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SUPREME COURT

STATE OF NEVADA

SATICOY BAY LLC SERIES 9641 CHRISTINE VIEW,

Appellant,

vs.

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Respondent.

No. 69419

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

Counsel for plaintiff/appellant certifies that the plaintiff/appellant, Saticoy Bay LLC Series 9641 Christine View, is a Nevada limited-liability company. The manager for Saticoy Bay LLC Series 9641 Christine View is the Bay Harbor Trust. The trustee for the Bay Harbor Trust is Iyad Haddad.

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

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JURISDICTIONAL STATEMENT

(A) Basis for the Supreme Court's Appellate Jurisdiction: The order granting defendant Federal National Mortgage Association's countermotion for summary judgment is appealable under NRAP 3A(b)(1).

(B) The filing dates establishing the timeliness of the appeal: The order granting defendant's countermotion for summary judgment was filed on December 8, 2015. Notice of entry of the order was served on appellant by electronic service on December 10, 2015. The notice of appeal was filed on December 11, 2015.

(C) The appeal is from an order granting defendant Federal National Mortgage Association's countermotion for summary judgment.

ROUTING STATEMENT

This case is a quiet title action. Rule 17 does not list quiet title matters as one of the cases retained by the Supreme Court. Counsel for appellant therefore believes that this appeal should be assigned to the Court of Appeals.

ISSUES PRESENTED ON APPEAL

1. Whether the HOA foreclosure sale extinguished defendant's deed of trust.

2. Whether the provisions of 12 U.S.C. § 4617(j)(3) protected the deed of trust assigned to Fannie Mae from being extinguished by the HOA foreclosure sale held on September 6, 2013.

3. Whether Fannie Mae has prudential standing to assert that 12 U.S.C. § 4617(j)(3) protected the deed of trust assigned to Fannie Mae from being extinguished.

4. Whether FHFA consented to the enforcement of the HOA's assessment lien.

5. Whether the HOA lien statute is unconstitutional.

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

7. An order granting summary judgment is reviewed de novo without deference to the findings of the lower court.

STATEMENT OF THE CASE

On October 30, 2013, Saticoy Bay LLC Series 9641 Christine View (hereinafter "plaintiff") filed a complaint against Federal National Mortgage Association (hereinafter "defendant" or "Fannie Mae"), The Cooper Castle Law Firm, LLP (hereinafter "Cooper Castle"), and Don Moreno and Rieta Moreno (hereinafter

"Morenos") claiming that plaintiff had acquired title to the real property located at 9641 Christine View Court, Las Vegas, Nevada (hereinafter "Property") at an HOA foreclosure sale conducted by Nevada Association Services, Inc. (hereinafter "NAS") on behalf of Cheyenne Ridge (hereinafter "HOA"). (JA1a, pgs. 1-7)

In its prayer for relief, plaintiff requested that the court enter a judgment determining and declaring that plaintiff is the rightful holder of title to the Property, free and clear of all liens, encumbrances, and claims of the defendants; for a determination that the defendants have no estate, right, title, interest or claim in the property; and for a judgment forever enjoining the defendants from asserting any right, title, interest or claim in the property. (JA1a, pgs. 3-4)

On April 22, 2015, plaintiff filed a motion for summary judgment. (JA1b, pgs. 38-117)

On May 8, 2015, defendant filed an opposition to plaintiff's motion and a countermotion for summary judgment, which included arguments that the recitals in the foreclosure deed were not conclusive, that NAS had no authority to foreclose on behalf of the HOA, that the foreclosure notices were insufficient, that the HOA foreclosure sale was commercially unreasonable, and that the HOA lien statute is facially unconstitutional. (JA1b, pgs. 115-208)

On May 19, 2015, plaintiff filed a reply in support of plaintiff's motion for summary judgment and an opposition to defendant's countermotion for summary judgment. (JA1c, pgs. 217-228)

On September 14, 2015, defendant filed a supplemental opposition to plaintiff's motion for summary judgment and countermotion for summary judgment and argued that the HOA did not foreclose its superpriority lien. (JA2a, pgs. 229-318)

On September 25, 2015, plaintiff filed a reply to defendant's supplemental opposition and argued that defendant and its predecessors failed to tender payment of the superpriority lien amount. (JA2a, pgs. 319-330)

On October 23, 2015, defendant filed a second supplemental opposition to plaintiff's motion for summary judgment and countermotion for summary judgment and argued that the provisions of 12 U.S.C. § 4617(j)(3) precluded the involuntary extinguishment of defendant's property interest. (JA2a, pgs. 331-345)

On November 4, 2015, plaintiff filed a reply to second supplemental opposition and opposition to countermotion for summary judgment. (JA2a, pgs. 356-401)

At the hearing held on November 17, 2015, the court denied plaintiff's motion for summary judgment and granted defendant's countermotion for summary judgment

because the court found that 12 U.S.C. § 4617(j)(3) prevented defendant's interest in the Property from being eliminated without the consent of the Federal Housing Finance Agency (hereinafter "FHFA"). (JA2b, pgs. 402-420)

An order denying plaintiff's motion for summary judgment and granting defendant's countermotion for summary judgment was filed on December 8, 2015. (JA2b, pgs. 421-424) Notice of entry of the order was served and filed on December 10, 2015. (JA2b, pgs. 425-431) Plaintiff filed its notice of appeal on December 11, 2015. (JA2b, pgs. 432-433)

STATEMENT OF FACTS

Plaintiff obtained title to the Property by a foreclosure deed recorded on September 26, 2013 that arose from a delinquency in assessments due from the former owners, Don and Rieta Moreno, to the HOA pursuant to NRS Chapter 116. See copy of foreclosure deed at JA1b, pgs. 55-57.

Defendant was the assigned beneficiary of a deed of trust that was recorded as an encumbrance on the Property on November 2, 2004. See copy of the deed of trust at JA1b, pgs. 59-80. Paragraph (C) on the second page of the deed of trust identified Countrywide Home Loans, Inc. as the "Lender," and Paragraph (E) on the second page of the deed of trust stated that Mortgage Electronic Registration Systems, Inc.

("MERS"), "acting solely as a nominee for Lender and Lender's successors and assigns" was "the beneficiary under this Security Instrument." (JA1b, pg. 60)

Prior to the HOA foreclosure sale, NAS recorded a notice of delinquent assessment lien on March 19, 2010. See copy of the notice of lien at JA1b, pg. 82.

NAS recorded a notice of default on August 16, 2010. See copy of the notice of default at JA1b, pgs. 84-85.

On August 23,2010, NAS mailed copies of the notice of default to the Morenos, to MERS, and to Countrywide Home Loans. See copy of the notice of default mailing at JA1b, pgs. 87-92.

On September 13, 2010, Recontrust Company, N.A. recorded a corporation assignment of deed of trust Nevada signed by MERS assigning all beneficial interest under the deed of trust to BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing LP (hereinafter "BAC"). See copy of assignment at JA1b, pg. 193.

On August 1, 2012, Bank of America recorded an assignment of deed of trust signed by MERS assigning all beneficial interest under the deed of trust to Bank of America, N.A. See copy of assignment at JA1b, pgs. 195-196.

On October 19, 2012, Bank of America recorded an assignment of deed of trust signed by Bank of America assigning all beneficial interest under the deed of trust to

defendant. See copy of assignment at JA1b, pgs. 198-199.

NAS recorded a notice of foreclosure sale on August 15, 2013. See copy of notice of foreclosure sale at JA1b, pgs. 94-95.

In August of 2013, NAS mailed copies of the notice of foreclosure sale to the Morenos, to MERS as nominee, and to Bank of America, N.A. at the return address in Fort Worth, Texas listed in the assignment of deed of trust recorded on October 19, 2012. See copy of notice of foreclosure sale mailing at JA1b, pgs. 97-102.

In addition, NAS posted a copy of the notice of foreclosure sale at three public locations in Clark County, Nevada. See copy of affidavit of posting notice of sale at JA1b, pg. 104. The notice of foreclosure sale was published in the Nevada Legal News on August 16, August 23, and August 30 of 2013. See copy of affidavit of publication at JA1b, pg. 106.

At the public auction held on September 6, 2013, plaintiff entered the highest bid and purchased the Property for $26,800.00. See recitals in foreclosure deed at JA1b, pgs. 55-57.

SUMMARY OF THE ARGUMENT

The nonjudicial foreclosure sale conducted on September 6, 2013 extinguished the deed of trust recorded on November 2, 2004 that was assigned to defendant on

October 19, 2012.

The provisions of 12 U.S.C. § 4617(j)(3) do not protect the deed of trust assigned to Fannie Mae from being extinguished by the HOA foreclosure sale held in this case, and Fannie Mae does not have prudential standing to assert that 12 U.S.C. § 4617(j)(3) prevented its deed of trust from being extinguished. FHFA's consent to the HOA's foreclosure sale may be implied from its conduct.

The nonjudicial foreclosure process provided by NRS 116.31162 to NRS 116.31168, does not violate due process because no "state actor" participates in the foreclosure process and because NRS 107.090, as incorporated by NRS 116.31168(1), requires that copies of both the notice of default and the notice of sale be mailed to holders of "subordinate" liens.

The HOA foreclosure sale held on September 6, 2013 was not required to be "commercially reasonable."

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 P.3d at 1031.

ARGUMENT

1. The HOA's foreclosure sale extinguished the deed of trust assigned to the defendant.

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).

By its clear terms, 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 November 2, 2004 falls squarely within the language of NRS 116.3116(2)(b). The statutory language does not limit the nature of this "priority" in any way.

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:

> 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.

334 P.3d at 409.

Under Nevada law, the nonjudicial foreclosure of the HOA's super priority lien extinguished the deed of trust held by the defendant.

2. There is a statutory conclusive presumption that the HOA's foreclosure sale was properly conducted.

Nevada has a disputable presumption that "the law has been obeyed." See NRS 47.250(16). This creates a disputable presumption that the foreclosure sale was

conducted in compliance with the law. Pursuant to NRS 116.31166, the recitals in the foreclosure deed are sufficient and conclusive proof that the required notices were mailed by NAS on behalf of the HOA. The foreclosure deed recorded on September 26, 2013 contains the following recitals on the first page (JA1b, pg. 55):

> This conveyance is made pursuant to the powers conferred upon agent by Nevada Revised Statutes, the Cheyenne Ridge governing documents (CC&R's) and that certain Notice of Delinquent Assessment Lien, described herein. Default occurred as set forth in a Notice of Default and Election to Sell, recorded on 8/16/2010 as instrument # 0002331 Book 20100816 which was recorded in the office of the recorder of said county. Nevada Association Services, Inc. has complied with all requirements of law including, but not limited to, the elapsing of 90 days, mailing of copies of Notice of Delinquent Assessment and Notice of Default and the posting and publication of the Notice of Sale.

The controlling statute, NRS 116.31166, provides:

> **Foreclosure of liens: Effect of recitals in deed; purchaser not responsible for proper application of purchase money; title vested in purchaser without equity or right of redemption**.
>
> 1. **The recitals in a deed** made pursuant to NRS 116.31164 of:
>
> (a) Default, the mailing of the notice of delinquent assessment, and the recording of the notice of default and election to sell;
> (b) The elapsing of the 90 days; and
> (c) The giving of notice of sale,
> are **conclusive proof of the matters recited**.

> 2. **Such a deed containing those recitals is conclusive against** the unit's former owner, his or her heirs and assigns, **and all other persons**. The receipt for the purchase money contained in such a deed is sufficient to discharge the purchaser from obligation to see to the proper application of the purchase money.
>
> 3. The sale of a unit pursuant to NRS 116.31162, 116.31163 and 116.31164 vests in the purchaser the title of the unit's owner without equity or right of redemption. (emphasis added)

NRS 47.240(6) also provides that conclusive presumptions include "[a]ny other presumption which, by statute, is expressly made conclusive." Because NRS 116.31166 contains such an expressly conclusive presumption, the recitals in the foreclosure deed are "conclusive proof" that the defendant and/or its predecessors were served with copies of the required notices for the foreclosure sale. The exhibits to plaintiff's motion for summary judgment prove that the recitals in the foreclosure deed are true. (JA1b, pgs. 54-106)

An additional conclusive presumption is found in NRS 47.240(2):

> The truth of the fact recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title, but this rule does not apply to the recital of a consideration.

In Shadow Wood Homeowners Association v. New York Community Bank,

132 Nev. Adv. Op. 5, 2016 WL 347979 (2016), this Court recognized that the recitals in a foreclosure deed are conclusive in the absence of grounds for equitable relief. 2016 WL 347979 at *6. In the present case, defendant produced no evidence of the fraud, unfairness, or oppression required to set aside a foreclosure sale.

3. The provisions of 12 U.S.C. § 4617(j)(3) do not apply to the HOA foreclosure sale held in this case.

At page 6 of its second supplemental opposition, defendant claimed that 12 U.S.C. § 4617(j)(3) "automatically bars any nonconsensual limitation or extinguishment through foreclosure of any interest in property held by Fannie Mae while in conservatorship." (JA2a, pg. 336) To the contrary, subparagraph (3) of 12 U.S.C. § 4617(j) bears the heading of "[p]roperty protection" and states:

> No **property of the Agency** shall be subject to levy, attachment, garnishment, foreclosure, or sale **without the consent of the Agency**, nor shall any involuntary lien attach to the **property of the Agency.** (emphasis added)

12 U.S.C. § 4502(2) states: "The term 'Agency' means the Federal Housing Finance Agency established under section 4511 of this title. 12 U.S.C. § 4502(10)(A) defines the term "enterprise" to mean "the Federal National Mortgage Association and any affiliate thereof." 12 U.S.C. §4502(20)(A) defines the term "regulated

entity" to mean "the Federal National Mortgage Association and any affiliate thereof." In this case, Bank of America, N.A. assigned its deed of trust to Fannie Mae (the "enterprise" or "regulated entity") and not to FHFA (the "Agency"). (JA1b, pgs. 198-199) No language in 12 U.S.C. § 4617 protects the property of an "enterprise" or a "regulated entity" from being extinguished through foreclosure.

Furthermore, when properly read in the context of 12 U.S.C. § 4617 as a whole, the language in subsection (j)(3) does not apply to the HOA's nonjudicial foreclosure of its super priority lien against the Property. The United States Supreme Court has applied the following principles when interpreting statutory language: 1) "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997); 2) "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." Kmart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988); and 3) "In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." Crandon v. United States, 494 U.S. 152, 158 (1990). (emphasis added)

The heading for subsection (j) of 12 U.S.C. § 4617 states that subsection (j) involves "Other Agency exemptions." The heading for subparagraph 1 of 12 U.S.C. § 4617(j) is the word "Applicability," and subparagraph 1 states that "[t]he provisions of this subsection **shall apply with respect to the Agency** in any case in which the Agency is acting as a conservator or receiver." (emphasis added) The heading for subparagraph (2) of 12 U.S.C. § 4617(j) is the word "Taxation," and the subparagraph states:

> The **Agency, including its franchise, its capital, reserves, and surplus, and its income**, shall be **exempt from all taxation imposed by any State, county, municipality, or local taxing authority**, except that **any real property of the Agency** shall be subject to State, territorial, county, municipal, or local taxing taxation to same extent according to its value as other real property is taxed, except that, notwithstanding the failure of any person to challenge an assessment under State law of the value of such property, and the tax thereon, shall be determined as of the period for which such tax is imposed. (emphasis added)

Consistent with the heading for "[o]ther Agency exemptions" at the beginning of Section 4617(j), subparagraph (2) provides the Agency (and not Fannie Mae) with an "exemption" from all taxation except for real property taxes assessed against "any real property of the Agency." Subparagraph (2) of Section 4617(j) does not exempt the Agency or any real property of the Agency from claims or liens by a person or

entity other than "any State, county, municipality, or local taxing authority." Absolutely no language in subparagraph (2) grants the Agency or its real property any exemption from attachment or foreclosure of an HOA assessment lien.

Subparagraph (4) of Section 4617(j) bears the heading "[p]enalties and fines" and provides:

> The Agency shall not be liable for any amounts in the nature of penalties or fines, including those arising from the failure of any person to pay **any real property, personal property, probate, or recording tax** or any recording or filing fees when due. (emphasis added)

It is in this context (sandwiched between two subparagraphs exempting "the Agency" from taxation) that subparagraph (3) of 12 U.S.C. § 4617(j) bears the heading of "[p]roperty protection" and states:

> No **property of the Agency** shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the Agency, nor shall any involuntary lien attach to the property of the Agency. (emphasis added)

By taking this language out of context, Fannie Mae asserts that this language applies not only as an exemption from taxation by "any State, county, municipality, or local taxing authority" against property of FHFA, but that it also prevents the deed of trust recorded against property owned by the Morenos and assigned to Fannie Mae

on October 19, 2012 from being extinguished by the nonjudicial foreclosure of the assessment lien recorded by the HOA on March 19, 2010.

In Robinson v. Shell Oil Co., 519 U.S. 337 (1997), the United States Supreme Court was faced with the task of deciding whether the term "employees" in section 704(a) of Title VII of the Civil Rights Act of 1964 referred only to current employees. The Court acknowledged that although the term may "have a plain meaning in the context of a particular section," the term did not have "the same meaning in all other sections and in all other contexts." As a result, the Court stated:

> Once it is determined that the term "employees" includes former employees in some sections, but not in others, **the term standing alone is necessarily ambiguous** and **each section must be analyzed to determine whether the context gives the term a further meaning** that would resolve the issue in dispute. (emphasis added)

Read in the context of the main heading and the other subparagraphs in 12 U.S.C. § 4617(j), the language in 12 U.S.C. § 4617(j)(3) clearly did not require that the HOA obtain "the consent of the Agency" before completing the nonjudicial foreclosure of its super priority lien recorded against the Property owned by the Morenos.

At page 7 of its second supplemental opposition (JA2a, pg. 337), Fannie Mae acknowledged that Section 4617(j)(3) is modeled after "the companion statute

governing Federal Deposit Insurance Corporation ('FDIC') receiverships" found in 12 U.S.C. § 1825(b)(2). (JA2a, pg. 337) Fannie Mae also cited cases that interpret 12 U.S.C. § 1825(b)(2) at pages 9 and 10 of its second supplemental opposition. (JA2a, pgs. 339-340)

In the case of Federal Deposit Insurance Corp. v. McFarland, 243 F.3d 876 (5th Cir. 2001), the Court of Appeals for the Fifth Circuit affirmed the district court's holding that the FDIC lost its priority to an intervening judgment lien when the FDIC failed to reinscribe its deed of trust within the statutory period provided by Louisiana law. First, the court recognized that "[w]e read the provisions of FIRREA in context, cognizant of the statute's structure and purpose." Id. at 885. Second, the court considered the history of the statutory language at issue:

> Before the passage of FIRREA, section 1825 only included the provision currently codified as 1825(a), which articulated the FDIC's exemption from taxation while acting in its corporate capacity. FIRREA added subsection (b) to extend this exemption to the FDIC's role as receiver. **We are persuaded that section 1825(b)(2) merely extends the general exemption of the FDIC from taxation to the receivership context**. (emphasis added)
>
> Id. at 886.

Taking into account the title to section 1825 ("Exemption from taxation"), the

heading assigned to subsection (a) ("General rule"), and the heading assigned to subsection (b)("Other exemptions"), the language confirmed "that section 1825(b)(2) was intended to address other exemptions from taxation than those stipulated in the 'general rule.'" Id.

The court then concluded:

> This Court has consistently interpreted section 1825(b)(2) in this fashion. We have found that this section prohibits state and local taxing authorities from foreclosing on property subject to an FDIC lien without its consent. **This Court has not applied the exemption of section 1825(b)(2) to liens not attached by state and local taxing authorities**. Indeed, we have repeatedly found that section 1825(b)(2) "represents the express will of Congress that the FDIC must consent to any deprivation of property *initiated by a state."* (emphasis added)
> Id.

The Court of Appeals for the Fifth Circuit interpreted the exemption created by section 1825(b)(2) as protecting the "property of the Corporation" only from liens by state and local taxing authorities. This interpretation exactly matches plaintiff's reading of the similar language used in 12 U.S.C. § 4617(j)(3).

In Federal Deposit Insurance Corp. v. Lowery, 12 F.3d 995 (10th Cir. 1993), (cited at JA2a, pg. 337), the property owners conveyed title to their property to FDIC in satisfaction of a promissory note, and the Treasurer for Cleveland County, Oklahoma notified FDIC that the property would be sold at public auction to pay

delinquent ad valorem taxes. In affirming the granting of injunctive relief to the FDIC, the Court of Appeals stated: "We note, however, section 1825(b)(2) does not excuse payment of tax by the FDIC, it simply denies authorities the ability to lien a FDIC property **as a vehicle for collection of delinquent tax**." Id. at 996. (emphasis added)

In GWN Petroleum Corp. v. Ok-Tex Oil & Gas, Inc., 998 F.2d 853 (10th Cir. 1993)(cited at JA2a, p. 338), the district court entered a summary judgment denying the plaintiff's attempt to garnish the production of oil and gas from leasehold estates and mineral interests subject to mortgages held by FDIC as receiver for First City Bank. The Court of Appeals approved the application of 12 U.S.C. § 1825(b)(2) to "FDIC when it is acting in its corporate capacity," but the Court of Appeals recognized that under 12 U.S.C. § 1821(d)(13)(C), "[n]o attachment or execution may issue by any court upon assets in the possession of the receiver." Id. at 856.

The counterpart to 12 U.S.C. § 1821(d)(13)(C) appears in 12 U.S.C. § 4617(b)(11)(C) and provides:

> No attachment or execution **may issue by any court** upon **assets in the possession of the receiver**, or upon the charter, of a regulated entity **for which the Agency has been appointed receiver.** (emphasis added)

No counterpart of 12 U.S.C. § 1821(d)(13)(C) exists in 12 U.S.C. § 4617 for

a regulated entity for which the Agency (FHFA) is acting "as conservator."

In the present case, no court was involved in the nonjudicial foreclosure of the HOA's super priority lien, and FHFA is acting only as a conservator, so the decision in GWN Petroleum Corp. does not support the arguments made by Fannie Mae.

At page 10 of its second supplemental opposition (JA2a, pg. 340), defendant stated that "foreclosure sales do not extinguish property interests of Fannie Mae under Section 4617(j)(3) without FHFA's consent" and cited the decisions in Trembling Prairie Land Co. v. Verspoor, 145 F. 3d 686 (5th Cir. 1998), and Federal Deposit Insurance Corp. v. Lee, 130 F.3d 1139 (5th Cir. 1997). Both of those cases invalidated tax sales where the FDIC was named as a receiver of the bank holding a mortgage on the subject property. Neither case mentions 12 U.S.C. § 4617 or the nonjudicial foreclosure of an HOA lien.

Because the language in 12 U.S.C. § 4617(j)(3) protects FHFA only from the collection of taxes by a State or municipal authority, and because 12 U.S.C. § 4617(b)(11)(C) protects the FHFA only from attachment or execution issued by a court when FHFA has been appointed as a receiver, the HOA was not required to obtain the consent of FHFA before conducting the HOA foreclosure sale that extinguished Fannie Mae's interest in the Property.

4. Defendant did not have standing to claim that the HOA foreclosure sale violated 12 U.S.C. § 4617(j)(3).

At page 3 of its second supplemental opposition (JA2a, pg. 333), Fannie Mae requested that the district court apply the interpretation of 12 U.S.C. § 4617(j)(3) adopted by the United States District Court in Skylights LLC v. Byron, 112 F. Supp. 3d 1145 (D. Nev. 2015) and other cases pending in the United States District Court, District of Nevada. In each of the cited cases, FHFA intervened in the action and joined in the motion filed with the court. In the present case, on the other hand, FHFA was not a party to the action below, and FHFA did not intervene to file an opposition or countermotion in response to plaintiff's motion for summary judgment.

At page 11 of its second supplemental opposition (JA2a, pg. 341), Fannie Mae cites the above-referenced cases as authority that pursuant to 12 U.S.C. § 4617(b)(2)(A)(i), "the property of Fannie Mae effectively becomes the property of FHFA once it assumes the role of conservator, and that property is protected by section 4617(j)'s exemptions."

Because 12 U.S.C. § 4617(j)(3) only protects "property of the Agency," i.e. FHFA, and not "property of Fannie Mae," defendant's argument was based only on rights belonging to FHFA and not to Fannie Mae. The record on appeal contains no

evidence that FHFA granted Fannie Mae the right to make any arguments on FHFA's behalf in order to protect FHFA's interest in the Property.

In Freedom Mortgage Corporation v. Las Vegas Development Group, LLC, 106 F. Supp. 3d 1174 (D. Nev. 2015), the lender filed an action challenging the extinguishment of its deed of trust by an HOA foreclosure sale because the loan was insured by HUD. The court noted that prudential standing "encompasses 'the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.'" Id. at 3, quoting United States v. Lazarenko, 476 F.3d 642, 649-50 (9th Cir. 2007)(quoting Allen v. Wright, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)).

The court also stated: "Essentially, the standing question in such cases is whether the constitutional . . . provision on which the claim rests properly can be understood as granting persons in plaintiff's position a right to judicial relief." Id. at 3, quoting The Wilderness Soc'y v. Kane Cnty., Utah, 632 F.3d 1162, 1169 (10th Cir. 2011)(quoting Warth v. Seldin, 422 U.S. 490, 500, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)). The court concluded that:

> **The federal government is not a party to this case**. Its rights are being championed by private lender Freedom Mortgage, which acknowledges it is " neither attempting to sue under HUD'S name nor asserting HUD's rights, because *Freedom* is the real party in interest." **Because HUD is the best proponent of its interests and has not sought to raise the challenge Freedom Mortgage brings, it would be imprudent for the court to recognize Freedom Mortgage's standing to pursue Property Clause claims in this case**. I thus decline to recognize Freedom Mortgage's prudential standing to challenge the HOA's foreclosure on the Castro property under the Property Clause. (footnotes omitted) (emphasis added)

106 F. Supp. 3d at 1180.

12 U.S.C. § 4617(j)(3) protects "property of the Agency" and requires "consent of the Agency." 12 U.S.C. § 4617(j)(3) does not mention "property of the regulated entity" or "consent of the regulated entity."

As noted above, in the present case, FHFA was not a party to the action, and FHFA did not intervene to assert that 12 U.S.C. § 4617(j)(3) required its consent for the HOA foreclosure sale that extinguished Fannie Mae's deed of trust. The district court erred by allowing Fannie Mae to challenge the HOA foreclosure sale based solely on rights that belong to FHFA and not to Fannie Mae.

5. FHFA's conduct as conservator has manifested its consent to the foreclosure of association liens against property encumbered by a trust deed assigned to Fannie Mae.

In paragraph 8 on page 5 of its second supplemental opposition (JA2a, pg. 335), Fannie Mae asserted that a statement on HOA Super-Priority Lien Foreclosures issued by FHFA on April 21, 2015 (JA2a, pg. 355) proves that FHFA did not consent to the foreclosure of the HOA's super-priority lien in this case. Courts have recognized that "implied consent" may be inferred from conduct or failure to act. Roell v. Withrow, 538 U.S. 580, 590 (2003); Operation Able of Greater Boston, Inc. v. National Able Network, Inc., 646 F. Supp. 2d 166, 173 (D. Mass. 2009).

Page 302-2 of the Fannie Mae Single Family 2011 Servicing Guide for June 10, 2011 recognized that Fannie Mae's security may be impaired by unpaid HOA dues. It states in part:

> When the HOA of a PUD or condo project notifies the servicer that a borrower is 60 days' delinquent in the payment of assessments or charges levied by the association, **the servicer should advance the funds to pay the charges if necessary to protect the priority of Fannie Mae's mortgage lien**. If the project is located in a state that has adopted the Uniform Condominium Act (UCA), the Uniform Common Interest Ownership Act (UCIOA), or a similar statute that provides for up to six months of delinquent assessments to have lien priority over the mortgage lien, Fannie Mae will reimburse the servicer for up to six months of such advances. However, Fannie Mae will not reimburse the servicer for any fees or costs related to attempts to collect the delinquent assessments. (emphasis added)
>
> (JA2a, pg. 391)

Page 1 of Fannie Mae's Servicing Guide Announcement SVC-2012-05 issued on April 11, 2012 stated:

> Currently, **Fannie Mae requires servicers to advance funds** when the servicer is notified by an HOA for a PUD or condo project that the borrower is 60 days delinquent in the payment of assessments or charges levied by the association **if necessary to protect the priority of Fannie Mae's mortgage lien**. Fannie Mae provides for reimbursement to the servicer up to six months for such advances in certain states. (emphasis added)

(JA2a, pg. 393)

Fannie Mae's Selling Guide Announcement from January 14, 2014 has similar language. It states:

> Fannie Mae supports maintaining the maximum six-month limited priority lien for common expense assessments (typically known as homeowner association or HOA fees) that currently applies in most jurisdictions. The six-month period is clear and provides discrete and measureable risk exposure for mortgage lending on units located in condo and PUD projects. **The six-month period sufficiently balances the rights and needs of lenders (including mortgage servicers and secondary market investors), HOAs and borrowers.** (emphasis added)

(JA2a, pg. 397)

In addition, at page 391 of its Servicing Guide: Fannie Mae Single Family (Jan. 14, 2015), Fannie Mae directed the servicers for its loans to "take all reasonable

actions to prevent new liens that would be superior to Fannie Mae's mortgage lien from being attached against the property." (JA2a, pg. 400)

If Fannie Mae truly believed that an HOA's priority assessment lien against a property subject to a Fannie Mae deed of trust could not be foreclosed without FHFA's consent, these directives to servicers of Fannie Mae loans would not be necessary. Moreover, these directives are indicative of implied consent. If the servicer fails to comply with Fannie Mae's directives and fails to make the required payments, Fannie Mae has rights of recourse against its servicer and would not suffer any damage.

Furthermore, even though FHFA was established in July of 2008, FHFA has never announced a procedure by which a foreclosing HOA could request the consent of FHFA to foreclose its lien against property encumbered by a deed of trust owned by Fannie Mae. The fact that no such procedure exists supports plaintiff's interpretation of 12 U.S.C. § 4617(j)(3) that consent by FHFA is not required before an HOA can foreclose its super priority lien and extinguish a "subordinate" deed of trust assigned to Fannie Mae.

Paragraph (J) on page 2 of the deed of trust (JA1b, pgs. 60) states: "(J) **'Applicable Law'** means all controlling applicable federal, **state and local statutes**,

regulations, ordinances and administrative rules and orders (that have the effect of law) as well as **all applicable final, non-appealable judicial opinions**." (emphasis added)

Paragraph 16 at page 12 of the deed of trust (JA1b, pg. 70) provides:

> **16. Governing Law; Severability; Rules of Construction.** This Security Interest shall be governed by federal law and **the law of the jurisdiction in which the Property is located**. **All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law.** Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision. (emphasis added)

The deed of trust expressly provides that any rights or obligations held by Fannie Mae are "subject to" the "requirements and limitations" of Nevada's HOA foreclosure statute.

In Valle del Sol Inc. v. Whiting, 732 F.3d 1006 (9th Cir. 2013), the Court of Appeals identified three classes of preemption: (1) express preemption "when the text of a federal statute explicitly manifests Congress's intent to displace state law"; (2) field preemption where "the States are precluded from regulating conduct in a field

that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance"; and (3) conflict preemption "where it is impossible for a private party to comply with both state and federal law" or where the challenged state law "stands 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Id. at 1022-1023.

In the present case, express preemption does not apply because no provision in Title 12 of the U.S. Code purports to displace the rights of homeowner's associations in the recording and enforcement of HOA assessment liens.

Field preemption does not apply because Title 12 of the U.S. Code does not purport to regulate the recording and enforcement of HOA assessment liens.

Conflict preemption does not apply because requiring that Fannie Mae protect its deed of trust from extinguishment by foreclosure of an HOA's super priority lien does not make it impossible for Fannie Mae to comply with 12 U.S.C. § 4617. Instead, as noted above, Fannie Mae's own directives to its servicers recognize that Fannie Mae's deeds of trust are subject to extinguishment by the foreclosure of an HOA superpriority lien.

In Valle del Sol Inc. v. Whiting, 732 F.3d 1006, 1023 (9th Cir. 2013), the Court of Appeals stated that "the purpose of Congress is the ultimate touchstone in

every pre-emption case," and "in a field which the states have traditionally occupied, . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." In the present case, 12 U.S.C. §4617(j) does not express an intent by Congress to pre-empt the nonjudicial foreclosure of an HOA superpriority lien pursuant to existing state law against a deed of trust held in the name of a regulated entity (Fannie Mae).

6. An HOA foreclosure sale is not required to be "commercially reasonable," and a sale cannot be set aside based on a claim of inadequate price alone.

At page 21 of its opposition and countermotion (JA1b, pg. 145), defendant argued that this Court's decision in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, 334 P.3d 4008 (2014), "expressly left open the possibility that the sale is void for being commercially unreasonable." Defendant also argued that the requirement of "commercial reasonableness" for sales of personal property under Article 9 of the Uniform Commercial Code matches the standards applied to real property foreclosure sales by Restatement (Third) of Property (Mortgages) § 8.3 (1997) and that the requirement of "commercial reasonableness" is incorporated by the obligation of good faith contained in NRS 116.1113. (JA1b, pg. 146)

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.

Although the comment to Section 1-113 of the Uniform Common Interest Ownership Act ("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.

NRS 104.9109(4)(k) states 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 assessment lien is not one of the four instances. 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 held in the present case pursuant to NRS 116.31162 through NRS 116.31168 and, by incorporation, NRS 107.090.

In its opposition and countermotion, defendant did not produce any evidence of the fair market value of the Property on the date of sale. Defendant merely compared the foreclosure sale price of $26,800.00 to the principal amount listed in the deed of trust recorded on November 2, 2004. (JA1b, pg. 148)

In Shadow Wood Homeowners Association v. New York Community Bank, 132 Nev. Ad. Op. 5, 2016 WL 347979 (2016), this Court stated multiple times that an inadequate price alone is not enough to set aside a foreclosure sale. For example,

this Court 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. (emphasis added)
>
> 2016 WL 347979 at *6.

This Court also specifically addressed the impact of a bank's failure to protect its interests by failing to act:

> 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):
>
> WARNING! A SALE OF YOUR PROPERTY IS IMMINENT! UNLESS YOU PAY THE AMOUNT SPECIFIED IN THIS NOTICE BEFORE THE SALE DATE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE. YOU MUST ACT BEFORE THE SALE DATE.
>
> 2016 WL 347979 at *8.

The notice of foreclosure sale in the present case included this same warning at the top of the first page of the notice (JA1b, pg. 202). Despite this warning, defendant chose not to pay the superpriority amount or take any action to stop the HOA foreclosure sale. (JA1b, pg. 202)

In SFR Investments Pool 1, LLC v. U.S. Bank N.A., 130 Nev. Adv. Op 75, 334 P.3d 408, 418 (2014), this Court stated that the bank could have paid the entire lien amount and requested a refund of the balance. Defendant also chose not to use this remedy.

7. The foreclosure process in NRS Chapter 116 does not violate due process because no state actor participates in the nonjudicial foreclosure process provided in NRS 116.31162 to 116.31168.

At page 26 of its opposition and countermotion (JA1b, pg. 150), defendant argued that none of the HOA assessment lien statute's "express notice provisions provide for mandatory notice to lenders – despite the fact that lender property rights are directly threatened by an HOA's non-judicial foreclosure." On the other hand, as stated at page 8 of plaintiff's reply points and authorities filed on May 19, 2015 (JA1c, p. 224), due process is not an issue because no "state actor" participates in the nonjudicial foreclosure of an HOA lien.

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. The Court also cited Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978), and stated 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" included the decision in Charmicor v. Deaner, 572 F.2d 694 (9th Cir. 1978), where the Court of Appeals found 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. Id. at 695.

This Court 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).

Because 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 provisions in NRS Chapter 116 do not violate due process.

8. 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 required that copies of both the notice of default and the notice of sale be mailed to holders of subordinate interests.

At page 30 of its opposition and countermotion, defendant stated that Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983), "requires that reasonable steps be taken to provide actual notice to interested parties" and that "opt-in" notice provisions "have repeatedly been held to violate Constitutional due process requirements." In Mennonite Board of Missions v. Adams, the United States Supreme Court stated:

> 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 did not impose a requirement that the notice be received by the mortgagee. The standard in Mennonite 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)).

In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408 (2014), this Court addressed U.S. Bank's argument that the notice requirements in NRS Chapter 116 are unconstitutional and stated 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) . . . ."

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. Plaintiff has also placed in brackets in NRS 107.090(2) the language provided by the second sentence in NRS 116.31168(1):

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 parties thereto [of the unit's owner and the common-interest community], 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)

NRS 107.090 includes both an "opt in" provision for "any" person with an interest **and** a "mandatory" notice provision for holders of "subordinate" interests.

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

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

NRS 107.090(4) requires that a copy of the notice of sale be mailed to each

person described in NRS 107.090(3).

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

NRS 116.31168(1) expressly incorporates "[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). As noted above, NRS 107.090(4), which is without question one of **the** provisions of NRS 107.090, requires that a copy of the notice of sale be mailed to "each person described in subsection 3." Because NRS 107.090(3)(b) requires that a copy of the notice of default must be mailed by a foreclosing HOA to every holder of every type of interest "subordinate" to "the association's lien" (even if they do not request notice), a copy of the notice of sale must also be mailed to each such

person.

This Court has stated 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). This Court has also stated that 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). 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).

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.

NRS 107.090(3)(b) mandates notice only to holders of "subordinate" liens, while the "opt-in" provisions in NRS 116.31163 and NRS 116.311635 apply to "[e]ach person who has requested notice pursuant to NRS 107.090 or 116.31168." Because more persons qualify to request notice under NRS 116.31163, NRS 116.311635, and NRS 107.090(2), as incorporated by NRS 116.31168(1), than are automatically required to receive notice under NRS 107.090(3)(b), (4), as incorporated by NRS 116.31168(1), the opt-in provisions in NRS 116.31163, NRS 116.311635, and NRS 107.090(2) are not made superfluous by incorporating the mandatory notice provisions in NRS 107.090(3)(b) and NRS 107.090(4).

The "mandatory" notice provisions incorporated by NRS 116.31168(1) do not conflict with the request for notice provisions in NRS 116.31163 and NRS 116.311635 – the "mandatory" notice provisions are in addition to the request for notice provisions in the exact same way that the mandatory notice provisions in NRS 107.090(3)(b), (4) are in addition to the request for notice provisions in NRS 107.090(2) and NRS 107.090(3)(a), (4).

This Court has 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).

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.

NRS 116.31168(1) incorporates the exact notice requirements that are used by lenders when they foreclose their deeds of trust. 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.

CONCLUSION

By reason of the foregoing, plaintiff respectfully requests that this Court reverse the order by the district court granting defendant's motion for summary judgment and remand this case to the district court with directions to enter judgment in favor of the plaintiff quieting title to the real property in plaintiff's name.

DATED this 14th day of April, 2016.

LAW OFFICES OF
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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 type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7), it is proportionately spaced and has a typeface of 14 points and contains 10,504 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 14th day of April, 2016.

LAW OFFICES OF
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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 14th day of April, 2016, a copy of the foregoing **APPELLANT'S OPENING BRIEF** was served electronically through the Court's electronic filing system to the following individuals:

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/s/ /*Marc Sameroff /*
An Employee of the LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.