IN THE SUPREME COURT OF THE STATE OF NEVADA

LN MANAGEMENT LLC SERIES 5105 PORTRAITS PLACE,

Appellant,

v.

GREEN TREE LOAN SERVICING, LLC,

Respondent.

Case No. 69477

RESPONDENT'S ANSWERING BRIEF

APPEAL
From the Eighth Judicial District Court, Clark County
THE HONORABLE DOUGLAS E. SMITH
District Court Case No. A-13-679816-C

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

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

Ditech Financial LLC, formerly known as Green Tree Servicing LLC, is a wholly-owned subsidiary of Walter Investment Management Corp., a publicly traded corporation. Wolfe & Wyman LLP is the only law firm whose partners or associates have appeared or are expected to appear for Green Tree Servicing LLC in any stage of this litigation including this Court.

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

Dated this August 8, 2016
Clark County, Nevada

WOLFE & WYMAN LLP

By:/s/ *Colt B. Dodrill*

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I. ROUTING STATEMENT

This Court should retain this matter. Although this quiet title action does not specifically fall within any category of cases under NRAP 17(a), this Court resolved several of the issues related to HOA foreclosures in SFR v. U.S. Bank. However, SFR v. U.S. Bank did not reach issues of first impression raised in this appeal, including constitutionality of NRS 116.3116. This issue is of significant importance and its resolution will have a statewide impact. Therefore, it is appropriate for this Court to retain this matter.

II. STATEMENT OF ISSUES UPON APPEAL

1. Whether the district court correctly held that an HOA foreclosure in violation of the automatic bankruptcy stay is void ab initio.
2. Whether the district court correctly held that the Deed of Trust's beneficiary of record and creditor has standing to challenge an HOA foreclosure that violates the automatic bankruptcy stay.
3. Alternatively, whether the HOA's foreclosure of a delinquent assessment lien is commercially unreasonable when the property sold for approximately 12% of the value of the mortgage loan, the HOA violated the Bankruptcy Stay, and the HOA's notices were defective.
4. Alternatively, whether NRS 116.3116 is facially unconstitutional, because it does not require notice to all lienholders affected by the

foreclosure.

III. STATEMENT OF THE CASE

This is an action for quiet title. This appeal arises from a quiet title action following 5105 Portrait Pl Trust's purported purchase of the subject property at an HOA Sale and subsequent transfer of the property to Appellant LN Management LLC Series 5105 Portraits Place ("Appellant"). On April 10, 2013, Appellant filed a Complaint in the Eighth Judicial District Court of Clark County, Nevada, joining Bank of America, N.A., Zions First National Bank, and William and Betty Webster as defendants. Appellant's Appendix ("AA") at PA1-11. Appellant sought declaration from the district court that it took title to the property free and clear of the Deed of Trust. Id. at PA4. On March 19, 2015, Green Tree filed its Complaint in Intervention against Appellant and Portraits at Painted Desert Homeowners Association ("HOA") challenging the validity and effect of the HOA Sale. Id. at PA16-24.

On July 9, 2015, Green Tree moved for summary judgment against Appellant and the HOA on the basis that, *inter alia*, the HOA Sale was void ab initio because it was conducted in violation of the Bankruptcy Stay. AA at PA25-114. After the hearing, the district court granted summary judgment in favor of Green Tree. AA at PA159-163. This appeal followed. AA at PA174-175.

IV. STATEMENT OF RELEVANT FACTS

Respondent Green Tree is the current beneficiary of a first-position Deed of Trust recorded on October 29, 2003, and encumbering the real property located at 5105 Portraits Pl., Las Vegas, Nevada 89149 ("Property"). AA at PA59-60. The Deed of Trust secures a $192,000.00 loan to William and Betty Webster ("Websters"). Id. at PA35-36.

On June 3, 2011, the Websters petitioned for Chapter 13 Bankruptcy protection in the Eastern District of Texas, case number 11-41748. AA at PA65-67. The Subject Property was included in Schedule A of the Bankruptcy petition. Id. at PA69. On March 21, 2013, the Websters filed a Voluntary Conversion from Chapter 13 to Chapter 7. Id. at PA80-82. On March 25, 2013, the Bankruptcy court converted their Bankruptcy. Id. at PA99. The Chapter 13 Trustee filed her Final Report on April 19, 2013. Id. at PA105-108. The Court discharged the Chapter 13 Trustee on September 9, 2013. Id. at PA110.

In the meantime, On August 4, 2011, the HOA's agent recorded a Notice of Default. AA at PA73. On November 19, 2012, the HOA's agent recorded a Notice of Trustee's Sale, reciting $4,221.00 due and a sale date of December 19, 2012. Id. at PA75. A Trustee's Deed Upon Sale recorded on January 29, 2013, recites a January 23, 2013 sale to 5105 Portraits Pl Trust for $23,100.00 ("HOA Sale"). Id. at PA77-78. On April 9, 2013, a Quitclaim Deed was recorded reciting

that 5105 Portraits Pl Trust transferred the Property to Appellant. Id. at PA6-8. Green Tree disputes the validity and effect of the HOA Sale. Id. at PA16-24.

V. SUMMARY OF THE ARGUMENT

This Court should affirm the district court's judgment on several grounds. First, there are no genuine issues of material fact that the HOA conducted its foreclosure in violation of the automatic bankruptcy stay. Appellant erroneously challenges the district court's order based on misunderstanding of the law related to standing and conflict of laws principles. Here, Green Tree has standing to enforce the automatic stay protections because it was a secured creditor of the Websters' estate. Further, contrary to Appellant's proposition, Ninth Circuit law applies because the Property is located in Nevada. As discussed below, Ninth Circuit authorities provide that acts in violation of the automatic bankruptcy stay are void ab initio. Accordingly, the HOA Sale is void and the Deed of Trust was not extinguished. Thus, this Court should affirm the district court's judgment.

Second, the Court should affirm on the alternate basis that the HOA Sale was commercially unreasonable as a matter of law. Specifically, Shadow Wood Homeowners Assoc., Inc. v. N.Y. Community Bancorp, Inc., 132 Nev. Adv. Op. 5, 366 P.3d 1105 (2016) held that a grossly inadequate price combined with evidence of fraud, unfairness or oppression warrants setting aside an HOA Sale. Here, the HOA sold the Property securing a $192,000.00 loan for a mere $23,100.00 –

approximately twelve percent of its value. Moreover, the HOA recorded various notices and ultimately foreclosed on the Property during the pendency of the Borrowers' bankruptcy – in violation of the automatic stay. Further, the HOA's notices were defective because they include many fees that are not allowed to be included in the super-priority amount of the lien. These two factors demonstrate unfairness to Green Tree. Unfairness coupled with grossly disproportionate sales price demonstrate that the HOA Sale was not commercially reasonable or conducted in good faith.

Third, the provisions of NRS 116 governing foreclosures on HOA liens ("HOA Foreclosure Statute") are facially unconstitutional. The HOA Foreclosure Statute is unconstitutional on its face because it does not ensure that lienholders receive notice before their deeds of trusts are extinguished by an HOA foreclosure sale. Instead, lenders must "opt-in" if they wish to receive advance notice of a foreclosure. The United States Supreme Court held that such an "opt-in" regime is unconstitutional because it violates due process. For these reasons, this Court should affirm the district court's judgment in favor of Green Tree.

VI. STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo. Wood v. Safeway, 121 Nev. 724, 729,121 P.3d 1026, 1029 (2005).

Constitutional challenges to a statute may be addressed by this Court when raised for the first time on appeal. Levingston v. Washoe County By & Through Sheriff of Washoe County, 112 Nev. 479, 482, 916 P.2d 163, 166 (1996), opinion modified on reh'g, 114 Nev. 306, 956 P.2d 84 (1998) (citing McCullough v. State, 99 Nev. 72, 74, 657 P. 2d 1157, 1158(1983).

This Court will affirm the lower court's judgment if it reached the right result on an incorrect ground. Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970).

VII. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S JUDGMENT IN FAVOR OF GREEN TREE.

This Court should affirm the district court's judgment in favor of Green Tree because of the undisputed evidence that the HOA violated the automatic bankruptcy stay. Contrary to Appellant's disingenuous arguments, Green Tree has standing to enforce the automatic stay protections as a secured creditor of the Websters' estate. Also, Appellant is incorrect that Fifth Circuit law applies because the Websters filed for bankruptcy in Texas. This proposition shows complete misunderstanding of conflict of laws principles because the Property is located in the Ninth Circuit and thus, Ninth Circuit law governs. Moreover, acts in violation of the automatic stay are void ab initio. Thus, the HOA Sale is void and the Deed of Trust was not extinguished by the HOA Sale.

Further, this Court should affirm the district court's judgment on two alternative grounds. First, the HOA Sale should be set aside because it was commercially unreasonable evidenced by the inadequate sales price and unfairness and oppression to Green Tree. Second, Nevada's HOA Foreclosure Statute is facially unconstitutional because it fails to mandate notice to lienholders whose deeds of trust risk being extinguished by an HOA foreclosure sale. For the following reasons, this Court should affirm the district court's judgment in favor of Green Tree.

A. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S JUDGMENT BECAUSE THERE ARE NO GENUINE ISSUES OF MATERIAL FACT THAT THE HOA'S FORECLOSURE VIOLATED THE AUTOMATIC STAY.

This Court should affirm the district court's order because the HOA conducted its foreclosure in violation of the automatic bankruptcy stay. First, Appellant's argument that Green Tree does not have standing to challenge the automatic stay violation is disingenuous. The law is clear – Green Tree, as the secured creditor of the Websters' estate, has standing to object to violation of the automatic stay that may have extinguished its Deed of Trust.

Second, Appellant's contention that Fifth Circuit law applies because the Websters filed for bankruptcy in Texas is misleading. Here, Ninth Circuit law applies because the situs of the Property is in Nevada. Further, in the Ninth

Circuit, acts in violation of the automatic stay are void ab initio. Because the HOA violated the Bankruptcy stay, the HOA Sale is void and the Deed of Trust continues to encumber the Property. For these reasons, this Court should affirm the district court's judgment in favor of Green Tree.

1. This Court Should Affirm the District Court's Order Because Green Tree Has Standing to Challenge the HOA Sale.

The district court correctly held that Green Tree has standing to enforce the automatic stay protection. Appellant's arguments to the contrary are disingenuous for several reasons. First, Appellant erroneously conflates two distinct issues concerning conflict of law principles and standing. Second, Appellant's argument that Green Tree does not have standing to enforce the automatic stay protection is misleading. "Nevada has a long history of requiring an actual justiciable controversy as a predicate to judicial relief." Doe v. Bryan, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986). "Moreover, litigated matters must present an existing controversy, not merely the prospect of a future problem." This Court defines justiciable controversy as:

> (1) there must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy, that is to say, a legally protectable interest; and (4) the issue involved in the controversy must be ripe for judicial determination.

Kress v. Corey, 65 Nev. 1, 189 P.2d 352 (1948). Here, Green Tree meets these elements because there is a controversy regarding the Deed of Trust – clearly Green Tree and Appellant are adverse due to the encumbrance, Green Tree is the current beneficiary of the Deed of Trust at issue, and neither party disputes the ripeness. Further, jurisdiction is proper in this Court to determine the validity of the HOA Sale pursuant to Nev. Rev. Stat. Ch. 112 et seq., because Websters, by definition, were insolvent at the time of the sale. NRS 112.160. Thus, Green Tree has standing to challenge the HOA Sale pursuant to NRS 112.210.

Further, the legislative history of section 362 of the "bankruptcy" code clearly recognizes that creditors are protected when it states:

> The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against debtor's property. Those who acted first would obtain payment of their claim in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally.

H.R. Rep. No. 595, 95th Cong., 1st Session 340-42 (1977), reprinted in 1978 U.S. Code Cong. & Admin. News (U.S.C.C.A.N.) 5787, 6297. Thus, Congress recognizes the need for creditors to protect themselves from bankruptcy stay violations.

Appellant's contention that creditors cannot raise such challenges herein are belied by numerous cases that hold not only that secured creditors have standing to raise challenges but that such challenges may be raised outside the bankruptcy

court. For example, in In re Killmer, 501 B.R. 208 (Bankr. S.D.N.Y. 2013), Beneficial Home Service Corporation ("Beneficial") held a security interest in the debtor's property. The debtor's property was sold at a tax sale in violation of the automatic stay to a third party purchaser purportedly terminating Beneficial's lien. Beneficial successfully sought to declare the tax sale void. Id. In so holding, the court addressed the standing of a creditor to have a sale declared void:

> The situation that is alleged to have occurred here is the type of scenario that Congress intended to prevent. Since the automatic stay is meant to prevent creditors from racing to the courthouse to the detriment of other creditors, the Court sees no reason why a creditor who has been harmed by a stay violation should not be able to seek redress for its injury.

In re Killmer, 501 B.R. at 212, 2013 WL 6038838, at 3*. Federal District Courts interpreting the same issue hold similarly. United States v. Miller, No. CIV.A.5:02-CV-0168-C, 2003 WL 23109906, at *7 (N.D. Tex. Dec. 22, 2003). In Miller, the United States sought to void a foreclosure sale by filing a declaratory relief complaint in the Federal District Court. The defendant challenged the standing of the United States to invoke the violation of the automatic stay as the basis for challenging the sale. In rejecting the argument, the Court held:

> Less obvious but no less important interests protected by § 362 are those of creditors, who are "clearly intended to benefit from § 362." Pointer, 952 F.2d at 86; 5 see also Pierce, 272 B.R. at 204 ("The stay is intended to benefit both debtors and creditors"); Glendenning v. Third Fed. Savs. Bank (In re Glendenning), 243 B.R. 629, 634 (Bankr.E.D.Pa.2000) (noting that protection of creditors' interests is confirmed by fact that automatic stay arises even in face of debtor's dereliction in raising it). Congress intended to confer rights on creditors as parties for whose

benefit the automatic stay was promulgated.

Similar conclusions were reached in numerous other matters: Litton Loan Servicing, L.P. v. Rockdale Cnty., Ga. Am. Lien Fund, L.P. (In re Howard) 391 B.R. 511, 515 (Bankr. N.D. Ga. 2008) (assignee of debt secured by debtors' residence had standing to invoke automatic stay, and to seek determination that tax sale was void); In re Ring, 178 B.R. 570, 577, 581 (Bankr. S.D. GA. 1995) (junior secured creditor whose lien was impaired by foreclosure sale conducted by senior secured creditor in violation of the stay had standing to seek compensation for its damages as a civil contempt and for a declaration that the foreclosure sale was void); Ditto v. Delaware Savings Bank 2007 WL 471146 (Tenn Ct. App.) (Secured creditors have both Constitutional and Prudential Standing to prosecute declaratory relief claims). Thus, Green Tree, as one of the Websters' creditors, has standing to protect its security interest from the HOA's stay violation.

Finally, Appellant's reliance on In re Pointer and In re Brooks is misplaced. Pointer involved property tax liens on the debtor's property. In re Pointer, 952 F.2d 82, 84 (5th Cir. 1992). The debtor filed an adversary proceeding to determine the extent and validity of the liens attached during the bankruptcy of the property's prior owner, VVAL. Id. at 84. Ms. Pointer's foreclosure of that property occurred after the VVAL Bankruptcy court lifted the stay. Id. Conversely herein, the HOA did not seek to lift the stay. However, Green Tree's predecessor-in-interest,

EverBank, did seek and obtain relief from stay, although no foreclosure resulted. AA at PA112-114. Accordingly, Pointer is inapplicable to the facts at bar.

Appellant's interpretation of In re Brooks is also misguided. In Brooks, a husband and wife filed two separate bankruptcy petitions. In re Brooks, 871 F.2d 89 (9th Cir. 1989), aff'd In re Brooks, 79 B.R. 479 (9th Cir. B.A.P. 1987). The trustee of the wife's bankruptcy estate challenged a secured creditor's re-recordation of a deed of trust during the pendency of the husband's bankruptcy proceedings. Id. at 89. The Bankruptcy Appellate Panel of the Ninth Circuit held that the trustee of the wife's subsequent bankruptcy does not have standing to enforce the automatic stay protection because the wife was not a creditor of her husband's bankruptcy estate or a joint debtor of the estate. Id. at 90. Here, Green Tree's predecessor was a creditor of the Websters' estate. AA at PA106. Therefore, the facts of In re Brooks are clearly distinguishable. Further, Appellant appears to completely ignore that the Brooks court specifically stated that Congress intended to confer rights on creditors as parties for whose benefit the automatic stay was promulgated. Id. As a secured creditor of the Websters' estate, Green Tree, as EverBank's successor, has standing to object to violation of the automatic stay that may have extinguished its Deed of Trust. For these reasons, the Court should affirm the district court's judgment.

2. This Court Should Affirm the District Court's Order Because Ninth Circuit Law Controls the District Court's Proceeding.

The district court properly applied the correct law. This Court should affirm the district court's judgment because Appellant's proposition that Fifth Circuit law applies because the Websters filed for bankruptcy in Texas is disingenuous. This proposition is misleading because Fifth Circuit law does not govern Nevada properties. Indeed, Appellant's reliance on out-of-circuit authority violates Nevada's choice of law rule. This Court recently confirmed that Nevada follows the Restatement (Second) of Conflict of Laws in resolving choice of law disputes. Progressive Gulf Ins. Co. v. Faehnrich, 130 Nev. Adv. Op. 19, 327 P.3d 1061, 1063 (2014). The Restatement reads:

> (1) Whether a conveyance transfers an interest in land and the nature of the interest transferred are determined by the law that would be applied by the courts of the situs.
> (2) These courts would usually apply their own local law in determining such questions.

Restatement (Second) of Conflict of Laws § 223 (1971). Here, because the situs of the real property at issue is in Nevada, the district court correctly applied Nevada law. See, In re Lindsay, 59 F.3d 942, 948 (9th Cir. 1995) ("Texas law controls in this case, because the real estate foreclosed on is in Texas."). Thus, the district court correctly determined that Nevada or local law applies.

It necessary follows, therefore, because Nevada falls within the Ninth Circuit, Ninth Circuit law applies. "[W]hen the Ninth Circuit or any of its coequal

circuit courts issue an opinion, the pronouncements become the law of that *geographical area*." See Zuniga v. United Can Co., 812 F.2d 443, 450 (9th Cir. 1987) (emphasis added). Because Nevada falls within the geographical area of the Ninth Circuit, Appellant's reliance on the Fifth Circuit authority is misplaced. Because the Ninth Circuit authorities provide Green Tree standing to challenge the HOA's Bankruptcy stay violation, the district court's judgment should be affirmed.

Further, Appellant's argument that the HOA Sale is not void ab initio is misplaced. As Appellant concedes, in the Ninth Circuit, acts in violation of the automatic stay are void ab initio: "[T]he fundamental importance of the automatic stay to the purposes sought to be accomplished by the Bankruptcy Code requires that acts in violation of the automatic stay be void, rather than voidable." In re Schwartz, 954 F.2d 569, 572 (9th Cir. 1992) (quoting In re Garcia, 109 B.R. 335 (N.D.Ill.1989)). Indeed, "the majority of courts have long stated that violations of the automatic stay are void and of no effect." Id. Again, because this property is in Nevada, Ninth Circuit law applies. Because the HOA violated the Bankruptcy stay, its foreclosure sale is void. As a result, the Deed of Trust was not extinguished. Accordingly, this Court should affirm the district court's judgment in favor of Green Tree.

B. ALTERNATIVELY, THIS COURT SHOULD AFFIRM ON OTHER BASES SUPPORTED BY THE RECORD.

The Court should affirm the district court's judgment on two alternative grounds. First, the HOA Sale should be set aside because it was commercially unreasonable evidenced by the inadequate sales price and unfairness and oppression to Green Tree. Second, Nevada's HOA Foreclosure Statute is facially unconstitutional because it fails to mandate notice to lienholders whose deeds of trust risk being extinguished by an HOA foreclosure sale. For the following reasons, this Court should affirm the district court's judgment in favor of Green Tree.

1. The HOA Sale Was Commercially Unreasonable.

At a minimum, this Court should affirm the district court's judgment in favor of Green Tree because, as a matter of law, the HOA Sale was conducted in a commercially unreasonable manner. Nevada's version of the Uniform Common Interest Ownership Act ("UCIOA") imposes an express obligation of good faith on an HOA. NRS 116.31164 provides, "Every contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement." This requirement is verbatim from Section 1-113 of the UCIOA, which was adopted by the Nevada Legislature in 1991. *See* Assembly Bill 221 (1991), Section 44. The comment to Section 1-113 of the UCIOA states:

> This section sets forth a basic principle running throughout

> this Act: in transactions involving common interest communities, good faith is required in the performance and enforcement of all agreements and duties. Good faith, as sued (sic) in this Act, means observance of two standards: "honesty in fact," and observance of reasonable standards of fair dealing.

Nevada has also adopted the Uniform Commercial Code ("UCC"). See generally, NRS Chapter 104. Section 2-103(1)(b) of the UCC states, "Good faith … means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." Moreover, NRS 104.1201 defines good faith as "honesty in fact and the observance of reasonable commercial standards of fair dealing." This Court recently confirmed an HOA Sale can be set aside if it is not commercially reasonable. Shadow Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc., 132 Nev. Adv. Op. 5, 366 P. 3d 1105 (2016). In Shadow Wood, this Court held that "the courts retain the power, in an appropriate case, to set aside a defective foreclosure sale." Shadow Wood, 366 P. 3d at 1111. An HOA sale may be set aside as commercially unreasonable when there is gross inadequacy of purchase price and evidence of "some element of fraud, unfairness, or oppression." Id. A sales price less than 20 percent of fair market value is inadequate: "'[g]enerally … a court is warranted in invalidating a sale where the price is less than 20 percent of fair market value and, absent other foreclosure defects, is usually not warranted in invalidating a sale that yields in excess of that amount.'" Id. at 1112-1113 (quoting Restatement (Third) of Prop.: Mortgages § 8.3

cmt. b (1997)). This is precisely what happened here, because Appellant acquired a house for a mere $23,100.00 (AA at PA77) – approximately twelve percent of the value of the mortgage loan secured by the Deed of Trust (AA at PA36). Further, as discussed in great detail above, the HOA improperly recorded various notices and ultimately foreclosed on the Property during the pendency of the Websters' bankruptcy, all in violation of the automatic bankruptcy stay. Yet, because of the same stay, Green Tree's predecessor was unable to foreclose under its Deed of Trust, and, if the sale is not set aside, the Deed of Trust is extinguished. This is patently unfair and oppressive to Green Tree.

Further unfairness and oppression to Green Tree results from the defective foreclosure notices. Pursuant to NRS 116.3116, the HOA only has a lien on a unit for "any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive of subsection 1 of NRS 116.3102." Further, a lien under NRS 116.3116 is prior to all other liens and encumbrances on unit except:

> (b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent …
> The lien is also prior to all security interests described in paragraph (b) to the extent of the assessments for common expenses … which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien.

NRS 116.3116(2)(b). Further,

> As to first deeds of trust, NRS 116.3116(2) thus splits an

> HOA lien into two pieces, a superpriority piece and a subpriority piece. The superpriority piece, consisting of the last nine months of unpaid HOA dues and maintenance and nuisance-abatement charges, is "prior to" a first deed of trust. The subpriority piece, consisting of all other HOA fees or assessments, is subordinate to a first deed of trust.

SFR Investments Pool 1 v. U.S. Bank, 130 Nev. Adv. Op. 75, 334 P.3d 408, 411 (2014), reh'g denied (Oct. 16, 2014). Yet, here, the notices include many fees that are not allowed to be included in the superpriority amount. AA at PA73, PA75. The notices also fail to itemize these fees or to identify whether the HOA was foreclosing on a claimed superpriority portion of the lien. Id. Assuming, that the super-priority piece of the HOA lien was prior to the Deed of Trust, the HOA's failure to identify the correct super-priority amount of the Lien is a defect in notice to Green Tree. The grossly inadequate sales price coupled with unfairness to Green Tree provide grounds to set aside the HOA Sale. Shadow Wood, 366 P.3d at 1111-12. As a result, the HOA Sale must be set aside.

Finally, it has been well-settled under Nevada law that "a wide discrepancy between the sale price and the value of the collateral compels close scrutiny into the commercial reasonableness of the sale." Levers v. Rio King Land & Inv. Co., 560 P.2d 917, 919–20 (Nev. 1977). Although related, this equitable rule is different from the equitable rule of Shadow Wood. The Levers rule is concerned with the circumstances of the sale generally, as opposed to the treatment of junior lienholders in particular. Under Levers a discrepancy between the sale price and

the value of the collateral is only one factor in a totality-of-the-circumstances-type test, although a "wide" discrepancy triggers closer scrutiny of the reasonableness of other aspects of the sale. Here, there is a wide discrepancy between the sales price and the value of the collateral because the sales price is approximately twelve percent of the value of the mortgage loan secured by the Deed of Trust. Thus, closer scrutiny of the HOA Sale is required. Further, the wide discrepancy between the sales price and the value of the collateral is accompanied by unfairness to Green Tree, which warrants invalidating the HOA Sale under Levers' totality-of-the-circumstances test. Because the HOA Sale was commercially unreasonable under Shadow Wood and Levers, this Court should affirm the judgment for Green Tree.

2. The HOA Foreclosure Statute Is Unconstitutional.

Alternatively, the Court should affirm the district court's judgment in favor of Green Tree because the HOA Foreclosure Statute is facially unconstitutional under the Due Process Clauses of the Nevada and U.S. Constitutions. The Statute is facially unconstitutional because it does not mandate actual notice to lenders prior to an HOA foreclosure sale. Instead, the HOA Foreclosure Statute requires lenders and others with a security interest in a property to "opt-in" to receive their constitutionally protected notice by submitting a written notice request to the HOA. This requirement fails to provide mandatory notice guaranteed by the Due

Process Clause. As such, the HOA Foreclosure Statute is facially invalid.

a. The HOA Foreclosure Statute is facially unconstitutional because it does not mandate notice to lenders prior to extinguishment of their property rights.

The HOA Foreclosure Statute is facially unconstitutional because it does not provide for mandatory notice to lenders. A statute is unconstitutional on its face when "no set of circumstances exists under which the [statute] would be valid." City of Los Angeles v. Patel, 135 S. Ct. 2443, 2450 (2015). The U.S. Supreme Court held that at a minimum, [the] deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).[1] In Mennonite Bd. Of Mission v. Adams, the U.S. Supreme Court

[1] The Nevada Supreme Court has "consistently relied upon the [United States] Supreme Court's holdings interpreting the federal Due Process Clause to define the fundamental liberties protected under Nevada's due process clause." State v. Eighth Jud. Dist. Ct. (Logan D.), 306 P.3d 369, 377 (2013); Hernandez v. Bennett-Haron, 287 P.3d 305, 310 (2012) (holding that "the similarities between the due process clauses contained in the United States and Nevada Constitutions, permit us to look to federal precedent for guidance as we determine whether the procedures utilized in the inquest proceedings regarding officer-involved deaths are consistent with the due process clause set forth in Article I, Section 8(5) of the Nevada Constitution.") (citing Rodriguez v. Dist. Ct., 120 Nev. 798, 808 n. 22, 102 P.3d 41, 48 n. 22 (2004) (which recognizes that "[t]he language in Article I, Section 8(5) of the Nevada Constitution mirrors the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution")).

applied the Mullane standard in the same context as the present case – where a mortgagee's property interest was purportedly extinguished by a non-judicial foreclosure sale. 462 U.S. 791, 800 (1983). The Mullane Court held that any party with an interest in real property subject to deprivation must receive actual notice of the event that causes the deprivation. 462 U.S. 791 (1983). Additionally, "when notice is a person's due, process which is a mere gesture is not due process." Mullane, 339 U.S. at 314. Moreover, "[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice." Mennonite, 462 U.S. at 798. While diligence may differ depending on the context, Mennonite requires that reasonable steps be taken to provide actual notice to interested parties. See Mennonite, 462 U.S. at 795-800.

Here, the HOA Foreclosure Statute, in effect prior to the October 1, 2015 amendments, does not mandate actual notice to lenders under all circumstances. Lenders receive notice only if they have "opted-in" to receive notice from the HOA. In fact, none of the three provisions of the HOA Foreclosure Statute that deal with notice provide for mandatory notice to lenders. NRS 116.31162, the first express notice provision sets forth exactly who an HOA should notify of delinquent assessments before it commences foreclosure: "the unit's owner or his

or her successor in interest." Nowhere does this provision require that an HOA provide any notice to lenders of the delinquent assessment, in violation of the due process requirements.

The second express notice provision, NRS 116**Error! Bookmark not defined.**.31163 requires that a notice of default and election to sell be provided only to a holder of security interest who "has requested notice" or "has notified the association 30 days before the recordation of the notice of default, of existence of the security interest." NRS 116.31163 (1)-(2). Once again, conspicuously absent is any language requiring an HOA to affirmatively notify the lender of the default and election to sell, again in violation of basic due process requirements.

The third notice provision, NRS 116.311635, similarly requires that notice of an HOA foreclosure sale be mailed only to those holders of recorded security interests who have requested notice under NRS 116.31163 or those who have notified the association. NRS 116.311635 (1)(b)(1)-(2). Again, just like the other provisions, a lender must first request notice in violation of due process.

As described above, the HOA Foreclosure Statute explicitly allows extinguishment of a first deed of trust without any notice to lenders. If a lender does not "opt-in" to receive notice, the Statute allows extinguishment of a first deed of trust without constitutionally required notice. This result directly contradicts Mennonite that requires reasonable steps be taken to provide actual

notice to interested parties prior to a non-judicial foreclosure sale. This constitutional requirement is not eliminated if a party fails to take steps to safeguard its interest. See Mennonite, 462 U.S. at 795-801. Further, because notice must be afforded "under all circumstances," and it is not the case here, the HOA Foreclosure Statute is facially unconstitutional.

Courts in other states decided that "opt-in" notice provisions, like the ones in the HOA Foreclosure Statute violate due process. The case of Island Financial, Inc. v. Ballman, 607 A.2d 76 (Md. Ct. Spec. App. 1992) is instructive. In Island Financial, the Maryland Court of Special Appeals applied Mennonite in holding that the due process rights of a holder of a subordinate mortgage were violated when the holder failed to receive notice of the senior lien holder's foreclosure sale. Id. at 79-82. Like here, the Maryland statute contained only "opt-in" notice provisions as to subordinate security interest holders. The court held that the due process violation existed even though the subordinate mortgage holder failed to take advantage of the "opt-in" notice provisions. Id. at 81-82.

In Reeder & Associates v. Locker, 42 N.E.2d 1371 (Ind. Ct. App.1989), the Indiana Court of Appeals also applied Mennonite to hold that a security interest holder who had failed to use the procedures in the state's request-notice statute was still entitled to actual notice of a foreclosure that would extinguish its security interest. According to the court, "[c]onstitutional protection exists not only when a

mortgagee complies with the [statute]; it exists any time an action which will affect a property interest protected by the due process clause of the U.S. Constitution occurs." Id. at 1373.

In Small Engine Shop, Inc. v. Cascio, the United States Court of Appeals for the Fifth Circuit conducted an in-depth analysis of Louisiana's "opt-in" clause and concluded it did not satisfy due process requirements. 878 F .2d 883, 893 (5th Cir. 1989). Louisiana's "opt-in" statute did not mandate notice to all interested parties. Instead, just like the HOA Foreclosure Statute, it required an individual or entity to affirmatively request notice. Small Engine, 878 F.2d at 885-86. On appeal, the court analyzed the validity of the statute through lenses of Mennonite and Mullane. Id. at 888. The court ultimately held that the statute "as interpreted by the district court, cannot be squared with Mennonite's allocation of notice burdens." Id. at 890; see also Davis Oil Co. v. Mills, 873 F.2d 774, 787-88 (5th Cir. 1989) (reaching an identical conclusion). Thus, where a statute's sole notice provision is a burden-shifting "opt-in" provision, the statute is unconstitutional because it does not meet due process requirements.

This Court should reach the same result as in the analogous decisions discussed above because the HOA Foreclosure Statute is unconstitutional on its face due to its failure to guarantee lenders will receive notice of an HOA foreclosure sale. The fact that a lender may "opt-in" to request notice is not

sufficient, as the United States Supreme Court held in Mennonite: a "party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation." 462 U.S. at 799. Because the HOA Foreclosure Statute is unconstitutional, the district court's judgment in favor of Green Tree should be affirmed.

b. The HOA Foreclosure Statute Fails to Pass Constitutional Muster by Improper Interpretation of NRS 116.31168.

As discussed above, the HOA Foreclosure Statute is facially unconstitutional because it fails to mandate notice to lenders in violation of their due process rights. Any argument by Appellant that the Statute is constitutional because NRS 116.31168 incorporates by reference NRS 107.090 is improper because it ignores the Statute as a whole. When interpreting a statute, a court should consider multiple legislative provisions as a whole. U.S. Dep't of Energy v. Ohio, 503 U.S. 607, 630 (1992). Here, NRS 116.31168 implements the notice provisions of NRS 107.090 only to the extent they apply to parties who have requested notice in advance. NRS 116.31168 provides in pertinent part:

> Foreclosure of liens: **Requests by interested persons** for notice of default and election to sell; right of association to waive default and withdraw notice or proceeding to foreclose.
>
> 1. The provisions of NRS 107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed. **The request must identify the lien by stating the names of the unit's owner and the common-**

interest community.

NRS 116.31168 (emphasis added). NRS 116.31168, just like the provisions that precede it, is a self-limiting statute. As the caption of NRS 116.31168 makes clear, that provision was drafted to address *requesting* notice of the notice of default and election to sell. The caption reads: "Foreclosure of liens: *Requests* by interested persons for *notice of default* and election to sell; right of association to waive default and withdraw notice or proceeding to foreclose." NRS 116.31168 (emphasis added). Any argument that NRS 116.31168 is about the foreclosure of liens "generally," and that therefore the reference to NRS 107.090 should be interpreted as applying to the entirety of the lien foreclosure process is specious because each of NRS 116.31162, NRS 116.31163, NRS 116.311635, NRS 116.311634, NRS 116.31166 and NRS 116.31168 address part of the process of foreclosing under an association lien discretely. Each of these provisions start with the prefatory "Foreclosure of liens:" and then go onto addressing the specific processes. Under NRS 116.31168, the process following the colon is the request for notice by interested persons for *notice of default* and *the right of an association to waive default and withdraw the notice* only. It's not about any other notices or processes because those are specifically addressed in other provisions of the HOA Foreclosure Statute. Specifically, NRS 116.31168 fails to address the notice of trustee's sale, a document required to be recorded before the sale can take place.

Thus, even if the provision required actual notice to the lender of the notice of default and election to sell (and it does not), that alone is insufficient. The lender (and any interested party for that matter) must additionally receive notice of the time and place of sale, and details to cure any alleged default. Notice of only the breach *without notice of the corresponding sale* does not comply with the minimum requirements of Mullane, Mennonite, or Small Engine and fails to satisfy the lender's constitutional due process rights before taking its interest in real property.

In addition to the caption, the text itself plainly refers to *requests* by interested persons. This Court has 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. Southern Nevada Homebuilders v. Clark County, 121 Nev. 446, 117 P.3d 171 (2005). Further, a statute should be construed so no part is rendered meaningless. Public Employees' Benefit Program v. Las Vegas Metropolitan Police Department, 124 Nev. 138, 179 P.3d 542 (2008). The second sentence in NRS 116.31168(1) states that "[t]he *request* must identify the lien by stating the names of the unit's owner and the common-interest community." (emphasis added). Any argument by Appellant that the first sentence of NRS116.31168(1) is limited neither by the caption of the provision nor by the second sentence following it is incorrect

because doing so renders the second sentence of NRS 116.31168(1) superfluous. See Southern Nevada Homebuilders, 117 P.3d 171; Public Employees' Benefit Program, 179 P.3d 542. The second sentence of NRS 116.31168 has to be read to limit the reference to NRS 107.090 in the first sentence to be only about the request for notice (of default) portion of the provision. See id. Thus, the Statute fails to pass constitutional muster by improper interpretation of the Statute's notice provisions. Accordingly, the Statute is invalid on its face because the Statute's "opt-in" notice provisions are insufficient to meet due process requirements under both the Nevada and U.S. Constitutions. Because the Statute is facially unconstitutional, the district court's decision should be affirmed.

VIII. CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment in favor of Green Tree.

Dated this August 8, 2016
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CERTIFICATE OF COMPLIANCE

I hereby certify that this petition for rehearing/reconsideration or answer complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

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3. Finally, 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 and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this August 8, 2016
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CERTIFICATE OF SERVICE

This below hereby certifies that on the 8th day of August, 2016, I served the foregoing, RESPONDENT'S BRIEF through The Supreme Court of Nevada Electronic Filing (EFlex) to the following party(ies):

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