IN THE SUPREME COURT OF THE STATE OF NEVADA

SATICOY BAY LLC SERIES 350 DURANGO 104

Appellant,

vs.

WELLS FARGO HOME MORTGAGE, N.A.,

Respondent.

Case No.: 68630

District Court: A-13-688410-C

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APPEAL
From the Eighth Judicial District Court
The Honorable Ronald J. Israel

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Disclosure Statement

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made so the Justices of this Court may evaluate possible disqualification or recusal.

The following have an interest in the outcome of this case or are related to entities interested in the case:

- Wells Fargo Bank National Association a/k/a Wells Fargo Bank, N.A.;
- Wells Fargo Bank, N.A. d/b/a Wells Fargo Home Equity;
- Wells Fargo Home Mortgage, a division of Wells Fargo Bank, N.A. d/b/a America's Servicing Company.

There are no other known interested parties.

Chelsea Crowton of the law firm of Wright, Finlay & Zak represented Wells Fargo Bank, N.A. in this matter from its inception until February 2015.

Snell & Wilmer LLP has represented Wells Fargo Bank, N.A. in this matter since February 2015.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

Federal Cases

TABLE OF AUTHORITIES
(Continued)

Page

TABLE OF AUTHORITIES
(Continued)

Page

State Cases

TABLE OF AUTHORITIES
(Continued)

Page

Page

TABLE OF AUTHORITIES
(Continued)

Page

Other Authorities

Introduction

For roughly twenty years, no one behaved as if Nevada Revised Statute 116.3116 *et seq.* ("the Statute") allowed homeowners' association liens to extinguish first deeds of trust. They hadn't in Nevada, and they don't in American jurisprudence generally. And for good reason – the general rule in American lien law is first in time, first in right, and a first lien on a home recorded before an HOA lien is first in time, so no one would expect that an HOA lien could destroy that previously filed first lien on a home.

But then speculators and their counsel argued that the Statute empowered HOAs to foreclose their later-recorded liens and extinguish first liens anyway. After the speculators lost the vast majority of decisions in both state and federal courts, this Court held in a 4-3 decision that the foreclosure of an HOA lien under the Statute does extinguish first deeds of trust. *SFR Investments Pool I, LLC v. U.S. Bank, N.A.*, 334 P.3d 408 (2014) (hereinafter "*SFR v. U.S. Bank*"). Notably, the Nevada Legislature promptly and unanimously overruled *SFR v. U.S. Bank* during its next session – amending the Statute to give holders of deeds of trust a right to notice before an HOA foreclosure sale, and a right of redemption even after the sale. But for untold hundreds or thousands of Nevada homes (and mortgages), the law remains ambiguous, a problem that will not be resolved until there is a conclusive ruling as to the constitutionality of the Statute.

The Statute is unconstitutional. Merely calling what the HOA exploits at the foreclosure sale a "lien" does not make it constitutional. It is well-settled that state laws creating liens violate the Due Process Clause if they impair or extinguish property rights without providing notice to the party whose rights are impaired. And that is exactly what happened here – an HOA foreclosed under the Statute without notice to Wells Fargo. The Statute's answer to the constitutional requirement of notice – a weak species of opt-in notice – fails badly under Supreme Court and other controlling authority. Equally troubling, case law shows that the Statute effects a taking by the Statute's delegation to the HOA of the power to destroy a private property right – here, a first lien – without compensation to Wells Fargo. This Court should find the Statute facially unconstitutional for its violations of the Due Process Clause and Takings Clause, find the Statute unconstitutional as applied under the Due Process Clause and Takings Clause and conclude that the HOA foreclosure sale here is therefore void. The litigants here, as well as Nevada businesses and homeowners, would benefit greatly from this Court's ruling on this important matter.

The Statute contravenes Nevada public policy favoring the exploration of alternatives to residential foreclosures where possible. Indeed, the *SFR v. U.S. Bank* dissent addressed this exact concern, namely, the original homeowner's loss of any equity in the property (necessary, of course, for the borrower to repay the debt to the lender, which debt remains despite the HOA's foreclosure of its dues and assessments lien), the inability of the homeowner to redeem, and the need to adequately and justly adjudicate each and every parties' interest in the affected property, not just that of the HOA.

Finally, this Court should affirm the district court because the sale was commercially unreasonable as a matter of law – the undisputed record below demonstrates that the purchase price was a small fraction of the value of the property.

Statement of the Issues

1. Whether NRS 116.3116 violates the Due Process Clauses of the United States and Nevada Constitutions by eliminating a lender's property interest without requiring notice to the lender or an opportunity to cure.

2. Whether NRS 116.3116 violates the Takings Clause of the United States and Nevada Constitutions by appropriating a lender's security interest in real property without just compensation.

3. Whether the Statute violates Nevada public policy of promoting foreclosure alternatives for homeowners.

4. Whether the purchase price was commercially unreasonable as a matter of law.

Statement of the Case

I. <u>Nature of the Case</u>

This appeal arises from one of the many cases seeking to quiet title in the name of a purchaser of real property via a homeowners' association's non-judicial foreclosure sale.

II. <u>Proceedings Below</u>

Appellant, Saticoy Bay LLC Series 350 Durango 104, filed a Complaint for Quiet Title and Declaratory Relief against the Senholtzes and Wells Fargo on September 12, 2013. JA 1-6. Wells Fargo timely opposed Appellant's motion for preliminary injunction and counter-moved to dismiss on December 12, 2013. JA 44-241. On January 7, 2014, the district court stayed the case pending an anticipated decision from this Court concerning the interpretation of the Statute. JA 671. The district court lifted the stay on December 2, 2014, approximately two months after this Court's decision in *SFR v. U.S. Bank*. JA 677.

Wells Fargo then filed a renewed motion to dismiss, addressing the *SFR v. U.S. Bank* decision. JA 686. On July 13, 2015, the district court granted Wells Fargo's motion, finding that the Statute violates the Due Process Clauses of both the United States and Nevada Constitutions. JA 811. This appeal followed.

III. <u>Routing Statement</u>

As this Court is aware, it resolved several of the issues arising from cases concerning HOA foreclosure sales in *SFR v. U.S. Bank.* However, *SFR v. U.S. Bank* did not have reason to reach many important questions of first impression raised in this appeal. That decision leaves open whether the provisions of NRS Chapter 116, which allow a foreclosure sale conducted by an HOA on an HOA super-priority lien to extinguish pre-existing liens, violate the Due Process and Takings Clauses of the United States and Nevada Constitutions, and whether such sales are void because they are commercially unreasonable. These issues are of statewide significance and in need of resolution, and therefore appropriate to be resolved by this Court.

Moreover, this Court should decide the important and case-dispositive constitutional issues Wells Fargo raises because it is in the interest of the Nevada public that it to do so. Postponing complete consideration of the constitutionality of NRS Chapter 116 will keep at least hundreds of pending cases in a state of uncertainty, heightening the expense and economic disruption occasioned by the present tsunami of HOA litigation – even though it will all end if this Court finds NRS 116.3116 unconstitutional on any of the bases not yet addressed. Deciding these unresolved legal issues now will bring certainty and reduce litigation in this and other similar litigation. The lower courts badly need this Court's guidance.

Lacking it, district court judges are split on these issues, resulting in a flood of similar litigation and a lack of predictability in resolving these issues. Wells Fargo thus requests that this Court decide its challenges to NRS Chapter 116.

Factual Background

On February 7, 1997, Defendants, Roy S. Senholtz and Shirley P. Senholtz ("the Senholtzes") purchased the property located at 350 S. Durango Drive, #104, Las Vegas, Nevada 89128 (the "Property"). JA 721-22. On July 1, 2003, the Senholtzes obtained a loan in the amount of $81,370.00 from Wells Fargo Home Mortgage, Inc. to refinance their original loan for the purchase of the Property. JA 723-44. The Deed of Trust was recorded on August 11, 2003. JA 723. Thereafter, the Senholtzes allegedly stopped paying their HOA assessments and mortgage.

The Senholtzes' homeowners association, Angel Point Condominiums (the "HOA"), recorded a Notice of Delinquent Assessment Lien on November 15, 2012. App. 747. That Notice indicated that a total of $2228.00 was owed, of which $1133.00 was collection fees and interest. JA 747. On January 18, 2013, the HOA recorded a Notice of Default and Election to Sell Under Homeowners Association Lien. JA 748-49.

On April 4, 2013, a Notice of Breach and Default and Election to Cause Sale of Real Property under Deed of Trust was recorded. JA 750-55. The HOA then recorded a Notice of Trustee's Sale on May 20, 2013. JA 756-57. On June 14, 2013, the HOA held a trustee's sale and the Property was sold to Saticoy Bay LLC Series for the total amount of $6,900.00. JA 758-60. On August 29, 2013, a Certificate from the Nevada Foreclosure Mediation Program was recorded. JA 761.

Appellant brought suit on September 12, 2013 seeking to quiet title in the Property. The district court correctly dismissed the Complaint. This appeal followed.

Summary of the Argument

While *SFR v. U.S. Bank* decided some of the issues raised in Nevada's deluge of HOA superpriority lien litigation, several important issues of first impression remain for this Court's determination. This appeal raises several of those issues. None were addressed in, much less foreclosed by, *SFR v. U.S. Bank*, and each provides a basis to affirm the district court's dismissal of the Complaint.

<u>First</u>, as the district court correctly ruled, NRS 116.3116 violates the Due Process Clauses of the United States and Nevada Constitutions by appropriating a lender's property interest without notice. (*See* Section I., *below*, at pages 8-17).

<u>Second</u>, NRS 116.3116 violates the Takings Clause of the United States and Nevada Constitutions by appropriating a lender's property interest without just compensation. (*See* Section II., *below*, at pages 17-25).

Third, the Statute violates Nevada's established public policy of promoting foreclosure alternatives for homeowners, as it allows HOAs to swiftly foreclose on homeowners, without the protections or foreclosure alternatives afforded by the Foreclosure Mediation Program and NRS Chapter 107 and leaving borrowers indebted to their lenders – but without the ability to use their primary asset, the property, to satisfy that debt. (*See* Section III., *below*, at pages 26-32).

Fourth, even setting aside the Statute's many constitutional and public policy infirmities, this Court should affirm because the sale for $6,900 was commercially unreasonable as a matter of law. (*See* Section IV., *below*, at pages 32-41).

This Court should affirm.

Standard of Review

This Court reviews a district court's granting a motion to dismiss de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

Argument

I. The Statute Is Facially Void and Unenforceable Because It Violates Constitutional Due Process Rights and Fails to Require Actual Notice to Lenders of the Potential Loss of Their Security Interest.

The Statute is an unconstitutional piece of legislation, both on its face and as applied. There is no question that "state procedures for creating and enforcing attachments, as with liens, 'are subject to the strictures of due process.'" *Connecticut v. Doehr*, 501 U.S. 1, 12 (1991) (citations omitted). A review of what liens are – and of the many cases holding lien statutes unconstitutional where they empower lienors to impair property rights without providing notice or the need for a hearing – makes clear that the Statute violates the Due Process Clause.

A. The Statute Is Unconstitutional Because It Doesn't Afford Prior Notice or a Hearing to the Party Whose Property Rights Are Impaired by the Foreclosure of the Later-Arising HOA Lien, in Violation of Basic Lien Law.

Liens are constitutional when they impair a property right with notice and an opportunity to be heard – not when they deprive an individual of property without notice or a hearing, as the Statute does, and did to Wells Fargo here. The basic rule in lien law is first in time, first in right, meaning that a recorded interest has priority over later recorded interest. *U.S. By & Through I.R.S. v. McDermott*, 507 U.S. 447, 449 (1993) ("Absent provision to the contrary, priority for purposes of federal law is governed by the common-law principle that 'the first in time is the first in right.'"). There are exceptions to this rule. Certain liens, such as property tax liens and mechanics' liens can have priority over previously recorded interests. *See, e.g.*, *McDermott*, 507 U.S. at 449; *State Dep't of Taxation v. Kawahara*, 351 P.3d 746, 748 (2015); *J.E. Dunn Nw., Inc. v. Corus Const. Venture, LLC*, 127 Nev. Adv. Op. 5, 249 P.3d 501, 505 (2011) (discussing the priority of mechanics' liens). Yet when the government forecloses on a property tax lien, it is required to give notice to the party whose property interest will be erased by that foreclosure. *See, e.g.*, *Mennonite Bd. of Missions v. Adams*, 465 U.S. 791 (1983); *Covey v. Town of Somers*, 351 U.S. 141 (1956).

And when a mechanic's lien is foreclosed, it can impair or extinguish a previously recorded property interest, but the validity of that extinguishment rests upon notice, either through judicial foreclosure of the lien, or the open and notorious nature of the work giving rise to it, which thus afford the holder of the previously recorded property interest actual notice of the work giving rise to the mechanic's lien. *See In re Fontainebleau Las Vegas Holdings*, 128 Nev. Adv. Op. 53, 289 P.3d 1199, 1212 (2012); *Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. Adv. Op. 49, 245 P.3d 1149, 1157 (2010). By foreclosing Wells Fargo's prior-recorded mortgage interest without notice, the Statute violates basic precepts of lien law, thus flouting guarantees of due process.

A line of cases holding lien statutes unconstitutional for lack of notice and a chance to be heard makes very clear that the Statute is unconstitutional. For example, Maryland's highest court struck down the nation's oldest mechanic's lien law (dating to 1791), because the statute created liens that "temporarily deprive[d] a debtor of a significant property interest" without actual notice to the party whose rights were impaired or a prior hearing. *Barry Properties v. Fick Bros.*, 242 A.2d 222, 232 (Md. 1976). Deprivation of a property interest without notice or a hearing meant the lien statute violated the Due Process Clause, and was unconstitutional. *Id.* The *Barry* court was clear that there was state action, implicating the Due Process Clause: "[w]e think it clear that mechanics' liens involve state action since they are created, regulated and enforced by the State. *Id.* at 228 (citations omitted). So it must be here. The Statute does not temporarily deprive Wells Fargo of a property interest – it extinguishes it forever. The Statute does not require notice or a hearing before extinguishment, as the Due Process Clause would require. And it is undisputed that the HOA gave Wells Fargo no notice of its sale here. So as applied in this case, if the Statute authorized what the HOA did in selling the Ellis home and extinguishing Wells Fargo's property interest, it is unconstitutional. And the Statute is state action, as drafted by Nevada's Legislature and construed by its courts. *See Barry*, 242 A.2d at 228; *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 715 (2010) ("But the particular state actor is irrelevant. If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property…").

Many other courts have likewise invalidated lien statutes that, like the Statute, conferred power on private actors to impair other persons' property rights without notice, without a hearing, or both. Where Connecticut passed a law under which mechanic's liens could be filed and perfected "without authorization, supervision, or control by a judicial officer," and provided no right to hearing by the party whose property was liened, that law violated the Due Process Clause because it failed to given a hearing. *Roundhouse Const. Corp. v. Telesco Masons Supplies Co.*, A.2d 393, 394 (Conn. 1976). Nevada's landlord lien laws were held unconstitutional to the extent they allowed deprivation of property by a landlord against a tenant without notice or a hearing. *Adams v. Joseph F. Sanson Inv. Co.*, 376 F. Supp. 61, 68-69 (D. Nev. 1974). California's Innkeeper's Lien Law proved unconstitutional under the Due Process Clause where it permitted a private party to create a lien without a hearing before the lien was imposed. *Klim v. Jones*, 315 F. Supp. 109, 122 (N.D. Cal. 1970). *Klim* correctly emphasized the state action in fashioning this private lien, calling it "action encouraged, indeed only made possible, by explicit state action." *Id.* at 114. Finally, Georgia's statute authorizing all liens on personalty was held unconstitutional because it did not require notice or a hearing before the lienor deprived someone of their interest in their property, and thus did not provide due process. *Mason v. Garris*, 360 F. Supp. 420, 423 (N.D. Ga.) *amended*, 364 F. Supp. 452 (N.D. Ga. 1973).

By contrast, drafting a lien statute that does not violate the Due Process Clause is a straightforward endeavor. All you need to do is provide the notice and a chance to be heard that all the foregoing invalid statutes lacked. Thus, Maryland's condominium lien statute was valid where interested parties had notice and an opportunity to object. *Golden Sands Club Condo., Inc. v. Waller*, 545 A.2d

1332, 1338 (Md. 1988). And, while Washington and Nevada alone permit HOA liens to extinguish prior recorded property interests, such as a lender's under a mortgage, both only permit extinguishment where there is notice to the deed of trust holder, and a right to redeem. *Compare* Wash. Rev. Code §§ 64.34.364(4), (7) *with BAC Home Loans Servicing, L.P. v. Fulbright*, 328 P.3d 895, 901 (Wash. 2014). *See* NRS 116.3116 (amended effective October 1, 2015) (requiring service of Notice of Default and Election to Sell and Notice of Sale upon all lienholders, and giving property owner and first lien holder a 60 day right of redemption). And it's important to note that Nevada's Legislature *unanimously* repealed the features of the Statute that made it violate the Due Process Clause in its first session after the Nevada Supreme Court issued *SFR v. U.S. Bank*, underscoring that the Statute was being used in a way that violates constitutional and national norms of due process.[1]

[1] Nineteen other states don't have this problem, because their versions of the Uniform Common Interest Ownership Act follow the principle of first in time, first in right: they do not permit HOA liens when foreclosed to jump ahead of and extinguish first deeds of trust. *See* Ala. Code § 35-81-316 (Alabama); A.S. § 34.08.470 (Alaska); C.R.S. § 38-33.3-316 (Colorado); C.G.S.A. § 47-258 (Connecticut); 25 Del.C. § 81-316 (Delaware); Fla. Stat. § 718.116(5)(a) (Florida); H.R.S. § 514B-146 (Hawaii); 765 Ill. Comp. Stat. § 605/9 (Illinois); Md. Code Real Prop. § 11-110(f)(2), (3) (Maryland); M.G.L.A. 183A § 6(c) (Massachusetts); M.S.A. § 515B.3-116 (Minnesota); N.H. Rev. Stat. § 356-B:46 (New Hampshire); N.J. Stat. § 46:8B-21(b) (New Jersey); Or. Rev. Stat. §§ 94.709, 100.450 (Oregon); 27A V.S.A. § 3-116 (Vermont); W.Va. Code § 36-B-116 (West Virginia); 68 Pa. Cons. Stat. § 3315(b)(2), 5315(b)(2) (Pennsylvania); Tenn. Code § 66-27-415(b)(2)(A) (Tennessee). That no other state in America ever had a HOA lien

In sum, the Statute here is like the five above-described lien statutes that were held unconstitutional, but even worse. It allowed the HOA to place a lien, and extinguish outright and in perpetuity Wells Fargo's property interest, all without notice or a hearing to protect it. Meanwhile, a host of other statutes in this area comport with due process, as do lien statutes generally, for they confer notice and the chance for a hearing where they impair property rights. There is no doubt that the Statute violates due process.

B. The Statute's Answer to the Notice Requirement – a Weak Provision Affording Notice Only if the Lienholder Asks for It First – Does Not Redeem the Statute, for It Does Not Provide Constitutionally Due Process.

While the constitutional law of liens requires notice before property rights are impaired, the Statute makes an attempt to meet that notice requirement – albeit a weak attempt that fails to pass constitutional muster. This weak answer is housed within NRS 116.31163, .31165, and .31168, which together – instead of requiring affirmative notice to lenders – provide "opt-in" notice by permitting persons with an interest in the property, like Wells Fargo, to *request* notice in advance of a foreclosure sale by submitting written notices of their own to the HOA.

The Supreme Court has made clear that such haphazard and half-hearted gestures in the direction of notice are not constitutionally sufficient. *See, e.g., Mennonite Bd. of Missions v. Adams,* 465 U.S. 791, 798 (1983) (finding tax lien

law operating like the Statute strongly suggests that it cannot fit within the fabric of American lien law at all.

statute unconstitutional: "Notice by mail or other means as certain *to ensure actual notice* is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice.") (emphasis added). In *Mennonite*, the Supreme Court struck down an Indiana statute that merely provided notice by publication to lienholders whose first liens on property would be extinguished by the sale of a tax lien sale of the property in question. 465 U.S. at 798. The dissenters defended the statute on the grounds that notice by publication and posting would give sophisticated commercial actors constructive notice of tax sales. 465 U.S. at 808 (O'Connor, J., dissenting) (arguing for constructive notice standard, noting "approximately 95% of the mortgage debt outstanding in the United States is held" by large, sophisticated commercial actors). But the Court rejected that reasoning decisively, finding "actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice…" 465 U.S. at 800. Just as the tax sale statute in *Mennonite* violated the Due Process Clause, so does the Statute here, given its lack of provision for actual notice. *See also Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("when notice is a person's due, process which is a mere gesture is not due process.")

Courts following *Mennonite* have specifically rejected "opt-in" notice as constitutionally insufficient – just as this Court should. *See Small Engine Shop, Inc. v. Cascio*, 878 F.2d 883, 893 (5th Cir. 1989); *see also Davis Oil Co. v. Mills*, 873 F.2d 774, 787-88 (5th Cir. 1989). In *Small Engine Shop*, the United States Court of Appeals for the Fifth Circuit conducted an in-depth analysis of Louisiana's "opt-in" clause contained in its real property foreclosure statute, which – like the Statute – require no notice to interested parties unless they affirmatively requested it beforehand. *Id.* at 885-886. On appeal, the Fifth Circuit recognized that Louisiana's burden-shifting – from the party impairing property rights to the party whose rights stood to be impaired – was at the center of the controversy. The court analyzed the validity of the statute through the lenses of *Mennonite* and *Mullane*. *Id.* at 888. The court ultimately held that the statute "as interpreted by the district court, cannot be squared with *Mennonite*'s allocation of notice burdens." *Id.* at 890; *see also Davis Oil Co.*, 873 F.2d at 787-88 (reaching an identical conclusion). Specifically, because in *Mennonite* "the Supreme Court held that any owner of property subject to deprivation must receive 'notice by mail or other means as certain to ensure actual notice,'" the state by statute may not "prospectively shift the entire burden of ensuring adequate notice to the property owner regardless of the circumstances." *Small Engine Shop, Inc.*, 878 F.2d at 883-84 (citing *Mennonite*, 462 U.S. at 797). The Statute here is no different, and allows those with property interests the right only to be heard "on demand," which it cannot do. The Statute's opt-in notice provisions violate due process, and this Court should declare them, and the Statute, unconstitutional under the Due Process Clause.

II. The Statute Effects a Delegated Private-Actor Taking that Entirely Ousts Wells Fargo, and Thus Violates the Takings Clauses of the United States and Nevada Constitutions.

The Statute, by extinguishing the property rights of first lien holders like Wells Fargo without compensation, is repugnant to the Takings Clauses of the United States Constitution. The Fifth Amendment to the United States Constitution prohibits "private property be[ing] taken for public use without just compensation." U.S. Const. amend. V; *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 228-29 (1897). When the government takes altogether an interest in property, "it has a categorical duty to compensate the former owner." *Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002). Where the government effects a complete ouster of a property interest, that is a per se, physical taking that the government must compensate under the Fifth Amendment. *See, e.g., Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (holding that where government requires an owner to suffer a permanent physical invasion of her property-however minor-it must provide just compensation); *Cebe*

Farms, Inc. v. United States, 116 Fed. Cl. 179, 192 (2014) (recognizing that physical takings 'involve a physical occupation or destruction of property.").

There was an unconstitutional taking here because: (a) Wells Fargo's lien on the Ellis home was "property" within the meaning of the Takings Clause; (b) by the Statute, Nevada authorized the HOA to extinguish altogether Wells Fargo's property interest; (c) Nevada's delegation to a private actor of the power to extinguish Wells Fargo's property interest doesn't make it any less a taking, given the rich history of delegated private takings law, and given that the requirement of state action in takings is general and well-satisfied here; and (d) no one paid Wells Fargo for the property interest it lost.

A. There Is No Question that a Lien Is "Property" Under the Takings Clause, Which, if Taken or Destroyed by Statute, as Happened Here, Requires the State to Pay Compensation.

Supreme Court jurisprudence could hardly be clearer that the lien here is "property," which if taken or destroyed, must be compensated under the Fifth Amendment. *See United States v. Sec. Indus. Bank*, 459 U.S. 70, 76-77 (1982); *Armstrong v. United States*, 364 U.S. 40, 48 (1960). It is beyond dispute that a lien – including the first lien on the Ellis home at issue here – is "property" within the meaning of the Clause. *Sec. Indus. Bank*, 459 U.S. at 76-77. As such, the extinguishment or destruction of that lien by government is a taking under the Clause. *Id.* at 77-78. And this taking was "unconditional and permanent." *Lucas* *v. South Carolina Coastal Council*, 505 U.S. 1003, 1012 (1992). Given that the Statute effected the destruction of Wells Fargo's property, it thus was a taking. *Sec. Indus. Bank*, 459 U.S. at 76-77.

But the Statute's taking of Wells Fargo's property becomes even more clear in the remarkably applicable *Armstrong* case. There, the Supreme Court found a statute that destroyed the entire value of a lien to be a taking. *Armstrong*, 364 U.S. at 48. In *Armstrong*, where materialmen delivered materials to a contractor for use in constructing navy boats and obtained liens in the vessels pursuant to state law, the Court held that the government committed a taking when it took title to and possession of the property and made it impossible for the materialmen to enforce their liens. *Id.* There, the statute gave the United States government the right to recover all unfinished work, including materials, free of encumbrances, to protect the government's property interests. The Supreme Court explained that the "total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking'…." *Id.* In other words, the lienholders had compensable property, but "[i]mmediately afterwards, they had none." *Id.* And, "[t]his was not because their property vanished into thin air," but rather because the value of the liens had been destroyed by statutory fiat. *Id.* The Statute here likewise effected the complete destruction of the interest of Wells Fargo as a first lien holder. *Armstrong* compels the conclusion that the Statute effects an unconstitutional taking.

Finally, underscoring the taking present here, the Supreme Court struck down as prohibited a regulatory taking a law that, like the Statute, took banks' security interest in their collateral. *See Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935). The *Radford* Court held the Frazier-Lemke Act, which allowed farmers to buy their property at its current appraised value on a deferred payment plan, unconstitutional. *Id.* at 580-581. The Act's infringement of a mortgagee's right to recover full payment before being forced to abandon its security interest was impermissible because that is "the essence" of a mortgage. *Id.* The Court held that that the Act impaired substantive property rights and held that Fifth Amendment eminent domain proceedings and compensation were required to alter the mortgagee's interest in that way. *Id.* The Court concluded:

> For the Fifth Amendment commands that, however great the nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public.

Id. at 601-02. Decided during the Great Depression, *Radford* remains the law. *See Sec. Indus. Bank*, 459 U.S. at 78 (citing *Radford* for approval); *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992) (same). The Statute's taking of Wells Fargo's property is total and not partial, for its right was destroyed by the HOA foreclosure sale and not merely infringed, as in *Radford*. But *Radford* is a powerful reminder of the limitations of state power, and that the Fifth Amendment is a bulwark against laws that alter or destroy the property of mortgagees.

B. By the Statute, Nevada Authorizes the Destruction of First Liens, and Authorized the HOA Here to Take and Destroy Wells Fargo's Property.

Nevada authorizes the destruction of first liens in the Statute. *SFR v. U.S. Bank*, 334 P.3d 408 (Nev. 2014). Specifically, when a HOA forecloses on its lien under the statute, the result is the extinguishment of the first lien. *Id.* Thus, under the Statute as construed in *SFR v. U.S. Bank*, the HOA foreclosure sale necessarily destroyed Wells Fargo's property interest in the Ellis home as a matter of Nevada law.

C. The Statute Is a Taking Because It Fits Within the American Legal Tradition of Delegated Private Takings, Stretching from the Railroads of the Nineteenth Century to the Supreme Court's Decision in *Loretto*.

The fact that Nevada has reposed the power to destroy liens in HOAs in no way makes their destruction any less a taking. American law has a "long and distinguished" tradition of delegated private takings, meaning exercises of the power to condemn or take property by private actors to whom the state has delegated that power for a limited purpose. *See Rancho de Calistoga v. City of*

Calistoga, 800 F.3d 1083, 1092 (9th Cir. 2015) (citing Abraham Bell, *Private Takings*, 76 U. Chi. L. Rev. 517, 545 (2009)). The most well-known example was that of the railroad, to which states often delegated powers of eminent domain in the nineteenth century. *See id.* Yet as Professor Bell points out in his excellent treatment of this point, this doctrine is alive and well, as many American states confer limited powers to take on private actors today. *Id.* To cite examples he provides, Alabama grants electrical cooperatives eminent domain power. Ala. Code § 37-6-3(15). Arkansas grants the power to electric utilities. *Arkansas Power & Light Co. v. Harper*, 460 S.W.2d 75 (Ark. 1970). Illinois grants it to cable television companies as they lay wiring. *Times Mirror Cable Television of Springfield v. First Nat'l Bank*, 582 N.E.2d 216 (Ill. App. 1991). Indiana grants it for the laying of electric transmission lines. *Hagemeier v. Indiana & Michigan Electric Co.*, 457 N.E.2d 590 (Ind. App. 1983). Kansas grants it for fiber optic cables used in telecommunications. *Williams Telecomm. Co. v. Gragg*, 750 P.2d 398 (Kan. 1988). Texas and Oklahoma grant it for laying gas pipelines. *Aquila Southwest Pipeline Corp. v. Gupton*, 886 S.W.2d 497 (Tex. App. 1994); *McInturff v. Oklahoma Natural Gas Transmission Co.*, 475 P.2d 160 (Okla. 1970). Oregon lets logging and mining companies condemn land for roads, chutes, and other passages used in their activities. Or. Rev. Stat. § 772.410 (2007).

Indeed, one of the Supreme Court's most-cited and leading takings cases shows that delegated private takings are alive and well. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 438 (1982) (concluding that installation of cable plates, boxes, and wires, bolts and screws on an apartment building by a cable company pursuant to a statutory authorization constitutes a permanent physical taking). In *Loretto* the taking was the use by a cable company of a statutory permission to place cable facilities on a New York apartment building, whether the owner wanted the facilities there or not. New York State didn't place the cables on Jean Loretto's Upper West Side Manhattan walk-up any more than Nevada officials personally foreclosed the HOA lien. But that doesn't matter. Legislatures delegate to cable companies, railroads, power companies, and gas companies the power to destroy property rights. And when a state empowers private actors to do that, there is a taking that must be compensated.

Finally, it would be no answer for the HOAs or their business partners in the speculator community to retreat to a shell-game form of analysis, questioning what department of Nevada's government is the "state actor." Nevada's determination to extinguish Wells Fargo's property right, whether one locates it in the Statute the Legislature drafted in 1991 or in the court construing it in 2014, is a taking. *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 715 (2010) ("[T]he particular state actor is irrelevant. If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation. A State, by *ipse dixit*, may not transform private property into public property without compensation.") (emphasis added).

D. **The Taking Here Was Without Just Compensation, Because It Is Undisputed that No One Paid Wells Fargo for Loss of the Property Rights the HOA Foreclosure Extinguished.**

It is undisputed that Wells Fargo has not been compensated for the loss of its property interest occasioned by the HOA foreclosure sale. Thus, if this Court finds that there has been a taking of any sort, it must grant summary judgment for Wells Fargo, for takings must be compensated. U.S. Const. amend. V. *See, e.g.*, *Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (citing "a categorical duty to compensate the former owner.") Given that there is an uncompensated taking, there is no need to argue about whether there is a public purpose in the taking, because the presence of a public purpose does not relieve Nevada of its responsibility – unfulfilled here and under the Statute in general – to justly compensate takings.

E. **The Taking Here Even More Clearly Violates the Nevada Constitution, Which Provides Even Stronger Protections of the Property Rights of Nevadans.**

As this Court has held, the Nevada Constitution' Takings Clause is even more protective of property rights than is the Takings Clause found in the United States Constitution. *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 670, 137

P.3d 1110, 1127 (2006). The spirit of the Nevada's Takings Clause "contemplates expansive property rights and provides the foundation of Nevada's "rich history of protecting private property owners against government takings…." *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 646, 173 P.3d 734, 739 (2007). That "provision broadly applies to all types of privately owned 'property' and includes no language to justify excluding personal [or intangible] property from its scope." *Id.* As the Court explained in *McCarran*, "a per se regulatory taking occurs when a public agency seeking to acquire property for a public use enumerated in NRS 37.010 fails to follow the procedures set forth in NRS Chapter 37, Nevada's statutory provision on eminent domain, and appropriates or permanently invades private property for public use without first paying just compensation." 137 P.3d at 1127. And that is precisely what the Statute, as it is presently construed, has done here to Wells Fargo.

To permit this taking would stand against Nevada's strong, populist desire to keep government from supporting takings that aid one private party, here, the HOA and its speculator friends, over another, here Wells Fargo. Nevada is one of several states that responded to the United States Supreme Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005) by enacting legislation to place further restrictions on Nevada's exercise of the takings power. On November 25, 2008, a voter-approved amendment to the Nevada Constitution – colloquially titled the

PISTOL, or the People's Initiative to Stop the Taking of Our Land – went into effect. PISTOL *expressly excluded from public use* "the direct or indirect transfer of any interest in property taken in an eminent domain proceeding from one private party to another private party." So there is no legitimate public use here under the Nevada Constitution, as clarified by the voters and Legislature.

In light of the PISTOL and Nevada's "rich history of protecting private property owners against government takings" that is even more protective than rights afforded by the federal Constitution in this area, the taking effected by the Statute violates the Nevada Constitution even more clearly than it violates the federal Constitution. This Court should affirm.

III. The Statute Disregards Nevada's Stated Public Policy of Providing Homeowners with Possible Foreclosure Alternatives.

Due to the failure of other parties to bring this issue to the Court's attention previously, the *SFR v. U.S. Bank* decision did not address another important consideration – that the Statute as interpreted violates Nevada public policy as reflected in the Nevada Foreclosure Mediation Program and the Homeowners' Bill of Rights statutes. (NRS 107.086, NRS 107.040 *et seq.*, and 107.050 *et seq.*, respectively). These laws were enacted to address the foreclosure crisis and to provide opportunities for homeowners and lenders to discuss modification and avoid foreclosure where possible.

While the recent session of the Nevada Legislature saw the passage of laws that will sunset the Foreclosure Mediation Program at the end of 2016, federal programs, such as Making Home Affordable ("MHA"), Troubled Asset Relief Program ("TARP"), Home Affordable Modification Program, the Home Affordable Foreclosure Alternative program, Home Price Decline Protection, the Principal Reduction Alternative, and the Home Affordable Unemployment Program were all enacted to further the same goal of avoiding residential foreclosures where possible. (Office of the Special Inspector General For the Troubled Asset Relief Program, Quarterly Report to Congress, http://www.sigtarp.gov/Quarterly%20Reports/July_24_2013_Report_to_Congress.pdf, July 24, 2013 at 47).

While both Nevada's public policy and federal public policy favor exploring options to avoid foreclosure and assisting homeowners who face economic hardship, the Statute as construed in *SFR v. U.S. Bank* creates a regime in conflict with those long-standing policies and protections. Instead, the Statute permanently and precipitously deprives the homeowner of his or her entire interest in the property – all to satisfy a *de minimis* HOA lien – and without providing the borrower with any means of satisfying a still outstanding debt to the lender.

"It is a well established axiom of statutory construction that, whenever possible, a court should interpret two seemingly inconsistent statutes to avoid a potential conflict." *Tekle v. United States*, 511 F.3d 839, 857-58 (9th Cir. 2007) (citing *California ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States*, 215 F.3d 1005, 1012 (9th Cir. 2000)). Indeed, "[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *California ex rel. Sacramento*, 215 F.3d at 1012-13 (citing *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

Accordingly, in construing the Statute to authorize HOAs to seize borrowers' homes and sell them for a few thousand dollars, the *SFR v. U.S. Bank* decision erodes Nevada law requiring that residential foreclosures by lenders in payment of home mortgage (often worth hundreds of thousands of dollars) be pursuant to a particular and often lengthy process, which gives homeowners the right to attend mediations with their lender's representative, seek modification, or otherwise attempt to negotiate the terms of the note or foreclosure process.

As a result, this Court's interpretation of the Statute prevents lenders from considering foreclosure alternatives and result in more rapid foreclosures. Under *SFR v. U.S. Bank*, to the extent lenders do not simply purchase the properties themselves from the HOA,[2] lenders may rush to foreclose in order to protect their secured interest from extinguishment by an HOA foreclosure. Such conduct contravenes the Nevada Legislature's policy requiring or encouraging mediation, modification, and other foreclosure alternatives. "[C]ourts should not incentivize banks to foreclose on property at the first sign of distress. Banks should be encouraged to work with homeowners so that the bank may recoup as much of its loan as possible and the homeowner can remain in the home." *Premier One Holdings, Inc. v. BAC Home Loans Servicing LP*, 2013 WL 4048573, at *5 (D. Nev. Aug. 9, 2013).[3]

The *SFR v. U.S. Bank* opinion can be read to suggest that lenders delay foreclosure intentionally, thus concluding that loss of the first position deed of trust is somehow justified. *SFR*, 334 P.3d at 411. But such a reading ignores the many obligations placed on lenders under the Nevada Foreclosure Mediation Program

[2] While the Court has suggested that lenders should protect their rights by paying off the HOA liens, the Statute instead incentivizes lenders to buy the property at the HOA foreclosure sale themselves, thereby avoiding the time, expense, and delay of nonjudicial foreclosure and the requirement of participating in the Foreclosure Mediation Program and subsequent resulting challenges.

[3] In *Premier One*, the federal district court further noted that: "Banks have considerations that an HOA does not have when considering foreclosure, such as: if the property value on the market is fluctuating; the homeowner's long term ability to pay back the loan; and, whether the bank should allocate resources first to foreclosing on property owners with no chance at paying back their mortgage versus working with home owners that may merely be struggling to pay back their mortgages. An HOA has none of these considerations and merely wants to collect its statutorily entitled fees in the easiest manner possible." *Premier One Holdings, Inc.*, 2013 WL 4048573, at *5.

and the Homeowners' Bill of Rights, which significantly lengthen the foreclosure process, and as to which compliance is outside of the lenders' control, but nevertheless required by state law.

In addition, the HOA foreclosure sales expose homeowners to substantial financial loss and risk. The HOA sale in this case – for a price of $6,900.00 on a property worth over $100,000.00 – prevents the homeowner from recouping any equity. As a result, by selling the property for pennies on the dollar, the homeowner is exposed to a substantially greater difference between the sales price and the amount owed to the lender. When lenders then seek the deficiency from the homeowner, the amount sought from the homeowner individually (as opposed to from the asset) will be much greater where the HOA foreclosure price was just a few thousand dollars instead of a fair market value or commercially reasonable amount. The effect on borrowers' finances will be catastrophic – and all to ensure that an HOA's neighborhood dues are paid. As a result, "the owner will be left with no mechanism by which to obtain the property's value as an offset against the amount still owed . . . [and] the owner would not have an unjust enrichment action against that purchaser."[4] 334 P.3d at 421 (Gibbons, C.J., dissenting).

[4] Additionally, the dissent noted that a period of redemption would offer additional protections for the homeowner. *SFR v. U.S. Bank*, 334 P.3d 408, 423 (Nev. 2014) (Gibbons, C.J., dissenting).

And all of the foregoing is true despite the fact that HOAs take the least risk among creditors, while providing minimal value to the borrower/homeowner:

> The services provided by an HOA are luxuries, not necessities. And, in any event, many neighborhoods function fine without the services of an HOA. The HOA, in exchange for a small amount of services, levies a surcharge on the homeowner based on little more than the street on which the homeowner lives. It would be absurd to elevate the entire HOA lien over a bank considering the comparatively small amount of risk taken by the HOA to finance the purchase of the property, the small amount of services provided by an HOA compared to the other entities seeking to collect from a homeowner, and the small amount (if any) capital advanced by the HOA to the homeowner.

Premier One Holdings, Inc., 2013 WL 4048573, at *5.

Against this legislative and policy backdrop, permitting this HOA sale to stand conflicts with state and federal programs designed to help economically distressed homeowners and may be devastating to Nevada's citizens and the real estate market alike. As this Court has made clear, "a statute should not be read to produce absurd or unreasonable results." *D.R. Horton, Inc. v. Eighth Judicial District Ct.*, 123 Nev. 468, 475, 168 P.3d 731, 737 (2007). Likewise, when separate statutory schemes are conflicting, this Court "attempt[s] to construe both statutes in a manner to avoid conflict and promote harmony." *Beazer Homes Nevada, Inc. v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, 120 Nev. 575, 587, 97 P.3d 1132, 1140 (2004). Yet, the Statute as construed in *SFR v. U.S. Bank* contradicts and violates these well-established homeowner protections and creates an absurd result – the elevation of neighborhood dues over a borrower's ability to finance and repay what is often the largest debt and most significant asset financed in an ordinary person's lifetime. These statutes should not be ignored at the expense of the Nevada citizen and for the benefit of satisfying a *de minimis* HOA lien.

IV. The HOA Foreclosure Sale Was Not Commercially Reasonable, Providing This Court an Additional Reason to Affirm the District Court's Dismissal of Appellant's Complaint.

The failure to sell the Property in a commercially reasonable manner voids the sale and constitutes an independent basis for dismissal of Appellant's quiet title action as a matter of law. Appellant paid the *de minimis* price of $6,900.00 at the HOA foreclosure sale. The commercial unreasonableness of the sale means that it must be set aside.

This Court has held 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 commercially unreasonable sale. *Golden v. Tomiyasu*, 79 Nev. 503, 504, 387 P.2d 989 (1963). This Court has also has identified fraud or oppression as a basis to set aside a commercially unreasonable sale, finding that "[t]o say that a mortgagee with power to sell, who has an encumbrance on the estate of less than one-third of its value—an encumbrance which five or six months' rent will discharge—has the right to sell the estate absolutely to the first man he meets who will pay the amount of encumbrance, without any attempt to get a larger price for it, would in our opinion be equivalent to saying fraud and oppression shall be protected and encouraged." *Runkle v. Gaylord*, 1 Nev. 123, 129 (1865) (quoted by *Golden*, 79 Nev. at 513 (emphasis added)).

Shortly after *Golden*, this Court again addressed the issue, and held that "[a]lthough the price obtained at the sale is not the sole determinative factor, nevertheless, it is one of the relevant factors in determining whether the sale was commercially reasonable." *Levers v. Rio King Land & Inv. Co.*, 93 Nev. 95, 98-99, 560 P.2d 917, 920 (1977) (internal citations omitted). The Court held that, "[a] wide discrepancy between the sale price and the value of the collateral compels close scrutiny into the commercial reasonableness of the sale. This is especially true where, as here, the secured party purchases the collateral and subsequently resells it for a vastly greater amount than was credited to the debtor."[5] *Levers* acknowledges that purchase price is a relevant factor to determine commercial reasonableness, and holds that where there is a wide discrepancy between the sales price and the value, as here, more scrutiny should be given. *Id.* This principle necessarily means that every *de minimis* HOA foreclosure sale must be examined for commercial reasonableness in light of fair market value before it can be upheld.

[5] While this particular opinion addresses a secured party's obligations under NRS 104, the principles and rationale for a commercially reasonable sale price apply equally here.

This is so because Nevada's superpriority sales are the definition of what this Court has identified as fraudulent and oppressive conduct in the sales context. The HOAs "sell" homes at foreclosure well below fair market value (substantially less than the one-third of the value which this Court identified as fraudulent in *Runkle*), and to the first speculator that will pay the lien amount, without making any effort to obtain a fair market price. *See Runkle*, 1 Nev. at 129 (quoted by *Golden*, 79 Nev. at 513). Moreover, at the time that the sales took place – and certainly when this sale was conducted – the *SFR v. U.S. Bank* decision had not been rendered, and the overwhelming majority of the courts that did review HOA foreclosure "sales" under the Statute found them to be void, resulting in the dismissal with prejudice of hundreds of investor quiet title lawsuits as a matter of law. If the courts did not find those sales sufficient to quiet title, the market had no reason to either, and so sales prices were necessarily oppressive and subject to set aside as commercially unreasonable.

Courts from other jurisdictions have reached a similar conclusion, and in this context. The Vermont Supreme Court recently addressed this issue in the context of its own HOA super-priority statute (based on the Uniform Act). In its ruling, the Vermont court voided an HOA super-priority foreclosure sale holding that sale of the property for a price of $3,510.10 was not commercially reasonable when the property had a fair market value of $70,000. *See Will v. Mill Condominium*

Owners' Ass'n, 848 A.2d 336 (Vt. 2004). Specifically, the Vermont Supreme Court held that "the enforcement mechanisms provided for in [the Uniform Act] must be conducted in good faith as defined in § 1–113, that is, *in a commercially reasonable manner*." *Id.*

To the extent Appellant's position is that price is an insufficient basis to establish commercial unreasonableness, it cannot explain how the sale of the property for less than 10% of its fair market value is commercially reasonable, except to argue that even a shockingly low purchase price cannot invalidate a sale. Indeed, in *Chase Plaza Condominium Ass'n v. JPMorgan Chase Bank, N.A.*, 2014 WL 4250949, n.8 (D.C. App. 2014), the only other known appellate decision holding that an association may nonjudicially foreclose on the superpriority piece of its lien, that court expressly remanded the case to address JPMorgan's "claim that the foreclosure sale should be invalidated because the purchase price was unreasonably low."

This reasoning is consistent with the Restatement (Third) of Property (Mortgages), which this Court relied upon in *SFR* and other cases.[6] Section 8.3 provides:

> (a) A foreclosure sale obtained pursuant to a foreclosure proceeding that is otherwise regularly conducted in compliance with

[6] *See, e.g., American Sterling Bank v. Johnny Management LV, Inc.*, 435 P.3d 535, 537 (Nev. 2010); *Huston v. Bank of America Federal Sav. Bank*, 119 Nev. 485, 490, 491, 78 P.3d 71, 74 (2003).

> applicable law does not render the foreclosure sale *defective unless the price is grossly inadequate.*
>
> (b) Subsection (a) applies to both power of sale and judicial foreclosure proceedings.

(emphasis added). Shortly after *Golden*, this Court again addressed this issue, and held that:

> [a]lthough the price obtained at the sale is not the sole determinative factor, nevertheless, it is one of the relevant factors in determining whether the sale was commercially reasonable. A wide discrepancy between the sale price and the value of the collateral compels close scrutiny into the commercial reasonableness of the sale. This is especially true where, as here, the secured party purchases the collateral and subsequently resells it for a vastly greater amount than was credited to the debtor.

Levers v. Rio King Land & Inv. Co., 93 Nev. 95, 98-99, 560 P.2d 917, 920 (1977) (internal citations omitted). While this particular opinion addresses a secured party's obligations under NRS 104, the principles and rationale for a commercially reasonable sale can be analogized to these instant facts.[7] *Levers* makes clear this Court's view on the commercial reasonableness requirement generally. *Id.* *Levers* acknowledges that purchase price is a relevant factor to determine commercial reasonableness. *Id.*

Moreover, numerous courts have held that purchase prices for less than 20% of the value of the property are for inadequate consideration as a matter of law.

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[7] Notably, the United States District Court for the District of Nevada relied upon *Levers* in finding that the HOA sale conducted pursuant to NRS 116.3116 *et seq*. is potentially commercially unreasonable. *Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC*, 2013 WL 2460452 (D. Nev. June 6, 2013).

See Allied Steel Corp v. Cooper, 607 So.2d 113, 120 (Miss. 2006) (a sale for less than 40% of fair market value "shocks the conscience"); *Armstrong v. Csurilla*, 817 P.2d 1221, 1234 (N.M. 1991) (foreclosure sales that fall into the 10-40% percent range should not be confirmed absent good reasons to do so); *United Oklahoma Bank v. Moss*, 793 P.2d 1359 (Okla. 1990) (approximately 20% of fair market value); *Crown Life Ins. Co. v. Candlewood, Ltd.*, 818 P.2d 411 (N.M. 1991) (15% of fair market value); *Rife v. Woolfolk*, 289 S.E.2d 220 (W. Va. 1982) (14% of fair market value); *Ballentyne v. Smith*, 205 U.S. 285 (1907) (14% of fair market value); *First National Bank of York v. Critel*, 555 N.W.2d 773 (Neb. 1996) (reversing trial court's confirmation of a foreclosure sale that yielded 14% of the appraised value); *Polish Nat. Alliance v. White Eagle Hall Co., Inc.*, 470 N.Y.S.2d 642 (N.Y. App. Div. 1983) ("foreclosure sales at prices below 10% of value have been consistently held unconscionably low").

Here, there is a gross disproportion between the purchase price of $6,900.00 and the estimated value of the property of $105,013.00 – over *fifteen times* the purchase price.[8] A sale is not commercially reasonable where the result is so flagrantly detrimental to Nevada's homeowners and to the local real estate market.

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[8] Wells Fargo offers the generally accepted zillow.com estimate as an approximation of fair market value. http://www.zillow.com/homes/1_ah/350-S.-Durango-Dr.-.num.104,-Las-Vegas,-NV-89128_rb/?fromHomePage=true&shouldFireSellPageImplicitClaimGA=false&fromHomePageTab=zestimate (last visited January 12, 2016).

See, e.g., *Golden*, 79 Nev. at 513; *Runkle*, 1 Nev. at 129. Moreover, as stated in *Levers*, if the Property were sold today, Appellant cannot dispute that it would obtain a "vastly greater amount" than $6,900.00. Unquestionably, that is the very point of these investors' purchases. As established by the first Nevada courts with the opportunity to apply the "commercially reasonable" requirement of the Uniform Act, the sale here was not commercially reasonable and is void as a matter of law.

Additionally, the Eighth Judicial District Court and the District of Nevada have recently addressed commercial reasonableness in the context of HOA foreclosure sales, and also suggested that these sales may be void. In *SFR Investments Pool 1, LLC v. Nationstar Mortgage, LLC*, the district court found that a $7,000 purchase price was one factor the court considered in determining that the plaintiff buyer was not a bona fide purchaser, because the plaintiff did not provide valuable consideration for the property. *SFR Investments Pool 1, LLC v. Nationstar Mortgage, LLC*, Order Denying Application for Temporary Restraining Order n.9, Case No. A-13-684596-C, Dept. XXXI, entered on August 5, 2013; *see also Design 3.2 LLC v. Bank of New York Mellon*, Case No. A-10-621628, Dept. XV, "*Design 3.2* Order", entered on June 15, 2011) (finding that the purchaser at the HOA foreclosure sale was not a bona fide purchaser, in part because plaintiff purchased the property for only $3,743.84 and the amount due under the deed of trust was $576,000).

The *Bayview* court acknowledged that even if the foreclosure sale had extinguished the lender's deed of trust, the lender still would have standing to challenge the foreclosure sale as commercially unreasonable. *Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC,* 2013 WL 2460452, at *7 (D. Nev. June 6, 2013). In so doing, the court observed that the sale of a property for $10,000 "raises serious doubts as to commercial reasonableness." *Id.* These opinions are directly on point, and find or suggest that identical HOA foreclosure sales, for pennies on the dollar, are not commercially reasonable.

These same "serious doubts" identified in *Bayview* are triggered in the pending action. First, there is a gross disproportion between Appellant's purchase price of $6,900.00 and the assessed value of the property. Appellant and the HOA knew that the unreasonable sales price would not allow for any substantial payment to the lender. Finally, a sale is not commercially reasonable where the result is so flagrantly detrimental to Nevada's citizens and local real estate market. *See e.g. Golden*, 79 Nev. at 513; *Runkle*, 1 Nev. at 129.

Indeed, in *Golden v. Tomiyasu,* 79 Nev. 503, 387 P.2d 989 (1963), this Court held that only "proof of some element of fraud, unfairness *or* oppression as accounts for and brings about the inadequacy of price" will support setting aside a commercially unreasonable sale. 79 Nev. at 514, 387 P.2d at 995 (emphasis added). The Court did not mandate that proof of fraud alone was required, but held that some element of fraud, or unfairness, or oppression would support setting aside a sale. The requirement to present "some element of fraud, unfairness or oppression" suggests a sliding scale for a court to weigh and balance on a continuum, considering all of the surrounding facts and circumstances.

It is inherently unfair and oppressive that millions of dollars of secured interests can be wiped out to satisfy *de minimis* HOA liens, which results in Nevada citizens being unable to buy, sell, or refinance properties, and causes substantial increases in the costs of obtaining a home loan, among other dangerous effects. These consequences are unfair and oppressive to Nevada's citizens, its real estate market, and the industries which rely upon and service the real estate market.

Finally, requiring a commercially reasonable sale at fair market value is sound public policy and addresses many of the concerns of all parties involved (except those seeking a windfall of a home purchased for only a few thousand dollars). If each property was sold at fair market value, the HOA still would receive its super-priority lien amount (often less than $1,000), and the remaining proceeds would be apportioned first to the lender pursuant to its first-in-time deed of trust and then to any subsequent lien holders. Such a requirement would *guarantee* that the HOA receives its assessments, which fulfills the sole intent and purpose of the super-priority lien statute. Further, it would ensure that millions, if not billions, of dollars of properly perfected first-in-time deeds of trust are not capriciously extinguished throughout Nevada, with dire consequences for property values and individual's net worth. In such circumstances, the amount received by the lender would be comparable to what it would have received if it had foreclosed on the property prior to the HOA (less only the very limited super-priority lien amount).

Appellant's purchase of the property at the HOA foreclosure sale in this case was not commercially reasonable and is therefore invalid, as a matter of longstanding Nevada law and policy.

Conclusion

For the foregoing reasons, this Court should affirm.

DATED : January 19, 2016

SNELL & WILMER L.L.P.

/s/ Kelly H. Dove

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CERTIFICATE OF COMPLIANCE

I hereby certify that the **RESPONDENT'S ANSWERING BRIEF** complies with the typeface and type style requirements of NRAP 32(a)(4)-(6), because this brief has been prepared in a proportionally spaced typeface using a Microsoft Word 2010 processing program in 14-point Times New Roman type style.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because it contains approximately 9,952 words.

Finally, I hereby certify that I have read the **RESPONDENT'S ANSWERING 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 and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this Janaury 19, 2016

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On January 19, 2016, I caused to be served a true and correct copy of the foregoing **RESPONDENT'S ANSWERING BRIEF** by the method indicated:

☐ **BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document(s).

☐ **BY EMAIL:** by emailing a PDF of the document(s) listed above to the email addresses of the individual(s) listed below:

☐ **BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.

☐ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below:

☒ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

/s/ Ruby Lengsavath
An Employee of Snell & Wilmer L.L.P.

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