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 Jan 10 2017 11:16 a.m. Elizabeth A. Brown 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 REPLY BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

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

DATED this 9th day of January, 2017.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case **Page(s)**

Cases

No table of authorities entries found. No table of authorities entries found.

ARGUMENT

I. This Court Stated in *Shadow Wood* Unequivocably that HOA Foreclosures Sales, Just Like Other Foreclosure Sales, Must Be Commercially Reasonable.

Respondent Saticoy Bay cavils about the absence of the term "commercial reasonableness" in the *Shadow Wood* opinion to argue that this standard does not apply, but such semantic quibbling does not undermine the very clear directive of this Court to district courts when evaluating HOA foreclosure sales. *Shadow Wood Homeowners Ass'n, Inc. v. New York Cmty. Bancorp, Inc.*, 366 P.3d 1105 (Nev. 2016); *see also* NRS 116.1113 ("every contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement."). The statute and this Court are patent on this issue: HOA foreclosure sales must be performed in good faith and reasonable.

But here, the district court failed to follow *Shadow Wood's* directives and the statute's requirements by granting summary judgment despite evidence establishing genuine and material fact questions concerning the reasonableness of the HOA's foreclosure sale.

A. The Sale Price was Grossly Inadequate—10% of fair market value.

The undisputed evidence related to the foreclosure sale price and fair market value established that the sale price, $35,000 (AA063), was 10.4% of the value of the property at the time of foreclosure, which was $335,000.00 (AA102).

In *Shadow Wood* and elsewhere, this Court has stressed the importance of a foreclosure sale price in determining whether the sale was reasonable. *See, e.g.*, *Levers v. Rio King Land & Inv. Co.*, 93 Nev. 95, 98, 560 P.2d 917, 920 (1977) ("a wide discrepancy between the sale price and the *value of the collateral* compels close scrutiny into the commercial reasonableness of the sale.") (emphasis added); *Iama Corp. v. Wham*, 99 Nev. 730, 736, 669 P.2d 1076, 1079 (1983) (a 25.1% "discrepancy compels close scrutiny into the commercial reasonableness of the sale"); *Shadow Wood*, 366 P.3d at 1112 ("[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.") (quoting Restatement (Third) of Property, Mortgages, § 8.3 cmt. b (1997)) (emphasis added).[1]

The HOA foreclosure sale in this case falls well within the bounds of what this Court has identified as grossly inadequate, raising the inference that the HOA failed to "t[ake] steps to insure the best possible price would be obtained for the benefit of the debtor." *Levers*, 93 Nev. at 99, 560 P.2d at 920 (holding that the party failed to meet its burden to show that the sale was commercially reasonable).

[1] Restatement (Third) of Property (Mortgages) § 8.3 (1997) at cmt. b. ("in extreme cases a price may be so low (typically well under 20% of fair market value) that it would be an abuse of discretion for the court to refuse to invalidate it.").

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

Although the Restatement's approach and verbiage from this Court's opinions suggest that a district court can set aside a sale for a grossly inadequate price alone, to the extent a further element of fraud, unfairness, or oppression is required, there was evidence of it before the district court.[2]

Here, the HOA and HOA Trustee's knowledge of the fair market value of the property at the time of the foreclosure sale, combined with their failure to obtain a sales price even close to fair market value, demonstrates bad faith. Despite researching the fair market value of the property, the HOA sold the property at a 90% discount. (AA068–74). This does not reflect "a calculated effort to promote a sales price that is equitable to both the debtor and the secured creditor." *Dennison v. Allen Group Leasing Corp*., 110 Nev. 181, 186, 871 P.2d 288, 291 (Nev. 1994).

Combine that knowledge against the sales price, and then add these facts: (1) the foreclosure sale took place more than three years after the lien became due (in

[2] When the sales price is grossly inadequate, even a slight unfairness will justify setting aside the sale. *See, e.g.*, *Ballentyne v. Smith*, 205 U.S. 285, 290 (1907) ("if there be great inadequacy, slight circumstances of unfairness in the conduct of the party benefitted by the sale will be sufficient to justify setting it aside."); *see also* Rest. (Third) of Property (Mortgages) § 8.3 (1997) at cmt. c. ("even a slight irregularity in the foreclosure process coupled with a sales price that is substantially below fair market value may justify or even compel the invalidation of the sale.").

violation of NRS 116.3116(5)); (2) the lien expressly contained violation fines (which cannot be foreclosed upon pursuant to NRS 116.31162(6)); and (3) the notice of sale did not contain the amount necessary to satisfy the lien *as of the date of the proposed sale*, in violation of NRS 116.311635(3)(a).

These several facts establish a more than slight unfairness in the HOA's foreclosure sale. The district court appeared to not even consider these facts in determining whether or not the foreclosure was commercially reasonable. Where the quality of Saticoy Bay's title is only as good as the HOA's lien and the process the HOA used to foreclose on that lien, this evidence should compel judgment in Nationstar's favor, or at the very least, require a trial on these unanswered material fact questions.

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

Nevada law requires an HOA to account separately for violations and assessments, and the law does *not* permit an HOA to foreclose on violation fines. *See* NRS 116.310315; NRS 116.31162. Here, it is unrefuted that the HOA impermissibly foreclosed on violation fines. (AA077-AA082). Saticoy Bay had notice of this defect in the sale when it purchased the property at the HOA foreclosure sale because the foreclosure notices expressly state that they contain violation fines. (AA054) ("This amount includes assessments, late fees, interest, fines/violations and collection fees and costs."). Therefore, the foreclosure sale on

violated Nevada law and is void. The Court erred in failing to address this defect in the sale altogether.

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

Independently, the Court should reverse the District Court and direct the entry of summary judgment for Bank of America because the HOA Lien Statute is facially unconstitutional under the Due Process Clause. As the Ninth Circuit correctly held in *Bourne Valley Court Trust v. Wells Fargo Bank, N.A.*, 832 F.3d 1154 (9th Cir. 2016), the HOA Lien Statute is unconstitutional because it requires that mortgagees "opt-in" to receive notice of an HOA's foreclosure sale that satisfies the "state action" requirement.

A. HOA foreclosures constitute state action because they eliminate property rights solely through statutory authority.

Saticoy Bay claims that the HOA Lien Statute cannot be unconstitutional because an HOA's non-judicial foreclosure that can eliminate constitutionally-protected property rights does not constitute state action. Resp.'s Br., at 24. But the precedent Saticoy Bay cites is entirely distinguishable because those cases involve private, contractual rights, which are merely regulated by state statutes. In contrast, the HOA Lien Statute does not merely regulate the enforcement of contractual rights, but rather imposes a non-contractual, non-judicial foreclosure right that would not exist but for HOA Lien Statute.

For instance, in *Charmicor v. Deaner*, 572 F.2d 694, 695 (9th Cir. 1978), the Ninth Circuit held that state action was not present because the non-judicial foreclosure of a deed of trust is a procedure agreed upon by private parties, and the state merely restricts and limits the right to non-judicially foreclose a deed of trust. While *Charmicor* may seem applicable because it addressed a general Nevada statute on non-judicial foreclosures, the similarities between the Nevada statute in *Charmicor* and the HOA Lien Statute end there. Indeed, the *Charmicor* Court relied on *United States v. Hertz, Inc. v. Niobrara Farms*, 41 Cal. App. 3d 68, 87 (1974), which held that the Due Process Clause is not implicated by a non-judicial mortgage foreclosure under California law because "[i]t is accomplished entirely pursuant to procedures agreed upon in advance by the parties." *Id.*, at 87 (emphasis added).

The Ninth Circuit returned to *Charmicor* recently, considering a Hawaii non-judicial mortgage foreclosure statute, and pointing out that such statutes do "not confer the power of sale, but merely authorize[] the parties to contract for the express terms of foreclosure upon default." *Apao v. Bank of N.Y.*, 324 F.3d 1091, 1095 (9th Cir. 2003) (citing *Charmicor*, 572 F.2d at 695). It is clear these cases depend on the fact that two parties voluntarily agreed by contract to permit the exercise of foreclosure and sale remedies non-judicially. The holdings in these cases have no applicability where, as here, the challenged statute allows a private

party to extinguish another private party's property rights without any underlying contractual relationship, but rather solely based on the challenged statute itself. But for the HOA Lien Statute, mortgagees could not have their constitutionally-protected property interest extinguished by an HOA.

Where property rights are extinguished by private action authorized solely by a state statute, the state action requirement is satisfied. *See Culbertson v. Leland*, 528 F.2d 426, 432 (9th Cir. 1975). In *Culbertson*, the Ninth Circuit held that a private seizure of property pursuant to an innkeeper's lien statute constituted state action. *Id.*, at 432. The Arizona statute at issue in *Culbertson* authorized the keeper of a hotel or lodging house to seize, without notice or judicial procedure, the personal property of a lodger who failed to pay rent. *Id.*, at 427. The court held that the state action requirement was met because the parties "had no contractual relationship concerning [the] property," and consequently it was the statute, and not a private agreement, that "was the *sine qua non* for the activity in question." *Id.* The court distinguished cases where a "written instrument defined the rights of the parties," and thus "can be left and has traditionally been left to private hands." *Id.*, at 431. In those cases, the court explained, "the written agreement of the parties set forth their respective rights and liabilities; the statute merely reiterated and confirmed their arrangement," and thus the repossession "did not deprive [the debtor] of any rights which he had not already yielded voluntarily

and for consideration." *Id.*, at 432. The innkeeper and the tenant, like a mortgagee and an HOA, had not contracted to permit the non-judicial seizure. That seizure was authorized solely by state statute. As a consequence, "the state's involvement through that statute is not insignificant," and thus constituted state action. *Id.*

Here, the mortgagees whose property interests the HOAs purportedly extinguish are not bound by contract; mortgagees have not yielded their property rights to HOAs "voluntarily and for consideration." Instead, like the innkeeper in *Culbertson*, the sole source of an HOA's ability to extinguish a mortgagee's property interest is statutory—namely, the HOA Lien Statute, given to the HOA by the state. Accordingly, a foreclosure pursuant to the HOA Lien Statute is a state action, and is thus subject to the Due Process strictures of both the Nevada and federal constitutions.

B. The HOA Lien Statute impermissibly requires that mortgagees "opt-in" to receive notice of HOA foreclosure sales.

As Nationstar explained in its initial brief, the HOA Lien Statute is unconstitutional because none of its multiple notice provisions require that a mortgagee receive notice of an HOA's foreclosure sale unless the mortgagee "has requested notice" or "has notified the association" of its property interest before the HOA's foreclosure sale. *See, e.g.*, NRS 116.31163. As the Ninth Circuit correctly held in *Bourne Valley*, this "peculiar scheme for providing mortgage lenders with notice that a homeowners' association intended to foreclose on a lien" is

unconstitutional under well-established Due Process precedent, which requires that foreclosure statues mandate "notice by mail or other means **as certain to ensure actual notice**" to the mortgagee of a non-judicial foreclosure sale that can extinguish a mortgagee's interest. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Saticoy Bay's contention that the HOA Lien Statute is constitutional because it requires mandatory notices under NRS 107.090(3)(b) and NRS 107.090(4) fails because the Ninth Circuit explicitly addressed, and rejected, the argument that "the incorporation of section NRS 107.090 means that the foreclosing [HOA] were required to provide notice to mortgage lenders even absent a request." *Bourne Valley*, 832 F.3d at 1159. The Ninth Circuit correctly held that the HOA-sale purchaser's "preferred reading would impermissibly render the express notice provisions of [the HOA Lien Statute] entirely superfluous." *Id.*

C. The constitutional avoidance canon does not allow a court to rewrite the Legislature's statute to render it constitutional.

As the Ninth Circuit recognized in *Bourne Valley*, interpreting the HOA Lien Statute in a way that renders it constitutional requires rendering large, unconstitutional swaths of the statute "entirely superfluous." *Id.* The constitutional avoidance canon does not obligate this Court to rewrite unconstitutional statutes—that is the Legislature's duty. Rather, "[t]he canon of constitutional avoidance comes into play only when, after the application of

ordinary textual analysis, the statute is found to be susceptible to more than one construction; and the canon functions as a means of choosing between them." *Clark v. Martinez*, 543 U.S. 371, 384 (2005). Employing an ordinary textual analysis, it is clear the statute requires mortgagees to opt-in to receive notice of an HOA foreclosure sale. The *SFR Investments Pool 1, LLC v. U.S. Bank*, 334 P.3d 408 (2014) decision on which Saticoy Bay so heavily relies said as much, explaining that an "HOA must give notice of the sale to the owner and to the holder of a recorded security interest **if the security interest holder has notified the association** before the mailing of the notice of sale **of the existence of the security interest**." 334 P.3d at 411 (emphasis added).

Moreover, the policy basis underpinning the constitutional avoidance doctrine is not present here, as the Nevada Legislature has recently amended the HOA Lien Statute to cure its constitutional defects. The constitutional avoidance "canon is followed out of respect for [the Legislature], which we assume legislates in the light of constitutional limitations." *Almendarez-Torres v. U.S.*, 523 U.S. 224, 238 (1998). Here, the Nevada Legislature has implicitly recognized that the version of the HOA Lien Statue applicable here did not comply with constitutional limitations by amending the HOA Lien Statute's notice provisions to eliminate the "opt-in" requirements. As a result of these amendments, the HOA Lien Statute

now mandates that mailed notice be provided to all holders of recorded security interests, both with regard to the notice of default and the notice of sale.

As implicitly recognized by the Nevada Legislature, the plain language of the HOA Lien Statute applicable to this case shows the statute was unconstitutional. Because the HOA foreclosure sale was conducted pursuant to this invalid statute, the sale itself is invalid. Accordingly, the district court's judgment should be reversed.

CONCLUSION

This Court should reverse the District Court's judgment and remand with instructions that summary judgment should be entered in favor of Bank of America. In the alternative, the judgment should be reversed and the case remanded for further proceedings.

DATED this 9th day of January, 2017.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14 point font size.

I FURTHER CERTIFY that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C) it is proportionally spaced, has a typeface of 14 points or more and contains less than 7,000 words.

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

. . .

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

DATED this 9th day of January, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on this 9th day of January, 2017 I caused to be served a true and correct copy of foregoing **APPELLANT'S REPLY BRIEF** in the following manner:

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

/s/Michael Hannon
An employee of AKERMAN LLP