MICHAEL F. BOHN, ESQ.
Nevada Bar No.: 1641
mbohn@bohnlawfirm.com
JEFF ARLITZ, ESQ.
Nevada Bar No. 6558
jarlitz@bohnlawfirm.com
LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.
376 East Warm Springs Road, Ste. 140
Las Vegas, Nevada 89119
(702) 642-3113/ (702) 642-9766 FAX

Attorney for plaintiff/appellant

SUPREME COURT

STATE OF NEVADA

SATICOY BAY LLC SERIES 133 McCLAREN,

Appellant,

vs.

GREEN TREE SERVICING LLC,

Respondent.

No. 65708

APPELLANT'S OPENING BRIEF

Michael F. Bohn, Esq.
Jeff Arlitz, Esq.
Law Office of
Michael F. Bohn, Esq., Ltd.
376 East Warm Springs Rd., Ste. 140
Las Vegas, Nevada 89119
(702) 642-3113/ (702) 642-9766 Fax

Attorney for Appellant

NRAP 26.1 DISCLOSURE

Counsel for plaintiff/appellant states that plaintiff/appellant, Saticoy Bay LLC Series 133 McLaren, is a Nevada limited-liability company. The manager for Saticoy Bay LLC Series 133 McLaren is the Bay Harbor Trust. The trustee for the Bay Harbor Trust is Iyad Haddad.

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JURISDICTIONAL STATEMENT

(A) Basis for the Supreme Court's Appellate Jurisdiction: The order entered on May 7, 2014 is appealable under NRAP 3A(b)(1).

(B) The filing dates establishing the timeliness of the appeal: The order granting Green Tree's motion to dismiss was filed on May 7, 2014. Notice of entry of the order was served on appellant by mail on May 14, 2014. The notice of appeal from the order was filed on May 15, 2014.

(C) The appeal is from an order granting defendant Green Tree's motion to dismiss.

ISSUES PRESENTED ON APPEAL

1. Whether the "super priority" homeowners association lien under NRS Chapter 116 takes priority over an outstanding first mortgage.

2. Whether a foreclosure of the "super priority" lien extinguishes the first mortgage.

3. Whether the District Court erred in granting defendant's motion to dismiss.

4. The standard of review for the court's dismissal of plaintiff's complaint is rigorous and the court must construe the pleadings liberally and draw every fair intendment in favor of the plaintiff/appellant.

STATEMENT OF THE CASE

A. Facts Pertinent to the Underlying Action

Saticoy Bay LLC Series 133 McLaren (hereinafter "plaintiff") is the owner of the real property commonly known as 133 McLaren Street, Henderson, Nevada (hereinafter "Property"). (APP. Pg. 2, ¶1) Plaintiff obtained title to the Property by way of a foreclosure deed recorded on November 26, 2013. (APP. Pg. 2, ¶2) See copy of foreclosure deed at APP. Pgs. 72-74. The foreclosure deed arises from a delinquency in assessments due from the former owners, Charles J. Wight and Tara J. Wight, to the Hillpointe Park Maintance (hereinafter "the HOA") pursuant to NRS Chapter 116. (APP. Pgs. 2-3, ¶3)

Green Tree Servicing LLC (hereinafter "Green Tree") is the beneficiary of a deed of trust recorded as an encumbrance to the subject property on November 23, 2004 (APP. Pg. 3, ¶4) See copy of deed of trust at APP. Pgs. 32-59, and see copy of corporate assignment of deed of trust, recorded on May 28, 2013, at APP. Pgs. 61-62. National Default Servicing Corporation is the trustee of this deed of trust. (APP. Pg. 3, ¶6)

As reflected by the foreclosure deed recorded on November 26, 2013, at a public auction held on November 22, 2013, plaintiff was the highest bidder and paid the bid amount of $10,200.00 in cash. (APP. Pgs. 72-74)

Plaintiff filed its verified complaint on January 2, 2014 asserting three claims for relief: 1) entry of an injunction prohibiting Green Tree from foreclosing its deed of trust; 2) entry of a judgment pursuant to NRS 40.010 determining that plaintiff was the rightful owner of the Property and that the defendants have no right, title, interest, or claim to the Property; 3) entry of a declaration that title to the Property was vested in plaintiff free and clear of all liens and that the defendants be forever enjoined from asserting any right, title, interest or claim to the Property. (APP. Pgs. 1-7)

On February 12, 2014, Green Tree filed a motion to dismiss plaintiff's complaint. (APP. Pgs. 8-74) Plaintiff filed its opposition to the motion to dismiss

on February 21, 2014. (APP. Pgs. 75-217) Defendant Green Tree filed a reply in support of its motion to dismiss on March 11, 2014. (APP. Pgs. 219-250) At the hearing held on April 2, 2014, the district court granted Green Tree's motion because the HOA did not file suit or initiate a court action. See transcript of hearing at APP. Pg. 278, ll. 14-21.

On May 7, 2014, the court entered its written order granting the motion to dismiss. (APP. Pgs. 268-270) Notice of entry of the order was filed and mailed on May 14, 2014 (APP. Pgs. 271-275).

Plaintiff filed its notice of appeal on May 15, 2014.

STANDARD OF REVIEW

For the order dismissing plaintiff's complaint, the Court's review is rigorous, and the court "must construe the pleading liberally and draw every fair intendment in favor of the [non-moving party]." Vacation Village, Inc. v. Hitachi America, Ltd., 110 Nev. 481, 484, 874 P.2d 744, 746 (1994).

ARGUMENT

1. NRS 116.3116 granted to the HOA a super priority lien that took priority over the earlier recorded first deed of trust assigned to Green Tree.

NRS 116.3116 provides in part:

Liens against units for assessments.

1. **The association has a lien on a unit for** any construction penalty that is imposed against the unit's owner pursuant to NRS 116.310305, **any assessment levied against that unit or any fines imposed against the unit's owner from the time the construction penalty, assessment or fine becomes due**. Unless the declaration otherwise provides, any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.

2. **A lien under this section is prior** to all other liens and encumbrances on a unit **except:**

(a) Liens and encumbrances recorded before the recordation of the

declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to;

(b) **A first security interest on the unit** recorded before the date on which the assessment sought to be enforced became delinquent or, in a cooperative, the first security interest encumbering only the unit's owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent; and

(c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.

The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien, unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien. If federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior to all security interests described in paragraph (b) must be determined in accordance with those federal regulations, except that notwithstanding the provisions of the federal regulations, the period of priority for the lien must not be less than the 6 months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association. (emphasis added)

By its clear terms, NRS 116.3116 (2) provides that the super-priority lien for 9 months of charges is "prior to all security interests described in paragraph (b)." The first deed of trust, recorded on November 23, 2004, assigned to Green Tree falls squarely within the language of paragraph (b). The statutory language does not limit the nature of this "priority" in any way.

In its decision in the case of SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75 (2014), this Court stated:

NRS 116.3116 gives a homeowners' association (HOA) a superpriority lien on an individual homeowner's property for up to nine months of unpaid HOA dues. With limited exceptions, this lien is "prior to all other liens and encumbrances" on the homeowner's property, even a first deed of trust recorded before the dues became delinquent. NRS

> 116.3116(2). We must decide whether this is a true priority lien such that its foreclosure extinguishes a first deed of trust on the property and, if so, whether it can be foreclosed nonjudicially. We answer both questions in the affirmative and therefore reverse.

At the conclusion of its opinion, this Court stated:

> NRS 116.3116(2) gives an HOA a true superpriority lien, proper foreclosure of which will extinguish a first deed of trust. Because Chapter 116 permits nonjudicial foreclosure of HOA liens, and because SFR's complaint alleges that proper notices were sent and received, we reverse the district court's order of dismissal. In view of this holding, we vacate the order denying preliminary injunctive relief and remand for further proceedings consistent with this opinion.

Because the facts in the present case are substantially the same as the facts in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., this Court should reach the same conclusion that the nonjudicial foreclosure of the HOA's super priority lien at the public auction held on November 22, 2013 extinguished the "first security interest" assigned to Green Tree. As a result, the district court erred by granting Green Tree's motion to dismiss.

2. The recitals in the foreclosure deed are conclusive proof that the HOA complied with all requirements for the nonjudicial foreclosure of its super priority lien.

Regarding the procedure used to enforce the HOA's super priority lien, in the case of SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75 (2014), this Court stated:

> But the choice of foreclosure method for HOA liens is the Legislature's, and the Nevada Legislature has written NRS Chapter 116 to allow nonjudicial foreclosure of HOA liens, subject to the special notice requirements and protections handcrafted by the Legislature in NRS 116.31162 through NRS 116.31168. Countervailing policy arguments exist in favor of allowing nonjudicial foreclosure, including that judicial foreclosure takes longer to accomplish, thereby delaying the common interest community's receipt of needed HOA funds.

The evidence in the record on appeal establishes that the agent for the HOA recorded a notice of delinquent assessment lien on January 14, 2011 (APP. Pg. 64), a notice of default and election to sell on September 9, 2011 (APP. Pgs. 66-67), and a notice of foreclosure sale on October 29, 2013 (APP. Pgs. 69-70).

The foreclosure deed recorded on November 26, 2013 (APP. Pgs. 72-73) includes the following recitals:"Nevada Association Services, Inc. has complied with all requirements of law including, but not limited to, the elapsing of 90 days, mailing of copies of Notice of Delinquent Assessment and Notice of Default and the posting and publication of the Notice of Sale." Because NRS 116.31168(1) expressly incorporates the notice requirements contained in NRS 107.090, the HOA was required to mail copies of the notice of default and election to sell and the notice of sale to all persons with a claimed interest "subordinate" to the HOA's super priority lien. Because Green Tree did not acquire its interest in the Property until May 28, 2013 (APP. Pgs. 61-62), the required notices prior to that date would have been mailed to Green Tree's predecessor.

The recitals in the deed are sufficient and conclusive proof that the required notices were mailed by the HOA. NRS 116.31166 provides:

> **Foreclosure of liens: Effect of recitals in deed; purchaser not responsible for proper application of purchase money; title vested in purchaser without equity or right of redemption**.
>
> 1. **The recitals in a deed** made pursuant to NRS 116.31164 of:
> (a) Default, the mailing of the notice of delinquent assessment, and the recording of the notice of default and election to sell;
> (b) The elapsing of the 90 days; and
> (c) The giving of notice of sale,
> are **conclusive proof of the matters recited**.
>
> 2. **Such a deed containing those recitals is conclusive against** the unit's former owner, his or her heirs and assigns, **and all other persons**. The receipt for the purchase money contained in such a deed is sufficient to discharge the purchaser from obligation to see to the proper application of the purchase money.
>
> 3. The sale of a unit pursuant to NRS 116.31162, 116.31163 and 116.31164 vests in the purchaser the title of the unit's owner without equity or right of redemption. (emphasis added)

In the case of Pro-Max Corp. v. Feenstra, 117 Nev. 90, 16 P.3d 1074 (2001), the district court refused to apply the conclusive presumption contained in NRS 106.240 because "[t]he district court determined that the legislature intended for the statute to protect bona fide purchasers." This Court reversed the district court's

judgment that the statute only protects bona fide purchasers and stated:

> We conclude that the statute is clear and unambiguous. That being the case, no further interpretation is required or permissible. Under the plain language of the statute, the deeds of trust are conclusively presumed to have been satisfied and the notes discharged. This conclusive presumption is plain, clear and unambiguous. **No limitation of the statute's terms to bona fide purchasers can be read into the statute.** (emphasis added)
>
> 117 Nev. at 95, 16 P.3d at 1078-79.

NRS 47.240(6) also provides that conclusive presumptions include "[a]ny other presumption which, by statute, is expressly made conclusive." Because NRS 116.31166 contains such an expressly conclusive presumption, the recitals in the foreclosure deed are "conclusive proof" that Green Tree or its predecessor was served with copies of the required notices for the foreclosure sale held on November 22, 2013.

Furthermore, the title in the name of the appellant is made conclusive and not subject to attack from any party including Green Tree. Green Tree's claims, if any, for any alleged failure to receive notice are against the foreclosure agent. See Moeller v. Lien 25 Cal. App. 4th 822, 832, 30 Cal. Rptr. 2d 777 (1994).

It is respectfully submitted that this Court should find that the foreclosure deed received by the appellant at the time it obtained title to the subject property is conclusive and sufficient proof that title is vested in the appellant and not subject to attack from Green Tree.

3. Insufficiency of price is not grounds to invalidate plaintiff/appellant's title.

This Court has stated on multiple occasions that mere inadequacy of price is not sufficient to set aside a foreclosure sale where there is no showing of fraud, unfairness, or oppression. Long v. Towne, 98 Nev. 11, 639 P.2d 528, 530 (1982); Turner v. Dewco Services, Inc., 87 Nev. 14, 479 P.2d 462 (1971); Brunzell v. Woodbury, 85 Nev. 29, 449 P.2d 158 (1969); Golden v. Tomiyasu, 79 Nev. 503, 387 P.2d 989 (1963). Consequently, the fact that plaintiff/appellant purchased the Property for $10,200.00 does not provide any basis to set aside the foreclosure sale.

The Long v. Towne case, Id., is notable because it involved a foreclosure sale of an association's lien for failure to pay assessments. A distinguishing factor between each of the cited Nevada cases is that the complaining party in each case was the property owner, not an encumbrancer on the property, such as Green Tree. At all times, from the time of the foreclosure proceedings through the foreclosure sale, Green Tree and its predecessor had the right to cure the default and maintain their interest in the property, but failed to do so. Green Tree's failure to protect its rights should not be a basis to deprive the plaintiff/appellant of its rights.

This Court's recent decision in SFR Investments Pool 1, LLC v. U.S. Bank, N.A.,130 Nev., Adv. Op. 75 (2014), is dispositive of this issue. In the SFR case, the amount due on the notice of delinquency was less than $5,000.00, and the amount due on the mortgage was hundreds of thousands of dollars. However, this Court noted twice in its opinion that the bank had a simple remedy – to pay the small lien, and if necessary, sue for a refund of any balance which may be due.

Any property owner whose property is governed by CC&R's has a remedy for any disagreement with the homeowners association. That remedy is mediation or arbitration under NRS Chapter 38. However, this remedy must be exercised before the foreclosure sale takes place. The homeowner may additionally seek relief, such as injunctive relief, if faced with the threat of immediate harm, such as a pending foreclosure sale. See Hamm v. Arrowcreek Homeowners Association 124 Nev. 290, 183 P.3d 895 (2008). The remedy of an injunction, however, is only effective if sought before the foreclosure sale takes place.

Green Tree and its predecessor failed to exercise any of their remedies or take any steps to preserve their security to it's own detriment.

/ / /

/ / /

CONCLUSION

The language in NRS 116.3116 created a super priority lien that extinguished Green Tree's first deed of trust when plaintiff/appellant purchased the real property at the HOA foreclosure sale.

As a result, it is respectfully requested that this Court reverse the order by the district court granting defendant Green Tree's motion to dismiss and remand this case to the district court with directions to enter judgment in favor of the plaintiff quieting title to the real property in plaintiff/appellant's name.

DATED this 7th day of October, 2014.

LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

By: / s / Michael F. Bohn, Esq. /
Michael F. Bohn, Esq.
376 East Warm Springs Road, Ste. 140
Las Vegas, Nevada 89119
Attorney for plaintiff/appellant

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect X6 14 point Times New Roman.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 37(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7) it is proportionately spaced and has a typeface of 14 points and contains 3,104 words. 3. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

DATED this 7th day of October, 2014.

LAW OFFICES OF
MICHAEL F. BOHN,ESQ., LTD.

By: / s / Michael F. Bohn, Esq. /
Michael F. Bohn, Esq.
376 East Warm Springs Road, Ste. 140
Las Vegas, Nevada 89119
Attorney for plaintiff/appellant

CERTIFICATE OF SERVICE

In accordance with N.R.A.P. 25, I hereby certify that I am an employee of The Law Offices of Michael F. Bohn, Esq., Ltd., and that on the 7th day of October, 2014, a copy of the foregoing **APPELLANT'S OPENING BRIEF** was served electronically through the Court's electronic filing system to the following individuals:

Michael R. Brooks, Esq.
Christopher S. Connell, Esq.
1645 Village Center Circle
Suite 200
Las Vegas, NV 89134

/s/ / *Marc Sameroff*/
An Employee of the LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.