In the Supreme Court of the State of Nevada

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

AMICUS CURIAE BRIEF OF ZAISAN ENTERPRISES LLC

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ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in determining that the procedure for the foreclosure of HOA liens set forth in NRS 116.3116, et seq. to be facially unconstitutional in this case when the Respondent actually received notice?
2. Was Appellant a bona fide purchaser for value at the HOA's foreclosure sale of the subject property?

SUMMARY OF ARGUMENT

It's easy to lose sight of the big picture. However, in *Freedom Mortgage Corp. v. Las Vegas Development Group, LLC*, U.S. District Court for Nevada, Case 2:14-cv-01928-JAD-NJK (2015) Judge Dorsey focused exactly on that:

> In the years following Las Vegas's real estate crash, lenders and investors were at loggerheads over the legal effect of a homeowner's association's (HOA's) nonjudicial foreclosure of a superpriority lien on a lender's first trust deed. The Nevada Supreme Court settled the debate last September in *SFR Investments Pool I, LLC v. U.S. Bank*, holding that "NRS 116.3116(2) gives an HOA a true superpriority lien, proper foreclosure of which will extinguish a first deed of trust." The *SFR* decision made winners out of the investors who purchased foreclosure properties in HOA sales and losers of the lenders who gambled on the opposite result, elected not to satisfy the HOA liens to prevent foreclosure, and thus saw their interests wiped out by sales that often yielded a small fraction of the loan balance.

Respondent was one of those lenders and its interest in the property was wiped out by the HOA foreclosure sale. As a consequence, it no longer has any legally cognizable interest in the property.

ARGUMENT

I. THE STATUTE IS FACIALLY CONSTITUTIONAL AND ALSO CONSTITUTIONAL AS APPLIED IN THIS CASE.

Respondent argued that the NRS Chapter 116 non-judicial statutory scheme for HOA assessment lien foreclosures is facially unconstitutional and therefore every non-judicial foreclosure of an HOA assessment lien is void. Respondent further contended that the Nevada Supreme Court in *SFR Investments Pool 1, LLC*

v. U.S. Bank, N.A., 130 Nev. Adv. Op. 75; 334 P.3d 408 (Nev. 2014) (hereafter "*SFR*") has "not yet addressed" the NRS Chapter 116 statutory scheme. Respondent's argument is legally unfounded wishful thinking apparently advanced to cover for Respondent's negligence in failing to protect its secured interest.

The standard for challenging a statute as facially unconstitutional is very high. Specifically, "[w]hen making a facial challenge to a statute, the challenger generally bears the burden of demonstrating that there is no set of circumstances under which the statute would be valid." *Deja Vu Showgirls v. State, Dept. of Tax*, 130 Nev. Adv. Op. 73 at p. 9; 334 P2d 392, 398 (2014).

Facial challenges have long been disfavored because they invalidate a statute in its entirety. *Washington State Grange v. Washington State Republican Party*, 552 US 442, 449-50 (2008). Drawing from long-established U.S. Supreme Court precedent, *Washington State Grange*, *Id* at 450-51, identified several of the reasons why courts should be reluctant to grant facial challenges. These reasons include the following: Claims of facial invalidity often rest on speculation. As a consequence, the claims raise the risk of "premature interpretation of statutes on the basis of factually barebones records." *Sabri v. United States*, 541 U.S. 600, 609 (2004) (internal quotation marks and brackets omitted); Facial challenges to statutes run contrary to the fundamental principle of judicial restraint that courts should neither "'anticipate a question of constitutional law in advance of the

necessity of deciding it' "nor" 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); and, Facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. "[W]e try not to nullify more of a legislature's work than is necessary, for we know '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'" *Ayotte v. Planned Parenthood of Northern New Eng*., 546 U.S. 320, 329 (2006) (Quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984). The afore-described speculative, possibly premature, and anti-democratic nature of a facial challenge caused the U.S. Supreme Court to restate the standard for prevailing on such a claim in sweeping terms:

> To succeed in a typical facial attack, [Respondent] would have to establish "that no set of circumstances exists under which [the statute] would be valid", *United States v. Salerno*, 481 U.S. 739, 745 (1987), or that the statute lacks any "plainly legitimate sweep", *Washington v. Glucksberg*, 521 U.S. 702, 740, n. 7 (1997) (Stevens, J., concurring in judgments) (internal quotation marks omitted). *U.S. v. Stevens*, 130 S. Ct. 1577 (2010)

Respondent cannot meet this standard. For reasons discussed below, *see* subsection I b infra, the fact that the Statute might operate unconstitutionally under

some set of circumstances is insufficient to render it wholly invalid. Specifically, the possibility that the failure to serve an interested party with constitutionally required notice would cause the Statute to operate unconstitutionally cannot render the Statute facially invalid for not expressly mandating such notice in circumstances where, as here, constitutionally sufficient notice was actually and timely served.

A. This Court upheld the Statute's facial constitutionality in *SFR*.

In *SFR*, the unanimous Court[1] rejected out of hand the same contention Respondent raises here - that the Statute is facially unconstitutional because it lacked a requirement for providing adequate notice to a lien holder and thus violates due process:

> The contours of U.S. Bank's due process argument are protean. To the extent U.S. Bank argues that a statutory scheme that gives an HOA a superpriority lien that can be foreclosed nonjudicially, thereby extinguishing an earlier filed deed of trust, offends due process, the argument is a nonstarter.[2]

[1] The concurring and dissenting opinion in *SFR* disagrees with the majority only on the issue of whether NRS 116 requires a judicial foreclosure to eliminate a first deed of trust.

[2] *SFR*, 130 Nev. Adv. Op. at 22.

The Court based its conclusion that the defendant's argument didn't hold up to analysis on its finding that the Statute's mandatory notice requirements were sufficient and thus the Statute's due process provisions were facially constitutional:

> 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….[3]

Indeed, *SFR* went further by pointing out that a lender that knew when it accepted a deed of trust that its secured interest could be foreclosed if the HOA's assessment liens were not paid – as Respondent did here - is ill-positioned even to complain about the facial constitutionality of the Statute:

> Chapter 116 was enacted in 1991, and thus [the lender] was on 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] first deed of trust. . . Consequently, the conclusion that foreclosure on an HOA super priority lien extinguishes all junior liens, including a first deed of trust recorded prior to a notice of delinquent assessments, does not violate [the lender's] due process rights. [Quoting, *7912 Limbwood Court Trust*, 979 F. Supp. 2d at 1152]

Respondent seems to have an aversion to quoting *SFR*. The reason is apparent. There is no reasonable way to construe *SFR's* language except to conclude that it first conducted a "facial" and then an "as applied" constitutional

[3] *SFR*, 130 Nev. Adv. Op. at 22.

analysis of NRS 116. In each instance the Court found the statute to pass constitutional muster. As in this case, the *SFR* lender actually received the aforementioned notices and did nothing to protect itself. The unanimous court spoke to the same issue that Respondent complains of here – the effect of actual notice on a lack-of-notice based due process claim:

> [N]othing appears to have stopped U.S. Bank from determining the precise superpriority amount in advance of the sale or paying the entire amount and requesting a refund of the balance. Cf. *In re Medaglia*, 52 F.3d 451, 455 (2d Cir. 1995) ("*[I]t is well established that due process is not offended by requiring a person with actual, timely knowledge of an event that may affect a right to exercise due diligence and take necessary steps to preserve that right.*")[4] (Emphasis added)

On the other hand, Respondent is correct about one thing: *SFR* in fact also considered an 'as applied' due process challenge to the Statute based on the content of the statutory notices it received. *SFR* separately rejected that challenge based on the notices that were actually served on the *SFR* lender.[5]

Respondent's facial challenge impliedly concedes it can prevail only by persuading that the Statute's alleged failure to mandate notice of the foreclosure be served on all interest holders of record renders it void in all possible applications.

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[4] *SFR*, 130 Nev. Adv. Op. at 23. The Court's internal quotation comes from *In re Medaglia*, 52 F.3d 451, 455 (2nd Cir, 1995).

[5] *SFR*,130 Nev. Adv. Op. at 23.

For Respondent's argument to succeed, the Court would have to overrule *SFR* and declare the Statute facially invalid. Such a holding would have the profound effect of striking down NRS Chapter 116 in its entirety, among the drastic consequences of which would be that all past HOA foreclosure sales would be void. No good cause exists for this Court to do so.

B. The HOA's actual pre-sale service on Respondent of constitutionally sufficient notice of the foreclosure satisfied due process.

Respondent was mailed both the Notice of Default and Election to Sell, and the Notice of Sale. This inconvenient fact undercuts Respondent's constitutional argument, which is premised on the Fourteenth Amendment's requirement that at least equivalent notice be served on affected property interest holders. As a consequence, Respondent is compelled to couch its due process complaint as a 'facial' constitutional challenge that, if successful, would render the Statute void for all purposes.

The problem with Respondent's approach is that the U.S. Supreme Court due process cases on which Respondent must rely[6] make clear that Respondent's contentions in this case amount to an "as applied" constitutional challenge rather

[6] *Tulsa Professional Collection Services, Inc., v. Pope,* 485 U.S. 478, 108 S.Ct. 1340 99 L.Ed.2d 565 (1988); *Mennonite Board. of Missions v. Adams,* 465 U.S. 791 (1983); and *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950).

than a "facial" challenge. Specifically, the holdings in the cases cited by Respondent demonstrate that where a property-interest holder is constitutionally entitled to notice of a statutory proceeding that threatens his property interest, actual service of that notice is sufficient to render the statute constitutional "as applied" even where such service is not expressly mandated by the statute.[7]

The US Supreme Court cases cited by Respondent[8] never say, hold or imply that statutes similar to NRS Chapter 116 are 'facially' unconstitutional unless they expressly mandate that notice be served on interest holders of record. Instead, their holdings hinge on whether the manner of notice actually provided to the affected property interest holder satisfied the Due Process Clause of the Fourteenth Amendment.[9] The facts and holdings of the progeny of *Mennonite Board* and *Mullane* make clear that the subject statutes are constitutional if reasonable notice was in fact given to the ascertainable property interest holders of record.

For example, *Tulsa Professional Collection Services, Inc., v. Pope*, 485 U.S. 478, 108 S.Ct. 1340 99 L.Ed.2d 565 (1988) involved a probate statute that required

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[7] As shown in subsection I c *infra*, the Statute does specifically require that prior notice be given to a party whose property rights might be impaired by an HOA foreclosure.

[8] *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) and *Mennonite Board. of Missions v. Adams*, 465 U.S. 791 (1983)

[9] *See*, for example, *Mennonite Board* at 800.

any claims against the estate to be brought within two months of the personal representatives' publication of notice. According to the statute, only heirs had to be actually served. The probate statute also provided that claims not brought within two months were extinguished. The *Tulsa* claimant, who was the assignee of a hospital lien for the decedent's final illness, was never served with notice and didn't learn about the estate until it was too late to file a claim.

On this record, the US Supreme Court declined to hold the probate statute facially unconstitutional. Instead, the Court applied the core holding of *Mennonite Board* and *Mullane* ruling that whether the claimant's interest survived despite the statute's failure to expressly require service on him depended on whether the claimant's identity had been "reasonably ascertainable" by the personal representative. If so, then Fourteenth Amendment Due Process Clause required actual notice be given to him. If not, publication was sufficient and the probate statute barred the claim.

The aspect of the *Tulsa* holding that is crucial to this case is that the probate statute's failure to mandate service on interest-holders who were entitled to notice under the Fourteenth Amendment did not render the statute facially unconstitutional. Instead, the Court remanded the matter to the trial court to obtain a factual determination of whether the *Tulsa* claimant's contact information was reasonably ascertainable. If not, the statute was constitutional as applied. If it was,

then the trustee's failure to give notice was fatal to his defense and the claimant was entitled to a reversal. By remanding for a factual determination, the Supreme Court made clear that despite its failure to expressly mandate service on a known class of claimants who were constitutionally entitled to notice, the probate statute was not facially unconstitutional.

In *Tracy v. County of Chester Tax Claim Bureau*, 507 Pa. 288, 489 A.2d 1334 (1985) the Pennsylvania Supreme Court similarly applied *Mennonite Board* and *Mullane* in a tax foreclosure case where a corporate property owner didn't receive timely notice of the foreclosure sale and as a consequence lost his interest. The tax authority failed to serve the owner at its current address because the owner had neglected to update its corporate filings with its new address.

As in *Tulsa*, the Pennsylvania Court applied the core holding of *Mennonite Board* and *Mullane* that Fourteenth Amendment Due Process Clause required the taxing authority to "make a reasonable effort to ascertain the identity and whereabouts of the owner(s))." In applying that holding, the Court declined to find the tax foreclosure statute facially unconstitutional for failing to expressly mandate service on the property owner. Instead the Court examined the record and made a factual determination that in that particular instance the taxing authority had failed to make a sufficient effort to locate and then serve the owner.

The *Tracy* opinion makes clear that the tax foreclosure statute's failure to expressly mandate notice to reasonably ascertainable owners does not render it facially unconstitutional. More significant to this case, the opinion indicates that had the taxing authority made sufficient but ultimately unsuccessful efforts to locate the owner, his interest would have been wiped out whether or not he received actual notice. The importance of this holding was not lost on the commentators. For example:

> The court did not hold the notice provisions of the Pennsylvania Real Estate Tax Sale Law to be unconstitutional but held that where a taxing authority plans to subject property to a tax sale "it must notify the record owner of property by personal service or certified mail, and where the mailed notice has not been delivered because of an inaccurate address, the authority must make a reasonable effort to ascertain the identity and whereabouts of the owner(s)."[10]

Here, Respondent erroneously contends that the Statute is automatically unconstitutional because it purportedly fails to expressly mandate prior notice of a foreclosure be served on a party whose property rights may become impaired. Respondent has supplied no authority to support such a contention, and none

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[10] Michael L. Pillion, "Constitutional Validity of Pennsylvania Procedure Governing Notice of Judicial Sales of Real Property after *Mennonite Board*, *First Pennsylvania Bank*, and *In Re Upset Sale, Tax Claim Bureau of Berks County*," 30 Vill. L. Rev. 1191 (1985). Available at: http://digitalcommons.law.villanova.edu/vlr/vol30/iss5/8

exists. What is true under the doctrine of *Mullane*, *Mennonite Board*, *Tulsa* and *Tracy* is that a foreclosure sale would be unconstitutional if it proceeded in circumstances where reasonable efforts were not undertaken to serve property interest holders with adequate notice. In this case where Respondent was actually and timely served with adequate notice, the foreclosure caused no constitutional harm and Respondent is entitled to no relief.

II. THE STATUTE REQUIRES SERVICE OF NOTICE OF HOA FORECLOSURES ON ALL PARTIES OF RECORD AND ALSO ON INTERESTED PARTIES WHO REQUEST NOTICE.

A. The Statute's notice provisions that Respondent characterizes as being "opt-in" are in fact "add-ons" to other provisions of the Statute that mandate notice be sent to parties of record.

Notwithstanding Respondent's repeated quoted use of the expression "opt-in" to describe the statutes' notice provisions, neither the Statute nor *SFR* use that expression, and neither contains any language requiring anyone to "opt-in" in order to receive notice of HOA assessment defaults or foreclosures sales. Instead, the Statute mandates service on all parties of record and also affords others who may have springing interests, interests not of record, or any other interested person the opportunity to add their names to the list of parties who will receive mandatory notices of foreclosures. More accurately, the Statute's provisions that allow any interested party to request notice could be described as "add-ons."

Surprisingly, the cases Respondent cites as authority for its "opt-in" characterization of the Statute actually contradict its argument and support Respondent's view. For example, *Small Engine Shop Inc. v. Cascio*, 878 F. 2d 883 (5th Cir. 1989) held that the similar notice provisions that Respondent here describes as "opt-in" in fact were designed only to "supplement" (*i.e.*, an "add on") other mandatory statutory notice provisions to give "property owners, whose identities a reasonably diligent, responsible state actor could not reasonably ascertain, the opportunity to request such notice and thereby become ascertainable." *Id* at 893.

Significantly, prior to the Court's decision, there was reason to anticipate that *Small Engine* might construe the statute differently. Unlike in this case, apart from allowing a property interest holder to request actual notice, the only alternative notice mandated by the Louisiana statute was constructive notice (publication). But, with an eye to avoiding the hazards associated with striking down a statute as void, the Court "prudently" rejected the facial challenge to the statute urged by the *Small Engine* Appellant:

> "Under the district court's approach, La. Rev. Stat. Ann 13:3886 would constitute an unnecessarily sweeping 'unreasonable procedure' inconsistent with constitutional limitations upon legislative action. In contrast, we believe that the statute simply supplements Louisiana's pre-existing constructive notice scheme. … Moreover, because our

> approach avoids finding constitutional defects in the statute, prudence dictates our conclusion."[11] (Omitting citations).

Here, the District Court specifically relied on a misreading of *Small Engine* to find that the so-called "opt-in" nature of the statute was fatal to due process:

> The Fifth Circuit's decisions in *Small Engine Shop, 2 Inc. v. Casico* and *Davis Oil Company v. Mills* are persuasive here. In *Small Engine Shop,* the Fifth Circuit considered a Louisiana foreclosure statute which included notice provisions which placed the burden on the interest holders to notify the foreclosing party of their interest in order to be noticed of the foreclosure sale.
>
> The Fifth Circuit concluded that the Louisiana statute could only be said to supplement the State's constructive notice provisions that such a statute could not satisfy due process where a party was entitled to actual notice as it has impermissibly shifted the burden to the interest holder to seek out notice.
>
> This Court has only been presented with an argument regarding the notice entitled to a lender which has properly recorded its Deed of Trust. Due process is not satisfied by NRS 116's opt-in provisions where, as is the case here, the lender is entitled to actual notice as opposed to just constructive notice. (Decision Transcript p. 36)

The problem with the court's analysis is that *Small Engine* specifically did not find the so-called "opt-in" statute unconstitutional at all. Rather, the court reversed and remanded for the lower court to determine, factually, whether actual notice occurred or was reasonably possible and held that it was not deciding whether the statute was facially unconstitutional:

> Because Small Engine did not request notice under La.Rev.Stat.Ann. 13:3886, *we do not decide whether the provisions of the statute are*

[11] *Small Engine,* 878 F.2d at 890

> *constitutional in their entirety*. See *Davis Oil Co*., 873 F.2d 774, 790 n. 23 (5th Cir., 1989). We merely hold that the statute does not relieve the responsible state actor in a particular case from exercising the "reasonable diligence" appropriate in the circumstances to ascertain, reasonably, the identity of an individual or entity subject to the deprivation of property. (Footnote 9)(Emphasis added.)

In *Small Engine*, as was the case in *Tulsa* and *Tracy* (see discussion supra at pp. 17-20), *Small Engine* remanded the case to the trial court to determine from the record whether the exercise of due diligence would have uncovered Small Engine's identity to make pre-foreclosure service possible. Here it is contradicted that Respondent had actual notice, so there can be no constitutional question.

B. NRS 116.31163 requires an HOA's notice of default and election to sell to be served on all parties of record and also on any interested parties who request notice; similarly, NRS 116.311635 requires the notice of sale be served on the same categories of parties.

NRS 116.31163(1) requires that the HOA mail notice of the default and election to sell to any person who "requests" that they receive notice. NRS 116.31163(2) supplements this provision by mandating that notice of default and election to sell be mailed to "any holder of a recorded security interest encumbering the unit's owner's interest" who has "notified" the HOA of the existence of the interest at least 30 days before the recording of the notice of default. Most generally, HOA's become "notified" of a security interest holder's interest as a consequence of the interest being recorded.

Similarly, NRS 116.311635(1)(b)(1) requires notice of the sale to those who "request" it while NRS 116.311635(1)(b)(2) mandates that notice of the sale be mailed or otherwise served on "The holder of a recorded security interest or the purchaser of the unit" who "notified" the HOA of its interest in the property before mailing of the notice of sale. Again, the recording of a security interest by its holder is the most common way the holder "notifies" the HOA.

Under both NRS 116.31163(2) and NRS 116.311635(1)(b)(2), the HOA is automatically "notified" of a lender's interest as a matter of law by operation of Nevada's recording statutes: NRS 111.315, NRS 111.320, NRS 111.353. *Summa Corp. v. Greenspun*, 98 Nev. 528, 531, 655 P.2d 513, 515 (1982). The recording of even "an improperly acknowledged instrument" can provide constructive notice. *Torrealba v. Kesmetis*, 124 Nev. Adv. Op. No. 10, 178 P.3d 716, 724 (2008). As a practical matter, the constructive notice created by recording foreclosure-related documents acts as the equivalent of actual notice because "the legal system assumes that anyone interested in real property has inspected the public records," 11.2 Nevada Real Estate: Principles and Practices, Eastwick (2008) at p. 154. In an HOA foreclosure, this inspection usually takes the form of a foreclosure guarantee that HOAs routinely purchase from a title insurance company.

To make its contrary argument, Respondent conflates NRS 116.31163(1) and NRS 116.31163(2), and NRS 116.31163(2) and NRS 116.311635(1)(b)(2), as

if they described the same category of persons: those who request notice. They do not. Subsection 1 uses the word "request" because it is an "add-on" that supplements the statute's mandatory provisions by providing a mechanism for persons to receive notice whose claims to the property are not of record. Subsection 2 compels that notice be given to persons about whose interest in the property the HOA has been "notified."

Respondent ignores the different statutory language to advance an interpretation that would render the inclusion of subsections (2) to both NRS 116.31163 and 116.31165 redundant to subsections (1). But, Respondent fails to offer any legislative history or other precedent to support its view and to show that the legislature intended NRS 116.31163(2) and NRS 116.311635(1)(b)(2), to be superfluous. *See, e.g., Haney v. State*, 124 Nev. Adv. Op. No. 40; 185 P.3d 350 (Nev. 2008). Moreover, Respondent's approach violates a basic principle of statutory construction that requires statutes to be construed as a whole and not be read in a way that would render words or phrases superfluous or make a provision nugatory. *In Re: the Estate of Melton*, 128 Nev. Adv. Op. No. 4 at 10 (2012), 272 P. 3d 668 (2012).

Construing NRS 116 as a whole in a way that gives ordinary meaning to all of its "words and phrases" requires no mental gymnastics. The purpose and meaning of the legislature's different word choice in subsections (1) and (2) of

NRS 116.31163 and NRS 116.31165 is apparent - those parties whose interests in the property appear as a matter of record are entitled to notice from the HOA as a matter of right; as a supplement, interested persons can assure they will receive notice by expressly requesting it from the HOA.

C. NRS 116.31168 expressly incorporates NRS 107.090 including its mandate that the notice of default and election to sell and the notice of sale be served on all parties of record.

NRS 116.31168 also requires notice to all parties of record of the Notice of Default and Election to Sell, and the Notice of Sale through its express adoption of the procedures stated in NRS 107.090. That statute sets forth the mandatory notice requirements for Nevada's non-judicial deed of trust foreclosures. Specifically, NRS 116.31168(1) provides: "The provisions of NRS 107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed." For its part, NRS 107.090 expressly mandates service of the notice of default [sub-section (3)] and the notice of sale [subsection (4)] on all parties of record. The Court in *SFR* recognized this mandate in concluding that the combined requirements of NRS 116.31162 through NRS 116.31168, and by incorporation NRS 107.090 required service of notice that is sufficient to survive a due process challenge.[12]

[12] *SFR,*130 Nev. Adv. Op. at 21-22.

Because NRS 116.31168's incorporation of the mandatory service requirements of NRS 107.090 undermines what it sees as "the Statute's primary constitutional defect." The argument that NRS 107.090(3)(b), which mandates service on parties with recorded interests, does not apply to lenders in a HOA lien foreclosure context because such interest is not "subordinate to the deed of trust." Although NRS 107.090(3)(b) provides for mandatory service on persons "whose [property] interest or claimed interest is subordinate to the deed of trust," Respondent's argument disregards the incorporation language of NRS 116.31168. Application of that language reveals the legislation's intent and the statute's meaning.

As previously noted, NRS 116.31168(1) provides:

> The provisions of NRS 107.090 apply to the foreclosure of an association's lien *as if a deed of trust were being foreclosed* ... [emphasis added]

This formulation makes clear the legislature's awareness that NRS 107.090 uses the phrase "subordinate to the deed of trust" to reference the instrument being foreclosed. Here, the legislature also knew that the purpose for incorporating the procedures of NRS 107.090 into the HOA foreclosure procedure was to prescribe the notice method to be used for HOA lien foreclosures. This explains why the

legislature chose to make its meaning and intent clear by saying the NRS 107.090 procedure would be followed "as if" the HOA lien were a deed of trust.

Secondly, Respondent asserts that the caption of the Statute implies that the requirements of NRS 107.090 only apply to those who "request" notice. Such an interpretation would be inconsistent with the language of the statute, and is unsupported by any legislative history. To the contrary, a basic principal of statutory construction is that titles or captions of statutes should be disregarded as an indication of legislative intent.[13] For the foregoing reasons, this Court should reaffirm *SFR*'s ruling that the Statute mandates that a foreclosing homeowner's associate serve the notice of default and the notice of sale on all parties of record on the property to be foreclosed.

III. PURCHASERS AT HOA FORECLOSURE SALES DESERVE BONA FIDE PURCHASER PROTECTION EXCEPT IN RARE CIRCUMSTANCES WHICH DO NOT APPLY HERE.

After the District Court's written decision here, the Court issued a published unanimous opinion in *Shadow Wood, supra*. That case addressed some of the alleged unresolved issues in *SFR* which included whether purchasers of property

[13] See, *Lawson v. FMR LLC*, 572 U.S. ___, 134 S.Ct. 1158, 188 L.Ed.2d 158 (2014); *Trainmen v. Baltimore & Ohio R. Co., 331 U. S. 519* (1947), "the [statutory] text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner." Id., at 528.

via an HOA's foreclosure under NRS Chapter 116 qualified for bona fide purchaser status.[14]

In addressing whether a third party who buys property at an HOA foreclosure sale can be a bona fide purchaser, the Court recited general legal principles governing bona fide purchaser status and emphasized that bona fide purchaser status can be crucial in determining whether to set aside a sale. Thus, factors such as the purchaser's knowledge of the pre-sale dispute between the lender and the HOA and the potential harm to the purchaser must be taken into account when deciding whether to set aside the sale. The Court stated that a low sale price alone is not sufficient to put the purchaser on notice that something is amiss with the sale.

Shadow Wood directly applied Nevada's bona fide purchaser doctrine to purchasers at HOA foreclosure sales. *Shadow Wood*, supra, at pp. 22-24. The Court said:

> A subsequent purchaser is bona fide under common-law principles if it takes the property "for a valuable consideration and without notice of the prior equity, and without notice of facts which upon diligent inquiry would be indicated and from which notice would be imputed

[14] There is not even a hint from this Court that it intends to retreat from *SFR* by suddenly holding that NRS Chapter 116 is facially unconstitutional. To the contrary, in reversing the District Court, *Shadow Wood* goes out of its way to repudiate the notions of inadequate price as a defense and then provides additional bona fide purchaser protections to buyers of HOA foreclosure properties.

> to him, if he failed to make such inquiry." *Bailey v. Butner*, 64 Nev. 1, 19, 176 P.2d 226, 234 (1947) (emphasis omitted); see also *Moore v. De Bernardi*, 47 Nev. 33, 54, 220 P. 544, 547 (1923) ("The decisions are uniform that the bona fide purchaser of a legal title is not affected by any latent equity founded either on a trust, [e]ncumbrance, or otherwise, of which he has no notice, actual or constructive."). Although, as mentioned, NYCB might believe that Gogo Way purchased the property for an amount lower than the property's actual worth, that Gogo Way paid "valuable consideration" cannot be contested. *Fair v. Howard*, 6 Nev. 304, 308 (1871) ("The question is not whether the consideration is adequate, but whether it is valuable.")
>
> *Shadow Wood*, supra, at p. 22

The Court went on to say that an innocent purchaser at an HOA foreclosure sale is, in fact, also a bona fide purchaser:

> When a trustee forecloses on and sells a property pursuant to a power of sale granted in a deed of trust, it terminates the owner's legal interest in the property. *Charmicor, Inc. v. Bradshaw Fin. Co.*, 92 Nev. 310, 313, 550 P.2d 413, 415 (1976). This principle equally applies in the HOA foreclosure context because NRS Chapter 116 grants associations the authority to foreclose on their liens by selling the property and thus divest the owner of title. *See* NRS 116.31162(1) (providing that "the association may foreclose its lien by sale" upon compliance with the statutory notice and timing rules); NRS 116.31164(3)(a) (stating the association's foreclosure sale deed "conveys to the grantee all title of the unit's owner to the unit") And if the association forecloses on its superpriority lien portion, the sale also would extinguish other subordinate interests in the property. *SFR Invs.*, 334 P.3d at 412-13.
>
> *Shadow Wood*, supra, at p. 23

So, when a homeowner’s association's foreclosure sale complies with the statutory foreclosure rules, as evidenced by the recorded notices, and without any

facts to indicate the contrary, the purchaser would have only "notice" that the former owner or lender had the ability to raise an equitably based post-sale challenge arising out of the HOA's breach of statutory foreclosure procedures. Here, Zaisan never had any knowledge of any dispute between the HOA, its designated agent or anyone else. In such circumstances, Appellant must be considered a bona fide purchaser for value for the purposes of the subject sale.

CONCLUSION

Based on the foregoing, Appellant respectfully requests this Court to reverse the District Court's order.

Dated August 23, 2016

/s/ S. Wolfe Thompson
S. WOLFE THOMPSON, NSB 6463
Attorney for Appellant

CERTIFICATE OF COMPLIANCE & SERVICE

1. I hereby certify that the APPELLANT'S OPENING 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 5490 words.

2. I hereby certify that I have read the Amicus Curiae Brief of Zaisan Enterprises LLC, 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.

3. On the date below the attached brief was submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

Dated August 25, 2016

/s/ S. Wolfe Thompson
S. WOLFE THOMPSON, NSB 6463
Attorney for Appellant

Electronically Filed
Aug 25 2016 01:08 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

In the Supreme Court of the State of Nevada

♠ ♥ ♦ ♣

SATICOY BAY LLC SERIES 350 DURANGO 104, Appellant, VS. WELLS FARGO HOME MORTGAGE, Respondent.	Case No. 68630
WELLS FARGO BANK, N.A., D/B/A AMERICA'S SERVICING CO., Appellant, VS. ZAISAN ENTERPRISES LLC, Respondent.	Case No. 68647

EMERGENCY MOTION TO CONSOLIDATE OR FILE AMICUS BRIEF

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MOTION

Respondent Zaisan Enterprises LLC (Zaisan) respectfully requests consolidation of the above-captioned Appeals or, alternatively, permission to file an Amicus Curiae in *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage*, Docket No. 68630, as indicated in the attached Exhibit 1. Because oral argument is scheduled for September 8, 2016, in *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage*, Docket No. 68630, Zaisan Enterprises LLC also respectfully requests expedited consideration of this motion in accordance with NRAP 2.

ARGUMENT

Recently, in *Bourne Valley Court Trust v. Wells Fargo Bank, N.A.*, No. 15-15233, the United States Court of Appeals for the Ninth Circuit found NRS 116.3116, *et seq*. to be facially unconstitutional. The mandate has not issued yet in that case, and a motion to stay publication and for *en banc* consideration has been filed pending the outcome in *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage*, Docket No. 68630, pending before this court.

In *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage*, Docket No. 68630, the court is considering the alleged facial unconstitutionality of the same statute. The identical issue is before the court in *Wells Fargo Bank, N.A., D/B/A America's Servicing Co.*, Docket No. 68647. That case has been fully briefed.[1]

[1] A copy of the brief is attached at Exhibit 1. The same issue is also before the court in *Wells Fargo Bank, N.A. v. Zaisan Enterprises LLC*, Docket No. 69352, *Zaisan Enterprises LLC v. Green Tree Servicing LLC*, Docket No. 703389.

I. THE ZAISAN CASES ON APPEAL PRESENT IDENTICAL ISSUES AND SHOULD BE JOINED IN *SATICOY BAY LLC SERIES 350 DURANGO 104 V. WELLS FARGO HOME MORTGAGE*.

In *Saticoy Bay LLC Series 350 Durango 104,* the issues largely focus on whether NRS Chapter 116 is facially constitutional and also constitutional as applied since Wells Fargo in both cases actually received notice of default and notice of sale pursuant to NRS Chapter 116's foreclosure procedure. The Statute's notice provisions that Wells Fargo characterizes in both cases as being "opt-in" are in fact "add-ons" to other provisions of the Statute that mandate notice be sent to parties of record. Essentially, Wells Fargo is arguing in both cases that *SFR Investments Pool I, LLC v. U.S. Bank*, 130 Nev. Adv. Op. 75; 334 P.3d 408 (2014) should be reversed.

Saticoy Bay LLC and Zaisan Enterprises LLC, as purchasers at foreclosures under NRS Chapter 116, also each claim to be bona fide purchasers for value under Nevada law as indicated in *Shadow Wood Homeowners Association, Inc. and Gogo Way Trust v. New York Community Bancorp, Inc*., 132 Nev. Adv. Op. 5 (2016). After the District Court's decision in each case, the Court issued a published unanimous opinion in *Shadow Wood, supra*. That case addressed some of the alleged unresolved issues in *SFR, supra,* which included whether purchasers of property via an HOA's foreclosure under NRS Chapter 116 qualified for bona fide purchaser status. In *Saticoy Bay LLC Series 350 Durango 104,* the court determined as a matter of law that the appellant was not a bona fide purchaser for value. In *Wells Fargo Bank, N.A., D/B/A America's Servicing Co.,* the District Court agreed that Zaisan was a bona fide purchaser for value. Apparently, Saticoy Bay was not.

NRAP 3(b)(2) allows the Court to consolidate appeals. To be consistent between this case and the Zaisan cases, the Court should grant the motion to consolidate.

II. IN THE ALTERNATIVE, ZAISAN SHOULD BE ALLOWED TO FILE AN AMICUS CURIAE BRIEF.

NRAP 29(a) provides for filing Amicus Curiae briefs with the consent of the Court. As required by NRAP 19(c), the proposed brief is attached. Zaisan also requests waiver of the time for filing as required by NRAP 29(f).

In accordance with NRAP 29(c):

(1) The Movant's interest is as a party on appeal that will be directly affected by the decision in *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage*.

(2) The amicus brief is desirable because it presents a more complete picture of the argument, and offers additional relevant authorities in favor of holding the statute to be facially constitutional.

CONCLUSION

Based on the foregoing, Respondent's requests for an extension to file Respondent's Answering Brief should be granted.

Dated August 25, 2016

/s/ S. Wolfe Thompson

S. WOLFE THOMPSON, NSB 6463
Attorney for Zaisan Enterprises LLC

On the date below the attached brief was submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for each of the above-referenced cases.

Dated August 25, 2016

/s/ S. Wolfe Thompson
S. WOLFE THOMPSON, NSB 6463
Attorney for Zaisan Enterprises LLC

Exhibit 1