foreclosure purchaser because it is the foreclosure purchaser. It was the entity
16 that initially acquired title from the homeowner, NYCB. (*Id.*) Regardless of the
17 various arguments that Gogo Way may proffer regarding the price it paid and its lack
18 of notice regarding NYCB’s potential challenge to the HOA Sale, it cannot establish
19 these two specific requirements necessary to obtain bona fide purchaser protection
20 under NRS 645F.440.

21 /././

23 ⁸(...continued)

24 property...against which there is an outstanding notice of the
25 pendency of an action for foreclosure recorded pursuant to NRS
26 14.010 or notice of default and election to sell recorded pursuant to
NRS 107.080.” NRS 645F.370.

27 ⁹ ““Foreclosure purchaser’ means a person who... acquires or attempts
28 to acquire title to a residence in foreclosure from a homeowner.”
NRS 645F.330.

1 Again, like the other Appellant, Gogo Way would have the Court apply
2 different provisions from different statutes in an across-the-board effort to obtain
3 protection that the Nevada Legislature did not see fit to supply. If the Nevada
4 Legislature intended to extend bona fide purchaser protection to properties purchased
5 almost universally at a fraction of their value at a homeowner's association
6 foreclosure sale, the Legislature would have mentioned HOAs in NRS 645F, and
7 would not have limited NRS 645F.370 to residences in foreclosures initiated by a
8 mortgage lender under a deed of trust.

9 **C. GOGO WAY'S NEW ARGUMENTS ON APPEAL DO LITTLE TO AID**
10 **IT IN ACQUIRING BONA FIDE PURCHASER STATUS.**

11 Completely ignoring the fact that the District Court rejected its bona fide
12 purchaser argument because it determined that the law Gogo Way argued for bona
13 fide purchaser protection did not apply, Gogo Way now plows forward headlong
14 pretending that it raised common law-based theories to the District Court, rather than
15 solely arguing its failed statutory-based theory. In an apparent attempt to distance
16 itself from its doomed effort, Gogo Way's appellate brief fails to even mention the
17 very statute it repeatedly argued to the District Court as the sole basis of its bona fide
18 purchaser defense. *See*, Gogo Way App. Brief. pg. 9 ln. 1 - pg. 13 ln. 22.

19 **1. The Court Should Not Consider Any Of Gogo Way's New Theories.**

20 One of the most basic tenants of appellate procedure is that a party may not
21 raise new arguments for the first on appeal. This Court has held and repeatedly
22 reaffirmed the canon that, "Parties 'may not raise a **new theory** for the first time on
23 appeal, which is inconsistent with or different from the one raised below.'" *See*
24 *Dermody v. City of Reno*, 113 Nev. 207, 210, 931 P.2d 1354, 1357 (1997), *quoting*
25 *Powers v. Powers*, 105 Nev. 514, 516, 779 P.2d 91, 92 (1989) (emphasis added)); *See*
26 *also, Force v. Peccole*, 77 Nev. 143, 150, 360 P.2d 362, 365 (1961) ("a party on
27 appeal cannot assume an attitude or adopt a theory inconsistent with or different from
28 that taken at the hearing below."). This rule is meant to maintain the "...efficiency,

1 fairness, and integrity of the judicial system for all parties.” *Schuck v. Signature*
2 *Flight Support of Nevada, Inc.*, 126 Nev. ___, ___, 245 P.3d 542, 544, (2010)
3 (citation omitted).

4 Gogo Way’s entire argument on appeal consists of new arguments that were
5 not previously raised to, nor considered by, the District Court. Originally, Gogo Way
6 claimed that the HOA Sale could not be overturned pursuant to NRS 645F.440(5).
7 (APP000678-79). Gogo Way raised the argument for the first time in its Opposition
8 to NYCB’s Motion for Summary Judgement and specifically stated that “NRS
9 645F.300 *et seq* provides the law that governs where a foreclosure sale may be set
10 aside against a purchaser of the foreclosure property.” (APP000678). In the District
11 Court, Gogo Way relied exclusively on this statutory argument. (APP000678-79)
12 In fact, it did not cite a single authority other than NRS Chapter 645F in the
13 proceedings below for the bona fide purchaser defense. (*Id.*)

14 Gogo Way relied solely on the same argument again in “Defendants’ Reply to
15 Opposition to Plaintiff’s Motion for Summary Judgment.” (APP000911)
16 Specifically referencing NRS 645F.440, Gogo Way stated that “Nevada has **statutory**
17 **law** that determines when a foreclosure sale may be set aside against a bona fide
18 purchaser.” (*Id.*) Every single argument/position Gogo Way raised below was based
19 upon statute. (See, APP000678-79; APP000911-12) Gogo Way failed to even
20 mention any alleged common law basis for their bona fide purchaser protection
21 argument in the District Court, let alone articulate a legal argument in this regard.
22 (See, APP000678-79; APP000911-12). Put simply, the new “common law theory”
23 advanced by Gogo Way is a creature that was never hatched until the Appellants filed
24 this appeal.

25 In granting NYCB’s Motion for Summary Judgment, the District Court
26 considered Gogo Way’s statutory argument, and properly rejected it. (*See*,
27 APP000924). It concluded that Gogo Way was not entitled to protection as a bona
28 fide purchaser under NRS 645F.440. (*Id.*) Having heard no other basis for this bona

1 fide purchaser argument from either of the Appellants, the District Court may or may
2 not have considered whether any common law protections were available to Gogo
3 Way. (See generally, APP000917-925) Neither counsel for the Appellants, nor the
4 undersigned counsel, can legitimately identify all of the considerations of the District
5 Court in rendering its Order. However, what is plain and clear is that neither
6 Appellant raised this newly advanced position to the District Court, so it obviously
7 was not preserved for appeal. Gogo Way should not be allowed to present new
8 theories it failed to raise or preserve before the District Court, and this Court should
9 not consider Gogo Way's improper attempt for a second bite at the apple, changing
10 its position now because its initial theory was flawed and was rejected.

11 **2. Even Under Its New Theories, Gogo Way Cannot Establish That**
12 **It Is A Bona Fide Purchaser.**

13 Gogo Way's newly minted argument for bona fide protection status wrongly
14 relies upon an assumption that bona fide purchaser status is conferred upon a buyer
15 at a foreclosure sale. However, nothing in the common law doctrine it now advances
16 for the first time extends that protection to a foreclosure purchaser. *See 25 Corp. Inc.*
17 *v. Eisenman Chem. Co.*, 101 Nev. 664, 675, 709 P.2d 164, 172 (1985); *Berge v.*
18 *Frederick*, 95 Nev. 183, 186-87, 591 P.2d 246, 247-48 (1973). In fact, none of the
19 cases cited by Gogo Way involved a foreclosure sale, let alone a foreclosure sale
20 conducted by a homeowners association. *See e.g., Berge*, 95 Nev. at 185, 591 P.2d
21 at 247 ("Appellant's claim is based upon a quitclaim deed from Fredericks dated June
22 21, 1974.... The claim of Valdez is based upon a quitclaim deed from Fredericks to
23 her dated December 22, 1975....").¹⁰ Nonetheless, Gogo Way, having purchased the

25 ¹⁰ Gogo Way argues that this Court should adopt California case law
26 because its statute regarding foreclosure sales pursuant to a deed of
27 trust is similar to Nevada's and therefore Nevada should include the
28 bona fide purchaser provisions in the California statute. However,
this argument, ignores the fact that NRS 645F.440 provides bona fide

(continued...)

1 Subject Property at a HOA foreclosure sale for the collection of unpaid assessments,
2 argues that it should be afforded bona fide purchaser protection.

3 To acquire common law bona fide purchaser protection the buyer must
4 purchase the property without knowledge, either actual or constructive, of a superior
5 claim to title.¹¹ *Huntington v. Mila, Inc.*, 119 Nev. 355, 357, 75 P.3d 354, 356 (2003)
6 (“A subsequent purchaser with notice, actual or constructive, of **an interest in**
7 **property superior** to that which he is purchasing is not a purchaser in good faith, and
8 is not entitled to the protection of the recording act.”) However, a purchaser cannot
9 simply put blinders on and claim ignorance of a superior interest with the expectation
10 that his purchase would be deemed bona fide and protectible. *See Allison Steel Mfg.*
11 *Co. v. Bentonite, Inc.*, 86 Nev. 494, 498, 4701 P.2d 666,668 (1970). If circumstances
12 exist that would cause a reasonable purchaser to question the superiority of the title
13 being sold, the purchaser is imputed with any notice it would have discovered upon
14 investigation. *Id.* (“When anything appears in these title deeds sufficient to put a
15 prudent man on inquiry which if prosecuted with ordinary diligence would lead to
16 actual knowledge of some right or title in conflict with the title he is about to
17 purchase, **it is his duty to make inquiry**, and if he does not do so he is chargeable
18 with actual knowledge of what the inquiry would have disclosed.” (citation omitted)
19 (emphasis added)).

20 There is a simple reason that the common law protections are not and cannot
21

22 ¹⁰(...continued)

23 purchaser protections to *subsequent* purchasers but not foreclosure
24 purchasers. Citation of California authority provides little in the way
of relief to Gogo Way.

25 ¹¹ In comparison, in providing protection to a subsequent purchaser -
26 but not the foreclosure purchaser - NRS 645F.440 limits the type of
27 notice that would defeat a subsequent buyer's status as a bona fide
28 purchaser. It defines a bona fide purchaser as a person “...who does
not know of have reasonable cause to believe that the foreclosure
purchaser engaged in conduct which violates subsection 1.”

1 be applied to a purchaser at a HOA foreclosure sale, like Gogo Way. The HOA
2 foreclosure sale inherently puts the buyer on notice that there is a competing claim
3 to title, i.e. the title held by the record owner of the property. It also inherently
4 imparts notice to a purchaser of the likelihood that the competing claim to title had
5 been recorded before the HOA lien on which the HOA foreclosure sale is based. The
6 simple fact that the HOA trustee is attempting to sell the property, and divest the title
7 holder of its interest, is enough to impart constructive notice onto the purchaser that
8 there may be an adverse claim to title. If Gogo Way's theory was true, no
9 homeowners association sale could ever be set aside.

10 Gogo Way either intentionally or mistakenly confuses the type of notice
11 required for it to obtain status as a bona fide purchaser. It claims that it is a bona fide
12 purchaser because it did not have notice that the HOA Sale was being conducted
13 improperly, or that NYCB had attempted to pay off the HOA Lien. However, the
14 notice this Court has required for a purchaser to obtain bona fide purchaser status has
15 nothing to do with notice of a trustee's actions or inactions. Instead, in *Huntington*,
16 this Court focused the notice inquiry upon the knowledge that a purchaser had of a
17 senior interest in the property in question. Specifically, this Court held that in order
18 for a purchaser like Gogo Way to obtain bona fide purchaser status, it must *not* have
19 had prior notice, including constructive or inquiry, of an interest in the property that
20 is prior or superior to that which Gogo Way was purchasing. *Id.*, 119 Nev. 355, at
21 357.

22 There is no genuine issue of fact that NYCB's ownership interest in the
23 property had been recorded before the interest that Gogo Way was purchasing.
24 (APP000012) Consequently, Gogo Way knew at the time of the sale of an interest
25 in the property that preceded (and was, therefore, superior to) the interest Gogo Way
26 was seeking to acquire at the HOA foreclosure sale. The argument that Gogo Way
27 is entitled to bona fide purchaser protections because it may not have known of the
28

1 oppressive acts of the HOA and its trustee in foreclosing on the property is
2 completely unsupported and insupportable. The relevant inquiry is whether Gogo
3 Way was aware of a prior, superior interest in the property - not whether it was aware
4 if the HOA or its trustee behaved improperly before and during the sale.

5 Finally, the price paid for the property is another proper point of consideration
6 when determining whether to extend bona fide purchaser protections. Gogo Way
7 purchased the Subject Property for approximately a quarter of the price that the
8 Subject Property sold for only nine months earlier.¹² Obviously, this would raise the
9 specter to a reasonable purchaser that something was amiss with either the title or the
10 manner in which the sale was set up and conducted. When coupled with the fact that
11 the County Recorder's office clearly showed that the record owner of the property
12 was NYCB when Gogo Way purchased the Subject Property from Shadow Wood
13 HOA, Gogo Way's claims of innocence and ignorance ring completely hollow.

14 Quite simply, Gogo Way was not a bona fide purchaser and is not entitled to
15 the protections of a bona fide purchaser. Gogo Way only gave the District Court one
16 basis for its request for bona fide purchaser protection, and the District Court
17 correctly determined that the law on which Gogo Way relied did not provide the
18 protection it requested. Gogo Way now attempts to introduce new arguments for the
19 first time as to why it should be permitted to avail itself of this protection, but these
20 arguments, even if the Court were to consider them, likewise do not demonstrate that
21 Gogo Way was a truly innocent purchaser which had no knowledge of any potentially
22 superior claims to title.

23 /././

24 /././

26 ¹² In May of 2011, the Subject Property Sold for \$45,900.00.
27 (APP000012-13). However, on February 22, 2012, Gogo Way
28 purchased it for only \$11,018.39. (APP000019).

1 **D. IN YET ANOTHER NEW ARGUMENT THAT WAS NOT MADE IN**
2 **DISTRICT COURT, GOGO WAY MISTAKENLY ARGUES THE HOA**
3 **SALE CANNOT BE SET ASIDE BECAUSE NYCB DID NOT MAKE A**
4 **PROPER TENDER.**

5 Gogo Way also includes a second new argument on appeal that was not made
6 to the District Court below. It now borrows California law to attempt to validate the
7 HOA Sale by alleging that NYCB did not make a proper tender of the lien amount.
8 [Gogo App. Br. pg. 13-16] As with Gogo Way's other new arguments, this Court
9 should follow precedent and refuse to consider any arguments that were not preserved
10 below. However, like the common law bona fide protection argument that Gogo Way
11 has untimely raised, its new "tender" argument fails as well even if it is considered
12 in this appeal. Again, this Appellant attempts to use distinguishable case law that has
13 zero precedential value. First, Gogo Way relies upon case law that stems from
14 foreclosure sales that had been conducted by the beneficiary of a deed of trust - not
15 a HOA. Second, Gogo Way presupposes that the amount Shadow Wood claimed it
16 was owed was the amount that Shadow Wood was actually entitled to collect, and this
17 presumption is inaccurate.

18 The very cases cited by Gogo Way speak in terms of the amount that is owed
19 to the foreclosing entity rather than the amounts claimed. *Gaffney v. Downey Savings*
20 *& Loan Ass'n*, 200 Cal.App.3d 1154, 1165 (1988) ("[n]othing short of the full amount
21 **due the creditor** is sufficient to constitute a valid tender....") (citation omitted);
22 *Nguyen v. Calhoun*, 105 Cal.App.4th 428, 440 (2003) ("it is a debtor's responsibility
23 to make a tender of the entire **amount due...**") (citation omitted). However, nothing
24 about this or any of the other California cases cited by Gogo Way requires a tender
25 of an amount *greater* than the amount the creditor is owed. *See Gaffney*, 200 Cal.
26 App3d at 1165. Such a notion would be absurd and is ripe for abuse from creditors
27 seeking to profit off the leverage created by their ability to foreclose.

28 Here, Shadow Wood was owed far less that it claimed. Following the NYCB

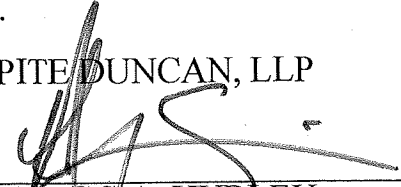
1 Foreclosure Sale, the only amounts due to Shadow Wood were nine months of regular
2 monthly assessments, and nothing more, \$1,519.29.¹³ See NRS 116.3116(2). In the
3 following months, the only amounts possibly due to Shadow Wood consisted of the
4 monthly assessments following the NYCB Foreclosure Sale (\$1,519.29), and perhaps
5 the late fees that accumulated (\$90.00). Therefore, the total amount potentially due
6 to Shadow Wood was considerably less than the \$6,783.16 NYCB tendered.
7 Moreover, as detailed above, and in the Response to Shadow Wood's Opening Brief,
8 the amount tendered by NYCB was more than Shadow Wood *itself* claimed it was
9 due through February 28, 2012. (APP000372) The fact that Shadow Wood rejected
10 a proper tender does not change the fact that NYCB offered to pay more than Shadow
11 Wood was "due" to prevent the sale. Gogo Way cannot safely rely on Shadow
12 Wood's "unreasonable and oppressive actions" to prevent the sale from being set
13 aside, and the "tender" argument that it raises for the first time on appeal would lead
14 to dangerous precedent if adopted in this matter, serving only to offer safe harbor for
15 other unscrupulous collectors who use similar "unreasonable and oppressive actions."

16 V. CONCLUSION

17 For the foregoing reasons, NYCB respectfully requests that this Court affirm
18 the decision of the District Court.

19 DATED this 13th day of January, 2014.

20 PITE DUNCAN, LLP

21 
22 GREGG A. HUBLEY
23 ANTHONY R. SASSI
24 Attorneys for Respondent

25 ¹³ A more detailed argument regarding the amount of the Super Priority
26 Lien is found in Respondent's Brief in Response to Appellant
27 Shadow Wood Homeowners Association's Opening Brief §IV(B).
28 The arguments made therein are incorporated by reference.

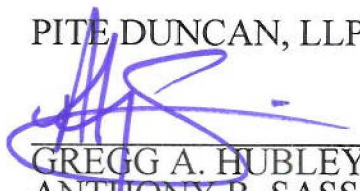
1 **CERTIFICATE OF COMPLIANCE**

2 I hereby certify that this Answering Brief complies with the formatting
3 requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the
4 type style requirements of NRAP 32(a)(6) because this Opening Brief has been
5 prepared in a proportionally spaced typeface using WordPerfect9 in size 14 Times
6 New Roman. I further certify that this Answering Brief complies with the page or
7 type volume limitations of NRAP 32(a)(7)(A) because, excluding the parts exempted
8 by NRAP 32(a)(7)(C), it does not exceed 30 pages.

9 Finally, I hereby certify that I have read this Answering Brief, and to the best
10 of my knowledge, information, and belief, it is not frivolous or interposed for any
11 improper purpose. I further certify that this Answering Brief complies with all
12 applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which
13 requires every assertion in the brief regarding matters in the record to be supported
14 by a reference to the page and volume number, if any, of the transcript or appendix
15 where the matter relied on is to be found. I understand that I may be subject to
16 sanctions in the event that the accompanying brief is not in conformity with the
17 requirements of the Nevada Rules of Appellate Procedure.

18 DATED this 15th day of January, 2014.

19 PITE DUNCAN, LLP

20 
21 GREGG A. HUBLEY
22 ANTHONY R. SASSI
23 Attorneys for Respondent

CERTIFICATE OF SERVICE

I, the undersigned, declare: I am, and was at the time of service of the papers herein referred to, over the age of 18 years, and not a party to this action. My business address is 520 South Fourth Street, Suite 360, Las Vegas, NV 89101.

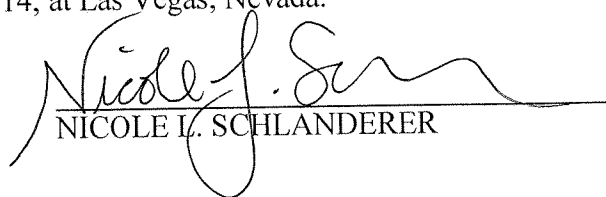
I hereby certify that on January 13, 2014, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Michael R. Bohn, mbohn@bohnlawfirm.com

Bradley Bace, brad@alessikoenig.com

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 13th day of January 2014, at Las Vegas, Nevada.


NICOLE L. SCHLANDERER

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