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SUPREME COURT

STATE OF NEVADA

NATIONSTAR MORTGAGE, LLC,

Appellant,

vs.

SATICOY BAY LLC SERIES 2227 SHADOW CANYON,

Respondent.

No. 70382

RESPONDENT'S ANSWERING BRIEF

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Shadow Canyon

NRAP 26.1 DISCLOSURE STATEMENT

Counsel for plaintiff/respondent certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Plaintiff/respondent, Saticoy Bay LLC Series 2227 Shadow Canyon is a Nevada limited-liability company.

2. The manager for Saticoy Bay LLC Series 2227 Shadow Canyon is Bay Harbor Trust.

3. The trustee for Bay Harbor Trust is Iyad Haddad a/k/a Eddie Haddad.

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ROUTING STATEMENT

This case is a quiet title action. Rule 17 does not list quiet title matters as one of the cases retained by the Supreme Court. Counsel for plaintiff/respondent therefore believes that this appeal should be assigned to the Court of Appeals.

ISSUES PRESENTED ON APPEAL

1. Whether the HOA foreclosure sale extinguished defendant's deed of trust.

2. Whether an HOA foreclosure sale is required to be "commercially reasonable."

3. Whether an HOA foreclosure sale can be set aside based solely on a claim that the sale price was grossly inadequate.

4. Whether the nonjudicial foreclosure process provided by NRS Chapter 116 violates due process.

5. An order granting summary judgment is reviewed de novo without deference to the findings of the lower court.

STATEMENT OF THE CASE

On June 24, 2014, Saticoy Bay LLC Series 2227 Shadow Canyon (hereinafter "plaintiff") filed a complaint asserting three claims for relief: 1) entry of an injunction prohibiting Nationstar Mortgage, LLC (hereinafter "defendant") from holding a foreclosure sale of the real property commonly known as 2227 Shadow Canyon, Henderson, Nevada (hereinafter "Property") pursuant to a deed of trust recorded as an encumbrance against the Property on February 7, 2006; 2) entry of a determination pursuant to NRS 40.010 that plaintiff is the rightful owner of the Property and that the defendants have no right, title, interest or claim to the Property;

and 3) entry of a declaration pursuant to NRS 40.010 that title to the Property was vested in plaintiff free and clear of all liens and encumbrances, that the defendants have no estate, right, title or interest in the Property, and that the defendants be forever enjoined from asserting any estate, right, title, interest or claim to the Property adverse to plaintiff. (Appellant's Appendix Vol. 1 (hereinafter "AA1") , pgs. 1-6)

On July 1, 2014, defendant filed an answer to complaint. (AA1, pgs. 7 to 11)

On August 27, 2015, defendant filed a motion for summary judgment. (AA1, pgs. 12-132)

On September 10, 2015, plaintiff filed an opposition to motion for summary judgment and countermotion for summary judgment. (AA1, pgs. 133-240)

On October 8, 2015, defendant filed a reply in support of its motion for summary judgment and opposition to plaintiff's countermotion for summary judgment. (Appellant's Appendix Vol. 2 (hereinafter "AA2"), pgs. 241-256)

On November 6, 2015, defendant filed its supplemental brief on procedural due process and commercial reasonableness. (AA2, pg. 274 to AA4, pg. 700)

On November 19, 2015, plaintiff filed its its supplemental brief on procedural due process and commercial reasonableness. (Appellant's Appendix Vol. 4

(hereinafter "AA4"), pgs. 701-715)

On April 7, 2016, the court entered findings of fact, conclusions of law, and judgment in favor of plaintiff. (AA4, pgs. 750-757) Notice of entry of the judgment was served and filed on April 8, 2016. (AA4, pgs. 758-767)

Defendant filed its notice of appeal on May 6, 2016. (AA4, pgs. 768-769)

STATEMENT OF FACTS

Plaintiff obtained title to the Property by a foreclosure deed recorded on February 3, 2014. (AA1, pgs. 158-160) The foreclosure deed arises from a delinquency in assessments due from Patricia E. Evans (hereinafter "the former owner") to the Sun City Anthem Community Association (hereinafter "the HOA") pursuant to NRS Chapter 116. (AA1, pg. 158)

Pulte Mortgage LLC was named as "Lender" and "MERS" was named as beneficiary "solely as a nominee for Lender and Lender's successors and assigns" in a deed of trust recorded against the Property on February 7, 2006. See copy of deed of trust at AA1, pgs. 162-171.

On October 5, 2011, Bank of America, N.A. recorded an assignment of deed of trust executed by MERS assigning the deed of trust to Bank of America, N.A. See copy of assignment of deed of trust at AA1, pgs. 181-182.

On October 15, 2013, defendant recorded an assignment of deed of trust executed by Bank of America, N.A. assigning the deed of trust to defendant. See copy of corporate assignment of deed of trust at AA1, pgs. 183-184.

On April 16, 2010, Red Rock Financial Services (hereinafter "foreclosure agent") recorded a lien for delinquent assessments in the amount of $771.00 against the Property. (AA1, pg. 186)

On April 29, 2010, the foreclosure agent mailed a copy of the lien for delinquent assessments to the former owner. (AA1, pgs. 188-190)

On June 24, 2010, the foreclosure agent recorded a notice of default and election to sell for the amount of $2,057.18 against the Property. (AA1, pg. 192)

On June 30, 2010, the foreclosure agent mailed copies of the notice of default to the former owner, to defendant's predecessor, Pulte Mortgage LLC, and to other lien holders. (AA1, pgs. 194-205)

On November 26, 2013, the foreclosure agent recorded a notice of foreclosure sale for the amount of $8,005.16 against the Property. (AA1, pgs. 207-208)

On November 26, 2013, the foreclosure agent mailed copies of the notice of foreclosure sale to the former owner, to defendant's predecessor, Pulte Mortgage LLC, and to defendant at its address in Lewisville, Texas. (AA1, pgs. 210-216) The

notice mailed to defendant was received by the defendant on December 3, 2013. (AA1, pg. 216)

On December 2, 2013, a copy of the notice of foreclosure sale was served on the former owner by posting the notice in a conspicuous place on the Property. (AA1, pgs. 218-219)

Beginning on December 5, 2013, copies of the notice of trustee's sale were posted in three public places located in Clark County, Nevada and three public places located in Henderson, Nevada for 20 days consecutively. (AA1, pgs. 221-222)

The notice of foreclosure sale was published in the Nevada Legal News on December 12, December 18, and December 25 of 2013. (AA1, pg. 224)

On January 2, 2014, the foreclosure agent conducted a public auction at which plaintiff entered the high bid of $35,000.00 to purchase the Property. On February 3, 2014, the foreclosure agent recorded the foreclosure deed conveying title to the Property to plaintiff. (AA1, pgs. 158-160)

SUMMARY OF THE ARGUMENT

The language in NRS 116.3116(2) granted to the HOA a super priority lien that extinguished defendant's first deed of trust when plaintiff purchased the real property at the HOA foreclosure sale held on January 2, 2014.

The foreclosure agent complied with all statutory requirements to properly foreclose the HOA's superpriority lien, and the foreclosure sale cannot be set aside based solely on a claim that the price paid was grossly inadequate or that the sale was commercially unreasonable.

The foreclosure deed is conclusive in the absence of grounds for equitable relief, and defendant Bank is not entitled to equitable relief because it has an adequate remedy at law against the HOA and its foreclosure agent.

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

STANDARD OF REVIEW

In Wood v. Safeway, Inc., 121 Nev. 724, 121 P.3d 1026, 1029 (2005), this Court stated that it "reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court."

ARGUMENT

1. Defendant's trust deed was extinguished by the HOA foreclosure sale.

NRS 116.3116(2) provides in part that the HOA's assessment lien is "prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien . . . ."

The first deed of trust, recorded on February 7, 2006 falls squarely within the language of paragraph (b). The statutory language does not limit the nature of this "priority" in any way.

In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408 (2014), this Court stated:

> NRS 116.3116(2) gives an HOA a true superpriority lien, proper foreclosure of which will extinguish a first deed of trust. Because Chapter 116 permits nonjudicial foreclosure of HOA liens, and because SFR's complaint alleges that proper notices were sent and received, we reverse the district court's order of dismissal.

Id. at 419.

Because the facts in the present case are substantially the same as the facts in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., the district court properly found

that the nonjudicial foreclosure of the HOA's super priority lien at the public auction held on January 2, 2014 extinguished the "first security interest" held by defendant.

2. The foreclosure agent properly foreclosed the HOA's superpriority lien, and the foreclosure sale was not required to be "commercially reasonable."

At page 6 of Appellant's Opening Brief, defendant asserts that "[t]he HOA Lien Statute requires that HOA foreclosure sales be commercially reasonable," and defendant cites the "obligation of good faith" that appears in NRS 116.1113.

NRS Chapter 116 does not contain any language that requires an HOA foreclosure sale to be "commercially reasonable," and no language in NRS Chapter 116 even suggests that an interested party can seek to set aside an HOA foreclosure sale as being "commercially unreasonable" under the terms of the Uniform Commercial Code.

Although the comment to Section 1-113 of the Uniform Common Interest Ownership Act ("UCIOA") states that the definition of "good faith" contained in Section1-113 of the UCIOA is "derived from and used in the same manner as in Sections 2-103(i)(b) and 7-404 of the Uniform Commercial Code," the definition adopted in the comment does not include the word "commercial."

The amendment to NRS Chapter 104 made in 2005 placed the current

definition of "good faith" in Nevada's Uniform Commercial Code 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.

NRS 104.9109(4)(k) states 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 in four instances. An HOA assessment lien is not one of the four instances. Consequently, the language in NRS 104.9610(2) requiring that "[e]very aspect of a disposition of collateral, including the method, manner, time, place and other terms, must be commercially reasonable" does not apply to the HOA foreclosure sale held in the present case pursuant to NRS 116.31162 through NRS 116.31168 and, by incorporation, NRS 107.090.

At page 7 of Appellant's Opening Brief, defendant cites Jones v. Bank of Nevada, 91 Nev. 368, 535 P.2d 1279 (1975), where this Court affirmed the district court's order finding the sale of a private airplane to be commercially reasonable even though the buyer was able to resell the aircraft for $52,000 more than the buyer paid at foreclosure. This Court stated that "the price obtained upon sale is not the sole determinative factor." 91 Nev. at 372, 535 P.2d at 1281.

Defendant also cites Will v. Mill Condominium Owners' Association, 176 Vt. 380, 848 A.2d 336 (2004), which recognized that "the rules 'generally applicable to real estate mortgages' do not impose a commercial reasonableness standard on foreclosure sales," but that "the UCIOA does provide for this additional layer of protection." On the other hand, there are substantial differences between Vermont's version of the UCIOA and NRS Chapter 116.

Unlike the nonjudicial foreclosure process provided in NRS 116.31162 to 116.31168, 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. 27A V.S.A. § 3-116(p) expressly 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 also does not contain any statutory 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)

NRS 116.1108 expressly incorporates "the law of real property," but it does not incorporate any part of the Uniform Commercial Code, which was the subject of Dennison v. Allen Group Leasing Corp., 110 Nev. 181, 871 P.2d 288 (1994), cited at page 8 of Appellant's Opening Brief. In Dennison, this Court stated:

> We have previously held that **public sales of repossessed equipment** must be commercially reasonable. Savage Constr. v. Challenge-Cook, 102 Nev. 34, 37, 714 P.2d 573, 574 (1986) (construing California Commercial Code § 9504(3)). The conditions of a commercially reasonable sale should reflect a calculated effort to promote a sales price that is equitable to both the debtor and the secured creditor. Id. at 38, 714 P.2d at 575. (emphasis added)
>
> 871 P.2d at 291.

At the bottom of page 8 and top of page 9 of Appellant's Opening Brief, defendant quotes from Levers v. Rio King Land & Investment Co., 93 Nev. 95, 560 P.2d 917 (1977), where the secured party entered the only bid to purchase the

appellant's ranch supplies for $100 at a sale attended only by the secured party and a former employee. There was no evidence that the secured party publicized the sale in any way, and the secured party resold the collateral to a third party for $10,000. This Court applied NRS 104.9504(3) that required the secured party to "proceed in a commercially reasonable manner to dispose of collateral," and reversed the district court's order setting aside the sale to the third party. This Court instead held that it was sufficient theat the $10,000 value of the collateral be deducted from the secured party's claim for the $25,000 balance owed.

In the present case, the HOA and its foreclosure agent complied with every notice requirement in NRS Chapter 116, including mailing a copy of the notice of default to defendant's predecessor and a copy of the notice of foreclosure sale to defendant. The Property was also not sold to the foreclosing HOA, but to a third party entering the high bid at a public auction.

The record on appeal also does not contain any evidence of misconduct by the HOA or its foreclosure agent that destroyed the value of the personal property collateral being sold as took place in Iama Corp. v. Wham, 99 Nev. 730, 669 P.2d 1076 (1983).

3. The foreclosure sale cannot be set aside based solely on a claim that the price paid was grossly inadequate.

At the bottom of page 9 of Appellant's Opening Brief, defendant cites Shadow Wood Homeowners Association v. New York Community Bank, 132 Nev. Ad. Op. 5, 334 P.3d 408 (2016), but the words "commercially reasonable" do not appear anywhere in the opinion. The opinion also does not discuss or apply any provisions of the Uniform Commercial Code.

This Court instead applied Nevada real property law that requires "proof of some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price." 366 P.3d at 1111 (quoting Golden v. Tomiyasu, 98 Nev. 503, 514, 387 P.2d 989, 995 (1963), cert. denied, 382 U.S. 844 (1965)).

At the top of page 10 of Appellant's Opening Brief, defendant states that this Court "favorably quoted" from cmt. b to Section 8.3 of the Restatement (Third) of Prop.: Mortgages (1997) that "a court is warranted in invalidating a sale where the price is *less than 20 percent* of fair market value." (emphasis by Appellant) At the bottom of page 10 of Appellant's Opening Brief, defendant claims that the sale price of $35,000.00 is "just 10% of the unrebutted fair market value of the property at the time of the sale."

On the other hand, the only evidence supporting defendant's claim regarding the fair market value of the Property is a residential appraisal summary report, dated

May 4, 2015, that states on page #1: "An extraordinary assumption is made that the interior is in similar condition as the exterior and that the condition was similar at the effective date of this appraisal," and "[t]he use of the extraordinary assumption may have affected the assignment results." (AA1, pg. 101) The "extraordinary assumption" is repeated at page #6 of the report. (AA1, pg. 105) The record on appeal contains no evidence that this "extraordinary assumption" is true.

At page 11 of Appellant's Opening Brief, defendant cites Shadow Wood as authority that "[b]ecause the sales price was grossly inadequate as a matter of law, Nationstar was not required to show any evidence of 'fraud, unfairness or oppression: in the sale." On the other hand, the "gross inadequacy" test is the exact standard that this Court refused to adopt in Golden v. Tomiyasu:

> The court then referred to the inadequacy of the consideration and said: "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.'" Several earlier California cases are cited. (emphasis added)
>
> 98 Nev. at 514, 387 P.2d at 994-995.

The reference to Section 8.3 of the Restatement (Third) of Prop.: Mortgages

in Shadow Wood was used solely as an example regarding the one factor of inadequacy of price. This portion of the case must be read in context:

> The question remains whether NYCB demonstrated sufficient grounds to justify the district court in setting aside Shadow Wood's foreclosure sale on NYCB's motion for summary judgment. Breliant v. Preferred Equities Corp., 112 Nev. 663, 669, 918 P.2d 314, 318 (1996) (stating the burden of proof rests with the party seeking to quiet title in its favor). As discussed above, **demonstrating that an association sold a property at its foreclosure sale for an inadequate price is not enough to set aside that sale**; there must also be a showing of fraud, unfairness, or oppression. *Long,* 98 Nev. at 13, 639 P.2d at 530.
>
> **NYCB failed to establish that the foreclosure sale price was grossly inadequate as a matter of law**.NYCB compares Gogo Way's purchase price, $11,018.39, to the amount NYCB bought the property for at its foreclosure sale, $45,900.00. Even using NYCB's purchase price as a comparator, and adding to that sum the $1,519.29 NYCB admits remained due on the superpriority lien following NYCB's foreclosure sale, Gogo Way's purchase price reflects 23 percent of that amount and is therefore not obviously inadequate. *See* Golden, 79 Nev. at 511, 387 P.2d at 993 (noting that even where a property was "sold for a smaller proportion of its value than 28.5%," it did not justify setting aside the sale); *see also* **Restatement (Third) of Prop.: Mortgages § 8.3 cmt. b (1997) (stating that while "[g]ross inadequacy cannot be precisely defined in terms of a specific percentage of fair market value[, g]enerally ... a court is warranted in invalidating a sale where the price is less than 20 percent of fair market value and, absent other foreclosure defects, is usually not warranted in invalidating a sale that yields in excess of that amount").** (emphasis added)
>
> 366 P.3d at 1112-1113.

If this Court had intended to adopt a rule allowing sales to be set aside based

solely on a "grossly inadequate" price, this Court would not have cited the California rule found in Long v. Towne just before referring to the Restatement.

In this section of the Shadow Wood opinion, this Court focused only on the burden placed on the former owner that was seeking to overturn the sale that divested it of title. No burden was placed on the purchaser to prove that it paid at least 20% of fair market value at the HOA foreclosure sale. If this Court had intended to abandon the California rule and adopt the Restatement instead, this Court would have said so.

Comment b to section 8.3 of the Restatement (Third) of Prop.: Mortgages also distinguishes between a case where the holder of a senior interest purchases the property by a credit bid and a case where a bona fide purchaser buys the property:

> On the other hand, where foreclosure is by power of sale, judicial confirmation of the sale is usually not required and the issue of price inadequacy will therefore arise only if the party attacking the sale files an independent judicial action. Typically this will be an action to set aside the sale; it may be brought by the mortgagor, junior lienholders, or the holders of other junior interests who are prejudiced by the sale. **If the real estate is unavailable because title has been acquired by a bona fide purchaser,** the issues of price inadequacy may be raised by the mortgagor or a junior interest holder in a suit against the foreclosing mortgagee for damages for wrongful foreclosure**. This latter remedy, however, is not available based on gross price inadequacy alone.** In addition, the mortgagee must be responsible for a defect in the foreclosure process of the type described in Comment *c* of this section. (emphasis added)

Consequently, by referring to comment b to §8.3 of the Restatement (Third) of Prop.: Mortgages, this Court did not adopt any requirement that an HOA foreclosure sale be "commercially reasonable," and this Court did not state that "gross inadequacy" of price alone can justify equitable relief setting aside the sale. Instead, where the property has been sold to a bona fide purchaser as happened here, the holder of a junior interest is limited to an action for damages against the foreclosing mortgagee.

In Shadow Wood, this Court also specifically addressed the impact of a bank's failure to take action to protect its interests:

> Against these inconsistencies, however, must be weighed NYCB's (in)actions. The NOS was recorded on January 27, 2012, and the sale did not occur until February 22, 2012. NYCB knew the sale had been scheduled and that it disputed the lien amount, yet it did not attend the sale, request arbitration to determine the amount owed, or seek to enjoin the sale pending judicial determination of the amount owed. The NOS included a warning as required by NRS 116.311635(3)(b):
>
> WARNING! A SALE OF YOUR PROPERTY IS IMMINENT! UNLESS YOU PAY THE AMOUNT SPECIFIED IN THIS NOTICE BEFORE THE SALE DATE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE. YOU MUST ACT BEFORE THE SALE DATE.
>
> 366 P.3d at 1114.

The notice of foreclosure sale in the present case included this same warning at the top of the first page of the notice (AA1, pg. 207). Despite receiving a copy of

the notice and the warning on December 3, 2013 (AA1, pg. 216), defendant chose not to pay the superpriority amount or take any action to stop the HOA foreclosure sale from being held thirty (30) days later on January 2, 2014.

At the bottom of page 11 of Appellant's Opening Brief, defendant argues that "the foreclosure sale took place more than 3 years after the lien became due, in violation of NRS 116.3116(5)." NRS 116.3116(6), as the statute existed at the time of the sale, did not set a time limit for the foreclosure sale to take place in relation to the date of the notice of lien – NRS 116.3116(6) instead only required that the nonjudicial foreclosure proceeding by "instituted within 3 years after the full amount of the assessments becomes due." The earliest assessment reflected on the first page of the payment allocation report (AA1, pg. 83) fell due on January 1, 2010. The foreclosure process was "instituted" when the foreclosure agent mailed the lien for delinquent assessments to the unit owner on April 29, 2010, which is well within the 3 year time limit. (AA1, pgs. 188-190)

Defendant also asserts that the notice of foreclosure sale did not state "[t]he amount necessary to satisfy the lien as of the date of the proposed sale" as required by NRS 116.311635(3)(a), but the notice of foreclosure sale did state the total amount of the lien "of **$8,005.16** as of 11/26/2013." (AA1, pg. 208)

Defendant also objects that the notice of default was not signed "by the person designated in the CC&Rs to do so" or by the HOA president, but NRS 116.31162(2) states that the notice may also be signed by the person designated "by the association for that purpose." The record on appeal does not contain any evidence disputing the authority of Yvette Thomas of Red Rock Financial Services to sign the notice of default. (AA1, pg. 205)

At page 12 of Appellant's Opening Brief, defendant raises a new argument that "district courts must consider the equities when addressing HOA foreclosure sales." Defendant did not raise this equitable claim in its motion for summary judgment (AA1, pgs. 12-132), in its reply (AA2, pgs. 241-256), or in its supplemental brief on procedural due process and commercial reasonableness. (AA2, pg. 274 to AA4, pg. 700)

Arguments raised for the first time on appeal need not be considered. Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 623 P.2d 981, 983 (1981).

NRS 116.31166(1) provides that "[t]he recitals in a deed made pursuant to NRS 116.31164" are "conclusive proof of the matters recited." NRS 116.31166(2) provides 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)

The foreclosure deed recorded on June 12, 2012 (AA 1, pgs. 158-160) includes each of the five recitals required by NRS 116.31166(1): (1) default, (2) mailing of the delinquent assessment, (3) recording of the notice of default and election to sell, (4) the elapsing of the 90 days, and (5) the giving of the notice of sale. The recitals state:

> This conveyance is made pursuant to the powers conferred upon agent by Nevada Revised Statutes, the Sun City Anthem Community Association governing documents (CC&R's) and that certain Lien for Delinquent Assessment s, described herein. 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. Said property was sold by said agent, on behalf of Sun City Anthem Community Association at public auction on **01/02/2014,** at the place indicated on the Notice of Sale.
>
> (AA1, pg. 158)

In Shadow Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc., 132 Nev. Adv. Op. 5, 334 P.3d 408 (2016), this Court stated that the recitals in a foreclosure deed are "conclusive, in the absence of grounds for equitable relief." 366 P.3d at 1112 (quoting Holland v. Pendleton Mortg. Co., 61 Cal. App. 2d 570, 143 P.2d 493, 496 (1943)).

In Section II (D) of the Shadow Wood opinion, this Court also stated that Gogo Way's "putative status as a bona fide purchaser" had a bearing on the bank's request for equitable relief and that "[e]quitable relief will not be granted to the possible detriment of innocent third parties." 366 P.3d at 1115 (quoting Smith v. United States, 373 F.2d 419, 424 (4th Cir. 1966)).

Because defendant has an adequate remedy at law against the HOA and its foreclosure agent for any defects in the foreclosure process, defendant has no right to equitable relief against plaintiff. County of Washoe v. City of Reno, 77 Nev. 152, 360 P.2d 602 (1961); State v. Second Judicial District Court, 49 Nev. 145, 241 P.317 (1925); Turley v. Thomas, 31 Nev. 181, 101 P. 568 (1909); Conley v. Chedic, 6 Nev. 222 (1870); Sherman v. Clark, 4 Nev. 138 (1868).

In Shadow Wood, this Court stated:

> Consideration of harm to potentially innocent third parties is especially pertinent here where NYCB did not use the legal remedies available to it to prevent the property from being sold to a third party, such as by seeking a temporary restraining order and preliminary injunction and filing a lis pendens on the property. *See* NRS 14.010; NRS 40.060. *Cf. Barkley's Appeal. Bentley's Estate,* 2 Monag. 274, 277 (Pa.1888) ("In the case before us, we can see no way of giving the petitioner the equitable relief she asks without doing great injustice to other innocent parties who would not have been in a position to be injured by such a decree as she asks if she had applied for relief at an earlier day.").
>
> 366 P.3d at 1115, n.7.

This court also stated:

> A subsequent purchaser is bona fide under common-law principles if it takes the property "for a valuable consideration and without notice of the prior equity, and without notice of facts which upon diligent inquiry would be indicated and from which notice would be imputed to him, if he failed to make such inquiry." Bailey v. Butner, 64 Nev. 1, 19, 176 P.2d 226, 234 (1947) (emphasis omitted); *see also* Moore v. De Bernardi, 47 Nev. 33, 54, 220 P. 544, 547 (1923) (**"The decisions are uniform that the bona fide purchaser of a legal title is not affected by any latent equity founded either on a trust, [e]ncumbrance, or otherwise, of which he has no notice, actual or constructive."**). Although, as mentioned, NYCB might believe that Gogo Way purchased the property for an amount lower than the property's actual worth, that Gogo Way paid "valuable consideration" cannot be contested. Fair v. Howard, 6 Nev. 304, 308 (1871) ("The question is not whether the consideration is adequate, but whether it is valuable."); see *also* Poole v. Watts, 139 Wash.App. 1018 (2007) (unpublished disposition) (stating that the fact that the foreclosure sale purchaser purchased the property for a "low price" did not in itself put the purchaser on notice that anything was amiss with the sale).
>
> 366 P.3d at 1115-1116.

In Moeller v. Lien, 25 Cal. App. 4th 822, 831-832, 30 Cal. Rptr. 2d 777 (1994), the court applied the "general rule" that "a trustor has no right to set aside a trustee's deed as against a bona fide purchaser for value by attacking the validity of the sale" (citing Homestead Savings v. Darmiento, 230 Cal. App. 3d 242, 281 Cal. Rptr. 367 (1991)), and the court stated: "Where the trustor is precluded from suing to set aside the foreclosure sale, the trustor may recover damages from the trustee." (citing Munger v. Moore, 11 Cal. App. 3d 1, 89 Cal. Rptr. 323 (1970)).

In Firato v. Tuttle, 48 Cal.2d 136, 308 P.2d 333, 335 (1957), the California Supreme Court stated:

> The rule indicated by section 2243, which would protect innocent purchasers for value who take without any notice that the conveyance by the trustee was unauthorized, is in accord with the rule protecting such purchasers who acquire their interests from one who holds a general power and who makes a conveyance for an unauthorized purpose, see Alcorn v. Buschke, 133 Cal. 655, 66 P. 15, and cases cited, or from a trustee under a secret trust. Ricks v. Reed, 19 Cal. 551; Rafftery v. Kirkpatrick, 29 Cal. App. 2d 503, 508, 85 P.2d 147; Civil Code, s 869. **The protection of such purchasers is consistent 'with the purpose of the registry laws, with the settled principles of equity, and with the convenient transaction of business.'** Williams v. Jackson, 107 U.S. 478, 484, 2 S.Ct. 814, 819, 27 L.Ed. 529. **It also finds support in the better reasoned cases from other jurisdictions which have dealt with similar problems upon general equitable principles and in the absence of statutory provisions.** Simpson v. Stern, 63 App.D.C. 161, 70 F.2d 765, certiorari denied 292 U.S. 649, 54 S.Ct. 859, 78 L.Ed. 1499; Williams v. Jackson, supra, 107 U.S. 478, 2 S.Ct. 814; Town of Carbon Hill v. Marks, 204 Ala. 622, 86 So. 903; Lennartz v. Quilty, 191 Ill. 174, 60 N.E. 913; Millick v. O'Malley, 47 Idaho 106, 273 P. 947; Day v. Brenton, 102 Iowa 482, 71 N.W. 538; Willamette Collection & Credit Service v. Gray, 157 Or. 79, 70 P.2d 39; Locke v. Andrasko, 178 Wash. 145, 34 P.2d 444. (emphasis added)

Because defendant allowed the Property to be sold to the plaintiff at public auction without objection, plaintiff acquired title to the Property free of defendant's "subordinate" deed of trust.

4. The foreclosure sale is not void even if the foreclosure agent applied a portion of the sales proceeds to pay violation fines.

At page 13 of Appellant's Opening Brief, defendant claims that the foreclosure sale was void because the foreclosure agent applied a portion of the sales proceeds to the payment of violation fines. On the other hand, NRS 116.31166(2) states that "[t]he receipt for the purchase money contained in such a deed is sufficient to discharge the purchaser from obligation to see to the proper application of the purchase money." If any sales proceeds were improperly applied, defendant's claim is against the HOA and its foreclosure agent and not plaintiff.

5. The nonjudicial foreclosure process provided in NRS 116.31162 to NRS 116.31168, and by incorporation, NRS 107.090, does not violate due process because no state actor participates in the foreclosure of an HOA assessment lien.

At page the bottom of page 13 of Appellant's Opening Brief, defendant argues that "the HOA Lien Statute that applied before the 2015 amendments" is facially unconstitutional.

In Lugar v. Edmondson Oil Co., Inc., 475 U.S. 922 (1982), however, the Supreme Court stated that "[o]ur cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State" and that "fair attribution" required a two-part approach: 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." Id. at 937.

In Lugar, the Supreme Court found that "joint participation" between a private party and the Clerk of the state court who issued a writ of attachment, which was then executed by the County Sheriff, satisfied the "state actor" requirement. No "state actor" is involved in the nonjudicial foreclosure process provided by NRS 116.31162 to NRS 116.31168, and by incorporation, NRS 107.090.

In Lugar, the Supreme Court cited its prior ruling in Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978), and the Court acknowledged that even where the state was responsible for creating a statute, "[a]ction by a private party pursuant to this statute, without something more, was not sufficient to justify a characterization of that party as a 'state actor.'" 475 U.S. at 939.

In SFR Investments Pool 1, LLC v. U.S. Bank, N.A.,130 Nev., Adv. Op. 75, 334 P.3d 408 (2014), this Court stated that "[t]he contours of U.S. Bank's due process argument are protean" and that U.S. Bank's argument that the statutory scheme offended due process "is a nonstarter." 334 P.3d at 418.

This Court has also stated 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).

In Apao v. Bank of New York, 324 F.3d 1091 (9th Cir. 2003), the court rejected a due process challenge to Hawaii's nonjudicial foreclosure statute.

In Charmicor v. Deaner, 572 F.2d 694 (9th Cir. 1978), the court compared Cal. Civil Code § 2924 with the statutory procedure for non-judicial foreclosure sales provided in NRS 107.080, and the court found that the statutory source of the power did not transform the private foreclosure into state action for due process purposes:

> Thus, the California statute confirms a contractual right; **the Nevada statute confers a power of sale upon the trustee.**
>
> **The statutory source of the Nevada power of sale, however, does not necessarily transform a private, nonjudicial foreclosure into state action.** As this court said in Melara v. Kennedy, 541 F.2d 802, 806 (9th Cir. 1976): "Further, the statute creates only the right to act; it does not require that such action be taken."
>
> Other recent cases which hold that the source of the right is not conclusive as to state action include Adams v. Southern California First National Bank, 492 F.2d 324, 330 (9th Cir. 1973), cert. denied, 419 U.S. 1006 (1974), and Kenly v. Miracle Properties, 412 F Supp. 1072, 1075 (D. Ariz. 1976).
>
> Even this court's opinion in Culbertson v. Leland, 528 F.2d 426 (9th Cir. 1975), holding that Arizona's Innkeeper's Lien Statute colored otherwise private transactions with state action, did not consider the statutory source of the rights involved to be determinative. (emphasis added)

572 F.2d at 695-696.

In Melara v. Kennedy, 541 F.2d 802 (9th Cir. 1976), the court held that the

extra-judicial sale of stored goods to enforce a warehouseman's lien under Cal. Commercial Code § 7210 was not "a deprivation, under color of state law, of the due process rights of the owner of those goods." The agent for the purchaser of a home stored the seller's household goods, and the agent mailed a foreclosure of lien notice to the seller. The court rejected the plaintiff's argument that state action existed because "the statute is the only source of the extra-judicial sale remedy." The court instead stated that "even though private enforcement of warehouseman's liens was unknown at common law, this is not determinative of the state action issue." Id. 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.

In addition, in the present case, the HOA's authority to record an assessment lien against the unit owner and foreclose the lien is not based solely on statute – the lien for delinquent assessments (AA1, pg. 186), the notice of default and election to sell (AA1, pg. 192), and the notice of foreclosure sale (AA1, pg. 208) each refer to the authority granted to the HOA by the covenants, conditions and restrictions recorded on October 31, 2000 in the official records of Clark County Nevada.

In footnote 1 at page 14 of Appellant's Opening Brief, defendant cites Culbertson v. Leland, 528 F.2d 426 (9th Cir. 1975), as "holding that operation of

innkeeper's lien statute that permitted non-judicial seizure to be state action." In that case, however, the court stated that "the statute was appellee Leland's sole authority for the seizure" and that "since the statute was the *sine qua non* for the activity in question, the state's involvement through that statute is not insignificant." Id. at 432.

The present case, on the other hand, is more like Adams v. Southern California First National Bank, 492 F.2d 324 (9th Cir. 1973), because the recorded CC&Rs provided the HOA with express authority to record and foreclose its super priority lien.

In footnote 1 at page 14 of Appellant's Opening Brief, defendant also cites J.D. Construction, Inc. v. Ibex International Group, LLC, 126 Nev. 366, 240 P.3d 1033 (2010), where this Court applied due process requirements to the judicial remedy provided by NRS 108.2275 to expunge a frivolous or excessive lien. This judicial remedy required a hearing in the district court. The foreclosure of a mechanic's lien pursuant to NRS 108.239 also requires the filing of a civil action in "any court of competent jurisdiction that is located within the county where the property upon which the work of improvement is located . . . ." NRS Chapter 116, on the other hand, provides for a non-judicial foreclosure process that does not involve a "state actor."

Defendant also cites Connolly Development, Inc. v. Superior Court, 17 Cal. 3d 803, 553 P.2d 637 (1976), but the California Supreme Court found "state action" because the lien "becomes effective only upon recordation with the county recorder, an official of the state; moreover, it can be enforced only by resort to the state courts." 17 Cal. 3d at 815. In footnote 14, the court also stated: "We do not therefore rest our holding that stop notice procedures involve state action merely upon the fact the procedure was created by statute."

At the top of page 15 of Appellant's Opening Brief, defendant cites the decision in Bourne Valley Court Trust v. Wells Fargo Bank, 2016 WL 4254983 (9th Cir. Aug. 12, 2016)(hereinafter "Bourne Valley").

First, the majority opinion in Bourne Valley improperly based its analysis on speculation about "hypothetical" or "imaginary" cases. Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449-50 (2008). For example, the majority stated that "it is unclear if they [the bank and the HOA] were even aware of each other's existence" even though the CC&Rs were mentioned in the PUD rider to the deed of trust and in the legal description of the property in the deed of trust, and the recorded CC&Rs existed before Wells Fargo's deed of trust was recorded.

The court in Bourne Valley also stated that "without Nevada's law, Wells

Fargo would have a fully secured interest." This statement ignored the CC&Rs and the HOA's lien rights under NRS 116.3116(2) that both existed before Wells Fargo's deed of trust was recorded.

In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408 (2014), this Court recognized that "Chapter 116 was enacted in 1991, and thus [the lender] was on notice that by operation of the statute, the [earlier recorded] CC & Rs might entitle the HOA to a super priority lien at some future date which would take priority over a [later recorded] first deed of trust." Id. at 418. (quoting 7912 Limbwood Court Trust v. Wells Fargo Bank, N.A., 979 F. Supp. 2d 1142,1149 (2013).

In the present case, the deed of trust was recorded on February 7, 2006 (AA1, pgs. 29-46), and the deed of trust was assigned to defendant on October 15, 2013. (AA1, pgs. 51-52) Defendant and its predecessor therefore had constructive notice before the HOA foreclosure sale that defendant's deed of trust was "subordinate" to the superpriority lien rights granted to the HOA by the covenants, conditions and restrictions recorded on October 31, 2000 in the official records of Clark County Nevada.

Second, as discussed above, the majority opinion in Bourne Valley misapplied

Supreme Court precedent that requires that "the party charged with the deprivation must be by a person who may fairly be said to be a state actor." Lugar v. Edmondson Oil Co., Inc., 475 U.S. 922, 937 (1982). The decisions by the United States Supreme Court and the Ninth Circuit discussed above clearly explain that the enactment of a statute alone does not satisfy the "state actor" requirement for due process to be an issue.

In Yniguez v. Arizona, 939 F.2d 727 (9th Cir. 1991), vacated by Arizonans for Official English v. Arizona, 520 U.S. 43 (1997), the court of appeals stated:

> Yniguez next contends that the district court's judgment is no impediment to AOE and Park because **it is not a binding precedent on the state courts**. All parties agree that it is not binding in the sense that the courts of Arizona are free to place a different interpretation on Article XXVIII and thereby render it constitutional. That is, there is no dispute that **the Arizona courts are the definitive expositors of Arizona state law**. (emphasis added)
>
> 939 F.2d at 736.

In its decision to vacate the Ninth Circuit's opinion, the United States Supreme Court stated:

> Federal courts lack competence to rule definitively on the meaning of state legislation, see, e.g., Reetz v. Bozanich, 397 U.S. 82, 86-87 (1970), nor may they adjudicate challenges to state measures absent a showing of actual impact on the challenger, see, e.g., Golden v. Zwickler, 394 U.S. 103, 110 (1969)

520 U.S. at 48.

In United States ex rel. Lawrence v. Woods, 432 F.2d 1072, 1075 (7th Cir. 1970), the court stated: "The United States Supreme Court has final appellate jurisdiction over federal questions arising either in state or federal proceedings, and by reason of the supremacy clause the decisions of that court on national law have binding effect on all lower courts whether state or federal." The court also recognized that a holding by a federal court of appeals is not binding on a state court: "[B]ecause lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts." Lawrence v. Woods, 432 F.2d at 1076. *See also* People v. Brisbon, 544 N.E.2d 297, 308 (Ill. 1989).

In Bromley v. Crisp, 561 F.2d 1351, 1354 (10th Cir. 1977), cert. denied, 435 U.S. 908 (1978), the court stated that "the Oklahoma Courts may express their differing views on the retroactivity problem or similar federal questions until we are all guided by a binding decision of the Supreme Court." In the present case, the United States Supreme Court made such a binding decision in Lugar v. Edmondson Oil Co., Inc., 475 U.S. 922 (1982), and in Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978), which the majority opinion in Bourne Valley failed to follow. This court is not required to adopt the flawed reasoning used in Bourne Valley, which ignores the

"state actor" requirement adopted by the United States Supreme Court.

6. NRS 116.31168(1) expressly 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.

In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408 (2014), this Court stated:

> **In view of the fact that the "requirements of law" include compliance with NRS 116.31162 through NRS 116.31168 and by incorporation, NRS 107.090, *see* NRS 116.31168(1)**, we conclude that U.S. Bank's due process challenge to the lack of adequate notice fails, at least at this early stage in the proceeding. (emphasis added)
>
> 334 P.3d at 418.

NRS 116.31168 provides in part:

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

In order to read NRS 107.090 as directed by the first sentence of NRS 116.31168(1), the words "association's lien" need to be substituted in place of each use of the words "deed of trust" in NRS 107.090. In order to read NRS 107.090 as directed by the second sentence of NRS 116.31168(1), the "names of the unit's owner

and the common-interest community" need to be substituted in place of the words "the parties thereto" that appear in NRS 107.090(2).

NRS 107.090 includes both an "opt in" provision that may be used by "any" person with an interest and a "mandatory" notice provision for holders of "subordinate" interests. NRS 116.31168(1) expressly incorporates both of these notice provisions.

As provided by NRS 107.090(2), any "person with an interest" may record "an acknowledged request for a copy of the notice of default or of sale." When a deed of trust is foreclosed, NRS 107.090(3)(a) requires that a copy of the notice of default be mailed to each person who has recorded a request for notice.

In addition, NRS 107.090(3)(b) requires that a copy of the notice of default also be mailed to "[e]ach other person with an interest whose interest or claimed interest is subordinate to the deed of trust." The definition of "person with an interest" in NRS 107.090(1) includes holders of "any right, title or interest in, or lien or charge upon, the real property." This definition includes holders of deeds of trust. NRS 107.090(3)(b) therefore requires that notice be mailed to holders of deeds of trust "subordinate" to "the deed of trust" ["association's lien"] being foreclosed even if they do not record a request for notice.

NRS 107.090(4) requires that a copy of the notice of sale be mailed to each person described in NRS 107.090(3).

The notice requirements in NRS 107.090(3)(b) and 107.090(4) apply regardless of whether the holder of the subordinate interest (deed of trust) records a request to receive the notice provided pursuant to NRS 107.090(3)(a). If notice was required only for those persons who had recorded a request for notice, there would be no reason for NRS 107.090(3)(b) to exist because all such persons would already be covered by NRS 107.090(3)(a). Because NRS 107.090(3)(a) and NRS 107.090(3)(b) are connected by the word "and," the statute without question requires that notice be provided **both** to holders of interests who have recorded a request for notice **and** to holders of "subordinate" interests even if they have not recorded a request for notice**.**

At pages 15 and 16 of Appellant's Opening Brief, defendant argues that the HOA Lien Statute does not comply with the notice requirements in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) and Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983). Both of those cases, however, involved a "state actor." In Mullane, the court considered "the constitutional sufficiency of notice to beneficiaries on judicial settlement of accounts by the trustee of a common trust fund established under the New York Banking Law, Consol. Laws, c. 2." 339

U.S. at 307. In Mennonite, the court considered whether notice by publication and posting provided a mortgagee of real property with adequate notice of a proceeding by the county treasurer to sell mortgaged property for nonpayment of real property taxes. 462 U.S. at 792.

In the present case, on the other hand, no judicial proceeding was filed to foreclose the HOA's assessment lien, and the nonjudicial foreclosure sale was conducted at the direction of a private party, the HOA, and not a government official. The absence of a "state actor" in the nonjudicial foreclosure process makes the decisions in Mullane and Mennonite irrelevant to this appeal.

In Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983), the United States Supreme Court stated:

> Since a mortgagee clearly has a legally protected property interest, he is entitled to notice reasonably calculated to apprise him of a pending tax sale. Cf. Wiswall v. Sampson, 14 How. 52, 67 (1853). When the mortgagee is identified in a mortgage that is publicly recorded, **constructive notice must be supplemented by notice mailed to the mortgagee's last known available address,** or by personal service. But unless the mortgagee is not reasonably identifiable, constructive notice does not satisfy the mandate of *Mullane.* (emphasis added)
>
> 462 U.S. at 798.

As a result, due process only requires that notice be mailed to the "last known available address" of a mortgagee "identified in a mortgage that is publicly recorded."

There is no requirement that the notice be received by the mortgagee.

This standard is consistent with the notice requirements in NRS 107.090 and this Court's holding that a nonjudicial foreclosure agent's only duty is to mail the notices, that "[t]heir mailing presumes that they were received," and that "[a]ctual notice is not necessary as long as the statutory requirements are met." Hankins v. Administrator of Veteran Affairs, 92 Nev. 578, 555 P.2d 483, 484 (1976); Turner v. Dewco Services, Inc., 87 Nev. 14, 479 P.2d 462, 464 (1971)(applying NRS 107.080(3)).

At page 16 of Appellant's Opening Brief, defendant focuses only on the request for notice provisions in NRS 116.31163 and NRS 116.311635 and claims that "[m]ortgagees must receive notice *only* if they have previously requested notice from the HOA." (emphasis by appellant) Defendant's interpretation of the statute, however, ignores the mandatory notices that must be mailed to holders of interests "subordinate" to the HOA's lien pursuant to NRS 107.090(3)(b) and NRS 107.090(4), as expressly incorporated by NRS 116.31168(1).

At page 19 of Appellant's Opening Brief, defendant Bank asserts that "[t]he HOA Lien Statute explicitly permits the total extinguishment of a first deed of trust without *any* notice to the mortgagee holding that deed." (emphasis by appellant) To

the contrary, if a first deed of trust is "subordinate" to the HOA's superpriority lien and could be extinguished by the HOA foreclosure sale, NRS 107.090(3)(b) and NRS 107.090(4) required that copies of both the notice of default and the notice of sale be mailed to the holder of the "subordinate" deed of trust.

At page 20 of Appellant's Opening Brief, defendant refers to a comment to the 2008 version of the UCIOA stating that the notice of sale must be provided to the otherwise-first mortgage lender. The Nevada statute meets this requirement because NRS 116.31168(1) has always incorporated the mandatory notices required by NRS 107.090(3)(b) and NRS 107.090(4) since the UCIOA was adopted in Nevada in 1991.

At page 20 of Appellant's Opening Brief, defendant cites Island Financial, Inc. v. Ballman, 607 A.2d 76 (Md. Ct. Spec. App. 1992), where the holder of a second deed of trust intervened in a judicial foreclosure proceeding and objected to the auditor's account and moved to vacate the sale. At page 21 of Appellant's Opening Brief, defendant also cites Reeder & Associates v. Locker, 42 N.E.2d 1371, 1373 (Ind. Ct. App. 1989), where the auditor sent a notice of tax delinquency and sale to the mortgagors at their last known address, but did not mail notice to the mortgagee.

The Nevada statute is unlike Md. Real Prop. Code Ann., § 7-105(c) and IC 6-

1.1-24-4.2 (1982) because NRS 116.31162 to NRS 116.31168 provides for a nonjudicial foreclosure process and because NRS 107.090(3)(b) and NRS 107.090(4), as incorporated by NRS 116.31168(1), require that copies of the notice of default and notice of sale be mailed to holders of "subordinate" interests like defendant in the present case.

The notice provisions in NRS Chapter 116 and the facts in the present case are also unlike each of the six cases cited in footnote 4 at pages 21 and 22 of Appellant's Opening Brief.

At page 22 of Appellant's Opening Brief, defendant claims that "NRS 116.31168 implements the notice provisions of NRS 107.090 only to the extent they apply to parties who have requested notice in advance." In making this argument, defendant focuses on the word "request" in the title to NRS 116.31168 and in the second sentence of NRS 116.31168(1).

At page 23 of Appellant's Opening Brief, defendant claims that the word "request" in NRS 116.31168 "refers back to the more specific sections of NRS Chapter 116 that govern notice–for instance, NRS 116.311635. . . ."

The word "request" instead refers to the request for notice provision in NRS 107.090(2) that is incorporated by the first sentence in NRS 116.31168(1) and that

is modified by the second sentence in NRS 116.31168(1).

This Court has directed that statutes be construed to give meaning to all of their parts and language, and that courts read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation. Board of County Comm'rs v. CMC of Nevada, 99 Nev. 739, 744, 670 P.2d 102, 105 (1983).

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).

At pages 24 of Appellant's Opening Brief, defendant claims that incorporating the notice requirements in NRS 107.090, as expressly directed by the first sentence in NRS 116.31168(1), would render NRS 116.31163(1), NRS 116.31163(2), NRS 116.311635(b)(1), and NRS 116.311635(b)(2) "completely superfluous" and make the second sentence of NRS 116.31168(1) "completely meaningless."

On the other hand, the "mandatory" notices in NRS 107.090(3)(b) and NRS

107.090(4), that are expressly incorporated by NRS 116.31168(1), are only mailed to holders of interests "subordinate" to the association's lien, while the request for notice provisions in NRS 116.31163 and NRS 116.311635 may be used by any holder of a recorded interest.

Due process, even if it applies, would not necessarily require notice to a senior lienholder whose interest would not be affected by the sale. NRS 116.31163 and NRS 116.311635 provide senior lienholders with a method to request that copies of the notice of default and notice of sale be mailed to them at the address they desire. The request for notice provisions also give "shadow owners" a method to request notice when MERS is the named beneficiary identified in a deed of trust.

NRS 107.090 contains both a request for notice provision in NRS 107.090(2) and NRS 107.090(3)(a) and mandatory notice provisions in NRS 107.090(3)(b) and NRS 107.090(4) for holders of interests "subordinate" to the deed of trust being foreclosed. If defendant's analysis was correct, then every nonjudicial foreclosure of a deed of trust in Nevada would also be unconstitutional because the mandatory notice provisions in NRS 107.090(3)(b) and NRS 107.090(4) would make the request for notice provisions in NRS 107.090(2) and NRS 107.090(3)(a) superfluous.

This 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 (1990). This Court has also recognized a general presumption that statutes will be interpreted in compliance with the Constitution. Sereika v. State, 114 Nev. 142, 955 P.2d 175, 180 (1998). Where a statute is susceptible to both a constitutional and an unconstitutional interpretation, the court is obliged to construe the statute so that it does not violate the constitution. Whitehead v. Nevada Commission on Judicial Discipline, 110 Nev. 380, 878 P.2d 913, 919 (1994), citing Sheriff v. Wu, 101 Nev. 687, 708 P.2d 305 (1985).

The interpretation of the statute adopted by the district court gives effect to all of the language in the statute and confirms the existence of the "mandatory" notice requirements for holders of "subordinate" interests that satisfy any due process concerns. Defendant, on the other hand, seeks to have this Court adopt an interpretation of the statute that eliminates the "mandatory" notice provisions in NRS 107.090(3)(b) and NRS 107.090(4) that are expressly incorporated by NRS 116.31168(1).

/ / /

/ / /

/ / /

CONCLUSION

By reason of the foregoing, plaintiff respectfully requests that this Court affirm the district court's findings of fact, conclusions of law, and judgment entered in favor of plaintiff on April 7, 2016. (AA4, pgs. 750-757)

DATED this 7th day of November, 2016.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect X6 14 point Times New Roman.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7), it is proportionately spaced and has a typeface of 14 points and contains 10,446 words.

3. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

DATED this 7th day of November, 2016.

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CERTIFICATE OF SERVICE

In accordance with N.R.A.P. 25, I hereby certify that I am an employee of the Law Offices of Michael F. Bohn, Esq., Ltd., and that on the 7th day of November, 2016, a copy of the foregoing **RESPONDENT'S ANSWERING BRIEF** was served electronically through the Court's electronic filing system to the following individuals:

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