IN THE SUPREME COURT OF THE STATE OF NEVADA

U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN TRUST 2006-OA1, MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006OA-1; and CLEAR RECON CORPS, Appellants, vs. 5316 CLOVER BLOSSOM CT TRUST, Respondent.	Case No. 68915

APPEAL

from the Eighth Judicial District Court, Department XXIV
The Honorable Jim Crockett, District Judge
District Court Case No. A-14-704412-C

APPELLANT'S INITIAL BRIEF

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

U.S. Bank, N.A.

Clear Recon Corps

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction under NRAP 3A(b)(1) because the district court entered summary judgment on all claims against all parties in favor of Plaintiff 5316 Clover Blossom Ct Trust on September 10, 2015, and the notice of entry of that final order was entered on September 10, 2015. Appellants U.S. Bank, N.A., as Trustee, and Clear Recon Corps. filed a notice of appeal on September 28, 2015, *see* NRAP 4(a)(6).

ISSUES PRESENTED

(1) Whether U.S. Bank, N.A. is entitled to judgment as a matter of law based on the undisputed facts because:

(a) NRS 116.3116 is unconstitutional on its face because it fails to provide the notice mandated by the due process clauses of the Nevada and United States Constitutions.

(b) The homeowners' association trustee violated standards of commercial reasonableness by foreclosing on the lien even after a full tender of payment of the superpriority portion of the lien, thus recovering a sales price of less than 20% the market value of the property.

(2) In the alternative, whether the district court erred by denying Appellants the opportunity to conduct additional discovery regarding:

(a) Whether U.S. Bank, N.A.'s agent's offer to tender payment for the superpriority portion of the homeowners' association's lien extinguished the lien.

(b) Whether the homeowners' association's foreclosure was commercially reasonable under Nevada law in light of the depressed sales price and U.S. Bank, N.A.'s offer to tender payment for the superpriority lien.

(c) Whether the homeowners' association complied with all of the requirements under Nevada law for a foreclosure under NRS 116.3116 capable of extinguishing a first deed of trust.

STATEMENT OF THE CASE

This is one of many cases regarding the proper interpretation and application of NRS 116.3116 following this Court's decision in *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408 (Nev. 2014). Plaintiff-Respondent 5316 Clover Blossom Ct Trust (**CB Trust**) claims that its purchase of certain property in North Las Vegas, Nevada at a homeowners' association's foreclosure sale for $8,200.00 extinguished the deed of trust held by U.S. Bank, N.A., in its capacity as Trustee (**U.S Bank**) securing a loan of over $147,000.00. Only a few months after US Bank answered the Complaint—and before the parties had any chance to conduct discovery—CB Trust moved for summary judgment, arguing that it was entitled to a judgment establishing it to be the holder of the property free and clear of U.S. Bank's deed of trust due to the homeowner association's foreclosure sale and the recitals in the trustee's deed that purportedly vested ownership of the property in CB Trust. The district court granted summary judgment over U.S. Bank's opposition and entered final judgment.

The district court's decision should be reversed because NRS 116.3116—as it existed before the Nevada Legislature amended it during the 2015 Term—is facially unconstitutional. On its face, the statute does not ensure that holders of senior mortgage liens receive notice before those liens are extinguished by a homeowners' association's foreclosure. Instead, senior lienholders must "opt-in" to

receive advance notice of a foreclosure. Under binding law from the United States Supreme Court, such an "opt-in" regime is unconstitutional because it violates due process.

Even if the statute were constitutionally valid, the district court's judgment cannot be allowed to stand. By terminating this proceeding in its infancy, the district court concluded, as a matter of law, that the individualized facts of a case are irrelevant to whether a homeowners' association's foreclosure extinguishes a senior deed of trust on property. That holding flies in the face of this Court's holding in *SFR Investments*, where the Court made clear that several of the issues concerning the effect of a homeowners' association's foreclosure required factual development before a court could rule. The holding also runs afoul of this Court's most recent decision on the issue in *Shadow Wood Homeowners Assoc., Inc. v. N.Y. Community Bancorp, Inc*., 132 Nev. Adv. Op. 5 (Jan. 28, 2016), where this Court made clear that the mere fact that a trustee deed from a homeowners' association's foreclosure sale contains certain recitals about how the sale complied with the statute does not preclude consideration of the validity of the sale. The district court's ruling is particularly unjust under the facts of this case, given that U.S. Bank was denied the opportunity to develop the facts surrounding the homeowners' association's refusal to accept an offer to pay the full amount of the

superpriority lien and whether the foreclosure was commercially reasonable and in compliance with Nevada law.

STATEMENT OF FACTS

I. Factual Background

In June 2004, Dennis Johnson and Geraldine Johnson (collectively **Borrowers**) purchased real property located at 5316 Clover Blossom Court, North Las Vegas, Nevada 89031 (the **Property**). To finance this purchase, Borrowers took out a loan in the amount of $147,456.00, which was secured by a deed of trust (**Deed of Trust**) in favor of Countrywide Home Loans, Inc. R. 114-45. This Deed of Trust was assigned to U.S. Bank via an Assignment of Deed of Trust, which was recorded on June 20, 2011. R. 147-48.

Alessi & Koenig, LLC (**HOA Trustee**), acting on behalf of Country Gardens Owners' Association (**HOA**), recorded two Notices of Delinquent Assessment Liens on February 22, 2012, at 9:17 AM, both ostensibly encumbering the Property. One of the Notices stated the Borrowers owed $1,095.50 to the HOA. R. 150. The other Notice stated the Borrowers owed $1,150.50 to the HOA. R. 152. On April 20, 2012, the HOA Trustee recorded a Notice of Default and Election to Sell Under Homeowners Association Lien stating the total amount due to the HOA was $3,396.00. R. 154. The HOA Trustee then recorded a Notice of Trustee's Sale on October 31, 2012, stating the total amount due to the HOA was

$4,039.00, and setting the sale for November 28, 2012. R. 156. No sale occurred on that date. Rather, on January 26, 2013, the HOA non-judicially foreclosed on the Property. R. 158-59. According to the Trustee's Deed Upon Sale, the HOA sold the Property to Plaintiff for $8,200.00. *Id.*

Prior to the foreclosure sale, Bank of America, N.A. (**BANA**),[1] through counsel at Miles Bauer Bergstrom & Winters LLP (**Miles Bauer**), contacted the HOA Trustee and offered to pay the full superpriority amount of the HOA's lien on the Property if the HOA Trustee provided proof of that amount. R. 165-66. Instead of providing a payoff ledger with the exact superpriority amount, the HOA Trustee sent a payoff demand in the amount of $4,186.00. R. 168-70. However, the ledger showed the HOA's monthly assessments to be $55.00, meaning the total amount of the last nine months of delinquent assessments was $495.00. *Id*. On December 6, 2012, BANA tendered $1,494.50—which included $999.50 in "reasonable collection costs" in addition to the $495.00 for delinquent assessments—to the HOA Trustee to satisfy the superpriority lien. R. 172-73. The HOA Trustee refused to accept this tender, and proceeded to foreclose on the Property. R. 176.

[1] At the time, BANA serviced the loan secured by U.S. Bank's Deed of Trust.

II. Procedural Background

Respondent CB Trust filed its Complaint on July 25, 2014. R. 1-5. U.S. Bank answered the Complaint on September 25, 2014. R. 7-12. On April 23, 2015, CB Trust filed its Amended Complaint. R. 13-29. CB Trust filed a motion for summary judgment on May 18, 2015. R. 30-88. U.S. Bank filed an opposition and countermotion for summary judgment on July 22, 2015. R. 88-176. On September 10, 2015, the district court granted summary judgment in CB Trust's favor. R. 212-18. U.S. Bank filed its notice of appeal on September 28, 2015. R. 228-30.

ARGUMENT

I. Standard of Review

"This [C]ourt reviews a district court's grant of summary judgment de novo." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). A motion for summary judgment should be granted "when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to judgment as a matter of law.'" *Id.*; NRCP 56(c). All evidence and inferences must be viewed in a light most favorable to the non-moving party on a summary judgment motion. *Safeway*, 121 Nev. at 729, 121 P.3d at 1029.

"NRCP 56(f) permits a district court to grant a continuance when a party opposing a motion for summary judgment is unable to marshal facts in support of

its opposition." *Aviation Ventures, Inc. v. Joan Morris, Inc.*, 121 Nev. 113, 117-18, 110 P.3d 59, 62 (2005). A district court's order denying relief under Rule 56(f) is reviewed for an abuse of discretion. *Harrison v. Falcon Prods.*, 103 Nev. 558, 560, 746 P.2d 642, 643 (1987).

II. U.S. Bank Is Entitled to Judgment as a Matter of Law Based on the Undisputed Facts.

The district court erred by denying U.S. Bank's motion for summary judgment on two grounds. First, the district court held that the HOA Lien Statute was constitutional, despite its fatal inadequacies under the due process clauses of both the United States and Nevada Constitutions. Second, the district court should have granted summary judgment in light of the undisputed evidence that the HOA's foreclosure was commercially unreasonable.

A. The HOA Lien Statute Is Unconstitutional On Its Face Under the Due Process Clause.

The district court's judgment should be reversed because the provisions of NRS 116 governing foreclosures on HOA liens (the **HOA Lien Statute**) are facially unconstitutional under the Due Process Clauses of the Nevada and U.S. Constitutions. The HOA Lien Statute does not mandate actual notice to a deed of trust holder prior to an HOA's foreclosure. Rather, the HOA Lien Statute impermissibly requires those with a security interest on a Nevada property potentially subject to an HOA lien to "opt-in" to their constitutional protections by

requesting notice prior to the HOA's foreclosure—a requirement that fails to provide the mandatory notice guaranteed by the Due Process Clause. As such, the HOA Lien Statute is invalid on its face.

1. Eliminating property rights by means of a foreclosure is state action.

As an initial matter, under both state and federal law, elimination of a property interest by means of a foreclosure is a form of state action and thus subject to due-process requirements. In *J.D. Construction v. IBEX Int'l Group*, 240 P.3d 1033 (Nev. 2010), J.D. Construction placed a mechanic's lien on property owned by Ibex. *Id*. at 1035. J.D. Construction was *not* a state actor. *See id*. This Court nevertheless held that "[a] mechanic's lien is a 'taking' in that the property owner is deprived of a significant property interest, which entitles the property owner to federal and state due process." *Id.* at 1040 (citing *Connolly Develop., Inc. v. Sup. Ct. of Merced County*, 17 Cal. 3d 803, 132 Cal. Rptr. 477, 553 P.2d 637, 644 (1976)). The Court further opined that due process is satisfied if both parties are allowed the opportunity to present their case. *Id*. (citing *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976)).

Similarly, the Ninth Circuit has held that a private seizure of property pursuant to an innkeeper's lien statute constitutes state action. *Culbertson v. Leland*, 528 F.2d 426, 432 (9th Cir. 1975). The statute at issue in *Culbertson* authorized the keeper of a hotel or lodging house to seize—without notice or

judicial procedure—the personal property of a lodger who failed to pay rent. *Id.* at 427. The court held that the state action requirement was met because the parties "had no contractual relationship concerning [the] property," and consequently it was the statute, and not a private agreement, that "was the *sine qua non* for the activity in question." *Id.* The court distinguished cases where a "written instrument defined the rights of the parties," and thus "can be left and has traditionally been left to private hands." *Id.* at 431. In those cases, "the written agreement of the parties set forth their respective rights and liabilities; the statute merely reiterated and confirmed their arrangement," and thus the repossession "did not deprive [the debtor] of any rights which he had not already yielded voluntarily and for consideration." *Id.* at 432. The innkeeper and the tenant had not contracted to permit the non-judicial seizure. That seizure was authorized solely by state statute. As a consequence, "the state's involvement through that statute is not insignificant," and thus constituted state action. *Id.*

Here, the mortgagees whose property interests the HOAs purportedly extinguish are not bound by contract: mortgagees have not yielded their property rights to HOAs "voluntarily and for consideration." Instead, like the innkeeper in *Leland*, the *sole source* of an HOA's ability to extinguish a mortgagee's property interest is statutory—namely, the HOA Lien Statute.

Like a purchaser at a mechanic's lien sale, CB Trust attempts to take property and, as a result, deprive U.S. Bank of a significant property interest. While U.S. Bank has a first deed of trust rather than a fee simple, its position is identical to that of a defendant in a mechanic's lien case, such as *J.D. Construction*. In both instances, a third-party purchaser seeks to extinguish a pre-existing interest; CB Trust attempted to do so pursuant to the procedures set forth in Chapter 116.

2. The HOA Lien Statute is facially unconstitutional because it does not ensure notice and an opportunity to be heard prior to the elimination of property rights.

The HOA Lien Statute is unconstitutional on its face because it does not ensure that mortgagees at risk of losing property interests will receive notice and an opportunity to be heard.[2] An "elementary and fundamental requirement of due process . . . is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of an action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S.

[2] A statute is unconstitutional on its face when "no set of circumstances exists under which the [statute] would be valid." *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2450 (2015) (internal quotation marks omitted). A litigant may attack a statute's facial unconstitutionality in violation of due process even if the party received actual notice that was not required by the law in question. *See, e.g.*, *Garcia-Rubiera v. Calderon*, 570 F.3d 443, 456 (1st Cir. 2009) (sustaining facial attack on notice provisions and holding that "actual notice cannot defeat [facial] due process claim").

306, 314 (1950).[3] The U.S. Supreme Court has applied this standard in the same context as this case—where a mortgagee's property interest was purportedly extinguished by a non-judicial foreclosure. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983). The *Mennonite* Court held that the Due Process Clause required that "[n]otice by mail or other means ***as certain to ensure actual notice*** [to the mortgagee] is a minimum constitutional precondition" to a non-judicial foreclosure sale that can extinguish the mortgagee's interest. *Id.* (emphasis added).

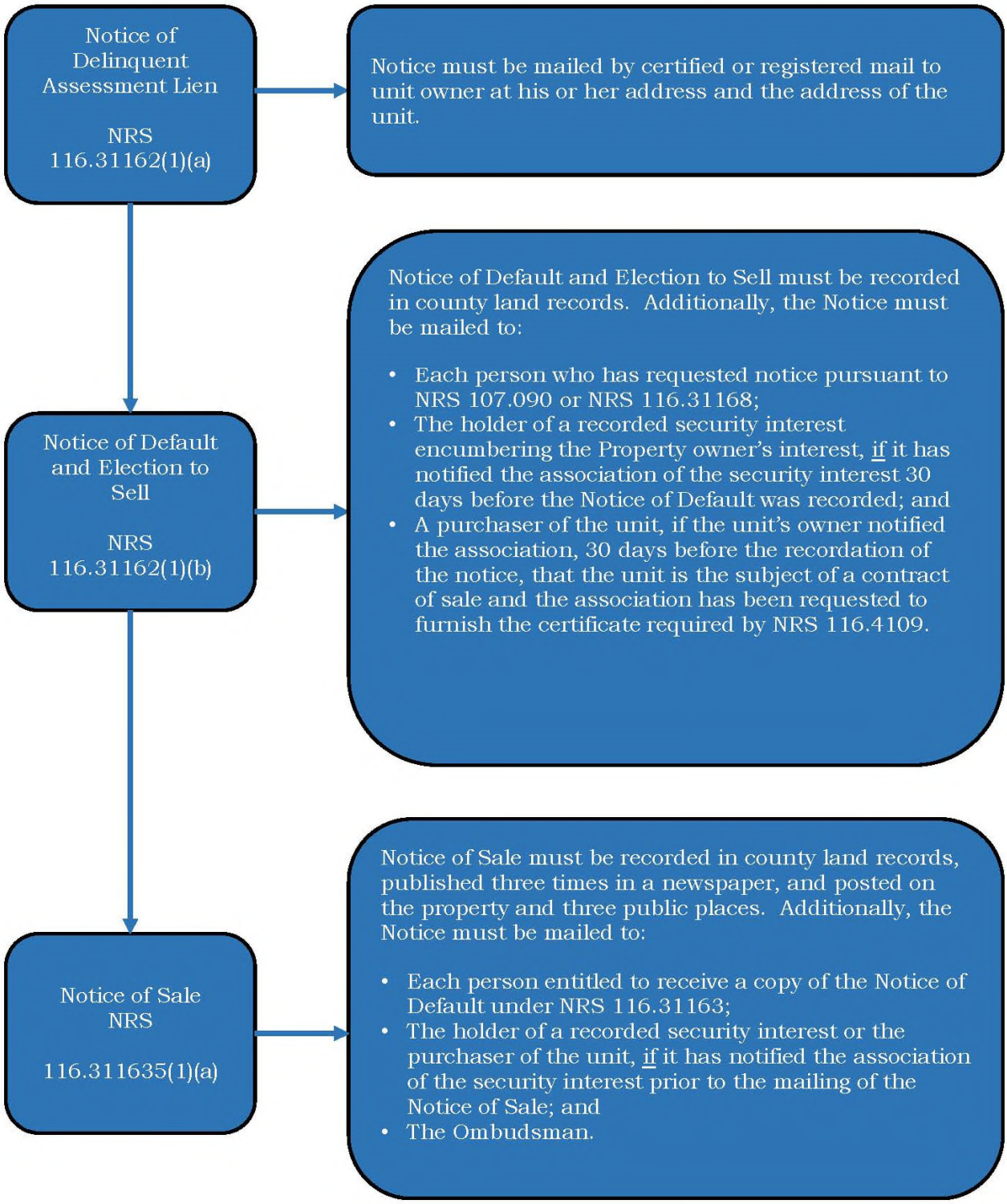
On its face, Nevada law does not "under all circumstances" ensure actual notice to a deed of trust holder "of the pendency of an action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314. Mortgagees must receive notice *only* if they have previously requested notice from the HOA. NRS 116.31163 requires that a notice of default and election to sell be provided only to a holder of a recorded security interest who "has requested notice" or "has notified the association" more than 30 days before recording the notice of default of the existence of a security interest. NRS 116.31163 (1)-(2). Section 116.311635 similarly requires that notice of an HOA foreclosure sale be sent only to those

[3] Because the Nevada Constitution's Due Process Clause "virtually mirror[s] the language in the United States Constitution," *Reinkemeyer v. Safeco Ins. Co. of Am.*, 117 Nev. 44, 50, 16 P.3d 1069, 1072 (2001), and Nevada courts look to federal case law interpreting the United States Constitution for guidance, *see Hernandez v. Bennett-Haron*, 287 P.3d 305, 310 (Nev. 2012), the due-process analysis under each Constitution is the same, and the HOA Lien Statute is unconstitutional under both.

mortgagees of record who have requested notice under NRS 116.31163, or those who have "notified the association." NRS 116.311635 (1)(b)(1)-(2). A third provision concerning notice of delinquent assessments does not require notice to mortgagees at all. NRS 116.31162.

The notice requirements for foreclosing on an HOA lien under the pre-2015 Amendments HOA Lien Statute are summarized in the following chart:

Foreclosures on HOA Liens Under Nevada Chapter 116



In failing to require that notice be given to deed of trust beneficiaries under the HOA Lien Statute, the Nevada Legislature diverged from how other states have drafted similar statutes. In drafting the HOA Lien Statute, the Nevada Legislature largely followed the Uniform Common Interest Ownership Act (**UCIOA**), upon which the statute is based. Section 3-116(j)(1) of the 1982 uniform act would have required that a foreclosure on the HOA's superpriority lien "must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute]]." In this instance, however, Nevada drafted a unique provision and created the requirements for foreclosing on an HOA lien from scratch—and in the process, failed to ensure that affected deed of trust beneficiaries would receive adequate notice.

The HOA Lien Statute explicitly permits total extinguishment of a first deed of trust without *any* notice to the mortgagee holding that deed. If a mortgagee does not request notice—or, put differently, fails to "opt in" to its constitutional right—Nevada law permits extinguishment of a first deed of trust without notice. Such a result contravenes *Mennonite*, which holds that a "party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation." 462 U.S. at 799; *see also Mullane*, 339 U.S. at 314 (notice must be afforded "under all circumstances").

The drafters of the UCIOA have tacitly acknowledged the problem with Nevada's statute, issuing the following comment as part of the 2008 version of the uniform law:

> In some states, nonjudicial foreclosure procedures require notice to subordinate lienholders only when those lienholders have recorded a timely request for notice of sale on the real property records. . . . The issue of notice to subordinate lienholders becomes more critical under this Act, given that subsection (c) gives the association a limited priority over the otherwise-first mortgage lender, thus rendering that lender a subordinate lienholder. ***It would be manifestly unfair for an association's foreclosure sale to extinguish the lien of the otherwise-first mortgage lender if the association did not in fact provide the lender with notice of that sale.***

Uniform Law Commission, UCIOA cmt. 8 (2008) (emphasis added). To remedy this defect, the 2008 version of the uniform act includes a new section expressly stating that an association's foreclosure "does not terminate an interest that is subordinate to the lien to any extent unless the association provides notice of the foreclosure to the record holder of the subordinate interest." *Id.* § 3-116(r).

A number of courts have concluded that opt-in notice statutes do not protect the due-process rights of property interest holders. For example, in *Island Financial, Inc. v. Ballman*, 607 A.2d 76, 79-82 (Md. Ct. Spec. App. 1992), the Maryland Court of Special Appeals applied *Mennonite* in holding that the rights of a holder of a subordinate mortgage on certain property were violated when the holder failed to receive notice of the senior lien holder's foreclosure. The court held that the due-process violation existed even though the subordinate mortgage

holder failed to take advantage of a Maryland statute that would have allowed it to "opt in" to receiving notice of a subsequent foreclosure by recording a request for notice—in other words, a procedure materially identical to the "request for notice" procedure in NRS 116.31163. *Id.* at 81-82. According to the court, "[c]onstitutional due process protection does not exist only for those who follow the notice statute but encompass all interests that may be affected by state action." *Id.* at 81.

Similarly, in *Reeder & Associates v. Locker*, 42 N.E.2d 1371 (Ind. Ct. App. 1989), the Indiana Court of Appeals applied *Mennonite* to hold that a mortgagee who had failed to use the procedures in the applicable request-notice statute was nonetheless entitled to actual notice of a foreclosure that would eliminate its security interest. As the court noted, "[c]onstitutional protection exists not only when a mortgagee complies with the [request-notice statute]; it exists any time an action which will affect a property interest protected by the due process clause of the U.S. Constitution occurs." *Id.* at 1373.[4]

[4] *Accord e.g.*, *Wylie v. Patton*, 720 P.2d 649, 655 (Idaho 1986) (reversing quiet title judgment after determining that lienholder failed to receive constitutionally required notice, even though lienholder failed to request notice under applicable statute); *City of Boston v. James*, 530 N.E.2d 1254, 1257 (Mass. App. Ct. 1988); ("'[A] party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation.'") (quoting *Mennonite*, 462 U.S. at 799); *Jefferson Twp. v. Block 447A*, 548 A.2d 521, 524 (N.J. 1988) ("[A] person's entitlement to the notice required by due process cannot be conditioned on the requirement that he request it."); *In re Foreclosure of Tax Liens*, 103 A.D.2d 636,

Consistent with the many on-point decisions on the issue, the HOA Lien Statute is unconstitutional on its face because it does not guarantee that beneficiaries of first deeds of trust will receive notice of an HOA's foreclosure sale. The fact that a lienholder may record a request for notice is not enough; as the United States Supreme Court made clear in *Mennonite*, a "party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation." 462 U.S. at 799. Accordingly, the HOA Lien Statute is unconstitutional, and the district court's decision should be reversed.

3. The HOA Lien Statute cannot be saved by a broad reading of the notice provisions of NRS 116.31168.

The HOA Lien Statute cannot be saved by a broad interpretation of the language of NRS 116.31168, which implements the notice provisions of NRS 107.090 only to the extent they apply to parties who have requested notice in advance. Section 116.31168 states:

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640 (N.Y. App. Div. 1984) (holding that the state's constitutional obligation to notify mortgagees could not be "abrogated by requiring the mortgagee to request notice"; "The state has an obligation to all mortgagees, not merely to those who request notice."); *United States v. Malinka*, 685 P.2d 405, 408-09 (Okla. Civ. App. 1984) (holding Oklahoma tax foreclosure sale unconstitutional due to failure to guarantee notice to affected lienholders despite availability of request-notice procedures); *Seattle First Nat'l Bank v. Umatilla Cnty.*, 713 P.2d 33, 34-37 (Or. App. 1986) (holding publication notice statute unconstitutional as violative of due process despite request-notice statute).

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

NRS 116.31168 (italicized emphasis added). Although the term "request" is not defined, it is a vital component of both the title and the relevant subsection of NRS 116.31168. It refers back to the more specific sections of NRS Chapter 116 that govern notice—for instance, NRS 116.311635, which provides that a notice of sale be provided to a holder of a first deed of trust or any other lienholder only "if either of them has notified the association, before the mailing of the notice of sale, of the existence of the security interest, lease or contract of sale, as applicable." Similar provisions govern the notice of default and election to sell. *See* NRS 116.31163.

An interpretation holding that this general statute, which includes references to a "request," requires mandatory notice when three other provisions specifically impose only "opt-in" notice would violate several Nevada canons of construction. *See, e.g.*, *State Tax Comm'n ex rel. Nev. Dep't of Taxation v. Am. Home Shield of Nev., Inc.*, 254 P.3d 601, 605 (Nev. 2011) ("A specific statute controls over a general statute."); *id.* at 604 ("Statutes must be construed as a whole, and phrases may not be read in isolation to defeat the purpose behind the statute."); *Nev. Power*

Co. v. Haggerty, 115 Nev. 353, 366, 989 P.2d 870, 878 (1999) (holding that a statute's title can reflect legislative intent).

In particular, reading NRS 116.31168 as incorporating broader notice requirements would impermissibly render several sections of Chapter 116 superfluous. "When interpreting a statute, [courts] must give its terms their plain meaning, considering its provisions as a whole so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory." *Southern Nevada Homebuilders Ass'n v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005). If NRS 116.31168 incorporates all of the notice requirements of NRS 107.090, the following subsections of the HOA Lien Statute are completely superfluous: NRS 116.31163 (1), NRS 116.31163 (2), NRS 116.311635 (b)(1), and NRS 116.311635 (b)(2). In fact, it would even render the second sentence of NRS 116.31168(1)—fully half of the subsection—completely meaningless.

A review of the underlying statutory subsections further demonstrates the absurd result that would attach if CB Trust's interpretation were adopted. The first two, NRS 116.31163(1) and NRS 116.31163(2), provide that a notice of default and election to sell need only be provided to a mortgagee who has "requested notice pursuant to NRS 107.090 or NRS 116.31168." The next two, NRS 116.311635(b)(1) and NRS 116.311635(b)(2), require that notice of the foreclosure

sale itself—the event that purportedly extinguishes the constitutionally-protected property interest of a mortgagee—be sent *only* to those who have *requested* "notice under NRS 116.31163," and the "holder of a recorded security interest or the purchaser of the unit, *if either of them have notified the association* . . . of the existence of the security interest." NRS 116.311635(b) (emphasis added). CB Trust's interpretation assumes that the Nevada Legislature drafted a series of five interlocking request-notice provisions—the four request-notice provisions and NRS 116.31168(1), which also references a "request" for notice—four and a half of which have no meaning whatsoever, because a small part of one of those subsections negates all the rest and requires actual notice of a foreclosure sale.

Reading NRS 116.31168's as incorporating by reference NRS 107.090's requirement that a foreclosing HOA to provide actual notice of a foreclosure sale to mortgagees renders every one of these provisions meaningless. Courts should "construe statutes to give meaning to all of their parts and language . . . and read each sentence, phrase, and word to render it meaningful within the context and purpose of the legislation." *Harris Associates v. Clark County School Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003). CB Trust's interpretation ignores this maxim, instead espousing an interpretation that would render not only a phrase or word without meaning, but entire statutory subsections. As such, it should be rejected.

As plainly written, the HOA Lien Statute fails to meet the requirements for due process under both the Nevada and United States Constitutions. The fact that a lienholder may record a request for notice under the statute is simply not enough; numerous courts have held state laws to be unconstitutional despite similar request-notice provisions. Because the HOA Lien Statute is unconstitutional, the district court's judgment should be reversed and the case remanded with instructions to grant summary judgment in favor of U.S. Bank.

B. The Foreclosure Sale of the Property For A Fraction Of Its Market Value Despite Bank Of America's Submission Of Tender Was Commercially Unreasonable.

A second ground on which U.S. Bank was entitled to summary judgment is the HOA Trustee's violation of standards of commercial reasonableness in the decision to foreclose after BANA made tender of the full superpriority portion of the lien. Nevada subjects HOA foreclosures to a commercial reasonableness test, stating that "every contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement." NRS 116.1113. The drafters of this section defined good faith as follows: "[g]ood faith . . . means observance of two standards: 'honesty in fact,' and observance of reasonable standards of fair dealing. While the term is not defined, [it is] derived from and used in the same manner as . . . Sections 2-103(i)(b) and 7-404 of the Uniform Commercial Code." UCIOA § 1-113 cmt. (1982). Nevada's version of the UCC defines "good faith" as

"honesty in fact and the observance of *reasonable commercial standards* of fair dealing." NRS 104.1201(2)(t) (emphasis added).

Nevada courts have confirmed that this commercial reasonableness standard applies to the disposition of collateral. *See, e.g.*, *Jones v. Bank of Nev.*, 91 Nev. 368, 373, 535 P.2d 1279, 1282 (1975). And courts in other states interpreting the same UCIOA provision at issue here, UCIOA § 1-113, have held that the disposition of the collateral in these cases, real property, must be commercially reasonable. *Will v. Mill Condominium Owner's Ass'n*, 848 A.2d 336, 340 (Vt. 2004) ("Although the rules generally applicable to real estate mortgages do not impose a commercial reasonableness standard on foreclosure sales, the UCIOA does provide for this additional layer of protection.").

Granting superpriority to nominal HOA liens over first deeds of trust "represents a 'significant departure from existing practice.'" *SFR Investments*, 334 P.3d at 412 (quoting the official comments to UCIOA § 1-116). However, NRS 116.1113's requirement that the foreclosure of these superpriority liens be commercially reasonable serves to protect first deed of trust holders from unreasonable foreclosures. The commercial reasonableness requirement is provided in the statutory text, was clearly intended by the statute's drafters, and has been recognized by other courts interpreting the same provision.

In this case, the HOA Trustee made the decision to foreclose on the Property rather than accept BANA's payment of the full amount that the HOA would have been entitled to upon the foreclosure of the Property, along with an additional sum of $999.50 for the HOA's collection costs. R. 172-74, 176. When BANA tendered payment of the superpriority amount to the HOA, the HOA had two choices: (1) accept the superpriority payment and forego foreclosure, or (2) reject the superpriority amount and proceed with the foreclosure of the extinguished lien. Under either scenario, the HOA would receive the full amount it was entitled to: the superpriority portion of its lien, along with reasonable collection costs. By capriciously choosing to reject BANA's superpriority tender and proceed with foreclosure, the HOA unnecessarily attempted to extinguish BANA's lien. The decision to foreclose rather than accept BANA's tender not only would extinguish the Deed of Trust, but also leave U.S. Bank with a deficiency exceeding $100,000. Therefore, summary judgment was improper in light of questions about the HOA Trustee's decision to foreclose.

III. The District Court Erred By Granting Summary Judgment Before Discovery Even Began.

Even if NRS 116.3116 were valid and constitutional, and U.S. Bank were not entitled to judgment as a matter of law due to the HOA Trustee's commercially unreasonable foreclosure based on the undisputed facts, the district court still would have erred by granting summary judgment before discovery began in this

case. The district court's grant of summary judgment to CB Trust denied U.S. Bank the opportunity to develop the factual record surrounding the loan servicer's tender and the HOA Trustee's rejection, the commercial reasonableness of the foreclosure, and the foreclosure process's compliance (or lack thereof) with the requirements of NRS 116. To the extent that any factual questions remained, the district court should have allowed discovery on these matters.

A. U.S. Bank's evidence of tender of payment for the superpriority amount of the lien created a genuine issue of fact that barred summary judgment in favor of CB Trust.

The district court's grant of summary judgment to CB Trust was premature in light of questions surrounding the HOA Trustee's decision to reject a tender of payment for the full amount of the superpriority portion of the lien. In *SFR Investments*, 334 P.3d at 414, this Court drew attention to the fact that "as a junior lienholder, [the holder of the first deed of trust] could have paid off the [HOA] lien to avert loss of its security[.]" In this case, there is evidence that the loan servicer did just that by offering to pay the superpriority amount of the HOA lien prior to the sale and submitting a check for the full payment required by statute.

This Court's statement in *SFR* was well-grounded in Nevada law. For at least fifty years, this Court has consistently held that an offer to pay is sufficient tender. *See, e.g.*, *Ebert v. Western States Refining Co.*, 75 Nev. 217, 221-222, 337 P.2d 1075, 1077 (1959). Furthermore, tender is complete when "the money is

offered to a creditor who is entitled to receive it[.]" *Cladianos v. Friedhoff*, 69 Nev. 41, 45, 240 P.2d 208, 210 (1952). After the money owed is offered to the creditor, "nothing further remains to be done, and the transaction is completed and ended." *Id.*

Other jurisdictions agree that tender is defined as "*an offer of payment* that is coupled either with no conditions or only with conditions upon which the tendering party has a right to insist." *Fresk v. Kramer*, 99 P.3d 282, 286-87 (Or. 2004) (emphasis added); *see also* 74 AM. JUR. 2D *Tender* §22 (2014). Put differently, it is irrelevant whether any money actually changes hands—tender is complete upon the offer to pay. *See Guthrie v. Curnutt*, 417 F.2d 764, 765-66 (10th Cir. 1969) ("We have held that when a party, able and willing to do so, offers to pay another a sum of money and is told that it will not be accepted, the offer is a tender without the money being produced.").

Consistent with that rule, several courts have held that a rejected tender still precludes foreclosure and discharges the lien. *See, e.g., Bisno v. Sax*, 346 P.2d 814, 820 (Cal. Dist. Ct. App. 1959) ("[T]he acceptance of payment of a delinquent installment of principal or interest cures that particular default and precludes a foreclosure sale based upon such a preexisting delinquency. The same is true of a tender which has been made and rejected."); *Lichty v. Whitney*, 182 P.2d 582, 582 (Cal. Dist. Ct. App. 1947) ("A tender of the amount of a debt, though refused,

extinguishes the lien of a pledgee, and will entitle the pledger to recover the property pledged."); *Segars v. Classen Garage and Service Co.*, 612 P.2d 293, 295 (Okla. Civ. App. 1980) ("A proper and sufficient tender of payment operates to discharge a lien.").

Both the drafters of NRS 116 and the Nevada agency charged with its enforcement have confirmed that tender of the superpriority amount preserves a first deed of trust holder's interest in the foreclosed property. The drafters of the UCIOA, adopted by Nevada as NRS 116, contemplated this result when drafting the superpriority provision, stating that "[a]s a practical matter, secured lenders will most likely pay the [nine] months assessments demanded by the association rather than having the association foreclose on the unit." UCIOA § 3116 cmt. 1 (1982) (cited with approval in *SFR Investments*, 334 P.3d at 414.).[5] Further, the Nevada Real Estate Division of the Department of Business and Industry (**NRED**), the agency charged with administering NRS 116, has explained that it is "likely that the holder of the first security interest will pay the super priority lien amount to avoid foreclosure by [an HOA]." 13–01 Op. Dep't of Bus. & Indus., Real Estate

[5] This Court cited to the official comments to UCIOA extensively when analyzing NRS 116.3116 in *SFR Investments*. *See SFR Investments*, 334 P.3d at 412 ("An official comment written by the drafters of a statute and available to the legislature before the statute is enacted has considerable weight as an aid to statutory construction.").

Div. 18 (2012) (hereinafter **NRED Letter**); *see also Folio v. Briggs*, 99 Nev. 30, 34, 656 P.2d 842, 844 (1983) (explaining that courts "are obliged to attach substantial weight to [an] agency's interpretation" of a statute it is charged with administering). This superpriority amount is equal to the assessments that "would have become due in the absence of acceleration during the nine months immediately preceding institution of an action to enforce the lien . . . ." *See* NRS 116.3116(2); *accord* NRED Letter (explaining that "the total amount of the super priority lien attributable to assessments is no more than 9 months of the monthly assessments reflected in the association's budget.").

Here, BANA, which serviced the loan secured by U.S. Bank's senior deed of trust at the time, offered to pay the superpriority amount to the HOA Trustee prior to the foreclosure sale. Shortly after the HOA Trustee recorded the Notice of Default and Election to Sell, BANA, through counsel at Miles Bauer, contacted the HOA Trustee and offered to pay the superpriority lien if adequate proof of the amount was provided. R. 172-74. This alone was sufficient tender to extinguish the superpriority portion of the HOA's lien prior to the foreclosure. However, BANA went further and mailed a check to the HOA Trustee for not only the full sum of the superpriority portion ($495), but also an additional $999.50 for reasonable collection costs. R. 174. Therefore, U.S. Bank has presented evidence demonstrating that BANA not only fulfilled but even exceeded the legal

requirements for tender of the superpriority portion, which redeemed the first-priority position of U.S. Bank's deed of trust prior to the foreclosure sale.

Because the superpriority portion of the HOA's lien was extinguished prior to the foreclosure sale, CB Trust's interest in the Property, if any, is subordinate to U.S. Bank's senior deed of trust pursuant to NRS 116.31164(3)(a). This provision provides that the purchaser at an HOA foreclosure receives "a deed without warranty which conveys to the grantee *all title of the unit's owner to the unit*." NRS 116.31164(3)(a) (emphasis added). Put differently, under Nevada law, the HOA lost the ability to pass clear title when BANA's offer of tender extinguished the superpriority lien.

Since the notice of appeal was filed in this case, this Court decided *Shadow Wood Homeowners Assoc., Inc. v. N.Y. Community Bancorp, Inc.*, 132 Nev. Adv. Op. 5 (Jan. 28, 2016). In *Shadow Wood*, this Court held that the trial court needed to develop the factual record as to "what the fees and costs [claimed by the HOA Trustee on a payoff ledger] represent[ed]" and whether they were unreasonable. *Id.* at *18.[6] The Court left open "[t]he question of whether and, if so, to what extent

[6] An important factual difference in *Shadow Wood* is that NYCB (the mortgage loan servicer) had foreclosed before the HOA, and bought the property at auction. Once owner, NYCB then failed to pay ongoing HOA assessments. When NYCB sought to pay off the superpriority portion of the HOA lien, the HOA Trustee insisted that NYCB also pay the past due assessments NYCB had incurred after becoming owner of the property. The court pointed out that NYCB had an "obligation, as the new owner, to pay the monthly HOA assessments as they came

costs and fees are recoverable in the context of an HOA superpriority lien." *Id*. at *17.

Here, U.S. Bank presented evidence in opposition to CB Trust's summary judgment motion demonstrating that BANA tendered the superpriority amount prior to the HOA's foreclosure sale in this case along with $990.50 in reasonable collection costs. By ending the litigation in the infancy, the district court cut off any opportunity for U.S. Bank to investigate the issues surrounding its tender, the rejection of the funds, the costs and fees claimed by the HOA Trustee, and whether BANA's tendered collection costs were sufficient to cover those costs and fees. By implication, the district court held that *it would not have made any difference* what amount the servicer tendered for payment—the fact that the payment was rejected by the HOA was the only fact needed to grant summary judgment to the purchaser at the ensuing foreclosure sale. Respectfully, that is not consistent with Nevada law. If the district court was not convinced that BANA's tender of payment was clearly sufficient to extinguish the HOA's lien and pay any recoverable costs and fees, it should have left open the opportunity to further

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due." 132 Nev. Adv. Op. 5, at *16. In this case, on the other hand, U.S. Bank and its predecessor never foreclosed on the property and became owner. Rather, U.S. Bank sought to pay the superpriority portion of the lien solely in order to preserve its mortgage lien, and had no legal obligation to pay ongoing monthly assessments. Therefore, the factual questions involving the sufficiency of tender might be simpler in the present case than in *Shadow Wood*.

develop the factual record. Accordingly, at the very least, a genuine issue of material fact precludes summary judgment in CB Trust's favor.

B. The district court erred by refusing to allow U.S. Bank to conduct discovery regarding the commercial reasonableness of the HOA's foreclosure.

Second, the district court erred by granting summary judgment without allowing U.S. Bank any opportunity to obtain relevant discovery concerning whether the HOA's foreclosure was conducted in a commercially reasonable manner, as required under Nevada law. As discussed *supra*, Sec. II.B, Nevada subjects HOA foreclosure sales to a duty of good faith, which includes "honesty in fact and the observance of *reasonable commercial standards* of fair dealing." NRS 104.1201(2)(t) (emphasis added). The requirement that the foreclosure of these superpriority liens be commercially reasonable provides first deed of trust holders with assurance that, in the event of an HOA foreclosure, they will receive some of the value they bargained for when they provided a mortgage loan.

Even if the HOA Trustee's decision to foreclose had been commercially reasonable, questions of material fact as to whether the *conduct* of the foreclosure sale complied with reasonable commercial standards of fair dealing. Under Nevada law, a commercially reasonable sale should reflect a calculated effort to promote a sales price equitable to both the debtor and to the secured creditor. As this Court has explained, the "quality of the publicity, the *price obtained at the auction*, [and]

the number of bidders in attendance" are also factors to consider when analyzing the commercial reasonableness of a public sale. *Dennison v. Allen Group Leasing Corp*., 110 Nev. 181, 186, 871 P.2d 288, 291 (1994) (emphasis added). "To say that a mortgagee with a 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 the 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) (emphasis added) (quoted in *Golden v. Tomiyasu*, 79 Nev. 503, 387 P.2d 989 (1963)).

Importantly, it is well-settled under Nevada law that "a wide discrepancy between the sale price and the *value of the collateral* compels close scrutiny into the commercial reasonableness of the sale." *Levers v. Rio King Land & Inv. Co.*, 93 Nev. 95, 98, 560 P.2d 917, 920 (1977) (emphasis added); *see also Iama Corp. v. Wham*, 99 Nev. 730, 736, 669 P.2d 1076, 1079 (1983); *Jones*, 91 Nev. at 368. Such close scrutiny is surely required here, where property securing a $147,456.00 loan was sold for $8,200.00.

Courts analyzing the commercial reasonableness of foreclosure sales have either voided such sales or refused to grant summary judgment in favor of the

foreclosing party where the discrepancy between the sales price and the value of the secured property was much less egregious than the present case. For example, in *Iama Corp.*, this Court reversed a trial court's finding that a sale of collateral was conducted in a commercially reasonable manner. 99 Nev. at 737. Central to the court's decision was the wide discrepancy—25.1% —between the fair market value and the sale price of the collateral. *Id.* at 736. The court then scrutinized whether proper notice was given, whether the bidding was competitive, and whether the sale was conducted pursuant to the sheriffs office's normal procedures. *Id.* The court ultimately set aside the sale because the pre-foreclosure conduct of the seller had detrimentally affected the price the collateral would bring at auction. *Id.* at 736-37.

The Court also squarely addressed this issue in *Shadow Wood*. In its opinion, this Court favorably quoted the rule from the Third Restatement of Property that while "[g]ross inadequacy cannot be precisely defined in terms of a specific percentage of fair market value[, g]enerally ... a court is warranted in invalidating a sale where the price is less than 20 percent of fair market value." *Shadow Wood*, 132 Nev. Adv. Op. 5, at *15 (quoting Restatement (Third) of Property, Mortgages, § 8.3 cmt. b (1997)). Here, the HOA sold the Property for $8,200.00—less than 6% of the value of the mortgage loan secured by U.S. Bank's deed of trust. Therefore, the HOA foreclosure in this case falls well within the

bounds of what this Court has identified as grossly inadequate, raising the inference that the HOA failed to "t[ake] steps to insure the best possible price would be obtained for the benefit of the debtor." *Levers*, 93 Nev. at 99 (holding that the party failed to meet its burden to show that the sale was commercially reasonable). Accordingly, the district court should not have granted summary judgment to CB Trust in light of questions surrounding the commercial reasonableness of the foreclosure.

The ruling in *Shadow Wood* is consistent with decisions from other states' courts applying the UCIOA to hold commercially unreasonable foreclosure sales as void. In *Will v. Mill Condominium Owner's Ass'n*, 848 A.2d 336, 340 (Vt. 2004), the property was sold pursuant to a homeowners' association lien of $3,510.10. *Id.* at 338. The fair market value of the property was $70,000.00. *Id.* The court noted that the comment to UCIOA § 1-113, discussed in Section C(1) *supra*, "expresse[d] in unequivocal terms the Legislature's intent to import the [UCC's] commercial reasonableness standard into the UCIOA." *Id.* at 341. The court explained that the homeowners' association bears the burden to prove the foreclosure was commercially reasonable. *Id.* at 342. The court also stated that the party conducting the sale "must make a good faith effort to maximize the value of collateral," and "have a reasonable regard for the debtor's interest." *Id.* After espousing these standards, the court voided the trustee's sale because the sale was

not made in a commercially reasonable manner. *Id.* at 342. Central to the court's finding was the sale of the condominium for an amount 85% lower than the value of the collateral, and the fact that there was only one bid on the property. *See id.* Because the sale was commercially unreasonable, the court vacated a grant of summary judgment in favor of the HOA, and voided the sale. *Id.* at 343.

C. The district court erred by denying U.S. Bank the opportunity to discover whether the HOA's foreclosure sale complied with Nevada law.

Finally, the district court erred when it granted summary judgment to CB Trust because U.S. Bank was denied the opportunity to discover whether the HOA's foreclosure complied with the requirements of Nevada law. As this Court stated in *SFR Investments*, "NRS 116.3116(2) gives an HOA a true superpriority lien, **proper foreclosure of which** will extinguish a first deed of trust." (emphasis added.) *SFR Investments Pool 1, LLC*, 334 P.3d at 419. But even though CB Trust never demonstrated that the HOA's foreclosure was "proper," U.S. Bank was denied the chance to conduct discovery on that very issue. For example, U.S. Bank was denied the chance to depose the HOA and its Trustee to determine whether the HOA lien was comprised of "assessments for common expenses based on the periodic budget adopted by the association" (as required for the lien to acquire superpriority status under NRS 116.3116(2)(c)), or whether the HOA would have accepted any offer of payment of an amount from U.S. Bank for less than the full

lien (*i.e.*, the superpriority and subpriority portions of the lien). Those sorts of issues are important to this case, and the district court erred by granting summary judgment before U.S. Bank ever had a chance to investigate them.

In the district court, CB Trust argued that any discovery regarding the HOA's compliance with Nevada law was unnecessary, as the recitals contained in the trustee's deed upon sale served as "conclusive evidence" that the HOA complied with the law. This is another issue this Court directly addressed in *Shadow Wood*, holding that, as a matter of law, deed recitals under NRS 116.3116 cannot be conclusive as to the facts of whether statutory requirements were met. *Shadow Wood*, 132 Nev. Adv. Op. 5, at *13-15 (Jan. 28, 2016). In *Shadow Wood*, the foreclosure deed contained a recital word-for-word identical to the recital in this case.[7] This Court rejected the argument that the recital prevented any challenge to the foreclosure, on several grounds. First, there is "long-standing and broad inherent power of a court to sit in equity and quiet title, including setting aside a foreclosure sale if the circumstances support such action." *Id*. at *14. Second, **"**the recitals made conclusive by operation of NRS 116.31166 implicate compliance only with the statutory prerequisites to foreclosure." *Id*. (emphasis added). Finally, this Court cited case law from other jurisdictions "under which equitable relief

[7] "All requirements of law regarding the mailing of copies of notices and the posting and publication of the copies of the Notice of Sale have been complied with." *Compare Shadow Wood*, Adv. Op. 5, at *9 *with* R. 158

may still be available in the face of conclusive recitals, at least in cases involving fraud." *Id*. This led the Court to conclude that the mere fact that an HOA's foreclosure deed contains the "conclusive recitals" of NRS 116.31166 did not preclude a challenge to the HOA Trustee's foreclosure. *Id*.

Furthermore, CB Trust's position overlooks the requirements of NRS 116.31166(3), which extend beyond the matters recited in the trustee's deed. Its reading of NRS 116.31166 ignores the axiom that no part of a statute should be construed to render another void. *See Harris Assocs.*, 119 Nev. at 642, 81 P.3d at 534; *accord, e.g.*, *Banegas v. State Indus. Ins. System*, 117 Nev. 222, 229, 19 P.3d 245, 250 (2001) ("[W]ords within a statute must not be read in isolation, and statutes must be construed to give meaning to all of their parts and language within the context of the purpose of the legislation."). Further, where statutory provisions may be viewed as conflicting, they must be harmonized. *See, e.g. Int'l Game Tech., Inc. v. Second Judicial Dist. Court ex rel. County of Washoe*, 124 Nev. 193, 201, 179 P.3d 556, 561 (2008); *Acklin v. McCarthy*, 96 Nev. 520, 523, 612 P.2d 219, 220 (1980) ("An entire act must be construed in light of its purpose and as a whole.").

Ignoring these two maxims, CB Trust has contended that under NRS 116.31166(1–2), an HOA's compliance with the HOA Lien Statute rests solely on reciting compliance with the statute's notice provisions in a foreclosure deed.

According to CB Trust, because the foreclosure deed in this case contains these recitations, it is entitled to summary judgment on its quiet title claim without producing any evidence of actual compliance with the HOA Lien Statute.

CB Trust's interpretation would render NRS 116.31166(3) null. CB Trust essentially argues that the recitals in the Foreclosure Deed are conclusive proof that the foreclosure extinguished BANA's Deed of Trust under NRS 116.31166(1–2). But that argument ignores NRS 116.31166(3)'s requirement that the foreclosure sale be conducted *pursuant to NRS 116.31162, 116.31163, and 116.31164* to vest the purchaser at the HOA foreclosure sale with title to the Property. As this Court has explained, the Legislature's use of "pursuant to" means "in compliance with; in accordance with; under . . . [a]s authorized by; under . . . [i]n carrying out." *In re Steven Daniel P.*, 309 P.3d 1041, 1044 (2013) (quoting BLACK'S LAW DICTIONARY at 1356 (9th ed. 2009)). Furthermore, "pursuant to" is a "restrictive term" that mandates compliance. *Id*.

Here, by using the phrase "pursuant to" in NRS 116.31166(3) with reference to NRS 116.31162, 116.31163 and 116.31164, the Nevada Legislature mandated compliance with those statutes. Consequently, an HOA's foreclosure sale does not vest title without equity or right of redemption unless the HOA actually complied with NRS 116.31162, NRS 116.31163, and NRS 116.31164, not just NRS 116.31166(1). The recitals, in this case, simply said:

> This conveyance is made pursuant to the powers conferred upon Trustee by NRS 116 et seq., and that certain Notice of Delinquent Assessment Lien described herein. Default occurred as set forth in a Notice of Default and Election to Sell which was recorded in the office of the recorder of said county. All requirements of law regarding the mailing of copies of notices and the posting and publication of the copies of the Notice of Sale have been complied with. Said property was sold by said Trustee at public auction on January 16, 2013 at the place indicated on the Notice of Trustee's Sale.

R. 47. Missing from the Deed of Trust are recitations, for instance, that the HOA had mailed the homeowner a schedule of additional fees that could be charged, a proposed repayment plan, and notice of right to contest the past due obligation, as required by NRS 116.31162. Nor did the Deed of Trust recite that the HOA Trustee had complied with the procedures in NRS 116.31164(3) for post-sale matters.[8]

CB Trust's interpretation of NRS 116.31166 not only would write the notice requirements of NRS 116.31162, NRS 116.31163, and NRS 116.31164 out of existence, it also would lead to absurd and unjust results. According CB Trust's logic, an HOA could fail to record any of the three notices the HOA Lien Statute requires, *falsely* recite that they did in fact record the notices, and the court would

[8] U.S. Bank freely admits that it is logically impossible for the Trustee's Deed Upon Sale to describe the HOA Trustee's compliance with the post-sale requirements of NRS 116.31164(3). This only further illustrates the absurdity of CB Trust's position that a conclusory recitation of compliance with "all requirements of law" in the Deed of Trust could preclude any inquiry into the circumstances of that compliance.

be forced to hold that the notices were in fact recorded, *even if* the opposing party produced irrefutable evidence that proved the recitals were false. And there is no limiting principle to CB Trust's position; a dishonest HOA could collude with a dishonest purchaser to sell property without any proper announcement to the current owner or other security holders and still take title to the property free and clear under the aegis of a patently false, yet "irrefutable" recitation. The Nevada Legislature could not have possibly intended such unjust consequences

The Alaska Supreme Court considered a similar issue in *Rosenberg v. Smidt*, 727 P.2d 778 (Alaska 1986). There, the appellants argued that under Alaska's version of the 1982 UCIOA, the recitals in the foreclosure sale deed were conclusive evidence of compliance in favor of bona fide purchasers. *Id*. at 783. The deed in that case stated (similar to the trustee deed here):

> All other requirements of law regarding the mailing, publication and personal delivery of copies of the Notice of Default and all other notices have been complied with, and said Notice of Sale was publicly posted as required by law and published in the Anchorage Times on August 26 and September 2, 9, and 16, 1980.

Id. The parties disputed whether the deed barred the respondents from overturning the sale based on lack of notice. *Id*. While the appellants alleged that the court should accept the recitals as "conclusive proof," the respondents alleged that only

recitals of fact, not conclusions of law, were subject to this standard.[9] The court held as follows:

> The fact that .080(c) explicitly calls for factual details in the deed recital concerning recording, price, publication, and sale suggests that facts are also called for concerning mailing or delivery. *Further, requiring a factual recital tends to assure that the requirements of law concerning mailing or delivery are complied with*. A conclusory statement can be a matter placed in a form, or a programmed deed, and will not require the trustee to review what was actually done. A factual recital does require review in each case. While a factual recital requirement does not protect against fraud in all cases, it does tend to prevent the more common failings of oversight and neglect. A conclusory recital, on the other hand, accomplishes little or nothing.

Id. at 786 (emphasis added). The court also reasoned that one of UCIOA's primary purposes was to "require that effective notice of default and sale be given parties in interest, and to provide a self-effecting method of assuring that such notice is given."

As this Court recognized in *SFR Investments*, the first-lien-extinguishing effect of NRS 116.3116 constitutes a "'significant departure from existing practice.'" 334 P.3d at 412 (quoting UCIOA § 3-116, cmt 1 (1982)). For that reason alone, strict compliance with the statute should be required before a first lienholder has its deed of trust extinguished. But here, the district court granted

[9] AS § 3.20.080(c) provides: The deed shall recite the date and the book and page of the recording of default, and the mailing or delivery of the copies of the notice of default, the true consideration for the conveyance, the time and place of the publication of notice of sale, and the time, place and manner of sale, and refer to the deed of trust by reference to the page, volume and place of record.

judgment in favor of CB Trust without giving U.S. Bank any opportunity to explore in discovery whether the HOA did, in fact, comply with all of the requirements of the HOA Lien Statute. For that additional and independent reason, the district court's judgment should be reversed.

CONCLUSION

For all of the above reasons, the district court's judgment should be reversed, and summary judgment awarded instead to U.S. Bank on all claims in this case. In the alternative, the case should be remanded to the district court for further proceedings, consistent with this Court's ruling in *Shadow Wood*.

DATED this 2nd day of February, 2016.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this opening brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14 point font size.

I FURTHER CERTIFY that this opening brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C) it is proportionally spaced, has a typeface of 14 points or more and contains 8,777 words.

FINALLY, I CERTIFY that I have read this **Appellant's Initial 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 answering brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 2nd day of February, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of February, 2016, I served and deposited for mailing in the U.S. Mail a true and correct copy of the foregoing **APPELLANT'S INITIAL BRIEF**, postage prepaid and addressed to:

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