IN THE SUPREME COURT OF THE STATE OF NEVADA

SATICOY BAY LLC SERIES 9050 W WARM SPRINGS 2079, Appellant, vs. NEVADA ASSOCIATION SERVICES; JAMES P. MARKEY; AND DITECH FINANCIAL LLC, Respondents.	No. 74153	Electronically Filed Apr 23 2018 09:35 a.m. Elizabeth A. Brown Clerk of Supreme Court

APPEAL
From the Eighth Judicial District Court of Nevada
The Honorable Timothy Williams (Dept. 16)
District Court Case No. A-16-730623-C

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 Disclosure Statement

The undersigned counsel of record hereby certifies that the following are persons and 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 recusal:

Respondent, DITECH FINANCIAL LLC is a limited liability company organized and existing under the laws of the State of Delaware. It is a wholly owned subsidiary of Walter Investment Management Corp., a publicly traded corporation.

The law firm of Wolfe & Wyman LLP has appeared as counsel of record for DITECH FINANCIAL LLC from the inception of this action in the Eighth Judicial District Court through the present.

Dated: April 20, 2018.

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Introduction

On October 1, 2015, the Nevada Legislature's sweeping amendments to NRS Chapter 116, which governs HOA non-judicial foreclosure sales, went into effect. The unprecedented volume of post-HOA foreclosure quiet title, declaratory relief and wrongful foreclosure actions that have flooded Nevada's state and federal courts following this Court's landmark decision in *SFR Investment Pool 1, LLC v. U.S. Bank*, 130 Nev. Adv. Op. 75, 334 P.3d 408 (2014) provided the impetus for the Legislature's 2015 overhaul of NRS Chapter 116. The clear purpose and intent of these amendments was to balance the interests of the numerous stakeholders that are affected by a HOA's foreclosure, by creating more certainty in the process and clarity in the outcome of HOA Foreclosure Sales, and ultimately curtailing the need for post-sale litigation to obtain clear title.

The issue in this case is singular: Did the former homeowner, James Markey ("Markey"), redeem his property following a HOA Foreclosure Sale, in accordance with the newly-enacted redemption provisions? The resolution of this issue rests on carrying out the clear intent of the Legislature in its enactment of these 2015 amendments to NRS Chapter 116. In this case, the only way for the Court to meet this burden is to hold that Markey redeemed the property, and thereby extinguished the effects of the HOA Foreclosure Sale.

Statement of the Issues

1. Whether Markey satisfied NRS 116.31166's redemption provisions to redeem his interest in the Property and extinguish the effects of the HOA Foreclosure Sale.

Statement of Facts

1. On June 11, 2004, Markey purchased the parcel of real property located at 9050 W. Warm Springs Road, Las Vegas, NV 89148 ("Property") from builder, Rhodes Ranch General Partnership, as his sole and separate property, recorded with the Clark County Recorder as Instrument No. 20040615-0004598 on June 15, 2004. JA vol. 2, 224-26.

2. January 30, 2013: Markey borrowed $135,775.00 from Quicken Loans Inc., which was secured by a Deed of Trust encumbering the subject property, recorded with the Clark County Recorder as Instrument No. 201304120000455 on April 12, 2013. JA vol. 2, 228-50.

3. February 1, 2013: Federal National Mortgage Association ("Fannie Mae") purchased the Mortgage Loan (the Promissory Note and DOT) encumbering the Property from Quicken Loans, Inc. JA vol. 2, 253, 257.

4. March 31, 2013: Ditech began servicing the Fannie Mae-owned Mortgage Loan. JA vol. 2, 254, 264.

5. January 10, 2015: Nevada Association Services, Inc. ("NAS") executed a Notice of Delinquent Assessment Lien for the amount of $1,616.35 against the property on behalf of The Falls Condominiums aka The Falls @ Rhodes Ranch ("HOA"), recorded with the Clark County Recorder as Instrument No. 20150112-0002436 on January 12, 2015. JA vol. 2, 316.

6. April 20, 2015: NAS executed a Notice of Default and Election to Sell Under HOA Lien against the property on behalf of the HOA, recorded with the Clark County Recorder as Instrument No. 20150421-0003050 on April 21, 2015. JA vol. 2, 318-19.

7. September 4, 2015: NAS executed a Notice of Foreclosure Sale against the property on behalf of the HOA, recorded with the Clark County Recorder as Instrument No. 20150909-0001506 on September 9, 2015. JA vol. 2, 321-22.

8. The HOA Sale was held on November 20, 2015: NAS sold the property at the HOA foreclosure auction on behalf of the HOA. JA vol. 2, 324-26. Saticoy Bay LLC Series 9050 W. Warm Springs 2079 ("Saticoy Bay") purchased the property at the HOA foreclosure auction for the amount of $48,600.00. JA vol. 2, 324 (emphasis added).

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9. The last day to redeem the Property was Tuesday, January 19, 2016[1].

10. At the time of the November 20, 2015, HOA foreclosure auction, Markey was the only person with a recorded interest in the property, other than recorded Deed of Trusts and Assignments, since he first purchased the property as new construction from Rhodes Ranch General Partnership on June 11, 2004. JA vol. 2, 328-29.

11. On December 1, 2015, Ditech advised NAS of its intent to redeem the property under the newly enacted redemption statute that was part of the 2015 amendments to NRS Chapter 116. JA vol. 2, 351-52.[2,3] That same day, NAS advised Eddie Haddad, managing member and corporate representative for Saticoy Bay ("Haddad"), and Michael Bohn, Esq., counsel for Saticoy Bay and Eddie Haddad ("Bohn") of Ditech's notice of intent to redeem. JA vol. 2, 350-51.

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[1] The Court may take judicial notice of this fact, pursuant to NRS 47.130.

[2] From December 1, 2015 to January 20, 2016, Haddad, Christopher Yergensen, Esq., counsel for NAS ("Yergensen"), Ryan O'Malley, Esq., former counsel for Ditech ("O'Malley"), Bohn, and Markey engaged in numerous discussions regarding redemption of the subject property that were memorialized in e-mail correspondences. JA vol. 2, 331-359.

[3] The e-mail correspondences by, among and between Haddad, Bohn, Yergensen, O'Malley and Markey are charged with the disputable presumptions that the dates of the e-mails are true and that such e-mails were sent and received in their regular course. NRS 47.250(12)-(13). In addition, these e-mail correspondences are present sense impressions (NRS 51.085), recorded recollections (NRS 51.125), records of regularly conducted activity (NRS 51.135). Therefore, these e-mails are exceptions to the general rule against the admission of hearsay as evidence.

12. December 11, 2015: Markey advised NAS of his intent to redeem the Property. JA vol. 1, 189-191, 197-199.

13. December 15, 2015: NAS advised Saticoy Bay and Ditech that it had received a certified letter from the homeowner notifying them of his intent to redeem the Property. JA vol. 2, 340.

14. January 12, 2016: NAS advised Saticoy Bay that it had received the redemption funds from Markey, and that Saticoy Bay could pick up a check for the redemption funds on the following day. JA vol. 2, 334. That same day, Haddad advised Bohn and NAS that he does not have to accept a check from NAS because "[t]he redemption must come from either the prior owner or the bank or any other party who has an interest in the property." JA vol. 2, 334. However, Haddad also stated that "if NAS would like to trust the borrower and release the surplus funds, and in turn the borrower submits the redemption payment, then so be it." JA vol. 2, 334.

15. January 15, 2016: NAS delivered a cashier's check to Saticoy Bay's counsel's office for the amount of $50,052.16, following Markey's "explicit instructions" to NAS to deliver the cashier's check to Saticoy Bay as payment of the redemption price. JA vol. 1, 190,199; JA vol. 2, 333, 356. That same day, Saticoy Bay advised NAS that it was rejecting the cashier's check because it was from NAS with "the owner's name on it", and the redemption funds must come

from the owner. JA vol. 2, 332.

16. After Markey became aware of Saticoy Bay's rejection of his tender, he sent a personal check to NAS for the redemption amount, which Markey claims was NAS delivered to Saticoy B on January 19, 2016. JA vol. 1, 190.

17. January 19, 2016: Ditech advised NAS of its position that Markey's redemption of the property was effective, and therefore Ditech was not raising a claim to the excess proceeds from the sale. JA vol. 2, 356. However, in light of Saticoy Bay's rejection of Markey's tender, Ditech authorized NAS to tender any excess proceeds to which Ditech may still have an interest to Saticoy Bay for the benefit of Markey. *Id*.

18. January 20, 2016: NAS advised Saticoy Bay NAS takes the legal position that Markey's redemption was completed on January 15, 2016, when NAS delivered the cashier's check for the amount of $50,052.16 to Bohn's office, and therefore, NAS would not deliver a foreclosure deed to Saticoy Bay at that time. JA vol. 2, 359. NAS also advised Saticoy Bay of its understanding that Markey and Ditech intended to seek a legal determination of this matter, and therefore, NAS would place Markey's funds in its trust account and await the legal determination of this matter. *Id*.

19. Later that same day, Saticoy Bay advised Markey, Ditech and NAS that the redemption period had lapsed and neither the owner nor the trust deed

holder has properly complied with the redemption statute. JA vol. 2, 358. Saticoy Bay claimed that the entirety of the redemption funds must come from either the unit owner or trust holder, and that neither party can use the excess proceeds to pay Saticoy Bay the redemption amount, because those funds are Saticoy Bay's funds. *Id*. In addition, Saticoy Bay advised the parties that, even if its position regarding the funds is not upheld, the unit owner and trust deed holder failed to comply with the other provisions of the redemption statute because no notice of redemption was served and there was no certified copy of the deed, trust deed or assignment of the trust deed served. *Id*.

20. April 21, 2016: MERS assigned the record beneficial interest in the Jan. 2013 DOT to Ditech, recorded with the Clark County Recorder as Instrument No. 20160428-0003296 on April 28, 2016. JA vol. 2, 362-64.

Summary of Argument

Markey effectively redeemed the Property on January 15, 2016, when he tendered the undisputed redemption amount to Saticoy Bay. In order to carry out the Legislature's clear intents of balancing the Parties' relative interests, encouraging good-faith participation, and promoting certainty and finality in the HOA Foreclosure Process, equity requires this Court to find that Markey substantially complied with NRS 116.31166(3)-(4)'s redemption provisions, and that any deficiencies with Markey and Ditech's satisfaction of the redemption

provisions do not render the January 15, 2016, redemption invalid. To hold otherwise would run afoul of the Legislative intent, and create absurd and inequitable results. Accordingly, this Court must hold that Markey redeemed the Property on January 15, 2016, which extinguished the effects of the HOA Foreclosure Sale, restored Markey's interest and the Deed of Trust to their priority positions prior to the Sale, and that Saticoy Bay is entitled to the redemption funds, upon its release of any further interest in or claim to the Property.

Standard of Review

This Court reviews issues of statutory construction de novo. *Leven v. Frey*, 123 Nev. 399, 402, 168 P.3d 712, 714 (2007). "[W]hether a statute's procedural requirements must be complied with strictly or only substantially is a question of law subject to this Court's plenary review." *Id*.

Legal Argument

I. MARKEY REDEEMED THE PROPERTY WITHIN THE REDEMPTION PERIOD.

A homeowner, holder of the recorded security interest or a successor in interest of those persons may redeem a property at any time within 60 days after a HOA Foreclosure Sale by paying:

> (a) The purchaser the amount of his or her purchase price, with interest at the rate of 1 percent per month thereon in addition, to the time of redemption, plus:

(1) The amount of any assessment, taxes or payments toward liens which were created before the purchase and which the purchaser may have paid thereon after the purchase, and interest on such amount;
(2) If the purchaser is also a creditor having a prior lien to that of the redemptioner, other than the association's lien under which the purchase was made, the amount of such lien, and interest on such amount; and
(3) Any reasonable amount expended by the purchaser which is reasonably necessary to maintain and repair the unit in accordance with the standards set forth in the governing documents, including, without limitation, any provisions governing maintenance, standing water or snow removal; and
(b) If the redemptioner is the holder of a recorded security interest on the unit or the holder's successor in interest, the amount of any lien before his or her own lien, with interest, but the association's lien under which the unit was sold is not required to be so paid as a lien.

NRS 116.31166(3).

Notice of redemption must be served by the person redeeming the unit on the person who conducted the sale and on the person from whom the unit is redeemed, together with:
(a) If the person redeeming the unit is the unit's owner whose interest in the unit was extinguished by the sale or his or her successor in interest, a certified copy of the deed to the unit and, if the person redeeming the unit is the successor of that unit's owner, a copy of any document necessary to establish that the person is the successor of the unit's owner.
(b) If the person redeeming the unit is the holder of a recorded security interest on the unit or the holder's successor in interest:
(1) An original or certified copy of the deed of trust securing the unit or a certified copy of any other recorded security interest of the holder.
(2) A copy of any assignment necessary to establish the claim of the person redeeming the unit, verified by the affidavit of that person, or that person's agent, or of a subscribing witness thereto.
(3) An affidavit by the person redeeming the unit, or that person's agent, showing the amount then actually due on the lien.

N.R.S. 116.31166(4). Nothing in the statute restricts the unit's owner from using

excess proceeds from the HOA sale to redeem the property. "The remedies provided by this chapter must be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed." NRS 116.1114.

A. The Court Must Interpret the Statute to Carry Out the Clear Intent of the Legislature.

"When interpreting a statute, this Court 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.'" *S. Nevada Homebuilders Ass'n v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005). Furthermore, the Court must construe statutory language to avoid absurd or unreasonable results." *Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 255 P.3d 1275, 1278–79 (2011) (quoting *Pellegrini v. State*, 117 Nev. 860, 874, 34 P.3d 519, 528 (2001).

"To determine whether a statute and rule require strict compliance or substantial compliance, [the] court looks at the language used and policy and equity considerations." *Leyva*, 127 Nev. 470, 255 P.3d at 1278–79. In doing so, the Court must determine "whether the purpose of the statute or rule can be adequately served in a manner other than by technical compliance with the statutory or rule language." *Id*. (quoting *Leven v. Frey*¸ 123 Nev. 399, 407, 168 P.3d 712, 717 n. 27 (2007)). "In general, 'time and manner' requirements are

strictly construed, whereas substantial compliance may be sufficient for 'form and content' requirements." *Einhorn v. BAC Home Loans Servicing, LP*, 128 Nev. Adv. Op. 61, 290 P.3d 249, 254 (2012) (quoting *Leven*, 123 Nev. at 408, 168 P.3d at 718). However, "strict compliance does not mean absurd compliance." *Id*. "[A] court's requirement for strict or substantial compliance may vary depending on the specific circumstances." *Leven*, 123 Nev. at 407, 168 P.3d at 717. "Ultimately, the Court is charged with carrying out the clear intent of the legislature." *Id*. at 1279 (emphases added).

A. The Court Must Carry Out the Clear Intent of the Legislature to Balance the Parties' Interests and to Create Certainty in the HOA Foreclosure Process.

> S.B. 306 strikes a balance between the interests of homeowners, HOAs, banks, mortgage lenders, government-sponsored entities, investors and the title industry. Senate Bill 306 provides all homeowners with a realistic opportunity to enter into a repayment plan and an opportunity to redeem their units if they fall behind on their HOA dues. Homeowner associations can collect assessments needed to maintain their communities. Banks, mortgage lenders and government-sponsored entities will receive enhanced notice of HOA foreclosures and greater opportunities to protect their interests. Investors in the title industry will receive greater certainty regarding the title status of units that have been foreclosed upon by the HOA.

JA vol. 2, 373.

> The bill creates certainty about the consequences of the HOA foreclosure so that HOA home titles do not become clouded.

JA vol. 2, 68. The clear intent behind the addition of the redemption provision was to provide the homeowner and/or first secured encumbrancer an opportunity to redeem their interests within a reasonable time after the HOA foreclosure sale, while still ensuring that the HOA is compensated for its past-due assessments and collection efforts, and incentivizing potential investors to continue to bid on HOA foreclosure properties by guaranteeing a return on their investments even if the property is ultimately redeemed. Here, the Court must carry out the Legislature's intent of balancing the Parties' relative interests by holding that Markey redeemed the Property and that Saticoy Bay is entitled to the redemption funds.

Saticoy Bay claims that it is entitled to have title to the Property quieted in its favor because Markey and Ditech failed to comply with the statutory redemption requirements in several ways:

(1) Markey was not permitted to use the excess proceeds to satisfy the redemption because (a) he was not entitled to the redemption funds under the distribution requirements for excess proceeds set forth in NRS 116.31164(7); (b) Ditech failed to prove its authority to engage in the redemption efforts as Fannie Mae's contractually-authorized servicer; (c) Ditech and Markey's claim and use of the excess proceeds estopped them from attacking the validity of the sale; and (d) NAS did not have authority to bypass NRS 116.31164(7) by attempting to tender the excess proceeds to Saticoy Bay;

(2) Markey and Ditech did not provide proper notice of redemption within the statutory period; and

(3) Markey and Ditech did not strictly comply with NRS 116.31166(4) because they did not provide Saticoy Bay with the requisite production of documents to prove their authority to redeem the property.

However, the record makes it clear that the Court cannot accept Saticoy Bay's arguments, because to do so would run afoul of well-established canons of statutory interpretation, including the requirement to carry out the Legislature's intent in enacting the 2015 amendments to NRS Chapter 116. In fact, a review of the entire NRS Chapter 116 statutory scheme shows that the Legislature intended for substantial compliance to be substituted for provisions generally requiring strict compliance in circumstances where equity so requires. Accordingly, traditional notions of imposing strict compliance with time and manner provisions must not be applied in this case, where doing so would cause severe prejudice or an absurd result. Indeed, the Court must evaluate the record and balance the equities in manner that satisfies the Legislature's clear intent of restoring balance to the HOA foreclosure process. Thus, the only appropriate adjudication of this case is to hold that Markey redeemed the Property, which extinguished the effects of the HOA Sale and restored Markey's interest and the Deed of Trust to their priority positions prior to the Sale, and that Saticoy Bay is entitled to the redemption funds in the

amount of $50,052.16 that were tendered to Saticoy Bay on January 15, 2016, upon its release of any further claim and interest in the Property.

B. Markey Timely Tendered the Undisputed Redemption Amount to Saticoy Bay.

"Tender occurs when a party makes an amount available without conditions." *US Bank, N.A. v. SFR Investments Pool 1, LLC*, 3:15-cv-00241-RCJ-WGC, 2016 WL 4473427, at *6 (D. Nev. Aug. 24, 2016) (quoting *Tender*, Black's Law Dictionary 1696 (10th ed. 2014)). "It was settled law before Nevada even became a state that timely and complete tender immediately discharges a lien against real property, even if the tender is rejected, although the lienor remains entitled to repayment of the debt." *US Bank, N.A. v. SFR Investments Pool 1, LLC*, at *6-7 (internal citations omitted). This long-standing doctrine is applicable in the HOA foreclosure context. *See Stone Hollow Ave. Trust v. Bank of Am., Nat'l Ass'n*, 391 P.3d 760 (2016) (Pickering, J., dissenting) (citing 1 Grant S. Nelson, Dale A. Whitman, Ann M. Burkhart & R. Wilson Freyermuth, Real Estate Finance Law § 7:21 (6th ed. 2014)) ("Under the prevailing view, … a tender of the lien amount invalidates a foreclosure sale to the extent that the sale purports to extinguish the tenderer's interest in the property.") Here, tender of the full redemption amount was made to Saticoy Bay within the statutory timeframe, which immediately extinguished Saticoy Bay's interest in the Property as a matter of law.

1. Markey's Ratification of NAS's Tender Renders it Valid and Enforceable.

Tender "need not be made by [a debtor] personally." *Forderer v. Schmidt*, 154 F. 475, 477 (9th Cir. 1907). "If made by a third person at his request it is sufficient, and, if made by a stranger without his knowledge or request, it seems that a subsequent assent of the debtor would operate as a ratification and make the tender good." *Id*. The Restatement further supports a finding that NAS may properly tender the redemption amount on behalf of Markey:

> A performance in full of the obligation secured by a mortgage, or a performance that is accepted by the mortgagee in lieu of payment in full, by one who holds an interest in the real estate subordinate to the mortgage but is not primarily responsible for performance, does not extinguish the mortgage, but redeems the interest of the person performing from the mortgage and entitles the person performing to subrogation to the mortgage under the principles of § 7.6. Such performance may not be made until the obligation secured by the mortgage is due, but may be made at or after the time the obligation is due but prior to foreclosure.

The Restatement (Third) of Property (Mortgages) § 6.4(e) (1997).[4] The same principle applies to the instant action. Here, it is undisputed that NAS delivered a cashier's check to Saticoy Bay's counsel on January 15, 2016 (still within the 60-day redemption period), and there is no dispute that the checks satisfied the full

[4] The Nevada Supreme Court has typically followed the Restatement in related contexts in recent years. *See Montierth v. Deutsche Bank (In re Montierth)*, 131 Nev. Adv. Rep. 55, 354 P.3d 648, 651 (2015).

redemption amount under the statute. JA vol.1, 136. The cashier's check was an unconditional order to pay the money required to be tendered to Saticoy Bay to allow Markey to redeem the property under NRS 116.31166(3). *See also* NRS 104.3104. Accordingly, Saticoy Bay's interest in the property was extinguished on January 15, 2016, when NAS delivered the cashier's check for the amount of $50,052.16 to Bohn's office.

2. Markey's Use of Excess Proceeds to Satisfy the Redemption Amount was Proper.

Saticoy Bay's claim that excess proceeds cannot be used to provide the redemption amount is misguided. NRS 116.31164(7)(b) directs the person conducting the sale to distribute the excess proceeds from the sale, i.e. the remaining proceeds after all expenses of the sale, expenses of the HOA of securing possession before the sale, and the HOA's lien have been satisfied, to subordinate claims of record and then to the unit's prior owner. Here, Ditech would have been entitled to all of the remaining excess proceeds because it was the contractually-authorized servicer of the Fannie Mae Mortgage Loan that was secured by the Deed of Trust encumbering the Property at the time of the HOA Sale. JA vol. 2, 253-64. Ditech authorized NAS to tender the excess proceeds to fund the redemption amount for the benefit of Markey. JA vol. 2, 356. Therefore, Markey's use of excess proceeds toward the redemption amount was proper.

Furthermore, Saticoy Bay's argument that use of the excess proceeds toward the redemption funds estopped Ditech and Markey from attacking the validity of the HOA Sale runs afoul of the purpose of the redemption provisions, which is to *balance* the interests of all stakeholders. Saticoy Bay's argument only creates imbalance and unfairness because it places an undue burden on homeowners, many of whom are already financially stretched (which is likely what initially led to the HOA initiating foreclosure proceedings) to come up with the full amount of the redemption funds without the benefit of being able to use excess proceeds, despite the fact that the redemption funds are intended to *reimburse* the purchaser. This case provides a clear example of how Saticoy Bay's argument would lead to absurd results because Markey would have been required to come up with over $50,000.00 to satisfy the redemption amount, while the excess proceeds, which total $44,035.77, remained parked in a trust account and unavailable for use in reversing the HOA Foreclosure Sale. JA vol. 2, 343. One need not strain to list the many ways that this scenario would substantially disrupt the balance of interests the Legislature intended to strike by enacting the redemption statute (borrowers would be forced to walk away from a home that would be redeemable with the excess proceeds; borrowers, lenders and servicers would also be disadvantaged by having to needlessly give up liquidity to tender large redemption

amounts). Because Saticoy Bay's estoppel argument runs afoul of the Legislature's intent and stands to create absurd and inequitable results, it must fail.

C. Markey Complied With The Notice Requirement.

Saticoy Bay received actual notice that Markey and Ditech were exercising their respective rights to redeem the Property within the 60-day redemption period satisfies NRS 116.31166(4)'s notice requirement. "Where the purpose of the notice requirements is fulfilled … substantial compliance [satisfies] the statute." *Leyva*, 255 P.3d at 1278-79. NRS 116.31166(4) does not set forth any specific provisions for the form or content of the notice of redemption. Therefore, Saticoy Bay was put on notice of Markey's intent to redeem the Property on December 15, 2015 when NAS advised Saticoy Bay and Ditech that it had received a certified letter from the homeowner notifying them of his intent to redeem the property. JA vol. 2, 340. It is immaterial that Saticoy Bay actually received the notice of Markey's redemption from NAS rather than Markey himself.

Saticoy Bay never expressed any issue with the form and manner of Markey's notice of redemption through NAS at any time during the 60-day redemption period, despite having ample opportunity to do so. Saticoy Bay also never expressed any issue with Ditech's notice of redemption, which was served in exactly the same manner. JA vol. 2, 339-354. Furthermore, during the redemption period, Saticoy Bay engaged in continuous discussions with Ditech and NAS about

the manner in which the redemption needed to be carried out. *Id*. In fact, Saticoy Bay suggested several times that the Parties finalize the redemption of the Property by having Ditech tender the redemption funds to Saticoy Bay, and then work out reimbursement/subrogation of the tendered funds with Markey at a later date. JA vol. 2, 339, 345, 346. Taken together, these fact unequivocally confirm that Saticoy Bay had no issue with or objection to the form of the notices of redemption during the redemption period. Indeed, Saticoy Bay did not express *any* objections or reservations to the notices of redemption until the day *after* the redemption lapsed. JA vol. 2, 358. These facts clearly reflect that Saticoy Bay was on actual notice of Markey and Ditech's intents to redeem, and it was not prejudiced by the form of such notice. Therefore, the redemption statute's notice requirement was satisfied.

D. Markey's Redemption is Not Invalidated by His Failure to Provide a Certified Copy of His Deed to Saticoy Bay.

Markey's compliance with the redemption statute also is not defeated by an alleged failure to provide a certified copy of his deed to the Property. In *Einhorn v. BAC Home Loans Servicing, LP*, the Nevada Supreme Court determined that "strict compliance with the statute's document mandate [was] required" because the clear legislative intent of the document mandate was to ensure that the mediator and the homeowner were satisfied "that whoever is foreclosing actually owns the note and has authority to modify the loan," and, further, that the party seeking the

FMP certificate is the proper entity, under the nonjudicial foreclosure statutes, to proceed against the property." 128 Nev. Adv. Op. 61, 290 P.3d 249, 254 (2012) (internal citations omitted); *see also Leyva*, 255 P.3d at 1279 ("The legislative intent behind requiring a party to produce the assignments of the deed of trust and mortgage note is to ensure that whoever is foreclosing "actually owns the note" and has authority to modify the loan.") (internal citation omitted).

Much like NRS 107.086's document mandate, the clear legislative intent behind NRS 116.31166(4)(b)'s requirement that the redeeming unit owner produce a certified copy of his deed to the unit is to ensure that the person seeking to redeem the property has the standing and authority to exercise redemption rights. However, *unlike* NRS 107 and the FMR's, NRS Chapter 116 does not include a mandatory recommendation for sanctions where a redeemer fails to strictly comply with the provisions of the redemption statute. Rather, Chapter 116 provides that "[t]he **remedies provided by this chapter must be liberally administered** to the end that the aggrieved party is put in as good a position as if the other party had fully performed." NRS 116.1114 (Emphasis added). This requirement supports a determination that the failure of a unit owner to produce a certified copy of his deed to the unit shall not necessarily defeat his redemption. Furthermore, the legislative intent behind the 2015 amendments to Chapter 116 – striking a balance "between the interests of homeowners, HOAs, banks, mortgage lenders,

government-sponsored entities, investors and the title industry" – also supports this proposition. "Nevada homeowners benefit by the changes made in this bill as well. Taking away someone's property that is worth hundreds of thousands of dollars is not a matter that should be taken lightly and there are quite a few consumer protections in this bill." JA vol. 2, 359.

Here, there is no question or issue that Markey was the unit's owner and therefore had authority to redeem the unit under NRS 116.31166. At the time of the November 20, 2015, HOA foreclosure auction, Markey was the only person with a recorded interest in the Property, other than recorded Deed of Trusts and Assignments, since he first purchased the Property as new construction from Rhodes Ranch General Partnership on June 11, 2004. JA vol. 2, 328-29. During the redemption period, Saticoy Bay never challenged Markey or Ditech's authority to redeem the Property, nor did it demand that Markey and Ditech produce the title documents to the Property set forth in the redemption statute. JA vol. 2, 331-359. Rather, Saticoy Bay's only stated objection during the redemption period was its opinion that it was not required to accept the redemption funds from NAS, but that the funds had to come from the unit owner or the deed of trust beneficiary. JA vol. 2, 334. Again, the first time Saticoy Bay stated *any* objection to Markey's failure to provide a certified deed was the day after the 60-day redemption period ended. JA vol. 2, 358. Clearly, Saticoy Bay was not prejudiced by Markey's failure to

provide the certified copies of the title documents. As previously discussed herein, Saticoy Bay expressed no intention of enforcing this requirement under the redemption statute during the actual redemption period, but rather continued to negotiate and discuss the terms of the redemption with the Parties to try to finalize the same up until the last day of the redemption period. JA vol. 2, 339-354. Therefore, the Court should determine that Markey substantially complied with the statute and that he redeemed the property from Saticoy Bay.

E. Deviations from Strict Compliance with NRS 116.31166 Should Not Defeat Markey's Redemption.

Even if strict compliance is required, this Court's decision in *Pasillas v. HSBC Bank USA* supports a finding that failure to comply with a statute's strict compliance provision does not necessarily defeat the abusing party's rights and claims. Specifically, the *Pasillas* Court determined that the district court was required to consider appropriate sanctions where the Bank failed to adhere to the strict compliance requirements of NRS 107.086. 127 Nev. 462, 469, 255 P.3d 1281, 1286-87 (2011). The *Pasillas* Court did *not* determine that the district court was prohibited from ordering the Foreclosure Mediation Program administrator from entered a Letter of Certification that would allow the bank to proceed with the foreclosure process. *Id*. (Emphasis added). Rather, the Court remanded the case to the district court with instructions to consider "appropriate sanctions." *Id*. The Court then noted that the district court should review certain factors more

specific to the foreclosure mediation context when considering appropriate sanctions, including "whether the violations were intentional, the amount of prejudice to the non-violating party, and the violating party's willingness to mitigate any harm by continuing meaningful negotiation." *Id*. at 470, 255 P.3d at 1287.

Here, Saticoy Bay should not be rewarded for its decision to wait until the redemption period lapsed before objecting to the redemption based upon sufficiency of notice and Markey's failure to serve a certified copy of the deed, especially given the fact that Saticoy Bay negotiated with the Parties to try to finalize the redemption up until the last day of the redemption period. Again, when analyzing the circumstances of the instant action under the backdrop of the legislative intent behind the 2015 amendments, the Court must find in favor of Ditech and Markey. Indeed, the only way to ensure that all parties to the instant action are "put in as good a position as if the other party had fully performed" (*see* NRS 116.1114) is to hold that Markey redeemed the Property.

II. SATICOY BAY'S ARGUMENTS MADE FOR THE FIRST TIME ON APPEAL MUST NOT BE CONSIDERED.

"[P]arties may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below." *Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 437, 245 P.3d 542, 544 (2010) (internal citation omitted). "This rule is not meant to be harsh, overly formalistic, or to

punish careless litigators." *Id*. "Rather, the requirement that parties may raise on appeal only issues which have been presented to the district court maintains the efficiency, fairness, and integrity of the judicial system for all parties." *Id*.

In its Opening Brief, Saticoy Bay argues that Ditech did not have authority to redeem because it failed to provide proof of its authority on behalf of the lender and/or Fannie Mae to redeem the Property. *See* Opening Br. 12-14. This argument was never raised in front of the District Court, and therefore, should not be considered on appeal. Furthermore, it fails on the merits because Saticoy Bay never challenged Ditech's authority to redeem the Property during the redemption period, but rather Saticoy Bay continued to negotiate and discuss the terms of the redemption up until the last day of the redemption period. JA vol. 2, 339-354.

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Conclusion

Markey's redemption was timely, proper and constituted a good-faith substantial compliance with NRS Chapter 116's redemption provisions. Accordingly, this Court should hold that Markey redeemed the Property and extinguished the effects of the HOA Sale, such that Markey's interest and the Deed of Trust encumbering the Property remain valid interests with the same priority they held prior to the HOA Sale; and that Saticoy Bay is entitled to the redemption funds upon its release of any claim or interest to the Property.

Dated: April 20, 2018.

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Certificate of Compliance

1. 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 2013 processing program, in 14-point Times New Roman style. The undersigned counsel further certifies that this brief complies with the page- and type-volume limitations of NRAP 32(a)(7) because it is 25 pages and contains 5,893 words.

2. I further certify that I have read RESPONDENT'S ANSWERING BRIEF, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose.

3. 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 upon is to be found.

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

Dated: April 20, 2018.

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Certificate of Service

I, the undersigned, declare under the penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, the outcome of this action. On April 20, 2018, I caused to be served a true and correct copy of the foregoing **RESPONDENT'S ANSWERING BRIEF** upon the following individuals and entities, by the method indicated:

☐ **By E-Mail:** by transmitting via e-mail the document(s) listed above to the e-mail addresses set forth below and/or included on the Court's Service List for the above-referenced case.

☒ **By Electronic Submission:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

☐ **By U.S. Mail:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada, addressed as set forth below:

/s/ Brigette E. Foley
An Employee of Wolfe & Wyman LLP