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SUPREME COURT

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 2006-OA1; and CLEAR RECON CORPS, Appellant, vs. 5316 CLOVER BLOSSOM CT TRUST, Respondent.	No. 68915

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

Counsel for plaintiff/respondent states that plaintiff/respondent, 5316 Clover Blossom Ct Trust, is a Nevada Trust. Resources Group, LLC, a Nevada limited-liability company, is the trustee of the trust. The manager for Resources Group, LLC is Iyad Haddad.

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1. Whether the foreclosure of the HOA's assessment lien extinguished defendant's first deed of trust.

2. Whether the recitals in the foreclosure deed are conclusive in the absence of proof of fraud, unfairness, or oppression.

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

4. Whether an HOA foreclosure sale is required to be "commercially reasonable."

5. Whether defendant made an effective tender of the superpriority amount prior to the HOA foreclosure sale.

6. The standard of review for the district court's granting of summary judgment is de novo.

STATEMENT OF THE CASE

Plaintiff 5316 Clover Blossom Ct Trust (hereinafter "plaintiff") filed a verified complaint on July 25, 2014 asserting three claims for relief: 1) entry of an injunction prohibiting defendant U.S. Bank, National Association, successor trustee to Bank of America, N.A., successor by merger to Lasalle Bank, N.A., as trustee to holders of the Zuni Mortgage Loan Trust 2006-OA1, Mortgage Loan Pass-through Certificates Series 2006-OA1 (hereinafter "defendant") and Clear Recon Corps (hereinafter "Clear Recon") from foreclosing the deed of trust recorded on June 30, 2004 against the property commonly known as 5316 Clover Blossom Ct, North Las Vegas, Nevada (hereinafter "Property"); 2) for entry of a determination pursuant to NRS 40.010 that plaintiff was the rightful owner of the Property and that the defendants had no right, title, interest or claim to the Property; 3) for entry of a declaration that title to the Property was vested in plaintiff free and clear of all liens and that the defendants be forever enjoined from asserting any right, title, interest or claim to the Property. (App. Vol. I, pgs. 1-6)

On September 25, 2014, defendant filed an answer to complaint. (App. Vol. I, pgs. 7-12)

On April 23, 2015, plaintiff filed an amended complaint that added specific allegations that the HOA foreclosure sale complied with all requirements of law (¶7) and that prior to the HOA foreclosure sale, no individual or entity paid the super-priority portion of the HOA lien (¶8).(APP. Vol. I, pgs. 15-17)

On May 18, 2015, plaintiff filed a motion for summary judgment. (App. Vol. I, pg. 31 to App. Vol. II, pg. 88) On July 22, 2015, defendant filed an opposition to plaintiff's motion and a countermotion for summary judgment. (App. Vol. II, pgs. 89 to App. Vol. III, pg. 176) On July 29, 2015, defendant filed a reply in support of plaintiff's motion for summary judgment and opposition to countermotion for summary judgment. (App. Vol. III, pg. 177 to App. Vol. IV, pg. 197)

On August 13, 2015, defendant filed a supplemental briefing in support of

countermotion for summary judgment. (App. Vol. IV, pgs. 198-211)

At the hearing held on August 20, 2015, the court granted plaintiff's motion for summary judgment. Written findings of fact, conclusions of law, and judgment granting quiet title was entered on September 10, 2015. (App. Vol. IV, pgs. 212-218).

Notice of entry of judgment was filed and served on September 10, 2015. (App. Vol. IV, pgs. 219-227) Defendant filed its notice of appeal from the judgment on September 28, 2015. (App. Vol. IV, pgs. 228-230)

STATEMENT OF FACTS

Plaintiff is the owner of the Property and obtained title to the Property by way of a foreclosure deed recorded on January 24, 2013 (App. Vol. I, pgs. 47-48).

Countrywide Home Loans, Inc. was named as the "Lender" and MERS was named as the beneficiary in a deed of trust recorded against the Property on June 30, 2004. (App. Vol. II, pg. 114 to App. Vol. III, pg. 145) An assignment of deed of trust in favor of the defendant was recorded on June 20, 2011. The assignment listed defendant's address as 9062 Old Annapolis Rd., Columbia, MD 21045. (App. Vol. III, pgs. 147-148)

On February 22, 2012, the foreclosure agent for Country Gardens Owners' Association (hereinafter "HOA") recorded a notice of delinquent assessment (lien) as instrument # 201202220001651 with the County Recorder for Clark County, Nevada. (App. Vol. I, pg. 50) On April 20, 2012, the foreclosure agent for the HOA recorded a notice of default and election to sell under homeowners association lien as instrument # 201204200000428 with the County Recorder for Clark County, Nevada. (App. Vol. I, pg. 55) On April 30, 2012, the foreclosure agent mailed a copy of this notice to defendant at 9062 Old Annapolis Rd., Columbia, MD 21045. (App. Vol. I, pg. 52 and pg. 59)

On October 25, 2012, the foreclosure agent mailed a copy of a notice of trustee's sale to defendant at 9062 Old Annapolis Rd., Columbia, MD 21045. (App.

Vol. II, pg. 68) On October 31, 2012, the foreclosure agent for the HOA recorded the notice of trustee's sale as instrument # 201210310000738 with the County Recorder for Clark County, Nevada. (App. Vol. II, pg. 72)

On October 28, 2012, the foreclosure agent caused a copy of the notice of trustee's sale to be posted on the Property and to be posted for 20 days consecutively in three public places in Clark County, Nevada. (App. Vol. II, pgs. 74-75) A copy of the notice of trustee's sale was published in the Clark County Legal News on November 2, November 9, and November 16 of 2012. (App. Vol. II, pg. 77)

As reflected by the foreclosure deed recorded on January 24, 2013, at the public auction held on January 16, 2013, plaintiff was the highest bidder and paid the bid amount of $8,200.00 in cash. (App. Vol. I, pgs. 47-48)

SUMMARY OF THE ARGUMENT

The language in NRS 116.3116(2) granted to the HOA a super priority lien that extinguished defendant's first deed of trust when plaintiff purchased the real property at the HOA foreclosure sale held on January 16, 2013.

The conclusive recitals in the foreclosure deed recorded on January 24, 2013 prove that the HOA complied with all requirements necessary to make the deed "conclusive" against the defendant pursuant to NRS 116.31166(2). The exhibits to plaintiff's countermotion for summary judgment proved that the recitals are true.

The nonjudicial foreclosure process prescribed by NRS 116.31162 to NRS 116.31168, and by incorporation, NRS 107.090, does not violate due process because no "state actor" participates in the nonjudicial foreclosure process and because the HOA must mail copies of both the notice of default and the notice of sale to holders of "subordinate" liens affected by the sale even if they do not request notice.

A nonjudicial foreclosure sale under NRS Chapter 116 is not required to be "commercially reasonable" and cannot be set aside based solely on a claim that the sale was "commercially unreasonable."

The HOA foreclosure agent's rejection of the amount tendered by Bank of

America does not affect the validity of the HOA foreclosure sale or plaintiff's status as a bona fide purchaser.

STANDARD OF REVIEW

In the case of Wood v. Safeway, Inc., 121 Nev. 724, 121 P.3d 1026, 1029 (2005), this Court stated that it "reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court." This Court also stated:

> Summary judgment is appropriate under NRCP 56 when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant. A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party.

121 Nev. at 731, 121 P.3d at 1031.

ARGUMENT

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

NRS 116.3116 provides in part:

> **Liens against units for assessments.**
>
> 1. **The association has a lien on a unit for** any construction penalty that is imposed against the unit's owner pursuant to NRS 116.310305, **any assessment levied against that unit or any fines imposed against the unit's owner from the time the construction penalty, assessment or fine becomes due**. Unless the declaration otherwise provides, any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.
>
> 2. **A lien under this section is prior** to all other liens and encumbrances on a unit **except:**
>
> (a) Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to;
>
> (b) **A first security interest on the unit** recorded before the date on which the assessment sought to be enforced became delinquent or, in a cooperative, the first security interest encumbering only the unit's

owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent; and

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

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

NRS 116.3116 (2) provides that the super-priority lien for 9 months of charges is "prior to all security interests described in paragraph (b)." The first deed of trust, recorded on April 3, 2003, falls squarely within the language of paragraph (b). The statutory language does not limit the nature of this "priority" in any way.

In its decision in the case of SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408 (2014), this Court stated:

> NRS 116.3116 gives a homeowners' association (HOA) a superpriority lien on an individual homeowner's property for up to nine months of unpaid HOA dues. With limited exceptions, this lien is "prior to all other liens and encumbrances" on the homeowner's property, even a first deed of trust recorded before the dues became delinquent. NRS 116.3116(2). We must decide whether this is a true priority lien such that its foreclosure extinguishes a first deed of trust on the property and, if so, whether it can be foreclosed nonjudicially. We answer both questions in the affirmative and therefore reverse.

334 P.3d at 409.

At the conclusion of its opinion, this Court stated:

> NRS 116.3116(2) gives an HOA a true superpriority lien, proper

> foreclosure of which will extinguish a first deed of trust. Because Chapter 116 permits nonjudicial foreclosure of HOA liens, and because SFR's complaint alleges that proper notices were sent and received, we reverse the district court's order of dismissal. In view of this holding, we vacate the order denying preliminary injunctive relief and remand for further proceedings consistent with this opinion.
>
> Id. at 419.

Because the facts in the present case are substantially the same as the facts in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., the district court should have found that the nonjudicial foreclosure of the HOA's super priority lien at the public auction held on January 16, 2013 extinguished the "first security interest" held by defendant.

2. The recitals in the foreclosure deed are conclusive in the absence of grounds for equitable relief.

NRS 116.31166 provides that the recitals in the foreclosure deed are sufficient and conclusive proof that a default occurred and that the required notices were mailed by the HOA. The first page of the foreclosure deed recorded on January 24, 2013 includes each of the five recitals required by NRS 116.31166(1): (1) default, (2) mailing of the delinquent assessment, (3) recording of the notice of default and election to sell, (4) the elapsing of the 90 days, and (5) the giving of the notice of sale. (App. Vol. I, pg. 47)

NRS 116.31166 provides:

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

equity or right of redemption. (emphasis added)

/ / /

NRS 47.240(6) also provides that conclusive presumptions include "[a]ny other presumption which, by statute, is expressly made conclusive." Because NRS 116.31166 contains such an expressly conclusive presumption, the recitals in the foreclosure deed are "conclusive proof" that defendant was served with copies of the notice of default and the notice of sale for the foreclosure sale. Exhibit 3 to plaintiff's motion proved that on April 30, 2012, the foreclosure agent mailed a copy of the notice of default to defendant at 9062 Old Annapolis Rd., Columbia, MD 21045. (App. Vol. I, pg. 52 and pg. 59) Exhibit 4 to plaintiff's motion proved that on October 25, 2012, the foreclosure agent mailed a copy of a notice of trustee's sale to defendant at 9062 Old Annapolis Rd., Columbia, MD 21045. (App. Vol. II, pg. 68) Defendant did not deny that the HOA's agent mailed copies of both of the required notices to defendant.

In Shadow Wood Homeownwers Association v. New York Community Bank, 132 Nev. Adv. Op. 5 (2016), this Court stated that "[h]istory and basic rules of statutory interpretation confirm our view that courts retain the power to grant equitable relief from a defective foreclosure sale when appropriate despite NRS 116.31166." Id. at *11. This Court also stated:

> And, cases elsewhere to have addressed comparable conclusive- or presumptive-effect recital statutes confirm that such recitals do not defeat equitable relief in a proper case; rather, such recitals are "conclusive, *in the absence of grounds for equitable relief*." Holland v. Pendleton Mortg. Co., 61 Cal. App. 2d 570, 143 P.2d 493, 496 (Cal. Ct. App.1943) (emphasis added); *see* Bechtel v. Wilson, 18 Cal. App. 2d 331, 63 P.2d 1170, 1172 (Cal. Ct. App.1936) (distinguishing between a challenge to the sufficiency of pre-sale notice, which was precluded by the conclusive recitals in the deed, and an equity-based challenge based upon the alleged unfairness of the sale); *compare* 1 Grant S. Nelson, *Real Estate Finance Law, supra,* § 7:23, at 986–87 ("After a defective power of sale foreclosure has been consummated, mortgagors and junior lienholders in virtually every state have an equitable action to set aside the sale.") (footnotes omitted), *with id.* § 7:22, at 980–82 (noting that "[m]any states have attempted to enhance the stability of power of sale foreclosure titles by enacting a variety of *presumptive statutes* "), *and* 6 Baxter Dimaway, *Law of Distressed Real Estate,* § 64:161 (2015)

(noting that a trustee's deed recital can be overcome on a showing of actual fraud).

/ / /

In the present case, defendant offered no evidence that the foreclosure sale was defective or that there were any equitable grounds to set the sale aside. Defendant's opposition and countermotion for summary judgment was instead based on defendant's claim that the HOA foreclosure statute violated defendant's right to due process (App. Vol. II, pgs. 93-98), that the HOA's foreclosure agent failed to provide defendant with notice of the super-priority amount and refused to accept defendant's tender of $1,494.50 (App. Vol. II, pgs. 98-103), and that an HOA foreclosure sale must be commercially reasonable and that the purchase price of $8,200.00 paid by plaintiff was only 6% of the $147,456.00 loan owed to defendant. (App. Vol. II., pgs. 103-108)

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

At page 6 of Appellant's Initial Brief, defendant contends that "the provisions of NRS 116 governing foreclosures on HOA liens (the **HOA Lien Statute**) are facially unconstitutional under the Due Process Clause of the Nevada and U.S. Constitutions." In SFR Investments Pool 1, LLC v. U.S. Bank, N.A.,130 Nev., Adv. Op. 75, 334 P.3d 408 (2014), on the other hand, this Court stated that "[t]he contours of U.S. Bank's due process argument are protean" and that U.S. Bank's argument that the statutory scheme offended due process "is a nonstarter." 334 P.3d at 418.

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

The United States Supreme Court agrees that in order for the "due process" clause to be implicated, a "state actor" must participate. In Lugar v. Edmondson Oil Co., Inc., 475 U.S. 922 (1982), the Supreme Court stated that "[o]ur cases have

accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State" and that "fair attribution" required a two-part approach: 1) "the deprivation must be caused by the exercise of some right or privilege created by the State"; and 2) "the party charged with the deprivation must be a person who may fairly be said to be a state actor." Id. at 937.

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

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

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

At page 7 of Appellant's Initial Brief, defendant cites J.D. Construction, Inc. v. Ibex International Group, LLC, 126 Nev. Adv. Op. 36, 240 P.3d 1033 (2010), as authority that "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, Inc. v. Ibex International Group, LLC, however,

this Court applied due process requirements to the judicial remedy provided by NRS 108.2275 to expunge a frivolous or excessive lien, which required a hearing in the district court. The foreclosure of a mechanic's lien pursuant to NRS 108.239 also requires the filing of a civil action in "any court of competent jurisdiction that is located within the county where the property upon which the work of improvement is located . . . ." NRS Chapter 116, on the other hand, provides for a non-judicial foreclosure process that does not involve a "state actor."

In Connolly Development, Inc. v. Superior Court, 17 Cal. 3d 803, 553 P.2d 637 (1976), the court found that "the imposition and enforcement of mechanic's liens and stop notices constitute state action," but the court recognized that the lien "becomes effective only upon recordation with the county recorder, an official of the state; moreover, it can be enforced only by resort to the state courts." 17 Cal. 3d at 815. In footnote 14, the court also stated: "We do not therefore rest our holding that stop notice procedures involve state action merely upon the fact the procedure was created by statute."

At pages 7 and 8 of Appellant's Initial Brief, defendant cites Culbertson v. Leland, 528 F.2d 426 (9th Cir. 1975), and claims that due process rights are different when a "written instrument defined the rights of the parties" than when "[t]hat seizure was authorized solely by statute." Id. at 431-432. This reasoning used by the Court in Culbertson v. Leland, however, was expressly rejected in Melara v. Kennedy, 541 F.2d 802 (9th Cir. 1976), where the Court of Appeals stated that "[t]he authorization by statute of the challenged conduct does not by itself require a finding of state action," (Id. at 804) and that "lack of common law origin is a factor of dubious worth." (Id. at 806) The Court also recognized that "the statute creates only the right to act; it does not require that such action be taken." Id.

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

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

At page 9 of Appellant's Initial Brief, defendant contends that "[t]he HOA Lien Statute is unconstitutional on its face because it doe not ensure that mortgagees at risk of losing property interests will receive notice and an opportunity to be heard." In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408 (2014), on the other hand, this Court painstakingly went through each of the foreclosure requirements in NRS Chapter 116 and called the statutory scheme "elaborate." In rejecting U.S. Bank's claim that there was a due process violation, this Court stated:

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

NRS 116.31168 provides in part:

> **Foreclosure of liens: Requests by interested persons for notice of default and election to sell; right of association to waive default and withdraw notice or proceeding to foreclose.**
>
> 1. **The provisions of NRS 107.090 apply to the foreclosure of an**

association's lien as if a deed of trust were being foreclosed. The request must identify the lien by stating the names of the unit's owner and the common-interest community. (emphasis added)

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

Request for notice of default and sale: Recording and contents; mailing of notice; request by homeowners' association; effect of request.

1. As used in this section, "person with an interest" means any person who has or claims any right, title or interest in, or lien or charge upon, the real property described in the deed of trust [association's lien], as evidenced by any document or instrument recorded in the office of the county recorder of the county in which any part of the real property is situated.

2. **A person with an interest** or any other person who is or may be held liable for any debt secured by a lien on the property desiring a copy of a notice of default or notice of sale under a deed of trust [association's lien] with power of sale upon real property **may at any time after recordation of the deed of trust [association's lien] record in the office of the county recorder** of the county in which any part of the real property is situated **an acknowledged request for a copy of the notice of default or of sale**. The request must state the name and address of the person requesting copies of the notices and identify the deed of trust [association's lien] by stating the names [of the unit's owner and the common-interest community] of the parties thereto, the date of recordation, and the book and page where it is recorded.

3. The trustee or person authorized to record **the notice of default** shall, within 10 days after the notice of default is recorded and mailed pursuant to NRS 107.080, cause to be deposited in the United States mail an envelope, registered or certified, return receipt requested and with postage prepaid, containing a copy of the notice, addressed to:

(a) Each person who has recorded a request for a copy of the notice; **and**

(b) Each other person with an interest whose interest or claimed interest is subordinate to the deed of trust [association's lien].

4. The trustee or person authorized to make the sale shall, at least 20 days before the date of sale, cause to be deposited in the United States mail an envelope, registered or certified, return receipt requested and with postage prepaid, containing a copy of **the notice of time and place of sale**, addressed to each person described in subsection 3. (emphasis added)

At page 10 of Appellant's Initial Brief, defendant quotes from Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983), and highlights the words "as

certain to ensure actual notice" in order to direct attention away from the Court's statement that "[n]otice by mail" satisfies the notice requirement. In particular, the Supreme Court stated:

> Since a mortgagee clearly has a legally protected property interest, he is entitled to notice reasonably calculated to apprise him of a pending tax sale. Cf. Wiswall v. Sampson, 14 How. 52, 67 (1853). **When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice must be supplemented by notice mailed to the mortgagee's last known available address,** or by personal service. But unless the mortgagee is not reasonably identifiable, constructive notice does not satisfy the mandate of *Mullane.* (emphasis added)
>
> 462 U.S. at 798.

The Supreme Court therefore recognized that due process only requires that notice be mailed to the "last known available address" of a mortgagee "identified in a mortgage that is publicly recorded." There is no requirement that the notice be received by the mortgagee.

The opinion in Mennonite Board of Missions v. Adams is consistent with the notice requirements in NRS 107.090 and this Court's holding that a nonjudicial foreclosure agent's only duty is to mail the notices, that "[t]heir mailing presumes that they were received," and that "[a]ctual notice is not necessary as long as the statutory requirements are met." Hankins v. Administrator of Veteran Affairs, 92 Nev. 578, 555 P.2d 483, 484 (1976); Turner v. Dewco, 87 Nev. 14, 479 P.2d 462, 464 (1971)(applying NRS 107.080(3)).

At page 10 of Appellant's Initial Brief, defendant claims that "Nevada law does not 'under all circumstances' ensure actual notice to a deed of trust holder" and that "[m]ortgagees mus receive notice *only* if they have previously requested notice from the HOA." However, at page 10 of Appellant's Initial Brief, defendant cites only NRS 116.31163 (1)-(2) and NRS 116.311635, and in the chart on page 12 of Appellant's Initial Brief, defendant only includes the notice provisions from NRS 116.31162 and NRS 116.311635. Defendant thereby ignores the "mandatory" notice provision for holders of "subordinate" interests contained in NRS 107.090(3)(b) and

NRS 107.090(4) that are expressly incorporated by NRS 116.31168(1).

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

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

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

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

At page 16 of Appellant's Initial Brief, defendant asserts that NRS 116.31168 "implements the notice provisions of NRS 107.090 only to the extent they apply to parties who have requested notice in advance." At page 17 of Appellant's Initial Brief, defendant claims that the use of the word "request" in the title of NRS

116.31168 and in the second sentence of NRS 116.31168(1) supersedes the express language in the first sentence of NRS 116.31168(1) that incorporates all of "[t]he provisions of NRS 107.090" and not just the request for notice provisions in NRS 107.090(2) and NRS 107.090(3)(a). In SFR, this Court acknowledged that the notices required by NRS 107.090 are required for an HOA foreclosure "by incorporation." 334 P.3d at 418.

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

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

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

At page 17 of Appellant's Initial Brief, defendant contends that the second sentence in NRS 116.31168(1) "refers back to the more specific sections of NRS Chapter 116 that govern notice – for instance, NRS 116.311635." To the contrary, the second sentence in NRS 116.31168(1) refers to the request for notice provision in NRS 107.090(2) that is expressly incorporated by the first sentence in NRS 116.31168(1) and modifies the language in NRS 107.090(2), so that it applies to an HOA foreclosure. The first sentence in NRS 116.31168(1), on the other hand, expressly incorporates "the provisions of NRS 107.090" and not just the request for notice provision in NRS 107.090(2).

NRS 107.090(4) expressly requires that a copy of the notice of time and place

of sale be mailed "to each person described in subsection 3." Because NRS 107.090(4) is one of "the provisions of NRS 107.090," the requirement that a copy of the notice of sale be mailed to holders of "subordinate" interests is also incorporated by NRS 116.31168(1).

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

At page 18 of Appellant's Initial Brief, defendant contends that "[i]f NRS 116.31168 incorporates all of the notice requirements of NRS 107.090," the provisions in NRS 116.31163(1), NRS 116.31163(2), NRS 116.311635(b)(1), and NRS 116.311635(b)(2) are "completely superfluous." To the contrary, the mandatory notices required by NRS 107.090(3)(b) and NRS 107.090(4), as incorporated by NRS 116.31168(1), do not render the statute's "opt-in" notice provisions superfluous because the "mandatory" notices are provided only to holders of interests "subordinate" to the HOA's assessment lien. On the other hand, the request for notice provision in NRS 107.090(2) that is incorporated by NRS 116.31163(1) and NRS 116.31168(1) applies to any "person with an interest" who records a request for notice. The request for notice provisions in NRS 116.31163(2) and NRS 116.311635(b)(2) likewise extend to "[a]ny holder of a recorded security interest."

Because more persons qualify to request notice of the default and the notice of sale than are "required" to receive notice as holders of "subordinate" interests, the "mandatory" notices required by NRS 107.090(3)(b) and NRS 107.090(4) do not render the "request for notice" provisions "superfluous." NRS 107.090 contains both request for notice provisions in NRS 107.090(2) and NRS 107.090(3)(a), (4) and mandatory notice provisions in NRS 107.090(3)(b), (4), and no lender argues that the mandatory notice for holders of "subordinate" interests renders the "request for notice" provisions in NRS 107.090 superfluous.

At the bottom of page 18 of Appellant's Initial Brief, defendant argues that NRS 116.31163(1) and NRS 116.31163(2) provide that the notice of default "need only be provided" to a mortgagee who has requested notice. At the bottom of page 18 and top of page 19 of Appellant's Initial Brief, defendant also argues that NRS 116.311635(b)(1) and NRS 116.311635(b)(2) require that the notice of foreclosure sale "be sent *only* to those who have *requested*" notice. Nothing in these sections states that they supersede the mandatory notice provisions in NRS 107.090 that are expressly incorporated by NRS 116.31168(1).

At page 19 of Appellant's Initial Brief, defendant contends that giving effect to the mandatory notice provisions for holders of "subordinate" interests incorporated by NRS 116.31168(1) "renders every one of these provisions meaningless." Because the "mandatory" notices are only required for holders of "subordinate" interests, and because NRS 107.090 uses the word "and" between NRS 107.090(3)(a) and NRS 107.090(3)(b), the "mandatory" notice requirements for holders of "subordinate" interests are in addition to and not in place of the "request" for notice provisions that can be used by any holder of an interest.

Defendant, however, seeks to eliminate from the statute the exact notice requirement that was placed in the statute to ensure that copies of both the notice of default and the notice of sale are mailed to holders of "subordinate" interests.

This Court has directed that "whenever possible, a court will interpret a rule or

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

If this Court were to adopt the defendant's analysis, then every nonjudicial foreclosure of a deed of trust pursuant to NRS 107.080 would be unconstitutional because the mandatory notice requirements in NRS 107.090(3)(b) and NRS 107.090(4) would make the "request for notice" provisions in NRS 107.090(2) "superfluous." On the other hand, the use of the word "and" between NRS 107.090(3)(a) and NRS 107.090(3)(b) reveals the Legislature's intent that the mandatory notice for holders of "subordinate" interests supplements, and does not supersede, the notices required for persons who record a request for notice.

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

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

HOA Foreclosure	Statutory Requirement	Bank Foreclosure
NRS 116.31162(1)(a)	Delinquency by homeowner	NRS 107.080(1)
NRS 116.31162(1)(a)	Mail notice of delinquency to homeowner	No statutory requirement but required by terms of deed of trust
NRS 116.31162(1)(b)	Execute notice of default and election to sell (NOD) that describes the deficiency in payment	NRS 107.080(2)(b)
NRS 116.31162(1)(a)	Record NOD	NRS 107.080(3)
NRS 116.31162(2)(b)	Mail NOD by certified or registered mail, return receipt requested to homeowner	NRS 107.080(3)
NRS 116.31163 and NRS 116.31168 (incorporating requirements of NRS 107.090)	Mail NOD to interested parties who request notice	NRS 107.090(3)(a)
NRS 116.31168 (incorporating requirements of NRS 107.090)	Mail NOD to subordinate claim holders	NRS 107.090(3)(b)
NRS 116.31162(1)(c)	Failure to pay for 90 days after NOD is recorded and mailed	NRS 107.080(3)
NRS 116.311635(1)(a)	Give notice of the time and place of the sale in the manner and for a time not less than that required by law for the sale of real property upon execution/posting in a public place and on property	NRS 107.080(4)

HOA Foreclosure	Statutory Requirement	Bank Foreclosure
NRS116.311635(1)(a)(1)	Mail Notice of Sale (NOS) to homeowner	NRS 107.080(4)
NRS116.311635(1)(b)(1) and NRS116.311635(1)(b)(3)	Mail NOS to interested parties who request notice	NRS 107.090(4)
NRS 116.31168 (incorporating requirements of NRS 107.090)	Mail NOS to subordinate claim holders	NRS 107.090(4)
NRS116.311635(1)(b)(3)	Mail NOS to Ombudsman	No statutory requirement
NRS 116.311635(2)	Post NOS on property or personally deliver to homeowner	NRS 107.080(4)

NRS 107.090, as incorporated by NRS 116.31168(1), expressly provides that notices be mailed to all persons with an interest, whose interests are subordinate to the HOA's super priority lien, regardless of whether they request notice. The statutory requirements for foreclosure of an HOA lien and trust deed are virtually identical, and the statutes mirror each other. Because these notice requirements are constitutional when used to foreclose a deed of trust, they are also constitutional when used to foreclose an HOA assessment lien.

5. The amount paid by plaintiff at the HOA foreclosure sale does not affect the validity of the sale.

At page 20 of Appellant's Initial Brief, defendant asserts that "Nevada subjects HOA foreclosures to a commercial reasonableness test." NRS Chapter 116 does not contain any language that requires an HOA foreclosure sale to be "commercially reasonable," and no language in NRS Chapter 116 even suggests that an interested party can seek to set aside an HOA foreclosure sale as being "commercially unreasonable" under the terms of the Uniform Commercial Code. Instead, this Court stated in SFR:

> NRS 116.3116 largely tracks section 3-116(a)-(ii) of the 1982 UCIOA. But it does not use the language in subsections (j) and (k) of UCIOA §

> 3-116, which offer alternative HOA lien foreclosure provisions for adaptation to local law. *See* 1982 UCIOA § 3-116(j)(1) ("In a condominium or planned community, the association's lien must be foreclosed in a like manner as a mortgage on real estate [or by power of sale] under [insert appropriate state statute]]."); *id.* § 3-116(k) (offering optional fast-track foreclosure method for cooperatives, which often carry substantial debt service obligations). **Instead, the Nevada Legislature handcrafted a series of provisions to govern HOA lien foreclosures, NRS 116.31162 through NRS 116.31168**, and refashioned 1982 UCIOA §§ 3-116(j)(2) and (3), concerning cooperatives, as NRS 116.3116(10). (emphasis added)
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> 130 Nev. Adv. Op. 75 at *6, 334 P.3d at 411.

At page 20 of Appellant's Initial Brief, defendant argues that the "obligation of good faith" in NRS 116.1113 must be interpreted as incorporating the definition of "good faith" now found in NRS 104.1201(2)(t) and as adding a "commercial reasonableness" standard to the HOA foreclosure sale. Although the comment to Section 1-113 of the UCIOA states that the definition of "good faith" contained in Section1-113 of the UCIOA is derived from and used in the same manner as in Sections 2-103(i)(b) and 7-404 of the Uniform Commercial Code," the definition adopted in the comment does not include the word "commercial."

The amendment to NRS Chapter 104 made in 2005 placed the current definition of "good faith" in Nevada's Uniform Commercial Code in NRS 104.1201(2)(t). NRS 104.1102 expressly provides that Article 1 of the Uniform Commercial Code "applies to a transaction to the extent that is governed by another Article of the Uniform Commercial Code." No provision of the Uniform Commercial Code purports to govern an HOA foreclosure sale.

Prior to the 2005 amendment, the definition of "good faith" contained in NRS 104.2103(1)(b) stated: "'Good faith' **in the case of a merchant** means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." (emphasis added) The HOA is not a "merchant," so the former definition of "good faith" in NRS 104.2103(1)(b) could not apply to it.

Furthermore, NRS 104.9109(4)(k) provides that Article 9 of the Uniform

Commercial Code does not apply to "[t]he creation or transfer of an interest in or lien on real property" except in four instances. An HOA lien is not one of the listed exceptions. Consequently, the language in NRS 104.9610(2) requiring that "[e]very aspect of a disposition of collateral, including the method, manner, time, place and other terms, must be commercially reasonable" does not apply to the HOA foreclosure sale that was held in the present case pursuant to NRS 116.31162 through NRS 116.31168 and, by incorporation, NRS 107.090.

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

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

Because there is no provision for "commercial reasonableness" within NRS Chapter 116, it would be improper to impose this additional requirement when it is not specifically set forth in the chapter.

In Shadow Wood Homeownwers Association v. New York Community Bank, 132 Nev. Ad. Op. 5 (2016), this Court stated multiple times that price alone is not sufficient to set aside a foreclosure sale. For example, this Court stated:

> While not directly addressing the preemption argument Shadow Wood and Gogo Way make as to NRS 116.31166, our post-NRS 107.030(8) cases reaffirm that courts retain the power, in an appropriate case, to set aside a defective foreclosure sale on equitable grounds. *See Golden v. Tomiyasu,* 79 Nev. at 514, 387 P.2d at 995 **(adopting the California rule that "inadequacy of price, however gross, is not in itself a sufficient ground for setting aside a trustee's sale legally made; there**

> **must be in addition proof of some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price"** (quoting *Oller v. Sonoma Cty. Land Title Co.,* 137 Cal.App.2d 633, 290 P.2d 880, 882 (Cal.Ct.App.1955))); *McLaughlin v. Mut. Bldg. & Loan Ass'n,* 57 Nev. 181, 191, 60 P.2d 272, 276 (1936) (noting that, in the context of an action to recover possession of a property after a trustee sale, "[h]ad the conduct of the trustee and respondent, in connection with the sale, been accompanied by any actual fraud, deceit, or trickery, a more serious question would be presented"); *see also Nev. Land & Mortg. Co. v. Hidden Wells Ranch, Inc.,* 83 Nev. 501, 504, 435 P.2d 198, 200 (1967) ("In the proper case, the trial court may set aside a trustee's sale upon the grounds of fraud or unfairness."). And, cases elsewhere to have addressed comparable conclusive-or presumptive-effect recital statutes confirm that such recitals do not defeat equitable relief in a proper case; rather, such recitals are "conclusive, *in the absence of grounds for equitable relief*." *Holland v. Pendleton Mortg. Co.,* 61 Cal.App.2d 570, 143 P.2d 493, 496 (Cal.Ct.App.1943) (emphasis added); *see Bechtel v. Wilson,* 18 Cal.App.2d 331, 63 P.2d 1170, 1172 (Cal.Ct.App.1936) (distinguishing between a challenge to the sufficiency of pre-sale notice, which was precluded by the conclusive recitals in the deed, and an equity-based challenge based upon the alleged unfairness of the sale); *compare* 1 Grant S. Nelson, *Real Estate Finance Law, supra,* § 7:23, at 986–87 ("After a defective power of sale foreclosure has been consummated, mortgagors and junior lienholders in virtually every state have an equitable action to set aside the sale.") (footnotes omitted), *with id.* § 7:22, at 980–82 (noting that "[m]any states have attempted to enhance the stability of power of sale foreclosure titles by enacting a variety of *presumptive statutes* "), *and* 6 Baxter Dimaway, *Law of Distressed Real Estate,* § 64:161 (2015) (noting that a trustee's deed recital can be overcome on a showing of actual fraud). (emphasis added)
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> Id. at *13-14.

This Court also stated:

> The question remains whether NYCB demonstrated sufficient grounds to justify the district court in setting aside Shadow Wood's foreclosure sale on NYCB's motion for summary judgment. *Breliant v. Preferred Equities Corp.,* 112 Nev. 663, 669, 918 P.2d 314, 318 (1996) (stating the burden of proof rests with the party seeking to quiet title in its favor). As discussed above, demonstrating that an association sold a property at its foreclosure sale for an inadequate price is not enough to set aside that sale; there must also be a showing of fraud, unfairness, or oppression. *Long,* 98 Nev. at 13, 639 P.2d at 530.
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> Id. at *15.

At page 21 of Appellant's Initial Brief, defendant cites Jones v. Bank of Nevada, 91 Nev. 368, 535 P.2d 1279 (1975), where this Court affirmed the district court's determination that a secured party had properly repossessed and sold a private

airplane to an aircraft broker who resold the plane at a higher price. As noted above, NRS 104.9109(4)(k) expressly provides that the provisions of Article 9 do not apply to a lien on real property.

Defendant also cites Will v. Mill Condominium Owners' Association, 176 Vt. 380, 848 A.2d 336 (2004), but there are substantial differences between Vermont's version of the UCIOA and NRS Chapter 116. For example, 27A V.S.A. § 3-116(j) in Vermont's version of the UCIOA requires that an association's lien be judicially foreclosed pursuant to 12 V.S.A. chapter 172 or subsection (o) of 27A V.S.A. § 3-116(j). 27A V.S.A. § 3-116(p) also provides that "[e]very aspect of a foreclosure, sale, or other disposition under this section, including the method, time, date, place, and terms, must be commercially reasonable." Nevada's version of the UCIOA contains no such language. Vermont's version of the UCIOA also does not contain any counterpart of the nonjudicial foreclosure procedure provided in NRS 116.31162 to NRS 116.31168.

NRS 116.1108 expressly provides that "the law of real property . . . supplement the provisions of this chapter, except to the extent inconsistent with this chapter."

In Golden v. Tomiyasu, 79 Nev. 503, 387 P.2d 989 (1963), cert. denied, 382 U.S. 844 (1965), this Court adopted the following rule:

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

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

This Court applied the same rule in Long v. Towne, 98 Nev. 11, 639 P.2d 528, 530 (1982); Turner v. Dewco Services, Inc., 87 Nev. 14, 479 P.2d 462 (1971); Brunzell v. Woodbury, 85 Nev. 29, 449 P.2d 158 (1969); and Shadow Wood

Homeownwers Association v. New York Community Bank, 132 Nev. Ad. Op. 5 (2016).

In the present case, defendant failed to offer any proof of the required "element of fraud, unfairness, or oppression" bringing about the $8,200.00 price that defendant claims is "commercially unreasonable." The respondents in Golden v. Tomiyasu were likewise unable to produce evidence to support their claim to set aside a trustee's sale, and this Court reversed the decision by the trial court setting aside the sale even though 80 acres of property valued at $200,000 were sold for $18,025.73.

6. Bank of America did not make an effective tender prior to the HOA foreclosure sale, and plaintiff is protected as a bona fide purchaser.

At page 22 of Appellant's Initial Brief, defendant claims that "[b]y conspicuously choosing to reject BANA's superpriority tender and proceed with foreclosure, the HOA unnecessarily attempted to extinguish BANA's lien." At pages 23 and 24 of Appellant's Initial Brief, defendant also contends that a tender is complete when money is offered to a creditor and that a rejected tender still precludes foreclosure and discharges the lien.

Exhibit 3 to the Miles, Bergstrom & Winters, LLP affidavit attached to defendant's opposition and countermotion proves, however, that defendant did not offer to pay the amounts demanded by the HOA – Bank of America offered on December 6, 2012 to pay only the amount that Bank of America's counsel felt was appropriate based on his interpretation of the statute. Defendant also placed inappropriate conditions on its tender of the check for $1,494.50. In particular, counsel for Bank of America stated:

> This is a non-negotiable amount and any endorsement of said cashier's check on your part, whether express or implied, will be strictly construed as an unconditional acceptance on your part of the facts stated herein and express agreement that BANA's financial obligations towards the HOA in regards to the real property located at 5316 Clover Blossom Court has now been "paid in full."
>
> (App. Vol. III, pg. 173)

Paragraph 9 in the Miles, Bergstrom & Winters, LLP affidavit acknowledges that the HOA's foreclosure agent returned the check. (App. Vol. III, pg. 163)

It is undisputed that despite receiving actual notice of the HOA foreclosure sale, and despite having its tender of $1,494.50 rejected by the HOA foreclosure agent, defendant took no action to stop the HOA foreclosure sale from taking place on January 16, 2013 or to warn potential bidders that it had any objection to the sale.

In Moeller v. Lien, 25 Cal. App. 4th 822, 30 Cal. Rptr. 2d 777 (1994), the respondent allowed a trustee's sale to go forward even though it had available cash deposits to pay off the loan. Id. at 828. The trial court set aside the sale because "[t]he value of the property was four times the amount of the debt/sales price." Id. at 829. The Court of Appeals reversed the trial court's order and stated:

> Thus **as a general rule, a trustor has no right to set aside a trustee's deed as against a bona fide purchaser for value by attacking the validity of the sale.** (Homestead Savings v. Damiento, supra, 230 Cal. App. 3d at p. 436.) The conclusive presumption precludes an attack by the trustor on a trustee's sale to a bona fide purchaser **even though there may have been a failure to comply with some required procedure which deprived the trustor of his right of reinstatement or redemption**. (4 Miller & Starr, supra, § 9:141, p. 463; cf. Homestead v. Damiento, supra, 230 Cal. App. 3d at p. 436.) The conclusive presumption precludes an attack by the trustor on the trustee's sale to a bona fide purchaser even where the trustee wrongfully rejected a proper tender of reinstatement by the trustor**. Where the trustor is precluded from suing to set aside the foreclosure sale, the trustor may recover damages from the trustee**. (Munger v. Moore (1970) 11 Cal. App. 3d 1, 9, 11 [89 Cal. Rptr. 323].)

Id. at 831-832. (emphasis added)

In Gaffney v. Downey Savings & Loan Ass'n, 200 Cal. App. 3d 1154, 1165, 246 Cal. Rptr. 421 (1988), the court stated that "[n]othing short of the full amount due the creditor is sufficient to constitute a valid tender, and the debtor must at his peril offer the full amount." The court also observed that "it is a debtor's responsibility to make an unambiguous tender of the entire amount due or else suffer the consequences that the tender is of no effect." Id.

In Nguyen v. Calhoun, 105 Cal. App. 4th 428, 129 Cal. Rptr. 2d 436 (2003), the defaulting borrower had entered into a contract to sell the subject property to the plaintiff. The lender agreed that it would postpone the sale if the borrower could prove that the plaintiff's new loan had funded. The new loan funded on July 9, 1998, but the borrower's cure payment was not received by the lender until July 13, 1998. Meanwhile, the defendant purchased the property at the trustee's sale held on July 10. The court of appeals ruled for the defendant because in the absence of a direction by the lender to mail a payment, "the payment is not effective until received by the creditor." Id. at 449. The court also stated that "[a] mistake that occurs outside (dehors) the confines of the statutory proceeding does not provide a basis for invalidating the trustee's sale." Id. at 450.

In the present case, defendant offered no evidence that defendant made any information regarding the attempted tender known to plaintiff or any of the other bidders at the HOA foreclosure sale held on January 16, 2013. Plaintiff was therefore a bona fide purchaser for value without notice of any outstanding claim by defendant that it was denied an opportunity to tender the super priority lien amount.

In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408 (2014), this Court stated at page 418:

> And from what little the record contains, nothing 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."). (Emphasis added)

When the HOA rejected the tender calculated by counsel for Bank of America, defendant chose not to use the available option of "paying the entire amount and requesting a refund of the balance."

In the case of Shadow Wood Homeowners Association v. New York

Community Bank, 132 Nev. Ad. Op. 5 (2016), this Court identified other ways that a bank could protect its interest:

> Against these inconsistencies, however, must be weighed NYCB's (in)actions. The NOS was recorded on January 27, 2012, and the sale did not occur until February 22, 2012. NYCB knew the sale had been scheduled and that it disputed the lien amount, yet it did not attend the sale, request arbitration to determine the amount owed, or seek to enjoin the sale pending judicial determination of the amount owed. The NOS included a warning as required by NRS 116.311635(3)(b):
>
> Id. at *19.

In Shadow Wood, this Court also stated in footnote 7 at page *21:

> Consideration of harm to potentially innocent third parties is especially pertinent here where **NYCB did not use the legal remedies available to it** to prevent the property from being sold to a third party, **such as by seeking a temporary restraining order and preliminary injunction and filing a lis pendens on the property**. *See* NRS 14.010; NRS 40.060. *Cf. Barkley's Appeal. Bentley's Estate,* 2 Monag. 274, 277 (Pa.1888) ("In the case before us, we can see no way of giving the petitioner the equitable relief she asks without doing great injustice to other innocent parties who would not have been in a position to be injured by such a decree as she asks if she had applied for relief at an earlier day."). (emphasis added)

After the HOA's foreclosure agent rejected the payment tendered by Bank of America, defendant took absolutely no action to stop the HOA foreclosure sale or warn potential purchasers that it had any objection to the sale.

The bona fide purchaser doctrine was adopted by this Court as far back as 1880 in the case of Moresi v. Swift, 15 Nev. 215 (1880), where this Court stated:

> The rule that a man who advances money bona fide and without notice, will be protected in equity, applies equally to real estate, chattels, and personal estate.

In the case of Moore v. DeBernardi 47 Nev. 33, 220 P. 544 (1923), this Court stated:

> 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, incumbrance, or otherwise, of which he has no notice, actual or constructive. Brophy M. Co. v. B. & D. G. & S. M. Co., 15 Nev. 108.
> . . . .

> To entitle a party to the character of a bona fide purchaser, without notice, he must have acquired the legal title, and have actually paid the purchase money before receiving notice of the equity of another party. Moresi v. Swift, 15 Nev. 215.

It is undisputed that plaintiff purchased the Property at the sale held on January 13, 2013 without notice that defendant claimed that the HOA's super priority lien had been extinguished by the HOA's rejection of Bank of America's tender.

At pages 29 to 33 of Appellant's Initial Brief, defendant contends that the district court erred by not allowing defendant to conduct discovery to determine whether the HOA's foreclosure was conducted in a "commercially reasonable manner." At pages 34 to 38 of Appellant's Opening Brief, defendant claims that it was also denied the opportunity to discover whether the HOA's foreclosure complied with the requirements of Nevada law. As noted above, there is no requirement that an HOA foreclosure sale be "commercially reasonable," and the exhibits to plaintiff's motion for summary judgment proved that the HOA's foreclosure agent complied with all notice requirements provided in NRS 116.31162 to NRS 116.31168.

At page 38 of Appellant's Initial Brief, defendant asserts that the Court in Rosenberg v. Smidt, 727 P.2d 778 (Alaska 1986), interpreted a conclusive recital provision "under Alaska's version of the 1982 UCIOA," but that case actually interpreted language in AS 34.20.080(c) governing the nonjudicial foreclosure of a deed of trust that is materially different from the language in NRS 116.31166.

CONCLUSION

By reason of the foregoing, plaintiff respectfully requests that this Court affirm the order by the district court granting plaintiff's motion for summary judgment and denying defendant's countermotion for summary judgment.

DATED this 3rd day of March, 2016.

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CERTIFICATE OF COMPLIANCE

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

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 37(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7) it is proportionately spaced and has a typeface of 14 points and contains 11,239 words.

3. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

DATED this 3rd day of March, 2016.

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CERTIFICATE OF SERVICE

In accordance with N.R.A.P. 25, I hereby certify that I am an employee of The Law Offices of Michael F. Bohn, Esq., Ltd., and that on the 3rd day of March, 2016, a copy of the foregoing **RESPONDENT'S ANSWERING BRIEF** was served electronically through the Court's electronic filing system to the following individuals:

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