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 10:39 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 APPENDIX VOL. 4

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UCIOA	AB 221	Explanation; Comments	Fnt
	141	Repeals NRS 117.025 (specifications for condo map), 117.027 (title co. certificate on condo map), 117.120 ((condo as subdivision of land), 278A.140 (common open space org. must keep funds in trust account and keep records), 278A.150 (liens for assessments in PUD), 278A.160 (sale under PUD ass't lien), 361.243 (separate ass't of condos).	

1. Footnote references are to lettered comments on Memorandum dated January 17, 1990, from Gurdon H. Buck to Members, Committee h-5 Uniform Laws, Group H Condominiums, Cooperatives amd Associations of C-Owners, copy attached hereto, together with follow up memorandum.

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DISTRICT COURT

CLARK COUNTY, NEVADA

SATICOY BAY LLC SERIES 2227 SHADOW CANYON, Plaintiff, vs. NATIONSTAR MORTGAGE LLC.; PATERNO C. JURANI, ESQ.; and REPUBLIC SILVER STATE DISPOSAL, DBA REPUBLIC SERVICES, Defendants.	CASE NO.: A-14-702938-C DEPT NO.: V

PLAINTIFF'S SUPPLEMENTAL BRIEF REGARDING DUE PROCESS AND COMMERCIAL REASONABLENESS

Plaintiff Saticoy Bay LLC Series 2227 Shadow Canyon ("plaintiff"), by and through its attorney, Michael F. Bohn, Esq., files this supplemental brief to address the arguments raised in the supplemental brief filed on November 6, 2015 by defendant, Nationstar Mortgage LLC (hereinafter "defendant").

POINTS AND AUTHORITIES

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

As set forth at page 12 of plaintiff's opposition and countermotion, filed on September 10, 2015, the United States Supreme Court has held that in order for an alleged deprivation of a federal right to be

"fairly attributable to the State," it is not enough that the alleged deprivation "be caused by the exercise of some right or privilege created by the State," but that "the party charged with the deprivation must be a person who may fairly be said to be a state actor." Lugar v. Edmondson Oil Co., Inc., 475 U.S. 922, 937 (1982). Due process is not an issue in this case because no "state actor" participates in the nonjudicial foreclosure process provided by NRS Chapter 116.

At page 4 of its supplemental opposition, defendant cites Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 531 U.S. 288 (2001), as authority that "the deed of an ostensibly private organization or individual is to be treated sometimes as if a State had caused it to be performed." In Brentwood Academy, however, the Court considered "whether a state wide association incorporated to regulate interscholastic athletic competition among public and private secondary schools may be regarded as engaging in state action when it enforces a rule against a member school." Id. at 290. The Court concluded that "the association's regulatory activity may and should be treated as state action owing to **the pervasive entwinement of state school officials in the structure of the association,** there being no offsetting reason to see the association's acts in any other way." Id. at 291. For example, the voting membership of each of the association's nine-person committees was "limited under the Association's bylaws to high school principals, assistant principals, and superintendents elected by member schools." Id.

The Court also recognized that "[t]he Association is not an organization of natural persons acting on their own, but of schools, and of public schools to the extent of 84% of the total." 531 U.S. at 298. In addition, the Court observed:

> To complement that entwinement of public school officials with the Association from the bottom up, the State of Tennessee has provided for entwinement from top down. State Board members are assigned ex officio to serve as members of the board of control and legislative council, and the Association's ministerial employees are treated as state employees to the extent of being eligible for membership in the state retirement system.

Id. at 300.

The Court also stated that "[e]ntwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards." Id. at 302.

Defendant has attached the amended and restated CC&Rs for Sun City Anthem and the amended and restated by-laws for the HOA as Exhibit A to defendant's supplemental brief. Section 1.1 of the amended and restated CC&Rs provides for "the creation of Sun City Anthem Community Association, Inc., an association comprised of all owners of real property in Sun City Anthem," and Section 6.2 of the CC&Rs provides that "[e]very owner shall be a Member of the Association." Section 3.1 of the Bylaws provides that the directors for the Association "shall be Members." No public officials are designated to serve on the Board of the Association, so there is no "entwinement" of public officials with the operation of the HOA in this case.

In Rendell-Baker v. Kohn, 457 U.S. 830 (1982), the respondent was the director of a nonprofit institution located on privately owned property in Brookline, Massachusetts. The Court observed that the school "was founded as a private institution and is operated by a board of directors, none of whom are public officials or are chosen by public officials." Id. at 832. Relying on its decision in Blum v. Yaretsky, 457 U.S. 991 (1982), the Supreme Court held that the respondents had failed to establish "state action" by the private institution even though respondents argued that the school "depended on the State for funds," even though the school was subject to extensive regulation, even though the respondents claimed that the school performed a "public function," and even though respondents claimed that there was a "symbiotic relationship" between the school and the State. 457 U.S. at 840-843.

At page 4 of its supplemental brief, defendant cites Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), where the appellee claimed that a local Moose Lodge's refusal to serve him liquor was "state action" that violated 42 U.S.C. § 1983. The Supreme Court agreed that a Liquor Control Board regulation that invoked "the sanctions of the State to enforce a concededly discriminatory private rule" was state action and that "[a]ppellee was entitled to a decree enjoining the enforcement of § 113.09 of the regulations promulgated by the Pennsylvania Liquor Control Board insofar as that regulation requires compliance by Moose Lodge with provisions of its constitution and bylaws containing racially discriminatory provisions." Id. at 179. No such regulations controlled the actions of the HOA in the present case.

Defendant also quotes from Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), in

which the Wilmington Parking Authority, an agency of the State of Delaware, leased space in its building to a restaurant that refused to serve appellant food and drink solely because he was a Negro. The Court observed that "[t]he land and the building were publicly owned" and that the commercially leased areas "constituted a physically and financially integral and, indeed, indispensable part of the State's plan to operate its project as a self-sustaining unit." Id. at 724-725. In the present case, on the other hand, the property subject to the HOA's lien rights is entirely private, and no agency of the government has any financial interest in the property as a lessor.

Defendant also quotes from Sutton v. Providence St. Joseph Medical Center, 192 F.3d 826 (9th Cir. 1999), where the Court of Appeals for the Ninth Circuit affirmed the district court's dismissal of the plaintiff's claim that a private employer had violated his rights under the 1964 Civil Rights Act and under the Religious Freedom Restoration Act. The plaintiff claimed that the private employer was under "compulsion" from the federal government. Citing the decisions in Lugar and similar cases, the Court of Appeals affirmed the dismissal of plaintiff's claims and stated:

> In summary, **Supreme Court precedent does not suggest that governmental compulsion in the form of a generally applicable law, without more, is sufficient to deem a private entity a governmental actor**. Instead, the plaintiff must establish some other nexus sufficient to make it fair to attribute liability to the private entity. Typically, the nexus has consisted of **participation by the state in an action ostensibly taken by the private entity**, through conspiratorial agreement (*Adickes*), official cooperation with the private entity to achieve the private entity's goal (*Lugar*), or enforcement and ratification of the private entity's chosen action (*Moose Lodge*). (emphasis added)

Id. at 841.

At page 5 of its supplemental brief, defendant argues that NRS Chapter 116 requires developers of planned unit developments to create a homeowners association, and that "Nevada stripped the ability of private parties to subordinate the assessment lien." Merely adopting a statute, however, does not satisfy the dual requirements that 1) "the deprivation must be caused by the exercise of some right or privilege created by the State"; and 2) "the party charged with the deprivation must be a person who may fairly be said to be a state actor." Lugar v. Edmondson Oil Co., Inc., 475 U.S. 922, 937 (1982).

At pages 5 and 6 of its supplemental brief, defendant asserts that "privatization of government services" results in savings to local governments, but defendant has not cited any decision stating that

such savings are proof of "state action."

Similarly, at page 7 of defendant's supplemental brief, defendant quotes statements made by Assemblywoman Ellen Spiegel in 2009 that increasing the length of the super priority lien would "prevent cost-shifting from common-interest communities to local government." Defendant again fails to identify any decision stating that saving the government money proves that a private entity was a "state actor."

At page 8 of its supplemental brief, defendant cites Blum v. Yaretsky, 457 U.S. 991, 1004 (1982), where the Supreme Court stated "our precedents indicate that a State can normally be held responsible for a private decision only when it has **exercised coercive power** or has **provided such significant encouragement**, either covert or overt, **that the choice must in law be deemed to be that of the State**." (emphasis added) Defendant then asserts that "Nevada used its coercive power to both mandate the creation of homeowners associations and then created the threat of super priority foreclosure to dragoon lenders into subsidizing homeowners associations." On the other hand, the cases cited by defendant establish that the Legislature's role in enacting the statute does not by itself satisfy the "state action" requirement.

With respect to NRS Chapter 116, no representative of the State ever participates in the decision by an HOA to record an assessment lien or to commence the nonjudicial process to foreclose the lien. In Blum v. Yaretsky, the Supreme Court found no state action was present when private parties (physicians and nursing home administrators) made decisions that resulted in adjustments to a patient's Medicaid benefits. Id. at 1005. Like the case of Blum v. Yaretsky, no government officials are involved in the decisions made by an HOA as to if and when to enforce its superpriority lien rights against a unit owner. Furthermore, it is abundantly fair to require a lender to pay a portion of the costs of maintaining the community where its collateral is located.

At page 8 of its supplemental brief, defendant cites Culbertson v. Leland, 528 F.2d 426 (9th Cir. 1975), as demonstrating "an instance where the state has become intertwined with a private actor's exercise of power over property necessitating procedural due process." Defendant quotes the Court's statement that because the Arizona Innkeeper's Lien statute was the sole authority relied upon by an

innkeeper to seize the tenant's personal property, "the state's involvement through the statute is not insignificant." Id. at 432. This reasoning used by the Court in Culbertson v. Leland, however, was expressly rejected by the Ninth Circuit Court of Appeals in Melara v. Kennedy, 541 F.2d 802 (9th Cir. 1976), where the Court stated that "[t]he authorization by statute of the challenged conduct does not by itself require a finding of state action," (Id. at 804) and that "lack of common law origin is a factor of dubious worth." (Id. at 806) The Court also recognized that "the statute creates only the right to act; it does not require that such action be taken." Id.

Furthermore, in the later decided case of Apao v. Bank of New York, 324 F.3d 1091, 1092 (9th Cir. 2003), the Court of Appeals rejected a due process challenge to Hawaii's nonjudicial foreclosure statute and stated that there had been "no legal or historical development in the intervening years that would require a departure from prior authority." The "prior authority" included the decision in Charmicor v. Deaner, 572 F.2d 694 (9th Cir. 1978), where the Court of Appeals found that the statutory procedure for non-judicial foreclosure sales provided in NRS 107.080 did not transform the private action into state action for due process purposes.

The Nevada Supreme Court has also recognized that "[t]he general rule is that the Constitution does not apply to private conduct." S.O.C., Inc. v. Mirage Casino-Hotel, 117 Nev. 403, 410, 23 P.3d 243, 247 (2001).

At page 9 of its supplemental brief, defendant states that "Nevada is overtly involved every aspect of HOA super priority lien foreclosure, **except foreclosing on the property itself.**" (emphasis added) Defendant thereby admits that no "state actor" participates in the nonjudicial foreclosure process. Because no state actor participated in the HOA's nonjudicial foreclosure of its superpriority lien, the HOA foreclosure sale could not violate the due process clauses in the United States Constitution and in the Nevada Constitution.

2. The foreclosure process in NRS Chapter 116 does not violate due process because NRS 116.31168(1) incorporates the notice requirements in NRS 107.090 and required that copies of both the notice of default and the notice of sale be mailed to holders of subordinate interests.

At page 9 of its supplemental brief, defendant asserts that "[t]he HOA Lien Statute does not

mandate actual notice to a deed of trust holder prior to an HOA's foreclosure." At page 10 of its supplemental brief, defendant states: "Put more simply, state action may not extinguish an interest in real property unless the holder of that interest is afforded notice of that action." At page 11 of its supplemental brief, defendant also contends: "The HOA Lien Statute explicitly permits the total extinguishment of a first deed of trust without *any* notice to the mortgagee holding that deed."

As demonstrated at pages 13 to 19 of plaintiff's opposition and countermotion, filed on September 10, 2015, NRS 107.090, as expressly incorporated by NRS 116.31168(1), requires that copies of both the notice of default and the notice of sale be mailed to holders of "subordinate" interests even if they do not record or mail a request for notice to the HOA.

As noted at page 16 of plaintiff's opposition and countermotion, filed on September 10, 2015, NRS 116.3116(2) expressly provides that defendant's first deed of trust is "subordinate" to the HOA's superpriority lien. As a result, NRS 107.090(3), as incorporated by NRS 116.31168(1), expressly required that a copy of the notice of default be mailed to defendant's predecessor because the deed of trust was "subordinate" to the HOA's assessment lien. Exhibit 7 to plaintiff's opposition and countermotion proves that the HOA's foreclosure agent mailed the required notice of default to defendant's predecessor, Pulte Mortgage, LLC.

NRS 107.090(4), which is also one of **the** provisions of NRS 107.090 incorporated by NRS 116.31168(1), requires that a copy of the notice of sale be mailed to "each person described in subsection 3." Because a copy of the notice of default must be mailed by a foreclosing HOA to every holder of every type of interest "subordinate" to "the association's lien," a copy of the notice of sale must also be mailed to each such person. Exhibit 9 to plaintiff's opposition and countermotion proves that the HOA's foreclosure agent mailed the required notice of sale to both defendant and defendant's predecessor.

In State v. Steven Daniel P. (In re Steven Daniel P.), 129 Nev., Adv. Op. 73, 309 P.3d 1041, 1046 (2013), the Nevada Supreme Court applied the concept of incorporating a statute by reference in the context of NRS Chapter 62C and stated:

> The United States Supreme Court has held that "[w]here one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been

> incorporated bodily into the adopting statute." Hassett v. Welch, 303 U.S. 303, 314 (1938) (quoting 2 J.G. Sutherland & John Lewis, *Statutes and Statutory Construction* 787 (2d ed. 1904)); *see also* State ex rel. Walsh v. Buckingham, 58 Nev. 342, 349, 80 P.2d 910, 912 (1938) ("A statute by reference made a part of another law becomes incorporated in it and remains so as long as the former is in force.")

Consequently, the provisions of NRS 107.090 requiring that copies of **both** the notice of default **and** the notice of sale be mailed to holders of interests "subordinate" to the HOA's lien must be read as if they were "incorporated bodily" into NRS Chapter 116.

At pages 10 through 12 of its supplemental brief, defendant focuses only on the notice requirements in NRS 116.31163, NRS 116.311635, and NRS 116.31162.

At page 13 of its supplemental brief, defendant states: "Rather than borrower from the existing mortgage foreclosure scheme, Nevada created NRS 116.31168(1)." Yet, that is exactly what NRS 116.31168(1) does – it incorporates the exact notice requirements from NRS 107.090 that are used in the nonjudicial foreclosure of deeds of trust.

At page 13 of its supplemental brief, defendant refers to a UCIOA Conversion Table prepared by the research division of the Legislative Counsel Bureau that identifies NRS 107.090 as a source of the language in section 104 of chapter 245 of AB 221 adopted in 1991. This reference supports plaintiff's argument that NRS 116.31168(1) is designed to incorporate all of the notice provisions in NRS 107.090.

At the middle of page 13 of its supplemental brief, defendant observes that in addition to incorporating the notice provisions contained in NRS 107.090, the original version of NRS 116.31168(1) adopted in 1991 also included a third sentence stating: "The association must also give reasonable notice of its intent to foreclose to all holders of liens in the unit who are known to it." As a result, under the former version of NRS 116.31168(1), in addition to requiring that copies of the notice of default and notice of sale be provided to each person who recorded a request for notice pursuant to NRS 107.090(2) (NRS 107.090(3)(a), (4)) and each holder of an interest "subordinate" to the HOA's lien (NRS 107.090(3)(b), (4)), the association was required to provide "reasonable notice" to "**all** holders of liens in the unit who are known to it." (emphasis added)

In 1993, the legislature deleted the third sentence in NRS 116.31168(1) and eliminated this **extra** notice requirement that required greater notice for HOA foreclosure sales than that required by NRS

107.090. In addition, instead of requiring that a "person with an interest" record a request for notice as provided by NRS 107.090(2), the legislature gave "[a]ny holder of a recorded security interest encumbering the unit owner's interest" the option of notifying the association "of the existence of the security interest." This optional provision does not supersede or modify the notices that are required to be mailed to holders of "subordinate" interests pursuant to NRS 107.090(3)(b) and NRS 107.090(4), as incorporated by NRS 116.31168(1).

At page 14 of its supplemental brief, defendant claims that the legislative history "demonstrates that the legislature created an opt-in notice scheme by design." To the contrary, the incorporation on the mandatory notice requirements contained in NRS 107.090(3)(b), (4) proves that an association must provide copies of the notice of default and notice of sale to all holders of "subordinate" interests even if they do not opt in to receive notice.

Defendant's interpretation violates the Nevada Supreme Court's direction that a statute should be interpreted to give the terms their plain meaning, considering the provisions as a whole, so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory. Southern Nevada Homebuilders v. Clark County 121 Nev. 446, 117 P.3d 171 (2005). A statute should be construed so that no part is rendered meaningless. Public Employees' Benefits Program v. Las Vegas Metropolitan Police Department 124 Nev. 138, 179 P.3d 542 (2008).

The Nevada Supreme Court has directed that "whenever possible, a court will interpret a rule or statute in harmony with other rules or statutes." Nevada Power Co. v. Haggerty, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999). By the clear terms of NRS 107.090(3)(b), the use of the word "and" means that the mandatory notice required for holders of "subordinate" interests supplements the request for notice provisions contained in NRS 116.31163, 116.311635, and 107.090(2). In particular, the "mandatory" notice required by NRS 107.090(3)(b) only applies to holders of "subordinate" interests, while the "opt-in" provisions in NRS 116.31163 and NRS 116.311635 apply to "[e]ach person who has requested notice pursuant to NRS 107.090 or 116.31168."

Because more persons qualify to request notice under NRS 116.31163, NRS 116.311635, and NRS 107.090, as incorporated by NRS 116.31168(1), than are automatically required to receive notice

under NRS 107.090(3)(b), (4), as incorporated by NRS 116.31168(1), the opt-in provisions in NRS 116.31163, NRS 116.311635, and NRS 107.090 are not made superfluous by incorporating the mandatory notice provision in NRS 107.090(3)(b). NRS 107.090 contains **both** "opt-in" notice provisions in NRS 107.090(2) and 107.090(3)(a), (4) **and** "mandatory" notice provisions for holders of "subordinate" interests in NRS 107.090(3)(b), (4), but no court has found that the "mandatory" notice provisions in NRS 107.090 render the "opt-in" provisions in NRS 107.090 "superfluous."

At the bottom of page 14 and top of page 15 of its supplemental brief, defendant argues that NRS Chapter 116 forces the holder of a "subordinate" deed of trust to pay the entire assessment lien, but does not provide a procedure for the secured lender to obtain a refund of the amounts in excess of the super priority lien. As noted by the Nevada Supreme Court in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408 (2014), "[i]f revisions to the foreclosure methods provided for in NRS Chapter 116 are appropriate, they are for the Legislature to craft, not this court." 334 P.3d at 417.

The notice requirements of NRS 116.31162 through 116.31168, and by incorporation, NRS 107.090, provide holders of "subordinate" deeds of trust with adequate notice prior to an HOA foreclosure sale. The statutory foreclosure process does not violate due process and is not facially unconstitutional.

3. The "commercial reasonableness" requirements contained in the Uniform Commercial Code do not apply to the HOA's foreclosure sale in this case.

At page 15 of its supplemental brief, defendant asserts that "Nevada's UCIOA's concept of good faith is derived from the Uniform Commercial Code Sec. 1-203, which Nevada codified at NRS 104.1203" and that "the appropriate analogy of a HOA sale is secured transactions sale under the Uniform Commercial Code and not a bank foreclosure sale."

To the contrary, as discussed at page 8 of plaintiff's opposition and countermotion, filed on September 10, 2015, the definition of "good faith" contained in the Comment to Section 1-113 of the UCIOA does not include any requirement of "commercial" reasonableness. The Comment to Section 1-113 of the UCIOA instead states that "good faith" means "observance of two standards: 'honesty in fact',

and observance of reasonable standards of fair dealing."

Nevada's definition of "good faith" in the Uniform Commercial Code does not appear in NRS 104.1203; the amendment to NRS Chapter 104 made in 2005 placed the current definition in NRS 104.1201(2)(t). NRS 104.1102 expressly provides that Article 1 of the Uniform Commercial Code "applies to a transaction to the extent that is governed by another Article of the Uniform Commercial Code." No provision of the Uniform Commercial Code purports to govern an HOA foreclosure sale.

Prior to the 2005 amendment, the definition of "good faith" contained in NRS 104.2103(1)(b) stated: "'Good faith' **in the case of a merchant** means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." (emphasis added) The HOA is not a "merchant," so the former definition of "good faith" in NRS 104.2103(1)(b) could not apply to it.

Furthermore, as discussed at page 9 of plaintiff's opposition and countermotion, filed on September 10, 2015, NRS 104.9109(4)(k) expressly provides that Article 9 of the Uniform Commercial Code does not apply to "[t]he creation or transfer of an interest in or lien on real property" except for four specific exceptions. NRS 116.1108 instead provides that "the law of real property . . . supplement the provisions of this chapter, except to the extent inconsistent with this chapter." As a result, the appropriate analogy for an HOA sale is not a "secured transactions sale under the Uniform Commercial Code" as claimed by defendant, but a nonjudicial foreclosure sale of real property under NRS 107.080 and NRS 107.090.

At page 16 of its supplemental brief, defendant again cites the decision in Will v. Mill Condominium Owners' Association, 176 Vt. 380, 848 A.2d 336 (2004), and again claims that "[t]he Vermont Supreme Court interpreted the same uniform act that Nevada adopted." To the contrary, as demonstrated at pages 10 and 11 of plaintiff's opposition and countermotion, filed on September 10, 2015, there are substantial differences between Vermont's version of the UCIOA and NRS Chapter 116. For example, 27A V.S.A. § 3-116(j) in Vermont's version of the UCIOA requires that an association's lien be judicially foreclosed pursuant to 12 V.S.A. chapter 172 or subsection (o) of 27A V.S.A. § 3-116(j). 27A V.S.A. § 3-116(p) also provides that "[e]very aspect of a foreclosure, sale, or other disposition under this section, including the method, time, date, place, and terms, must be commercially

reasonable." Nevada's version of the UCIOA contains no such language.

Vermont's version of the UCIOA does not contain any counterpart of the nonjudicial foreclosure procedure provided in NRS 116.31162 to NRS 116.31168, and Vermont's statute does not contain any language similar to the provision in NRS 116.31166(1) that the recitals in an HOA foreclosure deed "are conclusive proof of the matters recited" or the provision in NRS 116.31166(2) that "[s]uch a deed containing those recitals is conclusive against the unit's former owner, his or her heirs and assigns, **and all other persons**." (emphasis added)

At page 16 of its supplemental brief, defendant cites NRS 104.9504(3) and the decision in Jones v. Bank of Nevada, 91 Nev. 368, 535 P.2d 1279 (1975), where the Nevada Supreme Court affirmed the district court's determination that a secured party had properly repossessed and sold a private airplane to an aircraft broker who resold the plane at a higher price. As noted above, NRS 104.9109(4)(k) expressly provides that the provisions of Article 9 do not apply to a lien on real property.

Defendant also cites Iama Corp. v. Wham, 99 Nev. 730, 669 P.2d 1279 (1975), but defendant has produced no evidence that the HOA took any actions to destroy the value of the collateral like the secured party did to the bar equipment in Iama Corp. v. Wham.

At the bottom of page 16 and top of page 17 of is supplemental brief, defendant quotes from Section 8.3 of the Restatement (Third) of Property (Mortgages), but the statement that a foreclosure is not rendered defective "unless the price is grossly inadequate" is the exact rule that the Nevada Supreme Court refused to adopt in Golden v. Tomiyasu, 79 Nev. 503, 387 P.2d 989 (1963), cert. denied, 382 U.S. 844 (1965). The Supreme Court instead adopted the following rule:

> "However, **even assuming that the price was inadequate, that fact standing alone would not justify setting aside the trustee's sale.** `In California, 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.**'" (emphasis added)

387 P.2d at 995, quoting Oller v. Sonoma County Land Title Co., 137 Cal. App.2d 633, 290 P.2d 880 (1955).

The Nevada Supreme Court applied this same rule in Long v. Towne, 98 Nev. 11, 639 P.2d 528,

530 (1982); Turner v. Dewco Services, Inc., 87 Nev. 14, 479 P.2d 462 (1971); Brunzell v. Woodbury, 85 Nev. 29, 449 P.2d 158 (1969).

In the present case, defendant has not offered proof of the required "element of fraud, unfairness, or oppression" bringing about the price that defendant claims is unreasonable. Instead, at page 17 of its supplemental brief, defendant argues that defendant's expert places a "fair market value" of $335,000 on the property and that the foreclosure sale price of $35,000 is "less than the 20% mark set by the Restatement's authors."

In the case of BFP v. Resolution Trust Corporation, 511 U.S. 531, 548-49 (1994), the U.S. Supreme Court explained why the fair market value of a property cannot be used to prove the forced sale value of the property:

> But as we have also explained, the fact that a piece of property is legally subject to forced sale, like any other fact bearing upon the property's use or alienability, necessarily affects its worth. *Unlike* most other legal restrictions, however, **foreclosure has the effect of completely redefining the market in which the property is offered for sale; normal free-market rules of exchange are replaced by the far more restrictive rules governing forced sales**. Given this altered reality, and the concomitant inutility of the normal tool for determining what property is worth (fair market value), **the only legitimate evidence of the property's value at the time it is sold is the foreclosure-sale price itself**. (emphasis added)

Although the Supreme Court limited its holding to nonjudicial foreclosure sales held under deeds of trust, the logic in the opinion applies just as well to a nonjudicial foreclosure by a homeowners association.

In addition, as noted by the court in Bourne Valley Court Trust v. Wells Fargo Bank, N.A., 80 F. Supp. 3d 1131, 1136 (D. Nev. 2015), "[b]efore the Nevada Supreme Court issued SFR Investments, purchasing property at an HOA foreclosure sale was a risky investment, akin to purchasing a lawsuit."

In the last paragraph on page 17 of its supplemental brief, defendant asserts that "[t]he HOA, through its foreclosure agent, kept bidders in the dark regarding its position that it was not even conducting a super priority sale." Contrary to defendant's assertion, the exhibits to plaintiff's opposition and countermotion filed on September 10, 2015 prove that none of the foreclosure documents recorded and served by the HOA's foreclosure agent stated that the HOA was foreclosing the nonpriority portion of its assessment lien. Instead, all of the notices included the total amount of the lien as specifically

provided by NRS 116.31162 and approved by the Nevada Supreme Court in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408, 418 (2014).

CONCLUSION

The recitals in the foreclosure deed recorded on February 3, 2014 and the exhibits to plaintiff's opposition and countermotion, filed on September 10, 2015, prove that copies of all required notices were mailed to the defendant or its predecessor as required by NRS 107.090, as incorporated by NRS 116.31168(1).

Due process is not required because no "state actor" participates in the nonjudicial foreclosure process, but any due process concerns are satisfied by the mandatory notices that must be mailed to holders of "subordinate" interests pursuant to NRS 107.090(3)(b), (4), as expressly incorporated by NRS 116.31168(1).

An HOA sale is not governed in any way by Nevada's version of the Uniform Commercial Code, and no basis exists to set the HOA foreclosure sale aside as "commercially unreasonable." The foreclosure of the HOA's super priority lien extinguished defendant's "subordinate" deed of trust.

By reason of the foregoing, plaintiff respectfully submits that defendant's motion for summary judgment should be denied, and plaintiff's countermotion for summary judgment should be granted.

DATED this 19th day of November, 2015.

LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

By: / s / Michael F. Bohn, Esq. /
Michael F. Bohn, Esq.
376 East Warm Springs Road, Ste. 140
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Attorney for plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 2015, I electronically transmitted the above **PLAINTIFF'S SUPPLEMENTAL BRIEF REGARDING DUE PROCESS AND COMMERCIAL REASONABLENESS** to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all counsel in this matter; all counsel being registered to receive Electronic Filing.

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

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CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

SATICOY BAY LLC SERIES 2227 SHADOW CANYON, Plaintiff, vs. NATIONSTAR MORTGAGE LLC, Defendant.	CASE NO. A-14-702938-C DEPT. NO. V **TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE CAROLYN ELLSWORTH, DISTRICT COURT JUDGE

DEFENDANT NATIONSTAR MORTGAGE, LLC'S MOTION FOR SUMMARY JUDGMENT; OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND COUNTERMOTION FOR SUMMARY JUDGMENT

THURSDAY, JANUARY 14, 2016

FOR THE PLAINTIFF: MICHAEL F. BOHN, ESQ.

FOR THE DEFENDANT: STEVEN G. SHEVORSKI, ESQ.

COURT RECORDER:
LARA CORCORAN
District Court

TRANSCRIPTION BY:
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LAS VEGAS, NEVADA, THURSDAY, JANUARY 14, 2016, 9:05 A.M.

THE COURT: -- LLC vs. Nationstar, and this is Nationstar's Motion for Summary Judgment, and Plaintiff's Countermotion for Summary Judgment. If you'll state your appearances for the record.

MR. BOHN: Michael Bohn for plaintiff, Saticoy Bay.

MR. SHEVORSKI: Good morning, Your Honor. Steve Shevorski of Akerman on behalf of Nationstar.

THE COURT: Good morning. And so we're revisiting these motions after supplemental briefing, which I read the supplemental briefing and did a tentative addressing that narrow issue I'd asked you to. So you both, I assume, read it since you're used to getting these.

MR. SHEVORSKI: I have, Your Honor.

THE COURT: And go ahead, sir.

MR. SHEVORSKI: Thank you.

Obviously, addressing the state action issue is always a difficult one, especially when no one has ever looked at this issue before in terms of whether or not a Homeowners Association foreclosure sale can have the attributes of state action. Certainly, the Homeowners Association is a private, non-profit entity that's provided for in the Nevada Revised Statutes. However, we think in this particular unique instance there is sufficient state action using the nexus test and the compulsion test to warrant this unusual finding.

Addressing to your tentative order, Your Honor, first I would like to point out the reason we cited Culbertson. The United States Supreme Court has not recognized a distinction between a state action in the meaning of the 1983 -- the constitutional tort context, and state action under the procedural due process of the 14th Amendment; the tests are the same. And I would cite to Your Honor the Lugar case at 457 U.S. 922, the pinpoint is 928 dash --

THE COURT: Did you cite that in your --

MR. SHEVORSKI: Of course, Your Honor.

THE COURT: Okay.

MR. SHEVORSKI: This is the Lugar vs. Edmonson Oil case.

THE COURT: All right.

MR. SHEVORSKI: And it's at 457 U.S. Reports 922, pinpoint 928, 929.

THE COURT: Okay.

MR. SHEVORSKI: And I think you'll generally find, and in the 9th Circuit as well, is that the courts treat the issue the same.

THE COURT: Right.

MR. SHEVORSKI: One thing where we think is you noticed from Culbertson, that's really the only instance where you've got a -- in the 9th Circuit, at least, a federal court looking at a non-judicial seizure of property and finding

state action, and no one could agree if there are three separate opinions there, why there was state action, they just thought this was close enough and it met the test.

THE COURT: Well, what about the case I cited you to, that was Charmicor v. Deaner that -- from the 9th Circuit that's after Culbertson?

MR. SHEVORSKI: Sure. And generally speaking, that follows what I would call -- the cases that are in line, you could cite the Apao case, as well, A-p-a-o, in the 9th Circuit, that actually looked at Nevada's Chapter 107 and said, well, when the State is merely acquiescing in a private remedy there isn't state action. Here we think there is something -- there is something more than that.

THE COURT: Okay. Go ahead.

MR. SHEVORSKI: And the reason why we think there is something more than that, addressing to Your Honor's tentative ruling, is here you have the state actually interfering with a private contract. And we didn't have that before the SFR decision September 18th. We have that now, because --

THE COURT: And -- okay, so --

MR. SHEVORSKI: -- and that --

THE COURT: -- tell me how you think they're, yeah, interfering with a private contract.

MR. SHEVORSKI: Certainly. This particular security, this -- SFR says you can jump in line by virtue of a

state statute, a right that never existed at common law, jump in line ahead of a first deed of trust.

Here, not only that, because that was the issue in Culbertson. They said this didn't exist at common law and many of the judges -- there's a three judge panel -- two of them didn't think that was sufficient for a state action. But here there's something more.

THE COURT: But in Culbertson, I mean, that was an innkeeper statute, right, where --

MR. SHEVORSKI: It was, indeed.

THE COURT: -- they said -- basically, it was -- gave the innkeeper the right to seize property and get rid of it, of a tenant who --

MR. SHEVORSKI: Right.

THE COURT: -- hasn't paid, right?

MR. SHEVORSKI: And they thought there was state action there because the -- the property seized had no relationship to the debt.

THE COURT: Right. But -- but in the HOA lien situation, that's created by the CC&Rs, a private contract; no?

MR. SHEVORSKI: Right. The lien itself, the obligation, the debt is created -- it's actually created, Your Honor, by NRS 116.3116, subdivision (1). It says these --

THE COURT: Yeah, but without the CC&Rs you wouldn't

have; no?

MR. SHEVORSKI: Well, you probably -- you probably would not. They go together. But the reason why we've got something more here is, you know, just to the first point, to why we've got something more is, you can't contract around this particular provision.

The State has stepped into the -- this is why it's different than Flagg Brothers. In Flagg Brothers, the State of New York had merely acquiesced in a private arrangement between a debtor and a creditor, and the United States Supreme Court says, that isn't state action. The state has merely recognized what the parties have already agreed to, and provided them with a mechanism for enforcing that right. That is not state action.

Here, the State of Nevada has stepped into the marketplace and said, yeah, we understand, HOAs, you want to incentivize lenders to lend to your communities, otherwise, you're not going to have one. And you're going to use those incentives by issuing mortgage protection clauses in your CC&Rs to incentive -- because that's going to appear in the title report for the lender when it orders it.

Even despite that, we are not going to allow you to contract around the super priority. That is state intervention in the marketplace. That was not in Flagg Brothers, the United States Supreme Court case. They never

had a chance to consider what happens if the state intervenes and makes something that -- which could have been permissive, mandatory? And what if it's doing it, Your Honor, for an explicit state purpose?

The explicit state purpose is the state gets to develop property through private investment at zero cost to the state. It doesn't have to provide the street sweeping services, it doesn't have to provide for the maintenance of the lights, it doesn't have to provide for the maintenance of the parks, it doesn't -- if there's a pothole in the road, it doesn't send out -- if this was California it would be Caltrans. I'm sort of new to Nevada, so I'm not sure what they're called.

But if you live in California and you see Caltrans, there's a pothole and the state government's doing it. That doesn't occur. So the state gets the benefit of the expanded tax base at zero cost.

And this is why it's so important in 2009 AB 204, because the State was terrified that if HOAs failed the cost was going to come back to the state. That they had -- they had privatized many of the services previously provided by the State that are now provided by the HOA and paid for by assessments. They were terrified that those services were now going to be borne by local governments and the state. And so they increased the super priority.

That is something different than Flagg Brothers. And they're doing it and for the express purpose of retaining the benefit at zero cost, and so they've reached out into the private marketplace and grabbed a stranger to the HOA and said, you've got to pay for it. That is state action.

Now, I'd like to address the second point is, you know, is there stand -- does my client have standing to raise this argument, because it isn't -- the creation of the HOA isn't the harm. The creation of the super priority though, is. The reaching out into the marketplace and forbidding my client from contracting around the super priority is.

Reaching out, creating a statute that says, my client doesn't have the right to even ask for what the super priority amount is without the written consent of the unit owner is state action.

Also consider, Your Honor --

THE COURT: Well, does the statute say that?

MR. SHEVORSKI: It does. In 116.3116, I believe subdivision (9), you'll notice that this was amended in 2013, 116.34 -- 4109, subpart (7), actually --

THE COURT: I have it memorized.

MR. SHEVORSKI: Sure.

THE COURT: That's a chapter I --

MR. SHEVORSKI: This is a new provision, Your Honor. And this comes up in the NRAP 5 proceedings before the Nevada

Supreme Court. You're aware that Chief Judge Navarro certified two questions to the Nevada Supreme Court on what is the effect of NAS's decision saying, I can't tell them what the super priority amount is, because I'm terrified of violating 3116, subdivision (9), and I'm terrified of violating the Fair Debt Collection Practices Act, even more important, because that has a hammer provision; it has attorney's fees. That is state action.

Affecting my client's rights in jumping in line in priority, and then preventing my client from learning the very information that would save it, that -- now, that is state action. That is intervening in the marketplace. That is something that was not present in Flagg Brothers where you had a mere debtor/creditor relationship.

Here you have no voluntary relationship between the HOA and the Bank. We don't contract with them and they don't contract with us, which is one of the very reasons why it's so troubling in Justice Pickering's opinion that she says, well, gosh, you can just go sue the HOA. On what grounds?

THE COURT: Yeah. Well, that's always obviously always been a repeated issue --

MR. SHEVORSKI: Absolutely.

THE COURT: -- because it's dicta. It's kind of a throwaway comment and there's not any, I mean, so you --

MR. SHEVORSKI: But it's very --

THE COURT: -- start to think about how -- how do we do this. The only thing I can really think of would be unjust enrichment.

MR. SHEVORSKI: It's difficult because, Your Honor, they would have to confer a benefit on us that somehow the retention of that benefit is unjust (indecipherable) part in (indecipherable) decision. They certainly haven't conferred a benefit on us. We conferred a benefit on them that they're not entitled to, or would not be entitled to if we overpaid.

THE COURT: Well, that's what I mean.

MR. SHEVORSKI: That's my understanding.

THE COURT: For -- for unjust enrichment the other -- you would have had to have conferred a benefit upon and that they weren't entitled to.

MR. SHEVORSKI: I understand, Your Honor.

THE COURT: But I know that the HOA's position, I believe, would be, well, you -- you paid as a volunteer and --

MR. SHEVORSKI: Absolutely. I'm going to get cited the NAS decision that's saying, this is just a voluntary payment. You were just -- this is something you voluntarily did. You weren't under threat of foreclosure under the NAS decision and too bad for you, which is why the -- in many of the tax statutes, Your Honor, which is the closest analogy to what this is, they state in the tax statutes, you have the right to come into usually an administrative commission and

get a refund. If they're going to force you to overpay, the state provides a mechanism for you to come back and get your money. And that is perfectly acceptable under McKesson. The State --

THE COURT: Okay. Well, so what about the argument that they're not forcing you to overpay. You could figure it out yourself.

MR. SHEVORSKI: Sure. Well, you can't. And there's a statute -- there is a state statutory reason and a federal statutory reason. The State statutory reason is, particularly in these cases where we had such a crisis starting in 2008, is the borrower is gone. The lender can't reach out to the borrower and find them, and force them to sign a consent to get that payment information. And there is no provision in Chapter 116 that forces the HOA to provide us with that information.

Moreover, Your Honor, you'll notice in the cases that have appeared before you, many of the HOAs have decided to charging a fee because there's nothing that prevents them from doing so.

THE COURT: Charging a fee for --

MR. SHEVORSKI: Charging a fee just for the information that should be free of charge to us already, and then putting that into the lien. And there's -- since there's no limit on what that fee might be, it could be anything.

We are forced into a situation that we -- in order to have some certainty, we have to overpay to buy off the lien, and because it's a non-judicial system -- and notice also, Your Honor, how different this is from a -- a situation you might have where there's -- somebody's reached out to your property and garnished it pre-judgment or attachment.

This particular lien doesn't even have to have an affidavit to verify the amounts. There's no constitutional certainty as to what even is owed, because it takes place completely in an extrajudicial process with no guarantees that the information that's being -- the debt being sought is even accurate.

And so we're forced into a situation -- you know, many of my clients, as you know, decided to try to figure out what the nine months was and pay that, and then take their chances in a quiet title action later. Well, you can see what that got them. It got them 4,000 lawsuits defended by my firm.

So the -- really what -- the most economical thing that -- that the statute designed, it's designed for you to overpay, pay off the lien. But the -- what no one ever thought of was how many times you have to pay it, because as Your Honor is well aware, the banks can't simply foreclose. The banks have obligations under the state mediation program.

THE COURT: Okay. Well, what about -- I mean, the

Bank -- the law, of course, has been in effect for quite some time. It only --

MR. SHEVORSKI: Certainly.

THE COURT: -- blew up because the economy blew up.

MR. SHEVORSKI: Yes.

THE COURT: But so didn't SFR talk about, well, the Bank could, as part of the loan, require an escrow --

MR. SHEVORSKI: Yes, they --

THE COURT: -- require --

MR. SHEVORSKI: -- did talk about that, and I can tell you why that's wrong.

THE COURT: Okay.

MR. SHEVORSKI: Since 19 -- so the Uniform Condominium Act was enacted in 1976. In 1978, there was a very important Law Review article published that analyzed this new super priority lien that they thought of in 1976, and they identified a very important point; the -- in economics the concept is called "float".

And the concept of "float" is, you've got to build into the escrow the fact that an amount owed may change. And since Nevada, unlike any other state, Your Honor, has made this process non-judicial and secret, you can't build in enough float to protect yourself. We would have to build in, into that escrow amount, a much higher amount to account for the fact that on a yearly basis the HOA budget may change, the

amount of the assessments may change, and if somehow we're wrong and we don't build in enough float we're back in the same position. We can't run into the HOA and say, hey, the amount's changed. Tell us what it is, because --

THE COURT: Well, you could have also made that a condition of the loan with the homeowner that you, you know, by -- as part of the terms of the agreement, they agree that this gives their consent for you to obtain the amount, you know?

MR. SHEVORSKI: If we could have gone back 20 years and, number one, I don't think that statute existed then. Three -- 3116, subdivision (9) I believe it is -- we would have to -- it says a written consent to learn about the payment and it must be in recordable form. And so it would have to be -- and then the borrower themselves would have to send it into the HOA, and it has to exist separate and apart from the Deed of Trust.

Well, yes, could -- gone back, looking back in time, should people have done that? They probably should have. But that doesn't change the fact that you cannot escrow for this amount and they knew it. And --

THE COURT: Well, how is it different from escrowing for taxes, property taxes?

MR. SHEVORSKI: Public information.

THE COURT: Well, but it changes, I mean, so.

MR. SHEVORSKI: It does change, but you can actually learn that. And if your borrower disappears you can get that information.

THE COURT: I guess we have to talk in some more specific terms, though, or maybe you'll disagree with that; does that argument that, well, you know, this effects all loans, regardless of how old they are, maybe a loan is 25 years old or what have you, or do we have to focus on what the loan is in this case for this argument?

MR. SHEVORSKI: To find state action, because of the type of argument that's being made here, we're not making an as-applied challenge, we're making a facial challenge --

THE COURT: A facial challenge.

MR. SHEVORSKI: -- it would be, this is all -- this is all loans. This is a statewide analysis looking at the architecture, if you will, of the statute, the design of it and matching up the requirements of the procedural due process clause in the 14th Amendment, with what exists in Chapter 116, and is there a design flaw. We believe that there is.

THE COURT: Okay. So summarize for me, because Mr. Bohn is going to have to address these here points, as to the things that are built in the statute that, you know, basically make it such that the State has compelled, so the State's compelled -- well, the lien actually is through the CC&Rs but, I mean, I've forgotten that it was the first point you made,

and I should have taken a note.

MR. SHEVORSKI: That's quite all right. The lien is created by 3116, subdivision (1), it says, the Association shall have a lien.

THE COURT: Right.

MR. SHEVORSKI: But certainly, the CC&Rs talk about collecting a monthly assessment. They are the basis for having a budget which is the basis for finding there is going to be an assessment, although there is provisions in Chapter 116 that talk about that.

So what we have to show here is that, is there significant encouragement to do this? And what we have -- I think we've shown though the social science we've cited, Your Honor, the planning laws in Nevada is that they have provided significant encouragement to create -- both create this lien and then provide a mechanism to run to the non-judicial foreclosure sale to extract -- in order to put pressure and extract sums from secured lenders who have no relationship to the HOA at all, in order to further a governmental purpose, which is a cost savings.

And, Your Honor, in your tentative ruling said all cost savings isn't state action. But certainly under the United States Supreme Court's precedent, getting a benefit -- remember the racial restriction case is where there was a lease in a government building and profits were going to the

government despite the fact that this particular lessor had a rather disgusting racial policy dealing with who could lease from him.

Getting a profit is state action. So there's -- to me that's a distinction without a difference between cost savings and a profit. The bottom line is the purpose is governmental. The purpose of these -- of Nevada planning laws is governmental.

THE COURT: Well, okay, I mean, the planning law says if you're going to have this -- what's the term they use in the statute -- but basically the common area --

MR. SHEVORSKI: Common open space

THE COURT: -- common open space, then you need to create an HOA. If you're going to do that --

MR. SHEVORSKI: If you're going to --

THE COURT: -- if -- well, if you -- if you go to a municipality and you ask for a planned develop and that planned development has an open space component then you have to have. But you could apply for a planned development that didn't have common area.

MR. SHEVORSKI: I would submit to Your Honor, that would be very difficult to do, because the way the common open space is drafted, parking structure, if your people are going to have cars in your plan, they're going to have a street. And if the street connects more than one property, then you're

going to have to have an HOA to govern and maintain it. So this is a distinct act by the state legislature to use their planning laws in a way that increases their tax base at zero cost to them. That's -- I mean, that's the point.

THE COURT: I mean, that's certainly true --

MR. SHEVORSKI: And these HOAs, Your Honor --

THE COURT: -- that's the way -- that's the reason they -- it's very clear from the -- reading -- just the reading of the statute that they didn't want to get stuck --

MR. SHEVORSKI: They didn't want to get stuck.

THE COURT: -- with paying.

MR. SHEVORSKI: Absolutely. And consider how different this is than any other -- any other kind of private entity. It's not like an HOA can go out and compete and now own a movie franchise. These -- they are non-profit entities that have a specific purpose. And it's -- the specific purpose is to govern and maintain the community that has these common open spaces.

THE COURT: I just remembered what it was; that you can't contract around -- that's included in the statute, that you can't contract around the lien provisions and the super priority provisions.

MR. SHEVORSKI: Correct, Your Honor. And previously under Chapter 278 you could. This was --

THE COURT: When did that change?

MR. SHEVORSKI: In 1991, they were -- these changes to Chapter 278(a), many of them, just -- they weren't -- those -- the existing provisions weren't required anymore because of what happened in 1991 with the creation -- Nevada's unique creation of its own Uniform Common Interest Ownership Act. You just don't need -- you didn't need those provisions anymore because you had an entire Uniform Act that is -- that was designed to cover this -- the very communities that may have been regulated by Chapter 278.

THE COURT: Okay.

MR. SHEVORSKI: And so if -- if you look at -- if you look at the legislative history in AB 221 in 1991, specifically, it starts -- the legislative history starts at page 91. It goes to page 101. And you can see a spreadsheet of where every single section is taken. And some of the sections are taken showing -- from 278, 278(a) to show that these are interconnected. This was designed -- this was with a purpose. And it's not a private purpose, it's a governmental purpose.

THE COURT: And I read the statute here that -- about the -- furnishing the statement. It says, "The Association, upon written request, shall furnish to a unit's owner a statement setting forth the amount of unpaid assessments against the unit."

MR. SHEVORSKI: Right. And then --

THE COURT: But it doesn't allow for -- or it doesn't mandate, I should say. And you say there is the --

MR. SHEVORSKI: There was a change in 2013, so it's 116.4109, I believe, at subparts (7) through (10). And this was -- this was designed to create a problem -- to address a problem for the resale of units, because you need to know what the amounts owed are before you can sell them, because you're not going to have clear title.

THE COURT: Okay.

MR. SHEVORSKI: So this was a new provision that they thought of. Right. "Unit's owners as authorized agent for -- the authorized agent of the unit's owner or the holder of the security interest on the unit --

MR. SHEVORSKI: Correct. This was --

THE COURT: -- may request."

MR. SHEVORSKI: -- this is the only other potentially applicable provision where we could reach out to the HOA. But as you've seen through the arguments by Nevada Association Services, before the Nevada Supreme Court in response to the NRAP 5 question --

THE COURT: Um-hum.

MR. SHEVORSKI: -- it doesn't apply to our situations because that specific -- was designed for a specific problem where there were going to be the resale of units and security holders, for example, in a short sale

situation, are going to need to know in order to close, what the assessments owed are, what the precise amount is and that's designed to address that problem.

And so -- and that doesn't solve the problem, Your Honor, of the Fair Debt Collection Practices Act --

THE COURT: Um-hum.

MR. SHEVORSKI: -- because every court that's looked at this -- and this is what NAS says. This isn't me, Your Honor. If you read the briefing in that NRAP 5 case, it said, we're not going to risk -- we'd much rather get sued by the Bank then have Fair Debt Collection Practices Act liability, because of how egregious it can be. Per transaction, you're going to have attorney's fees and statutory damages, and we'd much rather have a problem with the Bank than have a class action by unit owners who would even meet the Walmart standard, which is almost impossible, but they probably would.

And so the reason why this is different than Flagg Brothers, the reason why this is different than Apao, is Nevada has made this issue a mandatory issue for my clients which we can't contract around. It's done it for a state purpose. And this takes it out of the situation where the state is merely acquiescing in private conduct.

THE COURT: All right. So if you -- let's assume then for argument's sake that you've established there is state action, your motion -- we drilled down on that as to,

you know, the issue, because you wanted to tell me why it was state action, but you're seeking summary judgment. So you're asking the Court to find that the entire statutory scheme is unconstitutional?

MR. SHEVORSKI: We are asking -- not the entire statutory scheme, the notice provisions are unconstitutional and the opportunity to be heard provision which is, there isn't one, is unconstitutional; that is the flaw in the design. One, we think we have a right to mandatory notice. And it doesn't matter if private parties are providing no -- are providing more notice than the statute requires, because what we're concerned with on a facial challenge is the design.

THE COURT: Um-hum.

MR. SHEVORSKI: We believe that Chapter 116 was written in a way -- and if you look at the amendments between the enactment in 1991, and the amendments in 1993, it was designed to be opt-in, and mandatory notices are due. We think that is quite clear.

Secondly, it's perfect -- it's fine, well and good for Justice Pickering to say that you have a remedy. But there needs to be state design of a remedy.

THE COURT: I didn't re-read SFR. I swear I've read it, you know, several times, but I didn't read it for today. But SFR didn't rule on the constitutionality of the statute.

MR. SHEVORSKI: They briefly touched upon it, and

near the end of the opinion where they characterized my law firm's arguments as Protean, I believe, was their -- was the Greek demigod, Protean. And it's at the very end of the opinion, and Justice Pickering writes, all you had to do was overpay and sue for a refund.

Well, number one, that doesn't look at the design of the statute, because procedural due process requires under McKesson that the state provide some kind of design. It doesn't -- McKesson says, you can do whatever you want, state, so long as it meets procedural due process requirements, but there has to be something.

For example, in our property tax statutes, you can overpay because the state doesn't want to have the cost of having people challenge their taxes up-front. You just overpay and then if there's a problem you can go to the Tax Commission and get a refund. That's a procedure that would be one example.

A second example, if there would be something in Chapter 116 providing a private cause of action or even going to NRED --

THE COURT: Um-hum.

MR. SHEVORSKI: -- and saying -- go to NRED. If you've overpaid, go to NRED and resolve it that way and get your money back. None of that is provided in Chapter -- there is nothing, not a single provision creating a right for my

client to get a refund, for my client to have some redressability if we take Justice Pickering up on her offer and sue FIRREA, nothing in Chapter 116 that waives the Voluntary Payment Doctrine. That is the McKesson problem. That is the violation of the procedural due process clause.

THE COURT: Well, could -- you could not -- could you not argue that it's -- well, it's -- that it's not a voluntary payment because it was done under duress for fear of losing our security interest in there, and you were unjustly enriched which is an equitable remedy.

MR. SHEVORSKI: Right. So the idea would be that we could overpay some minimal amount, then incur the attorney's fees and costs of running back into court. The problem, too, is the -- and so there's an proportionality problem. We're going to spend much more money trying to --

THE COURT: I think she said you could have -- you could request a refund, right?

MR. SHEVORSKI: Right. She -- we could request a refund.

THE COURT: Have you ever done that?

MR. SHEVORSKI: We -- yes, absolutely.

THE COURT: And they --

MR. SHEVORSKI: Many of the --

THE COURT: -- say "no". Sorry.

MR. SHEVORSKI: Sure. Many of the clients don't

have portfolios as large as Bank of America, or Nationstar which as you know, pursuant -- after the Lehman Brothers collapsed, Nationstar got Aurora's portfolio, which was part of Lehman Brothers.

THE COURT: Um-hum.

MR. SHEVORSKI: Many of the large banks have huge portfolios of loans, even still in Nevada. But many of my non-banking clients don't. And so it makes much more sense to just pay off the lien rather than do this.

So -- but, you know, you can request all you want. That doesn't mean you're going to get it. And then you're going to have to run to court and not be compensated for attorney's fees and costs to try to get a refund on some de minimus amount in order to protect your rights on a right that may not even exist.

THE COURT: Well, you might be able to get attorney's fees and costs if -- if their defense of the claim is frivolous.

MR. SHEVORSKI: If it's frivolous. But I've practiced for 14 years. I can't recall a single time in my experience, maybe it's just because of where I've worked, that that has ever happened, where someone -- a Clark County District Court Judge or a United States District Court Judge has -- has marked out a Nevada attorney for bringing a frivolous claim in ordering attorney's fees and costs. It is

-- it's highly unlikely.

THE COURT: I did it. Not as a Judge. I mean, I got attorney's fees and costs as a lawyer.

MR. SHEVORSKI: But I think you would agree with me, Your Honor, it's highly unlikely. It is highly unlikely. And my client's constitutional hopes don't pen on that dream.

I'll let me Bohn speak, but I think Your Honor knows where we're headed here.

THE COURT: Okay.

MR. BOHN: Do you want me here or at the podium, or do you really care?

THE COURT: I don't care. Whichever you're more comfortable at.

MR. BOHN: Well, the podium's in the way. Let me go up there. I read your tentative ruling. I learned long ago if I'm ahead to shut up and let the Judge rule. But I --

THE COURT: But additional --

MR. BOHN: -- I think --

THE COURT: -- arguments were made, so those, please.

MR. BOHN: I think the Charmicor and Apao, I think, deals with the -- handles the alleged -- the state action allegations and I think it's pretty clear, there is no state action here. A couple comments, going backwards from where he started.

If you sue for -- if the claim is for less than $20,000 in Nevada you're entitled to attorney's fees and costs. One of the -- and SFR made it clear that the amount of the super priority lien is a relatively nominal minor amount. A place like a Bank can certainly have the funds and resources, certainly, to hire dozens of attorneys to come to court every day to argue these issues after the fact. They would have certainly saved a lot of money had they overpaid and saved their interests that way than doing what they're doing now.

THE COURT: Yeah. I guess, his -- but the argument isn't that. The argument is that the -- their -- the statute -- statutory scheme is unconstitutional because it doesn't provide procedural due process. I specifically drilled down and said, well, before you can even talk about that you have to show a state action. That's what we wanted to address, and that's what he's done now. And so, you know, those are his arguments today.

MR. BOHN: Yes.

THE COURT: So do you want to address the --

MR. BOHN: Well, I think the Charmicor and Apao cases kind of cover that. They found no state action in the state non-judicial foreclosures that are utilized by Mr. Shevorski's clients when they are foreclosing on their own trust deeds, the same way the HOA is foreclosing on its trust

deeds. And I put a chart in the brief, you know, to show the parallel between the -- the foreclosure statutes under 107 and the foreclosures statutes under 116.

You know, Mr. Shevorski says, well, the state gets a benefit from these. Well, the state gets a benefit from it, but so does the Bank. You know, there is many purposes for CC&Rs and one of them is to maintain or increase property values.

And a Bank who is going to be putting money into a house wants to make sure those property values are maintained so they continue to keep their equity in that property so if they do have to liquidate, foreclose, they are -- they will be able to realize the money that they were entitled to from that property.

So, and I haven't seen a statute on this, but I've been told numerous times by mortgage people that for over 20 years, FHA will not insure a loan unless there is CC&Rs on the property, and the same thing with Fannie Mae and Freddie Mac. So everybody benefits from the CC&Rs, not just the state. And just because the state may have a tangential benefit to the CC&Rs does not bring it within the realm of a state action.

And I know you are very familiar with these issues. I don't want to burden you with things you've heard or read already. If you have any specific questions, I'm happy to answer them. Otherwise, I'm happy just to submit the matter

on the briefs and leave it at that.

THE COURT: All right. Well, of course, the issues are complex, and you, as always, have raised, you know, issues that are important and you've argued them well.

I still, you know, I -- but I -- Mr. Bohn points a contrary argument that this is good, that it's not -- it just doesn't benefit only the state to have this scheme in, it also does -- the HOAs -- having HOAs does, in fact, benefit the secured lender because it keeps the property values and does the -- keeping the HOA intact. That benefits the security, because if the whole neighborhood goes down, because the common areas aren't kept up, then we have disaster, and the property values are affected and they go, you know, go down even lower than they went down in the crash.

So I think all in all, my -- although, I found many of your arguments to be persuasive, that I'm going to stand on the tentative. I feel like there isn't sufficient state action to -- so that I don't -- I can't reach the further issue of, okay, it's procedurally -- there's a lack of procedural due process that makes the statute unconstitutional. Has anyone else taken this issue up before the Supremes?

MR. SHEVORSKI: There are -- have been a number of arguments on -- that have kind of danced around this issue and they've always asked for -- you know, they -- I'm sure Mr.

Bohn will agree, they sort of choose odd arguments to have, because there hasn't been factual development. And they complained during oral argument, why isn't there more factual developments.

I do anticipate that Wells Fargo, who is not a client of mine, has brought this up on a Writ issue, and I would suspect that that's probably -- unless they do the old unpublished opinion sending them back down, that may be the case. I would -- and that's -- that was argued a couple -- a month-and-a-half ago, two months ago?

MR. BOHN: October, I believe, it was.

MR. SHEVORSKI: October? Yeah. I can tell you, Your Honor, that the person sitting -- when we go into federal court is going to be the United States Government sitting next to me making these arguments in the form of a Asim Varma, for Arnold & Porter, who represents FHFA. So that's where I think ultimately that's where it's going to go is before the 9th Circuit.

THE COURT: And you said Judge Navarro asked to certify two questions?

MR. SHEVORSKI: She certified two questions.

THE COURT: Did the Court agree to hear those?

MR. SHEVORSKI: They had oral argument about -- about three or four weeks ago, Your Honor, on the question of -- the -- it was really a tender issue; what if someone

says --

THE COURT: Conditional tender?

MR. SHEVORSKI: -- someone reaches out to NAS, NAS responds, I can't talk to you because of the Fair Debt Collection Practices Act.

THE COURT: Oh.

MR. SHEVORSKI: And how does that affect the lender's rights.

THE COURT: I see. Okay. And now at the pro bono luncheon I saw Justice Cherry so I --

MR. SHEVORSKI: Sure.

THE COURT: -- said when are you going to decide the HOA cases, because we're in District Court waiting for all these decisions and we need these decisions. And he said, January.

MR. SHEVORSKI: That's my understanding --

THE COURT: It was already in the pipeline.

MR. SHEVORSKI: -- as well. That's my understanding as well. There is one out -- is this your client, Micky, that has one today?

MR. BOHN: Yeah. But that unfortunately doesn't have anything to do with constitutionality or recitals in the deed or commercial reasonableness.

MR. SHEVORSKI: It's two HOAs fighting.

MR. BOHN: It's -- it's two -- it's involving the

equal priority of two HOA liens.

THE COURT: And it came out today?

MR. BOHN: It came out this morning and I --

MR. SHEVORSKI: It's going to -- it's going to come out today.

MR. BOHN: Yeah.

THE COURT: Okay. I'll go read it after court.

MR. BOHN: It's -- but it's -- unfortunately, it doesn't apply to these issues being presented today or being -- it's -- in that particular case my client bought the property at an HOA sale. There were substantial excess proceeds, there was a secondary HOA, and they said, we want money from you and we said, no get it from the excess proceeds.

THE COURT: Oh.

MR. BOHN: And they said, no, we're not entitled to it, and the Supreme Court said, yes, you are, so.

MR. SHEVORSKI: Oh, you won?

MR. BOHN: Yeah.

MR. SHEVORSKI: Hey.

MR. BOHN: Hard to believe.

MR. SHEVORSKI: Congratulations.

MR. BOHN: Thank you.

THE CLERK: The motion's denied, the countermotion's granted?

THE COURT: Yes.

MR. SHEVORSKI: Very good, Your Honor.

THE COURT: So it's denied, countermotion --

MR. BOHN: Mr. Shevorski and I will --

THE COURT: -- is granted. And if he's going to --

MR. BOHN: -- we'll figure out a order that both of us can at least sign off on.

MR. SHEVORSKI: Yeah, it works.

THE COURT: Okay.

MR. SHEVORSKI: We always get along. Very good.

MR. BOHN: Thank you.

THE COURT: Thank you. I always enjoy you. Thank you so much.

MR. SHEVORSKI: Thank you, Your Honor.

(Proceeding concluded at 9:47 a.m.)

* * * * *

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

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DISTRICT COURT

CLARK COUNTY, NEVADA

SATICOY BAY LLC SERIES 2227 SHADOW CANYON, Plaintiff, vs. NATIONSTAR MORTGAGE LLC.; PATERNO C. JURANI, ESQ.; and REPUBLIC SILVER STATE DISPOSAL, DBA REPUBLIC SERVICES, Defendants.	CASE NO.: A702938 DEPT NO.: XIV Date of hearing: January 14, 2016 Time of hearing: 9:00 a.m.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

The motion of defendant Nationstar Mortgage, LLC ("Nationstar)for summary judgment, and countermotion of plaintiff Saticoy Bay LLC Series 2227 Shadow Canyon ("Plaintiff") having come before the court on the 14th day of January, 2016, Michael F. Bohn, Esq. appearing on behalf of plaintiff Saticoy Bay LLC Series 2227 Shadow Canyon ("Plaintiff"), Ariel E. Stern, Esq., appearing on behalf of Bank of America and Reconstruct Company, N.A., and the court, having reviewed the motions and the oppositions and having heard the arguments of counsel, makes it's findings of fact, conclusion of law and judgment as follows.

FINDINGS OF FACT

1. Plaintiff is the owner of the real property commonly known as 2227 Shadow Canyon,

Henderson, Nevada ("the Property").

2. Plaintiff obtained title to the Property at foreclosure sale conducted on January 2, 2014 as evidenced by foreclosure deed recorded February 3, 2014.

3. The foreclosure deed arose from a delinquency in assessments due from the former owner, Patricia E. Evans, to the Sun City Anthem Community Association ("the HOA"), pursuant to NRS Chapter 116.

4. Defendant Nationstar Mortgage LLC ("Nationstar") is the beneficiary of a deed of trust that was recorded as an encumbrance on the Property on February 7, 2006.

5. The foreclosure agent recorded a notice of default on June 24, 2010. The foreclosure agent then mailed a copy of the notice of default to Pulte Mortgage LLC on June 30, 2010. Pulte Mortgage is the predecessor in interest to defendant Nationstar's predecessor in interest,

6. The foreclosure agent recorded a notice of sale on November 26, 2013. The foreclosure agent then mailed a copy of the notice of sale to Pulte Mortgage LLC and defendant Nationstar on November 26, 2013.

7. Additionally, the foreclosure agent posted the notice of sale at three separate public locations and published the notice of sale in Nevada Legal News.

8. Defendant Nationstar and its predecessor in interest, Pulte Mortgage LLC, were on actual notice of the HOA foreclosure sale and failed to take any action to protect their interests in the Property.

9. The HOA foreclosure agent issued a deed upon sale which was recorded on February 3, 2014.

Default occurred as set forth in a Notice of Default and Election to Sell, recorded on 06/24/2010 as instrument number 0002131 Book 20100624 which was recorded in the office of the recorder of said county. Red Rock Financial Services has complied with all requirements of law including, but not limited to, the elapsing of 90 days, mailing of copies of Lien for Delinquent Assessments and Notice of Default and the posting and publication of the Notice of Sale.

10. Any findings of fact which should be considered to be a conclusion of law shall be treated as such.

CONCLUSIONS OF LAW

1. Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories,

and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." NRCP 56. "The party moving for summary judgment bears the initial burden of production to show the absence of a genuine issue of material fact." Cuzze v. U. and Community College System of Nevada, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007). Where the moving party will carry the burden of persuasion on those issues at trial, it "must present evidence that would entitle it to a judgment as a matter of law in the absence of contrary evidence." *Id.*

2. If the initial burden is carried, "the party opposing summary judgment assumes a burden of production to show the existence of a genuine issue of material fact." *Id.* The opposing party must "transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact." *Id.* The opposing party is "not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture." Wood v. Safeway, Inc., 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005) (citations and quotations omitted). If the opposing party fails to carry its burden, summary judgment will be entered against it if the moving party is also entitled to judgment as a matter of law. *See* NRCP 56(c). Since both parties have moved for summary judgment, and attach many of the same real property records to their respective motions, the only issue for the Court to resolve is which party is entitled to judgment as a matter of law. Based on the Court's prior tentative, this issue reduces to whether there is sufficient state action under the facts of this case to find Nevada's HOA lien statutes unconstitutional.

3. When ruling on a motion for summary judgment, the court may take judicial notice of the public records attached to the motion. See Anderson v. County of Nassau, 297 F. Supp 2d 540, 544-45 (E.D.N.Y. 2004); In Re Bayside Prison Litig., 190 F. Supp 2d 755, 760 (D. N.J. 2002). The recorded documents attached to the plaintiffs motion are referenced in the complaint and/or are public records of which the Court may, and did take judicial notice. See NRS 47.150; Lemel v. Smith, 64 Nev. 545 (1947) (Judicial Notice takes the place of proof and is of equal force.") "Documents accompanied by a certificate of acknowledgment of a notary public or officer authorized by law to take acknowledgments are presumed to be authentic." NRS 52.165.

4. The defendant did not object to the authenticity of any of the exhibits attached to the plaintiff's motion for summary judgment.

5. Plaintiff's complaint alleges three claims for relief against defendant Nationstar Mortgage, declaratory relief, injunctive relief, and quiet title. Summary judgment in favor of the plaintiff on all of plaintiff's claims for relief are appropriate.

6. The HOA foreclosure sale complied with all requirements of law, including but not limited to, recording and mailing of copies of Notice of Delinquent Assessment and Notice of Default, and the recording, posting and publication of the Notice of Sale.

7. Nationstar's first argument is that Nevada has mandated and/or encouraged the creation of HOAs to such an extent as to constitute state action. D. Supp. at 4-8. As an initial matter, it should be noted that this argument mischaracterizes Nevada law with regard to the establishment of HOAs. Nevada law merely requires that if a municipality approves the development of a planned unit development which contains any land set aside as common open space[1] within that development, then the development must be governed by a HOA. NRS 278A.130. Nothing in the Nevada statutes makes a blanket requirement that HOAs be established state-wide. The State is also not involved in the operation of those HOAs, which may provide more of a footing to argue state action.

8. Nationstar further argues that the State receives an identifiable benefit from the creation of HOAs in the form of "significant government cost saving [from placing the burden of streets and the like on the HOAs]." Mot. at 6-7. The legislative history cited by Nationstar belies this point though, as that indicates that the State was concerned about HOAs shifting *their* maintenance costs to the *State* after the HOAs had been given the right to operate by the State. Furthermore, even if this cost saving benefit could constitute state action, it is not the cause of Nationstar's alleged injury and Nationstar would lack standing in that regard. Constitutional standing requires, *inter alia*, "a causal connection between the injury and the conduct complained of." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Here,

---

Nationstar complains of the State's shifting the cost burden of street maintenance, but this shifting did not result in the loss of its first deed of trust. Hence, Nationstar's first argument should be rejected.

9. Nationstar next argues that the State is intimately intertwined with HOA foreclosures because it created the super-priority lien right, unknown at common law, and that this is sufficient state action. D. Supp. at 8-9. On this point, Nationstar cites to Culbertson v. Leland, 528 F.2d 426 (9th Cir. 1975). Nationstar argues that the Ninth Circuit found sufficient state action in Arizona's enactment of a statute giving hotel operators the right to a lien on evicted patrons' property because it was a right unknown at common law. D. Supp. at 8. However, *Culbertson* is distinguishable from this case.

10. Culbertson's holding was clearly couched in the fact that hotel operators had no lien at common law on their patrons' belongings and that Arizona's granting that right constituted a right granted by the State. 528 F.2d at 429-431. Nationstar's reliance on Culbertson fails to acknowledge Culbertson's detailed discussion beginning at page 429, as well as the fact that "the distinction between the sources of...the Nevada powers of sale does not compel, or strongly support, a holding that the latter constitutes state action." Charmicor v. Deaner, 572 F.2d 694, 696 (9th Cir. 1978). Therefore, the fact that Nevada's HOA lien is statutorily created has no real bearing on whether the enactment of that statute constitutes state action.

11. Nationstar also presents a second argument as to why Nevada is intimately intertwined with HOA foreclosures – that the State is "overtly involved in every aspect of the HOA super priority lien foreclosure, except foreclosing on the property itself." *Id.* at 9:2-3. However, the sale provided for in NRS 116 is *nonjudicial* and the state "has not compelled the sale of a [debtor's property and thereby the extinguishment of a first priority deed of trust], but has merely announced the circumstances under which its courts will not interfere with a private sale." Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 166 (1978).

12. Nationstar next argues that NRS 116 is intended to force first priority deed of trust holders to pay HOA liens without providing a clear and certain remedy for a refund of any amount they overpay. D. Supp. at 14-15. The cases it cites in support, however, both involved overpayments made to a state agency. See Garcia-Rubiera v. Fortuño, 665 F.3d 261 (1st Cir. 2011) (concerning duplicate payments to the Puerto Rico's state-run compulsory insurance agency); McKesson Corp. v. Div. of Alcoholic

Beverages & Tobacco, 496 U.S. 18 (1989) (concerning tax payments). There is no similar situation here. Moreover, contrary to Nationstar's position, the Nevada Supreme Court in *SFR* made no indication that the legislature *intended* first priority deed of trust holders to pay off HOA liens – it merely recognized that those holders may protect their interests by paying off the HOA lien. Based on the foregoing, the state need not provide a clear and certain remedy where there is no clear and direct state action in the first place.

13. Nationstar also presents further argument as to the commercial unreasonableness of the sale. Nationstar argues that the low sales price, in comparison to the fair market value of the Property, compels close scrutiny of the sale. D. Supp. at 16. While this may be the case, Nationstar would still have an obligation to show fraud, unfairness, or oppression to set aside the sale. See Shadow Wood Homeownwers Association v. New York Community Bank, 132 Nev. Ad. Op. 5 (2016) and Long v. Towne, 98 Nev. 11, 639 P.2d 528 (1982). Although Nationstar sets forth a plethora of allegations on page seventeen of its supplement, it provides no substantiated proof sufficient to carry its burden on a motion for summary judgment.

14. NRS Chapter 116 provides a conclusive presumption as to the validity of an HOA lien foreclosure sale, absent grounds for equitable relief. NRS 116.31166, provides:

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

15. In addition to the foreclosure deed, the plaintiff also submitted proofs of mailing of the notices of default and the notice of sale.

16. Any conclusion of law which should be a finding of fact shall be considered as such.

ORDER and JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff Saticoy Bay LLC Series 2227 Shadow Canyon counter motion for summary judgment is granted.

IT IS FURTHER ORDERED that defendant's Nationstar's motion for summary judgment is denied.

IT IS FURTHER ORDERED that judgment is entered on behalf of plaintiff Saticoy Bay LLC Series 2227 Shadow Canyon and against defendant Nationstar.

IT IS FURTHER ORDERED that title to the real property commonly known as 2227 Shadow Canyon, Las Vegas, Nevada and legally described as:

> All that certain real property situated in the County of Clark, State of Nevada, described as follows: Lot Two (2) in Block One (1) of FINAL MAP OF SUN CITY ANTHEM UNIT NO. 31 as shown by map thereof on file in Book 122 of Plats, Page 29 and amended by that certain CERTIFICATE OF AMENDMENT recorded June 29, 2005 in Book 20050629 as Instrument No. 0003382 in the Office of the County Recorder of Clark County, Nevada
>
> APN 190-17-310-002

is hereby quieted in the name of Saticoy Bay LLC Series 2227 Shadow Canyon.

IT IS FURTHER ORDERED that as a result of the foreclosure sale conducted on January 2, 2014 and the foreclosure deed recorded on February 3, 2014 as instrument number 201402030002095, the interests of defendant Nationstar as well as it's heirs or assigns in the property commonly known as 2227 Shadow Canyon, Las Vegas, Nevada are extinguished.

IT IS FURTHER ORDERED that defendants, as well as their heirs and assigns have no further right, title or claim to the real property commonly known as 2227 Shadow Canyon, Las Vegas, Nevada resulting from the deed of trust recorded as instrument number 20060207-0002596.

IT IS FURTHER ORDERED that defendants, as well as their heirs and assigns, or anyone acting on their behalf are forever enjoined from asserting any estate, right, title or interest in the real property commonly known as 2227 Shadow Canyon, Las Vegas, Nevada as a result of the deed of trust recorded as instrument number 20060207-0002596.

///

IT IS FURTHER ORDERED that defendants, as well as their heirs and assigns or anyone acting on their behalf are forever barred from enforcing any rights against the real property commonly known as 2227 Shadow Canyon, Las Vegas, Nevada as a result of the deed of trust recorded as instrument number 20060207-0002596.

DATED this 31st day of ~~March~~ April, 2016

DISTRICT COURT JUDGE

Respectfully submitted by:

LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

By: _____
MICHAEL F. BOHN, ESQ.
376 East Warm Springs Road, Ste. 140
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Attorney for plaintiff

Reviewed by:

AKERMAN LLP

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1160 Town Center Drive, Ste. 330
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Attorneys for defendant Nationstar

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY NEVADA

SATICOY BAY LLC SERIES 2227 SHADOW CANYON, Plaintiff, vs. NATIONSTAR MORTGAGE LLC.; PATERNO C. JURANI, ESQ.; and REPUBLIC SILVER STATE DISPOSAL, DBA REPUBLIC SERVICES, Defendants.	CASE NO.: A702938 DEPT NO.: XIV

NOTICE OF ENTRY OF JUDGMENT

TO: Parties above-named; and

TO: Their Attorney of Record

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that a **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT** has been entered on the 7th day of April, 2016, in the above captioned matter, a copy of which is attached hereto.

Dated this 8th day of April, 2016.

LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

By: */s/ /Michael F. Bohn, Esq./*
MICHAEL F. BOHN, ESQ.
376 E. Warm Springs Rd., Ste. 140
Las Vegas, NV 89119
Attorney for plaintiff

CERTIFICATE OF SERVICE

Pursuant to NRCP 5, NEFCR 9 and EDCR 8.05, I hereby certify that I am an employee of LAW OFFICES OF MICHAEL F. BOHN., ESQ., and on the 8th day of April, 2016, an electronic copy of the **NOTICE OF ENTRY OF JUDGMENT** was served on opposing counsel via the Court's electronic service system to the following counsel of record:

Ariel E. Stern, Esq.
AKERMAN LLP
1160 Town Center Drive, Ste. 330
Las Vegas, NV 89144
Attorneys for defendant Nationstar

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

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DISTRICT COURT

CLARK COUNTY, NEVADA

SATICOY BAY LLC SERIES 2227 SHADOW CANYON, Plaintiff, vs. NATIONSTAR MORTGAGE LLC.; PATERNO C. JURANI, ESQ.; and REPUBLIC SILVER STATE DISPOSAL, DBA REPUBLIC SERVICES, Defendants.	CASE NO.: A702938 DEPT NO.: XIV Date of hearing: January 14, 2016 Time of hearing: 9:00 a.m.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

The motion of defendant Nationstar Mortgage, LLC ("Nationstar)for summary judgment, and countermotion of plaintiff Saticoy Bay LLC Series 2227 Shadow Canyon ("Plaintiff") having come before the court on the 14th day of January, 2016, Michael F. Bohn, Esq. appearing on behalf of plaintiff Saticoy Bay LLC Series 2227 Shadow Canyon ("Plaintiff"), Ariel E. Stern, Esq., appearing on behalf of Bank of America and Reconstruct Company, N.A., and the court, having reviewed the motions and the oppositions and having heard the arguments of counsel, makes it's findings of fact, conclusion of law and judgment as follows.

FINDINGS OF FACT

1. Plaintiff is the owner of the real property commonly known as 2227 Shadow Canyon,

Henderson, Nevada ("the Property").

2. Plaintiff obtained title to the Property at foreclosure sale conducted on January 2, 2014 as evidenced by foreclosure deed recorded February 3, 2014.

3. The foreclosure deed arose from a delinquency in assessments due from the former owner, Patricia E. Evans, to the Sun City Anthem Community Association ("the HOA"), pursuant to NRS Chapter 116.

4. Defendant Nationstar Mortgage LLC ("Nationstar") is the beneficiary of a deed of trust that was recorded as an encumbrance on the Property on February 7, 2006.

5. The foreclosure agent recorded a notice of default on June 24, 2010. The foreclosure agent then mailed a copy of the notice of default to Pulte Mortgage LLC on June 30, 2010. Pulte Mortgage is the predecessor in interest to defendant Nationstar's predecessor in interest,

6. The foreclosure agent recorded a notice of sale on November 26, 2013. The foreclosure agent then mailed a copy of the notice of sale to Pulte Mortgage LLC and defendant Nationstar on November 26, 2013.

7. Additionally, the foreclosure agent posted the notice of sale at three separate public locations and published the notice of sale in Nevada Legal News.

8. Defendant Nationstar and its predecessor in interest, Pulte Mortgage LLC, were on actual notice of the HOA foreclosure sale and failed to take any action to protect their interests in the Property.

9. The HOA foreclosure agent issued a deed upon sale which was recorded on February 3, 2014.

Default occurred as set forth in a Notice of Default and Election to Sell, recorded on 06/24/2010 as instrument number 0002131 Book 20100624 which was recorded in the office of the recorder of said county. Red Rock Financial Services has complied with all requirements of law including, but not limited to, the elapsing of 90 days, mailing of copies of Lien for Delinquent Assessments and Notice of Default and the posting and publication of the Notice of Sale.

10. Any findings of fact which should be considered to be a conclusion of law shall be treated as such.

CONCLUSIONS OF LAW

1. Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories,

and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." NRCP 56. "The party moving for summary judgment bears the initial burden of production to show the absence of a genuine issue of material fact." Cuzze v. U. and Community College System of Nevada, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007). Where the moving party will carry the burden of persuasion on those issues at trial, it "must present evidence that would entitle it to a judgment as a matter of law in the absence of contrary evidence." *Id.*

2. If the initial burden is carried, "the party opposing summary judgment assumes a burden of production to show the existence of a genuine issue of material fact." *Id.* The opposing party must "transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact." *Id.* The opposing party is "not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture." Wood v. Safeway, Inc., 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005) (citations and quotations omitted). If the opposing party fails to carry its burden, summary judgment will be entered against it if the moving party is also entitled to judgment as a matter of law. *See* NRCP 56(c). Since both parties have moved for summary judgment, and attach many of the same real property records to their respective motions, the only issue for the Court to resolve is which party is entitled to judgment as a matter of law. Based on the Court's prior tentative, this issue reduces to whether there is sufficient state action under the facts of this case to find Nevada's HOA lien statutes unconstitutional.

3. When ruling on a motion for summary judgment, the court may take judicial notice of the public records attached to the motion. See Anderson v. County of Nassau, 297 F. Supp 2d 540, 544-45 (E.D.N.Y. 2004); In Re Bayside Prison Litig., 190 F. Supp 2d 755, 760 (D. N.J. 2002). The recorded documents attached to the plaintiffs motion are referenced in the complaint and/or are public records of which the Court may, and did take judicial notice. See NRS 47.150; Lemel v. Smith, 64 Nev. 545 (1947) (Judicial Notice takes the place of proof and is of equal force.") "Documents accompanied by a certificate of acknowledgment of a notary public or officer authorized by law to take acknowledgments are presumed to be authentic." NRS 52.165.

4. The defendant did not object to the authenticity of any of the exhibits attached to the plaintiff's motion for summary judgment.

5. Plaintiff's complaint alleges three claims for relief against defendant Nationstar Mortgage, declaratory relief, injunctive relief, and quiet title. Summary judgment in favor of the plaintiff on all of plaintiff's claims for relief are appropriate.

6. The HOA foreclosure sale complied with all requirements of law, including but not limited to, recording and mailing of copies of Notice of Delinquent Assessment and Notice of Default, and the recording, posting and publication of the Notice of Sale.

7. Nationstar's first argument is that Nevada has mandated and/or encouraged the creation of HOAs to such an extent as to constitute state action. D. Supp. at 4-8. As an initial matter, it should be noted that this argument mischaracterizes Nevada law with regard to the establishment of HOAs. Nevada law merely requires that if a municipality approves the development of a planned unit development which contains any land set aside as common open space[1] within that development, then the development must be governed by a HOA. NRS 278A.130. Nothing in the Nevada statutes makes a blanket requirement that HOAs be established state-wide. The State is also not involved in the operation of those HOAs, which may provide more of a footing to argue state action.

8. Nationstar further argues that the State receives an identifiable benefit from the creation of HOAs in the form of "significant government cost saving [from placing the burden of streets and the like on the HOAs]." Mot. at 6-7. The legislative history cited by Nationstar belies this point though, as that indicates that the State was concerned about HOAs shifting *their* maintenance costs to the *State* after the HOAs had been given the right to operate by the State. Furthermore, even if this cost saving benefit could constitute state action, it is not the cause of Nationstar's alleged injury and Nationstar would lack standing in that regard. Constitutional standing requires, *inter alia*, "a causal connection between the injury and the conduct complained of." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Here,

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Nationstar complains of the State's shifting the cost burden of street maintenance, but this shifting did not result in the loss of its first deed of trust. Hence, Nationstar's first argument should be rejected.

9. Nationstar next argues that the State is intimately intertwined with HOA foreclosures because it created the super-priority lien right, unknown at common law, and that this is sufficient state action. D. Supp. at 8-9. On this point, Nationstar cites to Culbertson v. Leland, 528 F.2d 426 (9th Cir. 1975). Nationstar argues that the Ninth Circuit found sufficient state action in Arizona's enactment of a statute giving hotel operators the right to a lien on evicted patrons' property because it was a right unknown at common law. D. Supp. at 8. However, *Culbertson* is distinguishable from this case.

10. Culbertson's holding was clearly couched in the fact that hotel operators had no lien at common law on their patrons' belongings and that Arizona's granting that right constituted a right granted by the State. 528 F.2d at 429-431. Nationstar's reliance on Culbertson fails to acknowledge Culbertson's detailed discussion beginning at page 429, as well as the fact that "the distinction between the sources of...the Nevada powers of sale does not compel, or strongly support, a holding that the latter constitutes state action." Charmicor v. Deaner, 572 F.2d 694, 696 (9th Cir. 1978). Therefore, the fact that Nevada's HOA lien is statutorily created has no real bearing on whether the enactment of that statute constitutes state action.

11. Nationstar also presents a second argument as to why Nevada is intimately intertwined with HOA foreclosures – that the State is "overtly involved in every aspect of the HOA super priority lien foreclosure, except foreclosing on the property itself." *Id.* at 9:2-3. However, the sale provided for in NRS 116 is *nonjudicial* and the state "has not compelled the sale of a [debtor's property and thereby the extinguishment of a first priority deed of trust], but has merely announced the circumstances under which its courts will not interfere with a private sale." Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 166 (1978).

12. Nationstar next argues that NRS 116 is intended to force first priority deed of trust holders to pay HOA liens without providing a clear and certain remedy for a refund of any amount they overpay. D. Supp. at 14-15. The cases it cites in support, however, both involved overpayments made to a state agency. See Garcia-Rubiera v. Fortuño, 665 F.3d 261 (1st Cir. 2011) (concerning duplicate payments to the Puerto Rico's state-run compulsory insurance agency); McKesson Corp. v. Div. of Alcoholic

Beverages & Tobacco, 496 U.S. 18 (1989) (concerning tax payments). There is no similar situation here. Moreover, contrary to Nationstar's position, the Nevada Supreme Court in *SFR* made no indication that the legislature *intended* first priority deed of trust holders to pay off HOA liens – it merely recognized that those holders may protect their interests by paying off the HOA lien. Based on the foregoing, the state need not provide a clear and certain remedy where there is no clear and direct state action in the first place.

13. Nationstar also presents further argument as to the commercial unreasonableness of the sale. Nationstar argues that the low sales price, in comparison to the fair market value of the Property, compels close scrutiny of the sale. D. Supp. at 16. While this may be the case, Nationstar would still have an obligation to show fraud, unfairness, or oppression to set aside the sale. See Shadow Wood Homeownwers Association v. New York Community Bank, 132 Nev. Ad. Op. 5 (2016) and Long v. Towne, 98 Nev. 11, 639 P.2d 528 (1982). Although Nationstar sets forth a plethora of allegations on page seventeen of its supplement, it provides no substantiated proof sufficient to carry its burden on a motion for summary judgment.

14. NRS Chapter 116 provides a conclusive presumption as to the validity of an HOA lien foreclosure sale, absent grounds for equitable relief. NRS 116.31166, provides:

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

15. In addition to the foreclosure deed, the plaintiff also submitted proofs of mailing of the notices of default and the notice of sale.

16. Any conclusion of law which should be a finding of fact shall be considered as such.

ORDER and JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff Saticoy Bay LLC Series 2227 Shadow Canyon counter motion for summary judgment is granted.

IT IS FURTHER ORDERED that defendant's Nationstar's motion for summary judgment is denied.

IT IS FURTHER ORDERED that judgment is entered on behalf of plaintiff Saticoy Bay LLC Series 2227 Shadow Canyon and against defendant Nationstar.

IT IS FURTHER ORDERED that title to the real property commonly known as 2227 Shadow Canyon, Las Vegas, Nevada and legally described as:

> All that certain real property situated in the County of Clark, State of Nevada, described as follows: Lot Two (2) in Block One (1) of FINAL MAP OF SUN CITY ANTHEM UNIT NO. 31 as shown by map thereof on file in Book 122 of Plats, Page 29 and amended by that certain CERTIFICATE OF AMENDMENT recorded June 29, 2005 in Book 20050629 as Instrument No. 0003382 in the Office of the County Recorder of Clark County, Nevada
>
> APN 190-17-310-002

is hereby quieted in the name of Saticoy Bay LLC Series 2227 Shadow Canyon.

IT IS FURTHER ORDERED that as a result of the foreclosure sale conducted on January 2, 2014 and the foreclosure deed recorded on February 3, 2014 as instrument number 201402030002095, the interests of defendant Nationstar as well as it's heirs or assigns in the property commonly known as 2227 Shadow Canyon, Las Vegas, Nevada are extinguished.

IT IS FURTHER ORDERED that defendants, as well as their heirs and assigns have no further right, title or claim to the real property commonly known as 2227 Shadow Canyon, Las Vegas, Nevada resulting from the deed of trust recorded as instrument number 20060207-0002596.

IT IS FURTHER ORDERED that defendants, as well as their heirs and assigns, or anyone acting on their behalf are forever enjoined from asserting any estate, right, title or interest in the real property commonly known as 2227 Shadow Canyon, Las Vegas, Nevada as a result of the deed of trust recorded as instrument number 20060207-0002596.

///

IT IS FURTHER ORDERED that defendants, as well as their heirs and assigns or anyone acting on their behalf are forever barred from enforcing any rights against the real property commonly known as 2227 Shadow Canyon, Las Vegas, Nevada as a result of the deed of trust recorded as instrument number 20060207-0002596.

DATED this 31st day of ~~March~~ April, 2016

DISTRICT COURT JUDGE

Respectfully submitted by:

LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

By: _____
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

SATICOY BAY LLC SERIES 2227 SHADOW CANYON,

Plaintiff,

v.

NATIONSTAR MORTGAGE, LLC; PATERNO C. JURANI and REPUBLIC SILVER STATE DISPOSAL, DBA REPUBLIC SERVICES,

Defendants.

Case No.: A-14-702938-C
Dept.: XIV

DEFENDANT NATIONSTAR MORTGAGE LLC'S NOTICE OF APPEAL

Nationstar Mortgage LLC (**Nationstar**), by and through its attorneys of record at Akerman LLP, submits its notice of appeal to the Nevada Supreme Court of the order granting plaintiff Saticoy Bay LLC Series 2227 Shadow Canyon's motion for summary that was entered in this matter on April 7, 2016, notice of which was serve on April 8, 2016.

DATED this 6th day of May, 2014.

AKERMAN LLP

/s/ *Allison R. Schmidt*
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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 May, 2016 I caused to be served a true and correct copy of foregoing **DEFENDANT NATIONSTAR MORTGAGE LLC'S NOTICE OF APPEAL** in the following manner:

(ELECTRONIC SERVICE ONLY) Pursuant to Administrative Order 14-2, the above-referenced document was electronically served on the date hereof and served through the Notice of Electronic Filing automatically generated by the Court's facilities to those parties listed on the Court's Master Service List.

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