

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

3 BANK OF AMERICA, N.A., )

4 )  
5 Plaintiff, )

6 vs. )

Case No.: 2:15-cv-01097-GMN-NJK

7 ORDER

8 SFR INVESTMENTS POOL I, LLC; )

9 ALTURAS AT MOUNTAIN'S EDGE )

10 HOMEOWNERS ASSOCIATION; DOE )

11 INDIVIDUALS I-X, inclusive, and ROE )

12 CORPORATIONS I-X, inclusive, )

13 Defendants. )

14 Pending before the Court is the Motion for Summary Judgment, (ECF No. 64), filed by  
15 Plaintiff Bank of America, N.A. ("BANA"). Defendant and Counterclaimant SFR Investments  
16 Pool 1, LLC ("SFR") filed a Response, (see ECF No. 68), to which BANA filed a Reply, (ECF  
17 No. 73).

18 Also pending before the Court is SFR's Motion for Summary Judgment, (ECF No. 65).  
19 BANA filed a Response, (ECF No. 67), and SFR filed a Reply, (ECF No. 74). For the reasons  
20 discussed below, the Court **GRANTS** BANA's Motion and **DENIES** SFR's Motion.

21 **I. BACKGROUND**

22 BANA filed its Complaint on June 10, 2015, asserting claims involving the non-judicial  
23 foreclosure on real property located at 10474 Badger Ravine Street, Las Vegas, Nevada 89178  
24 (the "Property"). (Compl. ¶ 7, ECF No. 1). On June 22, 2009, non-party Victor Garcia  
25 refinanced the Property by way of a loan in the amount of \$239,670.00 secured by a Deed of  
Trust ("DOT") recorded July 22, 2009. (Id. ¶ 12).

On June 4, 2010, Defendant Alturas at Mountain's Edge Homeowners Association  
("HOA"), through its agent Alessi & Koenig, LLC ("A&K"), recorded a notice of delinquent

1 assessment lien. (Id. ¶ 22). On January 26, 2011, A&K recorded a notice of default and  
2 election to sell to satisfy the delinquent assessment lien. (Id. ¶ 18). On February 16, 2012,  
3 HOA recorded a notice of trustee’s sale. (Id. ¶ 23). On July 11, 2012, SFR purchased the  
4 Property at the foreclosure sale pursuant to NRS § 116.1113. (Id. ¶ 33).

5 BANA asserts the following causes of action against various parties involved in the  
6 foreclosure and subsequent sales of the Property: (1) quiet title with a requested remedy of  
7 declaratory judgment; (2) wrongful foreclosure; (3) breach of Nevada Revised Statute (“NRS”)  
8 116.1113; (4) injunctive relief. (Id.).

## 9 **II. LEGAL STANDARD**

10 The Federal Rules of Civil Procedure provide for summary adjudication when the  
11 pleadings, depositions, answers to interrogatories, and admissions on file, together with the  
12 affidavits, if any, show that “there is no genuine dispute as to any material fact and the movant  
13 is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those that  
14 may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).  
15 A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to  
16 return a verdict for the nonmoving party. Id. “Summary judgment is inappropriate if  
17 reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict  
18 in the nonmoving party’s favor.” *Diaz v. Eagle Produce Ltd. P ’ship*, 521 F.3d 1201, 1207 (9th  
19 Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A  
20 principal purpose of summary judgment is “to isolate and dispose of factually unsupported  
21 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

22 In determining summary judgment, a court applies a burden-shifting analysis. “When  
23 the party moving for summary judgment would bear the burden of proof at trial, it must come  
24 forward with evidence which would entitle it to a directed verdict if the evidence went  
25 uncontroverted at trial. In such a case, the moving party has the initial burden of establishing

1 the absence of a genuine issue of fact on each issue material to its case.” C.A.R. Transp.  
2 Brokerage Co. v. Darden Rests., Inc., 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In  
3 contrast, when the nonmoving party bears the burden of proving the claim or defense, the  
4 moving party can meet its burden in two ways: (1) by presenting evidence to negate an  
5 essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving  
6 party failed to make a showing sufficient to establish an element essential to that party’s case  
7 on which that party will bear the burden of proof at trial. Celotex Corp., 477 U.S. at 323–24. If  
8 the moving party fails to meet its initial burden, summary judgment must be denied and the  
9 court need not consider the nonmoving party’s evidence. Adickes v. S.H. Kress & Co., 398 U.S.  
10 144, 159–60 (1970).

11         If the moving party satisfies its initial burden, the burden then shifts to the opposing  
12 party to establish that a genuine issue of material fact exists. Matsushita Elec. Indus. Co. v.  
13 Zenith Radio Corp., 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute,  
14 the opposing party need not establish a material issue of fact conclusively in its favor. It is  
15 sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the  
16 parties’ differing versions of the truth at trial.” T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors  
17 Ass’n, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid  
18 summary judgment by relying solely on conclusory allegations that are unsupported by factual  
19 data. Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go  
20 beyond the assertions and allegations of the pleadings and set forth specific facts by producing  
21 competent evidence that shows a genuine issue for trial. Celotex Corp., 477 U.S. at 324.

22         At summary judgment, a court’s function is not to weigh the evidence and determine the  
23 truth but to determine whether there is a genuine issue for trial. Anderson, 477 U.S. at 249. The  
24 evidence of the nonmovant is “to be believed, and all justifiable inferences are to be drawn in  
25

1 his favor.” Id. at 255. But if the evidence of the nonmoving party is merely colorable or is not  
2 significantly probative, summary judgment may be granted. Id. at 249–50.

## 3 **II. DISCUSSION**

4 BANA asserts claims against SFR for quiet title, violation of NRS § 116.1113, wrongful  
5 foreclosure, and injunctive relief. The Court first considers the impact of the Ninth Circuit’s  
6 ruling in Bourne Valley Court Trust v. Wells Fargo Bank, NA, 832 F.3d 1154 (9th Cir. 2016),  
7 cert. denied, No. 16-1208, 2017 WL 1300223 (U.S. June 26, 2017), before turning to BANA’s  
8 individual claims.

### 9 **A. The Scope and Effect of Bourne Valley**

10 In Bourne Valley, the Ninth Circuit held that NRS § 116.3116’s “‘opt-in’ notice scheme,  
11 which required a homeowners’ association to alert a mortgage lender that it intended to  
12 foreclose only if the lender had affirmatively requested notice, facially violated the lender’s  
13 constitutional due process rights under the Fourteenth Amendment to the Federal Constitution.”  
14 Bourne Valley, 832 F.3d at 1156. Specifically, the Court of Appeals found that by enacting the  
15 statute, the legislature acted to adversely affect the property interests of mortgage lenders, and  
16 was thus required to provide “notice reasonably calculated, under all circumstances, to apprise  
17 interested parties of the pendency of the action and afford them an opportunity to present their  
18 objections.” Id. at 1159. The statute’s opt-in notice provisions therefore violated the Fourteenth  
19 Amendment’s Due Process Clause because they impermissibly “shifted the burden of ensuring  
20 adequate notice from the foreclosing homeowners’ association to a mortgage lender.” Id.

21 The necessary implication of the Ninth Circuit’s opinion in Bourne Valley is that the  
22 petitioner succeeded in showing that no set of circumstances exists under which the opt-in  
23 notice provisions of NRS § 116.3116 would pass constitutional muster. See, e.g., United States  
24 v. Salerno, 481 U.S. 739, 745 (1987) (“A facial challenge to a legislative Act is, of course, the  
25 most difficult challenge to mount successfully, since the challenger must establish that no set of

1 circumstances exists under which the Act would be valid.”); *William Jefferson & Co. v. Bd. of*  
2 *Assessment & Appeals No. 3 ex rel. Orange Cty.*, 695 F.3d 960, 963 (9th Cir. 2012) (applying  
3 *Salerno* to facial procedural due process challenge under the Fourteenth Amendment). The fact  
4 that a statute “might operate unconstitutionally under some conceivable set of circumstances is  
5 insufficient to render it wholly invalid.” *Salerno*, 481 U.S. at 745. To put it slightly differently,  
6 if there were any conceivable set of circumstances where the application of a statute would not  
7 violate the constitution, then a facial challenge to the statute would necessarily fail. See, e.g.,  
8 *United States v. Inzunza*, 638 F.3d 1006, 1019 (9th Cir. 2011) (holding that a facial challenge to  
9 a statute necessarily fails if an as-applied challenge has failed because the plaintiff must  
10 “establish that no set of circumstances exists under which the [statute] would be valid”).

11 Here, the Ninth Circuit expressly invalidated the “opt-in notice scheme” of NRS  
12 § 116.3116, which it pinpointed in NRS 116.3116(2). *Bourne Valley*, 832 F.3d at 1158. In  
13 addition, this Court understands *Bourne Valley* also to invalidate NRS 116.311635(1)(b)(2),  
14 which also provides for opt-in notice to interested third parties. According to the Ninth Circuit,  
15 therefore, these provisions are unconstitutional in each and every application; no conceivable  
16 set of circumstances exists under which the provisions would be valid. The factual  
17 particularities surrounding the foreclosure notices in this case—which would be of paramount  
18 importance in an as-applied challenge—cannot save the facially unconstitutional statutory  
19 provisions. In fact, it bears noting that in *Bourne Valley*, the Ninth Circuit indicated that the  
20 petitioner had not shown that it did not receive notice of the impending foreclosure sale. Thus,  
21 the Ninth Circuit declared the statute’s provisions facially unconstitutional notwithstanding the  
22 possibility that the petitioner may have had actual notice of the sale.

23 HOA also argues that NRS § 107.090, which “requires that copies of the notice of  
24 default and election to sell, and the notice of sale be mailed to each ‘person with an interest or  
25 claimed interest’ that is ‘subordinate’ to the HOA’s super-priority,” is “incorporated into NRS

1 Chapter 116 by NRS 116.31168.” (HOA’s MSJ 8:18–26, ECF No. 32). However, Bourne  
2 Valley expressly rejected this argument. Bourne Valley, 832 F.3d at 1159 (“If section  
3 116.31168(1)’s incorporation of section 107.090 were to have required homeowners’  
4 associations to provide notice of default to mortgage lenders even absent a request, section  
5 116.31163 and section 116.31165 would have been meaningless.”).

6 Accordingly, the HOA foreclosed under a facially unconstitutional notice scheme, and  
7 thus the HOA foreclosure cannot have extinguished the DOT. Therefore, the Court must quiet  
8 title as a matter of law in favor of BANA as assignee of the DOT.

9 **B. Plaintiff’s Remaining Claims for Violation of NRS § 116.1113, Wrongful**  
10 **Foreclosure, and Injunctive Relief**

11 In its prayer for relief, BANA requests primarily a declaration that SFR purchased the  
12 Property subject to its DOT. (See Compl. 11:19–12:2). The other relief requested—with the  
13 exception of the injunctive relief—is phrased in the alternative. (See *id.* 9:8–10:23). Therefore,  
14 because the Court grants summary judgment for BANA on its quiet title claim, BANA has  
15 received the relief it requested. Accordingly, the Court dismisses BANA’s second and third  
16 causes of action as moot.

17 With regard to BANA’s request for a preliminary injunction pending a determination by  
18 the Court concerning the parties’ respective rights and interests, the Court’s grant of summary  
19 judgment for BANA moots this claim, and it is therefore dismissed.

20 **III. CONCLUSION**

21 **IT IS HEREBY ORDERED** that BANA’s Motion for Summary Judgment, (ECF No.  
22 64), is **GRANTED** pursuant to the foregoing.

23 **IT IS FURTHER ORDERED** that SFR’s Motion for Summary Judgment, (ECF No.  
24 65), is **DENIED**.

1           **IT IS FURTHER ORDERED** that SFR's counterclaims are **DISMISSED with**  
2 **prejudice.**

3           The Clerk of Court is ordered to close the case.

4           **DATED** this 21 day of March, 2018.

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Gloria M. Navarro, Chief Judge  
United States District Judge