

IN THE SUPREME COURT OF THE STATE OF NEVADA

NATIONSTAR MORTGAGE, LLC

Appellant,

vs.

SATICOY BAY LLC SERIES 2227
SHADOW CANYON,

Respondent.

Supreme Court No. 70382

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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 PETITION FOR *EN BANC* RECONSIDERATION

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NRAP 26.1 DISCLOSURE STATEMENT

Nationstar Mortgage LLC (**Nationstar**) is an indirect, wholly-owned subsidiary of Nationstar Mortgage Holdings, Inc. (**NSM Holdings**). Nationstar is directly owned by two entities: (1) Nationstar Sub1 LLC (**Sub1**) (99%) and (2) Nationstar Sub2 LLC (**Sub2**) (1%). Sub1 and Sub2 are both 100% owned by NSM Holdings. NSM Holdings' stock is owned approximately 64% by FIF HE Holdings LLC and approximately 36% by public stockholders.

DATED this 28th day of December, 2017.

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INTRODUCTION

In its published opinion, the panel reaffirmed *Golden v. Tomiyasu*, 79 Nev. 503, 387 P.2d 989 (1963), finding that an inadequate sales price is insufficient to set aside an HOA sale unless there is fraud, oppression, or unfairness. *Nationstar Mortg. LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 405 P.3d 641 (Nev. 2017). The panel's opinion determined three irregularities did not rise to the level of "fraud, oppression, or unfairness." One of the irregularities was the HOA's improper distribution of proceeds. The panel described payment of the subpriority component before the first deed of trust as a "post-sale impropriety," and an "apparently improper post-sale distribution." *Shadow Canyon*, 405 P.3d at 650. The panel nevertheless found no fraud, oppression or unfairness because NRS 116.31166(2) "absolves Saticoy Bay from any responsibility to see that the sale proceeds are properly distributed" *Id.*

The panel misapprehended Nationstar's argument, which focused on the HOA's pre-sale intent to pay the subpriority component before the deed of trust. The HOA did not simply make an inadvertent error when distributing proceeds. Rather, it at all times intended to elevate its subpriority component above the deed of trust, allowing it to collect the entirety of its delinquency with a grossly inadequate sales price. Simply stated, the sales price was grossly inadequate because the HOA intended—prior to the sale—to pay its subpriority component before the senior deed

of trust. The panel misinterpreted the argument as an attack on the HOA's post-sale distribution, overlooking the fact that the HOA's pre-sale intent to distribute proceeds improperly was a causative factor depressing the price. By treating the distribution of proceeds issue as purely a post-sale impropriety, the panel rejected an argument Nationstar never made.

The Court should grant *en banc* reconsideration to hold that an HOA's pre-sale intent to treat the entirety of its lien as senior to a deed of trust constitutes oppression or unfairness when it causes a grossly inadequate price. Alternatively, the Court should clarify that the portion of the panel's opinion addressing the distribution of proceeds does not preclude a finding that a *pre-sale* intent to improperly pay the subpriority component before the deed of trust constitutes oppression and unfairness. This is a matter of significant public importance because it affects the hundreds of HOA lien dispute matters pending in the courts.

FACTUAL BACKGROUND

The key fact underlying this petition is that Nationstar did not argue how an HOA distributes its proceeds after the sale can warrant setting the sale aside. The panel should not have "rejected" that argument, because Nationstar never made it. Instead, Nationstar argued that the HOA's pre-sale intent to pay itself the subpriority component before distributing proceeds to Nationstar created a market dynamic that produced the grossly inadequate sales price. The HOA's conduct assured the

property would sell for a grossly inadequate price, satisfying *Golden v. Tomiyasu*, 79 Nev. 503, 387 P.2d 989 (Nev. 1963)'s oppression or unfairness requirement.

The panel misunderstood Nationstar's argument. Its opinion makes this clear. The opinion rejects the argument "unfairness exists because all the foreclosure proceeds were distributed to the HOA (including fine-related proceeds) instead of just the HOA's superpriority lien amount" and concludes "[W]e are not persuaded that the apparently improper post-sale distribution of proceeds amounts to unfairness so as to justify invalidating an otherwise properly conducted sale." *Shadow Canyon*, 405 P.3d at 650 (emphasis added). Nationstar's argument was not based on post-sale conduct, but pre-sale intent. Also, Nationstar presented its position for the first time at oral argument, without the benefit of briefing. The full court should reconsider this discreet portion of the *Shadow Canyon* opinion.

LEGAL STANDARD

En banc reconsideration is available when the case implicates important precedential issues. NRAP 40A(a); *Huckaby Props. v. NC Auto Parts, LLC*, 130 Nev. Adv. Op. 23, 322 P.3d 429, 432 (Nev. 2014). That standard is met here because the issue of fraud, oppression and unfairness is present in nearly all HOA lien priority cases. Many cases involve a sale for less than 20% of fair market value. Pre-sale intent to pay subpriority amounts prior to payment of the senior deed of trust explains why. The issue has importance beyond this specific case.

ARGUMENT

A. The proceeds distribution issue is a first impression issue

Nationstar's proceeds distribution argument presented a substantial first impression issue in the HOA foreclosure context: whether an HOA's pre-sale intent to violate NRS 116.31164 is fraud, oppression, or unfairness. The panel reiterated that, under *Golden v. Tomiyasu*, a sale cannot be set aside solely on the basis of a grossly inadequate sales price. *Shadow Canyon*, 405 P.3d at 646. The panel explained "there must also be a showing of fraud, unfairness or oppression," but noted a wide price-to-fair-market-value disparity "may require less evidence of fraud, unfairness or oppression." *Id.* at 648. Whether an HOA's pre-sale intent to treat its lien as entirely senior to the deed of trust constitutes fraud, oppression, or unfairness—the argument Nationstar raised at oral argument—has yet to be decided. The Court instead rejected an argument Nationstar did not make, creating precedent on the proceeds distribution issue for the first time—without the benefit of briefing.

B. The HOA's pre-sale refusal to comply with NRS 116.31164 is oppressive and unfair

NRS 116.31164 dictates sale proceeds must be distributed in the following order: **first**, to the reasonable expenses of sale; **second**, to the reasonable expenses of securing possession before the sale and related expenses; **third**, to "the satisfaction of the association's lien;" **fourth**, to "the satisfaction in the order of priority of any subordinate claim of record"; and **fifth**, to the unit's owner. Given

NRS 116.3116(2)'s unique split priority structure under which the HOA has a partially-senior, partially-junior lien, NRS 116.31164 requires the HOA to distribute proceeds to first pay the HOA's superpriority lien, then to pay the senior deed of trust, then to pay its subpriority lien. *See id*; *see also* Report of the Joint Editorial Bd. for Unif. Real Prop. Acts, June 1, 2013 at Example 2, pp. 8-10, http://www.uniformlaws.org/shared/docs/jeburpa/2013jun1_JEBURPA_UCIOA%20Lien%20Priority%20Report.pdf.

In direct contravention of NRS 116.31164 and the Joint Editorial Board's guidance, the HOA decided to pay its subpriority lien before distributing any proceeds to Nationstar; its foreclosing trustee did not differentiate between the two components of the lien. (AA275, AA423). It made this decision prior to the sale.¹ The HOA's pre-sale intent to distribute proceeds in violation of NRS 116.31164 assured the property would sell for a grossly inadequate price. If the HOA had any intent to distribute proceeds as NRS 116.31164 requires, it would have opened bidding much closer to fair market value to best-position itself to receive payment on its sub-priority lien—which could only be satisfied if the sale yielded sufficient

¹ The HOA's post-sale conduct further supports this argument. The property sold for \$35,000—an amount exceeding the HOA's superpriority lien but far less than the amount required to pay the senior deed of trust. (AA029, AA082.) The HOA distributed \$23,149.19 from the sales proceeds to pay itself. (*Id.*) It also distributed \$2,741.22 to Red Rock, its foreclosure agent, and \$364 to the title company that provided a title report. (*Id.*) Only \$8,752.59 in excess proceeds remained to pay Nationstar's several hundred thousand dollar lien. (*Id.*)

proceeds to satisfy the senior deed of trust. *See* NRS 116.31164. Had the HOA done so, the property would have sold at a much higher price than \$35,000—roughly 10% of fair market value—and Nationstar would have received, at best, payment in full, or at worst, far more substantial proceeds in exchange for losing its interest.²

The panel opinion rejects the argument an HOA must establish the HOA took "all steps possible to obtain the highest sales price it could" and holds Article 9's commercial reasonableness standard "has no applicability in the context of an HOA foreclosure involving the sale of real property." *Shadow Canyon*, 405 P.3d at 642. These conclusions do not foreclose Nationstar's argument the HOA's pre-sale intent to violate the proceeds distribution statute satisfies *Golden v. Tomiyasu*'s fraud, oppression, or unfairness standard. Nothing prevents HOAs from bidding consistent with NRS 116.31164. NRS chapter 116 does not set opening bid procedures.

In particular, the Court declined to impose a commercial reasonableness standard on HOA sales based on its observations that NRS Chapter 116 provides "elaborate" requirements an HOA must follow to foreclose and HOAs have "little autonomy in taking extra-statutory efforts to increase the winning bid at the sale." *Id.* at *3. While NRS chapter 116 "curtails an HOA's ability to dictate the method, manner, time, place and terms of its foreclosure sale," *id.*, it says nothing about how

² Nationstar's expert report shows the property had a \$335,000 fair market value as of the January 2, 2014 sale. (AA103.)

an HOA must open bidding. The only provision touching this issue is NRS 116.31164(6)(b), which states an HOA may "purchase by a credit bid up to the amount of the unpaid assessments and any permitted costs, fees and expenses incident to the enforcement of its lien." NRS 116.31164(6)(b). Since the statutory scheme is silent on the opening bid amount, and how the HOA opens bidding has critical importance to the final sale price, the Court should grant reconsideration and find fraud, oppression, or unfairness based on the HOA's pre-sale intent to violate NRS 116.31164.

C. Alternatively, the Court should vacate its proceeds distribution ruling

The panel opinion rejects an argument Nationstar never made. Nationstar did not brief the proceeds distribution issue. The issue only arose briefly during oral argument—during and immediately following Nationstar's discussion about why NRS 116.1113's good faith requirement and Uniform Commercial Code principles provide a better fit for evaluating HOA foreclosure sales than the *Golden v. Tomiyasu* rule—but the panel misunderstood Nationstar's argument. Nationstar did not assert "unfairness exists because all the foreclosure sale proceeds were distributed to the HOA (including fine-related proceeds) instead of just the HOA's super-priority lien amount." *Shadow Canyon*, 405 P.3d at 650. The panel nevertheless rejected the argument "the apparently improper post-sale distribution of proceeds amounts to unfairness so as to justify invalidating an otherwise properly

conducted sale." *Shadow Canyon*, 405 P.3d at 650. As an alternative to granting *en banc* reconsideration and confirming an HOA's pre-sale intent to violate the proceeds distribution statute is unfairness, the Court should vacate the portion of its opinion rejecting a proceeds distribution argument Nationstar never made.

CONCLUSION

The Court should grant *en banc* reconsideration and determine a pre-sale intent to violate NRS 116.31164 satisfies *Golden v. Tomiyasu's* unfairness requirement. Alternatively, the Court should confirm the portion of its opinion rejecting an argument Nationstar did not raise has no precedential value, restoring the proceeds distribution issue to first impression status.

DATED this 28th day of December, 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 10 pages.

FINALLY, I CERTIFY that I have read this **Appellant's Petition for *En Banc* Reconsideration**, 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 28th day of December, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on this 28th day of December, 2017, I caused to be served a true and correct copy of foregoing **APPELLANT'S PETITION FOR *EN BANC* RECONSIDERATION** 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 Supreme 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/ Ariel Stern

An employee of AKERMAN LLP