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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

BANK OF AMERICA, N.A.,  <p style="text-align: center;">Plaintiff(s),</p> <p style="text-align: center;">v.</p> NEVADA TRAILS II COMMUNITY ASSOCIATION, et al.,  <p style="text-align: center;">Defendant(s).</p>		Case No. 2:18-CV-880 JCM (PAL)  <p style="text-align: center;">ORDER</p>
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Presently before this court is defendant/counter-claimant Daisy Trust’s motion for summary judgment. (ECF No. 32). Plaintiff/counter-defendant Bank of America, N.A. (“BANA”) filed a response (ECF No. 38), to which Daisy Trust replied (ECF No. 44).

Also before this court is defendant Nevada Trails II Community Association, Inc.’s (the “HOA”) motion to dismiss or in the alternative motion for summary judgment. (ECF No. 34). BANA filed a response (ECF No. 36), to which the HOA replied (ECF No. 42).

Also before the court is BANA’s motion for summary judgment. (ECF No. 35). Daisy Trust filed a response (ECF No. 37), to which BANA replied (ECF No. 43).

**I. Facts**

This case involves a dispute over real property located at 7623 Cascade Ridge Court, Las Vegas, Nevada 89113 (the “property”).<sup>1</sup> (ECF No. 1 at 2). On July 29, 2008, Sung Chang obtained a loan in the amount of \$267,600.00 from BANA to purchase the property, which was secured by a deed of trust recorded on July 30, 2008. (ECF No. 1 at 3–4).

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<sup>1</sup> BANA’s motion for summary judgment (ECF No. 35 at 2) incorrectly refers to the property as “7623 Nevada Trails Ridge.”

James C. Mahan  
U.S. District Judge

1 On September 1, 2009, defendant Alessi & Koenig, LLC (“A&K”), acting on behalf of the  
2 HOA, recorded a notice of delinquent assessment lien, stating an amount due of \$632.00. (ECF  
3 No.1 at 4). On December 7, 2009, A&K recorded a notice of default and election to sell to satisfy  
4 the delinquent assessment lien, stating an amount due of \$1,630.00. (ECF No. 1 at 4).

5 On January 15, 2010, BANA requested a ledger from A&K to identify the superpriority  
6 amount allegedly owed to the HOA. (ECF No. 35-4 at 6–7). A&K did not identify the super-  
7 priority portion of the lien but reasserted a total amount due of \$2,624.00. (ECF No. 35-4 at 11–  
8 14). BANA calculated the superpriority amount to be \$387.00 and tendered that amount to A&K  
9 on April 30, 2010, which A&K allegedly refused. (ECF No. 35-4. at 16–18).

10 On August 9, 2010, A&K recorded a notice of trustee’s sale, stating an amount due of  
11 \$2,763.00. (ECF No. 1 at 4). On November 18, 2011, A&K recorded a second notice of trustee’s  
12 sale, stating an amount due of \$4,173.00. (ECF No. 1 at 4). On August 2, 2012, A&K recorded a  
13 third notice of trustee’s sale, stating an amount due of \$4,398.00. (ECF No. 1 at 5).

14 On September 5, 2012, Daisy Trust purchased the property at the foreclosure sale for  
15 \$6,300.00. (ECF No. 1 at 6). A foreclosure deed in favor of Daisy Trust was recorded on  
16 September 11, 2012. (ECF No. 1 at 6).

17 On April 18, 2016, BANA filed the underlying complaint, alleging four causes of action:  
18 (1) quiet title/declaratory judgment against all defendants; (2) breach of NRS 116.1113 against the  
19 HOA and A&K; (3) wrongful foreclosure against the HOA and A&K; and (4) injunctive relief  
20 against Daisy Trust. (ECF No. 1).

21 On May 10, 2016, Daisy Trust filed a counterclaim against BANA seeking quiet title and  
22 declaratory relief. (ECF No. 11)

23 On May 5, 2017, Daisy Trust filed a motion for summary judgment regarding the two  
24 claims in its counterclaim. (ECF No. 32).

25 Also, on May 5, 2017, the HOA filed a motion to dismiss or in the alternative motion for  
26 summary judgment regarding all claims filed against it and argues that BANA failed to bring its  
27 claims within the “applicable three year statute of limitations.” (ECF No. 34 at 2).

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1           Lastly, on May 5, 2017, BANA filed a motion for summary judgment regarding the four  
2 causes of action in its complaint. (ECF No. 35).

3           The court will address each as it sees fit.

## 4       **II.     Legal Standards**

### 5           **A.     Motion to Dismiss**

6           The court may dismiss a plaintiff’s complaint for “failure to state a claim upon which relief  
7 can be granted.” Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide “[a] short and  
8 plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2).  
9 Although Rule 8 does not require detailed factual allegations, it does require more than labels and  
10 conclusions. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Furthermore, a formulaic  
11 recitation of the elements of a cause of action will not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662,  
12 677 (2009) (citation omitted). Rule 8 does not unlock the doors of discovery for a plaintiff armed  
13 with nothing more than conclusions. *Id.* at 678–79.

14           To survive a motion to dismiss, a complaint must contain sufficient factual matter to “state  
15 a claim to relief that is plausible on its face.” *Id.* A claim has facial plausibility when the plaintiff  
16 pleads factual content that allows the court to draw the reasonable inference that the defendant is  
17 liable for the misconduct alleged. *Id.* When a complaint pleads facts that are merely consistent  
18 with a defendant’s liability, and shows only a mere possibility of entitlement, the complaint does  
19 not meet the requirements to show plausibility of entitlement to relief. *Id.*

20           In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply  
21 when considering a motion to dismiss. *Id.* First, the court must accept as true all of the allegations  
22 contained in a complaint. *Id.* However, this requirement is inapplicable to legal conclusions. *Id.*  
23 Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.*  
24 at 678. Where the complaint does not permit the court to infer more than the mere possibility of  
25 misconduct, the complaint has “alleged – but not shown – that the pleader is entitled to relief.” *Id.*  
26 at 679. When the allegations in a complaint have not crossed the line from conceivable to  
27 plausible, plaintiff’s claim must be dismissed. *Twombly*, 550 U.S. at 570.

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1           The Ninth Circuit addressed post-Iqbal pleading standards in *Starr v. Baca*, 652 F.3d 1202,  
2 1216 (9th Cir. 2011). The Starr court held:

3           First, to be entitled to the presumption of truth, allegations in a complaint or  
4 counterclaim may not simply recite the elements of a cause of action, but must  
5 contain sufficient allegations of underlying facts to give fair notice and to enable  
6 the opposing party to defend itself effectively. Second, the factual allegations that  
are taken as true must plausibly suggest an entitlement to relief, such that it is not  
unfair to require the opposing party to be subjected to the expense of discovery and  
continued litigation.

7 Id.

### 8           **B.       Motion for Summary Judgment**

9           The Federal Rules of Civil Procedure allow summary judgment when the pleadings,  
10 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,  
11 show that “there is no genuine dispute as to any material fact and the movant is entitled to a  
12 judgment as a matter of law.” Fed. R. Civ. P. 56(a). A principal purpose of summary judgment is  
13 “to isolate and dispose of factually unsupported claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317,  
14 323–24 (1986).

15           For purposes of summary judgment, disputed factual issues should be construed in favor  
16 of the non-moving party. *Lujan v. Nat’l Wildlife Fed.*, 497 U.S. 871, 888 (1990). However, to be  
17 entitled to a denial of summary judgment, the nonmoving party must “set forth specific facts  
18 showing that there is a genuine issue for trial.” Id.

19           In determining summary judgment, a court applies a burden-shifting analysis. The moving  
20 party must first satisfy its initial burden. “When the party moving for summary judgment would  
21 bear the burden of proof at trial, it must come forward with evidence which would entitle it to a  
22 directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has  
23 the initial burden of establishing the absence of a genuine issue of fact on each issue material to  
24 its case.” *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000)  
25 (citations omitted).

26           By contrast, when the nonmoving party bears the burden of proving the claim or defense,  
27 the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential  
28 element of the non-moving party’s case; or (2) by demonstrating that the nonmoving party failed

1 to make a showing sufficient to establish an element essential to that party's case on which that  
2 party will bear the burden of proof at trial. See *Celotex Corp.*, 477 U.S. at 323–24. If the moving  
3 party fails to meet its initial burden, summary judgment must be denied and the court need not  
4 consider the nonmoving party's evidence. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–  
5 60 (1970).

6 If the moving party satisfies its initial burden, the burden then shifts to the opposing party  
7 to establish that a genuine issue of material fact exists. See *Matsushita Elec. Indus. Co. v. Zenith*  
8 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the  
9 opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient  
10 that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing  
11 versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626,  
12 631 (9th Cir. 1987).

13 In other words, the nonmoving party cannot avoid summary judgment by relying solely on  
14 conclusory allegations that are unsupported by factual data. See *Taylor v. List*, 880 F.2d 1040,  
15 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the  
16 pleadings and set forth specific facts by producing competent evidence that shows a genuine issue  
17 for trial. See *Celotex*, 477 U.S. at 324.

18 At summary judgment, a court's function is not to weigh the evidence and determine the  
19 truth, but to determine whether there is a genuine issue for trial. See *Anderson v. Liberty Lobby,*  
20 *Inc.*, 477 U.S. 242, 249 (1986). The evidence of the nonmovant is “to be believed, and all  
21 justifiable inferences are to be drawn in his favor.” *Id.* at 255. But if the evidence of the  
22 nonmoving party is merely colorable or is not significantly probative, summary judgment may be  
23 granted. See *id.* at 249–50.

### 24 **III. Discussion**

25 As an initial matter, BANA's claim for injunctive relief against Daisy Trust, claim (4), is  
26 dismissed without prejudice because the court follows the well-settled rule that a claim for  
27 “injunctive relief” standing alone is not a cause of action. See, e.g., *In re Wal-Mart Wage & Hour*  
28 *Emp't Practices Litig.*, 490 F. Supp. 2d 1091, 1130 (D. Nev. 2007); *Tillman v. Quality Loan Serv.*

1 Corp., No. 2:12-cv-346-JCM-RJJ, 2012 WL 1279939, at \*3 (D. Nev. Apr. 13, 2012) (finding that  
2 “injunctive relief is a remedy, not an independent cause of action”); Jensen v. Quality Loan Serv.  
3 Corp., 702 F. Supp. 2d 1183, 1201 (E.D. Cal. 2010) (“A request for injunctive relief by itself does  
4 not state a cause of action.”).

5 **A. Judicial Notice**

6 The court takes judicial notice of the following recorded documents: first deed of trust  
7 (ECF No. 35-1); notice of delinquent assessment (ECF No. 35-2); notice of default and election to  
8 sell (ECF Nos. 35-3); notice of trustee’s sale (ECF No. 35-5); trustee’s deed upon sale (ECF No.  
9 35-6); and declaration of covenants, conditions, and restrictions of Nevada Trails (ECF No. 35-8).  
10 See, e.g., United States v. Corinthian Colls., 655 F.3d 984, 998–99 (9th Cir. 2011) (holding that a  
11 court may take judicial notice of public records if the facts noticed are not subject to reasonable  
12 dispute); Intri-Plex Tech., Inv. v. Crest Grp., Inc., 499 F.3d 1048, 1052 (9th Cir. 2007).

13 **B. The HOA’s Motion to Dismiss**

14 **1. Claim 1**

15 Claim (1) of BANA’s complaint alleges a claim to quiet title/for declaratory relief against  
16 all defendants. (ECF No. 1 at 6–10). In the instant motion, the HOA argues that BANA’s quiet  
17 title claim should be dismissed because it is time-barred by the statute of limitations. (ECF No.  
18 34). The court disagrees.

19 Under Nevada law, “[a]n action may be brought by any person against another who claims  
20 an estate or interest in real property, adverse to the person bringing the action for the purpose of  
21 determining such adverse claim.” Nev. Rev. Stat. § 40.010. “A plea to quiet title does not require  
22 any particular elements, but each party must plead and prove his or her own claim to the property  
23 in question and a plaintiff’s right to relief therefore depends on superiority of title.” Chapman v.  
24 *Deutsche Bank Nat’l Trust Co.*, 302 P.3d 1103, 1106 (Nev. 2013) (internal quotation marks and  
25 citations omitted). Therefore, for plaintiff to succeed on its quiet title action, it needs to show that  
26 its claim to the property is superior to all others. See also *Breliant v. Preferred Equities Corp.*,  
27 918 P.2d 314, 318 (Nev. 1996) (“In a quiet title action, the burden of proof rests with the plaintiff  
28 to prove good title in himself.”).

1 Under NRS 40.010, an “action may be brought by any person against another who claims  
2 an estate or interest in real property, adverse to the person bringing the action, for the purpose of  
3 determining such adverse claim.” Nev. Rev. Stat. § 40.010. Further, NRS 11.070 sets forth a five-  
4 year limitations period for quiet title claims. *Weeping Hollow Ave. Trust v. Spencer*, 831 F.3d  
5 1110, 1114 (9th Cir. 2016) (“Under Nevada law, Spencer could have brought claims challenging  
6 the HOA foreclosure sale within five years of the sale.”); *Scott v. Mortg. Elec. Registration Sys.,*  
7 *Inc.*, 605 F. App’x 598, 600 (9th Cir. 2015) (“The statute of limitations for quiet title claims in  
8 Nevada is five years.”); *Bank of Am., N.A. v. Antelope Homeowners’ Ass’n*, No. 2:16-cv-00449-  
9 JCM-PAL, 2017 WL 421652, at \*3 (D. Nev. Jan. 30, 2017); *Nationstar Mortg. LLC v. Amber Hills*  
10 *II Homeowners Ass’n*, No. 2:15-cv-01433-APG-CWH, 2016 WL 1298108, at \*3 (D. Nev. Mar.  
11 31, 2016).

12 The foreclosure sale took place on September 5, 2012. (ECF No. 1). BANA filed the  
13 underlying complaint on April 18, 2016. (ECF No. 1). Thus, BANA’s quiet title claim was timely  
14 filed within the five-year limitations period set forth in NRS 11.070, and the HOA’s motion to  
15 dismiss on this basis will be denied.

## 16 2. Claim 2

17 Claim (2) of BANA’s complaint alleges that the HOA and A&K violated NRS 116.1113,  
18 which imposes an obligation of good faith in every contract or duty governed by Chapter 116.  
19 (ECF No. 1 at 10–11). For relief, BANA seeks damages in the amount of either the property’s fair  
20 market value or the unpaid principal on the loan as of the date of the HOA sale. (ECF No. 1 at  
21 12).

22 Because claim (2) is a claim for damages based on the alleged breach of a statutory duty,  
23 it must be brought within three years. See Nev. Rev. Stat. § 11.190(3)(a). The foreclosure sale  
24 took place on September 5, 2012. (ECF No. 1 at 2). BANA brought this lawsuit more than three  
25 years later, on April 18, 2016. (ECF No. 1). Therefore, claim (2) is time-barred, and the HOA’s  
26 motion to dismiss will be granted with prejudice as to this claim.

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**3. Claim 3**

Claim (3) of BANA’s complaint alleges that the foreclosure sale was wrongful because the HOA and A&K failed to give proper notice and an opportunity to cure the deficiency, and the HOA sold the property for a grossly inadequate amount. (ECF No. 1 at 12–13). BANA seeks damages in the amount of the property’s fair market value or the unpaid principal loan balance as of the time of the foreclosure sale. (ECF No. 1 at 13).

A tortious wrongful foreclosure claim “challenges the authority behind the foreclosure, not the foreclosure act itself.” McKnight Family, L.L.P. v. Adept Mgmt., 310 P.3d 555 at 559 (2013). A&K’s authority to foreclose on the HOA lien on behalf of the HOA arose from Chapter 116, essentially rendering count three a claim for damages based on liability created by a statute. Therefore, claim (3) is likewise time-barred under NRS 11.190(3)(a) because it was not brought within three years.

**C. Quiet Title<sup>2</sup>**

In the instant motions, Daisy Trust and BANA both move for summary judgment regarding their quiet title claims.

Daisy Trust argues that it is a bona fide purchaser and that the foreclosure sale was valid. (ECF No. 32).

BANA raises the following five arguments: (1) its tender was sufficient and should not have been rejected; (2) the HOA lien statute is facially unconstitutional, and “any [] factual issue[s] concerning actual notice [are] irrelevant”; (3) the foreclosure sale was commercially unreasonable; (4) Daisy Trust was not a bona fide purchaser for value; and (5) the SFR Investments decision should not be applied retroactively. (ECF No. 35 at 12).

Under Nevada law, “[a]n action may be brought by any person against another who claims an estate or interest in real property, adverse to the person bringing the action for the purpose of determining such adverse claim.” Nev. Rev. Stat. § 40.010. “A plea to quiet title does not require any particular elements, but each party must plead and prove his or her own claim to the property

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<sup>2</sup> The 2015 Legislature revised Chapter 116 substantially. 2015 Nev. Stat., ch. 266. Except where otherwise indicated, the references in this order to statutes codified in NRS Chapter 116 are to the version of the statutes in effect in 2010–12, when the events giving rise to this litigation occurred.

1 in question and a plaintiff’s right to relief therefore depends on superiority of title.” Chapman v.  
2 Deutsche Bank Nat’l Trust Co., 302 P.3d 1103, 1106 (Nev. 2013) (internal quotation marks and  
3 citations omitted). Therefore, for plaintiff to succeed on its quiet title action, it needs to show that  
4 its claim to the property is superior to all others. See also Breliant v. Preferred Equities Corp.,  
5 918 P.2d 314, 318 (Nev. 1996) (“In a quiet title action, the burden of proof rests with the plaintiff  
6 to prove good title in himself.”).

7 Section 116.3116(1) of the NRS gives an HOA a lien on its homeowners’ residences for  
8 unpaid assessments and fines. Nev. Rev. Stat. § 116.3116(1). Moreover, NRS 116.3116(2) gives  
9 priority to that HOA lien over all other liens and encumbrances with limited exceptions—such as  
10 “[a] first security interest on the unit recorded before the date on which the assessment sought to  
11 be enforced became delinquent.” Nev. Rev. Stat. § 116.3116(2)(b).

12 The statute then carves out a partial exception to subparagraph (2)(b)’s exception for first  
13 security interests. See Nev. Rev. Stat. § 116.3116(2). In SFR Investment Pool 1 v. U.S. Bank, the  
14 Nevada Supreme Court provided the following explanation:

15 As to first deeds of trust, NRS 116.3116(2) thus splits an HOA lien into two pieces,  
16 a superpriority piece and a subpriority piece. The superpriority piece, consisting of  
17 the last nine months of unpaid HOA dues and maintenance and nuisance-abatement  
charges, is “prior to” a first deed of trust. The subpriority piece, consisting of all  
other HOA fees or assessments, is subordinate to a first deed of trust.

18 334 P.3d 408, 411 (Nev. 2014) (“SFR Investments”).

19 Chapter 116 of the Nevada Revised Statutes permits an HOA to enforce its superpriority  
20 lien by nonjudicial foreclosure sale. Id. at 415. Thus, “NRS 116.3116(2) provides an HOA a true  
21 superpriority lien, proper foreclosure of which will extinguish a first deed of trust.” Id. at 419; see  
22 also Nev. Rev. Stat. § 116.3116(2)(1) (providing that “the association may foreclose its lien by sale”  
23 upon compliance with the statutory notice and timing rules).

### 24 **1. Deed Recitals**

25 Section 116.3116(1) of the Nevada Revised Statutes gives an HOA a lien on its  
26 homeowners’ residences for unpaid assessments and fines; moreover, NRS 116.3116(2) gives  
27 priority to that HOA lien over all other liens and encumbrances with limited exceptions—such as  
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1 “[a] first security interest on the unit recorded before the date on which the assessment sought to  
2 be enforced became delinquent.” Nev. Rev. Stat. § 116.3116(2)(b).

3 The statute then carves out a partial exception to subparagraph (2)(b)’s exception for first  
4 security interests. See Nev. Rev. Stat. § 116.3116(2). In *SFR Investment Pool 1 v. U.S. Bank*, the  
5 Nevada Supreme Court provided the following explanation:

6 As to first deeds of trust, NRS 116.3116(2) thus splits an HOA lien into two pieces,  
7 a superpriority piece and a subpriority piece. The superpriority piece, consisting of  
8 the last nine months of unpaid HOA dues and maintenance and nuisance-abatement  
9 charges, is “prior to” a first deed of trust. The subpriority piece, consisting of all  
10 other HOA fees or assessments, is subordinate to a first deed of trust.

11 334 P.3d 408, 411 (Nev. 2014) (“SFR Investments”).

12 Chapter 116 of the Nevada Revised Statutes permits an HOA to enforce its superpriority  
13 lien by nonjudicial foreclosure sale. *Id.* at 415. Thus, “NRS 116.3116(2) provides an HOA a true  
14 superpriority lien, proper foreclosure of which will extinguish a first deed of trust.” *Id.* at 419; see  
15 also Nev. Rev. Stat. § 116.3116(1) (providing that “the association may foreclose its lien by sale”  
16 upon compliance with the statutory notice and timing rules).

17 Subsection (1) of NRS 116.31166 provides that the recitals in a deed made pursuant to  
18 NRS 116.31164 of the following are conclusive proof of the matters recited:

- 19 (a) Default, the mailing of the notice of delinquent assessment, and the recording  
20 of the notice of default and election to sell;  
21 (b) The elapsing of the 90 days; and  
22 (c) The giving of notice of sale[.]

23 Nev. Rev. Stat. § 116.31166(1)(a)–(c).<sup>3</sup> “The ‘conclusive’ recitals concern default, notice, and  
24 publication of the [notice of sale], all statutory prerequisites to a valid HOA lien foreclosure sale  
25 as stated in NRS 116.31162 through NRS 116.31164, the sections that immediately precede and  
26

27 <sup>3</sup> The statute further provides as follows:

28 2. Such a deed containing those recitals is conclusive against the unit's  
former owner, his or her heirs and assigns, and all other persons. The receipt for the  
purchase money contained in such a deed is sufficient to discharge the purchaser  
from obligation to see to the proper application of the purchase money.

3. The 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.

Nev. Rev. Stat. § 116.31166(2)–(3).

1 give context to NRS 116.31166.” *Shadow Wood Homeowners Assoc. v. N.Y. Cmty. Bancorp., Inc.*,  
2 366 P.3d 1105 (Nev. 2016) (“Shadow Wood”). Nevertheless, courts retain the equitable authority  
3 to consider quiet title actions when a HOA’s foreclosure deed contains statutorily conclusive  
4 recitals. See *id.* at 1112.

5 Here, the court has taken judicial notice of the recorded trustee’s deed upon sale, the  
6 recorded notice of delinquent assessment, the recorded notice of default and election to sell, and  
7 the recorded notice of trustee’s sale. Pursuant to NRS 116.31166, the recitals in the recorded  
8 foreclosure deed are conclusive to the extent that they implicate compliance with NRS 116.31162  
9 through NRS 116.31164, which provide the statutory prerequisites of a valid foreclosure. See *id.*  
10 at 1112 (“[T]he recitals made conclusive by operation of NRS 116.31166 implicate compliance  
11 only with the statutory prerequisites to foreclosure.”). Therefore, pursuant to NRS 116.31166 and  
12 the recorded foreclosure deed, the foreclosure sale is valid to the extent that it complied with NRS  
13 116.31162 through NRS 116.31164.

14 Importantly, while NRS 116.3116 accords certain deed recitals conclusive effect—e.g.,  
15 default, notice, and publication of the notice of sale—it does not conclusively, as a matter of law,  
16 entitle Daisy Trust to success on its quiet title claim. See *Shadow Wood*, 366 P.3d at 1112  
17 (rejecting contention that NRS 116.31166 defeats, as a matter of law, actions to quiet title). Thus,  
18 the question remains whether BANA has demonstrated sufficient grounds to justify setting aside  
19 the foreclosure sale. See *id.* “When sitting in equity . . . courts must consider the entirety of the  
20 circumstances that bear upon the equities. This includes considering the status and actions of all  
21 parties involved, including whether an innocent party may be harmed by granting the desired  
22 relief.” *Id.*

## 23 **2. Rejected Tender**

24 In the instant motion, BANA argues that its tender on April 30, 2010, to A&K preserved  
25 the seniority of BANA’s deed of trust. (ECF No. 35 at 8–10). BANA asserts that it calculated the  
26 superpriority amount to be \$387.00 and tendered that amount to A&K on April 30, 2010, which  
27 A&K allegedly refused. (ECF No. 35-4 at 16–18).

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1           The court disagrees. BANA did not tender the amount set forth in the ledger, which stated  
2 an amount due of \$2,624.00. (ECF No. 35-4 at 11–14). Rather, BANA tendered a lesser amount,  
3 specifically, \$387.00. (ECF No. 35-4 at 16–18).

4           Under NRS 116.31166(1), the holder of a first deed of trust may pay off the superpriority  
5 portion of an HOA lien to prevent the foreclosure sale from extinguishing that security interest.  
6 See Nev. Rev. Stat. § 116.31166(1); see also SFR Investments, 334 P.3d at 414 (“But as a junior  
7 lienholder, U.S. Bank could have paid off the SHHOA lien to avert loss of its security . . . .”); see  
8 also, e.g., 7912 Limbwood Ct. Trust v. Wells Fargo Bank, N.A. et al., 979 F. Supp. 2d 1142, 1149  
9 (D. Nev. 2013) (“If junior lienholders want to avoid this result, they readily can preserve their  
10 security interests by buying out the senior lienholder’s interest.” (citing Carillo v. Valley Bank of  
11 Nev., 734 P.2d 724, 725 (Nev. 1987); Keever v. Nicholas Beers Co., 611 P.2d 1079, 1083 (Nev.  
12 1980))).

13           The superpriority lien portion, however, consists of “the last nine months of unpaid HOA  
14 dues **and maintenance and nuisance-abatement charges**,” while the subpriority piece consists of  
15 “all other HOA fees or assessments.” SFR Investments, 334 P.3d at 411 (emphasis added); see  
16 also 7912 Limbwood Ct. Trust, 979 F. Supp. 2d at 1150 (“The superpriority lien consists only of  
17 unpaid assessments and certain charges specifically identified in § 116.31162.”). BANA tendered  
18 \$387.00 based on its calculation of the nine months of unpaid HOA dues, without adequately  
19 accounting for the maintenance and nuisance-abatement charges. (ECF No. 35-4 at 16–18).  
20 Further, BANA fails to explain why it was appropriate to eliminate the other charges calculated in  
21 the ledger’s superpriority total. (ECF No. 35 at 5–10).

22           BANA merely presumed, without adequate support, that the amount set forth in the ledger  
23 included more than the superpriority lien portion and that a lesser amount based on BANA’s own  
24 calculations would be sufficient to preserve its interest in the property. See generally, e.g., Nev.  
25 Rev. Stat. § 107.080 (allowing trustee’s sale under a deed of trust only when a subordinate interest  
26 has failed to make good the deficiency in performance or payment for 35 days); Nev. Rev. Stat. §  
27 40.430 (barring judicially ordered foreclosure sale if the deficiency is made good at least 5 days  
28 prior to sale).

1 In response to BANA’s January 15, 2010, letter, A&K provided a statement indicating an  
2 amount due of \$2,624.00. (ECF No. 35-4 at 11–14). Rather than tendering the \$2,624.00 due so  
3 as to preserve its interest in the property and then later seeking a refund of any difference, BANA  
4 elected to pay a lesser amount (\$387.00) based on its unwarranted assumption that the amount  
5 stated in the notice included more than what was due. See *SFR Investments*, 334 P.3d at 418  
6 (noting that the deed of trust holder can pay the entire lien amount and then sue for a refund). Had  
7 BANA paid the amount set forth in the ledger (\$2,624.00), the HOA’s interest would have been  
8 subordinate to the first deed of trust. See Nev. Rev. Stat. § 116.31166(1).

9 After failing to use the legal remedies available to BANA to prevent the property from  
10 being sold to a third party—for example, seeking a temporary restraining order and preliminary  
11 injunction and filing a lis pendens on the property (see Nev. Rev. Stat. §§ 14.010, 40.060)—  
12 BANA now seeks to profit from its own failure to follow the rules set forth in the statutes. See  
13 generally, e.g., *Barkley’s Appeal. Bentley’s Estate*, 2 Monag. 274, 277 (Pa. 1888) (“In the case  
14 before us, we can see no way of giving the petitioner the equitable relief she asks without doing  
15 great injustice to other innocent parties who would not have been in a position to be injured by  
16 such a decree as she asks if she had applied for relief at an earlier day.”); *Nussbaumer v. Superior*  
17 *Court in & for Yuma Cty.*, 489 P.2d 843, 846 (Ariz. 1971) (“Where the complaining party has  
18 access to all the facts surrounding the questioned transaction and merely makes a mistake as to the  
19 legal consequences of his act, equity should normally not interfere, especially where the rights of  
20 third parties might be prejudiced thereby.”).

21 Based on the foregoing, BANA has failed to establish that it tendered a sufficient amount  
22 prior to the foreclosure sale so as to render Daisy Trust’s title subject to BANA’s deed of trust.

### 23 3. Due Process

24 BANA argues that the HOA lien statute is facially unconstitutional because it does not  
25 mandate notice to deed of trust beneficiaries. (ECF No. 35 at 11–16). BANA further contends  
26 that any factual issues concerning actual notice is irrelevant pursuant to *Bourne Valley Court Trust*  
27 *v. Wells Fargo Bank, N.A.*, 832 F.3d 1154 (9th Cir. 2016) (“Bourne Valley”). (ECF No. 35 at 11–  
28 16).

1           The Ninth Circuit held that NRS 116.3116's "opt-in" notice scheme, which required a  
2 HOA to alert a mortgage lender that it intended to foreclose only if the lender had affirmatively  
3 requested notice, facially violated mortgage lenders' constitutional due process rights. *Bourne*  
4 *Valley*, 832 F.3d at 1157–58. The facially unconstitutional provision, as identified in *Bourne*  
5 *Valley*, exists in NRS 116.31163(2). See *id.* at 1158. At issue is the "opt-in" provision that  
6 unconstitutionally shifts the notice burden to holders of the property interest at risk. See *id.*

7           To state a procedural due process claim, a claimant must allege "(1) a deprivation of a  
8 constitutionally protected liberty or property interest, and (2) a denial of adequate procedural  
9 protections." *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 982 (9th Cir.  
10 1998). BANA has satisfied the first element as a deed of trust is a property interest under Nevada  
11 law. See Nev. Rev. Stat. § 107.020 et seq.; see also *Mennonite Bd. of Missions v. Adams*, 462 U.S.  
12 791, 798 (1983) (stating that "a mortgagee possesses a substantial property interest that is  
13 significantly affected by a tax sale"). However, BANA fails on the second prong.

14           Due process does not require actual notice. *Jones v. Flowers*, 547 U.S. 220, 226 (2006).  
15 Rather, it requires notice "reasonably calculated, under all the circumstances, to apprise interested  
16 parties of the pendency of the action and afford them an opportunity to present their objections."  
17 *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); see also *Bourne Valley*,  
18 832 F.3d at 1158.

19           Here, adequate notice was given to the interested parties prior to extinguishing a property  
20 right. In fact, BANA acknowledges having received the notice of default. (ECF No. 35-4 at 6–7)  
21 ("This letter is written in response to your Notice of Default with regard to the HOA assessments  
22 purportedly owed on the above described real property."). As a result, the notice of trustee's sale  
23 was sufficient notice to cure any constitutional defect inherent in NRS 116.31163(2) because it put  
24 BANA on notice that its interest was subject to pendency of action and offered all of the required  
25 information. See also *Spears v. Spears*, 596 P.2d 210, 212 (Nev. 1979) ("The rule is well  
26 established that one who is not prejudiced by the operation of a statute cannot question its  
27 validity."). Further, BANA does not dispute receiving actual notice of the foreclosure sale, but  
28 merely that "actual notice does not change the analysis." (ECF No. 35 at 12–13).



1 sale, absent a showing of fraud, unfairness or oppression.” (citing *Golden v. Tomiyasu*, 387 P.2d  
2 989, 995 (Nev. 1963) (stating that, while a power-of-sale foreclosure may not be set aside for mere  
3 inadequacy of price, it may be if the price is grossly inadequate and there is “in addition proof of  
4 some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy  
5 of price” (internal quotation omitted)))).

6 Despite BANA’s assertion to the contrary, the *Shadow Wood* court did not adopt the  
7 restatement. In fact, nothing in *Shadow Wood* suggests that the Nevada Supreme Court adopted,  
8 or had the intention to adopt, the restatement. Compare *Shadow Wood*, 366 P.3d at 1112–13 (citing  
9 the restatement as secondary authority to warrant use of the 20% threshold test for grossly  
10 inadequate sales price), with *St. James Village, Inc. v. Cunningham*, 210 P.3d 190, 213 (Nev. 2009)  
11 (explicitly adopting § 4.8 of the Restatement in specific circumstances); *Foster v. Costco*  
12 *Wholesale Corp.*, 291 P.3d 150, 153 (Nev. 2012) (“[W]e adopt the rule set forth in the Restatement  
13 (Third) of Torts: Physical and Emotional Harm section 51.”); *Cucinotta v. Deloitte & Touche,*  
14 *LLP*, 302 P.3d 1099, 1102 (Nev. 2013) (affirmatively adopting the Restatement (Second) of Torts  
15 section 592A). Because Nevada courts have not adopted the relevant section(s) of the restatement  
16 at issue here, the Long test, which requires a showing of fraud, unfairness, or oppression in addition  
17 to a grossly inadequate sale price to set aside a foreclosure sale, controls. See 639 P.2d at 530.

18 Nevada has not clearly defined what constitutes “unfairness” in determining commercial  
19 reasonableness. The few Nevada cases that have discussed commercial reasonableness state,  
20 “every aspect of the disposition, including the method, manner, time, place, and terms, must be  
21 commercially reasonable.” *Levers v. Rio King Land & Inv. Co.*, 560 P.2d 917, 920 (Nev. 1977).  
22 This includes “quality of the publicity, the price obtained at the auction, [and] the number of  
23 bidders in attendance.” *Dennison v. Allen Grp. Leasing Corp.*, 871 P.2d 288, 291 (Nev. 1994)  
24 (citing *Savage Constr. v. Challenge-Cook*, 714 P.2d 573, 574 (Nev. 1986)).

25 Nevertheless, BANA fails to set forth sufficient evidence to show fraud, unfairness, or  
26 oppression so as to justify the setting aside of the foreclosure sale. BANA relies on its repeated  
27 assertion that it tendered the superpriority amount to show fraud, unfairness, or oppression.  
28 However, as discussed previously, the amount due on the date of BANA’s tender was set forth in

1 the ledger, specifically, \$2,624.00. Rather than tendering the noticed amount under protest so as  
2 to preserve its interest and then later seeking a refund of the difference in dispute, BANA chose to  
3 tender a lesser amount (\$387.00), an amount it calculated to be the superpriority portion. (ECF  
4 No. 35-4 at 16–18).

5 Accordingly, BANA’s commercial reasonability argument fails as a matter of law as it  
6 failed to set forth evidence of fraud, unfairness, or oppression. See, e.g., *Nationstar Mortg., LLC*  
7 *v. SFR Investments Pool 1, LLC*, No. 70653, 2017 WL 1423938, at \*2 n.2 (Nev. App. Apr. 17,  
8 2017) (“Sale price alone, however, is never enough to demonstrate that the sale was commercially  
9 unreasonable; rather, the party challenging the sale must also make a showing of fraud, unfairness,  
10 or oppression that brought about the low sale price.”).

#### 11 **5. Bona Fide Purchaser Status**

12 Because the court has concluded that BANA failed to properly raise any equitable  
13 challenges to the foreclosure sale, the court need not address BANA’s argument that Daisy Trust  
14 was not a bona fide purchaser for value. *Nationstar Mortg., LLC*, No. 70653, 2017 WL 1423938,  
15 at \*3 n.3 (citing *Shadow Wood*, 366 P.3d at 1114).

#### 16 **6. Retroactive Application**

17 BANA contends that SFR Investments should not be applied retroactively to extinguish the  
18 first deed of trust. (ECF No. 35 at 24–25).

19 The Nevada Supreme Court has since applied the SFR Investments holding in numerous  
20 cases that challenged pre-SFR Investments foreclosure sales. See, e.g., *Centeno v. Mortg. Elec.*  
21 *Registration Sys., Inc.*, No. 64998, 2016 WL 3486378, at \*2 (Nev. June 23, 2016); *LN Mgmt. LLC*  
22 *Series 8301 Boseck 228 v. Wells Fargo Bank, N.A.*, No. 64495, 2016 WL 1109295, at \*1 (Nev.  
23 Mar. 18, 2016) (reversing 2013 dismissal of quiet-title action that concluded contrary to SFR  
24 Investments, reasoning that “the district court’s decision was based on an erroneous interpretation  
25 of the controlling law”); *Mackensie Family, LLC v. Wells Fargo Bank, N.A.*, No. 65696, 2016 WL  
26 315326, at \*1 (Nev. Jan. 22, 2016) (reversing and remanding because “[t]he district court’s  
27 conclusion of law contradicts our holding in *SFR Investments Pool 1 v. U.S. Bank*”). Thus, SFR  
28 Investments applies to this case.

1 For the foregoing reasons, BANA has failed to show that it is entitled to judgment as a  
2 matter of law regarding its claim to quiet title. However, Daisy Trust is entitled to judgment in its  
3 favor.

4 **IV. Conclusion**

5 In sum, BANA's breach of NRS 116.1113 and wrongful foreclosure claims (claims 2 and  
6 3) will be dismissed with prejudice as they are time-barred by the statute of limitations. BANA's  
7 injunctive relief claim (claim 4) will be dismissed without prejudice. And, BANA's motion for  
8 summary judgment on its quiet title claim against all parties (claim 1) will be denied because  
9 BANA failed to show that it is entitled to judgment as a matter of law. On the other hand, Daisy  
10 Trust has shown that it is entitled to judgment as a matter of law as BANA cannot show that  
11 BANA's interest in the property is superior to that of Daisy Trust's interest. Daisy Trust has  
12 provided the recorded foreclosure deed in its favor, which is conclusive of the recitals contained  
13 therein, and has shown that its interest in the property is superior to that of BANA's interest.  
14 Therefore, the court will grant Daisy Trust's motion for summary judgment.

15 Accordingly,

16 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Daisy Trust's motion for  
17 summary judgment (ECF No. 32) be, and the same hereby is, GRANTED.

18 IT IS FURTHER ORDERED that the HOA's motion to dismiss or in the alternative  
19 motion for summary judgment (ECF No. 34) be, and the same hereby is, GRANTED IN PART  
20 and DENIED IN PART consistent with the foregoing.

21 IT IS FURTHER ORDERED that BANA's motion for summary judgment (ECF No. 35)  
22 be, and the same hereby is, DENIED.

23 The clerk is instructed to enter judgment accordingly and close the case.

24 DATED July 11, 2017.

25   
26 \_\_\_\_\_  
UNITED STATES DISTRICT JUDGE