IN THE SUPREME COURT OF THE STATE OF NEVADA

WELLS FARGO BANK, N.A., AS TRUSTEE ON BEHALF OF THE NEW HOLDERS OF THE HARBORVIEW MORTGAGE LOAN TRUST MORTGAGE LOAN PASS-THROUGH CERTIFICATES, SERIES 2006-12, Appellant, vs. TIM RADECKI, Respondent.	CASE NO. 71405

RESPONDENT'S ANSWERING BRIEF

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

JOHN HENRY WRIGHT, ESQ.
Nevada Bar No. 6182
THE WRIGHT LAW GROUP, P.C.
2340 Paseo Del Prado, Suite D-305
Las Vegas, NV 89102
Telephone: (702) 405-0001
Facsimile: (702) 405-8454
Email: john@wrightlawgroupnv.com
Attorney for Respondent

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and/or entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusals.

1. Attorney John Henry Wright, Esq. Respondent TIM RADECKI is an individual, and there are no stocks or other interests at issue.

2. The undersigned counsel is the only counsel expected to appear in this Court on behalf of Respondent;

3. The Respondent is not using a pseudonym.

DATED this 21st day of November, 2017.

/s/ John Henry Wright
JOHN HENRY WRIGHT, ESQ.
Nevada Bar No. 6182
THE WRIGHT LAW GROUP, P.C.
2340 Paseo Del Prado, Suite D-305
Las Vegas, NV 89102
Telephone: (702) 405-0001
Facsimile: (702) 405-8454
Email: john@wrightlawgroupnv.com
Attorney for Respondent

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

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The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER:

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

I. ARGUMENT

A. The District Court did not Err in Denying Wells Fargo's Challenge to the Validity of the HOA sale under *Shadow Wood*

1. *Commercial Reasonableness*

Wells Fargo first argues that the foreclosure sale was not commercially reasonable. For all the following reasons, all of Wells Fargo's commercial reasonableness arguments fail because any claim that there is a requirement of commercial reasonableness completely ignores the statutory language contained in NRS 116.31164(2) addressing the price at which the property can be sold at foreclosure; and such an argument would necessarily be based on misinterpreted case law.

a. *NRS 116.3116 Does Not Require Commercial Reasonableness*

As a threshold matter, Radecki points out that the *Shadow Wood* [1] opinion does not set out a commercial unreasonableness standard. In fact, the term "commercially unreasonable" only appears one time in the entire opinion, and even then it is only stated as a recitation of NYCB's allegations. The *Shadow Wood* opinion does not articulate commercial reasonableness in the way that Wells Fargo, and many other banks allege. Instead, Wells Fargo merely imagines that *Shadow Wood* set out a commercial reasonableness standard because the opinion makes reference to "twenty

[1] 366 P.3d 1105 (Nev. 2016).

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

percent". Wells Fargo takes this reference to "twenty percent" out of context and advances its commercial reasonableness arguments based on the erroneous belief that *Shadow Wood* requires the association at a non-judicial foreclosure sale to sell the property at a value on par with either the balance of the note (this has never been supported by law), or the appraisal value of similar properties sold on the open market, i.e., the "fair market value." However, as shown below, this Court's opinion in *Shadow Wood* did not adopt any such standard, and any argument suggesting otherwise is nothing more than an effort to distract this Court from the obvious fact that the foreclosure statutes do not require "fair market value" or any other "commercially reasonable" price. NRS 116.31164(2) provides:

> **NRS 116.31164 Foreclosure of liens: Procedure for conducting sale; purchase of unit by association; execution and delivery of deed; use of proceeds of sale.**
>
> * * *
>
> 2. On the day of sale originally advertised or to which the sale is postponed, at the time and place specified in the notice of postponement, the person conducting the sale may sell the unit at public auction to the highest cash bidder. Unless otherwise provided in the declaration or by agreement, the association may purchase the unit and hold, lease, mortgage or convey it. The association may purchase by a credit bid up to the amount of the unpaid assessments and any permitted costs, fees and expenses incident to the enforcement of its lien.

(Emphasis added).

Clearly, there is no statutory requirement that the foreclosure result in a price that is any greater than the amount bid by Radecki, the "*highest cash bidder*" at the

auction for the amount of $4,000.00. If there were, the legislature would not have stated that the unit could be sold to the highest cash bidder, nor would the legislature have allowed for an Association to acquire the unit by way of a *credit bid* in the amount of its lien. In this case, the lien amount identified on the Notice of Sale totaled $3,062.83, which represents an acceptable sale price under NRS 116.31164(2). Radecki purchased the property for $4,000.00. This is $937.17 more than the minimum sale price.

In *Pro-Max Corp. v. Feenstra*, this Court held that when interpreting a statute:

> Where the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.

117 Nev. 90, 95, 16 P.3d 1074, 1077 (2001) (citing *Erwin v. State of Nevada*, 111 Nev. 1535, 1538-39, 908 P.2d 1367, 1369 (1995)).

NRS §116.31164 and §116.31166 are clear and unambiguous. Neither contain a requirement that the sale be "commercially reasonable" nor that the purchaser at the sale satisfy the requirements of a "bona fide purchaser." There is neither a twenty percent minimum threshold nor a "fair market value" requirement.

The court cannot add to the statute a requirement that the legislature did not provide for. The fact that the statute provides for the sale to the highest cash bidder or allows for a credit bid in the amount of the lien defeats any argument that the

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

property must be sold at a fair market value of a traditional sale, or for an amount equal to the outstanding balance on the note, or for an amount equal to an appraisal conducted by the bank. All that is required is that the sale comply with the statute.

For the court to determine that the sales price must be greater than 20%, or any other percentage of some arbitrary value would render the statutory language allowing for a credit bid or sale to the highest cash bidder meaningless; and no provision of a statute should be made into mere surplusage as a result of statutory interpretation if such a result can be avoided. *Eggleston v. Costello (In re Estate of Thomas)*, 116 Nev. 492, 495 (2000) (citing *Paramount Ins. v. Rayson & Smitley,* 86 Nev. 644, 649, 472 P.2d 530, 533 (1970)). It is well settled that Courts seek to avoid construing statutes such that the plain language is rendered meaningless. *Id.* (citing *Bd. of County Comm'rs v. CMC of Nevada*, 99 Nev. 739, 744, 670 P.2d 102, 105 (1983)). Therefore, any argument regarding the fair market price of the property, or any expert opinions and appraisal reports are themselves meaningless. Compliance with the statute satisfies commercial reasonableness. *BFP v. Resolution Trust*, 511 U.S. 531 (1994). In *BFP*, when addressing the issue of what a reasonable value of a foreclosed property is the United States Supreme Court stated as follows:

> We deem, as the law has always deemed that a fair and proper price, or a "reasonably equivalent value" for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with.

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

* * *

> ... the fact that a piece of property is legally subject to forced sale, like any other fact bearing upon the property's use or alienability, necessarily affects its worth. Unlike most other legal restrictions, however, foreclosure has the effect of completely redefining the market in which the property is offered for sale; normal free-market rules of exchange are replaced by the far more restrictive rules governing forced sales. Given this altered reality, and the concomitant inutility of the normal tool for determining what a property is worth (fair market value), the only legitimate evidence of the property's value at the time it is sold is the foreclosure-sale price itself.

511 U.S. at 545-549.

Here, all of Nevada's foreclosure laws, NRS 116.31162 through NRS 116.31168, have been complied with, and actual notice was given to Wells Fargo, who failed to take any measures to protect its security interest. The property was sold to Radecki for a bid in the amount of $4,000.00, which is in compliance with NRS 116.31164(2). Thus, as a matter of law, the price paid at the foreclosure auction is the best evidence of the fair and proper, or in this context the "best", price for the property.

ii. *Even if Commercial Reasonableness were Required, Wells Fargo Cannot Establish the Requisite Evidence of Fraud, Unfairness or Oppression that Causes the "low price."*

Although there is no commercial reasonableness requirement, Wells Fargo spends the better part of fifteen pages arguing that the sale price was inadequate and that the foreclosure process was unfair. Accordingly, Radecki is obliged to respond, even though, as demonstrated above, there is no set minimum price or commercial

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

reasonable requirement at issue. No matter how much Wells Fargo says otherwise, the sales price is not the driving force in any commercial reasonableness analysis. Although it is misplaced here, assuming arguendo that commercial reasonableness were applicable, Wells Fargo still misses the mark because Wells Fargo fails to show how fraud, oppression, or unfairness resulted in a "low price."

In deciding *Shadow Wood*, this Court referred to its prior holding in *Golden v. Tomiyasu*, 79 Nev. 503, 504, 387 P.2d 989 (1963). *Golden* affirmed that there must be an element of fraud or unfairness, which is the proximate cause of the grossly inadequate price, before the sale would be set aside. Therefore, there should be no doubt that a party requesting that a foreclosure sale be set aside, must demonstrate fraud, unfairness, or oppression. A party must present some evidence of fraud, unfairness, or oppression in order to set aside a foreclosure sale. Inadequate price alone is never sufficient. This Court specifically adopted the California rule, and stated:

> 'However, even assuming the price was inadequate, that fact standing alone would not justify setting aside the trustee's sale. 'In California, it is not in itself a sufficient ground for setting aside a trustee's sale legally made; there must be in addition proof of some element of fraud, unfairness, or oppression as accounts for an brings about the inadequacy of price.''
>
> * * *
>
> We think there can be no doubt under the authorities that where, in addition to gross inadequacy of price, the purchaser has, in the language

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

> of the United States Supreme Court, 'been guilty of any unfairness or has taken any undue advantage, resulting in such gross inadequacy and consequent injury to the owner of the property, he will be deemed guilty of fraud warranting the interposition of a court of equity in favor or the owner who is himself without fault.'

387 P.2d at 996 (citing *Odell v. Cox,* 151 Cal. 70, 90 P. 194 (1907)).

Thus, *Golden* clearly established that there must be an element of fraud, oppression, or unfairness, on the part of the purchaser, which is the proximate cause of a grossly inadequate price, before the sale would be set aside.

This Court has also made it abundantly clear that its holding in *Golden* does in fact apply to HOA foreclosure cases. In *Shadow Wood* , this Court rejected New York Community Bancorp's commercial reasonableness arguments based on grossly inadequate price, stating that the bank must show evidence of fraud unfairness, or oppression:

> ... If true, this interpretation would also call into question this court's statement in *Long v. Towne*, that a common-interest community association's nonjudicial foreclosure sale may be set aside, just as a power of sale foreclosure sale may be set aside, upon a showing of grossly inadequate price plus "fraud, unfairness, or oppression." *98 Nev. at 13, 639 P.2d at 530* (citing *Golden v. Tomiyasu, 79 Nev. 503, 514, 387 P.2d 989, 995 (1963)* (stating that, while a power-of-sale foreclosure may not be set aside for mere inadequacy of price, it may be if the price is grossly inadequate and there is "in addition proof of some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price."
>
> * * *
>
> As discussed above, demonstrating that an association sold a property at its foreclosure sale for an inadequate price is not enough to set aside

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

> that sale; there must also be a showing of fraud, unfairness, or oppression. *Long*, 98 Nev. At 13, 639 P.2d at 530.

366 P.3d at 1110, 1112 (emphasis added).

Based on all the foregoing, it without question that Nevada law requires Wells Fargo to present evidence of fraud, unfairness or oppression, which brings about a low sales price. Thus, the threshold question is whether or not Wells Fargo can present any evidence that there was fraudulent or oppressive conduct on the part of Radecki that resulted in the low sales price. The answer to this threshold question is an emphatic NO! The undisputed evidence in this case is that Radecki attended a publicly noticed auction and was the successful bidder on the property by way of a cash bid in the amount of $4,000. That is all.

iii. Wells Fargo did not Meet the Initial Requirement of Presenting Evidence of Fraud, Unfairness or Oppression:

In addition to the fact that NRS 116.31164(2) does not even require the property to be sold for any amount greater than the association's lien, the above referenced case law establishes that any claim of inadequate price must be coupled with evidence of misconduct on the part of Radecki. In this case, there is neither any evidence nor any allegations of fraud or conspiracy on the part of Radecki. Wells Fargo is required to set forth all the circumstances constituting fraud on the part of Radecki. Wells Fargo has never even alleged, let alone substantiated, fraud on the

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

part of Radecki. There simply is no evidence of misconduct on the part of Radecki. Therefore, commercial reasonableness is not a factor in this case.

B. The Conduct of Cambridge and NAS did not Constitute Unfairness, Oppression, or Cause the "low" Price.

In its second argument, Wells Fargo continues to rely on Restatement § 8.3, which as explained above, has not been adopted by this Court. Restatement § 8.3 is not the law of our state. Wells Fargo goes to great lengths to explain how NAS rushed Cambridge to proceed with a nonjudicial foreclose on the property prior to a hearing on Wells Fargo's pending Motion for Summary Judgment. Wells Fargo also asserts a lengthy argument claiming that NAS aggressively encouraged Cambridge to move forward with the foreclosure because NAS was attempting to recover its fees and costs. In making this argument, Wells Fargo entirely misses this point: even if such assertions were true, Wells Fargo's issue is with NAS or Cambridge, not against Radecki. Wells Fargo is asking this Court to apply the Restatement (which is not the law in Nevada), and to also say that alleged misconduct on the part of NAS constitutes misconduct by Radecki, or that he had knowledge of the same. This is illogical and without merit. Even if NAS was working in bad faith, that does not, as mentioned above, satisfy Wells Fargo's obligation to show any misconduct on the part of Radecki. Moreover, even if Wells Fargo can demonstrate misconduct on the part of NAS, Wells Fargo still fails to demonstrate how NAS's decision to move

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

forward with a nonjudicial foreclosure caused the low price. Wells Fargo also fails to cite to any law or authority that required NAS and Cambridge to wait until the judicial process was complete before moving forward with a nonjudicial foreclosure.[2] Wells Fargo also fails to cite any authority that required NAS to exceed statutory publication requirements and attempt to attract even more bidders or sell the property for its fair market value. In fact, as explained above, the law in Nevada does not require the property to be sold for any sort of arbitrary percentage or "fair market value." As much as Wells Fargo talks about NAS wanting to collect its fees and costs, Wells Fargo still fails to explain how Radecki's purchase of the property at auction was anything other than proper. Wells Fargo spends pages of its brief talking about the conduct of NAS and Cambridge, and be that as it may, Wells Fargo completely ignores the fact that Radecki merely showed up at a properly noticed foreclosure sale, bid the amount of $4,000.00, and when no one else offered a higher bid, Radecki

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

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[2] Wells Fargo also fails to explain how waiting until after the hearing on a Motion for Summary Judgment would have somehow made a difference. A Motion for Summary Judgment is not a sale of the property, nor is it necessarily the end of the litigation. Even if summary judgment had been granted, the judgment would no doubt have been subject to appeal. So, how long was Cambridge and NAS suppose to wait? Until the Motion for Summary Judgment was heard? Until the appeal was filed? Or until the appeal was decided? The Motion for Summary Judgment would not create the finality that Wells Fargo is suggesting. A decision on the Motion for Summary Judgment would not have sold the property, nor would it have satisfied the past due assessments. Notwithstanding the pending Motion for Summary Judgment, the assessment were past due, and Cambridge was within its right to move forward with a non-judicial foreclosure.

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

became the successful bidder. Even if Wells Fargo can make out a claim against NAS or Cambridge, this appeal is not the proper place to assert it.

Simply stated, Wells Fargo attempts to mislead this Court by framing its entire discussion in the context of Restatement § 8.3 because under the Restatement, even a slight irregularity can void the sale. But, the Restatement is not the law of Nevada. Under our current law, Wells Fargo needed to show fraud, oppression, or unfairness that connects Radecki as an innocent third-party buyer to the "low price." Said differently, Wells Fargo has to show that it was because of the alleged misconduct by NAS that Radecki only bid $4,000.00, and that no one else offered a higher bid. Wells Fargo cannot show any connection between NAS's decision to move forward with a nonjudicial foreclosure and Radecki's innocent third-party bid to purchase the property. Even assuming, arguendo, that the conduct of Cambridge and NAS was unfair or oppressive, Wells Fargo has failed to meet their burden of showing that such unfairness or oppression caused the low sale price. Thus, Wells Fargo's second argument fails as a matter of law.

C. Radecki is a Bona Fide Purchaser

Considering how much Wells Fargo wants this Court to rely on the Restatement, it hardly seems coincidental that Wells Fargo overlooks that this Court did make reference to the Restatement (Third) of Prop.: Mortgages § 8.3 cmt. B. in

Shadow Wood. There, this Court made reference to one important section of cmt. b which cannot be overlooked here:

> ...[I]f the real estate is unavailable because title has been acquired by a bona fide purchaser the issue of price inadequacy may be raised by the mortgagor for damages for wrongful foreclosure.

In this case, title to the property has vested in Radecki. If the property has been sold to an innocent third party, setting aside the sale is not an available remedy. Rather, the remedy, if appropriate, would be an award of damages for wrongful foreclosure against the Association.

Under the Restatement (Third) of Property, Mortgages § 8.3 when a third party purchaser is involved in the sale, inadequacy in price alone will not be sufficient to set aside the sale. This is because third party purchasers are innocent bona fide purchasers. The Restatement explains as follows:

> *Comment a* Introduction. ...When a foreclosure sale is set aside, the court may upset third party expectations. A third party may have acquired title to the foreclosed real estate by purchase at the sale or by conveyance from the mortgage-purchaser. Thus, a general reluctance to set aside the sale is understandable and sensible. This reluctance may be especially justifiable when price inadequacy is the only objection to the sale.

Comment b of section 8.3 provides that if the property has been sold to a bona fide purchaser, setting aside the sale is not the appropriate remedy and that the issue of price alone is not sufficient:

> ...[I]f the real estate is unavailable because title has been acquired by a bona fide purchaser the issue of price inadequacy may be raised by the

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

> mortgagor or a junior interest holder in a suit against the foreclosing mortgagee for damages for wrongful foreclosure. This latter remedy, however, is not available based on gross inadequacy alone.

Obviously the sale of the property to a bona fide purchaser prevents the setting aside of the sale. In this case, title to the property has vested in Radecki. Thus, the appropriate remedy, if any, would be damages for wrongful foreclosure against the Association, but not setting aside the sale. As Radecki is an innocent purchaser here, this fight, to the extent there is one, is between Wells Fargo, the Association, and perhaps NAS. Regardless, any such claims are misplaced here as they cannot be properly asserted against Radecki as a bona fide purchaser.

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

D. The HOA Sale is not Voidable as the Uniform Fraudulent Transfers Act Does not Apply

Wells Fargo also makes the frivolous argument that Nevada's Uniform Fraudulent Transfers Act (UFTA) applies in this case. Rather than belabor the irrelevant point by responding to Wells Fargo's repeated recitation of sales price and Wells Fargo's unsupported allegation that nonpayment of HOA dues demonstrates insolvency, Radecki merely points out that the UFTA cannot apply to this case because the property at issue is not an "asset" as defined by NRS 112.150(2)(a).

Under NRS 112.150(2)(a), "asset" means property of a debtor, but the term does not include property to the extent it is encumbered by a valid lien. Moreover,

Nevada's UFTA applies when the debtor transfers property, not when a creditor transfers property pursuant to a foreclosure. NRS 112.180(1) provides;

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditors claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation"

NRS112.190(1) states:

> "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation"

This did not occur. There was a foreclosure pursuant to NRS 116.3116 with notice to all other creditors with the sale held publically. The HOA transferred the Property; not Ms. Munar.

Since this transaction involves neither an asset nor a transfer by a debtor, Nevada's UFTA does not apply, and Wells Fargo's contention that the foreclosure sale constitutes a fraudulent transfer is without merit.

E. The Foreclosure of the Association's Lien Extinguished the First Deed of Trust and Transferred Ownership of the Property

This Court has ruled that the foreclosure of the super-priority portion of an Association's lien extinguishes a bank's first deed of trust and that the foreclosure deed reciting compliance with the notice provision of NRS 116.31162 through NRS 116.31168 'is conclusive" as to the recitals "against the unit's former owner, his or

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

her heirs and assigns, and all other persons." *SFR Investments Pool I, LLC v. U.S. Bank, N.A.*, 334 P.3d 408 (Nev. 2014). In *SFR*, this Court explained:

> NRS 116.31164 addresses the procedure for sale upon foreclosure of an HOA lien and specifies the distribution order for the proceeds of sale. A trustee's deed reciting compliance with the notice provision of NRS 116.31162 through NRS 116.31168 'is conclusive" as to the recitals "against the unit's former owner, his or her heirs and assigns, and all other persons." NRS 116.31166(2). And, '[t]he sale of a unit pursuant to NRS 116.31162, 116.31163 and 116.31164 vests in the purchaser the title of the unit's owner without equity or right of redemption." NRS 116.31166(3).

334 P.3d 408, at 411-412.

This Court has long ago disposed of Wells Fargo's claim that the foreclosure sale did not transfer ownership of the property. This Court concluded that "NRS 116.3116(2) gives an HOA a true superpriority lien, proper foreclosure of which will extinguish a first deed of trust." *SFR*, 334. P.3d at 419. In this case, the Association's lien was properly foreclosed and Radecki owns the property free and clear of any claims by Wells Fargo or any other claimants.

Additionally, in the more recent case of *Shadow Wood*, this Court issued a unanimous decision and reaffirmed that the recitals in an Association's Foreclosure Deed are "conclusive" as to compliance with the foreclosure statutes. This Court concluded that a purchaser who buys a property at a foreclosure sale without knowledge of any adverse claims is an innocent third-party and a bona fide purchaser. The court also confirmed that an Association foreclosure sale is commercially

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

reasonable unless the party challenging the sale can provide evidence of fraud, unfairness, or oppression. And, as stated above, Wells Fargo has failed to meet its burden of showing fraud, unfairness, or oppression that resulted in the "low price."

F. This Court has Ruled that NRS 116.3116 is Constitutional and Does Not Violate Wells Fargo's Due Process Rights

Wells Fargo, like many other banks, comes to this Court claiming NRS 116.3116's notice scheme is unconstitutional. Wells Fargo makes this argument, despite the fact that this Court has made it clear that due process is not implicated in an HOA foreclosure because there is no government actor involved in the process. On January 26, 2017, this Court issued its decision in *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage*, 388 P.3d 970 (Nev. 2017). This Court stated unequivocally that Wells Fargo's due process rights are not violated and the statute does not violate the takings clause of the United States and Nevada Constitutions:

> NRS 116.3116 - .31168 grant a homeowners association (HOA) a superpriority lien for certain unpaid assessments and allow an HOA to nonjudicially foreclose on such a lien if specific requirements are met. In this appeal, we must determine whether these statutes violate a first security interest holder's due process rights. We hold that neither the HOA's nonjudicial foreclosure, nor the Legislature's enactment of the statutes, constitute state action. Therefore, the statutes do not implicate due process. Additionally, we consider whether the extinguishment of a subordinate deed of trust through an HOA's nonjudicial foreclosure violates the Takings Clauses of the United States and Nevada Constitutions. We hold that is does not, and we therefore reverse the district court's order and remand for further proceedings consistent with this opinion.

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

Wells Fargo also relies heavily on the Ninth Circuit's opinion in *Bourne Valley Court Trust v. Wells Fargo Bank, N.A.*, 832 F.3d 1154 (9th Cir. 2016). This is despite this Court's announcement that it was well aware of *Bourne Valley* and took the Ninth Circuit's holding into consideration when issuing its opinion. This Court acknowledged that the Ninth Circuit had found that the Legislature's enactment of the statute constitutes state action, but declined to follow it. This Court provided the following footnote:

> We acknowledge that the Ninth Circuit has recently held that the Legislature's enactment of NRS 116.3116 et seq. does constitute state action. *See Bourne Valley Court Tr. v. Wells Fargo Bank, N.A.*, 832 F.3d1154, 1159-60 (9th Cir. 2016). However, for the aforementioned reasons, we decline to follow its holding.

Saticoy Bay, 388 P.3d at 974, n.5.

Additionally, this Court has clarified that in *SFR,* this Court did not intend to suggest that there were any due process implications. This Court stated:

> Therefore, we hold that Nevada's superpriority lien statutes do not implicate due process. To the extent this court's decision in *SFR Investments Pool 1 LLC v. U.S. Bank, N.A.*, 130 Nev., Adv. Op 75, 334 P.3d 408 417-418 (2014), suggests otherwise, we clarify that due process is not implicated in an HOA's nonjudicial foreclosure.

Id. at 974.

As recent as last month, this Court has reaffirmed the decision in *Saticoy Bay* and again noted that due process is not implicated when an HOA forecloses on a superpriority lien in compliance with NRS 116 because there is no state action. *See*

PNS Bank, National Association, Successor in Interest to National City Real Estate Services, LLC, Successor by Merger to National City Mortgage, Inc., F/K/A National City Mortgage Co., v. Saticoy Bay LLC Series 5633 Desert Creek, No. 70909, slip op. (Nev. Oct. 13, 2017); *See also PNC Bank, N.A., Successor by Merger to National City Mortgage Co D/B/A Commonwealth United Mortgage Company v. Saticoy Bay LLC Series 4208 Rolling Stone Dr., Trust,* No. 69201, slip op. (Nev. June 15, 2017). This Court has specifically held that NRS 116.3116 et seq. does not implicate due process. Thus, it does not matter that the Ninth Circuit ruled in the bank's favor on the same issues. Wells Fargo's arguments regarding due process fail as a matter of law.

II. CONCLUSION

For the foregoing reasons, Appellant Wells Fargo's arguments fail as a matter of law, and the district court's judgment should be affirmed.

DATED this 21st day of November, 2017.

/s/ John Henry Wright
JOHN HENRY WRIGHT, ESQ.
Nevada Bar No. 6182
Attorney for Respondent

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32 (a)(4), the typeface requirement of NRAP 32(a)(5) and the type style requirement of NRAP 32(a)(6) because this brief has been prepared in proportionately spaced typeface using WordPerfect X6 in 14 point and Times New Roman.

2. I further certify that this brief complies with the page- or typed-volume limitations of NRAP 32(a)(7) because excluding the parts of the brief that are exempted by NRAP 32(a)(7)(c), it is proportionately spaced, has a typeface of 14 points or more and contains 4,748 words.

3. Finally, I hereby certify that I have read this answer 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 and volume number, if any of the transcript or appendix where the matter relied on is found. I understand that I may be subject to sanctions in the event that

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Las Vegas, Nevada 89102
T: (702) 405-0001 • F: (702) 405-8454

the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 21st day of November, 2017.

/s/ John Henry Wright
JOHN HENRY WRIGHT, ESQ.
Nevada Bar No. 6182
Attorney for Respondent

The Wright Law Group, PC
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
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