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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

_____)
US BANK, N.A.,)
)
Plaintiff,)
)
vs.)
)
SFR INVESTMENTS POOL 1, LLC et al.,)
)
Defendants.)
_____)

3:15-cv-00241-RCJ-WGC

ORDER

This case arises out of a completed homeowners’ association (“HOA”) foreclosure sale and an impending HOA foreclosure sale of the same property by a different HOA. Pending before the Court are two Motions to Dismiss the Complaint (ECF Nos. 24, 27), a Motion to Dismiss the Counterclaim (ECF No. 42), and a Motion for a Preliminary Injunction (ECF No. 46). For the reasons given herein, the Court denies the motions to dismiss the Complaint, grants the motion to dismiss the Counterclaim, with leave to amend, and consolidates the motion for a preliminary junction with a trial on the merits of Plaintiff’s second claim.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff US Bank, N.A. became the successor beneficiary of a \$236,000 promissory note and first deed of trust encumbering real property at 2546 Napoli Dr., Sparks, NV 89434 (the “Property”) on October 7, 2013. (Compl. ¶¶ 2, 6–19, ECF No. 1). On June 6, 2013, Defendants

1 had conducted a non-judicial HOA foreclosure sale of the Property at which Defendant SFR
2 Investments Pool 1, LLC (“SFR”) purchased the Property for \$9,000. (*Id.* ¶¶ 31–32). Prior to the
3 sale, however, counsel for Plaintiff’s predecessor-in-interest had tendered the \$288 super-priority
4 amount of the HOA lien to Defendant Alessi & Koenig, LLC (“Alessi”), counsel for Defendant
5 D’Andrea HOA, but Alessi had rejected the tender. (*Id.* ¶¶ 24–30).

6 Plaintiff sued SFR, D’Andrea HOA, Alessi, Siena HOA, and The Clarkson Law Group,
7 P.C. (“Clarkson”) for: (1) quiet title (SFR, D’Andrea HOA, and Siena HOA); (2) a preliminary
8 injunction (SFR, Siena HOA, and Clarkson); (3) wrongful foreclosure (D’Andrea HOA and
9 Alessi); (4) Negligence (D’Andrea HOA and Alessi); (5) Negligence Per Se (D’Andrea HOA
10 and Alessi); (6) Breach of Contract (D’Andrea HOA and Alessi); (7) Misrepresentation
11 (D’Andrea HOA); (8) Unjust Enrichment (SFR, D’Andrea HOA, and Alessi); and (9) Breach of
12 the Covenant of Good Faith and Fair Dealing (D’Andrea HOA and Alessi). SFR answered and
13 filed a Counterclaim for declaratory relief that the June 6, 2013 foreclosure sale at which it
14 purchased the Property extinguished US Bank’s deed of trust against the Property under Nevada
15 Revised Statutes section (“NRS”) 116.3116. Clarkson has moved to dismiss the single claim
16 against it in the Complaint for a preliminary injunction. Siena HOA has separately moved to
17 dismiss the quiet title and preliminary injunction claims for failure to state a claim. US Bank has
18 moved to dismiss the Counterclaim and has moved for a preliminary injunction preventing Siena
19 HOA and its agents (including Clarkson) from conducting a sale of the Property.

20 **II. LEGAL STANDARDS**

21 **A. Dismissal for Failure to State a Claim**

22 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the
23 claim showing that the pleader is entitled to relief” in order to “give the defendant fair notice of
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1 what the . . . claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47
2 (1957). Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action
3 that fails to state a claim upon which relief can be granted. A motion to dismiss under Rule
4 12(b)(6) tests the complaint’s sufficiency. *See N. Star Int’l v. Ariz. Corp. Comm’n*, 720
5 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule 12(b)(6) for
6 failure to state a claim, dismissal is appropriate only when the complaint does not give the
7 defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See Bell*
8 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint is
9 sufficient to state a claim, the court will take all material allegations as true and construe them in
10 the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th
11 Cir. 1986). The court, however, is not required to accept as true allegations that are merely
12 conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden*
13 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

14 A formulaic recitation of a cause of action with conclusory allegations is not sufficient; a
15 plaintiff must plead facts pertaining to his own case making a violation “plausible,” not just
16 “possible.” *Ashcroft v. Iqbal*, 556 U.S. 662, 677–79 (2009) (citing *Twombly*, 550 U.S. at 556)
17 (“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to
18 draw the reasonable inference that the defendant is liable for the misconduct alleged.”). That is,
19 under the modern interpretation of Rule 8(a), a plaintiff must not only specify or imply a
20 cognizable legal theory (*Conley* review), but also must allege the facts of his case so that the
21 court can determine whether the plaintiff has any basis for relief under the legal theory he has
22 specified or implied, assuming the facts are as he alleges (*Twombly-Iqbal* review). Put
23 differently, *Conley* only required a plaintiff to identify a major premise (a legal theory) and
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1 conclude liability therefrom, but *Twombly-Iqbal* requires a plaintiff additionally to allege minor
2 premises (facts of the plaintiff’s case) such that the syllogism showing liability is logically
3 complete and that liability necessarily, not only possibly, follows (assuming the allegations are
4 true).

5 “Generally, a district court may not consider any material beyond the pleadings in ruling
6 on a Rule 12(b)(6) motion. However, material which is properly submitted as part of the
7 complaint may be considered on a motion to dismiss.” *Hal Roach Studios, Inc. v. Richard Feiner*
8 *& Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citation omitted). Similarly, “documents
9 whose contents are alleged in a complaint and whose authenticity no party questions, but which
10 are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6)
11 motion to dismiss” without converting the motion to dismiss into a motion for summary
12 judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Moreover, under Federal Rule
13 of Evidence 201, a court may take judicial notice of “matters of public record.” *Mack v. S. Bay*
14 *Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court
15 considers materials outside of the pleadings, the motion to dismiss is converted into a motion for
16 summary judgment. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir.
17 2001).

18 **B. Preliminary Injunction**

19 The Court of Appeals in the past set forth two alternative sets of criteria for determining
20 whether to grant preliminary injunctive relief:

21 Under the traditional test, a plaintiff must show: (1) a strong likelihood of success
22 on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary
23 relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4)
24 advancement of the public interest (in certain cases). The alternative test requires
that a plaintiff demonstrate either a combination of probable success on the merits
and the possibility of irreparable injury or that serious questions are raised and the

1 balance of hardships tips sharply in his favor. These two formulations represent
2 two points on a sliding scale in which the required degree of irreparable harm
increases as the probability of success decreases. They are not separate tests but
rather outer reaches of a single continuum.

3 *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 415
4 F.3d 1078, 1092–93 (9th Cir. 2005) (quoting *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113,
5 1120 (9th Cir. 2005)) (citations and internal quotation marks omitted). The Supreme Court later
6 ruled, however, that a plaintiff seeking an injunction must demonstrate that irreparable harm is
7 “likely,” not just possible. *Winter v. NRDC*, 555 U.S. 7, 19–23 (2008) (rejecting the Court of
8 Appeals’ alternative “sliding scale” test insofar as it permitted an injunction based on a
9 probability of irreparable harm that is less than “likely”). The Court of Appeals has recognized
10 that the “possibility” test was “definitively refuted” in *Winter*, and that “[t]he proper legal
11 standard for preliminary injunctive relief requires a party to demonstrate ‘that he is likely to
12 succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary
13 relief, that the balance of equities tips in his favor, and that an injunction is in the public
14 interest.’” *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009) (quoting *Winter*, 129 S.
15 Ct. at 374) (reversing a district court’s use of the Court of Appeals’ pre-*Winter*, “sliding-scale”
16 standard and remanding for application of the proper standard).

17 A Court of Appeals ruling relying largely on the dissenting opinion in *Winter* parsed the
18 language of *Winter* and subsequent Court of Appeals rulings and determined that the sliding
19 scale test remained viable when there was a lesser showing of likelihood of success on the merits
20 amounting to “serious questions,” but not when there is a lesser showing of likelihood of
21 irreparable harm. See *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir.
22 2011). This case presents some difficulty in light of *Winter* and prior Court of Appeals cases.
23 To the extent *Cottrell*’s interpretation of *Winter* is inconsistent with *Selecky*, *Selecky* controls.
24

1 See *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc) (holding that, in the absence
2 of an intervening Supreme Court decision, only the en banc court may overrule a decision by a
3 three-judge panel). The Supreme Court stated in *Winter* that “[a] plaintiff seeking a preliminary
4 injunction must establish that he is *likely* to succeed on the merits, that he is *likely* to suffer
5 irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor,
6 and that an injunction is in the public interest.” *Winter*, 555 U.S. at 20 (citing *Munaf v. Geren*,
7 128 S. Ct. 2207, 2218–19 (2008); *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987);
8 *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–12 (1982)) (emphases added). The test is
9 presented as a four-part conjunctive test, not as a four-factor balancing test, and the word
10 “likely” modifies the success-on-the-merits prong in exactly the same way it separately modifies
11 the irreparable-harm prong. In rejecting the sliding-scale test as to the irreparable-injury prong
12 of the test, the *Winter* Court emphasized the fact that the word “likely” modifies the irreparable-
13 injury prong. See *id.* at 22. The word “likely” modifies the success-on-the-merits prong the same
14 way. See *id.* at 20.

15 In summary, to satisfy *Winter*, a movant must show that he is “likely” to succeed on the
16 merits. According to a layman’s dictionary, “likely” means “having a high probability of
17 occurring or being true.” Merriam–Webster Dictionary, [http://www.merriam-webster.com/
18 dictionary/likely](http://www.merriam-webster.com/dictionary/likely). Black’s defines the “likelihood-of-success-on-the-merits test” more leniently
19 as “[t]he rule that a litigant who seeks [preliminary relief] must show a reasonable probability of
20 success” Black’s Law Dictionary 1012 (9th ed. 2009). The Court must reconcile the cases
21 by interpreting the Cottrell “serious questions” requirement to be in harmony with the
22 *Winter/Selecky* “likelihood” standard, not as being in competition with it. “Serious questions
23 going to the merits” must therefore mean that there is at least a reasonable probability of success
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1 on the merits. “Reasonable probability” appears to be the most lenient position on the sliding
2 scale that can satisfy the requirement that the chance of success be “likely.”

3 **III. ANALYSIS**

4 **A. The Motions to Dismiss the Complaint**

5 Clarkson notes that a preliminary injunction is not a separate cause of action but a
6 remedy. But although Plaintiff appears to seek a preliminary injunction in the Complaint (and
7 has separately sought one via the present motion), the claim can also fairly be perceived as
8 requesting permanent injunctive relief under 28 U.S.C. § 2202 based on a favorable ruling on the
9 first cause of action under § 2201. Such a claim for “further relief” attendant to a potential
10 declaration under § 2201 is appropriate. Clarkson also argues, however, that it is not a proper
11 party to the Complaint at all because it is simply alleged to have recorded a Notice of Delinquent
12 Assessment Lien (“NDAL”) on behalf of Siena HOA¹ and to have provided a payoff demand to
13 Plaintiff when requested. (*See* Compl. ¶¶ 33–35). Plaintiff alleges that the payoff demand
14 indicates that Clarkson will not accept funds for the payoff of only the superpriority amount. (*Id.*
15 ¶ 35).² Siena HOA notes in its own motion to dismiss that it merely caused Clarkson to record a
16 NDAL as to the Property in September 2014, but there has been no foreclosure sale, nor has any
17 notice of sale (“NOS”) been recorded. It therefore asks the Court to dismiss the quiet title claim
18 because there is no ripe dispute over title to the property as between Siena HOA and Plaintiff.

19
20 1 It appears that one HOA sale has occurred and a second is impending: the first in June 2013 by
21 Alessi on behalf of D’Andrea HOA, and a second by Clarkson on behalf of Siena HOA. This
implies that SFR has defaulted on HOA fees to Siena HOA after buying the Property at
D’Andrea HOA’s sale, and also that D’Andrea HOA or Siena HOA is a sub-HOA of the other.

22 2 That’s not true. As Clarkson notes, the payoff demand attached to the Complaint itself makes
23 clear that the full amount demanded would be necessary to stop the foreclosure, but that lesser
24 payments would be accepted without any warranty or representation as to the legal effect of
lesser payments. (*See id.*, Ex. 17). The letter is not inconsistent with the ability of Plaintiff to
make a payment in an amount it believes sufficient to protect the first mortgage.

1 The Court agrees there will be no ripe quiet title controversy as between Siena HOA,
2 Clarkson, and Plaintiff unless and until Siena HOA causes Clarkson to conduct a foreclosure sale
3 that could affect Plaintiff's lien. There is a ripe quiet title claim against D'Andrea HOA, Alessi,
4 and SFR based on the 2013 foreclosure, of course. As to the 2013 foreclosure, Plaintiff alleges
5 D'Andrea HOA's agent, Alessi, wrongfully rejected tender of the superpriority amount before
6 selling the Property to SFR. But Clarkson, like Siena HOA, is not alleged to have had anything
7 to do with the 2013 foreclosure. Still, the Court can fairly interpret Plaintiff's claim against
8 Siena HOA and Clarkson as a claim for a declaration of the superpriority amount of Siena
9 HOA's current lien under NRS 116.3116 and for potential further relief. *See* 28 U.S.C. § 2201,
10 2202. Siena HOA has recorded the NDAL such that Plaintiff must now pay the superpriority
11 amount to Siena HOA or its agent before the impending foreclosure in order to protect its own
12 lien. There is a ripe controversy over the correct superpriority amount, because Clarkson has
13 allegedly refused to identify that amount despite a request by Plaintiff. Rather, Clarkson has
14 responded essentially that Plaintiff can take its chances by paying a lesser amount than the full
15 HOA lien if it wishes. Forcing Plaintiff to make such a choice makes the controversy over the
16 superpriority amount ripe for a declaratory judgment.

17 **B. The Motion to Dismiss the Counterclaim**

18 US Bank argues against SFR's Counterclaim on five bases: (1) NRS 116.3116 *et seq.* are
19 unconstitutional under the Due Process Clause for lack of notice; (2) NRS 116.3116 is
20 unconstitutional under the Takings Clause; (3) the interpretation of NRS 116.3116 by the Nevada
21 Supreme Court in *SFR Invs. Pool I, LLC v. U.S. Bank, N.A.*, 334 P.3d 408 (Nev. 2014) is
22 contrary to public policy; (4) the sale was commercially unreasonable under Nevada law; and (5)
23 *SFR Invs. Pool I, LLC* should be applied only prospectively, i.e., only to HOA foreclosures
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1 occurring after the announcement of that opinion. SFR has not timely responded even within the
2 two-week extension of time granted. This is enough to grant the motion. *See* Local R. 7-2(d).
3 However, the Court will address the motion on the merits, as well.

4 **1. Public Policy**

5 A federal court must honor state law in diversity cases, *Erie R.R. Co. v. Tompkins*, 304
6 U.S. 64, 78 (1938), as authoritatively interpreted by the state’s own courts, *Comm’r v. Estate of*
7 *Bosch*, 387 U.S. 456, 465 (1967) (citing *id.*). A federal court may not under *Erie* countermand a
8 state court’s authoritative interpretation of a state statute based upon the federal court’s own
9 sense of public policy under state law. A state’s own public policy is inherent in its statutes and
10 the authoritative judicial opinions interpreting them. A pronouncement by a federal court that a
11 state’s own public policy requires a different interpretation or application of a statute than the
12 state’s highest court has given it would run afoul of *Erie*, because a state’s highest court
13 presumably considers public policy when it interprets state statutes and implicitly rejects any
14 public policy arguments against the interpretation it adopts. Only if a state supreme court were
15 to announce a public policy in a later case after having previously interpreted a statute would it
16 arguably be appropriate for a federal court sitting in diversity to anticipate that the state supreme
17 court would alter its previous interpretation of the statute based on its later pronouncement of the
18 state’s public policy. US Bank does not allege such a pattern of events.

19 On the other hand, a federal court may strike down a state statute under the “substantive
20 due process” component of the Due Process Clause of the Fourteenth Amendment where a law
21 deprives a person of a right to life, liberty, or property that a court in its “reasoned judgment”
22 believes is “fundamental,” even if the proffered right is not specifically listed in the Constitution,
23 so long as the right can be perceived from history, tradition, or “new insight.” *Obergefell v.*

1 *Hodges*, --- S. Ct. ----, 2015 WL 2473451, at *11, 20 (2015) (liberty interest) (“[T]he
2 Constitution contemplates that democracy is the appropriate process for change, so long as that
3 process does not abridge fundamental rights. [But] when the rights of persons are violated, the
4 Constitution requires redress by the courts, notwithstanding the more general value of
5 democratic decisionmaking.” (citations and internal quotation marks omitted)); *see also Lochner*
6 *v. New York*, 198 U.S. 45, 56–57 (1905) (liberty and property interests) (“This is not a question
7 of substituting the judgment of the court for that of the legislature. . . . It is a question of which of
8 two powers or rights shall prevail, the power of the state to legislate or the right of the individual
9 to liberty of person and freedom of contract.”). A court should only exercise its reasoned
10 judgment to invalidate a democratically enacted law in the absence of any clear constitutional
11 requirement to do so after there has been “a quite extensive discussion” concerning the right at
12 issue in the halls of government and amongst the general public. *Obergefell*, 2015 WL 2473451,
13 at *9.

14 The doctrine of substantive due process is the closest thing of which the Court is aware to
15 a federal judicial power to strike down a state law based on a federal court’s own notions of good
16 policy. US Bank has not made a substantive due process argument, but *Obergefell* was decided
17 after the present motion was filed, and the theory of substantive due process reinvigorated
18 therein had been long discredited before that opinion was announced. Normally, the Court
19 would permit US Bank to make such an argument in a subsequent motion to dismiss if it wished
20 to do so, because the defense was not available when US Bank filed the present motion, *see* Fed.
21 R. Civ. P. 12(g)(2), but the issue is moot because the Court dismisses the Counterclaim for
22 another reason, *see infra*, with leave to amend. US Bank may attack any amended complaint on
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1 the bases noted here and may amend the Complaint to plead a substantive due process theory if it
2 wishes.

3 **2. Prospective Application of the Statute**

4 US Bank argues that *SFR Investments Pool I*'s interpretation of NRS 116.3116 should not
5 apply retroactively, i.e., that it should only apply to HOA foreclosure sales occurring after the
6 date *SFR Invs. Pool I, LLC* was decided. The Court is compelled to reject the argument under
7 *Erie*. The *SFR Investments Pool I* Court itself applied NRS 116.3116 retroactively in the way
8 US Bank argues against. The HOA foreclosure sale had already occurred in that case, as well,
9 and the Nevada Supreme Court gave no indication that its ruling was not to apply in the case
10 before it but only to future HOA foreclosure sales.

11 **3. The Takings Clause**

12 Both the United States and Nevada Constitutions prohibit the taking of private property
13 by a governmental entity for public use without just compensation. *See* U.S. Const. amend V,
14 Nev. Const. art. I, § 8, cl. 6. When the government destroys a lien under state law and itself
15 receives the value of the destroyed lien, there is a Fifth Amendment taking, even if the lien
16 remains technically valid but unenforceable because of the United States' sovereign immunity:

17 The total destruction by the Government of all value of these liens, which
18 constitute compensable property, has every possible element of a Fifth
19 Amendment "taking" and is not a mere "consequential incidence" of a valid
20 regulatory measure. Before the liens were destroyed, the lienholders admittedly
21 had compensable property. Immediately afterwards, they had none. This was not
22 because their property vanished into thin air. It was because the Government for
23 its own advantage destroyed the value of the liens, something that the
24 Government could do because its property was not subject to suit, but which no
private purchaser could have done. Since this acquisition was for a public use,
however accomplished, whether with an intent and purpose of extinguishing the
liens or not, the Government's action did destroy them and in the circumstances
of this case did thereby take the property value of those liens within the meaning
of the Fifth Amendment.

1 *Armstrong v. United States*, 364 U.S. 40, 46–49 (1960) (holding that the inability of a
2 subcontractor to enforce an otherwise valid materialmen’s lien under state law against the United
3 States after the United States acquired title to certain boats from the general contractor under a
4 contractual default clause resulted in a compensable taking). Here, the value transferred from
5 US Bank to SFR via the destruction of US Bank’s lien was not for any public use, but the
6 Supreme Court has also noted that the transfer of the value of a lien from a private creditor to a
7 private debtor might be a Fifth Amendment taking, because the Fifth Amendment prohibits the
8 government from taking private property for a non-public use regardless of whether it pays just
9 compensation and regardless of whether it immediately transfers the value of the thing taken to a
10 third party. *See United States v. Sec. Indus. Bank*, 495 U.S. 70, 76–78 (1982). Ultimately,
11 however, the Court interpreted the bankruptcy provision at issue to operate only prospectively in
12 order to avoid the potential constitutional problem, so the discussion on the Takings Clause in
13 that case would appear to be dicta. *See id.* at 78–82. US Bank is correct that the Supreme Court
14 has directly ruled that a federal statute may not take the interest of a mortgagee and give it to a
15 mortgagor without effecting a taking. *See Louisville Joint Stock Land Bank v. Radford*, 295 U.S.
16 555, 601–02 (1935) (holding that a federal law permitting a farm mortgagor to force a sale to
17 himself from the mortgagee at the current assessed value unlawfully took the property of the
18 mortgagee). But that isn’t what US Bank alleges happened here. Here, a junior lienor has lost
19 his interest via a senior lienor’s foreclosure sale at a price leaving nothing for the junior lienor.
20 There may or may not be legitimate issues of due process or commercial reasonableness, but the
21 loss of a junior lienor’s interest via the sale of an undersecured property is a common result.

22 The Court is compelled to reject the takings argument in this case. The destruction of an
23 undersecured junior lien via the foreclosure of a senior lien under priority rules published before
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1 the junior lienor took his lien has never been held to implicate the Takings Clause to this Court's
2 knowledge. The Court has searched for such a case to no avail, and US Bank has cited to none.
3 The announcement by the Nevada Supreme Court of its interpretation of NRS 116.3116's
4 priority rules that were at best previously unclear and at worst previously to the contrary raises
5 colorable arguments under the Contract Clause, the Ex Post Facto Clause, the substantive due
6 process component of the Due Process Clause, and perhaps the "synergy" between the rights
7 against retroactive lawmaking and the fundamental right to property emanating from those
8 clauses. *Cf. Obergefell*, 2015 WL 2473451, at *17. That is, the federal fundamental rights
9 against a state's use of retroactive laws and the deprivation of property without due process may
10 indeed protect a lienholder from the application of a state judicial opinion applying lien priority
11 rules in a way that a reasonable lienholder would not have anticipated under the state of the law
12 when he gave his lien. US Bank may amend the Complaint to plead those issues if it wishes and
13 may attack any amended complaint on those bases, but the Court perceives no takings problem.

14 **4. Commercial Unreasonableness of the Sale**

15 In addition to giving reasonable notice, a secured party must, after default,
16 proceed in a commercially reasonable manner to dispose of collateral. Every
17 aspect of the disposition, including the method, manner, time, place, and terms,
18 must be commercially reasonable. Although the price obtained at the sale is not
19 the sole determinative factor, nevertheless, it is one of the relevant factors in
20 determining whether the sale was commercially reasonable. A wide discrepancy
21 between the sale price and the value of the collateral compels close scrutiny into
22 the commercial reasonableness of the sale.

19 *Levers v. Rio King Land & Inv. Co.*, 560 P.2d 917, 919–20 (Nev. 1977) (citations omitted).

20 Under the facts of the case as pled, US Bank would survive a motion to dismiss on its own claim
21 for a declaratory judgment that the sale in this case was commercially unreasonable. But US
22 Bank is not entitled to dismissal of SFR's Counterclaim for a declaration that it was not.

23 Whether the sale here was commercially reasonable is a question of fact for summary judgment
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1 or trial. The Court will not rule purely on the (albeit undisputed) “wide discrepancy between the
2 sale price and the value of the collateral” because the Court (or a jury) must consider any
3 competent evidence proffered as to other relevant factors. There could be some factual
4 circumstance accounting for the extremely low sale price that alleviates the concerns of
5 commercial unreasonableness created thereby. There is currently no evidence before the Court
6 under which the Court could transform the present motion into one for summary judgment.

7 **5. Notice Under the Due Process Clause**

8 US Bank argues that because the statutes do not require junior lienors to be given notice
9 of an impending HOA foreclosure sale that might extinguish their liens, junior lienors in such
10 circumstances are deprived of the fundamental right to notice protected by the Due Process
11 Clause of the Fourteenth Amendment. The Court finds that the statutes do not provide sufficient
12 process but grants the motion based on the Due Process Clause of the Fifth Amendment, not
13 based on the Due Process Clause of the Fourteenth Amendment.

14 “An elementary and fundamental requirement of due process in any proceeding which is
15 to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise
16 interested parties of the pendency of the action and afford them an opportunity to present their
17 objections.” *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). The *Mullane*
18 Court ruled that under this standard notice by publication of an action to settle the accounts of a
19 common trust fund was constitutionally insufficient to inform those beneficiaries whose names
20 and addresses were known. *Id.* at 315; *see also, e.g., Walker v. City of Hutchinson*, 352 U.S. 112
21 (1956) (ruling that publication was insufficient under the Due Process Clause to provide
22 reasonable notice of condemnation proceedings to a landowner whose name was known).
23 Likewise, a governmental body conducting a tax sale must provide notice to junior lienors under
24

1 the standards of *Mullane. Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1983). An
2 HOA foreclosure sale under NRS 116.3116 can be seen to be analogous to the tax sale in
3 *Mennonite Board of Missions* by simply inserting “HOA” for “tax” in the relevant passage:

4 [A] mortgagee possesses a substantial property interest that is significantly
5 affected by a[n HOA] sale. Under [Nevada] law, a mortgagee acquires a lien on
6 the owner’s property A mortgagee’s security interest generally has priority
7 over subsequent claims or liens attaching to the property, and a purchase money
8 mortgage takes precedence over virtually all other claims or liens including those
9 which antedate the execution of the mortgage. The [HOA] sale immediately and
10 drastically diminishes the value of this security interest by granting the [HOA]-
11 sale purchaser a lien with priority over that of all other creditors. Ultimately, the
12 [HOA] sale may result in the complete nullification of the mortgagee’s interest,
13 since the purchaser acquires title free of all liens and other encumbrances

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15 Neither notice by publication and posting, nor mailed notice to the
16 property owner, are means “such as one desirous of actually informing the
17 [mortgagee] might reasonably adopt to accomplish it.” Because they are designed
18 primarily to attract prospective purchasers to the tax sale, publication and posting
19 are unlikely to reach those who, although they have an interest in the property, do
20 not make special efforts to keep abreast of such notices. Notice to the property
21 owner, who is not in privity with his creditor and who has failed to take steps
22 necessary to preserve his own property interest, also cannot be expected to lead to
23 actual notice to the mortgagee. The County’s use of these less reliable forms of
24 notice is not reasonable where, as here, “an inexpensive and efficient mechanism
such as mail service is available.”

Personal service or mailed notice is required even though sophisticated
creditors have means at their disposal to discover whether [HOA dues] have not
been paid and whether [HOA] sale proceedings are therefore likely to be initiated.
In the first place, a mortgage need not involve a complex commercial transaction
among knowledgeable parties, and it may well be the least sophisticated creditor
whose security interest is threatened by a tax sale. More importantly, a party’s
ability to take steps to safeguard its interests does not relieve the State of its
constitutional obligation.

Id. at 798–99 (citations omitted). *Mennonite Board of Missions* makes clear that junior lienors
must be given notice via personal service or mail (or perhaps via some other constitutionally

1 reasonable method) where they stand to lose a security interest in a property via a tax sale, and
2 that publication alone is not constitutionally sufficient.

3 There is, of course, a critical distinction between *Mennonite Board of Missions* and the
4 present case. Notice under the Due Process Clause is only a requirement as to government
5 action, because the Fourteenth Amendment does not govern private action. *Civil Rights Cases*,
6 109 U.S. 3, 10–11 (1883). A government conducting a tax sale to execute upon its own lien is
7 clearly subject to *Mullane*, but a homeowner’s association is not necessarily an arm of the
8 government simply because it conducts a non-judicial sale under state law.

9 When a state permits a private actor to use the machinery of government to deprive
10 another private actor of his constitutional rights, the first actor may in some cases be treated as a
11 state actor for the purposes of the Fourteenth Amendment. In *Shelley v. Kraemer*, 334 U.S. 1
12 (1948), the Supreme Court ruled that the judicial enforcement of a racially restrictive covenant
13 by a homeowner’s association constituted state action. The Court first noted that the Equal
14 Protection Clause of the Fourteenth Amendment spoke to the constitutional issue of race
15 discrimination. *See id.* at 10. Similarly here, the Due Process Clause of the Fifth Amendment
16 speaks to the constitutional issue of notice. Second, the Court noted that the private rule at issue
17 would have been unconstitutional under its precedents if a government actor were to have
18 enforced an identical rule. *See id.* at 11. Likewise here. *See Mennonite Bd. of Missions*, 462 U.S.
19 at 798–99. Third, the Court noted that in the case before it, as here, the rule had not been
20 imposed by a state or municipal legislature, but by a private homeowner’s association. *See*
21 *Shelley*, 334 U.S. at 12–13. Likewise here. The Court ruled that “the restrictive agreements
22 standing alone cannot be regarded as a violation of any rights guaranteed . . . by the Fourteenth
23 Amendment. . . . But here there was more.” *Id.* at 13. That “something more” was the judicial
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1 enforcement of the restrictions. *See id.* at 13–14. The same is true here as to SFR’s
2 Counterclaim; although SFR does not seek judicial foreclosure, it does ask the Court to issue an
3 order declaring the validity of the non-judicial foreclosure under the relevant state statutes. A
4 plain reading of *Shelley* would therefore lead the Court to apply it against the Counterclaim in
5 this case, although the Due Process Clause of the Fifth Amendment would apply, as opposed to
6 the Due Process Clause of the Fourteenth Amendment, because SFR asks a federal court to
7 enforce the challenged laws, so it is the present federal judicial action that is the source of the
8 government action under the theory of *Shelley*, not the non-judicial foreclosure under state law
9 itself.

10 The Court of Appeals has ruled that a state’s creation of non-judicial foreclosure statutes
11 alone does not sufficiently involve a state in a non-judicial foreclosure to implicate state action
12 unless some state actor such as a sheriff or court clerk has some direct involvement in the sale,
13 which is not alleged here. *See Apao v. Bank of N.Y.*, 324 F.3d 1091, 1093–94 (9th Cir. 2003);
14 *Charmicor v. Deanor*, 572 F.2d 694, 695–96 (9th Cir. 1978). But the present situation is
15 distinguishable from *Apao* in a way essential to the rule of *Shelley*, at least as to the
16 Counterclaim.

17 In *Apao*, the mortgagor herself had brought the action against the foreclosing mortgagee
18 after the foreclosure sale. *See Apao*, 324 F.3d at 1092. There, neither the mortgagee nor any
19 other party sought a judicial declaration of the validity of the foreclosure sale as against the
20 mortgagor, so no party had invoked the power of the United States (or any state) to enforce the
21 relevant statutes against the mortgagor. To the contrary, it was the complaining mortgagor who
22 had attempted to invoke the judicial power of the United States to void the sale. *See id.* There
23 was therefore no *Shelley* problem in *Apao* because the district court was not being asked to
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1 enforce a constitutionally problematic statute via judicial foreclosure or to declare the validity of
2 a non-judicial foreclosure, but rather to void a completed non-judicial foreclosure. The same is
3 true of US Bank's quiet title claim here. Although US Bank is a junior lienor and not a
4 mortgagor, it is similarly situated to the mortgagor in *Apao* for the purposes of the rule of
5 *Shelley*. As in *Apao*, US Bank's own quiet title claim cannot implicate state action under the rule
6 of *Shelley*, because it is US Bank itself, not SFR, who asks the Court to adjudicate the validity of
7 the potentially constitutionally problematic statutes. For reasons of standing, ripeness, estoppel,
8 waiver, equity, and probably several other jurisprudential doctrines, US Bank cannot complain of
9 the threat of impending judicial action that it has itself demanded. It therefore cannot invoke the
10 rule of *Shelley* to turn this Court's impending ruling on its own quiet title claim into government
11 action against it. Otherwise, the rule of *Shelley* could be combined with a declaratory judgment
12 action by any plaintiff to avoid the state-action requirement under the Fifth or Fourteenth
13 Amendments. That is, a plaintiff could convert any private action into state action simply by
14 asking a court to declare that the private action would be unconstitutional if it had been state
15 action. The rule of *Shelley* is not so broad. US Bank's only purchase onto due process standards
16 in the context of its own claims is an argument that some state or local government violated the
17 Fourteenth Amendment via its direct involvement in the foreclosure sale.

18 The result is different with respect to SFR's Counterclaim, however. In the context of
19 SFR's Counterclaim, US Bank may under the rule of *Shelley* invoke the Fifth Amendment
20 against this Court's potential declaration that SFR owns the Property free and clear of US Bank's
21 interest based on SFR's compliance with certain state statutes governing the notice process if
22 those statutes do not comport with due process. As to SFR's Counterclaim, SFR has invoked the
23 power of the Court to enforce potentially constitutionally problematic state statutes against US
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1 Bank just as the neighboring homeowners in *Shelley* sought to invoke the power of the state
2 courts to enforce the constitutionally problematic covenants against the Shelleys. *See Shelley*,
3 334 U.S. at 6. Because this Court’s enforcement of the state statutes via a declaration in
4 accordance with the Counterclaim would constitute government action under the Fifth
5 Amendment, *see id.* at 14–15 & n.14 (collecting cases), the Court must address the underlying
6 due process issue in determining the motion to dismiss the Counterclaim, regardless of whether
7 the non-judicial foreclosure action itself constituted state action under the Fourteenth
8 Amendment.

9 With respect to notifying US Bank of the sale, SFR plausibly alleges only having
10 complied with the statutes, not having gone beyond them, except as a possibility. (*See Countercl.*
11 ¶ 9, ECF No. 25 (“As recited in the Association Foreclosure Deed, the Association foreclosure
12 sale complied with all requirements of law, including but not limited to, recording and mailing of
13 copies of Notice of Delinquent Assessments and Notice of Default, and the recording, posting
14 and publication of the Notice of Sale.”)). Nevada’s statutes governing which parties must
15 receive notices of default (“NOD”) and NOSs in HOA foreclosures are complex. First, NRS
16 116.31162 governs notice of a NDAL and NOD to unit owners. *See Nev. Rev. Stat.* § 116.31162.
17 That statute is not implicated here. Second, NRS 116.31163 requires notice of a NOD by first
18 class mail within 10 days of recordation of the NOD to: (1) those who have requested notice
19 under NRS 116.31168 or 107.090; (2) any holder of a recorded security interest who has notified
20 the foreclosing HOA 30 days prior to the recordation of the NOD of the existence of its security
21 interest; and (3) certain purchasers of the unit. *See id.* § 116.31163. As to lienors of record like
22 US Bank, NRS 116.31163 therefore operates as an opt-in system requiring affirmative action by
23 the lienor of record to obtain notice of a NOD with respect to an HOA sale. Third, NRS
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1 116.311635 requires notice of a NOS by certified or registered mail, return receipt requested, to:
2 (1) the owner; (2) those entitled to notice of the NOD under NRS 116.31163, i.e., those who
3 have opted in under that section; (3) certain purchasers and any holder of a recorded security
4 interest who has notified the foreclosing HOA of the existence of its security interest prior to the
5 mailing of the NOS; and (4) the Ombudsman for Owners in Common-Interest Communities and
6 Condominium Hotels. *See id.* § 116.311635. As to lienors of record like US Bank, NRS
7 116.311635 therefore also operates as an opt-in system requiring affirmative action by the lienor
8 of record to obtain notice of a NOS with respect to an HOA sale. Fourth, NRS 116.31168 states,
9 “The provisions of NRS 107.090 apply to the foreclosure of an association’s lien as if a deed of
10 trust were being foreclosed. The request must identify the lien by stating the names of the unit’s
11 owner and the common-interest community.” *Id.* § 116.31168. NRS 107.090 defines a “person
12 with an interest” as including lienors of record, *see id.* § 107.090(1), notes that such persons may
13 request copies of a NOD and NOS by recording such a request, *see id.* § 107.090(2), and requires
14 notice by certified or registered mail, return receipt requested of both the NOD and NOS to
15 anyone who has requested such notice under NRS 107.090(2) *and any junior lienor of record*,
16 *see id.* § 107.090(3)–(4).

17 NRS 116.31168’s incorporation of NRS 107.090 would therefore appear to prevent a
18 facial due process attack on the notice procedures governing HOA sales in Nevada, despite the
19 opt-in provisions of NRS 116.31163 and 116.311635.³ US Bank could still rely on its
20 allegations that it did not in fact receive constitutionally sufficient notice in this case even if the

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22 3 Those opt-in provisions are not rendered superfluous by NRS 116.31168’s incorporation of
23 NRS 107.090, because they permit opt-in notice for a broader category of lienors than the
24 category of lienors to whom NRS 107.090 requires automatic notice. NRS 107.090 requires
notice only for junior lienors of record, but NRS 116.31163 and 116.311635 permit opt-in notice
for any lienor of record.

1 statutes required it. But the Court finds that the statutes did not in fact require mailed notice to
2 US Bank of the NOD or the NOS. There is an ambiguity in NRS 116.31168 that the Nevada
3 Legislature has recently clarified by amending the statute. NRS 116.31168’s first sentence read
4 alone appears to incorporate NRS 107.090 en toto. *See id.* § 116.31168(1) (“The provisions of
5 NRS 107.090 apply to the foreclosure of an association’s lien as if a deed of trust were being
6 foreclosed.”). But its second sentence makes it appear as if the Nevada Legislature may have
7 intended to incorporate only the opt-in provision under NRS 107.090(2). *See id.* (“*The request*
8 *must identify the lien by stating the names of the unit’s owner and the common-interest*
9 *community.*” (emphasis added)). A recent amendment to NRS 116.31168 completely amends
10 that section, removing any mention of NRS 107.090 and making clear that the opt-in procedure
11 applies to both NODs and NOSs. *See S.B. 306 § 7, 2015 Leg., 78th Sess. (Nev. 2015).*
12 Contemporaneous amendments to NRS 116.31163 and 116.311635 applicable to foreclosures
13 where the NOD or NOS are recorded on or after October 1, 2015, respectively, requires certified
14 mail of a copy of both the NOD and the NOS to all lienors of record whose liens were recorded
15 prior to the recordation of the NOD or the mailing of the NOS, respectively. *See id.* §§ 3–4, 9(1).
16 These latter amendments probably avoid any facial due process notice issues going forward, but
17 the very need for these amendments indicates that the Nevada Legislature perceived that the
18 statutes previously did not require such notice, i.e., that NRS 116.31168 did not incorporate NRS
19 107.090(3)–(4).

20 The Nevada Supreme Court itself has noted that the Nevada Legislature had declined to
21 adopt the Uniform Common Interest Ownership Act’s (“UCIOA”) recommendation of
22 “reasonable notice . . . to all lien holders of the unit whose interest would be affected,” UCIOA
23 3-116(j)(4), in favor of its own particularized notice provisions under Chapter 116. *see SFR Invs.*

1 *Pool I*, 334 P.3d at 411. Critically, although the Nevada Supreme Court noted that NRS 107.090
2 is incorporated by section 116.31168(1), in the very same paragraph, and even when specifically
3 citing to NRS 107.090(3)(b) and (4) (the provisions requiring mailed notice of NODs and NOSs
4 to junior lienors of record in deed of trust foreclosures), the Court concluded that notice to a
5 lienor of record requires the lienor to have notified the HOA of the interest before the recordation
6 of the NOD or mailing of the NOS under NRS 116.31163 and 116.311635, respectively. *See id.*
7 This shows that the Nevada Supreme Court either reads NRS 116.31168 not to incorporate the
8 automatic notice provisions of NRS 107.090(3)–(4) or that it reads the opt-in provisions of NRS
9 116.31163 and 116.311635 to supersede NRS 107.090(3)–(4)’s automatic notice provisions as to
10 HOA foreclosures even if NRS 107.090 is otherwise incorporated into Chapter 116 foreclosures
11 generally via NRS 116.31168.

12 The question then is whether notice only by publication of the time and place of sale is
13 constitutionally reasonable. The Court is compelled to find that it is not. “Notice by mail or
14 other means as certain to ensure actual notice is a minimum constitutional precondition to a
15 *proceeding which will adversely affect the liberty or property interests of any party*, whether
16 unlettered or well versed in commercial practice, if its name and address are reasonably
17 ascertainable.” *Mennonite Board of Missions*, 462 U.S. at 800 (first emphasis added). US
18 Bank’s security interest in the Property was not adversely affected by the declaration or notice of
19 default but by the sale itself. That is the event that foreclosed the right of redemption and vested
20 title in SFR free of US Bank’s lien, *see Nev. Rev. Stat. § 116.31166(3)*, and that is therefore the
21 event of which US Bank was constitutionally entitled to reasonable notice, *see Mullane*, 339 U.S.
22 at 314 (“An elementary and fundamental requirement of due process in any proceeding which is
23 to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise
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1 interested parties of the pendency of the action and afford them an opportunity to present their
2 objections.”). Notice is constitutionally reasonable when it is attempted in a manner such as a
3 person who actually wants the recipient to receive notice might attempt it:

4 [W]hen notice is a person’s due, process which is a mere gesture is not due
5 process. The means employed must be such as one desirous of actually informing
6 the absentee might reasonably adopt to accomplish it. The reasonableness and
7 hence the constitutional validity of any chosen method may be defended on the
8 ground that it is in itself reasonably certain to inform those affected . . . , or, where
9 conditions do not reasonably permit such notice, that the form chosen is not
10 substantially less likely to bring home notice than other of the feasible and
11 customary substitutes.

12 *Id.* at 315 (citations omitted).

13 Where US Bank’s identity and address were readily obtainable—an issue that is not
14 genuinely disputed—publication alone of the NOS was not a means such as one actually desirous
15 of informing US Bank of the sale might reasonably have adopted. It is not constitutionally
16 reasonable to require an interested party to monitor the public records for a NOS or to
17 proactively request notice of a potential future NOS. The constitutional standard is whether the
18 person giving the notification made reasonable efforts to apprise the interested party of the
19 proceeding under all the circumstances as if he actually wanted to notify him. That standard is
20 not satisfied by the statutes at issue here. A person actually desirous of informing an interested
21 party of a foreclosure sale would not rely on publication alone where the interested party’s
22 address is readily obtainable or even obtainable with some reasonable amount of effort. The
23 duty cannot be shifted to an interested party to actively request notice of a potential event
24 beforehand where the event is of a type that the interested party would obviously want notice. A
person actually desirous of informing another person of an impending foreclosure sale would not
gamble with mere publication or provide notice only if requested beforehand. Merely recording
a notice of sale in the public records and posting it near the courthouse steps where active effort

1 is required to discover it rather than mailing the interested party a copy of the notice at his easily
2 obtainable address is not constitutionally reasonable. *Mennonite Bd. of Missions*, 462 U.S. at
3 798–99.

4 In summary, the relevant statutes do not satisfy due process where a sale can be
5 characterized as government action. SFR’s Counterclaim for a declaration by this Court of the
6 extinguishment of US Bank’s interest via the HOA foreclosure sale implicates government
7 action under the rule of *Shelley* and the Due Process Clause of the Fifth Amendment. The Court
8 therefore dismisses SFR’s Counterclaim, with leave to amend. If SFR can affirmatively allege
9 that it or its agent gave US Bank constitutionally sufficient notice, i.e., personal or mailed notice,
10 the Counterclaim should be permitted to proceed to summary judgment. As the Court has
11 explained, *supra*, US Bank’s own quiet title claim cannot succeed on the due process issue
12 without a showing of state action in the non-judicial foreclosure sale itself, but that issue is not
13 now before the Court.

14 **C. The Motion for a Preliminary Injunction**

15 US Bank asks the Court to enjoin Siena HOA’s sale of the Property. As noted, *supra*,
16 there is a ripe controversy over the superpriority amount of the lien because Siena HOA and its
17 agents intend to sell the Property, and the sale of the Property under state law will destroy US
18 Bank’s lien unless US Bank tenders the superpriority amount of the lien before the sale. Siena
19 HOA and its agents, however, refuse to identify the superpriority amount, such that US Bank
20 must satisfy the entire HOA lien to avoid the sale, and much, if not most, of that amount is not in
21 fact in priority to US Bank’s lien. Also, US Bank argues that D’Andrea HOA’s 2013 HOA sale
22 itself did not extinguish US Bank’s lien because US Bank tendered the superpriority amount to
23 D’Andrea HOA’s agent, Alessi, before the sale.

1 US Bank has not shown via competent evidence that it has a reasonable probability of
2 success on its quiet title claim against D'Andrea HOA because it adduces no affidavit,
3 declaration, or other evidence tending to show that it in fact tendered or attempted to tender the
4 superpriority amount to D'Andrea HOA, Alessi, or any other entity before D'Andrea HOA's
5 2013 HOA sale. US Bank has however shown a reasonable probability of success on its
6 declaratory judgment claim against Siena HOA and Clarkson. US Bank has adduced three
7 exhibits to its motion: (1) the September 2014 NDAL filed by Clarkson on behalf of Siena HOA
8 indicating that SFR was delinquent on its assessments to Siena HOA in the amount of \$4,590.68;
9 (2) the NOD recorded contemporaneously with the NDAL; and (3) the March 2015 Escrow
10 Demand sent from Clarkson to US Bank's counsel indicating that \$3292.18 would be required to
11 stop the foreclosure, with no explicit indication of the superpriority amount. The Escrow
12 Demand contains an itemization indicating seven unpaid assessment fees totaling \$430 and no
13 charges for maintenance of the exterior of the Property or abatement of nuisances therefrom,
14 which are the only three kinds of charges giving rise to the superpriority portion of an HOA lien.
15 *See Nev. Rev. Stat. §§ 116.3116(2) (final unnumbered paragraph); id. § 116.310312.* The exact
16 amount of the superpriority lien is not important in the present context. The point is that US
17 Bank has shown that the superpriority amount can be readily calculated but that Siena HOA and
18 Clarkson refuse to confirm the amount. Because US Bank seeks a declaration of the amount, it
19 has shown that it is reasonably likely to succeed on the merits of its declaratory judgment claim.

20 A likelihood of irreparable harm has also been shown. If US Bank were to tender \$430
21 (or whatever the superpriority amount is) and the purchaser at Siena HOA's sale were to deny
22 that the full superpriority amount had been paid, US Bank could irretrievably lose its security
23 interest in the Property.

1 The equities tip sharply in US Bank’s favor. It stands to lose a security interest in real
2 property on the order of hundreds of thousands of dollars, depending on the sale price. Even if
3 the Property is undersecured (which is unknown), Siena HOA stands to lose only the subpriority
4 amount of its lien, which is no more than a few thousand dollars. Clarkson stands to lose
5 nothing. It has no direct interest in the Property, and its right to payment from Siena HOA for
6 collection services will not be affected by the sale or non-sale of the Property.

7 The public interest also favors a preliminary injunction. As the present controversy
8 between US Bank and D’Andrea HOA illustrates, a second sale by Siena HOA without a prior
9 judicial declaration of the superpriority amount would further cloud the title to the Property and
10 cause additional litigation over whether US Bank’s lien had been extinguished. Not only would
11 that cause needless litigation as to the Property at issue here, but the aggregate effect of hundreds
12 or thousands of similar controversies could have a significant effect on the real estate market in
13 this state by reducing the inventory available to homebuyers due to clouded titles of homes
14 previously sold at HOA sales, thereby artificially increasing the prices homebuyers must pay. It
15 is better to prevent the sale until the Court can declare the superpriority amount, so that US Bank
16 may pay it before a sale and avoid the additional controversy.

17 In order to both minimize any delay of a sale and avoid the additional controversy that
18 would arise from a sale before a declaration of the superpriority amount, the Court will
19 consolidate a hearing on the preliminary injunction motion with a trial on the merits (as to the
20 second cause of action only) under Rule 65(a)(2). The Court need not enjoin a sale at this time.
21 There is no indication of a NOS having been recorded. If Siena HOA records a NOS in the
22 interim, US Bank may ask the Court to enjoin the sale until after trial.

23 ///

1 **CONCLUSION**

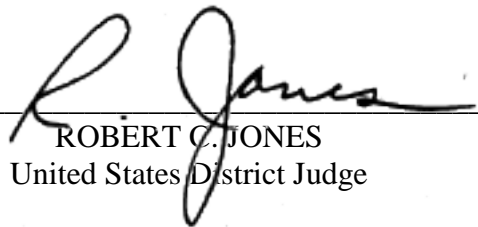
2 IT IS HEREBY ORDERED that the Motions to Dismiss (ECF Nos. 24, 27) are DENIED.

3 IT IS FURTHER ORDERED that the Motion to Dismiss (ECF No. 42) is GRANTED,
4 with leave to amend.

5 IT IS FURTHER ORDERED that the Motion for a Preliminary Injunction (ECF No. 46)
6 is CONSOLIDATED WITH A TRIAL ON THE MERITS. Siena HOA's answer is due within
7 **seven (7)** days of the entry of this Order into the electronic docket. The parties shall contact the
8 Court as to a mutually agreeable time for trial, whether Siena HOA or Clarkson intend to
9 demand a jury trial (US Bank appears to have made no timely jury demand), and the expected
10 length of the trial. The trial will concern the single question of the superpriority amount of Siena
11 HOA's lien against the Property under NRS 116.3116.

12 IT IS SO ORDERED.

13 Dated this 26th day of August, 2015.

14
15 
16 ROBERT C. JONES
United States District Judge