IN THE SUPREME COURT OF THE STATE OF NEVADA

BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP, a National Association.

Appellant,

vs.

SFR INVESTMENTS POOL 1, LLC, a Nevada Limited Liability Company,

Respondent.

Case No. 70501

APPEAL

from the Eighth Judicial District Court, Department XXI
The Honorable Valerie Adair, District Judge
District Court Case No. A-13-684501-C

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRA 26.1(a), and must be disclosed:

Bank of America, N.A.
Bank of America Holding Corporation
BAC North America Holding Company
NB Holdings Corporation
Bank of America Corporation

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

APPELLANT'S STATEMENT REGARDING ROUTING

Pursuant to NRAP 28(a)(5), Appellant Bank of America, N.A., states that this case raises as principal issues: a question of first impression of common law (NRAP 17(a)(13)) and a question of statewide public importance (NRAP 17(a)(14)), as the principal issue raised on appeal is whether a payment for the full amount of the superpriority lien under NRS 116.3116 (as it existed before amendments went into effect in October 2015) extinguished that lien and preserved the priority of a first deed of trust.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction under NRAP 3A(b)(1) because the district court entered summary judgment on all claims against all parties in favor of Cross-Defendant-Respondent SFR Investments Pool 1, LLC (**SFR**) on April 18, 2016. Notice of entry of the summary judgment was entered on April 27, 2016. Appellant Bank of America, N.A., filed a timely notice of appeal on May 27th, 2016, *see* NRAP 4(a)(6).

ISSUES PRESENTED

(1) Whether the district court erred by denying summary judgment to Appellant BANA where the undisputed evidence shows that BANA sent payment for the full superpriority portion of the lien.

(2) Whether NRS 116.3116 is facially unconstitutional under the Due Process Clause.

(3) Whether the district court erred by granting summary judgment to SFR in light of material questions surrounding:

(a) Whether the homeowners' association complied with all of the requirements under Nevada law for a foreclosure under NRS 116.3116 to extinguish a first deed of trust,

(b) Whether the homeowners' association's foreclosure was commercially reasonable under Nevada law in light of the depressed sales price and BANA's offer to tender payment for the superpriority lien, and

(c) Whether SFR could qualify as a bona fide purchaser when the deed of trust was recorded and the principal in SFR admitted that he expected litigation when he bid on the property.

STATEMENT OF THE CASE

In this case, Cross-Defendant-Respondent SFR claims its purchase of certain property in Clark County, Nevada at a homeowners' association's (**HOA**) foreclosure sale for $21,000.00 extinguished the deed of trust held by Appellant BANA, which secured a loan of over $74,000.00. SFR moved for summary judgment, arguing it was entitled to a judgment establishing it to be the holder of the property free and clear of BANA's deed of trust due to the HOA's foreclosure sale and the recitals in the trustee's deed that purportedly vested ownership of the property in SFR. The district court granted summary judgment to SFR over BANA's opposition and denied BANA's countermotion for summary judgment. BANA then filed a motion for reconsideration based on this Court's ruling in *Horizons at Seven Hills Homeowners Association v. Ikon Holdings, LLC*, 373 P.3d 66 (Nev. 2016). The district court, however, denied the motion.

STATEMENT OF FACTS

I. Factual Background

Armando Carias (**Borrower**) obtained title to real property located at 3617 Diamond Spur Avenue, North Las Vegas, Nevada 89032 (the **Property**) on or about October 27, 2010. (JA 170-183). Borrower took out a loan in the amount of $74,642, which was secured by a Deed of Trust (the **Deed of Trust**) executed on

October 27, 2010 in favor of W.J. Bradley Mortgage Corp. (**Bradley Mortgage**), with Mortgage Electronic Registration System, Inc. (MERS) as the beneficiary. (JA 170-172) Bradley Mortgage recorded the Deed of Trust on November 3, 2010. Later, the Deed of Trust was assigned to BAC Home Loans Servicing, LP, formerly known as Countrywide Home Loans Servicing LP,[1] and the assignment was recorded on January 26, 2012. (JA 185-186).

Plaintiff Alessi & Koenig, LLC (**HOA Trustee**), acting on behalf of Sutter Creek Homeowners Association (**HOA**), initiated foreclosure proceedings by recording a notice of delinquent assessment lien on February 23, 2012. (JA 188). The notice stated that the amount due to the HOA was $965.00, which included assessments, late fees, interest, and fees. *Id.* The HOA Trustee subsequently recorded a notice of default and election to sell under homeowners' association lien on May 18, 2012, stating that the amount due to the HOA was $2,290.00, which included assessments, dues, interest, and fees. (JA 190).

On June 15, 2012, in response to the notice of default, BANA's counsel at Miles, Bauer, Bergstrom & Winters, LLP (**Miles Bauer**), contacted the HOA to obtain a payoff ledger for the 9-month superpriority lien. (JA 196-197). The HOA responded on June 15, 2012, sending a ledger showing that the monthly assessment amount was $75.00 per month through January 1, 2012 and $80.00 per month after

[1] Bank of America, N.A. is the successor by merger to BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing LP.

January 1, 2012. (JA 199-204). On June 28, 2012, Miles Bauer tendered a check for $720.00, which the HOA Trustee rejected without explanation. (JA 206-208, 210, 212).

Instead, the HOA Trustee recorded a Notice of Trustee's Sale on January 22, 2013, setting the sale for February 20, 2013. The Notice stated the amount due to the HOA was $4,285.00. (JA 214). The Notice of Sale neither identified the super-priority amount claimed by the HOA, nor described the "deficiency in payment" required by NRS 116.31162(1)(b)(1). On February 20, 2013, a foreclosure sale took place, where the HOA sold its interest in the Property to SFR for $21,000.00. SFR recorded the Trustee's Deed Upon Sale on February 26, 2013. (JA 216).

II. Procedural Background

The procedural background of this case is complicated due to its nature as an interpleader action. The HOA Trustee filed a Complaint in Interpleader on July 1, 2013, against BANA and Borrower, interpleading the funds remaining from its foreclosure sale of the Property to SFR after it had deducted the amount of the HOA's lien and its own charges and fees. (JA 004-010).[2] BANA filed an Answer to the HOA Trustee's Complaint, Cross-Claim, and Third Party Complaint against

[2] The Borrower was voluntarily dismissed from the case without prejudice on June 10, 2014. (JA 065-067).

SFR on January 9, 2014. (JA 032-044).[3] SFR filed an Answer, Counter-Claim and Cross-Claim against BANA on February 14, 2014. (JA 045-058). BANA answered SFR's counterclaim and cross-claim on March 11, 2014. (JA 059-064). SFR filed its Answer to BANA's Cross-Claim on May 8, 2015. (JA 129-136).

BANA moved for summary judgment on October 30, 2015, arguing that it had fully tendered payment of the HOA's superpriority lien prior to foreclosure, that the HOA Lien Statute was facially unconstitutional on due process grounds, and that the sale was void for commercial unreasonableness. (JA 152-253). Shortly thereafter, on November 2, 2015, SFR moved for summary judgment, arguing that BANA's first deed of trust was extinguished on the basis of the recitals in the deed upon sale and that it was protected by the bona fide purchaser doctrine. (JA 254-330). The HOA and HOA Trustee filed a joinder to SFR's motion for summary judgment on November 20, 2015. (JA 331-336).

SFR filed an opposition to BANA's motion for summary judgment on November 20, 2015 (JA 337-355), which the HOA and HOA Trustee joined on November 21, 2015 (JA 356-361). BANA filed its opposition to SFR's motion for summary judgment and the joinder on December 17, 2015. (JA 362-668). SFR then replied in support of its motion for summary judgment on January 27, 2015.

[3] The district court permitted BANA to amend the Answer and Cross-Claims on April 23, 2015. (JA 127-128).

(JA 669-710). On January 28, 2016, BANA filed a reply brief in support of its motion for summary judgment. (JA 711-724).

The district court held a hearing on the motions for summary judgment on February 3, 2016. (JA 725-787). On April 18, 2016, the district court entered an order denying BANA's motion for summary judgment and granting summary judgment to SFR. (JA 788-795). Notice of entry of the order was made on April 27, 2016. (JA 796-805).

Following this Court's decision in *Horizons at Seven Hills Homeowners Association v. Ikon Holdings, LLC*, 373 P.3d 66 (Nev. 2016), BANA moved for reconsideration on May 16, 2016. (JA 806-887). SFR filed an opposition to the motion on June 3, 2016. (JA 895-910). BANA replied in support on June 20, 2016. (JA 911-922).[4]

BANA filed a timely notice of appeal on May 24, 2016. (JA 888-890).

SUMMARY OF THE ARGUMENT

The district court's decision should be reversed in light of this Court's recent holding that a servicer's tender of payment to an HOA for the full amount of the superpriority lien extinguished the lien and protected the deed of trust even though the HOA rejected payment. *Stone Hollow Avenue Trust v. Bank of America*, N.A.,

[4] After the notice of appeal was filed, the district court denied BANA's motion for reconsideration on June 20, 2016. (JA 923-924).

Case No. 64955, 2016 WL 4543202 (Nev. Aug. 11, 2016). In this case, the evidence clearly shows that BANA offered to pay the full amount of the superpriority lien and took further steps to pay off the lien by requesting the payoff ledger. Therefore, the holding in *Stone Hollow* applies to this case and dictates reversal of the district court's order.

Independently, the district court's summary judgment should be reversed because NRS 116.3116—as it existed before the Nevada Legislature amended it during the 2015 Term—is facially unconstitutional. On its face, the statute does not ensure that holders of senior mortgage liens receive notice before those liens are extinguished by a homeowners' association's foreclosure. Instead, senior lienholders must "opt-in" to receive advance notice of a foreclosure. Under binding law from the United States Supreme Court, such an "opt-in" regime is unconstitutional because it violates due process. Recently, the Ninth Circuit agreed that NRS 116.3116 is facially unconstitutional because it is an "opt-in" notice scheme. *Bourne Valley Court Trust v. Wells Fargo Bank*, ___ F.3d ___, No. 15-15223, 2016 WL 4254983 (9th Cir. Aug. 12, 2016). This holding correctly applies due process law and should guide this Court's reasoning on this issue.

Finally, even if BANA had not been entitled to summary judgment, remaining questions of material fact still existed to preclude summary judgment in SFR's favor. The district court granted summary judgment in reliance on the

theory that recitals in the foreclosure deed established a conclusive presumption that all statutory requirements had been fulfilled and prevented a challenge to the foreclosure sale. The district court failed to recognize that this Court rejected that theory in *Shadow Wood*. In fact, questions remain as to whether the foreclosure and sale complied with all statutory requirements. Questions also remain about the commercial reasonableness of the HOA's decision to reject BANA's check for the full superpriority lien and the conduct of the foreclosure sale, which gathered less than 22% of the appraised value. Finally, the fact that SFR was on record notice of BANA's deed of trust should have precluded the district court from holding that SFR was a bona fide purchaser. Therefore, there are material questions of fact that would require a reversal of the district court's decision even if BANA were not entitled to summary judgment.

ARGUMENT

I. Standard of Review

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

favorable to the non-moving party on a summary judgment motion. *Safeway*, 121 Nev. at 729, 121 P.3d at 1029.

A denial of a motion for reconsideration under NRCP 56(e) should be reviewed along with the underlying judgment. *AA Primo Builders, LLC v. Washington*, 245 P.3d 1190, 1197 (Nev. 2010). Such an order is reviewed under an abuse of discretion standard. *Land Baron Inv. v. Bonnie Springs Family LP*, 356 P.3d 511, 520 (Nev. 2015), *reconsideration en banc denied* (Jan. 22, 2016); *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010). "While review for abuse of discretion is ordinarily deferential, deference is not owed to legal error." *AA Primo*, 126 Nev. at 589, 245 P.3d at 1197.

II. BANA's Check For The Full Amount of the Superpriority Portion Extinguished That Portion Of The Lien.

This Court should reverse the district court's grant of summary judgment because it is undisputed that BANA's agent sent payment to the HOA for the superpriority lien that supposedly gave rise to SFR's interest in the Property. Under long-standing Nevada law, BANA's payment for the full amount of the superpriority lien extinguished that lien, even though the HOA purported to reject the payment.

In fact, in a recent case with nearly identical facts, this Court held that a servicer's offer of payment to an HOA for the full amount of the superpriority lien

extinguished the lien and protected the deed of trust *even though the HOA rejected payment*. In *Stone Hollow Avenue Trust v. Bank of America, N.A.*, Case No. 64955, 2016 WL 4543202 (Nev. Aug. 11, 2016), Stone Hollow purchased property at an HOA's foreclosure sale, then sued Bank of America, seeking judgment that it owned the property free and clear of Bank of America's security interest. After the district court awarded summary judgment to Bank of America, Stone Hollow appealed. On appeal, this Court first ordered reversal based on Stone Hollow's argument that it was a bona-fide purchaser for value. But after reconsideration, this Court affirmed summary judgment based on Bank of America's tender of payment to the HOA. This Court found that the HOA's rejection of payment for the full superpriority amount of the lien was "unjustified," and that "[w]hen rejection of a tender is unjustified, the tender is effective to discharge the lien." *Id.*, slip op. at 1.

In this case, BANA offered to pay nine months of assessments through its agent Miles Bauer by sending the HOA Trustee a letter that (1) outlined the Bank's position that the superpriority amount is limited to nine months' worth of regular assessments and (2) expressly offered to pay that amount, upon the HOA advising BANA of the amount. (JA 196-197). This Court has since further confirmed BANA's position as to the full amount of the superpriority lien. *Horizons at Seven Hills Homeowners Association v. Ikon Holdings, LLC*, 373 P.3d 66, 72 (Nev. 2016) ("[W]e conclude the superpriority lien granted by NRS 116.3116(2) does not

include an amount for collection fees and foreclosure costs incurred; rather it is limited to an amount equal to the common expense assessments due during the nine months before foreclosure."). The fact that the HOA Trustee unjustifiably rejected the offer of payment did not prevent it from constituting an effective tender.

A. A rejected offer to pay constitutes tender under Nevada law.

For at least fifty years, this Court has consistently held that an offer to pay is sufficient tender. *See, e.g.*, *Ebert v. Western States Refining Co.*, 337 P.2d 1075, 1077 (Nev. 1959). Tender is complete when "the money is offered to a creditor who is entitled to receive it[.]" *Cladianos v. Friedhoff*, 240 P.2d 208, 210 (Nev. 1952). After the money owed is offered to the creditor, "nothing further remains to be done, and the transaction is completed and ended." *Id.*

Other jurisdictions agree that tender is defined as "*an offer of payment* that is coupled either with no conditions or only with conditions upon which the tendering party has a right to insist." *Fresk v. Kramer*, 99 P.3d 282, 286-87 (Or. 2004) (emphasis added); *see also* 74 AM. JUR. 2D *Tender* §22 (2014). It is irrelevant whether any money actually changes hands—tender is complete upon the offer to pay. *See Guthrie v. Curnutt*, 417 F.2d 764, 765-66 (10th Cir. 1969) ("[W]hen a party, able and willing to do so, offers to pay another a sum of money and is told that it will not be accepted, the offer is a tender without the money being

produced."). *Stone Hollow* confirmed that a bank's tender, even if rejected, is sufficient to preserve its first-position deed of trust from extinguishment. *Stone Hollow*, Case No. 64955, 2016 WL 4543202 (Nev. Aug. 11, 2016) . The Nevada Supreme Court is not alone in this conclusion. Several other courts have also held that a tender made, even if rejected, precludes foreclosure and discharges the subject lien. *See Bisno v. Sax*, 346 P.2d 814, 820 (Cal. Dist. Ct. App. 1959) ("[T]he acceptance of payment of a delinquent installment of principal or interest cures that particular default and precludes a foreclosure sale based upon such a preexisting delinquency. The same is true of a tender which has been made and rejected."); *Lichty v. Whitney*, 182 P.2d 582, 582 (Cal. Dist. Ct. App. 1947) ("A tender of the amount of a debt, though refused, extinguishes the lien of a pledgee."); *Segars v. Classen Garage and Service Co.*, 612 P.2d 293, 295 (Okla. Civ. App. 1980) ("A proper and sufficient tender of payment operates to discharge a lien.").

The Nevada Supreme Court's recent order in *Stone Hollow* also comports with the drafter's comments to the UCIOA, as well as the NRED opinion interpreting the foreclosure provisions of NRS 116. All confirm that tender of the superpriority amount preserves a first deed of trust holder's interest in the foreclosed property. The drafters of the UCIOA, adopted by Nevada as NRS 116, contemplated this result when drafting the superpriority provision, stating that "[a]s a practical matter, secured lenders will most likely pay the [nine] months

assessments demanded by the association rather than having the association foreclose on the unit." UCIOA § 3116 cmt. 1 (1982) (cited with approval in *SFR Investments*, 334 P.3d at 414.).[5] Further, the Nevada Real Estate Division of the Department of Business and Industry (**NRED**), the agency charged with administering NRS 116, has explained that it is "likely that the holder of the first security interest will pay the super priority lien amount to avoid foreclosure by [an HOA]." 13–01 Op. Dep't of Bus. & Indus., Real Estate Div. 18 (2012) (hereinafter **NRED Letter**); *see also Folio v. Briggs*, 99 Nev. 30, 34, 656 P.2d 842, 844 (1983) (explaining that courts "are obliged to attach substantial weight to [an] agency's interpretation" of a statute it is charged with administering).

B. BANA's tender of payment before the foreclosure sale extinguished the superpriority portion of the HOA's lien.

Under the undisputed facts before the district court, BANA properly tendered payment for the full superpriority portion of the HOA's lien before the foreclosure sale, thus extinguishing that lien. Shortly after the recording of the Notice of Default and Election to Sell, BANA, through counsel at Miles Bauer, contacted the HOA Trustee and requested a payoff ledger detailing the

[5] This Court cited to the official comments to UCIOA extensively when analyzing NRS 116.3116 in *SFR Investments*. *See* 334 P.3d at 412 ("An official comment written by the drafters of a statute and available to the legislature before the statute is enacted has considerable weight as an aid to statutory construction.")

superpriority amount of the HOA's lien. (JA 196-197). In its communication to the HOA Trustee, Miles Bauer expressly stated that the "nine months' of common assessments pre-dating the NOD" was "the amount [BANA] should be required to rightfully pay to fully discharge its obligations to the HOA per NRS 116.3102," and that BANA "hereby offers to pay that sum upon presentation of adequate proof of the same by the HOA." (JA 197). After receiving the account statement, BANA calculated and tendered the full superpriority amount prior to the foreclosure. By doing so, BANA extinguished the superpriority portion of the HOA's lien, thus protecting the first-priority position of BANA's Deed of Trust prior to the foreclosure sale. Accordingly, when the Property was conveyed to SFR following the foreclosure sale, BANA's Deed of Trust still encumbered the Property.

In its summary judgment order, the district court held that BANA's tender was ineffective because it "requir[ed] the [HOA] to waive its rights as to a currently undecided matter—namely, what amounts are included in a superpriority lien pursuant to NRS 116." (JA 794). This is a clear misstatement of the law: until its amendment in 2015 (well after the relevant time period), NRS 116.3116(2) always stated that superpriority existed only for nine months of assessments and the few specified charges laid out in NRS 116.310312. Not only did the Nevada Legislature plainly define this, NRED—the only agency given statutory authority to administer NRS 116—issued an opinion in December of 2012 (a month before

the foreclosure sale in this case was held) confirming that the superpriority only included nine months of assessments. *See* NRED Letter.

This analysis is confirmed by this Court's opinion in *Horizons*, which stated that "legislative intent, the statute's text, and statutory construction principles" all showed that NRS 116.3116(2) limited superpriority to nine months of assessments. 373 P.3d at 72. BANA expects SFR to argue that the law was unclear until the *Horizons* opinion issued, and so it had the right to reject BANA's tender for nine months of assessments. This argument fundamentally misunderstands the nature of statutory interpretation. When a court interprets a statute, "it is explaining its understanding of what the statute has meant continuously since the date when it became law." *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 313 n.12 (1994) (emphasis added). Therefore, when this Court held that the superpriority amount of an HOA's lien is limited to nine months' delinquent assessments in *Horizons* on April 28, 2016, it also affirmed that the superpriority amount in this particular case was $720.00 on June 28, 2012, when Bank of America sent tender to the HOA Trustee. The HOA Trustee's ignorance or misunderstanding of the superpriority amount at that time is irrelevant—"ignorance of the law is no excuse." *U.S. v. Int'l Minerals and Chemical Corp.*, 402 U.S. 558, 563 (1971).

The district court also suggested that BANA's tender was ineffective because "BANA should have done something to put potential purchasers, such as

SFR, on notice of its attempted payment." (JA 794). However, contrary to the district court's suggestion, BANA did exactly what it was supposed to do under *SFR Investments*: seek to pay the superpriority amount of the lien before the foreclosure sale. *See SFR Investments*, 334 P.3d at 414 ("[A]s junior lienholder, [the holder of the first deed of trust] could have paid off the [HOA] lien **to avert loss of its security**[.]") (emphasis added); *id.* at 413 ("As a practical matter, secured lenders will most likely **pay the [9] months' assessments** demanded by the association **rather than having the association foreclose on the unit**.") (emphasis added). The tender was effective when the check was received by the HOA Trustee; no other steps were required for the tender to extinguish the superpriority lien. Therefore, BANA's first deed of trust survived the HOA's foreclosure sale.

C. The HOA Trustee's bad-faith rejection of the check invalidated the sale.

Leaving aside the fact that BANA's superpriority tender extinguished the superpriority portion of the HOA's lien, the HOA's rejection of the check is a further ground to grant summary judgment in BANA's favor. The HOA's decision (through its agent, the HOA Trustee) to reject BANA's superpriority payment invalidated the sale because it was made in bad faith. The HOA Lien Statute imposes an obligation of good faith in the "performance and enforcement" of

"every duty governed by" the statute. NRS 116.1113. When BANA attempted to pay the superpriority amount to the HOA, the HOA had two choices: (1) accept the superpriority payment and forgo foreclosure, or (2) reject the check and proceed with the foreclosure anyway. Under either scenario, the HOA would receive the full superpriority portion of its lien. By capriciously choosing to reject BANA's superpriority tender attempts and proceed with foreclosure, the HOA unnecessarily attempted to extinguish BANA's lien. This clear violation of the HOA's obligation to act in good faith invalidates the foreclosure sale on which SFR's quiet title claim relies.

Therefore, this Court could either rule that BANA's check was an effective tender of the superpriority lien, and consequentially the Deed of Trust survived the foreclosure sale, or that the HOA's bad-faith rejection of the check violated NRS 116.1163, in which case the foreclosure sale would be invalidated. Under either result, the district court was wrong to issue summary judgment to SFR and subsequently refuse to reconsider the judgment.

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

Furthermore, the district court's judgment should be reversed because the HOA Lien Statute is facially unconstitutional under the Due Process Clauses of the Nevada and U.S. Constitutions. The district court gave only a conclusory rejection

of BANA's due process argument, writing "NRS 116 is facially constitutional." *See* (JA 793). Since the district court's decision, the Ninth Circuit held that NRS 116.3116 is facially unconstitutional because it is an "opt-in" notice scheme. *Bourne Valley Court Trust v. Wells Fargo Bank*, ___ F.3d ___, No. 15-15223, 2016 WL 4254983 (9th Cir. Aug. 12, 2016). This decision was correct, as the HOA Lien Statute does not mandate actual notice to a deed of trust holder prior to an HOA's foreclosure. Rather, it impermissibly requires those with a security interest on a Nevada property potentially subject to an HOA lien to "opt-in" to their constitutional protections by requesting notice prior to the HOA's foreclosure—a requirement that fails to provide the mandatory notice guaranteed by the Due Process Clause. As such, the HOA Lien Statute is invalid on its face.

A. Eliminating property rights by means of a foreclosure is state action.

Under both state and federal law, elimination of a property interest by means of a foreclosure is a form of state action and thus subject to due-process requirements. In *J.D. Construction v. IBEX Int'l Group*, 240 P.3d 1033 (Nev. 2010), J.D. Construction placed a mechanic's lien on property owned by Ibex. *Id*. at 1035. J.D. Construction was *not* a state actor. *See id*. This Court nevertheless held that "[a] mechanic's lien is a 'taking' in that the property owner is deprived of a significant property interest, which entitles the property owner to federal and

state due process." *Id*. at 1040 (citing *Connolly Develop., Inc. v. Sup. Ct. of Merced County*, 17 Cal. 3d 803, 132 Cal. Rptr. 477, 553 P.2d 637, 644 (1976)). The Court further opined that due process is satisfied if both parties are allowed the opportunity to present their case. *Id*. (citing *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976)).

Similarly, the Ninth Circuit has held that a private seizure of property pursuant to an innkeeper's lien statute constitutes state action. *Culbertson v. Leland*, 528 F.2d 426, 432 (9th Cir. 1975). 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 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 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.*

Thus, the same logic applies to HOA sales. Like a purchaser at a mechanic's lien sale, SFR attempts to take property and, as a result, deprive BANA of a significant property interest. While BANA has a first deed of trust rather than a fee simple, its position is identical to that of a defendant in a mechanic's lien case, such as *J.D. Construction*. In both instances, a third-party purchaser seeks to extinguish a pre-existing interest; SFR attempted to do so pursuant to the procedures set forth in Chapter 116.

B. The HOA Lien Statute is facially unconstitutional because it does not ensure notice and an opportunity to be heard prior to the elimination of property rights.

The HOA Lien Statute is unconstitutional on its face because it does not ensure that mortgagees at risk of losing property interests will receive notice and an opportunity to be heard.[6] An "elementary and fundamental requirement of due

[6] A statute is unconstitutional on its face when "no set of circumstances exists under which the [statute] would be valid." *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2450 (2015) (internal quotation marks omitted). A litigant may attack a statute's facial unconstitutionality in violation of due process even if the party received actual notice that was not required by the law in question. *See, e.g.*, *Garcia-Rubiera v. Calderon*, 570 F.3d 443, 456 (1st Cir. 2009) (sustaining facial attack on notice provisions and holding that "actual notice cannot defeat [facial] due process claim").

process . . . is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of an action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).[7] The U.S. Supreme Court has applied this standard in the same context as this case—where a mortgagee's property interest was purportedly extinguished by a non-judicial foreclosure. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983). The *Mennonite* Court held that the Due Process Clause required that "[n]otice by mail or other means ***as certain to ensure actual notice*** [to the mortgagee] is a minimum constitutional precondition" to a non-judicial foreclosure sale that can extinguish the mortgagee's interest. *Id.* (emphasis added).

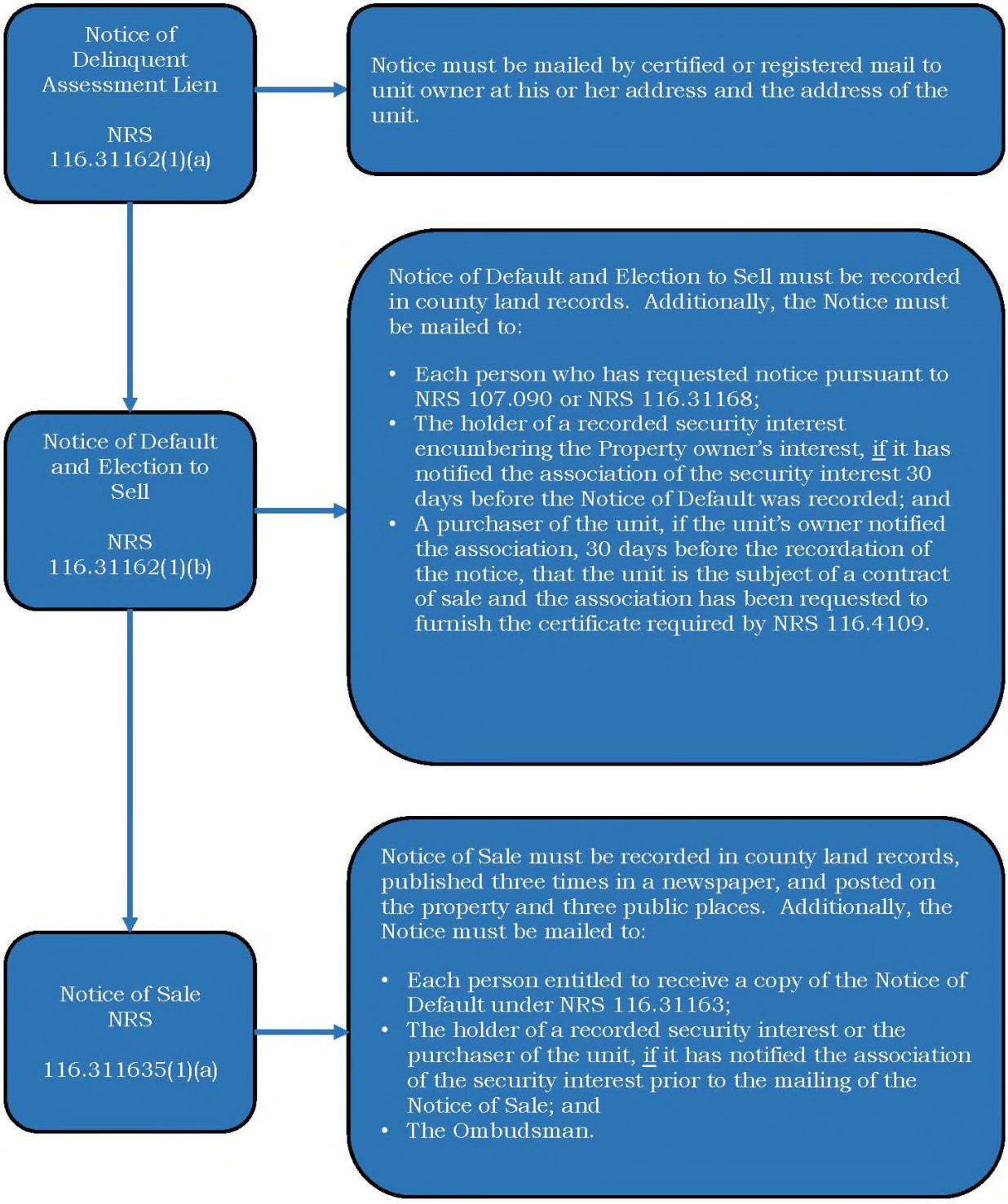
On its face, Nevada law does not "under all circumstances" ensure actual notice to a deed of trust holder "of the pendency of an action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314. Mortgagees must receive notice *only* if they have previously requested notice from the HOA. NRS 116.31163 requires that a notice of default and election to sell be provided only to a holder of a recorded security interest who "has requested notice" or "has

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

notified the association" more than 30 days before recording the notice of default of the existence of a security interest. NRS 116.31163 (1)-(2). Section 116.311635 similarly requires that notice of an HOA foreclosure sale be sent only to those mortgagees of record who have requested notice under NRS 116.31163, or those who have "notified the association." NRS 116.311635(1)(b)(1)-(2). A third provision concerning notice of delinquent assessments does not require notice to mortgagees at all. NRS 116.31162.

The notice requirements for foreclosing on an HOA lien under the pre-2015 Amendments HOA Lien Statute are summarized in the following chart:

Foreclosures on HOA Liens Under Nevada Chapter 116



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

The HOA Lien Statute explicitly permits the total extinguishment of a first deed of trust without *any* notice to the mortgagee holding that deed. If a mortgagee does not request notice—or, put differently, fails to "opt in" to its constitutional rights—Nevada law will allow the extinguishment of a first deed of trust without notice. Such a result contravenes *Mennonite*, which holds that a "party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation." 462 U.S. at 799; *see also Mullane*, 339 U.S. at 314 (notice must be afforded "under all circumstances").

The drafters of the UCIOA have tacitly acknowledged the problem with Nevada's statute, issuing the following comment as part of the 2008 version of the uniform law:

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

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

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

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

Similarly, in *Reeder & Associates v. Locker*, 42 N.E.2d 1371 (Ind. Ct. App. 1989), the Indiana Court of Appeals applied *Mennonite* to hold that a mortgagee who had failed to use the procedures in the applicable request-notice statute was nonetheless entitled to actual notice of a foreclosure that would eliminate its security interest. As the court noted, "[c]onstitutional protection exists not only when a mortgagee complies with the [request-notice statute]; it exists any time an action which will affect a property interest protected by the due process clause of the U.S. Constitution occurs." *Id.* at 1373.[8]

[8] *Accord e.g.*, *Wylie v. Patton*, 720 P.2d 649, 655 (Idaho 1986) (reversing quiet title judgment after determining that lienholder failed to receive constitutionally required notice, even though lienholder failed to request notice under applicable statute); *City of Boston v. James*, 530 N.E.2d 1254, 1257 (Mass. App. Ct. 1988); ("'[A] party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation.'") (quoting *Mennonite*, 462 U.S. at 799); *Jefferson Twp. v. Block 447A*, 548 A.2d 521, 524 (N.J. 1988) ("[A] person's entitlement to the notice required by due process cannot be conditioned on the requirement that he request it."); *In re Foreclosure of Tax Liens*, 103 A.D.2d 636, 640 (N.Y. App. Div. 1984) (holding that the state's constitutional obligation to notify mortgagees could not be "abrogated by requiring the mortgagee to request

Consistent with the many on-point decisions on the issue, the HOA Lien Statute is unconstitutional on its face because it does not guarantee that beneficiaries of first deeds of trust will receive notice of an HOA's foreclosure sale. The fact that a lienholder may record a request for notice is not enough; as the United States Supreme Court made clear in *Mennonite*, a "party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation." 462 U.S. at 799. Accordingly, the HOA Lien Statute is unconstitutional, and the district court's decision should be reversed.

C. The HOA Lien Statute cannot be saved by a broad reading of the notice provisions of NRS 116.31168.

Although the district court's order did not explain why it believed the HOA Lien Statute to be constitutional, SFR argued that the qualified incorporation of NRS 107.090 into one subsection salvages the constitutionality of the entire statute. (JA 350-353). However, this interpretation is contradicted by the plain text of the statute and axiomatic tenets of statutory construction. Nothing in the HOA Lien Statute incorporates the notice provisions of NRS 107.090 wholesale. Instead,

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notice"; "The state has an obligation to all mortgagees, not merely to those who request notice."); *United States v. Malinka*, 685 P.2d 405, 408-09 (Okla. Civ. App. 1984) (holding Oklahoma tax foreclosure sale unconstitutional due to failure to guarantee notice to affected lienholders despite availability of request-notice procedures); *Seattle First Nat'l Bank v. Umatilla Cnty.*, 713 P.2d 33, 34-37 (Or. App. 1986) (holding publication notice statute unconstitutional as violative of due process despite request-notice statute).

it only provides notice to those who have affirmatively opted in, rendering the HOA Lien Statute plainly unconstitutional.

Section 116.31168 is entitled, "Foreclosure of liens: *Requests* by interested persons for notice of default and election to sell; right of association to waive default and withdraw notice or proceeding to foreclosure," and Section 116.31168(1) reads as follows:

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

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

An interpretation holding that this general statute, which includes references to a "request," requires mandatory notice when three other provisions specifically impose only "opt-in" notice would violate multiple Nevada canons of construction. *See, e.g.*, *State Tax Comm'n ex rel. Nev. Dep't of Taxation v. Am. Home Shield of Nev., Inc.*, 254 P.3d 601, 605 (Nev. 2011) ("A specific statute controls over a general statute."); *id.* at 604 ("Statutes must be construed as a whole, and phrases may not be read in isolation to defeat the purpose behind the statute."); *Nev. Power Co. v. Haggerty*, 115 Nev. 353, 366, 989 P.2d 870, 878 (1999) (holding that a statute's title can reflect legislative intent).

The interpretation urged by SFR would entail that the Legislature enacted multiple request-notice provisions but intended them to have no meaning. "When interpreting a statute, [courts] must give its terms their plain meaning, considering its provisions as a whole so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory." *Southern Nevada Homebuilders Ass'n v. Clark County*, 117 P.3d 171, 173 (Nev. 2005). This interpretation of the HOA Lien Statute would not only render *a* provision nugatory, it would render *entire* statutory subsections nugatory. The following subsections of the HOA Lien Statute would be completely superfluous: NRS 116.31163(1), NRS 116.31163(2), NRS 116.311635(b)(1), NRS 116.311635(b)(2). It would even render the second sentence of NRS 116.31168(1)—fully half of the subsection—

completely meaningless. This is the very subsection that the district court's interpretation looks to in order to save the entire statute.

A review of the underlying statutory subsections further demonstrates the absurd result that would attach if the district court's interpretation is adopted. The first two, NRS 116.31163(1) and NRS 116.31163(2), provide that a notice of default and election to sell need only be provided to a mortgagee who has "requested notice pursuant to NRS 107.090 or NRS 116.31168." The next two, NRS 116.311635(b)(1) and NRS 116.311635(b)(2), require that notice of the foreclosure sale itself—the event that purportedly extinguishes the constitutionally-protected property interest of a mortgagee—be sent *only* to those who have *requested* "notice under NRS 116.31163," and the "holder of a recorded security interest or the purchaser of the unit, *if either of them have notified the association* . . . of the existence of the security interest." NRS 116.311635(b) (emphasis added). SFR's interpretation depends on the assumption that the Nevada Legislature drafted a series of five interlocking request-notice provisions—the four request-notice provisions and NRS 116.31168(1), which also references a "request" for notice—four and a half of which have no meaning whatsoever, because a small part of one of those subsections negates all the rest and requires actual notice of a foreclosure sale.

Even were NRS 107.090 incorporated, that section is also a request-notice provision. That provision, part of Nevada's non-judicial foreclosure scheme for deeds of trust, is entitled "*Request for notice* of default and sale; Recording and contents; mailing of notice; *request* by homeowner's association; effect of *request*." NRS 107.090 (emphasis added). Notably, other sections of the HOA Lien Statute also refer to NRS 107.090 as a request-notice provision, rather than the actual notice provision SFR claims it to be. *See* NRS 116.31163(1) (requiring that the Notice of Default be sent to those who have "requested notice pursuant to NRS 107.090 or NRS 116.31168[.]"). The argument that NRS 116.31168's reference to NRS 107.090 requires actual notice of a foreclosure sale to mortgagees renders every one of these opt-in provisions meaningless.

The district court's interpretation entails that the Nevada Legislature intended to incorporate a provision of NRS 107.090 to require that notice of default be provided to every "person with an interest . . . subordinate to the" HOA's lien, while simultaneously enacting other provisions requiring holders of recorded security interests to opt-in to be entitled to notice of foreclosure. Courts should "construe statutes to give meaning to all of their parts and language … and read each sentence, phrase, and word to render it meaningful within the context and purpose of the legislation." *Harris Associates v. Clark County School Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003). The interpretation adopted by the

district court ignores this maxim, instead rendering not only a phrase or word without meaning, but entire statutory subsections. This strained interpretation fails.

D. This Court did not resolve the facial unconstitutionality issue in *SFR Investments.*

This Court has not yet decided the particular challenge in this case. BANA anticipates that SFR will mistakenly cite the decision in *SFR Investments Pool 1, LLC v. Bank of America, N.A.*, 334 P.3d 408, 418 (Nev. 2014) to argue that this Court has already held that the opt-in requirement did not violate the due process clause. However, *SFR* issued no holding regarding the constitutionality of the statute, and in fact could not reach the due process claim because of the procedural posture of the case. *See SFR Investments*, 334 P.3d at 418. In *SFR Investments*, the mortgagee made an *as-applied*, rather than *facial*, challenge to the HOA Lien Statute, arguing that the notice it received was insufficient under the Due Process Clause. *SFR Investments*, 334 P.3d at 418. The Court did not reach that as-applied challenge, however, because "at the pleadings stage, we credit the allegations of the complaint that [the HOA] provided all statutorily required notices as true and sufficient to withstand a motion to dismiss." *Id.*

Furthermore, even if *SFR Investments* had held against the particular constitutional challenge—i.e. decided the notice received was sufficient—that holding would not be dispositive of BANA's facial challenge in this case. The

statute is unconstitutional because it requires mortgagees to opt-in to their due process rights by requesting notice of a foreclosure sale. That the Court may have held that the actual notice the party received in *SFR Investments* met due process requirements concerning the *content* of a notice has no bearing on a facial attack on a statute for failing to require notice at all.

IV. The District Court Erred By Granting Summary Judgment To SFR Despite Material Questions Of Fact.

Independently of the reasons discussed above that warrant summary judgment in BANA's favor, the district court also erred by granting summary judgment for SFR when material questions of fact remained. First, the district court held that recitals in the Foreclosure Deed were "conclusive proof" that the sale had been proper (JA 793), and so overlooked the lack of actual evidence of compliance with all the requirements imposed by the statute. Second, the district court overlooked evidence showing that the HOA and HOA Trustee withheld information from auction bidders about BANA's tender of the superpriority amount. Third, the court held that SFR was a bona fide purchaser despite evidence that it expected litigation and despite its failure to demonstrate that it had adequately inquired into the status of BANA's first deed of trust. Therefore, even if BANA were not entitled to an award of summary judgment, these material questions of fact still precluded the summary judgment in SFR's favor.

A. Recitals in the foreclosure deed cannot conclusively establish compliance with all of the HOA Lien Statute's requirements.

Questions of fact remain as to whether the HOA complied with all statutory requirements for the foreclosure sale. In granting summary judgment, the district court wrote, "Pursuant to *Shadow Wood*, the recitals set forth in the Foreclosure Deed that notices were properly provided is conclusive proof of the same. Alternatively, SFR has provided evidence that the Association Foreclosure Sale was properly noticed in this case." (JA 793). There are two problems with this conclusion under *Shadow Wood*. First, the order fundamentally misunderstands *Shadow Wood*'s holding, which unambiguously rejected the proposition that deed recitals have conclusive force. *Shadow Wood Homeowners Assoc., Inc. v. N.Y. Community Bancorp, Inc*., 366 P.3d 1105 (Nev. 2016). Second, the order addresses only requirements relating to notice, overlooking that the HOA Lien Statute imposes a range of other requirements.

In *Shadow Wood*, this Court rejected the argument that recitations under NRS 116.31166 "renders such deeds unassailable," and held that "in an appropriate case," a court can overturn "a defective HOA lien foreclosure sale." *Id*. at 1107. The decision held that, as a matter of law, deed recitals under NRS 116.3116 cannot be conclusive as to the facts of whether statutory requirements were met. *Id*. at 1110-12. The foreclosure deed in *Shadow Wood* contained a recital word-for-

word identical to the recital in this case.[9] This Court rejected the appellants' argument that the recitals prevented any challenge to the foreclosure, for three reasons. First, there is "long-standing and broad inherent power of a court to sit in equity and quiet title, including setting aside a foreclosure sale if the circumstances support such action." 366 P.3d at 1112. Second, "the recitals made conclusive by operation of NRS 116.31166 implicate compliance only with the statutory prerequisites to foreclosure." *Id*. (emphasis added). Finally, this Court cited case law from other jurisdictions "under which equitable relief may still be available in the face of conclusive recitals, at least in cases involving fraud." *Id*. This led the Court to conclude that the mere fact that an HOA's foreclosure deed contains the "conclusive recitals" of NRS 116.31166 did not preclude a challenge to the HOA trustee's foreclosure. *Id*.

Even prior to *Shadow Wood*, the theory that deed recitals under NRS 116.31166 resolve all questions of statutory compliance was fatally flawed because it overlooked the requirements of NRS 116.31166(3), which extend beyond the matters recited in the trustee's deed. This ignores the axiom that no part of a statute should be construed to render another void. *See Harris Assocs.*, 119 Nev. at 642, 81 P.3d at 534; *accord, e.g.*, *Banegas v. State Indus. Ins. System*, 117 Nev. 222,

[9] *Compare Shadow Wood*, 366 P.3d at 1108-09, ("All requirements of law regarding the mailing of copies of notices and the posting and publication of the copies of the Notice of Sale have been complied with.") with (JA 216) (same).

229, 19 P.3d 245, 250 (2001) ("[S]tatutes must be construed to give meaning to all of their parts and language within the context of the purpose of the legislation."). Further, where statutory provisions may be viewed as conflicting, they must be harmonized. *See, e.g. Int'l Game Tech., Inc. v. Second Judicial Dist. Court ex rel. County of Washoe*, 124 Nev. 193, 201, 179 P.3d 556, 561 (2008); *Acklin v. McCarthy*, 96 Nev. 520, 523, 612 P.2d 219, 220 (1980).

In violation of these two maxims, the district court held that under NRS 116.31166(1-2), an HOA's compliance with the HOA Lien Statute rests solely on reciting compliance with the statute's notice provisions in a foreclosure deed. (JA 793). According to this theory, because the foreclosure deed in this case contains these recitations, SFR was entitled to summary judgment on its quiet title claim without producing any evidence of actual compliance with the HOA Lien Statute.

This theory would render NRS 116.31166(3) null. SFR argued that the recitals in the foreclosure deed are conclusive proof that the foreclosure extinguished BANA's Deed of Trust under NRS 116.31166(1-2). But that argument completely overlooks NRS 116.31166(3)'s requirement that the foreclosure sale be conducted *pursuant to NRS 116.31162, 116.31163, and 116.31164* to vest the purchaser at the HOA foreclosure sale with title to the Property. As this Court has explained, the Legislature's use of "pursuant to" means "in compliance with; in accordance with; under . . . [a]s authorized by; under . . .

[i]n carrying out." *In re Steven Daniel P.*, 309 P.3d 1041, 1044 (2013) (quoting BLACK'S LAW DICTIONARY at 1356 (9th ed. 2009)). Furthermore, "pursuant to" is a "restrictive term" that mandates compliance. *Id.*

Here, by using the phrase "pursuant to" in NRS 116.31166(3) with reference to NRS 116.31162, 116.31163 and 116.31164, the Nevada Legislature mandated compliance with those statutes. Consequently, an HOA's foreclosure sale does not vest title without equity or right of redemption unless the HOA actually complied with NRS 116.31162, NRS 116.31163, and NRS 116.31164, not just NRS 116.31166(1). The recitals, in this case, simply said:

> All requirements of law regarding the mailing of copies of notices and the posting and publication of the copies of the Notice of Sale have been complied with.

(JA 216). Missing from the foreclosure deed are recitations, for instance, that the HOA had mailed the homeowner a schedule of additional fees that could be charged, a proposed repayment plan, and notice of right to contest the past due obligation, as required by NRS 116.31162. Nor did the foreclosure deed recite that the HOA Trustee had complied with the procedures in NRS 116.31164(3) for post-sale matters.[10]

[10] BANA freely admits that it is logically impossible for the foreclosure deed to describe the HOA's compliance with the post-sale requirements of NRS 116.31164(3). This only further illustrates the absurdity of SFR's position that a conclusory recitation of compliance with "all requirements of law" in the

SFR's interpretation of NRS 116.31166 not only would write the notice requirements of NRS 116.31162, NRS 116.31163, and NRS 116.31164 out of existence, it also would lead to absurd and unjust results. According to SFR's logic, an HOA could fail to record any of the three notices the HOA Lien Statute requires, *falsely* recite that it did in fact record the notices, and the court would be forced to hold that the notices were recorded, *even if* the opposing party produced evidence proving the recitals were false. And there is no limiting principle to SFR's position; a dishonest HOA could collude with a dishonest purchaser to sell property without proper announcement to the current owner or other security holders and still take title to the property free and clear under the aegis of a false, yet "irrefutable" recitation. The Nevada Legislature could not have possibly intended such unjust consequences.

Therefore, SFR cannot be entitled to summary judgment on the basis of deed recitals in lieu of actual evidence of compliance. As the plaintiff in a quiet title action, SFR is required to establish the foreclosure's compliance with all legal requirements under NRS 116. The district court did not make findings on the compliance with all of the statutory requirements. Therefore, even if BANA were not entitled to summary judgment, the proper outcome would be remand to the district court, not summary judgment in SFR's favor.

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foreclosure deed could preclude any inquiry into the circumstances of that compliance.

B. The record suggests that the foreclosure sale did not comply with the statutory duty of good faith.

1. The HOA Trustee's rejection of BANA's check was done in bad faith.

As discussed in Sec. II.C, the HOA's decision (through its agent, HOA Trustee) reject BANA's check for the superpriority lien amount was made in bad faith. The HOA Lien Statute imposes an obligation of good faith in the "performance and enforcement" of "every duty governed by" the statute. NRS 116.1113. BANA's tender paid the full superpriority amount and did not impair the HOA's ability to foreclose on the subpriority portion of the lien and recover that amount. By capriciously choosing to reject BANA's superpriority tender and proceed with foreclosure, the HOA unnecessarily attempted to extinguish BANA's interest in the Property despite BANA's tender of the superpriority lien. At the very least, this conduct raises material questions of fact about whether the HOA failed to act in good faith, which would invalidate the foreclosure sale on which SFR's quiet title claim relies.

2. The facts of the auction and sale price raise an inference that the sale was not commercially reasonable.

Additional questions of fact exist surrounding the commercial reasonableness of the sale. The district court rejected BANA's argument that the sale was commercially unreasonable on the ground that "NRS 116 has no

requirement that sales be commercially reasonable." (JA 794). However, this Court recently overturned a ruling in an HOA lien foreclosure case because the district court failed to address a party's challenge to the commercial reasonableness of the sale. *Wells Fargo Bank, N.A., v. SFR Holdings, Inc.*, No. 67873, 2016 WL 3481164 at *2 (Nev. June 22, 2016) (unpublished). Although unpublished, this case weighs against the district court's belief that commercial reasonableness standards do not apply to HOA lien foreclosure sales.

The HOA Lien Statutes mandates HOA foreclosure sales be commercially reasonable when it states that "every contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement." NRS 116.1113. The drafters of the model law on which the HOA Lien Statute is based defined "good faith" in their comment as "observance of two standards: 'honesty in fact,' and observance of reasonable standards of fair dealing. While the term is not defined, [it is] derived from and used *in the same manner as* . . . Sections 2-103(i)(b) and 7-404 of the *Uniform Commercial Code."* UCIOA § 1-113 cmt. (1982) (emphasis added). Nevada's version of the UCC defines "good faith" as "honesty in fact and the observance of *reasonable commercial standards* of fair dealing." NRS 104.1201(2)(t).[11]

[11] As noted by this Court in *SFR Investments*, "[a]n official comment written by the drafters of a statute and available to the legislature before the statue is enacted has considerable weight as an aid to statutory construction." 334 P.3d at 413.

Similarly, courts in other states interpreting the same UCIOA provision at issue here, UCIOA 1-113, have held that the disposition of the collateral in these cases, real property, must be commercially reasonable. *See, e.g, Will v. Mill Condo. Owner's Ass'n*. 848 A.2d 336, 340 (Vt. 2004) ("Although the rules generally applicable to real estate mortgages do not impose a commercial reasonableness standard on foreclosures sales, the UCIOA does provide for this additional layer of protection."). The commercial reasonableness requirement is provided in the statutory text, was clearly intended by the statute's drafters, and has been recognized by other courts interpreting the same statutory provision at issue here. Therefore, the HOA's sale of the Property at issue was required to be commercially reasonable.

The district court also rejected BANA's challenge, stating that a sale could not be commercially unreasonable based on price alone. (JA 794). However, the record shows material questions of fact about the conduct of the sale beyond the price. Specifically, SFR's managing member Christopher Hardin has testified that SFR had a general policy during the period in question not to bid on a property if it learned that the lender had tendered the superpriority lien. *See* (JA 506-507). However, the record contains no testimony or other evidence that the HOA Trustee

disclosed any facts about BANA's tender to bidders at the foreclosure auction.[12] Additionally, BANA submitted an appraisal report by R. Scott Dugan, a licensed appraiser, which concluded that the house was worth $98,000 on February 20, 2013, the date of the auction. (JA 218-253). Based on this appraisal, the auction sale price was less than 22% of the Property's true value. Thus, there are remaining questions about the commercial reasonableness of the sale.

SFR did not carry its burden of proving that the sale was proper and commercially reasonable as a matter of law. Although price alone is not a sufficient ground to rule a sale invalid, the purchase price in this case is sufficiently low—less than 22% of the appraised value—to at least raise a material question of fact as to whether the sale was commercially unreasonable, especially when coupled with the fact that BANA's tender was never disclosed to bidders. SFR was required to prove that the sale was commercially reasonable in order to be entitled to summary judgment. Material facts exist surrounding both the decision to reject BANA's tender and the conduct of the sale, and so summary judgment in SFR's favor was improper.

[12] Additionally, there is no evidence that SFR inquired into whether BANA had made or attempted tender of the superpriority lien.

C. The bona fide purchaser doctrine was not a proper basis for the district court to grant summary judgment.

The district court also erred when it summarily concluded that SFR was a bona fide purchaser. The bona fide purchaser doctrine is an affirmative defense, and so the party claiming the defense—in this case, SFR—bears the burden of proof. *W. Charleston Lofts I, LLC v. R & O Const. Co*., 915 F. Supp. 2d 1191, 1195 (D. Nev. 2013) (citing *Berge v. Fredericks*, 591 P.2d 246, 247-48 (Nev. 1979)). The district court's order misconstrues the bona fide purchaser defense as applying to SFR as long as SFR lacked actual knowledge of BANA's tender of payment. (JA 791) ("there is no evidence to suggest SFR had actual knowledge of BANA's attempt to pay a portion . . ."). This overlooks at least two ways by which the defense was defeated in this case.

First, a party qualifies as a bona fide purchaser only if it lacked notice of any "competing or superior interest in the same property." *Berge*, 591 P.2d at 247. BANA's recorded deed of trust was, at the very least, a "competing" interest, even if it had not qualified as "superior" in light of BANA's tender. In a recent decision, this Court confirmed that notice of a deed of trust is sufficient to defeat bona fide purchaser status. *Telegraph Rd. Trust v. Bank of America, N.A.*, No. 67787, 2016 WL 5400134 (Nev. Sep. 16, 2016) (unpublished) (affirming district court decision that rejected the bona fide purchaser defense because the purchaser was on inquiry notice of a deed of trust). Therefore, the district court committed a clear mistake of

law in concluding, "that SFR had record notice of the First Deed of Trust does not defeat its [bona fide purchaser] status." (JA 791).

Furthermore, SFR has not proven that it lacked record notice of BANA's tender of the superpriority lien. NRS 111.180 defines the bona fide purchaser defense as requiring that the purchaser lack not only actual knowledge, but also "constructive notice of, or reasonable cause to know that there exists a defect in, or adverse rights, title or interest, the real property." The corollary to this principle is that a "duty of inquiry" exists

> when the circumstances are such that a purchaser is in possession of facts which would lead a reasonable man in his position to make an investigation that would advise him of the existence of **prior unrecorded rights**. He is said to have constructive notice of their existence whether he does or does not make the investigation. The authorities are unanimous in holding that he has notice of whatever the search would disclose.

Berge, 591 P.2d at 249 (emphasis added). If the purchaser is under a duty of inquiry, there is a presumption of notice that can be rebutted by "showing that he made due investigation without discovering the prior right or title he was bound to investigate." *Id*. Furthermore, "reliance upon a vendor, or similar person with reason to conceal a prior grantee's interest, does not constitute 'adequate inquiry' for purposes of rebutting the presumption of notice." *Id.* at 249-50.

Thus, SFR's record notice of the first deed of trust not only directly defeats bona fide purchaser status, it also created a duty to inquire into the status of

BANA's interest. Despite having notice of the recorded deed, SFR has not alleged, and the record does not evidence, that it made any inquiry into whether BANA had attempted to pay the superpriority lien. It is SFR's burden to show that it performed due investigation into BANA's interest in the Property without learning of Bank of America's tender.

Relatedly, according to testimony from Christopher Hardin (SFR's managing member), beginning in December of 2012, SFR kept its HOA foreclosure auction purchases "as small as possible [it] knew [it] needed to expend a bunch of money in litigation" when it purchased properties at HOA foreclosure auctions. (JA 840:12-21; JA 842:5-11). Hardin also testified that SFR owned over 600 properties. (JA 834:12-14). Despite being a sophisticated, experienced investment entity, SFR apparently decided to forego even the slightest inquiry into the facts surrounding BANA's interest in the Property, preferring instead to buy the Property at a deep discount and accept as a business risk the chance that BANA's first deed of trust could still encumber the Property.

Thus, for two clear reasons—SFR's record notice of the deed of trust and its failure to fulfill its duty of inquiry into the status of Bank of America's interest—the district court erred in finding SFR to be a bona fide purchaser.

***

The district court's decision to grant summary judgment to SFR was erroneous. BANA has given two arguments for why this Court should order summary judgment in BANA's favor on all the claims in this case. In the alternative, however, BANA requests that this Court overturn the summary judgment in SFR's favor and remand the case to the district court for further factual development on the HOA's compliance with the requirements of NRS 116, the commercial reasonableness of the sale, and SFR's status (or lack thereof) as a bona fide purchaser.

CONCLUSION

For all of the above reasons, the district court's judgment should be reversed, and summary judgment awarded instead to BANA on all claims in this case. In the alternative, the district court's judgment should be vacated and the case remanded for further proceedings.

DATED this 7th day of October, 2016.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this opening 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 opening 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 11,562 words.

FINALLY, I CERTIFY that I have read this **Appellant's Opening Brief**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this answering 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 7th day of October, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on the 7th day of October, 2016, I caused to be served a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF**, in the following manner:

(UNITED STATES MAIL) By depositing a copy of the above-referenced document for mailing in the United States Mail, first-class postage prepaid, at Las Vegas, Nevada, to the parties listed below at their last-known mailing addresses, on the date above written:

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