IN THE SUPREME COURT OF THE STATE OF NEVADA

CARRINGTON MORTGAGE HOLDINGS, LLC, Appellant, v. R VENTURES VIII, LLC, A NEVADA SERIES LIMITED LIABILITY COMPANY OF THE CONTAINER R VENTURES, LLC UNDER NRS 86.296, Respondent.

Supreme Court Case No. 70545

District Court Case No. A684151

APPEAL

From the Eighth Judicial District Court
The Honorable ELISSA CADISH, District Judge
District Court Case No. A-13-684151-C

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTRODUCTION

Appellant Carrington Mortgage Holdings, LLC (**Carrington**) requests this Court reverse a district court order granting summary judgment in favor of R Ventures VIII, LLC (**R Ventures**). R Ventures claims that its purchase of the property at an HOA foreclosure sale for $10,100.00 (just 6% of the undisputed fair market value) extinguished a $189,573.00 deed of trust held by Carrington.

First, the district court's decision should be reversed because Carrington's predecessor tendered payment for nine months of HOA assessments prior to the HOA foreclosure sale, thereby extinguishing the super-priority portion of the HOA's lien.

Second, prior to the HOA sale, the HOA impermissibly split its lien from the right to proceeds, in derogation of case law from this Court and its own CC&Rs.

Third, NRS 116 is preempted in this case by the Supremacy Clause of the United States Constitution because of its conflict with federal mortgage insurance programs.

Fourth, the district court's finding that the recitations in the deed of foreclosure sale were "conclusive proof" that all legal requirements had been satisfied has been flatly rejected by this Court.

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Fifth, the district court erred by granting summary judgment without addressing material questions of fact on the issue of commercial reasonableness. This Court has recently overturned district court rulings for failing to address the issue of commercial reasonableness when it was at issue. *Wells Fargo Bank, N.A., v. Premier One Holdings, Inc.*, No. 67873, 2016 WL 3481164 at *2 (Nev. June 22, 2016) (unpublished); *Nationstar Mortgage LLC v. Messina*, No. 68603 (Nev. Dec. 2, 2016) (unpublished). The district court here failed to address the commercial reasonableness of the sale. Thus, at the very least, this case should be remanded for further proceedings..

This Court should also reverse the summary judgment because, prior to amendment in 2015, the provisions of NRS 116 governing foreclosures on HOA liens (the **HOA Lien Statute**) violated the due process clauses of the Nevada Constitution and the U.S. Constitution. The statute provides for a non-contractual, non-judicial foreclosure without ensuring notice to senior lien holders.[1]

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[1] For the reasons stated in the Ninth Circuit's decision in *Bourne Valley v. Wells Fargo Bank, N.A.*, 832 F.3d 1154 (9th Cir. 2016) and its Opening Brief, Carrington maintains that the HOA Lien Statute violates the Due Process Clause. Carrington recognizes the Nevada Supreme Court rejected this argument in *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage*, 133 Nev. Adv. Op. 5 (Nev. Jan. 26, 2017), and does not re-argue it below. However, Carrington preserves the issue in the event this result is changed by a future decision from this Court or the U.S. Supreme Court.

ARGUMENT

I. Bank of America's Tender Discharged the Super-Priority Lien

This Court should reverse the district court's grant of summary judgment because Bank of America, as prior deed of trust beneficiary, tendered payment to the HOA for the super-priority lien that gave rise to R Ventures' interest in the property. The HOA's bad faith rejection of that tender does not blunt its impact on the subordinate title the HOA passed to R Ventures.

In response, R Ventures makes two arguments: (1) that the tender was fatally conditional (Ans. Br. 6-8); and (2) that the tender was irrelevant because R Ventures took its interest without actual notice of the tender (Ans. Br. 8-10). Neither argument supports the district court's erroneous ruling.

A. The district court erred when it held that Bank of America made a "conditional offer" of payment

The district court erred when it held that Bank of America's tender was "conditional" because it premised payment upon the condition that the remainder of the HOA's lien was extinguished. Bank of America's tender was remitted to satisfy the nine months of delinquent assessments the HOA was entitled to collect from the beneficiary of the senior deed of trust. Bank of America was entitled to demand that its payment be applied to satisfy the super-priority portion of the lien. *See Fresk v. Kramer*, 99 P.3d 282, 286-87 (Or. 2004) (holding conditions to which the tendering party is entitled may be attached to a proper tender).

The Miles Bauer communications did not set forth an improper condition of the payment, but instead merely confirmed that the payment was sufficient to satisfy the super-priority portion of the lien, thus negating any claim that the deed of trust would be extinguished. There was no tender of an amount less than owed which required a release of claims. The tender was intended to pay off the nine months of assessments constituting the super-priority lien. Here, Bank of America did not just *offer to pay* the super-priority lien—which would have been sufficient tender—it also *sent payment* in excess of the maximum amount of the super-priority lien. The facts of this case establish that the tender was sufficient.

B. R Ventures' notice arguments do not affect the validity of Bank of America's tender

Bank of America offered to pay a sum equivalent to "the nine months of assessments for common expenses" in order to "fully discharge its obligations to the HOA." (J.A. at 410.) The HOA's agent, Red Rock, responded to Bank of America's offer requesting that value with a statement of account that included a precise amount of monthly master assessments of $62.00 and assessments of $8.00, along with other amounts unrelated to the super-priority lien. (*Id.* at 412-23.) Bank of America then tendered $655.14 to Red Rock—an amount in excess of the nine months of assessments—which was rejected. (*Id.* at 435-37.)

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As a matter of law, Red Rock, by its actions on behalf of the HOA, extinguished and discharged the super-priority portion of the lien. The HOA had no rights to pass along to R Ventures. *See Stone Hollow Avenue Trust v. Bank of America, N.A.*, No. 64955, 2016 WL 4543202 (Nev. Aug. 11, 2016) ("When rejection of a tender is unjustified, the tender is effective to discharge the lien."). R Ventures now posits that because it lacked direct notice of the tender, it took free of the tender's effects. (Ans. Br. 8-10). No authority supports this contention.

Even so, R Ventures cannot claim to be a bona fide purchaser under the facts of this case, which would be its burden under the law. *W. Charleston Lofts I, LLC v. R & O Const. Co.*, 915 F. Supp. 2d 1191, 1195 (D. Nev. 2013). NRS 111.180 defines the bona fide purchaser defense as requiring the purchaser to 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." R Ventures cannot possibly meet this standard because it was certainly on notice of Carrington's deed of trust. *See Telegraph Rd. Trust v. Bank of Am., N.A.*, No. 67787, 2016 WL 5400134 (Nev. Sep. 16, 2016) (unpublished) (affirming district court decision rejecting bona fide purchaser defense because the purchaser was on inquiry notice of a deed of trust). It also had a duty to further inquire given the exceedingly low price R Ventures paid for its interest.

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Bank of America's tender was not conditional—it discharged the super-priority portion of the HOA's lien, meaning such rights never transferred to R Ventures. But, even if there was no discharge, R Ventures cannot claim to be a bona fide purchaser under the facts of this case. At minimum, the summary judgment in their favor should be overturned to resolve the surrounding fact issues.

II. The Foreclosure was Invalid based on the Tri-Party Agreement

A. The HOA's Payment Right was Split from the Lien Prior to the HOA Foreclosure

In order to pursue a non-judicial foreclosure in Nevada, the foreclosing party must possess both the right to payment and the lien securing repayment. *Edelstein v. Bank of New York Mellon*, 286 P.3d 249, 258 (Nev. 2012). Here, First 100 purchased the payment rights under the HOA's lien prior to the foreclosure sale. (J.A. at 359-75.) The lien itself remained the property of the HOA, and was never assigned. The foreclosure was completed by the HOA. But, the HOA lacked standing to foreclose because it no longer possessed the payment rights under the lien at the time of the sale. Accordingly, as a matter of law, the district court erred in granting R Ventures' motion for summary judgment because the HOA foreclosure sale was invalid.

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B. The Tri-Party Agreement Violated NRS 116.3102(p) and the CC&Rs

A homeowners' association may "assign its right to future income, including the right to receive assessments for common expenses, but only to the extent the declaration expressly so provides." NRS 116.3102(p). This means that a homeowners' association's power to enter into a tri-party agreement like the one in this case is dependent upon **express** authorization from the homeowners' association's CC&Rs.

The CC&Rs here do not grant the HOA that power. R Ventures concedes the point as they can point only to a generalized provision addressing contractual authority, which they claim **implies** the right to enter into a tri-party agreement. (Ans. Br. 12). This is insufficient under NRS 116.3102. The CC&Rs expressly provide for the right to charge assessments, when they are due, parties to receive notice of a delinquency, and the powers of the association to foreclose. (*See generally* J.A. at 443-526.) But, there is no provision that would permit the HOA to enter a tri-party agreement, in violation of *Edelstein*, to sell its accounts receivable pertaining to overdue assessments.

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III. NRS 116 is Preempted by the Supremacy Clause

The district court erred when it held that NRS 116 was not preempted by the Supremacy Clause of the U.S. Constitution. As discussed in Carrington's opening brief, Nevada district courts have concluded that the HOA Lien Statute is preempted by federal law on two related but distinct grounds. In *Washington & Sandhill*, the court held that "[b]ecause a homeowners association's foreclosure under Nevada Revised Statute § 116.3116 on a Property with a mortgage insured under the FHA insurance program would have the effect of limiting the effectiveness of the remedies available to the United States, the Supremacy Clause bars such foreclosure sales." 2014 WL 4798565, at *7. Similarly, a second decision held that "[a]llowing an HOA foreclosure to wipe out a first deed of trust on a federally-insured property . . . interferes with the purposes of the FHA insurance program." *Saticoy Bay LLC v. SRMOF II 2012-1 Trust*, 2015 WL 1990076, at *4 (D. Nev. Apr. 30, 2015) (noting that "courts consistently apply federal law, ignoring conflicting state law, in determining rights related to federally-insured loans"). Because the deed of trust was federally insured, the court held that "the homeowners' association sale in the instant case is void." *Id.* at *5.

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Carrington explained how the HOA Lien Statute frustrates the FHA's foreclosure-avoidance efforts in section V.B. of its opening brief. R Ventures offers an off-base response, arguing that loan priority is determined by state law (Ans. Br. 13) and that HUD will not suffer a financial loss. (*Id*. at 15.) . This is not a proper preemption analysis. Preemption "occurs when the state law 'frustrates the purpose of the national legislation, or impairs the efficiencies of [the] agencies of the Federal government to discharge the duties for the performance of which they were created.'" *Munoz v. Branch Banking & Trust Co.*, 131 Nev. Adv. Rep. 23, 348 P.3d 689, 691 (Apr. 30, 2015). Carrington's position does not quarrel with the relative lien positions of the competing interest holders; rather, it is showing that the state law "frustrates the purposes of the national legislation." *Id*.

In other words, R Ventures ignores Carrington's demonstrations of how HUD regulations are intended to prevent foreclosures and keep at-risk borrowers in their homes, and how the HOA Lien Statute interferes with those purposes by allowing HOAs to foreclose on borrowers without following the set of procedures mandated by HUD. The fast-track foreclosure process under Nevada law frustrates the FHA's foreclosure-avoidance efforts. R Ventures has not even attempted to dispute this fact.

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IV. The Foreclosure Deed recitals are irrelevant.

This Court recently made clear that the "conclusive" deed recitals found in HOA foreclosure deeds do not bar mortgagees or homeowners from challenging the validity of an HOA foreclosure sale. *Shadow Wood Homeowners Ass'n, Inc. v. N.Y Community Bancorp, Inc.*, 366 P.3d 1105, 1111 (Nev. 2016). In response, R Ventures claims that Carrington "does not appear to challenge [the foreclosure deed's] assertions as untrue." (Ans. Br. 17-18.) This argument is belied by the record. As described below and in Carrington's opening brief, Carrington has presented evidence of a grossly inadequate price in addition to additional unfairness in the conduct of the sale—especially the unjust rejection of Bank of America's proper and sufficient tender.

The district court's judgment is based on a proposition already considered and rejected in *Shadow Wood*, where this Court made clear that foreclosure deed recitals are irrelevant to commercial reasonableness, the same avenue through which Carrington argues its Deed of Trust survived the HOA sale here. It did. The district court's judgment should be reversed.

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V. The District Court Erred by Granting Summary Judgment despite Material Questions of Fact Surrounding the Commercial Reasonableness of the HOA's Foreclosure

The district court erred by granting summary judgment despite evidence establishing material questions of fact as to whether the HOA's foreclosure was commercially reasonable. HOA foreclosure sales can be set aside as commercially unreasonable, and such sales must be set aside if the sale fetched an inadequate price and there is evidence of "fraud, unfairness, or oppression." *Shadow Wood*, 366 P.3d at 1114.

A. Gross inadequacy of sale price alone compels reversal.

To be clear, Carrington does not read *Shadow Wood* as establishing a bright-line rule that all foreclosure sales for less than 20% of fair market value are per se commercially unreasonable. Instead, Carrington urges this Court to adopt the Restatement approach, and reverse based on the gross inadequacy standard.

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Gross inadequacy **should** operate to satisfy the additional proof of unfairness required to set aside a foreclosure sale under the "price-plus" analysis espoused by *Long v. Towne*, 639 P.2d 528, 530 (Nev. 1982) ("mere inadequacy of price is not sufficient to justify setting aside a foreclosure sale, absent a showing of fraud, unfairness, or oppression."). Here, the HOA sold the property for $10,100.00—approximately 6% of its fair market value. Therefore, the HOA foreclosure 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).

In this case, the HOA sale transferred significant wealth from the homeowner (Ms. Pierce) and the lender that facilitated her ownership into the pockets of a speculator for an exceedingly low price. *See In re Krohn*, 203 Ariz. 205, 212, 52 P.3d 774, 779 (Ariz. 2002) ("Windfall profits, like those reaped by bidders paying grossly inadequate prices at foreclosure sales, do not serve the public interest and do no more than legally enrich speculators."). As the Restatement's drafters, the Arizona Supreme Court, and the *Shadow Wood* court urge, this Court should not offer judicial approval to such results and reverse.

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B. Additional unfairness/oppression factors are satisfied here.

Carrington does not dispute that *Shadow Wood* technically requires a "conjunctive test" where the inadequacy of the sale price must be coupled with additional factors suggesting "'fraud, unfairness, or oppression'" before the sale can be overturned. *Bank of NY Mellon Trust Co. v. Jentz*, No. 2:15-cv-01167-RCJ-CWH, 2016 WL 4487841 (D. Nev., Aug. 24, 2016) (quoting *Shadow Wood,* 366 P.3d at 1109-12). Even so, the requisite additional defects are evident and the district court's summary judgment cannot stand.

First, these additional factors are not an onerous burden—a court may invalidate upon a showing of **any slight defect** in the sale. *See Ballentyne v. Smith*, 205 U.S. 285, 290 (1907) ("if there be great inadequacy, slight circumstances of unfairness in the conduct of the party benefited by the sale will be sufficient to justify setting it aside").

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Red Rock's decision to refuse Bank of America's super-priority tender and instead purport to sell the property for a small fraction of the senior deed of trust shows bad faith. The HOA's decision is the antithesis of the "reasonable standards of fair dealing" required by NRS 116. Its failure to even argue a legitimate claim to more than the $655.14 tendered by Bank of America only confirms the bad faith animating the refusal and foreclosure. *Shadow Wood* affirmed that district courts must consider these equities when addressing HOA foreclosure sales. *Id. at* 1110-12. And here, where the quality of R Ventures' title is only as good as the HOA's lien and the process it used to foreclose on that lien, unanswered questions regarding the HOA's demands and its refusal of tender make summary judgment improper—either under or the Restatement approach, the two-part "price-plus" analysis embraced by current Nevada law, or the "totality of the circumstances" test utilized in *Levers*, 93 Nev. at 98, 560 P.2d at 919-20. Allowing the sale to stand yields the wrong result.

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CONCLUSION

For all of the above reasons, this Court should reverse the district court's judgment.

DATED this 16th day of February, 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 3733 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.

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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 16th day of February, 2017.

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CERTIFICATE OF SERVICE

In accordance with N.R.A.P. 25, I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on this 16th day of February, 2017, I caused to be served a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** via this Court's Electronic Filing System to the following:

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