IN THE SUPREME COURT OF THE STATE OF NEVADA

NATIONSTAR MORTGAGE, LLC Appellant, vs. SATICOY BAY LLC SERIES 2227 SHADOW CANYON, Respondent.	Case No. 70382	Electronically Filed Oct 07 2016 10:34 a.m. Tracie K. Lindeman Clerk of Supreme Court

APPEAL
from the Eighth Judicial District Court, Department VII
The Honorable Carolyn Ellsworth, District Judge
District Court Case No. A-14-702938-C

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

Nationstar Mortgage LLC (**Nationstar**) is an indirect, wholly-owned subsidiary of a publicly-traded company, Nationstar Mortgage Holdings Inc. ("NSM Holdings"), a Delaware corporation. Nationstar is directly owned by two entities: (1) Nationstar Sub1 LLC ("Sub1") (99%) and (2) Nationstar Sub2 LLC ("Sub2") (1%). Both Sub1 and Sub2 are Delaware limited liability companies. Sub1 and Sub2 are both 100% owned by NSM Holdings. The stock of NSM Holdings is owned approximately 64% by FIF HE Holdings LLC, a Delaware limited liability company, and approximately 36% by public stockholders.

DATED this 20th day of September, 2016

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STATEMENT OF JURISDICTION

This Court has jurisdiction under NEV. R. APP. P. 3A(b)(1). The District Court entered judgment in favor of Saticoy Bay LLC Series 2227 Shadow Canyon on April 4, 2016, and the notice of entry of that order was entered on April 8, 2016. The judgment finally resolved all claims among the parties before the District Court. Appellant Nationstar Mortgage, LLC timely filed its notice of appeal on May 6, 2016.

APPELLANT'S STATEMENT REGARDING ROUTING

Pursuant to NEV. R. APP. P. 28(a)(5), Appellant Nationstar Mortgage, LLC (**Nationstar**) states that this case raises questions of statewide public importance, as the principal issues raised on appeal include: (1) whether NRS 116.3116 (as it existed before amendments went into effect in October 2015) is unconstitutional; and (2) whether Nevada should expressly adopt the Restatement approach and hold that grossly inadequate foreclosure sales may be vacated by the district courts without further/additional analysis.

ISSUES PRESENTED

(1) Whether the association's sale of the subject property for approximately 10% of the value of the subject property should be set aside as commercially unreasonable where the HOA was aware of the market value of the property at the time of the lien foreclosure sale?

(2) Whether the association's improper foreclosure on violation fines renders the sale void.

(3) Whether NRS 116 is facially unconstitutional under the Due Process Clause?

STATEMENT OF THE CASE

This case involves a dispute over the effect of a homeowners association's foreclosure sale of property to Saticoy Bay LLC Series 2227 Shadow Canyon (**Saticoy Bay**). The association improperly foreclosed on a superpriority *and* violation lien, selling the Property to for $35,000, or approximately 10% of the Property's value - which was known to the HOA at the time of the foreclosure sale.

Saticoy now contends that it owns the property free and clear of Nationstar's senior deed of trust. Despite the grossly inadequate sales price and impermissible foreclosure on a violation fees, the District Court agreed with Saticoy Bay, holding that, *inter alia,* the foreclosure deed recitals were conclusive as to the validity of the foreclosure. That judgment should be reversed.

The vast divergence of the sales price at the foreclosure sale and the actual value of the property – which was known to the HOA at the time of foreclosure, as well as other factors indicating a lack of good faith in conduct of the sale, the foreclosure sale was commercially unreasonable as a matter of law and, thus, void.

Second, the foreclosure sale was void because it was conducted in violation of express Nevada law which prohibits recovery on violation liens by foreclosure. The District Court's order did not even address this defect.

Lastly, Nationstar is entitled to summary judgment because NRS 116, et seq., the HOA foreclosure statute, is facially unconstitutional because it does not mandate that mortgagees receive actual notice of HOA foreclosure sales.

STATEMENT OF FACTS

I. Factual Background

A. Nationstar's Lien on the Property

On February 7, 2006, Pulte Mortgage, LLC recorded a deed of trust, encumbering real property located at 2227 Shadow Canyon Drive, Henderson, Nevada 89044 (the **Property**). (AA029). The Deed of Trust secures a loan in the amount of $350,000.00. *Id.*

On September 28, 2011, the deed of trust and underlying note were assigned to Bank of America, N.A. (AA048). Later, on September 27, 2013, the deed of trust and underlying note were assigned to Nationstar Mortgage, LLC. (AA051).

B. The Association's Lien and Foreclosure

The Property is governed by the Conditions, Covenants, and Restrictions of the Sun City Anthem Community Association (the **HOA**).

On April 16, 2010, the agent of the HOA, Red Rock Financial Services (**HOA Trustee**), recorded a Notice of Delinquent Assessment Lien against the Property. (AA054). The Lien stated that the total amount due to the HOA was $771.00. (*Id.*). Further, the Lien stated that it included late fees, interest, fines/violations and collection fees and costs. (*Id.*). The Lien did not specify what portion of the Lien had super-priority over the senior Deed of Trust. (*Id.*).

On June 24, 2010, the HOA Trustee recorded a Notice of Default and Election to Sell, (AA056). The Notice of Default stated the total amount due to the HOA was $2,057.18. (*Id.*). The Notice of Default did not specify what portion of the Lien had super-priority over the senior Deed of Trust. (*Id.*). Contrary to law, the Notice of Default was not signed by the association president or person designated in the Covenants Codes & Restrictions of the HOA. (*Id*.).

On November 26, 2013, the HOA Trustee recorded a Notice of Foreclosure Sale. (AA058). The Notice of Sale stated that the amount due *as of the date of the execution of the Notice of Sale* was $8,005.16. (*Id.*). Contrary to law, the Notice of Sale failed to specify the amount due and owing on the lien as of the date of the

proposed sale. (*Id.*). The Notice of Sale did not specify what portion of the Lien had super-priority over the senior Deed of Trust. (*Id.*).

On February 2, 2014, the HOA Trustee recorded a Foreclosure Deed, stating the Property was sold at a foreclosure sale held on January 2, 2014 – more than three years after the lien was recorded. (AA061). The foreclosure deed indicates the value of the property to be $269,060.00 and the sales price of the property to Saticoy Bay was $35,000. (AA063).

At her deposition, the NRS 30(b)(6) witness for the HOA Trustee, Julia Thompson, testified that violation fines were included in the amounts disbursed to the HOA on its lien following the sale. (AA077-AA082).

C. The Association's Knowledge of the Market Value of the Property

On March 25, 2011 the HOA was advised by the HOA trustee that comparable property values were $255,000, $250,000, and $263,000 and that a first deed of trust in the amount of $350,000 encumbered the property. (AA068).

On October 15, 2013 the HOA was *again* advised by the HOA trustee that comparable property values were $320,000, $295,000, and $300,000 and that a first deed of trust in the amount of $350,000 encumbered the property. (AA069).

On October 14, 2013, the HOA Trustee obtained an online property valuation showing the subject property to be worth $301.292.00. (AA070). Also

on October 14, 2013, the HOA Trustee obtained the Clark County Assessment records, valuing the subject property at $249,389.00. (AA074).

Nationstar retained an expert to opine as to the value of the property as of the date of foreclosure. The expert, who was unrebutted, concluded that the value of the property at the time of foreclosure was $335,000.00. (AA102).

STANDARD OF REVIEW

This [C]ourt reviews a district court's grant of summary judgment de novo." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). A motion for summary judgment should be granted "when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to judgment as a matter of law.'" *Id.*; NRCP 56(c). All evidence and inferences must be viewed in a light most favorable to the non-moving party on a summary judgment motion. *Safeway*, 121 Nev. at 729, 121 P.3d at 1029.

ARGUMENT

I. The Sales Price of the Property at a 90% Discount Was Commercially Unreasonable as a Matter of Law.

The district court erred by granting summary judgment despite evidence establishing material questions of fact as to whether the HOA's foreclosure was conducted in a commercially unreasonable manner. The HOA Lien Statute requires that HOA foreclosure sales be commercially reasonable, stating that

"every contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement." NRS 116.1113. The drafters of this section defined good faith as follows:

> [g]ood faith . . . means observance of two standards: 'honesty in fact,' and observance of reasonable standards of fair dealing. While the term is not defined, [it is] derived from and used in the same manner as . . . Sections 2-103(i)(b) and 7-404 of the Uniform Commercial Code.

Uniform Common Interest Ownership Act § 1-113 cmt. (1982). Nevada's version of the UCC defines "good faith" as "honesty in fact and the observance of *reasonable commercial standards* of fair dealing." NRS 104.1201(2)(t) (emphasis added).

Nevada courts have confirmed that this commercial reasonableness standard applies to the disposition of collateral. *See, e.g.*, *Jones v. Bank of Nev.*, 91 Nev. 368, 373, 535 P.2d 1279, 1282 (1975). Likewise, courts in other states interpreting the same provision at issue here, Uniform Act § 1-113, have held that the disposition of real property must be commercially reasonable. *Will v. Mill Condo. Owners' Ass'n*, 848 A.2d 336, 340 (Vt. 2004) ("Although the rules generally applicable to real estate mortgages do not impose a commercial reasonableness standard on foreclosure sales, the [Uniform Act] does provide for this additional layer of protection.").

Granting superpriority to nominal HOA liens over substantial senior deeds of trust "represents a 'significant departure from existing practice.'" *SFR Invs.*, 334 P.3d at 412 (quoting the official comments to the Uniform Act § 1-116). However, NRS 116.1113's requirement that the foreclosure of these superpriority liens be commercially reasonable serves to protect first deed of trust holders from unreasonable foreclosures. In this case, two main questions of material fact exist relating to whether the HOA followed reasonable commercial standards of fair dealing.

A. The Sale Price was Grossly Inadequate

Here, questions of material fact surround the commercial reasonableness of the foreclosure sale of the property for a mere 10% of the fair market value of the property, *i.e.* $35,000 out of $335,000. Under Nevada law, a commercially reasonable sale should reflect a calculated effort to promote a sales price equitable to both the debtor and to the secured creditor. As this Court has explained, the "quality of the publicity, the *price obtained at the auction*, [and] the number of bidders in attendance" are also factors to consider when analyzing the commercial reasonableness of a public sale. *Dennison v. Allen Grp. Leasing Corp.*, 110 Nev. 181, 186, 871 P.2d 288, 291 (1994) (emphasis added).

Importantly, it is 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.*, 93 Nev. 95, 98, 560 P.2d 917, 920 (1977) (emphasis added); *see also Iama Corp. v. Wham*, 99 Nev. 730, 736, 669 P.2d 1076, 1079 (1983); *Jones*, 91 Nev. at 368. Such close scrutiny is surely required here, where a deliberately ill-defined interest in property securing a $350,000 loan sold for $35,000.

Courts analyzing the commercial reasonableness of foreclosure sales have either voided such sales or refused to grant summary judgment in favor of the foreclosing party where the discrepancy between the sales price and the value of the secured property was much less egregious than the present case. For example, in *Iama Corp.*, this Court reversed a trial court's finding that a sale of collateral was conducted in a commercially reasonable manner. 99 Nev. at 737. Central to the Court's decision was the sales price: 25.1% or roughly a fourth of the fair market value. *Id.* at 736. This Court again held that "such a discrepancy compels close scrutiny into the commercial reasonableness of the sale" and then carefully considered whether proper notice was given, whether the bidding was competitive, and whether the sale was conducted pursuant to the sheriffs office's normal procedures. *Id.* Ultimately, the Court set aside the sale because the seller's pre-foreclosure conduct had detrimentally affected the price at auction. *Id.* at 736-37.

This Court also squarely addressed the inferences to be drawn from a grossly inadequate sales price yet again in *Shadow Wood*, 366 P.3d at 1110-12. This Court

favorably quoted the rule from the Third Restatement of Property that while "[g]ross inadequacy cannot be precisely defined in terms of a specific percentage of fair market value[, g]enerally . . . a court is warranted in invalidating a sale where the price is *less than 20 percent* of fair market value." *Id.* at 1112 (quoting Restatement (Third) of Property, Mortgages, § 8.3 cmt. b (1997))(emphasis added).

In a similar case applying the Uniform Act, the Vermont Supreme Court likewise voided a commercially unreasonable foreclosure sale where a property with a fair market value of $70,000.00 was sold to satisfy an HOA lien of $3,510.10. *Will*, 848 A.2d at 338-40. That court explained that a foreclosing HOA bears the burden to prove the foreclosure was commercially reasonable. *Id.* at 342. The party conducting the sale also "must make a good faith effort to maximize the value of collateral," and "have a reasonable regard for the debtor's interest." *Id.* The court voided that sale because the condominium sold for 15% of its value and there was only one bid on the property. *See id.* These facts made the sale commercially unreasonable, and so the court vacated summary judgment and voided the sale. *Id.* at 343.

Here, the HOA sold the Property for $35,000—just 10% of the unrebutted fair market value of the property at the time of the sale. Therefore, the HOA foreclosure in this case falls well within the bounds of what this Court has identified as grossly inadequate, raising the inference that the HOA failed to

"t[ake] steps to insure the best possible price would be obtained for the benefit of the debtor." *Levers*, 93 Nev. at 99, 560 P.2d at 920 (holding that the party failed to meet its burden to show that the sale was commercially reasonable).

B. The HOA's Conduct Demonstrates Fraud, Unfairness or Oppression

Because the sales price was grossly inadequate as a matter of law, Nationstar was not required to show any evidence of "fraud, unfairness or oppression: in the sale. *Shadow Wood*, 366 P.3d at 1110-12. Nonetheless, the HOA and HOA Trustee's knowledge of the fair market value of the property at the time of the foreclosure sale, combined with their failure to obtain a sales price even close to fair market value demonstrates bad faith. Despite researching the fair market value of the property, the HOA sold the property at a 90% discount. This does not reflect "a calculated effort to promote a sales price that is equitable to both the debtor and the secured creditor." *Dennison v. Allen Group Leasing Corp*., 110 Nev. 181, 186, 871 P.2d 288, 291 (Nev. 1994).

Further, the fact that the foreclosure sale took place more than 3 years after the lien became due, in violation of NRS 116.3116(5), and that the lien expressly contained violation fines, which cannot be foreclosed upon pursuant to NRS 116.31162(6). Additionally, the notice of sale did not contain the amount necessary to satisfy the lien *as of the date of the proposed sale*, in violation of NRS 116.311635(3)(a), and, the Notice of Default and Election to Sell was not signed

"by the person designated in the CC&Rs to do so, or if no person is designated, by the HOA president" in violation of NRS 116.31162(2). (AA058-059). The HOA foreclosed on a lien that was extinguished due to the statutory time bar, and also a violation lien that could not be foreclosed upon as a matter of law. Foreclosing in violation of the plain language of the foreclosure statute further represents "fraud, oppression and unfairness" in the sale.

This Court's recent decision in *Shadow Wood* affirmed that district courts must consider these equities when addressing HOA foreclosure sales. 366 P.3d at *1110-12. In *Shadow Wood*, this Court considered it proper for the district court to develop the factual record in order to "assess the competing equities." *See id*. at 1112-14. Specifically, this Court held that summary judgment could not be granted on the bank's quiet title claim because the district court needed to develop, among other things, what the additional fees and costs claimed by the HOA represented and whether they were reasonable. *Id.*

The situation is similar here, where the district court appeared to not even consider these facts in determining whether or not the foreclosure was commercially reasonable. Where the quality of Saticoy Bay's title is only as good as the HOA's lien and the process it used to foreclose on that lien, these unanswered questions regarding the HOA's demands and its refusal of tender make

summary judgment improper. The district court's assertion that Nationstar should bear the burden of the HOA's bad faith requires reversal.

II. The Foreclosure is Void Because the HOA Impermissibly Foreclosed on Violation Fines.

Nevada law requires an HOA to account separately for violations and assessments. See NRS 116.310315. Here, it is unrefuted that the HOA impermissibly foreclosed on violation fines. (AA077-AA082). Saticoy Bay had notice of this defect in the sale when it purportedly purchased the property at the HOA foreclosure sale because the foreclosure notices expressly state that they contain violation fines. (AA054 stating "This amount includes assessments, late fees, interest, fines/violations and collection fees and costs."). The foreclosure sale on these violation was conducted in violation of NRS 116.31162(5). Thus the sale is void, Saticoy Bay is entitled to a refund of its purchase funds, and title to the property must be restored to the manner in which it existed prior to the improper foreclosure sale. The Court erred in failing to address this defect in the sale altogether.

III. The HOA Lien Statute Is Facially Unconstitutional Under the Due Process Clause.

The district court's judgment should be reversed because the provisions of the HOA Lien Statute that applied before the 2015 amendments are facially unconstitutional under the Due Process Clauses of the Nevada and U.S.

Constitutions. The HOA Lien Statute did not mandate actual notice to a deed of trust holder prior to an HOA's foreclosure. Rather, the HOA Lien Statute impermissibly required those with a security interest on a Nevada property potentially subject to an HOA lien to "opt-in" to their constitutional protections by requesting notice prior to the HOA's foreclosure—a requirement that fails to provide the mandatory notice guaranteed by the Due Process Clause. As such, the HOA Lien Statute is invalid on its face.[1]

The district court erred by dismissing the constitutional challenges, finding that the state actor requirement was not met. (AA753-754). The district court overlooked specific statutory provisions that the Legislature found it necessary to amend in 2015 in order to ensure the constitutionally guaranteed notice. S.B. 306 (Nev. 2015). Other courts' interpretations of the pre-amendment HOA Lien Statute confirm the Legislature's decision to correct it and persuasively indicate that the pre-amendment statute violated constitutional guarantees of due process.

[1] Nationstar's purported loss of a property interest pursuant to the HOA Lien Statute resulted from state action, and thus requires application of the Due Process Clause. *See, e.g.*, *Culbertson v. Leland*, 528 F.2d 426, 432 (9th Cir. 1975) (holding that operation of innkeeper's lien statute that permitted non-judicial seizure to be state action); *J.D. Construction v. IBEX Int'l Group*, 126 Nev. 366, 376, 240 P.3d 1033, 1040 (2010) ("A mechanic's lien is a 'taking' in that the property owner is deprived of a significant property interest, which entitles the property owner to federal and state due process."); *see also id.* at 376, 240 P.3d at 1041 (*citing Connolly Develop., Inc. v. Sup. Ct. of Merced Cnty.*, 553 P.2d 637, 644 (Cal. 1976)).

See Bourne Valley Court Trust v. Wells Fargo Bank, NA, __ F.3d ___, 2016 WL 4254983 at *3-5 (9th Cir. 2016).

A. The HOA Lien Statute Is Facially Unconstitutional because it Does not Ensure Notice and an Opportunity to be Heard Prior to the Elimination of Property Rights.

The HOA Lien Statute is unconstitutional on its face because it does not ensure that mortgagees at risk of losing property interests will receive notice and an opportunity to be heard.[2] An "elementary and fundamental requirement of due process . . . is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of an action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).[3] The U.S. Supreme Court has applied this standard in the same context as this case—where a mortgagee's property interest was purportedly

[2] 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) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987) (alteration in *Patel*)). A litigant may attack a statute's facial unconstitutionality in violation of due process even if the party received actual notice that was not required by the law in question. *See, e.g.*, *Garcia-Rubiera v. Calderon*, 570 F.3d 443, 456 (1st Cir. 2009) (sustaining facial attack on notice provisions and holding that "actual notice cannot defeat [facial] due process claim").

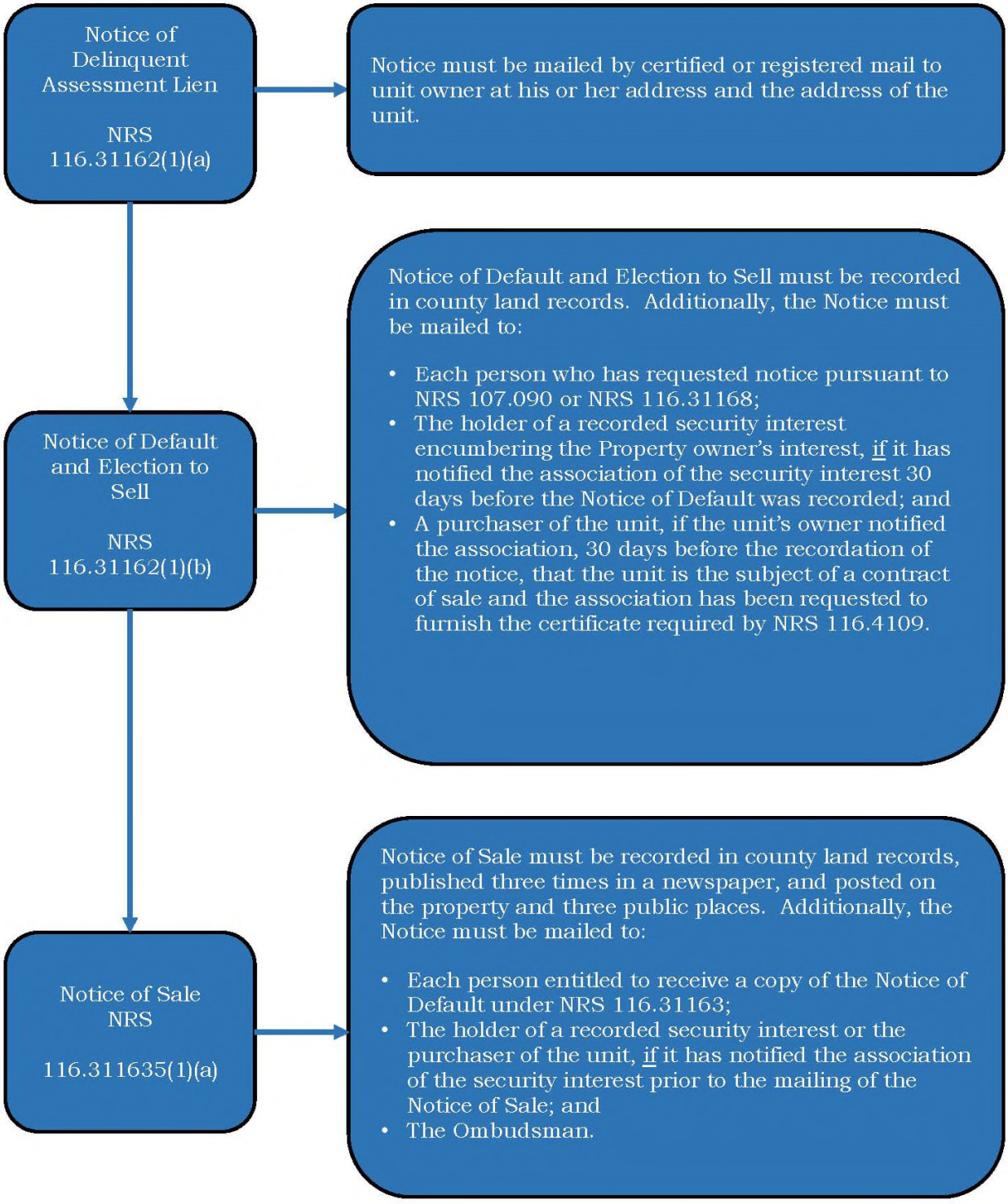
[3] Because the Nevada Constitution's Due Process Clause "virtually mirror[s] the language in the United States Constitution," *Reinkemeyer v. Safeco Ins. Co. of Am.*, 117 Nev. 44, 50, 16 P.3d 1069, 1072 (2001), and Nevada courts look to federal case law interpreting the United States Constitution for guidance, *see Hernandez v. Bennett-Haron*, 287 P.3d 305, 310 (Nev. 2012), the due-process analysis under each Constitution is the same, and the HOA Lien Statute is unconstitutional under both.

extinguished by a nonjudicial foreclosure. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983). The *Mennonite* Court held that the Due Process Clause required that "[n]otice by mail or other means *as certain to ensure actual notice* [to the mortgagee] is a minimum constitutional precondition" to a nonjudicial foreclosure sale that can extinguish the mortgagee's interest. *Id.* (emphasis added).

On its face, Nevada law does not "under all circumstances" ensure actual notice to deed of trust holders "of the pendency of an action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314. Mortgagees must receive notice *only* if they have previously requested notice from the HOA. NRS 116.31163 requires that a notice of default and election to sell be provided only to a holder of a recorded security interest who "has requested notice" or "has notified the association" of the existence of a security interest more than 30 days before the HOA records the notice of default. NRS 116.31163 (1)-(2). Section 116.311635 similarly requires that notice of an HOA foreclosure sale be sent only to those mortgagees of record who have requested notice under NRS 116.31163, or those who have "notified the association." NRS 116.311635(1)(b)(1)-(2). A third provision concerning notice of delinquent assessments does not require notice to mortgagees at all. NRS 116.31162.

The notice requirements for foreclosing on an HOA lien under the pre-amendment HOA Lien Statute are summarized in the following chart:

Foreclosures on HOA Liens Under Nevada Chapter 116



In failing to require that notice be given to deed of trust beneficiaries under the HOA Lien Statute, the Nevada Legislature initially diverged from other states that adopted similar statutes. In drafting the HOA Lien Statute, the Nevada Legislature largely followed the Uniform Act upon which the statute is based. Section 3-116(j)(1) of the 1982 Uniform Act would have required that a foreclosure on the HOA's superpriority lien "must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute]]." In this instance, however, Nevada drafted a unique provision and created the requirements for foreclosing on an HOA lien from scratch. In the process, it initially failed to ensure that affected deed of trust beneficiaries would receive adequate notice.

The HOA Lien Statute explicitly permits the total extinguishment of a first deed of trust without *any* notice to the mortgagee holding that deed. If a mortgagee does not request notice—or, put differently, fails to "opt in" to its constitutional rights—the pre-amendment HOA Lien Statute allowed the extinguishment of a first deed of trust without notice. Such a result—even when an "opt in" mechanism is available—contravenes *Mennonite*, which holds that 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; *see also Mullane*, 339 U.S. at 314 (notice must be afforded "under all circumstances").

The drafters of the Uniform Act highlighted the problem with Nevada's pre-amendment HOA Lien Statute, issuing the following comment as part of the 2008 version of the Uniform Act:

> In some states, nonjudicial foreclosure procedures require notice to subordinate lienholders only when those lienholders have recorded a timely request for notice of sale on the real property records. . . . The issue of notice to subordinate lienholders becomes more critical under this Act, given that subsection (c) gives the association a limited priority over the otherwise-first mortgage lender, thus rendering that lender a subordinate lienholder. *It would be manifestly unfair for an association's foreclosure sale to extinguish the lien of the otherwise-first mortgage lender if the association did not in fact provide the lender with notice of that sale.*

Uniform Law Commission, Uniform Common Interest Ownership Act cmt. 8 (2008) (emphasis added). To remedy this defect, the 2008 version of the Uniform Act included a new section expressly stating that an association's foreclosure "does not terminate an interest that is subordinate to the lien to any extent unless the association provides notice of the foreclosure to the record holder of the subordinate interest." *Id.* § 3-116(r).

A number of courts have concluded that opt-in notice statutes do not protect the due-process rights of property interest holders. For example, in *Island Financial, Inc. v. Ballman*, 607 A.2d 76, 79-82 (Md. Ct. Spec. App. 1992), the Maryland Court of Special Appeals applied *Mennonite* to hold that the rights of a holder of a subordinate mortgage on certain property were violated when the holder failed to receive notice of the senior lien holder's foreclosure. The court

held that the due-process violation existed even though the subordinate mortgage holder failed to take advantage of a Maryland statute that would have allowed it to "opt in" to receive notice of a subsequent foreclosure by recording a request for notice—in other words, a procedure materially identical to the "request for notice" procedure in NRS 116.31163. *Id.* at 81-82. According to the court, "[c]onstitutional due process protection does not exist only for those who follow the notice statute but encompasses all interests that may be affected by state action." *Id.* at 81.

Similarly, in *Reeder & Associates v. Locker*, 542 N.E.2d 1371 (Ind. Ct. App. 1989), the Indiana Court of Appeals applied *Mennonite* to hold that a mortgagee who had failed to use the procedures in the applicable request-notice statute was nonetheless entitled to actual notice of a foreclosure that would eliminate its security interest. As the court noted, "[c]onstitutional protection exists not only when a mortgagee complies with the [request-notice statute]; it exists any time an action which will affect a property interest protected by the [D]ue [P]rocess [C]lause of the U.S. Constitution occurs." *Id.* at 1373.[4]

[4] *Accord e.g.*, *Wylie v. Patton*, 720 P.2d 649, 655 (Idaho 1986) (reversing quiet title judgment after determining that lienholder failed to receive constitutionally required notice, even though lienholder failed to request notice under applicable statute); *City of Boston v. James*, 530 N.E.2d 1254, 1257 (Mass. App. Ct. 1988); ("'[A] party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation.'") (quoting *Mennonite*, 462 U.S. at 799); *Jefferson Twp. v. Block 447A*, 548 A.2d 521, 524 (N.J. 1988) ("[A] person's

Consistent with the many on-point decisions on the issue, the pre-amendment HOA Lien Statute was unconstitutional on its face because it did not guarantee that beneficiaries of first deeds of trust would receive notice of an HOA's foreclosure sale. The fact that a lienholder could record a request for notice was not enough; as the United States Supreme Court made clear 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. Accordingly, the HOA Lien Statute is unconstitutional, and the district court's decision should be reversed.

B. The HOA Lien Statute Cannot Be Saved by a Broad Reading of the Notice Provisions of NRS 116.31168.

The HOA Lien Statute cannot be saved by a broad interpretation of the language of NRS 116.31168. 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. Section 116.31168 states:

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entitlement to the notice required by due process cannot be conditioned on the requirement that he request it."); *In re Foreclosure of Tax Liens*, 103 A.D.2d 636, 640 (N.Y. App. Div. 1984) (holding that the state's constitutional obligation to notify mortgagees could not be "abrogated by requiring the mortgagee to request notice"; "The state has an obligation to all mortgagees, not merely to those who request notice."); *United States v. Malinka*, 685 P.2d 405, 408-09 (Okla. Civ. App. 1984) (holding Oklahoma tax foreclosure sale unconstitutional due to failure to guarantee notice to affected lienholders despite availability of request-notice procedures); *Seattle First Nat'l Bank v. Umatilla Cnty.*, 713 P.2d 33, 34-37 (Or. App. 1986) (holding publication notice statute unconstitutional as violative of due process despite request-notice statute).

> **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 foreclosure.**
>
> 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 (italicized emphasis added). Although the term "request" is not defined, it is a vital component of both the title and the relevant subsection of NRS 116.31168. It refers back to the more specific sections of NRS Chapter 116 that govern notice—for instance, NRS 116.311635, which provides that a notice of sale be provided to a holder of a first deed of trust or any other lienholder only "if either of them has notified the association, before the mailing of the notice of sale, of the existence of the security interest, lease or contract of sale, as applicable." Similar provisions govern the notice of default and election to sell. *See* NRS 116.31163.

An interpretation holding that this general statute, which includes references to a "request," requires an HOA to provide notice to those who have not requested it when three other provisions specifically impose only "opt-in" notice would violate multiple Nevada canons of construction. *See, e.g., State Tax Comm'n ex rel. Nev. Dep't of Taxation v. Am. Home Shield of Nev., Inc.*, 127 Nev. 382, 388, 254 P.3d 601, 605 (Nev. 2011) ("A specific statute controls over a general statute."); *id.* at 386, 254 P.3d at 604 ("Statutes must be construed as a whole, and phrases may not be read in isolation to defeat the purpose behind the statute.");

Nev. Power Co. v. Haggerty, 115 Nev. 353, 366, 989 P.2d 870, 878 (1999) (holding that a statute's title can reflect legislative intent).

In particular, reading NRS 116.31168 as incorporating broader notice requirements would impermissibly render several sections of Chapter 116 superfluous. "When interpreting a statute, [courts] must give its terms their plain meaning, considering its 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." *S. Nev. Homebuilders Ass'n v. Clark Cnty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005). If NRS 116.31168 incorporates all of the notice requirements of NRS 107.090, the following subsections of the HOA Lien Statute are completely superfluous: NRS 116.31163(1), NRS 116.31163(2), NRS 116.311635(b)(1), NRS 116.311635(b)(2). In fact, it would even render the second sentence of NRS 116.31168(1)—fully half of the subsection—completely meaningless.

A review of the underlying statutory subsections further demonstrates the absurd result that would attach if the district court's interpretation were adopted. The first two, NRS 116.31163(1) and NRS 116.31163(2), provide that a notice of default and election to sell need only be provided to a mortgagee who has "requested notice pursuant to NRS 107.090 or NRS 116.31168." The next two, NRS 116.311635(b)(1) and NRS 116.311635(b)(2), require that notice of the foreclosure sale itself—the event that purportedly extinguishes the constitutionally-

protected property interest of a mortgagee—be sent *only* to those who have *requested* "notice under NRS 116.31163," and the "holder of a recorded security interest or the purchaser of the unit, *if either of them have notified the association* . . . of the existence of the security interest." NRS 116.311635(b) (emphasis added). This interpretation hinges on the assumption that the Nevada Legislature drafted a series of five interlocking request-notice provisions—the four request-notice provisions and NRS 116.31168(1), which also references a "request" for notice—four and a half of which have no meaning whatsoever, because a small part of one of those subsections negates all the rest and requires actual notice of a foreclosure sale.

Reading NRS 116.31168 to incorporate by reference NRS 107.090's requirements such that a foreclosing HOA would be required to provide actual notice of a foreclosure sale to mortgagees who did not request notice renders every one of these provisions meaningless. Courts should "construe statutes to give meaning to all of their parts and language . . . and read each sentence, phrase, and word to render it meaningful within the context and purpose of the legislation." *Harris Assocs. v. Clark Cnty. Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003). This interpretation ignores this maxim, instead adopting an interpretation that would render meaningless not only a word or phrase, but entire statutory subsections.

As plainly written, the HOA Lien Statute fails to meet the requirements for due process under both the Nevada and United States Constitutions. The fact that a lienholder may record a request for notice under the statute is simply not enough; numerous courts have held state laws to be unconstitutional despite the availability of similar request-notice provisions. For that reason, the district court's judgment should be reversed.

CONCLUSION

This Court should grant Nationstar's Motion for Summary Judgment because of the commercially unreasonable sale price of the Property and other indications of lack of good faith in the sale. Further, the HOA Lien Statute is facially unconstitutional under the Due Process Clause and unconstitutionally vague.

DATED this 6th day of October, 2016.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14 point font size.

I FURTHER CERTIFY that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C) it is proportionally spaced, has a typeface of 14 points or more and contains 6,662 words.

FINALLY, I CERTIFY that I have read this **Appellant's Opening 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.

. . .

I understand that I may be subject to sanctions in the event that the accompanying answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 6th day of October, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on this 6th day of October, 2016 I caused to be served a true and correct copy of foregoing **APPELLANT'S OPENING BRIEF** in the following manner:

(ELECTRONIC SERVICE) The above referenced document was electronically filed on the date hereof with the Clerk of the Court for the Ninth Circuit Court of Appeals by using the Appellate Court's CM/ECF system and served through the Court's Notice of electronic filing system automatically generated to those parties registered on the Court's Master E-Service List.

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