

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

LN MANAGEMENT LLC SERIES 5105  
PORTRAITS PLACE,

Appellant,

v.

GREEN TREE LOAN SERVICING, LLC,

Respondent.

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Tracie K. Lindeman  
Clerk of Supreme Court

Case No. 69477

**RESPONDENT'S OPPOSITION TO APPELLANT'S MOTION TO STRIKE  
ISSUES 3 AND 4 OF RESPONDENT'S ANSWERING BRIEF**

Respondent Green Tree Servicing LLC, now known as Ditech Financial LLC ("Green Tree"), by and through its counsel of record, Wolfe & Wyman LLP, hereby responds in opposition to Appellant LN Management LLC Series 5105 Portraits Place's ("Appellant") Motion to Strike Issues 3 and 4 of Respondent's Answering Brief.

This Opposition is filed pursuant to NRAP 27 and is based on the following  
Memorandum of Points and Authorities and all papers and pleadings on file herein.

Dated this October 5, 2016  
Clark County, Nevada

WOLFE & WYMAN LLP

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## **MEMORANDUM OF POINTS AND AUTHORITIES**

This Court should deny Appellant's Motion to Strike Issues 3 and 4 of Respondent's Answering Brief because Green Tree may raise these issues for the first time on appeal. First, as Appellant concedes, this Court has the discretion to address important constitutional challenges, such as Green Tree's constitutional challenge of NRS 116.3116, when raised for the first time on appeal.

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)). Similarly, the Ninth Circuit Court of Appeals allows a party to raise constitutional issues for the first time on appeal, especially when it affects "the fairness, integrity, or public reputation of judicial proceedings." United States v. Rearden, 349 F.3d 608, 614 (9th Cir. 2003). Here, Green Tree brings an important constitutional challenge to NRS 116.3116 by arguing that the Statute is facially unconstitutional because it does not require notice to all lienholders affected by the foreclosure. This issue is of significant importance and raising it in this Court will preserve the fairness and integrity of these proceedings. Because issues of constitutional nature fall under a long

standing exception and can be raised for the first time on appeal, Appellant's arguments fail.

Second, Appellant's argument that Green Tree failed to comply with NRAP 44 requirements is disingenuous. NRAP 44 provides that "[i]f a party questions the constitutionality of an Act of the Legislature in a proceeding in which the state or its agency, officer, or employee is not a party in an official capacity, the questioning party shall give written notice to the clerk of the Supreme Court immediately upon the filing of the docketing statement or as soon as the question is raised in the court." Here, Green Tree raised its constitutional challenge in its Answering Brief, filed on August 12, 2016. Green Tree then complied with NRAP 44 by notifying the clerk of the Supreme Court on August 24, 2016. Appellant claims that Green Tree failed to notify the clerk "immediately" but this is not the standard for respondents. As stated above, Green Tree was required to notify the clerk "as soon as the question is raised in the court," which it accomplished on August 24, 2016. NRAP 44. Appellant further fails to argue, and has no grounds for arguing, that it was somehow prejudiced by Green Tree's brief delay in notifying the clerk. Instead, Appellant once again misinterprets the law in its favor by improper reliance on In re Candelaria, 126 Nev. Adv. Op. 40, 245 P.3d 518 (2010). Contrary to Appellant's arguments, the pertinent facts of In re Candelaria are materially different from this case. In Candelaria, appellant's counsel failed to

provide the clerk with any notice of the constitutional challenge, which is not the case here. 245 P.3d at 415. However, this Court nonetheless elected to address that appellant's arguments because the issues concerned important constitutional questions. Id. Because Green Tree's constitutional challenge can be raised for the first time on appeal and Green Tree complied with the requirements of NRAP 44, Appellant's Motion should be denied.

Third, Green Tree may raise its challenge to an HOA Sale based on commercial unreasonableness of the Sale. 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). Here, Green Tree argues that this Court should affirm the district court's order on the alternate basis that the HOA Sale was commercially unreasonable as a matter of law, pursuant to this Court's directive in Shadow Wood Homeowners Assoc., Inc. v. N.Y. Community Bancorp, Inc., 132 Nev. Adv. Op. 5, 366 P.3d 1105 (2016). As the prevailing party in the district court proceedings, Green Tree can raise any argument supported by the record, including that there are no genuine issues of material fact that the HOA Sale was commercially unreasonable. Wyatt, 468 P.2d at 341. Further, this Court did not decide Shadow Wood until April of this year, long after the briefing on Green Tree's Motion for Summary Judgment was completed in the district court. Because the controlling law has changed dramatically, Green Tree will be unfairly

prejudiced if the Court does not allow it to raise this argument on appeal as an alternate basis for affirming the district court's decision that the HOA Sale did not extinguish the Deed of Trust. For these reasons, this Court should deny Appellant's Motion.

### **CONCLUSION**

For the foregoing reasons, this Court should DENY Appellant's Motion to Strike Issues 3 and 4 of Respondent's Answering Brief.

Dated this October 5, 2016  
Clark County, Nevada

WOLFE & WYMAN LLP

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Attorneys for Respondent Green Tree  
Servicing LLC, now known as Ditech  
Financial LLC.

## **CERTIFICATE OF SERVICE**

This below hereby certifies that on the 5<sup>th</sup> day of October, 2016, I served the foregoing, RESPONDENT'S OPPOSITION TO APPELLANT'S MOTION TO STRIKE ISSUES 3 AND 4 OF RESPONDENT'S ANSWERING BRIEF through The Supreme Court of Nevada Electronic Filing (EFlex) to the following party(ies):

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*LN MANAGEMENT LLC SERIES 5105 PORTRAITS PLACE*

By: /s/ Rebecca Nichols

An employee of Wolfe & Wyman LLP