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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 REPLY 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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FHFA has manifested its consent to the nonjudicial foreclosure of homeowners association liens that have superpriority over deeds of trust assigned to Fannie Mae.

Fannie Mae does not have prudential standing to enforce the rights granted to FHFA by12 U.S.C. § 4617(j)(3).

An HOA foreclosure sale is not required to be commercially reasonable and cannot be set aside based solely on a claim that the price paid was "grossly inadequate."

The HOA foreclosure statute does not violate due process because NRS 107.090(3)(b) and NRS 107.090(4), as incorporated by NRS 116.31168(1), require that copies of the notice of default and the notice of sale be mailed to holders of interests "subordinate" to the HOA's assessment lien and because no "state actor" participates in the nonjudicial foreclosure process. Because the "mandatory" notice provisions are provided only to holders of "subordinate" interests, they do not make

the "request for notice" provisions in NRS Chapter 116 superfluous or meaningless.

ARGUMENT

1. Conflict preemption does not apply because extinguishment of Fannie Mae's "subordinate" deed of trust does not stand as an obstacle to the purposes and objectives expressed by Congress.

At page 10 of Respondent's Answering Brief, Fannie Mae claims that "the central issue in this case" is whether "the Federal Foreclosure Bar preempts the State Foreclosure Statute to the extent that it permits extinguishment of a statutorily protected Fannie Mae property interest without the consent of its conservator, FHFA."

Fannie Mae's phrasing of the issue is misleading because the words "Federal Foreclosure Bar" do not appear anywhere in 12 U.S.C. § 4617 and because 12 U.S.C. § 4617(j)(3) does not provide for "a statutorily protected Fannie Mae property interest" – section 4617(j)(3) only protects "property of the Agency." 12 U.S.C. § 4502 defines the term "Agency" as "the Federal Housing Finance Agency" (hereinafter "FHFA").

FHFA was not a party to the action below, and FHFA did not appear before the district court and argue that Fannie Mae's deed of trust was "property of the Agency."

At the bottom of page 10 of Respondent's Answering Brief, Fannie Mae asserts

that "the Federal Foreclosure Bar automatically bars any nonconsensual limitation or extinguishment through foreclosure of any property interest held by Fannie Mae while in conservatorship." No such words appear in 11 U.S.C. § 4617(j)(3).

In footnote 1 that appears at the bottom of pages 11 and 12 of Respondent's Answering Brief, Fannie Mae cites 11 decisions by the judges of the United States District Court where FHFA intervened and the courts agreed that an HOA foreclosure sale could not extinguish a deed of trust held in the name of either Fannie Mae or Freddie Mac. At pages 12 and 13 of Respondent's Answering Brief, Fannie Mae focuses on the decision in Skylights, LLC v. Byron, 112 F. Supp. 3d 1145 (D. Nev. 2015), which was adopted by each of the 10 decisions that followed.

At page 13 of Respondent's Answering Brief, Fannie Mae quotes the court's conclusion in Skylights that "[t]he plain meaning of this subsection is that when FHFA is acting as a conservator, none of the property sought to be conserved by FHFA may be subject to foreclosure without its consent." As discussed at pages 16 and 17 of Appellant's Opening Brief, this interpretation does not take into account the context in which 11 U.S.C. § 4617(j)(3) appears, and it ignores the clear distinction throughout the statute between "property of the Agency" and "property of Fannie Mae."

In order to avoid this distinction, the court in Skylights found that based on the language in 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." 112 F. Supp. 3d at 1155. On the other hand, this fusion of "property of Fannie Mae" with "property of the Agency" is contradicted by the many provisions in section 4617 that treat "property of Fannie Mae" as distinct from "property of the Agency."

The distinction between "property of Fannie Mae" and "property of the Agency" is further highlighted by the different goals assigned by 12 U.S.C. § 4617 to FHFA when it acts as a conservator than when it acts as a receiver. In particular, 12 U.S.C. § 4617(b)(2)(D) states that the Agency, as conservator, may take the actions "necessary to put the regulated entity in a sound and solvent condition" and "appropriate to carry on the business of the regulated entity and **preserve and conserve the assets and property of the regulated entity.**" (emphasis added) This language expresses a clear intent that when FHFA acts as a conservator, the property of the regulated entity remains separate and apart from the property of FHFA.

On the other hand, when the Agency acts as a receiver, 12 U.S.C. § 4617(b)(2)(E) mandates:

> In any case in which the Agency is **acting as receiver**, the Agency **shall place the regulated entity in liquidation and proceed to realize upon the assets of the regulated entity** in such manner as the Agency deems appropriate, including the sale of assets, the transfer of assets to a limited-life regulated entity established under subsection (i), or the exercise of any other rights or privileges granted to the Agency under this paragraph. (emphasis added)

12 U.S.C. § 4617(b)(2)(H) directs the Agency, both as conservator and receiver, to "pay all valid obligations of the regulated entity that are due and payable at the time of the appointment of the Agency as conservator or receiver." In addition, 12 U.S.C. § 4617(b)(2)(K)(i) provides that it is **only when the Agency is appointed as receiver** that the language in 12 U.S.C. § 4617(b)(2)(A) affects the rights of creditors in the property of the regulated entity. In particular, 12 U.S.C. § 4617(b)(2)(K)(i) states:

> Notwithstanding any other provision of law, **the appointment of the Agency as receiver** for a regulated entity pursuant to paragraph (2) or (4) of subsection (a) **and its succession, by operation of law**, to the rights, titles, powers, and privileges described in subsection (b)(2)(A) **shall terminate all rights and claims that the stockholders and creditors of the regulated entity may have against the assets or charter of the regulated entity** or the Agency arising as a result of their status as stockholders or creditors, except for the right to payment, resolution, or other satisfaction of their claims, as permitted under subsections (b)(9), (c), and (e). (emphasis added)

Because 12 U.S.C. § 4617(b) contains no similar language terminating the

rights and claims of creditors against the assets of the regulated entity when the Agency is appointed as conservator for a regulated entity, the HOA's super priority lien rights in the property subject to Fannie Mae's "subordinate" deed of trust were not affected by the language in 12 U.S.C. § 4617(b)(2)(A).

Similarly, 12 U.S.C. § 4617(b)(9) relating to payment of creditor claims "to the extent that funds are available from the assets of the regulated entity" only applies when the Agency serves as a receiver. Furthermore, 12 U.S.C. § 4617(b)(11)(C) prohibits "attachment or execution" by any court upon "assets in the possession of the receiver" only when the Agency "has been appointed receiver." No limits are placed on attachment or execution of the assets of the regulated entity when the Agency serves as conservator, and no limits are placed on the nonjudicial attachment of any liens to property of Fannie Mae.

If Congress had truly intended that "the property of Fannie Mae" be shielded from the nonjudicial foreclosure of an assessment lien, Congress could have drafted 12 U.S.C. § 4617(j)(3) to prohibit foreclosure of a lien against "property of the regulated entity." That Congress chose not to include "property of the regulated entity" in 12 U.S.C. § 4617(j)(3) proves that Congress did not choose to displace state foreclosure statutes for liens recorded against "property of the regulated entity" (or property in which the regulated entity holds a "subordinate" lien as is the case here).

At pages 3 and 4 of its Amicus Brief, FHFA cites 12 U.S.C. § 4617(b)(2)(A)(i) and the decision in Skylights v. Byron, 112 F. Supp. 3d 1145 (D. Nev. 2015), to claim that the property of Fannie Mae is property of the Agency during conservatorship, but FHFA does not address all of the provisions in 12 U.S.C. § 4617 that treat the two classes of property differently. FHFA also does not explain how shielding Fannie Mae from the consequences of Fannie Mae's failure to pay the small super priority portion of the lien for costs incurred by the HOA to maintain the quality of Fannie Mae's collateral helps "to restore the Enterprises' financial safety and soundness."

In Valle del Sol, Inc. v. Whiting, 732 F.3d 1006, 1023 (9th Cir. 2013), the court recognized that "conflict preemption" has two forms: impossibility and obstacle preemption:

> Courts find impossibility preemption "where it is impossible for a private party to comply with both state and federal law." Id. Courts will find obstacle preemption where the challenged state law "stands `as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Arizona, 132 S. Ct. at 2501 (quoting Hines v. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)).

As noted at pages 25 to 27 of Appellant's Opening Brief, Fannie Mae has directed its servicers to pay assessments or charges levied by an association in order to protect the priority of Fannie Mae's mortgage liens. If the HOA's foreclosure of

its assessment lien could not extinguish Fannie Mae's "subordinate" lien without the consent of FHFA, this direction that assessments be paid would be meaningless.

Because 12 U.S.C. § 4617 expressly contemplates that Fannie Mae "pay all valid obligations of the regulated entity," and because 12 U.S.C. § 4617 contains no language that restricts an HOA, or any other secured creditor, from conducting a nonjudicial foreclosure that will extinguish a "subordinate" deed of trust owned by Fannie Mae, no conflict exists between the federal statute and the HOA foreclosure statute. 12 U.S.C. § 4617(b)(2)(H) expressly provides that FHFA, as conservator, had the same obligation as Fannie Mae to "pay all valid obligations of the regulated entity that are due and payable at the time of the appointment of the Agency as conservator or receiver," which includes paying all amounts necessary to avoid the foreclosure of the HOA's super priority lien. Because it failed to make these required payments prior to the HOA foreclosure sale, Fannie Mae has no right to contest the validity of the sale or the extinguishment of Fannie Mae's "subordinate" deed of trust.

At page 14 of Respondent's Answering Brief, Fannie Mae cites California ex rel. Harris v. FHFA, 2011 WL 3794942 (N.D. Cal. Aug. 26, 2011), where the State of California sued FHFA, Fannie Mae, and Freddie Mac to challenge statements made by FHFA to Fannie Mae and Freddie Mac not to purchase mortgages on PACE-encumbered properties. The court did not discuss 12 U.S.C. § 4617(j)(3), but instead

applied 12 U.S.C. § 4617(f) that limits judicial review of "the exercise of powers or functions" of FHFA.

Fannie Mae also cites Federal Deposit Insurance Corp. v. Lowery, 12 F.3d 995 (10th Cir. 1993), where the FDIC was appointed as receiver of a failed bank, and the FDIC accepted title to real estate pledged as security for a note to the failed bank. The court applied 12 U.S.C. § 1825(b)(2) to prohibit the Treasurer for Cleveland County, Oklahoma from holding a tax sale of the property. In the present case, the "subordinate" deed of trust was not held in the name of FHFA, and the HOA did not foreclose a tax lien.

In GWN Petroleum Corp. v. Ok-Tex Oil Co., 998 F.2d 853 (10th Cir. 1993), the court affirmed an order by the district court denying the plaintiff's attempt to garnish proceeds from the sale of oil and gas that were paid to FDIC under agreements "assigned to FDIC in its corporate capacity." The court concluded that the proceeds were protected as "property of the FDIC" under 12 U.S.C. § 1825(b)(2) and also as "assets in the possession" of FDIC shielded from garnishment by 12 U.S.C. §1821(d)(13)(C). In the present case, no court issued any writ to garnish property of FHFA.

12 U.S.C. § 4617(b)(11)(C) contains a provision similar to 12 U.S.C. §1821(d)(13)(C) that prevents attachment or execution "by any court," but only for

"assets in the possession of the receiver . . . of a regulated entity for which the Agency has been appointed receiver." In the present case, the HOA's nonjudicial foreclosure sale does not involve attachment or execution issued by a court, and FHFA has never been appointed as the receiver for Fannie Mae.

At page 20 of Respondent's Answering Brief, Fannie Mae cites Trustees of MacIntosh Condominium Ass'n v. FDIC, 908 F. Supp. 58 (D. Mass. 1995), but in that case, FDIC foreclosed the deeds of trust held by it as receiver for the failed bank and extinguished the subordinate liens held by the HOA. The court also held that 12 U.S.C. § 1825(b)(2) barred the HOA from filing an action that would create "an involuntary lien on the property of the FDIC." Id. at 65. In the present case, on the other hand, neither the Property nor the deed of trust have ever been assigned to FHFA, and no legal action was filed to enforce the HOA's superpriority lien.

At page 21 of Respondent's Answering Brief, Fannie Mae cites Midatlantic Nat'l Bank/North v. Federal Reserve Bank of New York, 814 F. Supp. 1195, 1196 (S.D.N.Y. 1993), but the court relied on both 12 U.S.C. § 1821(d)(13)(C) and 12 U.S.C. § 1825 (b)(2) to hold that the plaintiff could not execute its judgment against funds held by the FDIC as receiver for the failed bank. The nonjudicial foreclosure sale in the present case did not involve any "attachment or execution" upon assets in the possession of FHFA as receiver for Fannie Mae.

At the bottom of page 21, Fannie Mae cites Monrad v. Federal Deposit Insurance Corp., 62 F.3d 1169 (9th Cir. 1995). In that case, the court applied 12 U.S.C. § 1825(b)(3) to reverse the district court's award of "late payment penalties" owed to former employees of the defunct bank. Although 12 U.S.C. § 4617(j)(4) contains similar language stating that "[t]he Agency shall not be liable for any amounts in the nature of penalties or fines," the HOA foreclosure in this case involved no such penalties or fines levied against FHFA.

At page 22 of Respondent's Answering Brief, Fannie Mae cites other cases that applied 12 U.S.C. § 1825(b)(3) to prevent penalties and fines from being imposed upon FDIC in situations unrelated to taxes. In each case, however, the FDIC was acting as receiver for the failed bank, and the protection was granted to the FDIC and not to the failed bank.

At pages 23 and 24 of Respondent's Answering Brief, Fannie Mae attempts to distinguish the interpretation of 12 U.S.C. § 1825(b)(2) in Federal Deposit Insurance Corp. v. McFarland, 243 F.3d 876 (5th Cir. 2001), from plaintiff's analysis of 12 U.S.C. § 4617(j)(3) by stating that neither the title nor text of section 4617(j)(1) mentions taxation. On the other hand, the court in McFarland did not rely solely on the reference to the word "taxation" in the section title to reach its conclusion. Plaintiff's analysis of 12 U.S.C. § 4617(j)(3) also does not depend on the title

assigned to each section of 12 U.S.C. § 4617 to support the conclusion that section 4617(j) is intended to apply only to exemptions from taxation.

It is Fannie Mae that seeks to use the "General powers" granted to FHFA by 12 U.S.C. § 4617(b)(2)(A) to claim that the words "property of the Agency" used in 12 U.S.C. § 4617(j)(3) are intended to include "property of Fannie Mae" even though no such words appear in the title or text of 12 U.S.C. § 4617(j).

At page 25 of Respondent's Answering Brief, Fannie Mae argues that 12 U.S.C. § 4617(j)(1) expresses an intent that 12 U.S.C. § 4617(j)(3) applies whether FHFA is "acting as a conservator or a receiver." On the other hand, 12 U.S.C. § 4617(j)(1) also states that the provisions of the subsection "shall apply with respect to the Agency" and not to the regulated entities, Fannie Mae and Freddie Mac. Nothing in 12 U.S.C. § 4617(j)(1) expresses an intent by Congress to include property owned and managed by Fannie Mae as "property of the Agency" protected by 12 U.S.C. § 4617(j)(3).

At page 26 of Respondent's Answering Brief, Fannie Mae describes plaintiff's argument as "counter-textual," but it is Fannie Mae that ignores the clearly stated intent that 12 U.S.C. § 4617(j)(3) applies only to "property of the Agency" and not to "property of Fannie Mae."

In Valle del Sol, Inc. v. Whiting, 732 F.3d 1006, 1023 (9th Cir. 2013), the court

identified "two cornerstones" of the Supreme Court's jurisprudence: 1) "the purpose of Congress is the ultimate touchstone in every pre-emption case"; and 2) "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, Fannie Mae claims that in adopting HERA, Congress expressed an intent to shield Fannie Mae from the consequences of its failure to follow both Nevada law and Fannie Mae's own guidelines that required payment of assessments that Fannie Mae knew had priority over its "subordinate" deed of trust. The statute upon which Fannie Mae relies expresses an intent to protect "property of the Agency" and not "property of Fannie Mae." If Congress had intended that 12 U.S.C. § 4617(j)(3) shield the regulated entities from the effect of nonjudicial foreclosures by senior liens, the statute would say so. Congress cannot have intended that the courts substitute the words "property of Fannie Mae" in place of the words "property of the Agency" in one subsection of 12 U.S.C. § 4617 when multiple provisions in 12 U.S.C. § 4617 treat the two phrases differently.

2. FHFA has manifested its consent to the nonjudicial foreclosure of association liens with priority over trust deeds held by Fannie Mae.

At page 26 of Respondent's Answering Brief, Fannie Mae again substitutes the

words "property of Fannie Mae" in place of the words "property of the Agency" to claim that Congress has preempted state law for the nonjudicial foreclosure of assessment liens against property in which Fannie Mae holds a "subordinate" interest.

At the bottom of page 27 of Respondent's Answering Brief, Fannie Mae admits that 12 U.S.C. § 4617(j)(3) does not prevent an HOA from foreclosing its assessment lien against the property owner. Fannie Mae instead argues that 12 U.S.C. § 4617(j)(3) preempts the recognized principal of real property law that the foreclosure of a senior lien extinguishes all subordinate liens when Fannie Mae holds the "subordinate" lien. No such language appears in the statute.

At page 28 of Respondent's Answering Brief, Fannie Mae cites Lamie v. United States Trustee, 540 U.S. 526, 538 (2004), and Connecticut National Bank v. Germain, 503 U.S. 249, 253-254 (1992), as authority that "courts are not free to rewrite a statute's text." Yet, Fannie Mae's entire argument relies upon rewriting the language used by Congress to apply 12 U.S.C. § 4617(j)(3) to "property of Fannie Mae" and not to "property of the Agency" as stated by Congress.

At page 29 of Respondent's Answering Brief, Fannie Mae does not deny that it has directed its servicers to protect Fannie Mae's deeds of trust from the super priority lien granted to an HOA by the Uniform Common Interest Ownership Act even though Fannie Mae now claims that federal law prevents an HOA foreclosure

sale from affecting Fannie Mae's "subordinate" deed of trust. Why would Fannie Mae expend its limited resources making these payments if Fannie Mae's deeds of trust can not be affected by an HOA foreclosure sale?

At page 6 of its Amicus Brief, FHFA states that "it has not consented and will never consent to the extinguishment of a property interest held by the Enterprises." FHFA has thereby taken a position that violates the express mandate by Congress in 12 U.S.C. § 4617(b)(2)(D) that the Agency take such action to "put the regulated entity in a sound and solvent condition" and in 12 U.S.C. § 4617(b)(2)(H) that the Agency "pay all valid obligations of the regulated entity that are due and payable at the time of the appointment of the Agency as conservator or receiver." How can Fannie Mae ever be placed in "sound and solvent condition" if FHFA has a stated policy to enable Fannie Mae to avoid paying its "valid obligations" and suffer no consequences?

At page 7 of its Amicus Brief, FHFA also argues that if Fannie Mae's interests could be extinguished by an HOA foreclosure sale, FHFA would have "to continuously monitor each potential HOA Sale and any other potential action that could affect the Enterprises' property interests." This, however, is exactly what a business in "sound and solvent condition" that pays "all valid obligations" is expected to do.

3. Fannie Mae does not have standing to assert rights granted to FHFA.

At page 31 of Respondent's Answering Brief, Fannie Mae states: "During conservatorship, Fannie Mae continues to exist as a private entity that can litigate its own right." At page 32 of Respondent's Answering Brief, Fannie Mae quotes a statement by Edward J. DeMarco before the U.S. House of Representatives that Fannie Mae and Freddie Mac "did not cease to be private legal entities when they were placed into conservatorship, nor did they become part of FHFA." This is exactly plaintiff's point. While in conservatorship, Fannie Mae is separate and distinct from FHFA. Yet, Fannie Mae seeks to assert statutory protections granted for property of FHFA and not for property of Fannie Mae.

At page 8 of its Amicus Brief, FHFA also states: "Fannie Mae continues to exist as a private entity that can litigate in its own right during conservatorship." At page 9 of its Amicus Brief, FHFA states that "FHFA endorses Fannie Mae's legal position in this case," and at page 10 of its Amicus Brief, FHFA states that in August of 2015, FHFA issued a statement that endorsed reliance by authorized loan servicers on the Federal Foreclosure Bar, so that FHFA would not need to be a party to the large number of cases where the Enterprises and/or their servicers were named parties.

Missing from FHFA's argument is any statement that it granted Fannie Mae or

its servicers the authority to appear in civil actions to assert rights belonging to FHFA and that FHFA agreed to be bound by any determinations of FHFA's rights in an action where only Fannie Mae or a servicer for Fannie Mae appeared. Because the statute applies only to "property of the Agency," only FHFA has standing to assert the rights that belong to FHFA and not to Fannie Mae or its servicers.

At page 35 of Respondent's Answering Brief, Fannie Mae states: "Fannie Mae is defending its own interest pursuant to a federal statute designed precisely to protect its property." Why then does 12 U.S.C. § 4617(j)(3) only refer to "property of the Agency" and not to "property of Fannie Mae"?

4. An HOA foreclosure sale is not required to be commercially reasonable.

At page 38 of Respondent's Answering Brief, Fannie Mae states that "[a] foreclosure sale that is not conducted in a commercially reasonable manner is ripe to be set aside." As authority, Fannie Mae cites Shadow Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc., 132 Nev. Adv. Op. 5, 366 P.3d 1105 (2016), and Long v. Towne, 98 Nev. 11, 639 P.2d 528 (1982). Neither opinion, however, includes the words "commercially unreasonable." Both cases instead applied Nevada real property law that requires "proof of some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price." Golden v. Tomiyasu, 98 Nev. 503, 514, 387 P.2d 989, 995 (1963).

Fannie Mae quotes Restatement (Third) of Prop.: Mortgages § 8.3, cmt. b (1997) as authority that "generally a purchase price less than 20 percent of the property's fair market value is grossly inadequate." Under the California rule adopted in Golden v. Tomiyasu, however, this Court stated that "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." 79 Nev. at 514, 387 P.2d at 995. (emphasis added)

The record on appeal contains no admissible evidence of the required element of fraud, unfairness, or oppression. The record on appeal also contains no admissible evidence of the fair market value of the Property on the date of the HOA foreclosure sale. Fannie Mae instead relies entirely upon the value assigned to the Property by the HOA's foreclosure agent in the declaration of value form attached to the foreclosure deed. (JA1b, pg. 57)

At page 39 of Respondent's Answering Brief, Fannie Mae claims that unfairness is proved because the HOA did not indicate whether the superpriority piece of the lien had been satisfied. On the other hand, Fannie Mae produced no evidence that it ever tendered payment of the superpriority lien. Fannie Mae instead refers to deposition testimony by Kim Kallfelz (JA2a, pg. 307) and Susan Moses

(JA2a, pg. 233 and pg. 256), and receipts for payments received by and disbursements made by the HOA's foreclosure agent (JA2a, pgs. 276-295). The deposition testimony and the receipts do not prove that any payments made by the former owners were applied to pay the superpriority amount of the HOA's lien.

At page 40 of Respondent's Answering Brief, Fannie Mae claims that section 11.04 of the CC&Rs included a mortgage savings clause (JA2a, pg. 300) and that the existence of this clause proves that the HOA did not intend to foreclose on the HOA's super priority lien. The record on appeal contains no evidence that the HOA or its foreclosure agent had any such intent. NRS 116.1104 also prevents any provision in the CC&Rs from waiving the HOA's superpriority lien rights under NRS 116.3116(2).

5. The HOA foreclosure statute does not violate due process.

At page 41 of Respondent's Answering Brief, Fannie Mae cites NRS 116.31163, NRS 116.311635, and NRS 116.31168 and claims that the statute "impermissibly shifts the burden to a junior interest holder to request notice." Fannie Mae does not mention NRS 107.090(3)(b) and NRS 107.090(4) that are expressly incorporated by the first sentence in NRS 116.31168(1) and require that copies of the notice of default and notice of sale be mailed to holders of interests "subordinate" to the HOA's lien even if they do not record or mail to the HOA a request for notice.

Fannie Mae cites Small Engine Shop, Inc. v. Cascio, 878 F.2d 883 (5th Cir. 1989), which involved a petition for foreclosure based on a confession of judgment that waived the right to a routine adversary hearing. This judicial remedy resulted in a sheriff's sale conducted pursuant to a writ of seizure and sale issued by the court. The court of appeals did not hold that the statute was unconstitutional; it instead adopted a different interpretation of the statute than the one used by the district court and remanded the case to the district court. Id. at 893.

Fannie Mae also cites National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988), to argue that the "state actor" requirement for due process is satisfied if the state provides the "mantle of authority that enhanced the power of the harm-causing individual action." In the Tarkanian case, the Court found that the "state actor" requirement was not met because of a "mantle of authority" granted to the private actor, the NCAA, but because "the final act challenged by Tarkanian – his suspension – was committed by UNLV" and because "[a] state university without question is a state actor." Id. at 192. No "state actor" participates in the nonjudicial foreclosure of an HOA assessment lien.

In footnote 10 at page 42 of Respondent's Answering Brief, Fannie Mae claims that "Saticoy Bay's argument that the State Foreclosure Statute does not involve a state actor was not sufficiently raised below," and that "no points and authorities

regarding state action were presented." To the contrary, Fannie Mae challenged the constitutionality of NRS 116.31162 to 116.31168 in its counter-motion for summary judgment filed on May 8, 2015 (JA1b, pgs. 150-166), so it raised the issue of whether due process applies to a nonjudicial foreclosure sale.

At page 8 of its reply and opposition, filed on May 19, 2015 (JA1c, pg. 224), plaintiff made the exact argument that the statutory procedure for a non-judicial foreclosure sale does not transform private action into state action for due process purposes, and plaintiff cited the decision in Charmicor v. Deaner, 572 F.2d 694 (9th Cir. 1978). At the top of page 43 of Respondent's Answering Brief, Fannie Mae argues that "an HOA's power of sale is derived from the statute alone." In Charmicor v. Deaner, the court rejected this exact argument when used to attack NRS 107.080. The court compared Cal. Civil Code § 2924 to NRS 107.080 and stated:

> Thus, the California statute confirms a contractual right; the Nevada statute confers a power of sale upon the trustee.
>
> **The statutory source of the Nevada power of sale, however, does not necessarily transform a private, nonjudicial foreclosure into state action.** As this court said in Melara v. Kennedy, 541 F.2d 802, 806 (9th Cir. 1976): "Further, the statute creates only the right to act; it does not require that such action be taken."
>
> Other recent cases which hold that the source of the right is not conclusive as to state action include Adams v. Southern California First National Bank, 492 F.2d 324, 330 (9th Cir. 1973), cert. denied, 419 U.S. 1006 (1974), and Kenly v. Miracle Properties, 412 F Supp. 1072, 1075

(D. Ariz. 1976).

> Even this court's opinion in Culbertson v. Leland, 528 F.2d 426 (9th Cir. 1975), holding that Arizona's Innkeeper's Lien Statute colored otherwise private transactions with state action, did not consider the statutory source of the rights involved to be determinative. (emphasis added)
>
> 572 F.2d at 695-696.

In Melara v. Kennedy, 541 F.2d 802, 803 (9th Cir. 1976), the court expressly rejected the plaintiff's argument that state action existed because "the statute is the only source of the extra-judicial sale remedy." The court instead stated that "even though private enforcement of warehouseman's liens was unknown at common law, this is not determinative of the state action issue." Id.

Furthermore, the statute is not the only source of the HOA's right to foreclose its lien. Both the notice of delinquent assessment lien (JA1b, pg. 82) and the notice of default (JA1b, pgs. 84-85) refer to the CC&Rs recorded on June 2, 1998 in the official records of the Recorder for Clark County, Nevada. Because the former owners acquired their title subject to the CC&Rs, the interest pledged to Fannie Mae in the deed of trust was also subject to the HOA's rights under the CC&Rs.

At page 43 of Respondent's Answering Brief, Fannie Mae asserts that because the notice of default and notice of sale must be recorded with the county recorder, the "county recorder's involvement" satisfies the state actor requirement. The notice of

default and the notice of sale for the nonjudicial foreclosure of a deed of trust are also recorded, and the courts have held that no "state action" is present. The same analysis applies to a nonjudicial HOA foreclosure sale.

At page 44 of Respondent's Answering Brief, Fannie Mae claims that incorporating the mandatory notice provisions in NRS 107.090(3)(b) and NRS 107.090(4) by reference "would render the express notice provisions of NRS 116.31163 and NRS 116.311635 superfluous and meaningless." On the other hand, because the mandatory notice provisions in NRS 107.090(3)(b) and NRS 107.090(4) are provided only to holders of interests "subordinate" to the HOA's assessment lien and because the request for notice provisions in NRS 116.31163 and NRS 116.311635 may be used by any holder of an interest, the request for notice provisions are not rendered superfluous or meaningless by the mandatory notice requirements.

If Fannie Mae's analysis were correct, then every nonjudicial foreclosure of a deed of trust would be unconstitutional because NRS 107.090 contains a request for notice provision in NRS 107.090(2) and a mandatory notice provision for holders of "subordinate" interests in NRS 107.090(3)(b). However, because the "request for notice" provisions can be used by more persons than are required to be provided with "mandatory" notice, the notice provisions can be read together so that neither

provision is rendered "superfluous."

CONCLUSION

By reason of the foregoing, plaintiff respectfully requests that this Court reverse the order granting defendant's motion for summary judgment entered on December 8, 2015 and remand this case to the district court.

DATED this 26th day of August, 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 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 6,099 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 26th day of August, 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 26th day of August, 2016, a copy of the foregoing **APPELLANT'S REPLY BRIEF** was served electronically through the Court's electronic filing system to the following individuals:

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