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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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THUNDER PROPERTIES, INC., a Nevada  
corporation,

Plaintiff,

v.

KATHLEEN J. TREADWAY, an individual;  
WELLS FARGO BANK, N.A., a national  
banking association; FEDERAL  
NATIONAL MORTGAGE ASSOCIATION,  
INC., a Delaware corporation; DOE  
individuals I through XX; and ROE  
CORPORATIONS I through XX,

Defendants.

Case No. 3:15-cv-00141-MMD-VPC

ORDER

(Motion to Dismiss – dkt. no. 10)

**I. SUMMARY**

Plaintiff acquired the property at issue at a homeowners' association foreclosure sale and now seeks to quiet title. Before the Court is Defendant Wells Fargo Bank, N.A. ("Wells Fargo") and Federal National Mortgage Association's (collectively "Defendants") Motion to Dismiss ("Motion"). (Dkt. no. 10.) The Court has reviewed Plaintiff's response (dkt. no. 32) and Defendants' reply (dkt. no. 33). The Court also heard oral argument on the constitutional challenges to NRS § 116.3116 ("the Statute") in conjunction with a similar case. (Dkt. no 42.) For the reasons discussed below, Defendants' Motion is granted with respect to Plaintiff's claim for injunctive relief and is denied with respect to the remaining claims.

1 **II. BACKGROUND**

2 Plaintiff initiated this action in state court seeking to quiet title and asserting claims  
3 of unjust enrichment, equitable mortgage, and slander of title. (Dkt. no. 1-1.) Plaintiff  
4 alleges that Defendant Kathleen Treadway (“Treadway”) purchased property (“Property”)  
5 within the Williamsburg Townhomes Homeowner’s Association (“HOA”). (Dkt. no. 1-1 ¶  
6 12.) Treadway obtained a reverse mortgage loan, secured by a deed of trust (“DOT”),  
7 from Well Fargo. (Dkt. no. 10 at 3.) Treadway failed to pay HOA assessments and the  
8 HOA eventually foreclosed on the Property pursuant to NRS § 116.3116. (Dkt. no. 1-1  
9 ¶25.) Plaintiff purchased the Property at the foreclosure sale.

10 **III. LEGAL STANDARD**

11 On a Rule 12(b)(6) motion, the court must determine “whether the complaint’s  
12 factual allegations, together with all reasonable inferences, state a plausible claim for  
13 relief.” *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys.*, 637 F.3d 1047, 1054 (9th  
14 Cir.2011) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009)). “A claim has facial  
15 plausibility when the plaintiff pleads factual content that allows the court to draw the  
16 reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556  
17 U.S. at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

18 When determining the sufficiency of a claim, “[w]e accept factual allegations in the  
19 complaint as true and construe the pleadings in the light most favorable to the non-  
20 moving party[; however, this tenet does not apply to] . . . legal conclusions . . . cast in the  
21 form of factual allegations.” *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011)  
22 (citation and internal quotation marks omitted). “Therefore, conclusory allegations of law  
23 and unwarranted inferences are insufficient to defeat a motion to dismiss.” *Id.* (citation  
24 and internal quotation marks omitted); *see also Iqbal*, 556 U.S. at 678 (quoting *Twombly*,  
25 550 U.S. at 555) (“A pleading that offers ‘labels and conclusions’ or ‘a formulaic  
26 recitation of the elements of a cause of action will not do.’”).

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1 **IV. DISCUSSION**

2 **A. The Statute**

3 Under NRS § 116.3116, a homeowners' association can establish a "lien on a unit  
4 for . . . any assessment levied against that unit or any fines imposed against the unit's  
5 owner from the time . . . the assessment or fine becomes due." NRS § 116.3116(1).  
6 Section 116.3116 further provides that such a lien "is prior to all other liens and  
7 encumbrances on a unit except," among other categories of liens, "[a] first security  
8 interest on the unit recorded before the date on which the assessment sought to be  
9 enforced became delinquent." NRS § 116.3116(2)(b). The statute, however, contains an  
10 exception to this exception, allowing a homeowners' association to establish a lien that  
11 takes priority over a first security interest for unpaid assessments over a nine-month  
12 period preceding the enforcement of the lien. NRS § 116.3116.<sup>1</sup> The statute also sets  
13 out the procedures a homeowners' association must follow in a nonjudicial foreclosure of  
14 its lien. The parties disagree about whether the statute, at the time in question, required  
15 an association to give notice to junior lienholders, or whether junior lienholders must  
16 "opt-in" to a notice system. Recent amendments to the statute require individual notice of  
17 default and notice of sale to all lien holders of record via certified mail. S.B. 306 § 3-4,  
18 9(1) 2015 Leg., 78<sup>th</sup> Sess. (Nev. 2015).

19 In 2014, the Nevada Supreme Court ruled that NRS § 116.3116 creates a "true  
20 superpriority lien" for 9 months of unpaid association assessments and certain charges.  
21 *SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408, 419 (Nev. 2014) (en banc).  
22 Accordingly, the court further held, a nonjudicial foreclosure of an homeowners'

23  
24 <sup>1</sup>Section 116.3116 was amended and reorganized in 2015. See 2015 Nev. Stat.  
25 1331, 1334. The statute retains the exceptions described above, but creates a separate  
26 subsection (NRS § 116.3116(3)), which states that an homeowners' association lien may  
27 take priority over a first deed of trust for "[t]he unpaid amount of assessments . . . which  
28 would have become due in the absence of acceleration during the 9 months immediately  
preceding the date on which the notice of default and election to sell is recorded," in  
addition to certain charges and costs. NRS § 116.3116(3). To avoid confusion over the  
recently reorganized subsections, the Court will cite to NRS § 116.3116 generally in  
discussing the provisions that give a homeowners' association a first priority lien.

1 association lien under NRS § 116.3116 would extinguish any first deed of trust, so long  
2 as certain statutory notice requirements are followed. *See id.* at 411-17. Before *SFR*  
3 *Invs. Pool*, courts across Nevada had interpreted this portion of the statute  
4 inconsistently.

5 **B. Due Process**

6 Defendants argue that the Statute is unconstitutional because it allows for their  
7 property — their rights under the DOT — to be taken without adequate notice. They  
8 argue that the Statute provides only for “opt-in” notice, rather than mandatory notice, and  
9 that this arrangement is unconstitutional under the notice requirements necessitated  
10 when a state action affects property interest as established in *Mullane v. Central*  
11 *Hannover Bank & Trust Co.*, 339 U.S. 306 (1950), and *Mennonite Bd. Of Missions v.*  
12 *Adams*, 462 U.S. 791 (1983).

13 The Fourteenth Amendment provides: “No state shall . . . deprive any person of  
14 life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1. It thus  
15 shields citizens from unlawful governmental actions, but does not affect conduct by  
16 private entities. The “dispositive question” to a constitutional due process challenge is  
17 “whether there was state action.” *Apao v. Bank of New York*, 324 F.3d 1091, 1095 (9th  
18 Cir. 2003). This threshold question is not satisfied here because the actions authorized  
19 under the Statute do not rise to the level of state action.

20 The Supreme Court has held that foreclosure procedures implicate the Fourteenth  
21 Amendment only where there is at least some direct state involvement in the execution  
22 of the foreclosure or seizure. *See Fuentes v. Shevin*, 407 U.S. 67, 70-71 (1972) (clerk of  
23 court made out writ of replevin authorizing seizure of property by sheriff); *Sniadach v.*  
24 *Family Fin. Corp.*, 395 U.S. 337, 338–39 (1969) (clerk of court issued summons at  
25 request of creditor's counsel, setting in motion garnishment of wages).

26 While it is true that state endorsement or enabling of private action can  
27 sometimes constitute state action for due process purposes, “[t]he existence of a state  
28 statute authorizing certain private action ‘is not the final answer to the touchstone of

1 state action.” *Culbertson v. Leland*, 528 F.2d 426, 429 (9th Cir. 1975) (quoting *Adams v.*  
2 *Southern California First National Bank*, 492 F.2d 324, 330 (9th Cir. 1973).

3 In fact, the Ninth Circuit has very clearly addressed whether nonjudicial  
4 foreclosures amounted to state action on more than one occasion. In *Charmicor v.*  
5 *Deaner*, 572 F.2d 694 (9th Cir. 1978), a corporation challenged Nevada’s nonjudicial  
6 foreclosure statute on the theory that it violated the due process clause of the Fourteenth  
7 Amendment by failing to provide a pre-sale hearing. The Nevada statute allowing for  
8 nonjudicial foreclosures did not simply confirm a contractual or common law right, rather  
9 it “confer[ed] a power of sale upon the trustee.” *Id.* at 695. Nevertheless, the Ninth Circuit  
10 held that “the statutory source of Nevada’s power of sale . . . does not necessarily  
11 transform a private, nonjudicial foreclosure into state action.” *Id.* The court concluded  
12 that Nevada’s nonjudicial foreclosure statute did not constitute state action and upheld  
13 the district court’s dismissal of a due process claim.

14 More recently, in *Apao*, 324 F.3d 1091, the Ninth Circuit revisited and explicitly  
15 affirmed its holding in *Charmicor*. The *Apao* court noted that nonjudicial sales do not  
16 involve “overt official involvement” and are neither compelled or encouraged by the  
17 statute; and while the statute may recognize and even authorize “private self-help  
18 remedy,” such authorization is not enough to “convert private conduct into state action.”  
19 *Id.* at 1094-1095 (citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164-54 (1978)). The  
20 court further noted that any procedural issues with the foreclosures were unrelated to  
21 “the threshold [and] dispositive question as to whether there was state action.” *Id.* at  
22 1095.

23 The Statute here similarly lacks any overt official involvement to convert an  
24 otherwise private nonjudicial foreclosure sale into state action. *See SFR Invs. Pool*, 334  
25 P.3d at 410-12 (describing history and function of the law.) Applying *Charmicor* and  
26 *Apao*, the nonjudicial foreclosure scheme governed by the Statute cannot be considered  
27 state action for the purposes of a due process challenge. Defendants’ due process  
28 argument falls short.

1           **C. Takings**

2           Defendants also argue that the Statute violates the takings clause of the Fifth  
3 Amendment. (Dkt. no 10 at 15.) Specifically, Defendants argue that “[t]his Statute, as  
4 enacted by the Legislature (and now as interpreted by *SFR v. U.S. Bank*) is government  
5 conduct” that amounts to a taking because the Statute extinguishes their secured  
6 interest in the Property without just compensation. *Id* at 16.

7           Nevada adopted the Statute in 1991. 1991 Nev. Stat., ch 245 § 1-128, at 535-79;  
8 *see also SFR Invs. Pool*, 334 P.3d at 410. Defendants obtained their secured interest in  
9 the Property in 2006, which was long after the Statute’s enactment. (Dkt. no 10 at 3.)  
10 Defendants cannot, and likely do not, actually argue the Statute constitutes a taking.  
11 Defendants’ argument seems to be that the Nevada Supreme Court’s interpretation of  
12 the Statute in *SFR Invs. Pool* changed the law and created a takings issue.

13           It is true that actions by the courts, just like actions by the legislative or executive  
14 branches, can constitute a taking under the Fifth Amendment. *See Stop the Beach*  
15 *Renourishment, Inc. v. Florida Dept. of Env’tl. Protection*, 560 U.S. 702, 714 (2010). As  
16 Justice Scalia wrote in that case, “if . . . a court declares that what was once an  
17 established right of private property no longer exists, it has taken that property.” *Id.* at  
18 715. However, there is no taking unless a party can show that before a court decision  
19 they were clearly entitled to the right which the decision took away. *Id.*

20           Defendants cannot show any such entitlement here. At best, there was  
21 disagreement among the lower courts in this state about how the superpriority lien  
22 should be understood. As another court in this district has noted, “lenders and investors  
23 were at loggerheads over the legal effect of a howeowners association’s nonjudicial  
24 foreclosure of a superpriority lien on the lender’s first trust deed . . . the *SFR* decision  
25 made winners out of,” those, like Plaintiff, who had invested in homeowners’  
26 associations foreclosed properties and losers out of those like Defendants who had  
27 “gambled on the opposite result.” *Freedom Mortg. Corp. v. Las Vegas Dev. Grp.*, 106  
28 F.Supp.3d 1174, 1176 (D. Nev. 2015.) In other words, the *SFR Invs. Pool* court did not

1 change the Statute or eliminate any previously announced rights by reversing an earlier  
2 decision; it simply clarified what the law meant since its enactment in 1991. Defendants'  
3 takings argument also falls short.

4 **D. Remaining Claims**

5 Defendants seek to dismiss claims for unjust enrichment, equitable mortgage and  
6 slander of title. The Court agrees with Plaintiff that accepting the allegations of the  
7 Complaint as true, Plaintiff has stated a claim.


8 Plaintiff does not oppose dismissal of its claim for injunctive relief. (Dkt. no. 32 at  
9 19.) Accordingly, this claim will be dismissed.

10 **V. CONCLUSION**

11 The Court notes that the parties made several arguments and cited to several  
12 cases not discussed above. The Court has reviewed these arguments and cases and  
13 determines that they do not warrant discussion as they do not affect the outcome of the  
14 Motion.

15 It is hereby ordered that Defendants' Motion to Dismiss (dkt. no. 10) is granted  
16 with respect to Plaintiff's claim for injunctive relief and is denied with respect to the other  
17 claims.

18 ENTERED THIS 31<sup>st</sup> day of March 2016.

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22 MIRANDA M. DU  
23 UNITED STATES DISTRICT JUDGE  
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