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4 **UNITED STATES DISTRICT COURT**  
5 **DISTRICT OF NEVADA**

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7 ABSOLUTE BUSINESS SOLUTIONS, INC.,

8 Plaintiff,

2:15-cv-01325-RCJ-NJK

9 vs.

**ORDER**

10 MORTGAGE ELECTRONIC  
11 REGISTRATION SYSTEMS, INC. et al.,

12 Defendants.

13 This case arises out of a homeowners association foreclosure sale. Now pending before  
14 the Court is a Motion to for Summary Judgment. (ECF No. 65.) For the reasons given herein, the  
15 Court grants the motion.

16 **I. FACTS AND PROCEDURAL HISTORY**

17 In 2005, Irma Mendez (“Plaintiff”) purchased real property at 3416 Casa Alto Ave.,  
18 North Las Vegas, Nevada, 89031 (the “Property”) for \$315,000, giving the lender a promissory  
19 note for \$252,792 and a Deed of Trust (“DOT”) against the Property securing the note. When  
20 Mendez became delinquent on her monthly assessment fees, Alessi & Koenig (“Alessi”)  
21 conducted a trustee’s sale to Absolute Business Solutions, Inc. (“ABS”), on behalf of Fiesta Del  
22 Norte Homeowners Association (the “HOA”).

23 The HOA sale has given rise to three lawsuits now pending before this Court: *Mendez v.*  
24 *Fiesta Del Norte Homeowners Ass’n*, 2:15-cv-00314 (filed Feb. 23, 2015) (“the ‘314 Case”);

1 *Absolute Bus. Sols., Inc. v. Mortg. Elec. Registration Sys., Inc.*, 2:15-cv-01325 (filed July 13,  
2 2015) (“the ‘1325 Case”); and the instant case, *Mendez v. Wright, Findlay and Zak LLP*, 2:15-  
3 cv-01077 (filed May 13, 2016) (“the ‘1077 Case”). The procedural background of these cases  
4 was detailed in the Court’s August 3, 2016 Order deciding several motions in this case, (ECF  
5 No. 57), and need not be fully reproduced here.

6 In brief, this case involves claims brought by Absolute Business Solutions, Inc. (“ABS”)  
7 for quiet title, preliminary injunctive relief, and a declaratory judgment that ABS is the rightful  
8 holder of title to the Property free of all other liens and encumbrances. When Federal National  
9 Mortgage Association (“Fannie Mae”), and the Federal Housing Finance Agency (“FHFA”)  
10 intervened as defendants, they filed quiet title and declaratory judgment counterclaims against  
11 ABS. (ECF Nos. 9, 18.) Fannie Mae also asserted a claim for unjust enrichment. (ECF No. 9.)

12 Now, Fannie Mae and FHFA move for summary judgment based on the Ninth Circuit’s  
13 opinion in *Bourne Valley Court Trust v. Wells Fargo Bank, NA*, 832 F.3d 1154 (9th Cir. 2016),  
14 which established that the “opt-in notice scheme” of NRS 116.3116<sup>1</sup> is facially unconstitutional  
15 because it violates the procedural due process rights of mortgage lenders.

## 16 **II. LEGAL STANDARDS**

17 A court must grant summary judgment when “the movant shows that there is no genuine  
18 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.  
19 Civ. P. 56(a). Material facts are those which may affect the outcome of the case. *See Anderson v.*  
20 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there  
21 is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See id.* A  
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23 1 Unless otherwise noted, all references to “NRS 116.3116” are inclusive of NRS 116.3116  
24 through 116.31168. Also, the Nevada Legislature amended the statute in October 2015.  
Accordingly, unless otherwise noted, all references to the statute are to the pre-amendment  
version.

1 principal purpose of summary judgment is “to isolate and dispose of factually unsupported  
2 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

3 In determining summary judgment, a court uses a burden-shifting scheme. The moving  
4 party must first satisfy its initial burden. “When the party moving for summary judgment would  
5 bear the burden of proof at trial, it must come forward with evidence which would entitle it to a  
6 directed verdict if the evidence went uncontroverted at trial.” *C.A.R. Transp. Brokerage Co. v.*  
7 *Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citation and internal quotation marks  
8 omitted). In contrast, when the nonmoving party bears the burden of proving the claim or  
9 defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate  
10 an essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving  
11 party failed to make a showing sufficient to establish an element essential to that party’s case on  
12 which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24.

13 If the moving party fails to meet its initial burden, summary judgment must be denied and  
14 the court need not consider the nonmoving party’s evidence. *See Adickes v. S.H. Kress & Co.*,  
15 398 U.S. 144 (1970). If the moving party meets its initial burden, the burden then shifts to the  
16 opposing party to establish a genuine issue of material fact. *See Matsushita Elec. Indus. Co. v.*  
17 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the  
18 opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient  
19 that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’  
20 differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809  
21 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid summary  
22 judgment by relying solely on conclusory allegations unsupported by facts. *See Taylor v. List*,  
23 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and  
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1 allegations of the pleadings and set forth specific facts by producing competent evidence that  
2 shows a genuine issue for trial. *See* Fed. R. Civ. P. 56(e); *Celotex Corp.*, 477 U.S. at 324.

3 At the summary judgment stage, a court’s function is not to weigh the evidence and  
4 determine the truth, but to determine whether there is a genuine issue for trial. *See Anderson*, 477  
5 U.S. at 249. The evidence of the nonmovant is “to be believed, and all justifiable inferences are  
6 to be drawn in his favor.” *Id.* at 255. But if the evidence of the nonmoving party is merely  
7 colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249–50.  
8 Notably, facts are only viewed in the light most favorable to the non-moving party where there is  
9 a genuine dispute about those facts. *Scott v. Harris*, 550 U.S. 372, 380 (2007). That is, even  
10 where the underlying claim contains a reasonableness test, where a party’s evidence is so clearly  
11 contradicted by the record as a whole that no reasonable jury could believe it, “a court should not  
12 adopt that version of the facts for purposes of ruling on a motion for summary judgment.” *Id.*

### 13 **III. ANALYSIS**

#### 14 **a. The Scope and Effect of *Bourne Valley***

15 In *Bourne Valley*, the Ninth Circuit held that the “opt-in notice scheme” of NRS  
16 116.3116—included in the statute until its amendment in October 2015—was facially  
17 unconstitutional because it violated the procedural due process rights of mortgage lenders. In its  
18 ruling, the Court of Appeals found the state action requirement of the petitioner’s Fourteenth  
19 Amendment challenge was met, because “where the mortgage lender and the homeowners’  
20 association had no preexisting relationship, the Nevada Legislature’s enactment of the Statute is  
21 a ‘state action.’” *Bourne Valley*, 832 F.3d at 1160. In other words, because a mortgage lender  
22 and HOA generally have no contractual relationship, it is only by virtue of NRS 116.3116 that  
23 the mortgage lender’s interest is “degraded” by the HOA’s right to foreclose its lien. *Id.*  
24 Accordingly, by enacting the statute, the Legislature acted to adversely affect the property

1 interests of mortgage lenders, and was thus required to provide “notice reasonably calculated,  
2 under all circumstances, to apprise interested parties of the pendency of the action and afford  
3 them an opportunity to present their objections.” *Id.* at 1159 (quoting *Mennonite Bd. of Missions*  
4 *v. Adams*, 462 U.S. 791, 795 (1983)). The statute’s opt-in notice provisions therefore violated the  
5 Fourteenth Amendment’s Due Process Clause because they impermissibly “shifted the burden of  
6 ensuring adequate notice from the foreclosing homeowners’ association to a mortgage lender.”  
7 *Id.* at 1159.

8         The necessary implication of the Ninth Circuit’s opinion in *Bourne Valley* is that the  
9 petitioner succeeded in showing that no set of circumstances exists under which the opt-in notice  
10 provisions of NRS 116.3116 would pass constitutional muster. *See United States v. Salerno*, 481  
11 U.S. 739, 745 (1987) (“A facial challenge to a legislative Act is, of course, the most difficult  
12 challenge to mount successfully, since the challenger must establish that no set of circumstances  
13 exists under which the Act would be valid.”); *see also William Jefferson & Co. v. Bd. of*  
14 *Assessment & Appeals No. 3 ex rel. Orange Cty.*, 695 F.3d 960, 963 (9th Cir. 2012) (applying  
15 *Salerno* to facial procedural due process challenge under the Fourteenth Amendment); *Lopez-*  
16 *Valenzuela v. Arpaio*, 770 F.3d 772, 789 (9th Cir. 2014) (applying *Salerno* to facial substantive  
17 due process challenge under the Fifth and Fourteenth Amendments). The fact that a statute  
18 “might operate unconstitutionally under some conceivable set of circumstances is insufficient to  
19 render it wholly invalid.” *Id.* To put it slightly differently, if there were any conceivable set of  
20 circumstances where the application of a statute would not violate the constitution, then a facial  
21 challenge to the statute would necessarily fail. *See William Jefferson & Co.*, 695 F.3d at 963 (“If  
22 William Jefferson’s as-applied challenge fails, then William Jefferson’s facial challenge  
23 necessarily fails as well because there is at least one set of circumstances where application of  
24 § 31000.7 does not violate a taxpayer’s procedural due process rights.”); *United States v.*

1 *Inzunza*, 638 F.3d 1006, 1019 (9th Cir. 2011) (holding that a facial challenge to a statute  
2 necessarily fails if an as-applied challenge has failed because the plaintiff must “establish that no  
3 set of circumstances exists under which the [statute] would be valid”).

4 Here, the Ninth Circuit expressly invalidated the “opt-in notice scheme” of NRS  
5 116.3116, which it pinpointed in NRS 116.31163(2). *Bourne Valley*, 832 F.3d at 1158; *see also*  
6 *Bank of Am., N.A. v. SFR Investments Pool 1 LLC*, No. 2:15-cv-691, 2017 WL 1043286, at \*9  
7 (D. Nev. Mar. 17, 2017) (Mahan, J.) (“The facially unconstitutional provision, as identified in  
8 *Bourne Valley*, is present in NRS 116.31163(2).”). In addition, this Court understands *Bourne*  
9 *Valley* also to invalidate NRS 116.311635(1)(b)(2), which also provides for opt-in notice to  
10 interested third parties. According to the Ninth Circuit, therefore, these provisions are  
11 unconstitutional in each and every application; no conceivable set of circumstances exists under  
12 which the provisions would be valid. The factual particularities surrounding the foreclosure  
13 notices in this case—which would be of paramount importance in an as-applied challenge—  
14 cannot save the facially unconstitutional statutory provisions. In fact, it bears noting that in  
15 *Bourne Valley*, the Ninth Circuit indicated that the petitioner had not shown that it did not  
16 receive notice of the impending foreclosure sale. Thus, the Ninth Circuit declared the statute’s  
17 provisions facially unconstitutional notwithstanding the possibility that the petitioner may have  
18 had actual notice of the sale.

19 Accordingly, the HOA foreclosed under a facially unconstitutional notice scheme, and  
20 thus the HOA foreclosure cannot have extinguished the DOT. Therefore, the Court must quiet  
21 title as a matter of law in favor of Fannie Mae as assignee of the DOT. (Assignment, ECF No.  
22 65-1 at 33–34.)

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