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SUPREME COURT

STATE OF NEVADA

SATICOY BAY LLC SERIES 350 DURANGO 104, Appellant, vs. WELLS FARGO HOME MORTGAGE, Respondent.	No. 68630

APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

(A) Basis for the Supreme Court's Appellate Jurisdiction: The order granting defendant Wells Fargo's renewed motion to dismiss is appealable under NRAP 3A(b)(1).

(B) The filing dates establishing the timeliness of the appeal: The order granting defendant's renewed motion to dismiss was filed on July 10, 2015. Notice of entry of the order was served on appellant by electronic service on July 13, 2015. The notice of appeal from the order was filed on August 11, 2015.

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

ISSUES PRESENTED ON APPEAL

1. Whether the nonjudicial foreclosure process in NRS Chapter 116 facially violates constitutional due process requirements.

2. Whether the extinguishment of defendant's deed of trust violates the takings clauses in the United States and Nevada Constitutions.

3. Whether the extinguishment of defendant's deed of trust violates public policy.

4. Whether the amount paid by plaintiff at the foreclosure sale provides grounds to set aside the foreclosure sale.

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

6. 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

Plaintiff Saticoy Bay LLC Series 350 Durango 104 (hereinafter "plaintiff") filed a Complaint on September 12, 2013 asserting three claims for relief: 1) entry of an injunction prohibiting defendant Wells Fargo Home Mortgage, a Division of Wells Fargo Bank, N.A. (hereinafter "defendant") from foreclosing the deed of trust held by it; 2) entry of a judgment pursuant to NRS 40.010 determining that plaintiff was the rightful owner of the real property commonly known as 350 South Durango Road, Unit 104, Las Vegas, Nevada (hereinafter "Property") and that the defendants had 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 defendant be forever enjoined from asserting any right, title, interest or claim to the Property. (JA1a, pgs. 1-8)

On April 13, 2015, defendant filed a renewed motion to dismiss plaintiff's complaint. (JA3c, Pgs. 686-715) On April 27, 2015, plaintiff filed an opposition to the motion to dismiss. (JA4a, pgs. 764-783) On June 4, 2015, defendant filed a reply

in support of renewed motion to dismiss plaintiff's complaint. (JA4b, pgs. 784-810)

At the hearing held on June 9, 2015, the court granted defendant's renewed motion to dismiss on the grounds that the HOA foreclosure statute (NRS Chapter 116) violates the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and art. I, sec. 8(5) of the Nevada Constitution. See transcript of hearing at JA4b, pgs. 822-826. A written order granting defendant's motion to dismiss was filed on July 10, 2015. (JA4b, pgs. 814-818).

Paragraph 2 of the court's conclusions of law (JA4b, pg. 816) found that NRS Chapter 116 violated the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution because "the Statute does not require the foreclosing party to take reasonable steps to ensure that actual notice is provided to interested parties who are reasonably ascertainable (unless the interested party first requests notice)." Paragraph 3 of the court's conclusions of law (JA4b, pg. 816) found that NRS Chapter 116 violates art. I, sec. 8(5) of the Nevada Constitution for the same reasons.

Paragraph 4 of the court's conclusions of law (JA4b, pgs. 816-817)found that "reference to NRS 107.090 does not salvage the federal or state constitutionality of the Statute because Plaintiff's construction of NRS107.090 as mandating notice to lenders before foreclosure would render superfluous the express 'opt-in' notice provisions contained in NRS 116.3116, in violation of rules of statutory construction."

Notice of entry of the order was filed and served on July 13, 2015. (JA4, pgs. 811-818) Plaintiff filed its notice of appeal from the order on July 14, 2015. (JA4, pgs. 819-820)

STATEMENT OF FACTS

Plaintiff is the owner of the Property and obtained title to the Property by way of a foreclosure deed recorded on June 17, 2013 (JA4a, pgs. 758-760).

Defendant is named as the lender in a deed of trust recorded against the

Property on August 11, 2003. (JA4a, pgs. 723-744)

On November 15, 2012, the agent for the Angel Point Condominiums (hereinafter "HOA") recorded a notice of delinquent assessment lien as instrument # 201211150001932 with the County Recorder for Clark County, Nevada. (JA4a, pg. 747) On January 18, 2013, the agent for the HOA recorded a notice of default and election to sell under homeowners association lien. (JA4a, pgs. 748-749) On May 20, 2013, the agent for the HOA recorded a notice of foreclosure sale. (JA4a, pgs. 756-757)

As reflected by the foreclosure deed recorded on June 17, 2013, at the public auction held on June 14, 2013, plaintiff was the highest bidder and paid the bid amount of $6,900.00 in cash. (JA4a, pgs. 758-760)

SUMMARY OF THE ARGUMENT

The language in NRS 116.3116(2) granted to the HOA a super priority lien that extinguished defendant's first deed of trust when plaintiff purchased the real property at the HOA foreclosure sale held on June 14, 2013. The conclusive recitals in the foreclosure deed recorded on June 17, 2013 prove that the HOA complied with all requirements to make the deed "conclusive" against the defendant pursuant to NRS 116.31166(2).

The nonjudicial foreclosure process prescribed by NRS 116.31162 to NRS 116.31168, and by incorporation, NRS 107.090, does not violate the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution and art. I, sec. 8(5) of the Nevada Constitution because no "state actor" participates in the nonjudicial foreclosure process and because the HOA must mail copies of the notice of default and notice of sale to holders of "subordinate" liens affected by the sale even if they do not request notice.

The nonjudicial foreclosure process does not involve a "taking" of private property for "public use" and does not violate public policy.

A nonjudicial foreclosure sale under NRS Chapter 116 is not required to be

"commercially reasonable" and cannot be set aside based solely on a claim that the sale price was unconscionable.

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. Defendant did not meet the requirements for the granting of a motion to dismiss.

In the case of Vacation Village, Inc. v. Hitachi America, Ltd., 110 Nev. 481, 484, 874 P.2d 744, 746 (1994), this Court adopted the following standards for deciding a motion to dismiss:

> All factual allegations of the complaint must be accepted as true. Capital Mortgage Holding v. Hahn, 101 Nev. 314, 315, 705 P.2d 126 (1985). A complaint will not be dismissed for failure to state a claim "unless it appears beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him [or her] to relief." Edgar v. Wagner, 101 Nev. 226, 228, 699 P.2d 110, 112 (1985) (citing Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957)).

In the present case, plaintiff alleged in paragraph 2 of its complaint that it acquired title to the Property by a foreclosure deed recorded on June 17, 2013 (JA1a, pg. 2), and plaintiff alleged in paragraph 7 of its complaint that the interest of each of the defendants had been extinguished by the foreclosure sale conducted by the HOA due to a delinquency in assessments owed by the former owners. (JA1a, pg. 3)

The first page of the foreclosure deed (JA4a, pg. 758) included the following recitals:

> Default occurred as set forth in a Notice of Default and Election to Sell, recorded on 1/18/2013 as instrument # 0002571 Book 201300118 which was recorded in the office of the recorder of said county. 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.

Defendant presented no evidence disputing that the HOA complied with all requirements for the nonjudicial foreclosure of its assessment lien pursuant to NRS Chapter 116. Defendant also did not deny that in compliance with NRS Chapter 116, the authorized agent for the HOA timely mailed to defendant a copy of the notice of default and election to sell under homeowners association lien, recorded on January 18, 2013 (JA4a, pgs. 748-749) and a copy of the notice of foreclosure sale, recorded on May 20, 2013 (JA4a, pgs. 756-757). Defendant also did not dispute that it did not pay the amount of the HOA's super priority lien prior to the public auction held on June 14, 2013.

Instead, the undisputed allegations in plaintiff's complaint prove that the foreclosure of the HOA's super priority lien at the HOA sale held on June 14, 2013 extinguished any estate, right, title, interest or claim in the property held by defendant and vested title to the real property in the plaintiff free of defendant's deed of trust. SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408 (2014).

2. Defendant's trust deed was extinguished by the HOA foreclosure sale.

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)

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 August 11, 2003, 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, 334 P.3d 408 (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.
>
> 334 P.3d at 409.

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.

Id. at 419.

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., the district court should have found that the nonjudicial foreclosure of the HOA's super priority lien at the public auction held on June 14, 2013 extinguished the "first security interest" held by defendant.

3. There is a conclusive presumption that the foreclosure sale was properly conducted.

The detailed and comprehensive statutory requirements for a foreclosure sale are indicative of a public policy which favors a final and conclusive foreclosure sale as to the purchaser. See 6 Angels, Inc. v. Stuart-Wright Mortgage, Inc., 85 Cal. App. 4th 1279, 102 Cal. Rptr. 2d 711 (2011); McNeill Family Trust v. Centura Bank, 60 P.3d 1277 (Wyo. 2033); In re Suchy, 786 F.2d 900 (9th Cir. 1985); and Miller & Starr, California Real Property 3d §10:210. In the case of SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408 (2014), this Court described the non-judicial foreclosure provisions of NRS Chapter 116 as "elaborate," and therefore supported the public policy favoring the finality of a foreclosure sale.

Additionally, there is a common law presumption that a foreclosure sale was conducted validly. Fontenot v. Wells Fargo Bank, 198 Cal. App. 4th 256, 129 Cal. Rptr. 3d 467 (2011); Moeller v. Lien 25 Cal. App. 4th 822, 30 Cal. Rptr. 2d 777 (1994); Burson v. Capps, 440 Md. 328, 102 A.3d 353 (2014); Timm v. Dewsnup 86 P.3d 699 (Utah 2003); Deposit Insurance Bridge Bank, N.A. Dallas v. McQueen, 804 S.W. 2d 264 (Tex. App. 1991); Myles v. Cox, 217 So.2d 31 (Miss. 1968); American

Bank and Trust Co v. Price, 688 So.2d 536 (La. App. 1996); Meeker v. Eufaula Bank & Trust, 208 Ga. App. 702, 431 S.E. 2d 475 (Ga. App 1993).

Under Nevada law, the recitals in the foreclosure deed are sufficient and conclusive proof that a default occurred and that the required notices were mailed by the HOA. The first page of the foreclosure deed recorded on June 17, 2013 includes each of the five recitals required by NRS 116.31166(1): (1) default, (2) mailing of the delinquent assessment, (3) recording of the notice of default and election to sell, (4) the elapsing of the 90 days, and (5) the giving of the notice of sale. (JA4a, Pg. 758)

The controlling statute, 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)

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 defendant was served with copies of the notice of default and the notice of sale for the foreclosure sale. Defendant did not deny that the HOA's agent mailed copies of both of the required notices to defendant.

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 protected 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.

In the present case, NRS 116.31166(2) expressly provides that the foreclosure deed vesting title in the plaintiff is "conclusive" and not subject to attack from any party including the defendant. The defendant's claims, if any, for any alleged failures in the foreclosure process are against the foreclosure agent. See Moeller v. Lien 25 Cal. App. 4th 822, 832, 30 Cal. Rptr. 2d 777 (1994).

4. The nonjudicial foreclosure process provided in NRS 116.31162 to 116.31168 does not violate due process because no state actor participates in the foreclosure of an HOA assessment lien.

At page 6 of its renewed motion to dismiss, defendant asserted that NRS Chapter 116 has a "fatal flaw" because "none of its express notice provisions provide for mandatory notice to lenders; despite the fact that their property rights are directly threatened by an HOA's non-judicial foreclosure." (JA3c, pg. 691) In SFR Investments Pool 1, LLC v. U.S. Bank, N.A.,130 Nev., Adv. Op. 75, 334 P.3d 408 (2014), on the other hand, this Court stated that "[t]he contours of U.S. Bank's due process argument are protean" and that U.S. Bank's argument that the statutory scheme offended due process "is a nonstarter." 334 P.3d at 418.

This Court has also stated that "[t]he general rule is that the Constitution does not apply to private conduct." S.O.C., Inc. v. Mirage Casino-Hotel, 117 Nev. 403, 410, 23 P.3d 243, 247 (2001).

The United States Supreme Court agrees that in order for the "due process" clause to be implicated, a "state actor" must participate. In Lugar v. Edmondson Oil

Co., Inc., 475 U.S. 922 (1982), the Supreme Court stated that "[o]ur cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State" and that "fair attribution" required a two-part approach: 1) "the deprivation must be caused by the exercise of some right or privilege created by the State"; and 2) "the party charged with the deprivation must be a person who may fairly be said to be a state actor." Id. at 937.

In Lugar, the Court found that "joint participation" between a private party and the Clerk of the state court who issued a writ of attachment, which was then executed by the County Sheriff, satisfied the "state actor" requirement. No "state actor" is involved in the nonjudicial foreclosure process provided by NRS 116.31162 to NRS 116.31168, and by incorporation, NRS 107.090.

The Court in Lugar cited its prior ruling in Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978), and the Court acknowledged that even where the state was responsible for creating a statute, "[a]ction by a private party pursuant to this statute, without something more, was not sufficient to justify a characterization of that party as a 'state actor.'" 475 U.S. at 939.

In Apao v. Bank of New York, 324 F.3d 1091, 1092 (9th Cir. 2003), the Court of Appeals rejected a due process challenge to Hawaii's nonjudicial foreclosure statute and stated that there had been "no legal or historical development in the intervening years that would require a departure from prior authority." The "prior authority" referred to in Apao v. Bank of New York included the case of Charmicor v. Deaner, 572 F.2d 694 (9th Cir. 1978), where the Court of Appeals ruled that the statutory procedure for non-judicial foreclosure sales provided in NRS 107.080 did not transform the private action into state action for due process purposes.

Because no state actor participated in the HOA's nonjudicial foreclosure of its superpriority lien, the HOA foreclosure sale could not violate the due process clauses in the United States Constitution and in the Nevada Constitution.

/ / /

5. The foreclosure process in NRS Chapter 116 does not violate due process because NRS 116.31168(1) incorporates the notice requirements in NRS 107.090 and requires that copies of both the notice of default and the notice of sale be mailed to holders of subordinate interests.

In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408 (2014), this Court painstakingly went through each of the foreclosure requirements in NRS Chapter 116 and called the statutory scheme "elaborate." In rejecting U.S. Bank's claim that there was a due process violation, this Court stated:

> U.S. Bank makes two additional arguments that merit brief discussion. First, the lender contends that the nonjudicial foreclosure in this case violated its due process rights. Second, it invokes the mortgage savings clause in the Southern Highlands CC & Rs, arguing that this clause subordinates SHHOA's lien to the first deed of trust. Neither argument holds up to analysis.
>
> 1.
>
> SFR is appealing the dismissal of its complaint for failure to state a claim upon which relief can be granted. NRCP 12(b)(5). The complaint alleges that "the HOA foreclosure sale complied with all requirements of law, including but not limited to, recording and mailing of copies of Notice of Delinquent Assessment and Notice of Default, and the recording, posting and publication of the Notice of Sale." It further alleges that, "prior to the HOA foreclosure sale, no individual or entity paid the super-priority portion of the HOA Lien representing 9 months of assessments for common expenses." **In view of the fact that the "requirements of law" include compliance with NRS 116.31162 through NRS 116.31168 and by incorporation, NRS 107.090, *see* NRS 116.31168(1)**, we conclude that U.S. Bank's due process challenge to the lack of adequate notice fails, at least at this early stage in the proceeding. (emphasis added)
>
> 334 P.3d at 417-418.

NRS 116.31168 provides in part:

> **Foreclosure of liens: Requests by interested persons for notice of default and election to sell; right of association to waive default and withdraw notice or proceeding to foreclose.**
>
> 1**. The provisions of NRS 107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed**. The request must identify the lien by stating the names of the unit's owner and the common-interest community. (emphasis added)

In order to read NRS 107.090 as directed by NRS 116.31168(1), defendant has placed the words "association's lien" in brackets following each use of the words

"deed of trust" in NRS 107.090:

> **Request for notice of default and sale: Recording and contents; mailing of notice; request by homeowners' association; effect of request.**
>
> 1. As used in this section, "person with an interest" means any person who has or claims any right, title or interest in, or lien or charge upon, the real property described in the deed of trust [association's lien], as evidenced by any document or instrument recorded in the office of the county recorder of the county in which any part of the real property is situated.
>
> 2. **A person with an interest** or any other person who is or may be held liable for any debt secured by a lien on the property desiring a copy of a notice of default or notice of sale under a deed of trust [association's lien] with power of sale upon real property **may at any time after recordation of the deed of trust [association's lien] record in the office of the county recorder** of the county in which any part of the real property is situated **an acknowledged request for a copy of the notice of default or of sale**. The request must state the name and address of the person requesting copies of the notices and identify the deed of trust [association's lien] by stating the names [of the unit's owner and the common-interest community] of the parties thereto, the date of recordation, and the book and page where it is recorded.
>
> 3. The trustee or person authorized to record **the notice of default** shall, within 10 days after the notice of default is recorded and mailed pursuant to NRS 107.080, cause to be deposited in the United States mail an envelope, registered or certified, return receipt requested and with postage prepaid, containing a copy of the notice, addressed to:
>
> (a) Each person who has recorded a request for a copy of the notice; **and**
>
> **(b) Each other person with an interest whose interest or claimed interest is subordinate to the deed of trust [association's lien].**
>
> 4. The trustee or person authorized to make the sale shall, at least 20 days before the date of sale, cause to be deposited in the United States mail an envelope, registered or certified, return receipt requested and with postage prepaid, containing a copy of **the notice of time and place of sale**, addressed to each person described in subsection 3. (emphasis added)

At page 12 of its renewed motion to dismiss (JA3c, pg. 697), defendant asserted that NRS 116.31168 "unconstitutionally shifts the burden to lenders, requiring they 'opt in' to receive notice of foreclosure." As set forth above, NRS 107.090 includes both an "opt in" provision for "any" person with an interest and a "mandatory" notice provision for holders of "subordinate" interests. NRS 116.31168(1) expressly incorporates both of these notice provisions.

As provided by NRS 107.090(2), any "person with an interest" may record "an acknowledged request for a copy of the notice of default or of sale." When a deed of trust is foreclosed, NRS 107.090(3)(a) requires that a copy of the notice of default be mailed to each person who has recorded a request for notice.

In addition NRS 107.090(3)(b) requires that a copy of the notice of default also be mailed to "[e]ach other person with an interest whose interest or claimed interest is subordinate to the deed of trust." The definition of "person with an interest" in NRS 107.090(1) includes holders of "any right, title or interest in, or lien or charge upon, the real property." This definition includes holders of deeds of trust. NRS 107.090(3)(b) therefore requires that notice be mailed to holders of deeds of trust "subordinate" to "the deed of trust" being foreclosed even if they do not record a request for notice.

NRS 107.090(4) requires that a copy of the notice of sale be mailed to each person described in NRS 107.090(3).

The notice requirements in NRS 107.090(3)(b) and 107.090(4) apply regardless of whether the holder of the subordinate interest (deed of trust) records a request to receive the notice provided pursuant to NRS 107.090(3)(a). If notice was required only for those persons who had recorded a request for notice, there would be no reason for NRS 107.090(3)(b) to exist because all such persons would already be covered by NRS 107.090(3)(a). Because NRS 107.090(3)(a) and NRS 107.090(3)(b) are connected by the word "and," the statute without question requires that notice be provided **both** to holders of interests who have recorded a request for notice **and** to holders of "subordinate" interests even if they have not recorded a request for notice**.**

At page 13 of its renewed motion to dismiss (JA3c, pg. 698), defendant asserted that the caption of NRS 116.31168 supersedes the express language in the body of NRS 116.31168(1) and that NRS 116.31168(1) does not incorporate the provisions of NRS 107.090 requiring that copies of both the notice of default and the notice of sale be mailed to holders of "subordinate" interests even if they do not make

an affirmative request for notice. As noted in the SFR decision, on the other hand, this Court acknowledged that the notices required by NRS 107.090 are required for an HOA foreclosure "by incorporation." Id. at 418.

In State v. Steven Daniel P. (In re Steven Daniel P.), 129 Nev., Adv. Op. 73, 309 P.3d 1041, 1046 (2013), this Court applied the concept of incorporating a statute by reference in the context of NRS Chapter 62C and stated:

> The United States Supreme Court has held that "[w]here one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute." Hassett v. Welch, 303 U.S. 303, 314 (1938) (quoting 2 J.G. Sutherland & John Lewis, *Statutes and Statutory Construction* 787 (2d ed. 1904)); *see also* State ex rel. Walsh v. Buckingham, 58 Nev. 342, 349, 80 P.2d 910, 912 (1938) ("A statute by reference made a part of another law becomes incorporated in it and remains so as long as the former is in force.")

Consequently, the provisions of NRS 107.090 requiring that copies of both the notice of default and the notice of sale be mailed to holders of interests "subordinate" to the HOA's lien must be read as if they were "incorporated bodily" into NRS Chapter 116.

At page 13 of its renewed motion to dismiss (JA3c, pg. 698), defendant argued that the second sentence in NRS 116.31168(1) refers to "[t]he *request*" and "demonstrates that the subject matter of this provision again pertains to persons or entities that have expressly requested notice." The second sentence in NRS 116.31168(1) does modify the request for notice provision in NRS 107.090(2), so that it applies to an HOA foreclosure. The first sentence in NRS 116.31168(1), on the other hand, expressly incorporates "the provisions of NRS 107.090" and not just the request for notice provision in NRS 107.090(2).

At page 13 of its renewed motion to dismiss (JA3c, pg. 698), defendant also argued that "NRS 116.31168 only applies to the notice of default and election to sell and does not apply to any other form of notice." On the other hand, NRS 107.090(4) expressly requires that a copy of the notice of time and place of sale be mailed "to each person described in subsection 3." NRS 116.31168(1) incorporates "the

provisions of NRS 107.090" and not just the provisions for service of the notice of default contained in NRS 107.090(3).

At the bottom of page 13(JA3c, pg. 698) and top of page 14 (JA3c, pg. 699) of its renewed motion to dismiss, defendant argued that NRS 107.090 is "a 'request for notice' provision, only governing an articulated request" because the caption to NRS 107.090 includes the word "request" three times. As noted above, however, NRS 107.090(3)(b) expressly requires that notice be provided to "[e]ach other person with an interest whose interest or claimed interest is subordinate to the deed of trust" and not just to "[e]ach person who has recorded a request for a copy of the notice" pursuant to NRS 107.090(2).

Defendant's focus on the captions assigned to each section of the statute in order to negate the express language contained in the body of the statute violates this Court's direction that courts must construe statutes to give meaning to all of their parts and language, and courts are to read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation. Board of County Comm'rs v. CMC of Nevada, 99 Nev. 739, 744, 670 P.2d 102, 105 (1983). A statute should be interpreted to give the terms their plain meaning, considering the provisions as a whole, so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory. Southern Nevada Homebuilders v. Clark County 121 Nev. 446, 117 P.3d 171 (2005). A statute should be construed so that no part is rendered meaningless**.** Public Employees' Benefits Program v. Las Vegas Metropolitan Police Department 124 Nev. 138, 179 P.3d 542 (2008).

At page 14 (JA3c, pg. 699) of its renewed motion to dismiss, defendant also argued that NRS 107.090(3)(b) "cannot apply to lenders for purposes of notice because their interest is not 'subordinate to the deed of trust' – their interest *is* the deed of trust." This argument, however, ignores the direction in the first sentence of NRS 116.31168(1) that NRS 107.090 "apply to the foreclosure of an association's lien **as if** a deed of trust were being foreclosed." The first sentence of NRS

116.31168(1) modifies NRS 107.090(3)(b), so that notice must be mailed to each interest "subordinate" to the "association's lien."

As noted at page 2 above, the district court found in paragraph 2 of its conclusions of law that NRS Chapter 116 violated the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution because "the Statute does not require the foreclosing party to take reasonable steps to ensure that actual notice is provided to interested parties who are reasonably ascertainable (unless the interested party first requests notice)." (JA4b, pg. 816) Paragraph 3 of the court's conclusions of law found that NRS Chapter 116 violates art. I, sec. 8(5) of the Nevada Constitution for the same reasons. (JA4b, pg. 816) These findings ignore the provisions of NRS 107.090(3)(b) and NRS 107.090(4), as incorporated by NRS 116.31168(1), that expressly required that copies of the notice of default and notice of sale be mailed to holders of interests "subordinate" to the HOA's assessment lien even if such holders did not request notice.

The district court also based its ruling on the notice requirements applied to governmental agents and employees in Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983)(property tax sale by county treasurer) ; Mulllane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)(judicial proceeding to settle fiduciary's account); and Small Engine Shop, Inc. v. Cascio, 878 F.2d 883 (5th Cir. 1989)(court ordered sheriff's sale pursuant to *ex parte* proceeding). Even though no "state actor" participated in the nonjudicial foreclosure sale held in this case, the "mandatory" notices required by NRS 107.090(3) and NRS 107.090(4) nevertheless satisfy the notice requirements discussed in these three cases.

In paragraph 4 of its conclusions of law, the district court found that "NRS 107.090 does not salvage the federal or state constitutionality of the Statutes because Plaintiff's construction of NRS107.090 as mandating notice to lenders before foreclosure would render superfluous the express 'opt-in' notice provisions contained in NRS 116.3116, in violation of rules of statutory construction." (JA4b, pgs. 816-

817) To the contrary, the mandatory notices required by NRS 107.090(3)(b) and NRS 107.090(4), as incorporated by NRS 116.31168(1), do not render the "opt-in" notice provisions superfluous because the "mandatory" notices are provided only to holders of interests "subordinate" to the HOA's assessment lien.

On the other hand, the request for notice provision in NRS 107.090(2) that is incorporated by NRS 116.31163(1) and NRS 116.31168(1) applies to any "person with an interest" who records a request for notice. The request for notice provisions in NRS 116.31163(2) and NRS 116.311635(b)(2) likewise extend to "[a]ny holder of a recorded security interest."

Because more persons qualify to request notice of the default and the notice of sale than are "required" to receive notice as holders of "subordinate" interests, the "mandatory" notices required by NRS 107.090(3)(b) and NRS 107.090(4) do not render the "request for notice" provisions "superfluous."

This Court has directed that "whenever possible, a court will interpret a rule or statute in harmony with other rules or statutes." Nevada Power Co. v. Haggerty, 115 Nev. 353, 364, 989 P.2d 870, 877 (1990). This Court has also recognized a general presumption that statutes will be interpreted in compliance with the Constitution. Sereika v. State, 114 Nev. 142, 955 P.2d 175, 180 (1998). This Court has stated that "statutes must be construed consistent with the constitution and, where necessary, in a manner supportive of their constitutionality." Foley v. Kennedy, 110 Nev. 1295, 1300, 885 P.2d 583, 586 (1994). Where a statute is susceptible to both a constitutional and an unconstitutional interpretation, the court is obliged to construe the statute so that it does not violate the constitution. Whitehead v. Nevada Commission on Judicial Discipline, 110 Nev. 380, 878 P.2d 913, 919 (1994), citing Sheriff v. Wu, 101 Nev. 687, 708 P.2d 305 (1985).

If this Court were to adopt the district court's analysis, then every nonjudicial foreclosure of a deed of trust pursuant to NRS 107.080 would also be unconstitutional because the mandatory notice requirements in NRS 107.090(3)(b) and NRS

107.090(4) would make the "request for notice" provisions in NRS 107.090(2) "superfluous." On the other hand, the use of the word "and" between NRS 107.090(3)(a) and NRS 107.090(3)(b) reveals the Legislature's intent that the mandatory notice for holders of "subordinate" interests supplements, and does not supersede, the notices required for persons who record a request for notice.

This Court has also recognized that when the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it. City Council of Reno v. Reno Newspapers, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989). Plaintiff's interpretation of the statute gives effect to both the request for notice provisions and the mandatory notice provisions for holders of "subordinate" interests and satisfies the concern that holders of "subordinate" interests be provided with notice by mail before their "subordinate" interests are extinguished. The district court's interpretation, on the other hand, eliminates the exact notice requirement that satisfies the "due process" concerns expressed by the district court.

The foreclosure procedures for HOA liens found in NRS Chapter 116 mirror the statutory procedures provided for foreclosures of trust deeds in NRS 107.080. The statutory requirements for the foreclosure procedures under NRS Chapter 116 for an HOA foreclosure and under NRS 107.080 for a bank foreclosure are detailed in the following graph:

HOA Foreclosure	Statutory Requirement	Bank Foreclosure
NRS 116.31162(1)(a)	Delinquency by homeowner	NRS 107.080(1)
NRS 116.31162(1)(a)	Mail notice of delinquency to homeowner	No statutory requirement but required by terms of deed of trust
NRS 116.31162(1)(b)	Execute notice of default and election to sell (NOD) that describes the deficiency in payment	NRS 107.080(2)(b)

HOA Foreclosure	Statutory Requirement	Bank Foreclosure
NRS 116.31162(1)(a)	Record NOD	NRS 107.080(3)
NRS 116.31162(2)(b)	Mail NOD by certified or registered mail, return receipt requested to homeowner	NRS 107.080(3)
NRS 116.31163 and NRS 116.31168 (incorporating requirements of NRS 107.090)	Mail NOD to interested parties who request notice	NRS 107.090(3)(a)
NRS 116.31168 (incorporating requirements of NRS 107.090)	Mail NOD to subordinate claim holders	NRS 107.090(3)(b)
NRS 116.31162(1)(c)	Failure to pay for 90 days after NOD is recorded and mailed	NRS 107.080(3)
NRS 116.311635(1)(a)	Give notice of the time and place of the sale in the manner and for a time not less than that required by law for the sale of real property upon execution/posting in a public place and on property	NRS 107.080(4)
NRS116.311635(1)(a)(1)	Mail Notice of Sale (NOS) to homeowner	NRS 107.080(4)
NRS116.311635(1)(b)(1) and NRS116.311635(1)(b)(3)	Mail NOS to interested parties who request notice	NRS 107.090(4)
NRS 116.31168 (incorporating requirements of NRS 107.090)	Mail NOS to subordinate claim holders	NRS 107.090(4)
NRS116.311635(1)(b)(3)	Mail NOS to Ombudsman	No statutory requirement
NRS 116.311635(2)	Post NOS on property or personally deliver to homeowner	NRS 107.080(4)

NRS 107.090, as incorporated by NRS 116.31168(1), expressly provides that notices be mailed to all persons with an interest, whose interests are subordinate to

the HOA's super priority lien, regardless of whether they request notice. The statutory requirements for foreclosure of an HOA lien and trust deed are virtually identical, and the statutes mirror each other. The notices provided to claimants to the real property are the same under both NRS Chapter 107 and NRS Chapter 116, and the notices are adequate. Because these notice requirements are constitutional when used to foreclose a deed of trust, they are also constitutional when used to foreclose an HOA assessment lien.

The notice requirements of NRS 116.31162 through 116.31168, and by incorporation, NRS 107.090, provide holders of "subordinate" deeds of trust with adequate notice prior to an HOA foreclosure sale.

6. The extinguishment of defendant's subordinate deed of trust does not violate the takings clauses of the United States and Nevada Constitutions.

At page 15 of its motion to dismiss (JA3c, pg. 700), defendant asserted that "[p]ermitting the extinguishment of a first-recorded deed of trust in favor of a *de minimis* homeowners' association's lien to recover several months of assessments is a taking that violates both Constitutions." The present case, however, does not involve any property being "taken for public use" as required by the Fifth Amendment to the U.S. Constitution or art. I, sec. 8 of the Nevada Constitution.

The case of McCarran Int'l Airport v. Sisolak, 122 Nev. 645, 137 P.3d 1110 (2006), is unlike the present case because that case involved a height restriction ordinance adopted by Clark County that reduced the height of any structures that could be erected on plaintiff's property from 150 feet to only 80 to 90 feet. In addition, the plaintiff argued that approximately 100 planes per day used his airspace at altitudes below 500 feet.

In the present case, on the other hand, NRS Chapter 116 was adopted by the Nevada legislature in 1991, and the super priority lien rights granted to the HOA by NRS 116.3116(2) and the HOA's declaration of Covenants Conditions and

Restrictions (CC&Rs) recorded on December 29, 1994 pre-dated the recording of defendant's deed of trust on August 11, 2003. (JA4a, pgs. 723-744) The recorded CC&Rs provided defendant with "notice that by operation of the statute, the [earlier recorded] CC&Rs might entitle the HOA to a super priority lien at some future date which would take priority over a [later recorded] deed of trust." SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, *22, 334 P.3d 408, 418 (2014), quoting 7912 Limbwood Court Trust v. Wells Fargo Bank, N.A., 979 F. Supp. 2d 1142, 1152 (D. Nev. 2013).

In the case of United States v. Security Industrial Bank, 459 U.S. 10 (1982), cited at page 16 of defendant's motion (JA3c, pg. 701) , the United States Supreme Court affirmed a decision by the Court of Appeals that the exemptions created by 11 U.S.C. § 522(f)(2) could not have "retrospective application" and invalidate liens acquired before the enactment date of the Bankruptcy Reform Act of 1978. In the present case, the enactment of NRS Chapter 116 in 1991 and the recording of the CC&Rs for the HOA could not be a taking of defendant's interest in the Property because the deed of trust was not recorded until August 11, 2003.

In Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935), cited at page 16 of defendant's motion, the United States Supreme Court held that a sub-section added to §75 of the Bankruptcy Act by the Frazier-Lemke Act adopted on June 28, 1934 could not be applied to change the mortgagee's rights in mortgages recorded in 1922 and 1924. No "retrospective" application of NRS 116.3116(2) exists in the present case. Defendant obtained its interest in the real property with constructive notice that NRS Chapter 116 and the CC&Rs for the HOA provided the HOA with super priority lien rights that could extinguish its "subordinate" interest in the property.

The case of Armstrong v. United States, 364 U.S. 40 (1960), cited at pages 16 and 17 of defendant's motion (JA3c, pgs. 701-702), is unlike the present case because

the United States took ownership of 11 boats that were subject to the petitioners' materialmen's liens under state law and thereby made those liens unenforceable. In this case, the private foreclosure sale by the HOA did not involve a government purchaser, and defendant's deed of trust was always subordinate to the HOA's super priority lien rights.

At page 17 of its motion (JA3c, pg. 702), defendant stated that "government seizure" of property is not necessary to finding "an unconstitutional taking," but that "[t]he government's 'simply impos[ing] a general economic regulation," which "in effect transfers the property interest from a private creditor to a private debtor" is a taking. United States v. Security Industrial Bank, 459 U.S. at 78. In the present case, however, no such economic regulation was imposed by the government after defendant acquired its deed of trust against the Property. Defendant instead acquired its interest in the Property subject to the super priority lien rights granted to the HOA by NRS Chapter 116 and the CC&Rs for the HOA.

7. The public policies identified by defendant do not override the benefits achieved by allowing the HOA to enforce its super priority lien rights.

At page 18 of its motion (JA3c, pg. 703), defendant asserted that allowing the HOA to enforce its super priority lien according to this Court's opinion in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408 (2014), would violate Nevada's public policy reflected in the Nevada Foreclosure Mediation Program and the Homeowners' Bills of Rights statutes. In its decision in SFR, on the other hand, this Court recognized several countervailing benefits achieved by NRS Chapter 116.

First, this Court observed:

> This makes an HOA's ability to foreclose on the unpaid dues portion of its lien essential for common-interest communities. *Id.* at 12. Otherwise, when a homeowner walks away from the property and the first deed of trust holder delays foreclosure, the HOA has to "either increase the assessment burden on the remaining unit/parcel owners or

> reduce the services the association provides (e.g., by deferring maintenance on common amenities)." *Id.*. at 5-6. To avoid having the community subsidized first security holders who delay foreclosure, whether strategically of for some other reason, UCIOA § 3-116 creates a true superpriority lien:

130 Nev., Adv. Op. 75 at *12; 334 P.3d at 414.

This Court also recognized:

> But as a junior lienholder, U.S. Bank could have paid off the SHHOA lien to avert loss of its security; it also could have established an escrow for SHHOA assessments to avoid having to use its own funds to pay delinquent dues. 1982 UCIOA § 3-116 cmt. 1; 1994 & 2008 UCIOA § 3-116 cmt. 2. The inequity U.S. Bank decries is thus of its own making and not a reason to give NRS 116.3116(2) a singular reading at odds with its text and the interpretation given it by the authors and editors of the UCIOA.

130 Nev., Adv. Op. 75 at *13; 334 P.3d at 414.

At page 19 of its motion (JA3c, pg. 704), defendant also claimed that the courts must impose a "commercial reasonableness requirement" upon an HOA's foreclosure sale in order to prevent homeowners from being exposed to large deficiency judgments when lenders sue them. This Court instead recognized that "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." SFR Investments Pool 1, LLC v. U.S. Bank, N.A. 130 Nev., Adv. Op. 75 at *20, 334 P.3d at 417.

At page 19 of its motion, defendant also asserted that this Court's interpretation of the statute "will prevent lenders from considering foreclosure alternatives and compel lenders to foreclose more quickly." Defendant offered no evidence for this argument, and defendant failed to explain why lenders will not simply pay the *de minimis* amount necessary to prevent the HOA from foreclosing its super priority lien as intended by the drafters of the Uniform Common Interest Ownership Act ("UCIOA").

At page 20 of its motion (JA3c, pg. 705), defendant contended that "banks will not lend money for residential real property purchases when their deed of trust could be extinguished by an HOA sale, without notice and for a commercially unreasonable price." Defendant provided no evidence to support this argument, and the statute requires that the HOA mail notice to "subordinate" lenders, so that a lender can prevent the property from being sold at a low price by curing the unit owner's arrearage or by bidding at the HOA sale.

At page 20 of its motion, defendant also asserted that "HOAs take the smallest amount of risk among creditors and provide the least amount of services to a homeowner." Defendant provided no evidence to support this argument, and as noted by this Court, a lender need take no risk regarding unpaid HOA assessments if it simply establishes an escrow to collect and pay the assessments. SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, *13, 334 P.3d 408, 414 (2014).

8. The amount paid by plaintiff at the HOA foreclosure sale does not support the dismissal of plaintiff's complaint.

At page 21 of its motion (JA3c, pg. 706), defendant quoted from this Court's decision in Golden v. Tomiyasu, 79 Nev. 503, 510, 387 P.2d 989 (1963), cert. denied, 382 U.S. 844 (1965), that "proof of some element of fraud, unfairness or oppression as accounts for and brings about the inadequacy of price" will support setting aside a foreclosure sale. Defendant, however, failed to quote the preceding sentence where this Court refused to adopt the rule that when the inadequacy of price is so great as to shock the conscience, price alone can be sufficient justification to set aside a foreclosure sale. This Court instead adopted the following rule:

> "However, **even assuming that the price was inadequate, that fact standing alone would not justify setting aside the trustee's sale**. In California, it is a settled rule that inadequacy of price, however gross, is not in itself a sufficient ground for setting aside a trustee's sale legally made; **there must be in addition proof of some element of fraud, unfairness, or oppression as accounts for and brings about the**

inadequacy of price.'" (emphasis added)

387 P.2d at 995, quoting Oller v. Sonoma County Land Title Co., 137 Cal. App.2d 633, 290 P.2d 880 (1955).

In the present case, defendant failed to offer any proof of the required "element of fraud, unfairness, or oppression" bringing about the $6,900.00 price that defendant claimed was "commercially unreasonable." The respondents in Golden v. Tomiyasu were likewise unable to produce evidence to support their claim to set aside a trustee's sale, and this Court reversed the decision by the trial court setting aside the sale even though 80 acres of property valued at $200,000 were sold for $18,025.73.

This Court concluded its opinion in Golden v. Tomiyasu by noting:

> In virtually all foreclosures the trustor or mortgagor suffers a loss. He has not been able to meet his obligation and loses the property. When the sale is by a trustee, as in the present case, he loses it without an equity of redemption. If the sale is properly, lawfully and fairly carried out, he cannot unilaterally create a right of redemption in himself. . . . We regret, as do all courts facing such a situation, that the mortgagor or trustor must lose his property, but we cannot arbitrarily afford relief under such circumstances as here exist.

387 P.2d at 997.

This Court applied the same rule in 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).

At page 21 of its motion (JA3c, pg. 706), defendant also quoted from this Court's opinion in Runkle v. Gaylord, 1 Nev. 123, 129 (1865), to argue that a mortgagee with an encumbrance of less than one-third of the value of the property who sells the property "to the first man he meets who will pay the amount of encumbrance [sic], without any attempt to get a larger price for it" alone proves "fraud and oppression." In Golden v. Tomiyasu , however, this Court recognized that before making this statement, the Court in Runkle v. Gaylord "had reviewed at length facts indicating collusion and fraud." 387 P.2d at 994.

In Golden v. Tomiyasu, this Court also examined six cases cited by the respondents as authority that "a judicial sale will be set aside for inadequacy of price alone when such inadequacy is so gross as to shock the conscience" and instead found that in each of the cases, the inadequacy of price was "coupled with fraud, unfairness, concealment, oppression, or other satisfying grounds to warrant the court in its judgment setting aside the sale." Id. In the present case, defendant failed to support its motion to dismiss with any evidence of such fraud, unfairness, or oppression.

At page 21 of its motion (JA3c, pg. 706), defendant also quoted from Levers v. Rio King Land and Investment Co., 93 Nev. 95, 98-99, 560 P.2d 917, 919-20 (1977), where a secured creditor paid only $100 to purchase the ranch supplies securing its note at a non-judicial sale held only 8 days after the creditor mailed notice to the debtor. This Court noted that only the secured creditor and a former employee attended the sale and that "[t]here is no evidence that respondents publicized the sale in any manner." Id. After paying $100 for the collateral, the secured creditor resold the collateral to a third party for $10,000. Under these egregious circumstances, this Court reversed the trial court's decision setting aside the sale. Instead, this Court held that it was sufficient that the district court deducted the fair market value of the collateral in calculating the deficiency judgment owed to the secured creditor. In the present case, defendant's renewed motion to dismiss failed to identify a single defect in the method, manner, time, or place of the public auction held on June 14, 2013. Defendant only objected to the sales price as being "commercially unreasonable."

NRS 116.1108 expressly provides that "[t]he principles of law and equity, including . . . the law of real property . . . supplement the provisions of this chapter, except to the extent inconsistent with this chapter." The Uniform Commercial Code is not one of the areas of law incorporated by NRS 116.1108, but the law of real

property is.

In addition, NRS 104.9109(4)(k) provides that Article 9 of the Uniform Commercial Code does not apply to "[t]he creation or transfer of an interest in or lien on real property" except for four specific exceptions. An assessment lien under NRS Chapter 116 is not one of the listed exceptions.

At pages 21 and 22 of its motion (JA3c, pgs. 706-707), defendant also cited non-binding decisions by federal and state district courts that focused only on the price obtained at the foreclosure sale.

In footnote 13 at page 22 of its motion (JA3c, pg. 707), defendant cited the case of Will v. Mill Condominium Owners' Association, 848 A.2d 336, 342 (Vt. 2004), as authority that "sale of the property for $3,510.10 was not commercially reasonable when the property had a fair market value of $70,000.00." This decision is specific to Vermont law and does not purport to interpret Nevada law. In particular, Vermont law does not include the nonjudicial foreclosure procedure that was "handcrafted" by the Nevada Legislature in NRS 116.31162 through NRS 116.31168. 27A V.S.A. § 3-116(j) instead requires that an association's lien be judicially foreclosed pursuant to 12 V.S.A. chapter 172 or subsection (o) of 27A V.S.A. § 3-116. 27A V.S.A. § 3-116(p) also provides that "[e]very aspect of a foreclosure, sale, or other disposition under this section, including the method, time, date, place, and terms, must be commercially reasonable." Nevada's version of the UCIOA contains no such language.

Vermont's version of the UCIOA also does not contain any statutory language similar to the provision in NRS 116.31166(1) that the recitals in an HOA foreclosure deed "are conclusive proof of the matters recited" or the provision in NRS 116.31166(2) that "[s]uch a deed containing those recitals is conclusive against the unit's former owner, his or her heirs and assigns, **and all other persons**." (emphasis added)

At page 22 of its motion (JA3c, pg. 707), defendant asserted that "[t]he HOAs are 'selling' properties well below their fair market value" and "selling the property to the first speculator who will pay the lien amount, without making any effort to obtain a fair market price." Defendant provided no evidence that the HOA in this case engaged in any such conduct.

At page 23 of its motion (JA3c, pg. 708), defendant referred to a Clark County Assessor Parcel Search Information Sheet (JA3c, pgs. 713-715) that showed a "total taxable value" assigned to the Property for 2015-2016 and argued that the $6,900 paid by plaintiff on June 14, 2013 is grossly disproportionate to the fair market value of the Property today.

In the case of BFP v. Resolution Trust Corporation, 511 U.S. 531, 548-49 (1994), the United States Supreme Court explained why the fair market value of a property cannot be used to prove the forced sale value of the property:

> But as we have also explained, the fact that a piece of property is legally subject to forced sale, like any other fact bearing upon the property's use or alienability, necessarily affects its worth. Unlike most other legal restrictions, however, foreclosure has the effect of completely redefining the market in which the property is offered for sale; normal free-market rules of exchange are replaced by the far more restrictive rules governing forced sales. Given this altered reality, and the concomitant inutility of the normal tool for determining what property is worth (fair market value), **the only legitimate evidence of the property's value at the time it is sold is the foreclosure-sale price itself**. (emphasis added)

Although the Supreme Court limited its holding to "mortgage foreclosures of real estate" (Id. at 552, n. 3), the logic of the opinion applies just as well to a nonjudicial foreclosure of an assessment lien pursuant to NRS Chapter 116.

In SFR Investments Pool 1, LLC v. U.S. Bank, N.A.,130 Nev., Adv. Op. 75, 334 P.3d 408 (2014), the amount due on the notice of delinquency was less than $5,000.00, and this Court upheld the HOA foreclosure sale and 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.

CONCLUSION

By reason of the foregoing, plaintiff respectfully requests that this Court reverse the order by the district court granting defendant's renewed 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's name.

DATED this 18th day of December, 2015.

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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 10,527 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 this18th day of December, 2015.

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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 18th day of December 2015, a copy of the foregoing **APPELLANT'S OPENING BRIEF** was served electronically through the Court's electronic filing system to the following individuals:

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/s/ /*Marc Sameroff /*
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